

IN THE COURT OF APPEAL  
ON APPEAL FROM THE HIGH COURT

CIVIL APPEAL NO. ABU 7 OF 2014  
(High Court HBC 94 of 2006)

BETWEEN : HABIB BANK LIMITED

Appellant

AND : 1. ALI'S CIVIL ENGINEERING LIMITED  
2. VITIANA TIMBERS (FIJI) LIMITED  
3. CHALLENGE ENGINEERING LIMITED  
4. NATIONAL BANK OF FIJI  
t/a COLONIAL NATIONL BANK  
5. DIRECTOR OF LANDS AND SURVEYOR GENERAL  
6. REGISTRAR OF TITLES  
7. ATTORNEY-GENERAL

Respondents

Coram : Calanchini P

Counsel : Ms B Narayan for the Appellant  
Mr V Prasad for 1<sup>st</sup> and 2<sup>nd</sup> Respondents  
Mr D Sharma for 3<sup>rd</sup> and 4<sup>th</sup> Respondents  
Ms T Sharma with Mr A Pratap for 5<sup>th</sup> – 7<sup>th</sup> Respondents

Dates of Hearing : 28 February 2014  
3 April 2014  
27 June 2014  
20 August 2014  
15 September 2014  
21 October 2014  
21 January 2015

Date of Ruling : 20 March 2015

## RULING

- [1] This is essentially an application for an enlargement of time to seek leave to appeal an interlocutory judgment of the High Court delivered on 11 March 2013. The effect of that judgment was that mortgage number 8465 held by the Appellant was declared null and void by the High Court. As a consequence the High Court also declared void a purported mortgagee sale under the said mortgage number 8465. There was no order made as to costs.
- [2] The application was filed on 13 February 2014 and was supported by an affidavit sworn on 12 February 2014 by Emmanuel Narayan. The application was opposed. An answering affidavit sworn on 28 March 2014 by Niwaz Ali was filed on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. The remaining Respondents did not file answering affidavits. Three further affidavits all sworn on 28 April 2014 by Emmanuel Narayan and two further affidavits sworn on 10 and 14 November 2014 by Emmanuel Narayan were filed on behalf of the Appellant. Further affidavits sworn on 28 May 2014, 19 September 2014 and 28 November 2014 by Niwaz Ali were filed on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. The Appellant and the 1<sup>st</sup> – 4<sup>th</sup> Respondents all filed written submissions.
- [3] On the face of the documents the application is made pursuant to Rule 27 of the Court of Appeal Rules (the Rules), the effect of which is that an application for an enlargement of time that is made after the time for appealing has passed is required to be made to the Court of Appeal. This is an exception to Rule 26 (3) which provides that in the case of concurrent jurisdiction an application should be made in the first place to the court below (i.e. in the High Court). Under section 20(1) of the Court of Appeal Act Cap 12 (the Act) a justice of appeal may exercise the powers of the Court of Appeal to, amongst other things, enlarge the time within which an application for leave to appeal may be given.
- [4] Before considering the principles relevant to an application to enlarge time, it is necessary to set out briefly some background facts to the proceedings in the High

Court and the procedural background to the application that is presently before the Court.

