

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL ABU 0027 OF 2016
(High Court HBJ 16 of 2015)

BETWEEN : VERONICA TUIGASIALE
Appellant

AND : DIRECTOR OF LANDS
First Respondent

AND : RAFCO ENTERPRISES LIMITED
Second Respondent

Coram : Calanchini P

Counsel : Mr. T Bukarau for the Appellant
Ms O Solimailagi for the First Respondent
Mr V Prasad for the Second Respondent

Date of Hearing : 28 March 2017

Date of Ruling : 12 May 2017

RULING

- [1] The application before the Court is an application for enlargement of time to apply for leave to appeal the interlocutory judgment delivered by the High Court on 21 March 2016. In that judgment the learned High Court Judge had dismissed the Appellant's application for leave to apply for judicial review of the decision of the First Respondent (the Director of Lands) to issue and or renew the grant of Crown Lease No. 755 on 17 August 2015 in favour of the Second Respondent (Rafco Enterprises Limited).
- [2] The application for an enlargement of time was made by a summons that was neither dated nor signed but was accepted for filing on 14 June 2016. The application was supported by an affidavit sworn on 14 June 2016 by Veronica Tuigasiale. The application was opposed by the Respondents, both of whom filed answering affidavits sworn on 5 August 2016 by Apisai Vulawalu and sworn on 4 August 2016 by Akcar Ali respectively. The Appellant filed two reply affidavits both sworn on 19 August 2016 by Veronica Tuigasiale. The parties filed written submissions prior to the hearing.
- [3] The application is made under section 13 of the Court of Appeal Act 1949 (the Act) and Rule 27 of the Court of Appeal Rules (the Rules). Section 20 of the Act enables the power of the Court of Appeal to extend the time within which an application for leave to appeal may be given to be exercised by a judge of the Court.
- [4] At the commencement of the proceedings in the court below Counsel for the Second Respondent (Rafco Enterprises) raised two preliminary issues which are set out on paragraph 7 of the High Court judgment as follows:

- “(1) That no written consent of Director of Lands under section 13(1) of the State Lands Act 1945 has been obtained by the Applicant for the relief sought; and*
- (2) That the Applicant has no statutory consent under section 13(1) of the (State Lands Act 1945) to occupy the land in question and that*

the Applicant has no lawful right to bring the present action as she is a trespasser in unlawful and illegal possession of Crown Land."

[5] For reasons that are not directly relevant to the present application the learned Judge took the view that it was neither necessary nor appropriate for him to consider the second preliminary issue. As for the first issue, the learned judge concluded that, since the Applicant had not obtained any written consent of the Director of Lands either prior to the commencement of the proceedings or subsequently, the application for leave to apply for judicial review was in breach of section 13 of the State Lands Act 1945. As a result the application for leave to apply for judicial review was dismissed. The learned Judge ordered the Appellant to pay \$500.00 costs to the Director of Lands and \$500.00 costs to Rafco Enterprises.

[6] It is against that decision that the Appellant now seeks an enlargement of time to apply for leave to appeal. The principles upon which an enlargement of time may be granted and upon which leave to appeal an interlocutory judgment may be granted are well known and well settled.

[7] As for seeking an enlargement of time reference need only be made to the decision of the Supreme Court in NLTB (now iTLTB) –v- Ahmed Khan and Another (CBV 2 of 2013; 15 March 2013). The factors that are usually considered to ensure that the discretion is exercised in a principled manner are (a) the length of the delay, (b) the reasons 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 discretion is to be exercised in a manner that re-enforces the importance of compliance with the rules of Court and the need to bring finality to litigation (see the decision the Supreme Court in McCaig –v- Abhi Manu CBV 2 of 2012; 24 April 2013).

[8] As for the application for leave to appeal an interlocutory judgment, it is only necessary to refer to the decisions of the Victorian Supreme Court in Niemann –v- Electronic

Industries Ltd [1978] VR 431 (Murphy J) at page 441 which was referred to and applied by this Court in **Kelton Investments Ltd –v- Civil Aviation Authority of Fiji** (ABU 34 of 1995; 18 July 1995). In the **Kelton** (supra) decision Tikaram P stated that:

“If the Judge’s order was prima facie clearly without jurisdiction or plainly wrong affecting substantive rights then I would have had no difficulty in granting the leave sought _ _ _.”

[9] Dealing first with the issues that arise under the application for an enlargement of time. The decision of the High Court was pronounced on 21 March 2016. The Appellant was required under Rule 16 of the Rules to file and serve the application for leave to appeal within 21 days thereafter, that is by 11 April 2016. The summons seeking an enlargement of time was filed on 14 June 2016 and served on the same day. The delay is about 2 months. The explanation is related to a misunderstanding by the legal practitioner acting for the Appellant as to the distinction between an interlocutory and a final judgment. An appeal notice had been filed within time on 11 April 2016. However the Appellant had not obtained leave and it became necessary for the Appellant to file a summons with supporting affidavit seeking leave to appeal. By the time this requirement could be satisfied the time for appealing had obviously expired and as a result it was necessary for the application to be filed as an application for enlargement of time to seek leave to appeal under Rule 27 of the Rules. However, it should be accepted that the Appellant had given notice of his intention to appeal within the time prescribed by Rule 16 of the Rules but had failed to do so in compliance with section 12(2) of the Act and Rule 26(3) of the Rules.

[10] It is inherent in the exercise of the discretion to consider the merit of the proposed appeal. As Thompson JA noted in **Tevita Fa –v- Tradewinds Marine Ltd and Another** (ABU 40 of 1994; 18 November 1994) at page 3:

“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.”

- [11] It is at this point that the principles applied in an enlargement of time application merge with the principles upon which leave may be granted to appeal an interlocutory judgment or order. Whether there is a ground of merit justifying the Court of Appeal's consideration must be considered in the context of whether the learned Judge's decision in the court below either was made without jurisdiction or was plainly wrong and affected the substantive rights of the Appellant to the extent that it would be unjust to allow the order to stand.
- [12] The authorities to which I have been referred and the authorities to which the learned Judge referred in his Ruling establish that it is not necessary to obtain the written consent of the Director before commencing court proceedings that are caught by section 13 of the State Lands Act. However in the present case the learned Judge found as facts on the material before him that (1) the Appellant had not made and did not indicate an intention to make an application, (2) at no stage had the Director of Lands communicated with the Appellant and (3) the Director had clearly raised his opposition to the proceedings.
- [13] However the issues raised by the grounds in the proposed notice of appeal are concerned not with the timing of the Director's consent but rather whether the proceedings commenced by the Appellant are proceedings that come within section 13 of the State Lands Act.
- [14] Under section 13 the written consent of the Director of Lands is required for any protected lease to be dealt with by any court of law or to be dealt with under the process of any court of law. As Hammett Act CJ noted in Rasul -v- Jeet Singh and Hazara Singh (1964) 10 Fiji LR 16 at page 17:

"It seems to me that the consent of the Director can therefore be obtained up to any time before the land is actually "dealt with" by the Court, which in my view is certainly not the case at any time before an order has been made by the Court or a judgment of the Court has been delivered. I can see no reason why a judgment of the Court dealing with the land could not properly be made "subject to the consent of the Director of Lands, with liberty to apply for further orders should that consent not be granted."

- [15] Although in this case it is clear that the Director's consent will not be granted, the issue is whether the lease is being dealt with by the Court or under the process of the Court?
- [16] The substantive relief sought by the Appellant in the application for leave to apply for judicial was a declaration that "*the Director of Lands exceeded and/or did not properly exercise the jurisdiction and/or acted ultra vires and made an error of law and/or abused her discretion and/or acted unreasonably and/or irrationally and acted in breach of legitimate expectation*" in purporting to issue and/or renew the grant of the Crown Lease in favour of Rafco Enterprises on 17 August 2015.
- [17] A dealing of the lease by the Court or a dealing of the lease under the process of any court that requires the Director's consent is described in the section as any sale, transfer, sub lease, assignment, mortgage or other alienation or dealing. An application for judicial review seeking a declaration that challenges a decision of the Director of Lands in relation to a state lease does not represent a dealing by the Court nor is it a dealing under the process of any court of law. In the event that the Court were to make a declaration it would not result in the lease being dealt with by the Court or under the process of any court.
- [18] As a consequence, in my view, there is sufficient merit in this ground of appeal to conclude that it is arguable that the learned Judge erred when he dismissed the application for judicial review on the ground upon which he relied. The right of the Appellant to bring an application for judicial review has been terminated for the wrong reason.
- [19] For those reasons, I grant the application for an enlargement of time to appeal the interlocutory order of the court below on the conditions set out in the orders below.

Orders:

1. *Enlargement of time is granted.*
2. *Leave to appeal the interlocutory Ruling dated 22 March 2016 is granted.*
3. *Appellant is to file and serve a notice of appeal within 21 days from the date of this Ruling.*
4. *The Appellant is to pay costs to each Respondent in the sum of \$800.00 (total \$1600.00) within 21 days from the date of this Ruling.*
5. *In default of either Order 3 or Order 4 the appeal is deemed to have been abandoned.*



W. Calanchini

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