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

CIVIL ACTION NO. ABU 0061 OF 2016
[On Appeal from the High Court Civil Action No. 0002 of 2010]

BETWEEN : **LINDA & COMPANY LIMITED**

Appellant

AND : **1. PROLINE BOATING COMPANY LIMITED**

2. DIRECTOR OF LANDS

3. THE REGISTRAR OF TITLES

4. DOMINION FINANCE LIMITED

5. PROLINE MARKETING LIMITED (IN RECEIVERSHIP)

Respondents

Coram : **Jameel, JA**

Counsel : **Mr. V. Singh for the Appellant**
Mr. M. Vama for the 1st Respondent
Ms. S. Chand and Ms. S. Ali for the 2nd and 3rd Respondents
Ms. N. Choo for the 4th Respondent
No appearance for the 5th Respondent

Date of Hearing : **23rd September 2019**

Date of Judgment : **3rd October 2019**

RULING

[1] This is an application by the 1st Respondent for an order that, amongst others, the appeal be struck out and dismissed on the basis that the Appellant has failed to take steps to prosecute its appeal.

[2] The application was made by summons filed on 4 April 2019 and was supported by an affidavit sworn on 4 April 2019 by Ratu Peni Delainavukailagi Faonelua Baro. There has been no opposing affidavit filed. However, the Appellant and the 1st Respondent had filed written submissions prior to the hearing.

[3] The Court's jurisdiction to strike out and dismiss an appeal for failure to prosecute an appeal may be exercised by a justice of appeal pursuant to section 20(1) (g) of the Act which provides that:

> *"20(1)A judge of the Court may exercise the following powers of the Court:*
>
> *(g)to dismiss an appeal for want of prosecution or for other causes specified in the rules;*

[4] The First Respondent filed an application for Judicial Review bearing No.HBJ 02 of 2010. The High Court delivered judgment on 31 May 2015 in favour of the 1st Respondent, and issued a writ of Certiorari quashing the decision of the 2nd Respondent dated 8 February 2010 to repossess the subject lands, and issued Declarations that the 2nd Respondent Director of Lands had acted unfairly in entering the 1st Respondent's Crown Lease, and therefore the subsequent Mortgages are unlawful, null and void, and that the registration of any Crown Leases pursuant to the new Crown leases are wrongful, null and void.

[5] The Appellant was not a party in the application in the High Court. However, on 29 April 2016 the High Court granted leave and on 31 May 2016 the Appellant lodged Notice of Appeal. Notice of Appeal was served on 31 May 2016. It is that notice of appeal that is the subject of the present application.

[6] On 13 January 2016 the 1st Respondent filed Notice of Motion notifying the change of its Solicitors from Sherani & Co, Barristers & Solicitors to Tonganivalu & Valentiabua, Barristers & Solicitors.

[7] On 25 July 2017 the 1st Respondent filed Notice of Motion, informing the change of Solicitors from Tonganivalu & Valentiabua, Barristers & Solicitors, to Esesimarm & Co, Barristers & Solicitors.

[8] From the judgment of the High Court, there emerged three categories of Appellants;

(i) The State entities tasked with the administration of Crown lands and registration of title (the Director of Lands and the Registrar of Titles), and the original mortgagee of the lease (the Appellant in this case),

(ii) The subsequent lessees (Blue Ocean Limited, the Appellant in ABU 56/2016), and Linda & Company Ltd. the Appellant in ABU 61/2016), and

(iii) The subsequent mortgagees (Australia New Zealand Banking Corporation, the Appellant in ABU 82 /2016 and Westpac Banking Corporation, the Appellant in ABU43/2015) of the second set of lessees.

[9] The Notice and Grounds of Appeal in the matter was filed and served by the Appellant on 06 May 2016. They are that

1. *the learned Judge erred in law by failing to consider and apply sections 38 and 39 (1) of the Land Transfer Act and the indefeasibility of title that is granted thereby to the registered proprietor of an interest in land affected by his decision;*
2. *the learned Judge erred in law and fact by failing to consider that the rights and interests of any third party, in particular the Appellant would be adversely affected by his decision;*
3. *the learned Judge erred in law by failing to ensure that the Appellant was served with the Originating summons or originating Motion as required under Order 53(2) of the High Court Rules 1988.*
4. *the learned Judge erred in law by ordering that Crown Lease 18013 is wrongful, null and void.*

[10] On 1st September 2016 this court directed that the six appeals, which arose from the Judgment of the High Court in HBJ 02 of 2010, be listed, called and heard together, and directed the Attorney General's office to complete the preparation of the court records for and on behalf of the Appellants in all 6 appeals. These appeals are:

(1) Civil Appeal ABU 037 of 2015 – Dominion Finance vs Proline Boating Company Limited & Ors.

