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

CIVIL APPEAL NO.ABU 52 of 2017
(On appeal from the decision of High Court at Lautoka Civil Action No. HBC 358 of 2002)

BETWEEN : **PRIYADARSHANI NAIDU**

Appellant

AND : **THE MEDICAL SUPERINTENDENT OF LAUTOKA HOSPITAL**

1st Respondent

THE MEDICAL SUPERINTENDENT OF THE COLONIAL WAR MEMORIAL HOSPITAL

2nd Respondent

THE CHIEF EXECUTUVE OFFICER FOR HEALTH

3rd Respondent

THE ATTORNEY-GENERAL

4th Respondent

Coram : **Basnayake JA**
Lecamwasam JA
Guneratne JA

Counsel : **Mr. D. S. Naidu fo. the Appellant**
Ms. M. Faktaufon for the Respondents

Date of Hearing : **13 November 2018**

Date of Judgment : **30 November 2018**

JUDGMENT

Basnayake JA

[1] This is an appeal against the order refusing leave to appeal on 21 March 2017 by the learned High Court Judge (pgs. 297 to 307 of the Record of the High Court (RHC)). Leave was sought from the High Court on 10 February 2016 by way of summons (pgs. 271/2 RHC) pursuant to section 12 (2) (f) of the Court of Appeal Act to appeal to the Court of Appeal, against the Interlocutory Ruling dated 19 January 2016 dismissing the appellant's action with costs.

The Grounds of Appeal (Pgs. 1 and 2 of the RHC)

[2] The appeal is based on the following grounds, namely:

1. *That the learned Judge erred in law and in fact in dismissing the application for adjournment despite the motion and affidavit filed by the counsel for the plaintiff which contained clear and cogent grounds as to vacation of the hearing date.*
2. *That the learned Judge erred in law and in fact in taking into consideration irrelevant matters and facts which were not available to him in refusing the application for adjournment.*
3. *That the learned Judge erred in law and in fact in failing to have regard to the fact that the defendant's counsel had been informed of the vacation of the trial date who had consented to the same and was not herself present but was represented by another counsel for the purpose of adjournment.*
4. *That the learned Judge erred in law and in fact in non-suiting the action and awarding costs of $2,000.00 to the defendants.*
5. *That the learned Judge erred in law and in fact in holding that the plaintiff's witnesses were not available or that the counsel for the plaintiff was feigning*

sickness and was guilty of obtaining continuous adjournments to avoid trial when such was not the case.

Interlocutory Ruling dated 19 January 2016 (pgs. 370-373 of the RHC)

[3] According to this ruling this case was fixed for trial on three consecutive days commencing 19 January 2016. On 19 January 2016, Mr Nacolawa moved for an adjournment on the ground that Mr. Naidu who had been appearing for the plaintiff had been indisposed. A motion was filed that morning in court with a medical report recommending 3 days rest for Mr. Naidu. The medical report diagnosed Mr. Naidu with a neck swelling. The learned judge had observed that the medical report does not suggest that Mr. Naidu is unfit and unable to appear in court but rather that Mr. Naidu had been hospitalized. For those reasons the medical report was rejected.

[4] The learned Judge had also noted the absence of the plaintiff and the witnesses and remarked that the plaintiff and all the witnesses had migrated to Australia. The learned Judge had observed that the plaintiff was in the habit of making applications for adjournments. On the last date of trial too, the plaintiff and the witnesses were not present and a date was moved. While obtaining an adjournment an application was made on behalf of the plaintiff to file affidavit evidence and to make the plaintiff and the witnesses available for cross-examination on *"skype"*. However no such affidavit evidence was filed. With the refusal for an adjournment and the inability of the counsel to prosecute the court dismissed the case with costs in a sum of $2000.00.