- [5] By Approval Notice of Lease dated 20 July 1989 Namakadre Mobile Enterprise obtained approval to lease Lot 2 on Plan DS1116 (LD 60/511) Laucala Beach Estate for a period of 10 years from 1 August 1989. It was a protected lease under the State Lands Act Cap 132. The area of land was 3500m<sup>2</sup>.
- [6] It would appear that in 1994 the lease was transferred to the First Respondent (Ali's Engineering). The land was then mortgaged to the Appellant (Habib Bank) on 3 August 1999 as mortgage number 6993. In 2004 a second mortgage document was registered as 8465 which purported to replace the previously registered mortgage 6993. This second mortgage document (number 8465) contained additional information concerning the particulars of the land and the area of the land secured. It amounted to a variation of the first mortgage number 6993. This occurrence can be explained by reference to the pleadings and the affidavit material. Habib Bank admitted to varying the earlier mortgage 6993 "*unilaterally*". It was a variation of the earlier mortgage between the same parties which secured a smaller area of land. The effect of the variation was to provide for a larger area of land (i.e. from 3500m<sup>2</sup> to 2.2938 hectares) since Ali's Engineering had made a representation to Habib Bank concerning a larger area of land in order to obtain an enhancement of a financial facility that was duly granted to Ali's Engineering.
- [7] By writ of summons issued by the High Court on 7 March 2006 the First and Second Respondents had commenced an action against the Appellant and others seeking relief in the form of, amongst others, a declaration that the registered varied mortgage number 8465 was null and void and a declaration that Habib Bank had no rights as mortgagee in respect of the land described in the said varied mortgage. An order was also sought to restraining the parties from proceeding with or completing the mortgage sale under mortgage number 8465.
- [8] By summons dated 26 September 2012 Ali's Engineering and Vitiana Timbers (Fiji) Limited applied for judgment on admissions pursuant to Order 27 Rule 3 of the High

Court Rules. In particular, the following orders amongst others were sought by the Applicants:

- “(i) A declaration that the varied relevant mortgage registered as Number 8465 with the Registrar of Deeds is fraudulent null and void.*
- “(ii) A declaration that (Habib Bank) has no rights, estates or interest as a mortgagee in respect of the land comprised in Lot 1 SO 4379 State Foreshore containing 2.2938 hectares \_\_\_ and being LD Ref Number 60/511 \_\_\_.*
- “(iii) A declaration that the purported mortgagee sale under mortgage No.8465 registered on 8 June 2004 is void.”*

[9] The Applicants relied on the affidavit sworn on 25 September 2012 by Niwaz Ali and the pleadings in support their application. Relying on the pleadings and the requirement under section 13 of the State Lands Act, the High Court granted orders (i) and (iii) but declined to make an order under (ii).

[10] Being dissatisfied with the orders made by the High Court in that judgment Habib Bank sought to appeal the judgment to this Court. It is in respect of that appeal that the Bank now seeks an enlargement of time.

[11] It is at this stage necessary to make two significant observations. The first is that the proceedings in the High Court involved an application for judgment on admissions under Order 27 of the High Court Rules. The application was heard by a Judge of the High Court on 27 and 28 February 2013. Judgment was delivered by the same Judge on 11 March 2013. The correct procedure was to appeal to the Court of Appeal pursuant to section 12 of the Act. The second point to note is that the judgment pronounced on 11 March 2013 was an interlocutory judgment (See: **Goundar -v- The Minister for Health** unreported ABU 75 of 2006; 9 July 2008).

[12] It follows that Habib Bank had 21 days from 11 March 2013 to apply for leave to appeal the interlocutory judgment of the High Court. The first application made to this Court by Habib Bank was by way of summons dated 13 November 2013 and filed on the same date.

- [13] The first three orders sought in the present summons are concerned with what is an application for an enlargement of time to apply for leave to appeal an interlocutory judgment. If an applicant is successful in an application for an enlargement of time to apply for leave then it follows that leave to appeal has been granted in the process. There is no need to seek three separate orders.
- [14] The application filed on 13 November 2013 was supported by an affidavit sworn on 13 November 2013 by Emmanuel Narayan. When that application for enlargement of time came on for mention on 25 November 2013, the summons was withdrawn and Habib Bank was ordered to pay costs to Ali's Engineering and Vitiana Timber (Fiji) Limited. The orders were made as a result of an application by Counsel for Ali's Engineering. The application was misconceived and the Court was not properly advised. Since the application by Habib Bank had been made well outside the time for appealing Rule 26 (3) did not apply. It is Rule 27 that provides that when an application for an enlargement of time is made after the time for appealing has expired, then the application must be made to the Court of Appeal. Unfortunately this resulted in a further delay since Habib Bank then made an unsuccessful application to the High Court before refiling the application in this Court.
- [15] Whether the application should be granted and time enlarged involves the exercise of a discretion. The factors to be considered by the court in order to ensure that the judicial discretion is exercised in a principled manner were discussed by the Supreme Court in **NLTB -v- Ahmed Khan and Another** (unreported CAV 2 of 2013; 15 March 2013 per Gates CJ). 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 or, where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed and (d) if time is enlarged, will the respondent be unfairly prejudiced? These matters should be considered in the context of whether it would be just in all the circumstances to grant or refuse the application. The onus is on the Appellant to show that in all the circumstances it would be just to grant the application.

