

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

CIVIL APPEAL ABU 0046 OF 2017  
(High Court HBC 116 of 2013)

BETWEEN : SATYA NAND

*Appellant*

AND : NASINU LAND PURCHASE AND  
HOUSING CO-OPERATIVE SOCIETY LIMITED

*Respondent*

Coram : Calanchini P

Counsel : Mr G O'Driscoll for the Appellant  
Mr R Singh for the Respondent

Date of Hearing : 23 April 2018

Date of Ruling : 31 May 2018

RULING

- [1] This is an application for an enlargement of time within which a notice of appeal against the final judgment of the High Court may be given. The judgment was pronounced on 27

March 2015 whereby the appellant was ordered to deliver vacant possession of the land described on C/T 31375 and situated at Lot 10 Maqbool Road Nadera to the respondent within 60 days of the judgment. The Appellants' counterclaim was dismissed with the appellant ordered to pay costs fixed in the sum of \$3000.00.

[2] The present application is made by summons filed on 11 May 2017 and was supported by a document that purported to be an affidavit signed by Satya Nand and filed on 11 May 2017. The jurat clause is not in the correct form and the date of "*signing*" is not stated. The document does not comply with Order 41 of the High Court Rules although no objection was taken at the hearing of the application. The application was opposed by the respondent on whose behalf an answering affidavit sworn by Satya Narayan on 12 July 2017 was filed. The appellant subsequently filed a reply affidavit in the correct form sworn by Satya Nand on 3 October 2017. The parties subsequently filed written submissions prior to the hearing.

[3] The application is made pursuant to jurisdiction given to the Court by section 13 of the Court of Appeal Act 1949 (the Act) and Rule 17(3) of the Court of Appeal Rules (the Rules). Pursuant to section 20(1) of the Act the jurisdiction of the Court to enlarge time may be exercised by a judge of the Court.

[4] It is convenient at this stage to consider briefly the procedural history of the application. Following the pronouncement of the final judgment the appellant filed a timely notice of appeal which was served on the respondent within the time limit of 42 days that is prescribed by Rule 16 of the Rules. However the appeal was deemed to have been abandoned on 12 January 2017 pursuant to Rule 18(10) as a result of the failure to comply with directions given by the Registrar under Rule 18(1) (a) of the Rules. It was not until 11 May 2017 that the appellant filed the present summons seeking an enlargement of time under Rule 17(3). This was necessary because the appellant had failed to take advantage of the opportunity given by Rule 17(2) to file a fresh notice of appeal as of right with 42 days of the date of deemed abandonment. Time to do so had expired on 23 February 2017.



[5] The background facts to the appeal and the application may be stated briefly. The respondent is a co-operative society and was the registered proprietor of all the land described in C/T 12648. The land described in that title was subdivided by the respondent for the benefit of the members of the co-operative society and the titles to individual lots were to be transferred to members upon payment in full of their shares. A Mr Deo Dutt Bidesi was a shareholder and member of the respondent society and by virtue of that membership Lot 10 on deposited plan No.5069 was allotted to him. That allocation allowed him to occupy the lot but the title to the lot remained in the name of the respondent society until payment for the shares had been made in full. Lot 10 was comprised of the land described in C/T 31375. The respondent society remained at all times material the registered proprietor of the said lot 10 described in C/T 31375. Mr Deo Dutt Bidesi died without having made full payment for his shares.

[6] The learned trial Judge noted that Bidesi had failed to pay the full amount for his shares and as a result Bidesi had never obtained title to the said Lot 10. After Bidesi's death lot 10 was occupied by his son Mani Ram and Mani Ram's wife Sumintra Devi. After Mani Ram's death lot 10 continued to be occupied by his wife Sumintra Devi until she migrated to Canada. After Sumintra Devi's move to Canada the appellant and his mother Raj Pati occupied Lot 10 from about 13 December 1993. Although there was some evidence of a sale and purchase agreement between the appellant and Sumintra Devi its validity was disputed and it was never sought to be enforced by the purchaser. The learned Judge concluded that the respondent had rightly dealt with Sumintra Devi as the occupier of the property after the death of Bidesi and Mani Ram for the purpose of paying compensation for improvements on lot 10. The learned Judge concluded that the respondent's title was indefeasible in the absence of fraud on the part of the respondent when it had subdivided and allotted lots to fully paid members who obtained by transfer a title to their lots. Members who were not full paid up obtained possession of an allotted lot. As a result Bidesi could not claim ownership of the land nor was he or any person claiming under him entitled to have the title transferred to him until he had paid in full the cost of his shares. This he never did in his lifetime.

- [7] The principles upon which an enlargement of time may be granted are well settled and well known. They were considered by the Supreme Court in NLTB (now iTLTB) –v- Khan and Another (CBV 2 of 2013; 15 March 2013). In order to ensure that the discretion is exercised in a principled manner the Court will consider (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 should 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 McCaig –v- Abhi Manu CBV 2 of 2012; 24 April 2013).
- [8] The length of time between the date of deemed abandonment of the appeal (12 January 2017) and the date of filing the present application (11 May 2017) is about 4 months. When taken into account, the 42 days allowed by Rule 17(2) of the Rules reduces the delay to the period between 23 February 2017 and 11 May 2017 being about two and a half months.
- [9] Although the delay is not inordinate it is still a period of time that requires an explanation for non-compliance with the Rules. The reasons are set out in the affidavit sworn by Satya Nand in support of the application. It would appear that the legal practitioners who had acted for the appellant up to and including the payment of costs as security to prosecute the appeal failed to subsequently inform the Court that the firm had ceased to act for the appellant. The legal practitioner then engaged by the appellant also had failed to file a notice of change of practitioner. As a result the Court Registry continued to send notices to the initial practitioner concerning the mandatory requirements for the preparation of the appeal record. Since there was no response from the appellant or any legal practitioner on his behalf, the appeal was subsequently deemed to have been abandoned. Part of the responsibility for this rests with the firm of legal practitioners initially acting for the appellant and part rests with the firm that took on the matter. To compound the problem a third firm of legal practitioners now acts for the appellant. In



my view the explanations are unsatisfactory and once again the consequences for the appellant result from a failure to understand and comply with the High Court Rules that relate to changes in representation of a party.

[10] Under those circumstances it is necessary to assess whether any of the grounds of appeal will probably succeed in the event that an enlargement of time is granted. In the same affidavit the appellant has attached the earlier notice of appeal that sets out the four grounds of appeal as:

- “1. *The learned trial Judge erred in law and in fact in failing to consider and applying the Co-operative Society Act to the Agreed Fact that the Deceased Deo Datt Bidesi was a member of the Respondent and was allotted the property the subject of the proceedings and that the Respondent had failed to transfer the subject land to the Deceased or his permitted heirs according to the aforesaid Act or its own By-Laws.*
2. *The learned trial judge erred in law and in fact when he held that the Respondent's title to the subject property is indefeasible without considering that the Respondent's title to the subject property was not under challenge by the Appellant but the Respondent's apparent failure to transfer the property to the Deceased or his permitted successor.*
3. *The learned trial Judge erred in law and in fact after finding as a fact that compensation was paid to a Third Party Sumintra, and failing to thereafter to hold that the Respondent was required under Act and its bye-laws to transfer the property to the deceased's successor.*
4. *The learned trial Judge after having summarized the issues failed to address the second issue, that is to say, if the property ought to be transferred to the Estate of Raj Pati.”*

[11] It must be noted that the written submissions filed by the appellant do not directly address any of the four grounds upon which the appellant relies for an enlargement of time. In his submissions at the hearing Counsel for the Appellant outlined the history of the family's membership of the Co-operative. In his submissions Counsel for the respondent

outlined the basis of the appellant's family's occupation of the land in question since Bidesi became a member of the Co-operative.

- [12] In ground 1 the appellant has not identified which provisions of the Co-operative Society Act should have been applied to the agreed fact relating to Bidesi's membership. The learned trial Judge found as a fact that Bidesi was a member, but not a fully paid up member, of the Co-operative. The learned Judge accepted that as such Bidesi was not entitled to have the title transferred to himself until he became a fully paid up member. The learned Judge also found that Bidesi had made no effort to become a fully paid up member so that the title could be transferred to him. His membership entitled him to possession or occupation of the allotted land. The appellant has not identified what section of the relevant legislation required the respondent to transfer title to Bidesi under those circumstances.
- [13] The second ground again does not identify either the legislation or the by-laws of the Co-operative that required the Co-operative to transfer the title to Bidesi while he remained only a partly paid up member.
- [14] The third ground ignores the fact that although Sumintra Devi did pay arrears of \$6000.00 at the same time she in effect relinquished the family's rights to occupancy when she accepted \$15,000.00 from the Co-operative as compensation for the value of improvements on the land.
- [15] The fourth ground raises the issue that the title should have been transferred to the estate of Raj Pati. Until Bidesi's membership had become fully paid there was no obligation on the part of the Co-operative to transfer the title to any person. After payment of agreed arrears Sumintra relinquished the family's occupancy by accepting a valuation of \$21,000.00 of which \$6000.00 was for arrears and the balance for the improvements.
- [16] The fact that cannot be ignored is that the respondent has at all material times remained the registered proprietor of the land. There was no material before the Court below to



conclude that the respondent was obligated to transfer title in the allotted land to Bidesi while he was alive until his membership was fully paid. Finally the evidence of the present secretary of the Co-operative was to the effect that membership ceased when Bidesi died. Bidesi's membership was never transferred to Bidesi's son Mani Ram Bidesi or to Ravi's wife Sumintra. After Bidesi had passed away, his son and Sumintra remained in occupation only so long as the Co-operative was prepared to allow him to do so. The inference is that the Co-operative would not pay any compensation for the improvements to the land until the arrears of membership owed by Bidesi were settled.

[17] It is apparent that the Co-operative has proceeded to deal with lot 10 in accordance with section 30 of the Co-operatives Act 1996 which, so far as irrelevant, provides:

*“(1) On the death of a member a co-operative may transfer the share or interest of that member to the person nominated in accordance with section 31 of this Act OR if there is no person so nominated, to the person as may appear to the Board to be the heir or personal representative of the deceased member, OR pay to such nominee, heir or personal representative, as the case may be, a sum representing the value of the member's share or other interest in the capital of the co-operative as determined in accordance with the regulations or the by-laws of the co-operative.” (emphasis added)*

[18] It was never contended by the appellant that the money had been paid to the wrong person. The appellant was concerned with securing the title to lot 10.

[19] In my judgment none of the grounds of appeal are like to succeed and as a result the application for enlargement of time is refused. The appellant is ordered to pay costs of \$2,000.00 to the respondent within 21 days of the date of this Ruling.

Orders:

1. *Application for enlargement of time is refused.*
2. *Appellant is to pay costs of \$2,000.00 to the Respondent within 21 days of the date of this Ruling.*



*W. Calanchini*

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