[5] It appears that this case was filed in November 2002 and originally fixed for hearing for 21, 22, 23 and 28 February 2012 (pg. 365 of RHC). On 21 February 2012, on the application of the plaintiff the trial dates already fixed were vacated subject to payment of costs in a sum of $1000.00. The trial was vacated for 1 March 2012. On 1 March 2012 an order was made to mention the case on 6 March 2012. On 6 March 2012, the hearing was fixed for 6 to 9 November 2012. However there is no mention in the RHC of the dates in November 2012. The next mentioned date is 17 March 2015. On 17 March 2015 the case

was fixed for 16 and 17 April 2015 for hearing. On 27 March 2015 the hearing dates were vacated and re-fixed for 26 and 27 August 2015. On 21 August 2015 this case was mentioned to consider a motion filed on 18 August 2015. On this day the hearing dates for 26 and 27 August were vacated and re-fixed for 19 to 24 January 2016. On 19 January 2016 again a motion was filed to get the trial dates vacated, resulting in the court refusing a date and dismissal of the plaintiff's case.

The order dated 21 March 2017 refusing to grant leave

[6] The learned Judge stated (pgs. 297 to 307 RHC) that basically the action was dismissed due to default of appearance and failure to offer any evidence in support of the claim. The learned Judge had noted that the appellant was not even able to swear an affidavit in support of this application (for leave). Instead an affidavit was filed by a clerk of the lawyer's firm (pgs. 255 to 257 RHC). The learned Judge has considered several authorities with regard to the discretionary powers of the judge and the circumstances under which an appeal court would reverse those decisions. The order appealed against being an interlocutory one, the learned Judge had considered several principles on which an appellate court would reverse such decisions.

[7] The learned Judge has considered the decision of Tikaram J in **Totis Inc. Sport (Fiji) Ltd & Another v John Leonard Clark & Another** (FCA 35 of 1996) that it has been long settled law and practice that interlocutory orders and decisions will seldom be amenable to appeal and appeals against interlocutory orders rarely succeed and leave is granted in most exceptional circumstances. The learned Judge has also considered the Fiji Court of Appeal decision in **Goldenwest Enterprise Ltd v Pautogo** [2008] FJCA 3 (3 March 2008) where it was held that in order to succeed in an appeal against exercise of discretion the appellant shall satisfy that the trial court acted on an entirely wrong principle or failed to take all the circumstances of the case into consideration and that it is manifest that the order would work injustice to the appellant.

[8] The learned Judge was not satisfied with the medical report that was tendered in support of the application for an adjournment. The medical report does not suggest that the counsel is unfit and unable to appear in court but rather only recommends three days' rest. Having considered the prospect of success in the event of granting leave the learned Judge had refused leave.

Submissions of the learned counsel for appellant

[9] The learned counsel for the appellant submitted that he got an assurance from the opposing counsel that no objection would be taken for a postponement. The learned counsel also submitted that refusal of an adjournment and dismissal of the action is unfair for the reason that there was a motion filed on the illness of the counsel supported with a medical report. The learned counsel referred to Order 35 rule 3 of the High Court rules where it states, *"The Judge may if he thinks it expedient in the interest of justice adjourn the trial for such a time and to such a place upon terms, if any, as he thinks fit."*

[10] In the written submissions filed in paragraph 14 vii (paragraph 14 starts with 14 iii) the learned counsel states that "the learned Judge did not ask the plaintiff to proceed with the trial but merely dismissed the plaintiff's claim". Again in paragraph 46 the learned counsel for the appellant states that, "the learned Judge erred in law and in fact in holding that the plaintiff's witnesses were not available or that the counsel for the plaintiff (appellant) was feigning sickness and was guilty of obtaining adjournments to avoid trial when such was not the case". The learned counsel thus states that the action was dismissed while the plaintiff and the witnesses were present in court and the dismissal of the action was without even inquiring from the plaintiff (appellant) whether the plaintiff was ready to proceed.

[11] This position was met by the learned Judge who states that the plaintiff and the witnesses were not in court and the counsel appearing for the plaintiff could not proceed with the case. The learned counsel for the respondent too states that the plaintiff and the witnesses were not present in court and the counsel appearing for the appellant had instructions

only for the purpose of obtaining a date. Apart from that the learned Judge states in the Ruling dated 21 March 2017 that the plaintiff could not even swear an affidavit along with the application whilst moving for leave. An affidavit was sworn to by a clerk of the lawyers (pgs. 255 to 257 RHC). In that affidavit it does not state that the action was dismissed while the plaintiff and the witnesses were present in court. It also does not state that the Judge dismissed the case without inquiring from the plaintiff to proceed. The learned Judge in paragraph 10 of the Ruling dated 19 January 2016 states that, "the plaintiff is not present in court today, and she is unable to call any witness to support her claim. As a result the matter is non-suited. I therefore dismiss the plaintiff's action...."

