IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

CIVIL MISC. ACTION NO: 33 OF 2011
(High Court HBC. 189 of 2004 Ltka.)

BETWEEN : **RAJ DATT**

Applicant/ Appellant

AND : **SUNIL DATT**

Respondent

Coram : **Calanchini AP**

Counsel : **Applicant in person**
Respondent in person

Date of Hearing : **20 May 2013**

Date of Decision : **7 June 2013**

DECISION

[1]. This is an application for an extension of time for filing a notice of appeal. The application was made by summons filed on 18 August 2011. The application was supported by an affidavit sworn by Raj Datt on 18 August 2011. An answering affidavit sworn on 20 July 2012 by Sunil Datt was then filed on behalf of the Respondent. The Applicant filed a reply affidavit sworn on 26 July 2012 by Raj Datt. Thereafter the parties continued to file further affidavit material without leave.

[2]. The proceedings in the Court below were commenced by summons dated 29 June 2004 under section 169 of the Land Transfer Act Cap 131 for immediate vacant possession of the land contained in Crown lease No.14796 located at Navakai, Nadi (the land). In a brief ex tempore decision delivered on 28 June 2005 the learned Judge ordered that the Applicant/Appellant (the Applicant) give vacant possession of the land to Sunil Datt (the Respondent) with a stay of execution until 28 October 2005.

[3]. A judgment given pursuant to an application under section 169 of the Land Transfer Act is a final judgment. The time for appealing a final judgment is 42 days from the date on which the judgment of the Court below was pronounced (Rule 16 of the Court of Appeal Rules (the Rules)). However the wording of Rule 16 had been amended by a legal notice dated 19 May 2010 which took effect from 31 December 2008. Prior to that date, Rule 16 had indicated that time for appealing was calculated from the date on which the judgment of the Court below had been *"signed, entered or otherwise perfected."* In the present case that date would appear to be 7 July 2005. The orders were confirmed by the learned judge in chambers on 13 January 2006.

[4]. Pursuant to section 20 (1) of the Court of Appeal Act Cap 12 (the Act) a single judge of the Court may exercise the power of the Court of Appeal to, amongst others, extend the time within which a notice of appeal may be given. The power of the Court of Appeal to extend time for appealing is derived from the High Court Rules as applied to the Court of Appeal pursuant to section 13 of the Act. Since the application for an extension of time to appeal was made after the expiration of the period for filing and serving a notice of appeal, the application in this case can only be made to this Court under Rule 27 of the Rules. There is in this case no concurrent jurisdiction with the Court below.

[5]. In an application of this kind, the Court is generally concerned with four issues. They are (1) the length of the delay, (2) the reasons for the delay, (3) the chances of the proposed appeal succeeding and (4) prejudice to the Respondent. See: **Bahadur Ali and Ors v. Ilaitia Boila and Chirk Yam and Ors,** (ABU0030 of 2002; 5 September

2002). The Court may consider whether the appeal raises (1) issues of general importance (**Native Land Trust Board –v- Lesavua and Subramani** – unreported Misc. action No. 1 of 2004; 18 March 2004), (2) important questions of law (**Beci and Others –v- Kaukimoce and Others** – unreported Misc. action No. 2 of 2009; 20 January 2010) and (3) issues that in the interest of justice should be considered by the Full Court (**Narayan –v- Narayan** – unreported Misc. action No. 14 of 2009; 3 September 2010).

[6]. Turning to the length of the delay. Even if it is assumed that time runs from the confirmation of the orders in January 2006, the application for leave to appeal out of time was not filed until August 2011. This is delay of over 5 years. It is a substantial delay.

[7]. The explanations for the delay are set out in paragraphs 22 to 25 of the Applicant's affidavit in support. The first reason stated is in paragraph 22 and appears to relate to his legal practitioner withdrawing the application for a stay of execution, whereupon the Judge confirmed the order for vacant possession. However that occurred on 13 January 2006 and as a result of which the learned Judge ordered the stay application be dismissed. That in itself is not an explanation for the delay in making the present application. I do accept however that the Applicant did not understand the effect of the withdrawal of the stay application by his legal practitioner. It had been filed on 23 November 2005 as an ex parte application for a stay of execution until the determination of the setting aside application. The fate of that application is not apparent from the material presently before me.

