IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

CIVIL APPEAL NO: ABU 5 of 2014
(High Court HBC 99 of 2013L)

BETWEEN	:	ILAMI LUTUMAILAGI and JOELI LUMUNI
		Appellants
AND	:	MILIANA NEIVALU
		Respondent
Coram	:	Calanchini P
Counsel	:	Mr E Maopa for the Appellants Mr K Vuataki for the Respondent
Date of Hearing	:	2 October 2014
Date of Judgment	:	28 November 2014

JUDGMENT

[1] This is an application by the Appellants for an order that the time in which a notice of appeal may be filed and served be enlarged.

[2] The application was made by summons filed on 28 January 2014 and was supported by an affidavit sworn on 24 January 2014 by Ilami Lutumailagi. The application was opposed by the Respondent who filed an answering affidavit sworn on 15 April 2014 by Miliana Neivalu. The Appellants filed a reply affidavit sworn on 13 May 2014 again by Ilami Lutumailagi. Prior to the hearing both parties filed written submissions.

[3] The Court's jurisdiction to determine the application is derived from section 13 of the Court of Appeal Act Cap 12 (the Act) and Rule 27 of the Court of Appeal Rules (the Rules). Pursuant to section 20 (1) of the Act this jurisdiction may be exercised by a justice of appeal.

[4] The Appellants are seeking to challenge the judgment of the High Court whereby the Respondent was granted an injunction restraining the Appellants, *"their servants, agents or howsoever from stopping, interfering, hindering or barring the Respondent, any member of the Rororo family and their children and/or authorised agent, contractor and workmen in clearing and removing sand and gravel from Nukuvatu Island"* until further order. The Court also granted an injunction restraining the Appellants from *"harassing or speaking harshly"* to the Respondent, *"any member of the Rororo family"* children, agents, contractors and workmen until further order. Both injunctions were granted on condition that the Respondent deposit 10% of sales proceeds in court on an on-going basis on every Friday of the week for the duration of the extraction work.

[5] The background to the dispute between the parties is complex and it is only necessary at this stage to give a summary of the relevant facts. The dispute is essentially about who has the right to the proceeds of sale of sand and gravel located on Nukuvatu Island as a result of dredging of the Nadi river bed by the State. A great deal of the argument before this Court and the court below concerned the existence of planting rights (kanakana or danudanu) held by the Respondent and ownership of Nukuvatu Island by either mataqali Nalubati or Tokatoka Nalubati. The Appellants, who are trustees of mataqali Nalubati, physically prevented the Respondent from removing the dredged material from the Island. The Respondent wanted to clear the dredged

material from the Island so that she could exercise her danudanu garden planting rights.

[6] The Appellants claim that the Island is owned by the mataqali Nalubati and rely on correspondence from the iTaukei Land Trust Board (iTLTB). The Respondent claimed to be a member of the Rororo family belonging to the Tokatoka Nalubati and whose danudanu was located on Nukuvatu Island. The learned Judge concluded that the Respondent had raised a serious question to be tried and that damages would not be an adequate remedy for the loss of the Respondent's danudanu (kanakana). The learned Judge concluded that the balance of convenience favoured granting the interim injunctive relief claim by the Respondent.

[7] In determining an application for an enlargement of time the Court has a discretion which must be exercised judicially. In **McCaig v Manu** (unreported CBV 2 of 2012; 27 August 2012) the President of the Supreme Court (Gates CJ) in delivering a ruling in a similar application set out the five factors that are usually considered to ensure that *"the judicial discretion is exercised in a principled manner."* They are (a) the length of the delay; (b) the reason for the delay; (c) whether there is a ground of merit justifying the appellate court's consideration, (d) where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed and (e) if time is enlarged, will the respondent be unfairly prejudiced? The purpose of the exercise is not the rigid application of a formula but to determine whether it would be just in all the circumstances to grant or refuse the application.

[8] In the present case the length of the delay is determined by calculating the length of time between the last day on which the Appellants were required to file and serve the notice of appeal and the date on which they filed and served the application for an enlargement of time.

