

IN THE COURT OF APPEAL
FIJI ISLANDS AT SUVA

[Misc. Action No. 15 OF 2009]

BETWEEN : **MACIU WAQABACA**
(APPLICANT/ORIGINAL PLAINTIFF)

AND : **NATIVE LAND TRUST BOARD**
(RESPONDENT/ORIGINAL DEFEDANT)

CORAM : **Byrne, Acting President**

COUNSEL : **N. Nawaikula for the Applicant**
: **A. Mataitini for the Respondent**

DATE OF HEARING
And SUBMISSION : **22nd January 2010**

DATE OF RULING : **6th October 2010**

RULING ON APPLICATION FOR LEAVE TO APPEAL OUT OF TIME

- [1] The applicant seeks leave to appeal out of time from a judgment of Jiten Singh, J in the High Court delivered on 10th of August 2003. The applicant filed his application for leave on 15th March 2009 nearly six years after the decision was delivered and perfected. The applicant has informed the Court that he is well aware of the length of time which has elapsed since the decision of Jiten Singh, J and that the time limited to bring an appeal is in the ordinary course of things six weeks from the date the decision was handed down.
- [2] Five factors are usually to be considered by a Court in deciding whether or not to give leave to appeal out of time against the decision which is wholly discretionary. These are:
- (i) The length of the delay .
 - (ii) The reason for the delay .
 - (iii) Are there questions to justify serious consideration?
 - (iv) If there is substantive delay, are there any grounds for believing that the appeal will probably succeed?
 - (v) The degree of prejudice for the respondent in enlarging time.
- [3] Before considering the submissions I have received from the parties it is necessary to mention briefly the background of this litigation.
- [4] The applicant alleges in his Statement of Claim that he purchased a piece of native land in 1982 and the previous owner pointed out the boundaries of the land to him.

- [5] He further alleges that after talking with a member of the Mataqali of the area, he learned that he was on the wrong piece of land on which he had planted cocoa already.
- [6] The respondent offered to assist the applicant to lease the land but the applicant rejected the offer.
- [7] The High Court held that the respondent was not responsible in law for the situation in which the applicant finds himself and held that the respondent does not owe any duty of care to its tenants to ensure that other landowners would abide by the law.

THE LAW

- [8] There is an abundance of Case Law on the questions raised by this application. No case has been cited to me in which on even remotely similar facts a delay of six years has been held not to be a bar to the granting of leave.
- [9] The main reason given by the applicant for his delay in appealing is that this was not of his own making but was caused by the lawyer he engaged not proceeding with reasonable speed to lodge his appeal in time. I shall not mention the name of the Solicitor mainly concerned in this delay except to say that the applicant informed me that has begun proceedings against the Solicitor.
- [10] In my view this is the only course now available to the applicant. I agree with Singh, J that the respondent is not liable in law for the applicant's problem. Also I am at a loss to understand why, knowing that his Solicitor was not proceeding at reasonable speed in his appeal, the applicant did not consult other lawyers. In short he slept on his rights.

- [11] All litigants are expected by the law to proceed with their actions as expeditiously as possible. The law does not assist those who sleep on their rights. Furthermore I consider that Jiten Singh, J was correct in holding that the respondent was not legally responsible to the applicant.
- [12] Under the terms of his lease the onus of having his land surveyed so as to be certain that its boundaries were correct was on the applicant. He did nothing about this. A survey would have disclosed that he was shown the wrong land by the person from whom he bought it and thus he was unlikely to have embarked on the cultivation of the land if he knew that he had been shown the wrong land.
- [13] I have some sympathy for the applicant but cannot ignore the fact that in my opinion he has not proceeded with the promptness which the law requires.
- [14] I therefore refuse the application for leave to appeal out of time and order the applicant to pay the respondent's costs which I fix at \$750.00.

Dated at Suva this 6th day of October 2010.



A handwritten signature in cursive script, reading "John E. Byrne", is written over a horizontal dotted line.

John E. Byrne
Acting President