[8]. The second reason appears to claim that the Applicant only became aware of the order when the bailiff attended to dismantle the Applicant's house and was on that day shown a copy of the order. However, it would appear that the house was dismantled a short time after the Respondent had obtained the writ of possession issued by the Court on 10 November 2005.

[9]. The third reason for the delay was the difficulty in obtaining the services of a legal practitioner on account of the Applicant being retired and unable to pay legal fees. Of course the response to that explanation is that the present application has been

commenced by the Applicant in person (apparently albeit with the assistance of a friend who is a legal practitioner) and there is no reason why the application could not have been commenced in person by the Applicant five years ago.

[10]. Finally, the Applicant states that he was sick for many months and had to walk *"on crutches"* because he was partly paralysed. Consequently it was more difficult to make the application within a reasonable time. However there is no medical certificate or evidence to support the claim of ill-health.

[11]. I have no hesitation in concluding that the explanations offered by the Applicant fall well short of being what may be described as *"wholly excusable"*. Certainly the explanations were not sufficient to justify the exercise of the discretion to grant leave to the Applicant.

[12]. During the course of submissions before me, the Applicant's son who presented his father's application, made reference to the difficulty of obtaining additional material to support the application. However, in my view, the search for additional evidence which may eventually become the subject of an application to this Court to adduce further evidence not produced in the Court below, is no reason for failing to file an appeal notice within the time prescribed by the Rules, let alone an explanation for an application that is five years late.

[13]. In cases where the delay is extreme and where the explanation for that delay is not wholly excusable, then an applicant will need to show good reason or special circumstances for the court to exercise the discretionary balance in his favour. This means that when the length of the delay is extreme and the explanations for it are wholly unsatisfactory, it is still necessary, in exercising the discretion given to the Court, to assess the chances of the proposed appeal succeeding. In **Tevita Fa –v- Tradewinds Marine Ltd and Another** (unreported) ABU 40 of 1994 delivered 18 November 1994 (CA) Thompson JA at page 3 stated:

> *"However as important as the need for a satisfactory explanation of the lateness is the need for the applicant to show that he has a reasonable chance of success if time is extended and the appeal proceeds."*

[14]. In a case such as the present, the Applicant must establish that his grounds raise more than just a reasonable chance of success to enable the Court to conclude that leave should be given. It is not sufficient for the Applicant to establish that his grounds of appeal are not wholly unmeritorious or wholly unlikely to succeed. In my opinion he must establish special circumstances.

[15]. The proposed Notice and Grounds of Appeal is attached to the affidavit sworn on 18 August 2011 by the Applicant. The Applicant seeks an order that the decision of the learned judge delivered on 28 June 2005 be set aside and in its place judgment entered for the Applicant on the following grounds:

> *"1 That the learned Judge erred in law and in fact in granting respondent the land and making the orders for the Appellant to vacate the said land.*
>
> *2 That the learned Judge erred in law and in fact by not giving enough time to vacate the land.*
>
> *3 That the learned Judge erred in law and in fact by prejudging that the land belongs to the respondent."*

[16]. The grounds of appeal in this case raise two issues only. The first is whether the land belonged to the Respondent. The second issue is the length of time allowed to the Appellant to vacate the land.

[17]. The application before the Court below was for an order for immediate possession of the land contained in State lease No. 14796. In support of the application the Respondent filed an affidavit sworn on 21 June 2004. Although the learned Judge made reference to an affidavit filed by the Appellant, there is no such affidavit in the file before me. What this means is that I am not able to determine whether any of the material and if so how much that was before me in this application was also before the learned Judge in the Court below. In view of the Appellant's submissions before me it is clear that at least some of that material is potentially fresh or further evidence that was not in the Appellant's affidavit in the Court below. This is significant because the issue that is relevant in any appeal brought pursuant to proceedings commenced

under section 169 of the Land Transfer Act is whether the case should have been disposed of in a summary manner as the learned Judge thought it should be or whether it should have gone to trial and be fully heard. That in turn is dependent upon whether the Appellant satisfied the onus that is placed on him under section 172 of the same Act.

[18]. Under section 169 of the Land Transfer Act certain persons, including the registered proprietor of the land (under a lease in this case) may summon a person in possession of the land or part thereof before a judge in chambers to show cause why that person should not be ordered to surrender possession of the land thus occupied to the claimant.