[12] If the appellant's action was dismissed whilst the appellant was present in court as claimed by the learned counsel, the appellant's chances of success in vacating the order dated 19 January 2016 may be within reach. The appellant's case becomes stronger if the witnesses too were present in court at that time. The learned Judge states in the ruling dated 19 January 2016 that none of them were present in court. If what the learned counsel states is correct, the learned counsel could have filed an affidavit by the appellant and or the witnesses or at least by the counsel who appeared in court on 19 January 2016 countering the position the learned Judge had taken in his Ruling dated 19 January 2016 and 21 March 2017.

Submissions of the learned counsel for the respondent

Abuse of process

[13] The learned counsel for the respondent submitted that the appellant in this case instead of filing a leave to appeal, filed an appeal thus abusing the process of the court. The appellant filed a leave to appeal application in the High Court in terms of section 12 (2) (f) of the Court of Appeal Act, seeking leave to appeal to the Court of Appeal from the interlocutory ruling dated 19 January 2016 (pgs. 270 to 272 RHC). In terms of Section 12 (2 (f) no appeal shall lie without the leave of the Judge (High Court Judge) or of the Court of Appeal from any interlocutory order or interlocutory judgment made or given by

a Judge of the High Court except in the following cases, namely:- *"((i) to (v) not reproduce)"*.

[14] The learned counsel submitted that under section 26 (3) of the Court of Appeal Rules the appellant may make a further application for leave to the Court of Appeal in the event of failing to obtain leave from the High Court. Rule 26 (3) is as follows:-

> *"(3) Where under these Rules an application may be made either to the Court below or to the Court of Appeal it shall be made in the first instance to the Court below."*

[15] On 21 March 2017 the learned High Court Judge refused leave. The appellant on 26 May 2017 filed a notice and grounds of appeal (Notice of Appeal) in the Court of Appeal (pgs. 1-2 RHC). In **Wehrenberg v Suluka** [2018] FJCA 112 (6 July 2018) the Court of Appeal held that, *"Where the Court below and the Court of Appeal enjoy concurrent jurisdiction in respect of an application the application must first be made to the court below under Rule 26 (3) of the Court of Appeal Rules. In the event the court below (High Court) refuses the application, it may be then renewed in the Court of Appeal. Pursuant to section 20 (1) of the Act a Judge of the Court of Appeal may exercise the courts power to grant leave and to grant a stay of proceedings to prevent prejudice to the claims of a party pending appeal"*. The learned counsel submitted that the appellant thus abused the process of the Court of Appeal in filing a direct appeal instead of a leave to appeal.

Belated Appeal

[16] The appellant filed this appeal on 26 May 2017 against an order dated 21 March 2017. That is 66 days from the date of the order appealed from. In terms of Rule 16 (a) of the Rules an appeal should be filed within 21 days. Rule 16 (a): "Subject to the provisions of the Rule, every notice of appeal shall be filed and served under Rule 15 (4) within the following period. (Calculated from the date on which the judgment or order of the Court below was pronounced), that is to say:-

(a) In the case of an appeal from an interlocutory order, 21 days".

[17] The learned counsel submitted that thus this appeal should not be entertained. The learned counsel also submitted that generally leave to appeal is refused against interlocutory decisions (**Kelton Investments Ltd v Civil Aviation Authority of Fiji** [1995] FJCA 15 (18 July 1995) **Hubball v Everitt and Sons (Limited)** [1900] 16 TLR 168) granting leave only in exceptional circumstances (**Totis Inc Sport (Fiji) Ltd & Another v John Leonard Clark & Another** (supra). In **Lakshman v Estate Management Services Ltd** [2015] FJCA 26 (27 February 2015) the test has been laid down for allowing leave in an interlocutory appeal as follows. "The question for determination in this case is, as enunciated in a series of Judgments, whether the learned Judge had applied the law correctly in relation to leave to appeal application and/or made a substantially wrong decision in refusing leave which has caused grave prejudice to the appellant thus causing a miscarriage of justice" (**Niemann v Electronic Industries Ltd** [1978] VR 431 (28 Feb 1978).