[16] In this case the interlocutory judgment of the High Court was pronounced on 11 March 2013. Pursuant to Rule 16 of the Rules the Appellant was required to file and serve the application for leave within 21 days from that date, that is by 1 April 2013. The summons upon which this application has proceeded was filed on 13 February 2014. There is as far as I am able to ascertain, no material to indicate upon what dates the summons was served on the Respondents.

[17] However, out of fairness to Habib Bank and for the reasons outlined earlier in this Ruling, I am prepared to consider the date on which the first application was filed as the date on which the application was made. That summons was filed on 13 November 2013 and I am prepared to infer that it had been served on the Respondents at the latest by 26 November 2013 being two clear days prior to the first mention date when all the parties appeared.

[18] The length of the delay is determined by calculating the length of time between the last day on which Habib Bank was required to have filed and served its application for leave to appeal and the date on which it filed and served the application for the enlargement of time. In this case the length of the delay is the period of time between 1 April 2013 and 26 November 2013 being a period of a few days short of 8 months. The delay is substantial.

[19] As for the explanation for the delay, it is appropriate to again clarify one issue. There was no reason for any party to have formed the impression that the application for judgment on admissions was heard by a Master. Although the material before me refers to the parties being under the impression that the hearing was before the Master, there was no evidence exhibited to justify that impression. Neither a copy of the daily High Court list for 27 February 2013 nor evidence of the date of appointment as a Judge was exhibited to any affidavit. When the application was listed for hearing on 27 February 2013 it was listed before the Hon Mr Justice Amaratunga. The summons had left open the option of either a Master or a Judge hearing the application. The judgment was signed by the Hon Mr Justice Amaratunga as a Judge of the High Court. Under those circumstances the only appeal was to the Court of Appeal with leave. The first time an application for leave to appeal was filed in the Court of Appeal was on 13 November 2013. The application was months out of time and as a

result the application for an enlargement of time was required to be made to the Court of Appeal under Rule 27 of the Rules. Rule 26(3) did not apply in this case.

[20] The summons filed on 22 March 2013 was filed under Order 59 Part II of the High Court Rules. It was the wrong procedure and cannot be relied upon as an attempt to comply with section 12(2) of the Court of Appeal Act or Rule 26 of the Court of Appeal Rules.

[21] The explanations for the delay are set out in the affidavit in support. The material refers to the misunderstanding as to the status of the Judge and the correct application of the Rules. I do have great difficulty in accepting the Appellant's explanation. The fiasco which evolved was due entirely to a lack of attention to detail. There is no other explanation put forward by the Appellant. The only matter that works in favour of the Appellant is that there has been attempted compliance with the wrong Rules, i.e. compliance with Order 59 Part II of the High Court Rules rather than compliance with the Court of Appeal Act and Rules. It appears that Habib Bank has at all times intended to appeal the judgment delivered on 11 March 2013.

