IN THE COURT OF APPEAL, FIJI
On appeal from the High Court of Fiji

CIVIL APPEAL ABU 81 of 2015
(High Court HBC 67 of 2014 Ltk)

BETWEEN : **WALI MOHAMMED**

Appellant

AND : **MOHAMMED SHAMSHER AZAAD KHAN**

Respondent

Coram : **Calanchini P**

Counsel : **Ms J Naidu for the Appellant**
Mr V Prasad for the Respondent

Date of Hearing : **30 August 2016**

Date of Ruling : **28 October 2016**

RULING

[1] On 10 November 2015 the Appellant filed a notice of appeal seeking an order that the decision of the High Court dated 2 October 2015 be set aside together with certain consequential orders.

[2] The decision of the High Court was a decision delivered in the exercise of the High Court's appellate jurisdiction pursuant to Order 59 Part II of the High Court Rules. The decision was delivered on 2 October 2015. The learned High Court Judge refused to grant an enlargement of time for the Appellant (Mohammed) to appeal the decision of the Master dated 5 June 2015.

[3] The litigation background is briefly outlined in the decision of the learned Judge and it is appropriate to repeat that background as it provides the necessary information for the present purposes. In 2014 Mohammed commenced proceedings by writ against Khan claiming a declaration that Khan holds a property on constructive trust for Mohammed and for a declaration that Khan holds the deposit of $15,000.00 and $30,000.00 paid by Mohammed to Khan in HFC loan account and improvements thereof in proportion to the value of the property by way of resulting trust for Mohammed. The statement of claim alleged that on 22 March 1988 Khan agreed to sell the property (native land lease) to Mohammed for certain consideration. Khan filed a striking out application. The Master on 5 June 2015 struck out the claim as it failed to disclose a reasonable cause of action against Khan and ordered Mohammed to pay costs of $1,000.00. Mohammed sought to appeal the interlocutory order of the Master and in order to do so required an enlargement of time to apply for leave to appeal pursuant to the various rules in Order 59 Part II of the High Court Rules.

[4] Since Mohammed's appeal to this Court was an appeal against a decision of the High Court exercising its appellate jurisdiction, the right to appeal is restricted to grounds of appeal that involve a question or questions of law only pursuant to section 12(1)(c) of the Court of Appeal Act Cap 12 (the Act).

[5] There is authority for the proposition that an appeal to this Court under section 12(1) (c) is also subject to the requirement to obtain leave under section 12(2) of the Act. In **Kaur –v- Singh** [1999] FJCA 46; ABU 11 of 1998; 13 August 1999 this Court (Tikaram P, Casey and Handley JJA) stated:

"Section 12(1)(c) of the Court of Appeal Act confers a right to appeal to this Court from a decision of the High Court in the exercise of its appellate jurisdiction on grounds which involve a question of law only but this right is subject to subsection 2.

Section 12(2)(f) provides that, subject to presently irrelevant exceptions, there shall be no appeal from an interlocutory order of the High Court except by leave."

[6] In Fiji the approach to be adopted for determining whether a judgment or order is an interlocutory or a final judgment or order is the applications approach: **Goundar –v- The Minister for Health**; ABU 75 of 2006, 9 July 2008. On the basis that the applications test is the appropriate test then the appeal to this Court from the decision of the learned High Court Judge in the exercise of his appellate jurisdiction was an interlocutory judgment and the orders made were interlocutory. This conclusion is to some extent based on the fact that the High Court Act Cap 13 section 21A effectively bestows upon the Master what may be described as a jurisdiction delegated under the Rules. In any event Mohammed must seek leave to appeal the interlocutory orders made by the learned Judge.

[7] The Appellant now seeks from this Court an order for an enlargement of time to apply for leave to appeal by way of a summons filed on 30 March 2016. The application was supported by an affidavit sworn on 16 March 2016 by Wali Mohammed. The application was opposed. The Respondent filed an answering affidavit sworn on 30 May 2016 by Mohammed Shamsher Azaad Khan. The Appellant then filed a reply affidavit sworn on 17 June 2016 by Wali Mohammed. Both parties subsequently filed written submissions. The parties presented oral submissions on 30 August 2016.

[8] Before considering the present application there is one procedural matter raised by the Respondent in his written submissions that should be addressed. The issue raised by the Respondent relates to Rule 17 of the Court of Appeal Rules.