[19]. Under section 172 the person summoned may show cause why he refuses to give possession of the land and if he proves to the satisfaction of the judge a right to the possession the application will be dismissed. The person summoned must show some right to possession which would preclude the granting of an order for possession under the summary procedure prescribed by section 169. In **Prasad –v- Hamid** (unreported ABU 59 of 2003 delivered 19 March 2004) the Court of Appeal said that:

> *"What was required was that some tangible evidence establishing a right or supporting an arguable case for such a right, must be adduced. What we have called the gloss on the section derives from the summary nature of the proceedings instituted under section 169. Courts are always reluctant to give summary judgment in cases where a Defendant shows that he has some reasonably arguable defence or case which requires to be heard at a proper trial of the proceedings."*

[20]. From the material that has been placed before me, the following is a summary of the background to the present proceedings. The case involves uncle and nephew. The nephew (Sunil Dutt) wants his uncle (Raj Dutt) to give up possession of that part of the nephew's lease that the uncle has lived on since 1990. (see paragraph 4 of the Respondent's affidavit sworn on 21 June 2004 in support of his application under section 169). Raj Dutt was the brother of Rudra Dutt (deceased) who was Sunil's father. Apart from Rudra Dutt, Raj Dutt (the Appellant) had two other brothers, Rishi Dutt and Prem Dutt. Their father's name was Badal. The four brothers had for many

years all lived on State leased land at Wailoaloa. Rudru Dutt as the eldest brother was the registered lessee of that State lease.

[21]. It would appear that in about 1990 Rudru Dutt sold the lease to Club (Fiji) Limited for $90,000.00. At about the same time Rudru Dutt purchased State lease No.10093 with an area of 2.2442 hectares for $21,000.00. Rudru Dutt became the registered proprietor of the lease on 17 December 1990.

[22]. The four brothers executed a document described as a *"Deed of Family Settlement"* on 16 October 1990. For the purposes of the present application, clauses 2 – 5 are relevant to these proceedings and provide:

> *"2. THAT the said RUDRA DUTT to give one quarter area of residential site on State lease 10093 to each of them Rishu Dutt, Prem Dutt and Raj Dutt. The said portion of lease is hereby given permanently and each of the parties shall pay land rent to Lands Department in respect of State Lease NO.10093 on apportion basis.*
>
> *3. THAT Upon transfer of Crown Lease No. 10093, the said RUDRA DUTT shall execute a proper title to each of the parties and should the lease become necessary as a result of Director of Town and Country Planning Board's refusal to grant permission for subdivision the Donor shall be prepared and willing at all times thereafter to re-apply at the request of the Donees provided however that the Donees shall bear all costs incurred for such an application.*
>
> *4. THAT the said RUDRA DUTT consents RISHI DUTT, PREM DUTT and RAJ DUTT to create substantial developments on Crown Lease No. 10093 for their occupation as stated herein above.*
>
> *5. THAT the said RISHI DUTT, PREM DUTT and RAJ DUTT upon receipt of $2000.00 (Two thousand dollars) and a residential site of ¼ (quarter) on Crown Lease No. 10093 (LD Ref: 4/10/1926) hereby dismiss all their other claims in respect of Crown Lease LD Ref: 4/10/1500 against the said RUDRA DUTT."*

[23]. The Deed is unusual in the sense that on one hand Rudru Dutt is referred to in the recital clauses as *"the Donor*" and his three brothers are referred to as *"the Donees*" and yet on the other hand in clause 5 the Donees appear to be giving consideration in return. An issue as to what constitutes delivery and whether the Deed was delivered in this case were, of course, issues that were not raised by the parties before me.

[24]. It would appear that the four brothers together with their families moved on to the land that was State lease No.10093. However in early 1991 Rudru Dutt passed away and on 3 May 1991 his widow Sheela Wati became registered lessee on transmission by death as the administrator of the estate of Rudru Dutt.

[25]. At no stage during the proceedings has either party referred to the existence of any will that may have been made by Rudru Dutt.

