

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

CIVIL APPEAL NO. ABU 149 of 2017
(High Court HBC 260 of 2016)

BETWEEN : **ORGANIC EARTH (FIJI) LIMITED**

Appellant

AND : **ROSALIA CHUTE**

Respondent

Coram : **Chandra RJA**

Counsel : **Ms. N. Tikoisuva for the Appellant**
Ms. N. Choo for the Respondent

Date of Hearing : **18 February 2018**

Date of Ruling : **14 May 2018**

RULING

- [1] The Applicant's solicitors made an application dated 21st December 2017, seeking leave to file notice of appeal out of time to appeal the decision of the High Court delivered on the 27th of October 2017.

- [2] The applicant filed an affidavit in support sworn by Adiamo Mokosoi, litigation Clerk of the solicitors of the Applicant deposing that:
- (a) On 11 December 2017 she was instructed by her Solicitors to file notice of appeal, against the decision of the High Court delivered on 27th October 2017.
 - (b) That the notice of appeal required the approval of the Applicant, who at that time was away in Australia.
 - (c) That she had mistakenly diarised the due date for time for appeal to be 15 December 2017.
 - (d) That when the papers were taken for filing on 11 December 2017, they were refused as it was 3 days late.
- [3] When the matter was mentioned in Court on 19th January 2018, the Applicant was granted leave to amend the application to an application seeking extension of time to file a notice of appeal.
- [4] The Respondent filed an affidavit in reply and took objection to the filing of the affidavit of the Applicant by a litigation clerk, that the reason for the delay is baseless and as such non-meritorious and sought a dismissal of the application.
- [5] The Applicant filed an affidavit in response to the affidavit of the Respondent, that she still wished to proceed with the appeal even though her Solicitors had made a mistake as to the dates for filing the appeal, that the grounds of appeal relied on by her were meritorious and that the Company would be prejudiced as the Respondent continues to occupy the property illegally and without their consent while the Company was paying the mortgage for the property.
- [6] In the submissions made on behalf of the Applicant, it was acknowledged that the Clerk ought not to have deposed the affidavit, but was relying on the subsequent affidavit filed

by a Director of the Applicant Company. That the late filing was due to administrative errors by the Applicant's Solicitors on the timelines for filing.

[7] In an application seeking extension of time, the Court is concerned with the following issues as set out in the Supreme Court decision in Native Land Transport Board v. Ahmed Khan (unreported CBV 2 of 2013; 15 March 2013):

(a) The length of the delay;

(b) The reasons for the delay;

(c) Whether there is a ground of merit justifying the Appellant's consideration;

(d) Whether the Respondent will be unfairly prejudiced if time is enlarged?

[8] The judgment that is being challenged by the Applicant was delivered on 27th October 2017. The application for leave to appeal out of time was filed 84 days later, which was after the single Judge had granted the Applicant to file same, when the Applicant had at first filed an application for leave to file a notice of appeal on the 21st of December 2017 which was 13 days after the due date of appealing (8th December 2017).

[9] The reasons for the delay, that the Solicitors Clerk had made a mistake about the date of filing and that the Director had been overseas, however are not acceptable. As submitted by the Respondent, the Applicant is a registered company, and steps should have been taken to see that there was an authorized representative who could act in the absence of the Director.

[10] Even though the reasons for the delay are not acceptable it is necessary to see whether the grounds of appeal are meritorious for this Court to exercise its discretion in granting leave. In Datt v. Datt Misc. Action No.33 of 2011; HBC.189/2004 ((7 June 2013), Calanchini AP (as he then was) stated thus:

"[13] In cases where the delay is extreme and where the explanation for that delay is not wholly excusable, then an applicant will

need to show good reason or special circumstances for the court to exercise the discretionary balance in his favour. This means that when the length of the delay is extreme and the explanations for it are wholly unsatisfactory.. It is still necessary, in exercising the discretion given to the Court, to assess the chances of the proposed appeal succeeding.”