[9] Rule 17 appears in the Rules under the heading *"Security for payment of costs"* and states:

> *"17.-(1) The appellant must-*
>
> *(a) within 7 days after service of the notice of appeal-*
> *(i) file a copy endorsed with a certificate of the date the notice was served; and*
> *(ii) apply to the Registrar to fix the amount of the security to be given by the appellant for the prosecution of the appeal, and or the payment of all such costs as may be ordered to be paid.*
> *(b) within such time as the Registrar directs, being not less than 14 days and not more than 28 days, deposit with the Registrar the sum fixed as security for costs.*
>
> *(2) If paragraph (1) is not complied with, the appeal is deemed to be abandoned, but a fresh notice of appeal may be filed before the expiration of –*
> *(a) in the case of an appeal from an interlocutory order – 21 days; or*
> *(b) in any other case – 42 days,*
> *calculated from the date the appeal is deemed to be abandoned.*
>
> *(3) Except with the leave of the Court of Appeal, no appeal may be filed after the expiration of time specified in paragraph (2)."*

[10] It would appear that the Appellant had initially filed a timely notice of appeal on 21 October 2015. However when the summons to fix security for costs was called on for hearing there was no appearance by Counsel for the Appellant. The summons was dismissed and the appeal was deemed to have been abandoned on 10 November 2015 under Rule 17(1). In accordance with Rule 17(2) the Appellant filed a fresh notice of appeal on the same day. Rule 17(1) was re-activated and there was on this occasion full compliance. As a result Rule 17 had no further application to the appeal filed on 10 November 2015. The Respondent Khan filed a summons on 15 December 2015 seeking an order that the notice of appeal be dismissed for want of leave. It was accepted by Counsel for the Appellant that leave to appeal is required where the appeal is against an order made by a Judge of the High Court on an interlocutory appeal from a Master. Since

the merits of the appeal had not been considered, the appeal was struck out on 4 March 2016. Under those circumstances there is no impediment preventing the Appellant from seeking an enlargement of time to file an application for leave to appeal. Such an application can properly be made pursuant to the jurisdiction given to this Corot under section 13 of the Court of Appeal Act. Pursuant to section 20(1) of the Act a single judge of the Court is empowered to exercise the jurisdiction to enlarge time.

[11] Whether an enlargement of time should be granted to enable the Appellant to file an application for leave to appeal involves the exercise of a judicial discretion. The factors to be considered by a court to ensure that the discretion is exercised in a principled manner are similar to those discussed by the Supreme Court on **NLTB –v- Khan and Another** (CAV 2 of 2013; 15 March 2013). 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 that will probably succeed and (d) if time is enlarged, will the Respondent be unfairly prejudiced. The onus is on the Appellant to establish that in all the circumstances it would be just to grant the application.

[12] Pursuant to Rule 16 of the Rules the Appellant was required to activate his appeal within 21 days from the date of the Judgment. Notwithstanding the failed attempts to launch this appeal, the actual delay is the period from 23 October 2015 to 30 March 2016. This is a period of just over 5 months. The period between the date on which the second notice of appeal was dismissed (4 March 2016) and when the present application was filed (30 March 2016) is 26 days.

[13] The reasons for the delays are obviously first of all the failure to attend the Chief Registrar's summons and secondly, a misunderstanding of the distinction between interlocutory and final orders and judgments. Neither represents a satisfactory explanation.

[14] Although the delay may be described as substantial and the explanation unsatisfactory the exercise of the discretion also depends upon whether there is a ground of appeal that will probably succeed. It is at this point necessary to recall that this appeal comes to the Court under section 12(1)(c) of the Act. As a result the jurisdiction of this Court is restricted to grounds of appeal that involve errors of law only. Therefore the Appellant is required to establish that (1) the ground or grounds of appeal involve errors of law only and (2) those grounds will probably succeed.