(2) Civil Appeal ABU 041 of 2015 – Director of Lands & Registrar of Titles vs Proline Boating & Ors.

(3) Civil Appeal ABU 043 of 2015 - Westpac Banking Corporation vs Proline Boating & Ors.

(4) Civil Appeal ABU 056 of 2016 - Blue Ocean Marine Limited vs Proline Boating Company Limited & Ors.

(5) Civil Appeal ABU 061 of 2016 – Linda & Co. Limited vs Proline Boating Company Limited & Ors.

(6) Civil Appeal ABU 082 of 2016 – ANZ Banking vs Proline Boating Company Limited & Ors.

The Application for Dismissal of the Appeal

[11] By Summons dated 1 February 2019, with supporting affidavit of Ratu Peni Delainavukailagi Faonelua Baro dated 1 February 2019, the 1st Respondent moved court for an order of dismissal of the appeal under sections 20(1) (g) of the Court of Appeal Act ("**the Act**"), and rules 7 (a), 17, 18, 18A read with Order 59 of the High Court Rules 1988. ("**the Rules").**

[12] The affidavit of Nitesh Lal dated 24 April 2019 filed in opposition states that as directed by court, all the parties except the first Respondent, took steps in regard to preparation of the appeal record. The counsel had met regularly and exchanged correspondence, and this was evidenced by the emails that had passed between the Counsel for the Appellants in the

six appeals, between December 2018 and January 2019. I observe that after this court tasked and directed the Attorney General's office to take over the preparation of the court records for the purpose of the appeal, necessary steps had been taken as directed.

Preparation of the appeal record.

[13] The issues that need to be considered in regard to this application are whether the delay in the preparation of the record amounts to want of prosecution of the appeal, warranting a dismissal of the appeal. I have already referred to section 20 (1) (g) of the Court of Appeal Act (Cap 12).

The Rules

Rule 18 (1) (a) of the Court of Appeal Rules provides that;

> *" The primary responsibility for the preparation of the record on appeal rests with the appellant, subject to the directions given by the Registrar.*

Rule 18(2) provides that the record consists of the following documents;

> *(f) the official transcript of the Judge's notes or record, if any, of such of the evidence given in the court below as is relevant to any question at issue on the appeal;*

The Practice Directions

[14] Registrar's Practice Direction No. 1 of 1999 provides as follows:

> *"**4. Legal Submissions and Lists of Authorities***
>
> *Judge's Notes of Counsel's submissions will not form part of the record but written submissions and lists of authorities especially if referred to in the judgment or decision may be included."*

[15] The 1st Respondent alleges that the Appellant has failed to lodge the court records with the Registry and must therefore the appeal must be struck out. It submits that; the legal burden of preparing the records lies on the Appellant, in accordance with the procedure prescribed under Rule 18 and the time frames prescribed for the lodgment of the appeal, and that the appeal will be deemed to be abandoned and stand dismissed under Rule 17. The 1st Respondent also submits that it is justified to invoke Rule 7 to aid in the interpretation of Rule 18 read with Order 59, and Rule 9(1). However, I find that this is baseless because the Appellant has complied with Rule 17(1).

[16] The 1st Respondent has failed to show what prejudice if any has been suffered by it due to the delay in the appeal being heard, but states in its written submissions that the grounds of appeal are frivolous and must be struck out under the inherent powers of court. However, its application was filed under section 20 (1) (g) of the Act. I find that the written submissions of the 1st Respondent do not refer to the fact that this court directed the Attorney General's office to prepare the appeal record. However, this fact has been significantly left out of the application for dismissal as well as in the submissions of the first Respondent.

[17] In determining the standard to be applied in determining what constitutes conduct amounting to failure to prosecute an appeal or action, a leading authority is **Allen v Sir Alfred McAlpine[1968]** 2 Q.B 229 at 224.The principle laid down was that in order to constitute failure to prosecute an action, there should have been contumelious conduct or intentional default, or inexcusable delay for which the plaintiff or lawyers have been responsible so that it gives rise to a substantial risk of a fair trial not being possible. As to what amounts to inordinate delay is a question of fact and degree, and is case -specific. In my view the conduct of the Appellant must exhibit delay which is also irregular, immoderate or excessive. Delay by itself will not by itself result in the court dismissing an appeal if the Appellant is able to point to a valid and reasonable explanation. Further, if the delay does not cause the Respondent prejudice, dismissal will not be ordered unless the delay in prosecuting the appeal will necessarily result in irreversible prejudice to the Respondent, or the applicant for dismissal.

