

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

CIVIL APPEAL ABU 43 OF 2018
(High Court HBJ 4 of 2005)

BETWEEN : **RATU KALIOVA DAWAI**

Appellant

AND : **NATIVE LANDS AND FISHERIES COMMISSION**
RATU VILIAME TAGIVEITAU
VILIAME NASETAVA
RATU VANANALAGI VESIKULA
ILAITIA BUADROMO

Respondents

Coram : **Calanchini P**

Counsel : **Mr I. Fa for the Appellant**
Ms M. Motofaga for the Respondent

Date of Hearing : **8 May 2019**

Date of Ruling : **24 May 2019**

RULING

[1] This is a second application by the appellant for an enlargement of time within which a notice of appeal may be filed and served. The judgment in question is the decision of the High Court at Lautoka refusing leave to apply for an order of committal under Order 52

of the High Court Rules. The decision was delivered on 8 December 2011 and on the basis of the applications rule is to be regarded as an interlocutory judgment.

[2] The first application for an enlargement of time was made pursuant to section 13 of the Court of Appeal Act 1949 (the Act) and Rule 27 of the Court of Appeal Rules (the Rules). The application was made some 34 days (at least) after the time for filing and serving a notice of appeal under Rule 16 of the Rules had passed. In a Ruling that was pronounced on 7 November 2014 the Court made the following orders:

- “(1) Application for an enlargement of time is granted.*
- (2) The Appellant is to file and serve his notice of appeal within 21 days from the date of this judgment.*
- (3) Thereafter the appeal is to proceed in accordance with Rules 17 and 18 of the Rules.*
- (4) The appellant is to pay the sum of \$1,800.00 costs to the Respondents within 21 days from the date of this judgment in default of which, apart from the usual consequences, the appeal is struck out.”*

[3] The appellant subsequently filed and served a notice of appeal on 27 November 2014 in compliance with order number (2) made on 7 November 2014. However the appellant failed to comply with Rule 17(1) of the Rules in that he failed to file the necessary affidavit of service of the notice of appeal and he failed to apply by summons for the Registrar to fix an amount as security for costs, both of which were required within 7 days of service of the notice of appeal. Pursuant to Rule 17(2) the appeal was deemed to have been abandoned with effect from 4 December 2014.

[4] The present application was made by summons filed on 31 May 2018 and was supported by an affidavit sworn on 29 May 2018 by Ratu Kaliova Dawai. The application was opposed. An answering affidavit sworn on 20 July 2018 by Ratu Vananalagi Isireli Vesikula was filed on behalf of the respondents. A reply affidavit annexing a proposed notice of appeal was filed on behalf of the appellant. The parties filed written submissions prior to the hearing.

- [5] The present application is made by summons dated 31 May 2018 pursuant to Rule 17(3) of the Rules. This application is 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 within 42 days of the date of the deemed abandonment. Section 20(1) of the Act gives to a judge of the Court of Appeal power to enlarge time.
- [6] The principles upon which an enlargement of time may be granted are well settled and well known. The court will consider (a) the length of the delay, (b) the reason for non-compliance, (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: **NLTB (now TLTB) –v- Khan and Another** [2013] FJSC 1; CBV 2 of 2013, 15 March 2013.
- [7] The length of time between the date of deemed abandonment of the appeal (4 December 2014) and the date of filing of the present application (31 May 2018) is about 3½ years. This delay can only be described as inordinate. As the respondents point out the total length of the delay between the date of the impugned judgment (8 December 2011) and the date of filing the present application (31 May 2018) is well over 6 years.
- [8] Counsel for the appellant urged the Court to regard the application as being unique on account of the special circumstances explained by the deponent in his supporting affidavit. In that affidavit the appellant relies on his financial difficulties due to a plethora of legal proceedings commenced by the appellant and all of which are concerned with the rightful holder of the chiefly title of Tui Nadi. This litigation commenced in 2005 and is continuing with substantive applications in the High Court and a pending appeal on a substantive issue in this Court.
- [9] The appellant also deposes to health issues with particular reference to left leg amputation in 2011 and on-going medication. There are no medical reports annexed to

the supporting affidavit. However the requirements to file an affidavit to establish service of the notice of appeal and to file a summons for the Registrar to fix security for costs are relatively inexpensive procedures which would have ensured compliance with Rule 17. If necessary on the return date of the summons an application could have been made for waiver of the requirement to pay security for costs which, if refused, could have been taken on appeal to a judge of the Court of Appeal. After that, as the Rules presently stand, there is no time limit for lodging an appeal record for certification by the Registrar. In the meantime the appellant would have the opportunity to find sufficient funds and regain some health. I do not find the explanation to be satisfactory let alone convincing and I do not consider that the reasons give rise to a unique application with special circumstances.

- [10] As for the merit of the appeal, the detailed background to these proceedings is set out in the Ruling dated 7 November 2014 and it is not proposed to repeat that material in this Ruling. The proposed grounds of appeal are annexed to the affidavit filed on 3 April 2019 by the appellant. The eight grounds upon which the appellant relies are the same eight grounds upon which reliance was placed in the first application for an enlargement of time.
- [11] However in my judgment the reasons for which an enlargement of time was granted in November 2014 do not now some 3½ years later carry the same weight as in 2014. Contempt proceedings may be described as hybrid proceedings. Although commenced under the High Court Rules as civil proceedings the court must be satisfied that there has been contempt beyond reasonable doubt and upon being so satisfied may impose a punishment. At the very least the proceedings are “*quasi criminal*.” It is fair to conclude that the technical reasons for which the first enlargement of time was granted are now outweighed by what is an inordinate delay with explanations that can only be described as unconvincing. Furthermore evidenced by non-compliance with the Court’s orders and Rules 17(1) and (2) it seems to me that the inordinate delay negates whatever merit may be found in the proposed grounds of appeal.

[12] I have also concluded that the prejudice by inference suffered by the respondents as a result of the appellant's delay can be found in the difficulty and anxiety they have experienced as a result of committal proceedings hanging over their heads for a prolonged period. In my judgment it can be inferred that the respondents have been more than minimally prejudiced by the appellant's inordinate and inexcusable delay and contravention of Rules 17(1) and (2). Since the appeal was initially commenced as a result of the appellant being granted an enlargement of time and since the total delay on the part of the appellant has become inordinate and inexcusable a further enlargement of time should be refused (See: **Biss -v- Lambeth, Southwack and Lewisham Health Authority** [1978] 2 All ER 125).

[13] In written submissions the appellant has claimed that the respondents will not suffer any unfair prejudice. However for the reasons stated above I do not agree with that submission. Furthermore there is ample existing litigation both in the High Court and in this Court that is directly concerned with the substantive issues in this dispute, For all of the above reasons the application is refused.

Orders:

- 1). *Application for enlargement of time is refused.*
- 2). *Appellant to pay costs to the Respondent in the amount of 2,000.00 within 28 days from the date of this Ruling.*



W. Calanchini

Hon Mr Justice W D Calanchini
PRESIDENT, COURT OF APPEAL