[15] With those requirements in mind, it is now necessary to examine in some detail the proceedings in the court below. Mohammed commenced proceedings by writ in the High Court. For the purposes of this Ruling it is only necessary to consider the first two paragraphs of the Statement of Claim:

> *"(1) At all material times the Defendant (Khan) is the registered owner of all that piece of land known as Lot 1 _ _ _ under iTaukei Lease No: 15007 (the property)*
>
> *(2) On 22 March 1988 the Defendant (Khan) agreed to sell the property to the plaintiff (Mohammed) for certain consideration.*
>
> *Particulars of consideration*
>
> *The Plaintiff was to give the Defendant the following consideration:*
>
> *a. Transfer ownership of two vehicles registration no BC 363 and BF 777 valued at $15,000*
> *b. Pay Off the Defendant's loan in the sum of $30,000 with HFC*
> *c. Pay lease rentals to iTaukei Land Trust Board (TLTB)."*

[16] The relief claimed by Mohammed flowed from the pleadings relating to and arising out of the alleged agreement. The writ was issued on 1 May 2014. Khan did not deliver a defence to the statement of claim. Instead he filed on 15 September 2014 a summons seeking an order that the statement of claim be struck out on the grounds that it disclosed no reasonable cause of action and was an abuse of the powers of the court. In the summons, although not strictly necessary, Khan referred to section 12 of the iTaukei Land Trust Act Cap 134. The application was made under O18 R18 (i) (a) and (d) of the High Court Rules and under the inherent jurisdiction of the Court. Khan did not file an

affidavit in support of the application on the basis of the prohibition in O18 R18(2) disallowing evidence in respect of any application under O18 R18(1)(a). Mohammed filed an affidavit in opposition that can only have relevance to the application under O18 R18(1) (d) and the court's inherent jurisdiction.

[17] Both parties filed comprehensive submissions prior to the hearing before the Master. Khan's submissions referred to two issues upon which reliance was placed in support of his application. The first was that there was no agreement in writing. The second was that there was no consent given by the iTLTB for the sale of the property.

[18] In his Ruling delivered on 5 June 2015 the Master found that section 12 of the iTaukei Land Trust Act did not apply and that there was no requirement to plead the issue of consent. The Master concluded that there had not yet been a dealing with the lease under section 12. The Master also indicated that in any event the Board by accepting rental payments from Mohammed cannot at the same time claim that the agreement was illegal.

[19] In relation to the issue that Mohammed had not pleaded that the agreement was in writing, the Master concluded:

> *"In view of the mandatory requirement of section 59(d) of the Indemnity Guarantee and Bailment Act and the legal consequences that flow from non-compliance I have reached the irresistible conclusion that the Plaintiff's Statement of Claim discloses no reasonable cause of action against the Defendant."*

[20] The Master found that the action was not an abuse of process. The Master then ordered that the writ of summons and the statement of claim be struck out with costs of $1,000.00 to be paid to Khan within 14 days.

[21] Being dissatisfied with the Master's orders Mohammed sought to appeal the decision under Order 59 Part II of the High Court Rules. The grounds of appeal only challenged the Master's decision that the agreement was caught by section 59(d) of the Indemnity

Guarantee and Bailment Act. The grounds are all claiming that section 59(d) does not apply to equitable interests.

[22] The learned High Court Judge refused to grant leave to appeal since the application for leave was made out of time. The learned Judge also refused to grant an enlargement of time to allow Mohammed to apply for leave to appeal. Although not raised as a ground of appeal by Mohammed and although Khan sought not to challenge the Master's finding that section 12 of the iTaukei Land Trust Act did not render this agreement illegal, the learned Judge overturned the Master's decision and concluded that the agreement was illegal. He then stated that section 59(d) was therefore of no relevance since the agreement was *"contaminated with illegality."* In doing so the learned Judge has not referred to any authority upon which he could be said to have relied for his decision to overturn the Master's findings on the application of section 12.

[23] Being dissatisfied with the decision of the learned High Court Judge Mohammed has now sought to appeal to this Court. The proposed grounds of appeal appear to be those that were filed on 10 November 2015 with the original notice of appeal. There are six grounds of appeal all of which allege that the learned Judge erred in law and in fact. On the basis that the words used claim errors in law and in fact, the notice of appeal does not comply with section 12(1)(c) of the Court of Appeal Act. However, although a notice of appeal may set out grounds of appeal that allege questions the law only, it does not automatically follow that the questions raised by the grounds do in fact raise questions of law only. Similarly it is possible that, although the grounds of appeal in the notice of appeal refer to errors of law and fact, one or other of the grounds may involve a question of law only. In my view grounds 4, 5 and 6 can be said to raise a question of law only. Ground 4 relates to the propriety of overturning the Master's decision on a ground that was not raised on appeal. Grounds 5 and 6 raise the issue of the correct application of section 59(d) of the Indemnity Guarantee and Bailment Act (hereafter referred to as section 59(d)). So far as in relevant section 59 states:

> *"59. No action shall be brought*

(a) _ _ _
(b) _ _ _
(c) _ _ _
(d) *Upon any contract or sale of lands, tenements or heuditaments or any interest in or concerning them, or*
(e) _ _ _
Unless the agreement upon which such action is to be brought _ _ _ is in writing and signed by the party to be charged there _ _ _."

[24] An agreement for the sale of land that is not in writing and signed by the person to be charged is not an invalid agreement. The effect of section 59(d) is that no action may be brought upon any contract for the sale of land or any interest in land unless the agreement upon which the action is brought, or a memorandum or note of it, is in writing and signed by the party to be charged or by some other person authorised by him. This is the re-enactment in Fiji of part of the Statute of Frauds (1677) (section 4).

[25] It follows that the absence of written evidence is a defence which must be specifically pleaded pursuant to Order 18 Rule 7 of the High Court Rules: **Clarke –v- Callow** (1877) 46 L.J.QB 55, **Olley –v- Fisher** (1887) 34 Ch.D 367; **Morgan –v- Worthington** (1878) 38 L.T.443. However equity has developed a principle known as part performance the effect of which is that where the plaintiff has, to the defendant's knowledge, performed an act referrable to the agreement as alleged, the defendant will not be allowed to rely on the absence of written evidence. Where a plaintiff seeks to rely on the doctrine of part performance in the absence of written evidence, it should usually be pleaded in the reply to the defence. A practice has developed where on occasion a plaintiff anticipating the defence, pleads acts of part performance in the statement of claim. In any event, whatever course of action is followed by the Plaintiff, the defence must be pleaded.

[26] It follows from the above that it is not a proper course of action for a defendant to seek the striking out of a statement of claim that does not plead an agreement for the sale of land in writing or evidenced by a written note or memorandum. If the defendant intends to challenge the agreement on that basis it is necessary to plead section 59(d) in the defence. The Master should not have determined the issue in the absence of Khan's

defence and Mohammed's reply. This is even more so the position when the application to strike out is made on the basis that the statement of claim does not disclose a cause of action since affidavit material adducing evidence is not allowed in such an application.

[27] I am satisfied that the Master should not have proceeded to consider Khan's application until the pleadings had closed. It was not appropriate to strike out the statement of claim until after the Defence had been delivered. As a result I am satisfied that the appeal in this Court will probably succeed on the basis that the learned High Court Judge should have granted an enlargement of time for Mohammed to seek leave to appeal the Master's decision. The learned Judge failed to consider the reasons for the Master's decision to strike out the statement of claim. The learned Judge should not have considered section 12 of the iTaukei Land Trust Act because that matter had not been raised on appeal.

[28] For the reasons stated, I am satisfied that both the decision of the Master and the decision of the High Court Judge raise an error on a question of law alone that will probably succeed. On the material before the Court I am not satisfied that the Respondent will be unfairly prejudiced if an enlargement of time is granted.

[29] I therefore grant the enlargement of time for Mohammed to file and serve an application for leave to appeal and grant leave to appeal. The Appellant is to file and serve a notice of appeal within 21 days from the date of this Ruling. Thereafter the appeal is to take its course in accordance with Rules 17 and 18 of the Court Appeal Rules. Leave to appeal is granted on condition that the Appellant pay to the Respondent costs summarily assessed in the sum of $1,800.00 within 14 days from the date of this Ruling in default of which the appeal is dismissed.

Orders:

1. *An enlargement of time is granted.*
2. *Leave to appeal is granted.*
3. *Appellant is to file and serve a notice of appeal within 21 days from the date of this Ruling in default of which the appeal is dismissed.*

4. *Appellant is to pay costs to the Respondent in the sum of $1,800.00 within 14 days from the date of this Ruling in default of which the appeal is dismissed.*
5. *The appeal is then to proceed in accordance with Rules 17 and 18 of the Court of Appeal Rules.*

W. Calanchini

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