[26]. However in a letter dated 21 February 1991 addressed to Raj Dutt, Messrs. Pillai, Naidu & Associates, Barristers and Solicitors stated:

> *"Re: Estate of Rudru s/o Badal.*
>
> *We have now been instructed to act as Solicitors for the estate of abovenamed deceased.*
>
> *The widow of the deceased Sheela Wati and other beneficiaries today called into our office and upon their instructions we hereby notify you that they do not have any objections for you to continue your occupation of (State) lease No.10093, but they strictly want you not to re-build any houses, etc or construct any new houses that are unlawful to Nadi Rural Local Authority.*
>
> *Further they have proposed to re-arrange your settlement upon receipt of Probate after granted in respect of the above estate."*

[27]. There is also in existence a copy letter dated 7 August 1997 addressed to the Assistant Director of Lands at Lautoka. The signature on the letter appears to have been rendered illegible. The name of Sheela Wati is printed below the illegible signature. The letter states (omitting formal parts).

> *"I, **Sheela Wati** daughter of Agnu Prasad of Navakai, Nadi, Domestic Duties, as executrix and trustee for the estate of **Rudru Dutt**, son of Badal advise you that:-*
>
> *(1) I intend to proceed with subdivision of above land.*
>
> *(2) The purpose of this application is to allocate shares to **Sunil Dutt**, **Anil Dutt**, **Ram Dutt** and **Manjula Wati** being issues of Rudru Dutt deceased who holds shares under provision of Succession Probate and Administration Act (Cap 60).*
>
> *(3) That the other occupants **Rishi Dutt**, **Rajendra Dutt** are now deceased while **Prem Dutt** has moved to resettle elsewhere.*
>
> *(4) The only other person residing on the land is **Raj Dutt** who will be properly re-allocated to reside on the land after the sub-division is complete."*

[28]. By letter dated 9 September 1998 addressed to Sheela Wati the Divisional Surveyor Western advised that the application for subdivision had been approved by the Director on what appears to be the usual conditions.

[29]. On the passing of Sheela Wati, Ram Dutt, Sunil Dutt and Anil Dutt (sons of Rudru Dutt) became registered lessees as administrators on transmission by death.

[30]. The partial surrender of State lease No. 10093 was registered on 18 July 2002 presumably on completion of the subdivision and the registration of three separate titles, one of which no doubt was State lease No. 14796. This is the State lease to which the Respondent referred in his affidavit in support of his initial application for vacant possession.

[31]. It is necessary to compare this chronology of events with the assertions made by the Respondent in his affidavit sworn on 21 June 2004 in support of his application. For that purpose it is necessary to refer to paragraphs 3, 4, and 5 only. They state:

> *"3. That sometime in 1990, my father bought 5 acres of Crown land and divided according to his knowledge and*

> *measurement in 3 portions, giving me one and the other 2 to my two brothers.*
>
> *4. That in 1990 when the Defendant had no place to live on his request I allowed him to make a temporary shelter on my portion of the land and to find alternative place and move out to which the Defendant agreed. The Defendant asked for twelve months to move out.*
>
> *5. That at later stage the said 5 acres of land was subdivided, three separate leases were made and my portion is subject to CL No. 14796."*

[32]. It is my view that there are inconsistencies between what has been deposed to by the Respondent and the documents produced by the Appellant. I am also satisfied that had the learned Judge in the Court below had placed before him the material that has now been produced in this application, he may well have taken a different approach.

[33]. I do acknowledge that most of the material that has been placed before me is fresh or additional evidence. For it to be considered at the hearing of an appeal, the Appellant must make an application to the Court of Appeal under Rule 22 (2) of the Court of Appeal Rules. However in order to make that application, the Appellant will require an extension of time for filing and serving a notice and grounds of appeal.

[34]. Taking into account the fact that the Appellant has attempted to conduct these proceedings with limited assistance and with no financial means together with his non-existent knowledge of legal procedure and his apparent limited education, I am of the view that an injustice would result should the Court of Appeal not have the opportunity to determine the appeal and any application brought by the Appellant to adduce further evidence. There are special circumstances that in the interest of justice warrant the exercise of the Court's discretion in favour of the Applicant.

[35]. I am prepared to allow the application and I make the following orders:

> *1. The application for an extension of time to appeal is granted.*
>
> *2. The Appellant is to file and serve an amended Notice of Appeal setting out the particulars of the alleged errors of the Court below within 14 days from the date of this decision.*

3. *The Appellant is to file and serve an application for leave to adduce fresh evidence returnable before the Court of Appeal. Such application together with a supporting affidavit is to be filed and served within 28 days from the date of this decision.*

4. *There will be no order as to costs in respect of this application.*

....
HON. MR JUSTICE W.D. CALANCHINI
ACTING PRESIDENT