- [11] In **Fiji Industries Ltd v National Union of Factory and Commercial Workers** [2017] FJSC 30’CBV0008.2016(27 October 2017), the Supreme Court dealt with the position regarding errors of solicitors in relation to the filing of appeals and the merits of an appeal in applications for extension of time for filing a notice of appeal. The Court observed as follows:

“45.it is important that applications for an extension of time for filing a notice of appeal do not become the opportunity to argue the full merits of the appeal. When the court is considering the merits of the proposed appeal, it is only deciding whether there is sufficient merit in the proposed appeal to permit it to proceed to a full hearing. The only exception to that is where the delay is substantial, in which case the court is deciding whether the appeal will probably succeed. Even then though, it will not be appropriate for the arguments to be developed in full. They need to be developed only to the extent that the court can determine the relative arguability of the grounds (and in cases of substantial delay the probability of success of any of those grounds).”

- [12] The proposed notice and grounds of appeal is attached to the affidavit sworn on 22nd February 2018 by the Applicant. The proposed grounds of appeal are:

“1. The Learned Judge erred in law in applying the legal test for vacant possession required under Section 172 of the Land Transfer Act by taking into consideration a requirement on the part of the Appellant to show that she had lawful ownership of the property.

2. The Learned Trial Judge erred in law and in fact in holding that the Appellant had not tendered the resolution of the company authorizing the sale, a factor which had no bearing to application for vacant possession.

3. The Learned Trial Judge erred in law and in fact in suggesting that the Appellant had not brought the proceedings with ‘clean hands and full facts’, when there was no evidence produced to indicate that the Appellants had misled the Court.”


- [13] The Applicant's case before the High Court was an application in terms of section 169 of the Land Transfer Act.
- [14] Such applications are dealt with by a High Court summarily on the affidavit evidence filed by the parties. The Applicant had tendered its documents in support of its claim which included the registration of its title with the registrar of lands. The learned trial Judge also accepted the fact that the Applicant was the last registered owner of the title to the property.
- [15] The Respondent in showing cause in terms of section 172 of the Land Transfer Act had opposed the application of the Respondent on two grounds:
- (1) That she was entitled to 50% of the subject property pursuant to the decision of the Court of Appeal in case number ABU0040 of 2007 on the basis that it was matrimonial property;
 - (2) That there had been no resolution passed by Rosewood Limited before disposing of this property.
- [16] The learned High Court Judge held against the Respondent on the first ground and concluded that she was not entitled to say that she was entitled to a half share of the property as she had been awarded \$65,000.00 in lieu of her share of the property.
- [17] The learned High Court Judge dealing with the second ground held that it appeared from the material available on record that the directors who signed the document did not have the authority to effect the transfer, and that there was no evidence that the second signatory to the transfer was in fact a director of Rosewood Limited.
- [18] The Appellant has taken up the position that the learned High Court Judge had despite acknowledging the relevant documents prescribing and confirming that the Appellants were the last registered owner placed the onus on the Appellants to prove that it had lawful ownership of the property.

- [19] In cases which have dealt with applications in terms of section 169 of the Land Transfer Act, it has been decided that in such actions, the first onus is on the plaintiff to satisfy court that he is the last registered owner, or lessor as described in section 169 (a), (b) or (c). Once that onus is satisfied the burden shifts to the Defendant to satisfy court that he has a right to the possession of the land. Gulam Mohammed Holding Ltd v. Motorpart Traders Ltd [2014] FJHC403; HBC 12 of 2014; Morris Hedstrom Limited v. Liaquat Ali CA No.153/87.
- [20] In the present case the learned High Court having ruled out the claim of the Respondent had dismissed the application of the Respondent on the basis that the legal ownership has not been established.
- [21] Therefore the grounds of appeal relied on by the Appellant have a high chance of success before the Court of Appeal.
- [22] Although there has been a delay in the making of the application the grounds of appeal are meritorious and have a high chance of success.
- [23] On the question of prejudice, no prejudice is caused to the Respondent as she is still in possession of the property although she is not entitled to same.
- [24] In the above circumstances the application for extension of time to file notice of appeal is granted to the Applicant.

Orders of Court:

- (1) *The application for an extension of time to appeal is granted.*
- (2) *The Applicant to file and serve notice of appeal to the Respondent within 14 days of this Ruling;*
- (3) *There will be no order as to costs in respect of this application.*




Hon. Justice Suresh Chandra
RESIDENT JUSTICE OF APPEAL