[9] It is against the decision of the High Court delivered on 28 November 2013 that the Appellants now seek leave to appeal out of time. The Appellants filed this application on 28 January 2014. There is no indication as to when the application had been served on the Respondent. Since Rule 16 of the Rules refers to the requirement that

the notice of appeal must be filed and served within the specified time, the date of service of any application for an enlargement of time is also relevant.

[10] In order to determine the length of the delay in this case it is first necessary to indicate that the decision under challenge is an interlocutory judgment; see: Section 12(2) (f) (ii) of the Act and **Goundar v. The Ministry of Health** (ABU 75 of 2006; 9 July 2008). Leave to appeal is not required in this case (ibid). Consequently, pursuant to Rule 16 of the Rules the Appellants were required to file and serve their Notice of Appeal within 21 days from the date on which the judgment in the High Court was pronounced. The effect of the Rule is that the Appellants were required to file and serve the application for enlargement of time on the Respondent by 19 December 2013. The length of the delay in this case was at least the period between 19 December 2013 and 28 January 2014, a period of 40 days or almost 6 weeks. The actual delay may be greater when the subsequent (if it was subsequent) date of service of the summons on the Respondent is taken into account.

[11] As for the explanation for that delay, there is none provided by the Appellants in either their supporting or reply affidavits. Since the delay of almost six weeks remains unexplained, the only basis upon which the Court could exercise its discretion in favour of the Appellants would be if the Appellants were able to establish that their appeal is likely to succeed. Only then could it be said that it would be just in all the circumstances to grant the application. In assessing this factor it is necessary to recall two matters. The first is the general reluctance of courts to accede to applications to grant leave to appeal or, as in this case, an enlargement of time, in respect of a challenge to an interlocutory judgment. The second is the general reluctance of appellate courts to interfere with the exercise of a discretion by a judge at first instance.

[12] For the purposes of this application it is sufficient to indicate that for the Appellants to establish that the appeal is likely to succeed they must establish that the decision is clearly wrong and that if it is allowed to stand a substantial injustice will be effected by its operation. As the granting of the injunctions to the Respondent involved the exercise of a discretion, the Appellants, in order to establish that the decision was clearly wrong, must show that the judge has made an error in exercising this

discretion. The accepted approach to determining that question was explained in **House v The King** (1936) 55 CLR 499 at pages 504 – 505:

> *"It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for this if it has the materials for doing so."*

[13] It is apparent from the judgment that the learned Judge at first instance regarded the application as an application for an interlocutory or *"quia timet"* injunction and applied the principles set out in **American Cynamid Co. –v- Ethicon Limited** [1975] AC 396. The procedural requirements for making such an application are set out in Order 29 of the High Court Rules.

[14] The purpose of an interlocutory injunction granted by the High Court in the exercise of its jurisdiction under Order 29 is to preserve matters pending the trial of matters in dispute. Unfortunately there is no reference in the decision of the learned Judge as to the dispute between the parties that was the subject matter of the writ or the originating summons. It is a requirement under Order 29 Rule 1(3) that generally the writ or the originating summons must be issued before an application for an injunction is made. Neither party has made any submission on this issue.

[15] The learned Judge has granted the injunction on the basis that, on the evidence before him, the Respondent was exercising a legitimate claim to access danudanu (kanakana) which involved clearing dredged material which had been placed on top of the alluvial soil. The Appellants had been interfering with that legitimate right of the Respondent and as a result the injunction was granted to restrain them from continuing with that interference. However, the Appellants challenge the Respondent's danudanu rights on Nukuvatu Island. But that is an issue which can only properly be determined at a hearing where witnesses give evidence orally and are cross-examined.

[16] In my judgment the Appellants have not established that the learned Judge has erred in the exercise of his discretion and as a result have not established that the decision was wrong or if wrong, would result in substantial injustice if left undisturbed. I have concluded that the Appellants have not established that the appeal challenging the granting of the injunction is likely to succeed. The application for an enlargement of time should be dismissed. This Court is not concerned with issues relating to non-compliance with the orders made by the High Court. The substantive dispute should proceed to a hearing in the court below without delay.

Orders:

(1) Application is dismissed.

(2) The Appellants are ordered to pay the sum of $1800.00 costs to the Respondent within 28 days from the date of this judgment.

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Hon. Mr Justice Calanchini
PRESIDENT, COURT OF APPEAL