[18] The learned counsel submitted that the appellant's five grounds of appeal are based on the learned Judge's failure to take into account cogent grounds as to vacation of the trial date. The learned counsel submitted that on 19 January 2016 when the trial commenced the appellant and her counsel were not present in court. The appellant was represented by a counsel only for the limited purpose of vacating the trial. The learned counsel submitted that the learned Judge did not take into account irrelevant matters in refusing to vacate the trial date and the dismissal of the action was due to non- prosecution.

[19] On 21 August 2015 the appellant filed an affidavit while moving to vacate the trial date (pgs. 249-251). An adjournment was sought at that time to facilitate the appellant's evidence through "*skype*" which requires leave of court. The court granted a six weeks adjournment for filing affidavit evidence and listed the case for trial for 19 January 2016. No such affidavit evidence was filed. The learned counsel submitted that the counsel appearing for the limited purpose of obtaining a date was not aware of making such an application to lead affidavit evidence. Neither was the counsel appearing for the appellant ready to prosecute the action. On 21 February 2012 the appellant has sought an

adjournment conceding that the appellant had not taken steps over a period of ten years to prosecute the action (pg. 366 RHC).

[20] The learned counsel submitted that the learned Judge's discretion to refuse an adjournment was not wrong in law. It was further submitted that the appellant's application to vacate the trial date (pgs. 1-8 of the Supplementary Record) does not disclose why the appellant was unable to file affidavit evidence. The learned counsel submitted that the learned Judge was entitled to infer that there was no likelihood of the appellant bringing the case to a conclusion. The learned counsel further submitted that the delay inevitably prejudiced the respondents as action having been initiated in 2002 was hanging over them while the appellant had failed to prosecute her case.

Judge's Discretion

[21] The learned counsel submitted that the appellant failed to demonstrate that the learned Judge exercised his discretion wrongly. The Court of Appeal in **Goldenwest Enterprise Ltd v Pautogo (supra)** held that, "*A trial court's decision on request for adjournment will not be reversed absent a clear showing that the trial court erroneously exercised its discretion... Unless it can be shown that the discretion was improperly exercised it should not be disturbed...since it is a matter of discretion an appeal court will be slow to interfere with it...in order to succeed in an appeal against such exercise of discretion, the appellant shall satisfy the appellate court that the trial court acted on an entirely wrong principle or failed to take all the circumstances of the case into consideration and that it is manifest that the order would work injustice to the appellant*".

[22] The learned counsel further submitted that consent obtained from the respondent's counsel cannot be considered as a ground of appeal as the decision to adjourn remains with the judge. With regard to the awarding of costs, the learned counsel submitted that it should not be viewed as costs to the respondents for wasted appearance but rather costs for the fault of the appellant in failing to properly prosecute the action.

[23] In **Levy v Ellis-Carr & Ors** [2012] EWHC 63 (Ch) (23 January 2012) the court stated (paragraph 33) that, "*Registrars, Masters and district judges are daily faced with cases coming on for hearing in which one party either writes to the court asking for an adjournment and then (without waiting for a reply) does not attend the hearing, or writes to the court simply to state that they will not be attending. Not infrequently "medical" grounds are advanced, often connected with the stress of litigation. Parties who think that they thereby compel the Court not to proceed with the hearing or that their non-attendance somehow strengthens the application for an adjournment are deeply mistaken. The decision whether or not to adjourn remains one for the judge. The decision must of course be a principled one.....the party who fails to attend either in person or through a representative to assist the judge in making that principled decision cannot complain too loudly if, in the exercise of the discretion, some factor might have been given greater weight*". Thus the learned counsel submitted that this appeal does not warrant the sympathy of court and to have it dismissed with costs.

Legal Matrix

[24] The appellant in this case relied on five grounds of appeal in support of his case in having the Ruling dated 21 March 2017 set aside. The grounds of appeal submitted in court for the leave to appeal application (pgs. 263-264 RHC) are identical to the grounds of appeal filed before the Court of Appeal (pgs. 1 and 2 RHC) indicating how much the appellant is committed towards the prosecution of this appeal. There are five grounds which relate to

(i) Filing a motion to move for an adjournment;
(ii) Learned Judge considering irrelevant matters in refusing leave;
(iii) Respondent counsel consenting for an adjournment;
(iv) Awarding $2000.00 as costs;
(v) Holding that the plaintiff's witnesses were absent and the counsel feigning illness.