[22] Therefore, in my judgment, this is a case where, despite the substantial delay and the alleged mistaken belief as to the status of the judicial officer, the appropriate test should be whether there is a ground of some merit that would justify allowing the appeal to go before the Court of Appeal. This test is not as onerous as establishing that the appeal will probably succeed. However, what and where are the grounds of appeal? The affidavit in support at paragraph 25 refers to 14 grounds of appeal contained in the Notice of Proposed Appeal at Annexure J to the affidavit. There are three annexures at J being J1, J2 and J3, none of which set out any proposed grounds of appeal. It is annexure K that contains a document titled Notice of Proposed Appeal. The problem is that it is a document for the High Court in its appellate jurisdiction for an appeal from the Master's decision delivered on 11 March 2013. The 14 grounds of appeal refer to the decision of the Master.

[23] These grounds of appeal do not appear to have been accurately summarised as is claimed in paragraph 25 of the affidavit in support sworn on 12 February 2014. The

summary of the proposed grounds is entirely unsatisfactory in the sense that each paragraph is in the form of a question.

- [24] Ground (a) appears to suggest that the learned Judge exceeded the jurisdiction given under Order 27 but does not specify how. Ground (a) also appears to allege that the learned Judge made "*serious errors pertaining to the facts*" but does not specify those errors.
- [25] Ground (b) alleges an error of law in relation to the effect of an approved notice of lease but does not specify the nature of the error. Ground (c) specifies an error of fact in relation to the date of the first mortgage document. Ground (d) alleges that the trial judge made certain findings on insufficient evidence. Ground (e) alleges an error of law in relation to the interpretation and effect of section 13 of the State Lands Act. Ground (f) alleges an error in the construction of clauses 16 and 20 (g) in Mortgage number 6993 by the learned Judge. To a larger extent ground (g) raises similar issues to those that are raised in ground (a).
- [26] In my judgment the appeal raises issues that affect the rights of the parties. Although this is properly classified as an interlocutory judgment as a result of the decision of this Court in **Goundar -v- The Minister of Health** (supra) it has nevertheless decided the rights of the parties under both two mortgage documents and a mortgagee sale. As a result the usual tests that are applied when considering an application for leave to appeal an interlocutory judgment should not be strictly applied when the judgment determines the proprietary rights of the parties. I am satisfied that the summary of the grounds set out in the affidavit in support raises appealable issues that should be considered by the Court of Appeal.
- [27] I am also satisfied that any prejudice caused to the First and Second Respondents is outweighed by the prejudice caused to the Appellant and to the Third and Fourth Respondents in the event that an enlargement of time is not granted.
- [28] As a result the application for an enlargement of time to seek leave to appeal the decision dated 11 March 2013 of the High Court is granted. It follows that leave to appeal under section 12 (2) (f) of the Act is granted. The Appellant is required to file



and serve a notice and grounds of appeal within 21 days from the date of this Ruling. The grounds of appeal are to be drafted in accordance with the requirements specified in the Court of Appeal Rules. The notice must state specifically and concisely the grounds of appeal. The grounds must identify each finding of fact, evidence, or law upon which each ground is based. The notice of appeal should not be over-loaded with grounds listed in no logical order or sequence. Grounds of appeal stated in vague and general terms will not be considered by the Court.

[29] Upon the filing and serving of the notice of appeal, the appeal will take its course in accordance with Rules 17 and 18 of the Rules.

[30] As for the alternative applications concerning the interlocutory Rulings delivered on 8 November 2013 and 30 January 2014, for the reasons stated in this Ruling, there is clearly no error in either Ruling. The applications are dismissed. In this case the costs of this application should be costs in the appeal.

**Orders:**

- (1) *Application for an enlargement of time is granted.*
- (2) *Leave to appeal is therefore granted.*
- (3) *Appellant to file and serve Notice of Appeal on all parties within 21 days from the date of this Ruling.*
- (4) *Thereafter appeal to proceed under Rules 17 and 18.*
- (5) *Alternative applications dismissed.*
- (6) *Costs in the appeal.*



*W. Calanchini*

Hon. Mr Justice W. D. Calanchini  
PRESIDENT, COURT OF APPEAL