[18] Whilst Rule 18 (1) (a) imposes the primary responsibility for the preparation of the record on the Appellant, this is subject to directions given by the Registrar and of course, the Court. In this case because of the directions of this court, the obligation of the Appellant to prepare the record was taken away from it. Thus, the delay that has ensued is not attributable to the Appellant, and section 18(1) (g) will not apply. The record reveals that the Appellant has indeed taken all necessary and possible steps from the date of the lodgment of the appeal, and has complied with the directions of the Registrar which had been given from time to time. In view of this, taken in conjunction with the direction of this court that the Attorney Generals' office prepares the appeal record, I am unable to conclude that the conduct of the Appellant warrants the use of my discretion under section 20 (1) (g) of the Act, read with Rule 18 (1).

[19] I note that the only reason for the delay in the preparation of the record was the delay in the release of the Judge's Notes by the Registry. This too, is not delay attributable to the Appellant, nor the Attorney General's office because it had taken steps continuously to obtain transcripts of the Judge's Notes. Although the Judge's notes will not be necessary for the preparation of the record in an appeal from a judgment in an application for Judicial Review, it appears that the Attorney General's office considered it to be necessary in this case. In fact the learned counsel for the second and third Respondent relied on Rule 18 (1) (e) to explain the reason for applying for the Judges Notes.

[20] However, since an application for Judicial Review is commenced and concluded, usually, on affidavit evidence, the court's observations and Judge's Notes would ordinarily be confined to the oral submissions of Counsel, which are not available to the parties. Any directions given by court, or undertakings given by parties, cannot be extracted or relied upon purely from the Judge's Notes, unless they are also borne out by the court Record. The Judge's Notes cannot substitute for the court record, although it may, in certain circumstances assist in ascertaining the contents of the court record.

[21] In the circumstances, although the obligation to prepare the appeal record rests primarily with the Appellant, since this court has dispensed with that by its direction of 1 October

2016, it would be necessary to determine whether the Attorney General's office had taken steps to comply with the directions of court. The record reveals that the Attorney General's office did comply with the directions of this Court. The delay was on the part of the Registry, which ought to have in the first instance intimated to the parties that the Judge's Notes are not a necessary component in the preparation of the appeal record in this instance. However, the conduct of the Appellant does not bring it within the provisions of section 20 (1) (g) of the Act. I do not find that there was contumelious or intentional default or inexcusable delay on the part of the Appellant or the Attorney General's office.

[22] During the Hearing of this application, learned Counsel for the Appellant submitted that due to inadvertence the 2nd and 3rd Respondents had sent the notice of listing and other related communications to the former lawyers of the 1st Respondent, instead of to Esesimarm & Co, the present lawyers. It is recalled that the solicitors were changed on three occasions, therefore it is understandable that the notices were misdirected. I find that the Appellants, and the 2nd and 3rd Respondents had otherwise made all efforts to take the relevant steps as directed by court, to prosecute communicate with all the parties.

[23] The substantive issue raised by the Appellant are meritorious and warrant consideration by this Court. It relates to a Crown Lease administered by the Director of Lands. Lease had been executed, cancelled and re -executed. The rights of the Appellant as a Mortgagee and the rights of bona fide purchasers become relevant. I am of the view that the grounds of appeal are meritorious.

[24] In conclusion the Appellant is entitled to have its appeal heard. The prejudice that will be suffered by the Appellant if the appeal is dismissed is likely to outweigh the prejudice that maybe suffered by the 1st Respondent by the appeal being maintained. The Appellant is entitled to costs of the application which was fixed summarily in the sum of $500.00 to be paid within four 28 days of the date of this Ruling.

Orders:

1. *The 1st Respondent's Summons and application dated 4 April 2019 are dismissed.*

2. *The Appellant's notice of appeal filed on 31 May 2016 may be proceeded with.*

3. *The 2nd and 3rd Respondents are to complete the preparation of the appeal briefs within 6 weeks from the date of this Ruling.*

4. *The 1st Respondent is to pay costs of $500.00 to the Appellant within 21 days from the date of this Ruling.*

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Hon. Justice F. Jameel
Justice of Appeal