[25] On the first ground I have examined the motion that was filed (pg. 295 RHC). It is dated 18 January 2016. Addressed to the Senior Legal Officer of the Attorney General's

Chambers. It states, *"Our solicitor Mr. Dorsami Naidu has some serious medical issues....that he would not be in a position to conduct the full trial. In the light of this we would be asking for a vacation of the hearing date.."* and signed at the end by Dorsami Naidu. In addition to that, the medical reports tendered do not vouch for the counsel's inability to attend court. It only recommends rest for three days. I have already mentioned the views taken by court with regard to attitudes of counsel and parties in obtaining dates. Although the law gives a discretion to the Judge with regard to adjournments, it appears that that discretion has been taken for granted. At the end it is not the Judge who makes the decision whether to hear the case or put it off. It is already done by the counsel and the party who seeks the adjournment. I find that the learned Judge had formed an impression about the counsel feigning illness after considering all the material and the long history. If the learned Judge was wrong, the learned counsel could have produced more material to convince the learned Judge and the Court of Appeal. I do not find any such material to convince us that the counsel had a valid reason to keep away from court.

[26] With regard to the second ground the learned counsel does not mention the irrelevant matters that the learned Judge had considered in refusing leave. The same ground was mentioned while supporting the leave to appeal application too. It shows how much consideration and effort had been given prior to filing these grounds. Is it the position that grounds of appeal carry from one case to the other irrespective of different facts and law peculiar to each case? I see no merit in these grounds.

[27] The third ground relates to the consent taken from the opponent's counsel for an adjournment. I have dealt with this earlier. I see no merit in this ground. The fourth ground relates to costs. I agree with the submission made by the learned counsel for the respondent that the award of costs is for the failure of the appellant in prosecuting this action. I am of the view that the learned counsel for the appellant in this case is taking undue advantage of the sympathy shown towards him by his opponent. The last ground is with regard to the unavailability of the parties and the illness of counsel which I have already dealt with and see no merit.

[28] When court refuses an adjournment and the party is not prepared to prosecute the action what could the Judge do other than dismiss the action? The appellant failed to justify his absence from court other than to produce a medical report recommending rest. Considering the history of this case the learned Judge cannot be found fault with for considering that the counsel for the appellant was feigning sickness. If the counsel was truly ill he could have proved it with any other medical reports obtained thereafter to prove that in fact he was ill and the application for postponement was reasonable. No such material was produced. Further the counsel could not give a reason for not filing affidavit evidence yet. The learned Judge and the learned counsel for the respondent took up the position that the appellant and the witnesses were not in court. If the party or witnesses are not present and an adjournment is not given the learned Judge is left with no option but to dismiss the action. On the previous occasion a date was given to produce affidavit evidence. However no such evidence was produced. Not even an explanation had been given up to date for not producing the evidence over which a date was taken. I am of the view that there is no material on which this court can hold with the appellant. It appears that the learned counsel had been attempting to get the sympathy of court rather than relying on facts and the law.

[29] I am of the view that this appeal should not be entertained at all considering the fact that the learned counsel instead of filing a leave application filed an appeal before this court. Although the appeal filed is out of time no application has been made at any time to enlarge the time. Without even going into the other facts therefore, this case is bound to fail. Even considering the merits I see no reason to set aside the learned Judge's Ruling dated 21 March 2017. Therefore this appeal is dismissed with costs in a sum of $5000.00 payable by the appellant to the respondents.

Lecamwasam JA

[30] I agree with Basnayake JA in his reasons and the conclusions.

Guneratne JA

[31] I agree with the reasoning and conclusions of Basnayake JA.

Orders of the Court are:

1. *Appeal dismissed.*
2. *Ruling of the High Court dated 21 March 2017 affirmed.*
3. *Respondents entitled to costs of this Court in a sum of $5000.00 payable by the appellant.*

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Hon. Justice E. Basnayake
JUSTICE OF APPEAL

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Hon. Justice S. Lecamwasam
JUSTICE OF APPEAL

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Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL