

**IN THE COURT OF APPEAL, FIJI**  
**[APPELLATE JURISDICTION]**

**Civil Appeal No. ABU 007 of 2020**  
**(HBC No. 277 of 2015)**

**BETWEEN** : **JONE BATINIKA** *Appellant*

**AND** : **I-TAUKEI LAND TRUST BOARD** *Respondent*

**Coram** : Almeida Guneratne, JA

**Counsel** : Mr. J. Lanyon for the Appellant  
: Ms. L. Komaitai for the Respondent

**Date of Hearing** : 17 July, 2020

**Date of Order** : 14 August, 2020

**RULING**

[1] The issue for determination before me is whether the Appellant should be granted extension of time to take steps for the certification of the Copy Record and proceed to appeal an appeal which had earlier been “deemed to have been abandoned”.

**Background aspects in brief**

[2] The Appellant filed notice and grounds of appeal against the impugned judgment of the High Court which the Appellant claimed was filed within the statutory time limits prescribed. Assuming that was done, the subsequent issue that arose was, whether the

Appellant had taken steps to have the copy Record certified in time as envisaged by the applicable Practice Directions.

- [3] At the hearing before me, learned Counsel for the Appellant conceded that, he was out of time in terms of Practice Direction No.1 of 2019(PD) but invited Court to have regard to Practice Direction No.5 of 2019 (PD) which addresses the factual circumstances on which a request for enlargement of time ought be accommodated, in which regard, Counsel adverted to a supporting affidavit. Counsel submitted that, the delay on the Appellant's part in taking steps to have the copy Record certified has been explained adequately therein. I shall advert to that affidavit later.
- [4] Learned Counsel for the Respondent in opposing the Appellant's submission submitted that:-
- (a) even on the P.D the Appellant was relying on, his Appeal is one that has been "deemed to be abandoned".
  - (b) And, therefore, there being no Appeal "on foot", the Appellant has no basis to move further.
- [5] In his short reply submissions, (Mr) J. Lanyon for the Appellant, (a) harked back to the said supporting affidavit as to the circumstances that had resulted in failing to have the copy Record certified in time and (b) went beyond in addressing on the substantive aspects on the argument, "the public interest" demands his client's lament to be gone into by the Full Court in as much as, his client having had an interest on the basis of an "agricultural interest" which the Respondent had initially condoned, it was not open for the Respondent to change that on the basis of a changed policy to sub-divide the land in order not be given for residential purposes. Consequently, learned counsel raised an issue based on "estoppel" as well and in so doing invited Court to give consideration to the grounds of Appeal urged on that substantive issue.
- [6] Having called upon learned Counsel for the Respondent to make a counter-submission thereto, Ms. Komaitai submitted that, - while conceding that, initially the plot of land

given to the Appellant was for Agricultural purposes, there being a change of policy to allocate such land for residential purposes, that was the reason that, the Appellant's claim for renewal of his lease for "Agricultural purposes" was not granted.

(b) Ms. Komaitai went further in saying that, the Board is willing to provide the Appellant with an alternative plot of land for him to pursue his "agricultural purposes".

- [7] In the light of the said submissions made by respective Counsel and the written submissions tendered as well, I considered it necessary to first look at the factual content contained in the affidavits filed on behalf of the parties, the material parts of which I reproduce below.

Appellant's Affidavit in support of Summons for Enlargement of Time (dated 20 February, 2020)

*16. I am advised by my solicitors and verily believe that upon finalizing the copy records with the Respondent's solicitors, my solicitors attempted to file the same with the Court of Appeal Registry but was duly informed that it cannot be accepted since the period of filing had gone beyond the prescribed time frame stipulated under Paragraph 6(iii) of Practice Direction 1 of 2019.*

*17. I am advised by my solicitors and verily believe and verily believe that the Appeal Record should have been submitted for Certification on or before 31 December 2019.*

*18. I am advised by my solicitors and verily believe that due to the non-communication of Law Solutions to my current solicitor of the fact that the Registry has sent them a letter dated 19 November 2019 for the finalization of the Copy records, my copy records were not certified on time.*

*19. I am advised by my solicitors and verily believe that they have compiled their copy record and have submitted the same to the Court of Appeal registry.*

*20. I am further advised by my solicitors and verily believe that the Respondent's solicitors have agreed to the Copy Records filed and are ready to proceed for trial.*

*Attached herewith and marked as "JB 9" a copy of the letter issued by TLTB dated 07 February 2020.*

*21. I humbly pray that this oversight on my solicitor's part should not deprive me of my cry for justice and I further pray that also that these rules should not deprive my right to be heard".*

Respondent's Affidavit in Response dated 29 May, 2020

*"3. I refer to paragraphs 13 – 17 and state that the reasons provided by the Appellant are not sufficient for it to be granted an extension of time. It is not clear when this Lawyers left his former employer, Law Solutions and who was in carriage of the file when he had left as he was the Counsel appearing on the matter on previous occasions.*

*4. The Appellant does not clarify if his litigation file with Law Solution was always under his Lawyer Mr. Lanyon's carriage throughout the course or whether there are other lawyers in Law Solutions was handed over the file from the time Mr. Lanyon left Law Solutions and when he started his Law Firm.*

*5. I refer to the Summons for Enlargement of Time and state that the Application is made under the Rule 18 of the Court of Appeal Rules and Practice Directions 5 of 2019 which is incorrect and therefore the application must fail.*

*6. I ask that the Appellant Summons for enlargement of time to be dismissed with costs to the Respondent."*

Appellant's Affidavit in Reply (dated 17 June, 2020)

Paragraph 1

*"4. In response, I am advised by my Solicitors and verily believe that this matter is a contentious matter and as such it should not be deposed by a clerk. I am therefore seeking if the Honourable Court dismiss Semi's Affidavit based on the above.*

Paragraph 2

5. I have no issues with Paragraph 2 of Semi's Affidavit and further repeat Paragraphs 3 to 17 of my Affidavit in Support (hereinafter referred to as "First Affidavit" filed on 21 February 2020).

6. I otherwise deny all other allegations contained herein.

Paragraph 3-4

7. I deny Paragraphs 3 and 4 of Semi's Affidavit and repeat Paragraphs 13-17 of my first Affidavit.

8. I further add that only on 04<sup>th</sup> February 2020, Lanyon Lawyers formally filed its Notice of Change of Solicitors as per my instructions.

Paragraph 5

9. In response to Paragraph 5 of Semi's Affidavit, I wish to state that there was a typo error in terms of the rule under which an extension of time can be made. The correct rule is Rule 27 of the Court of Appeal Rules.

10. I am advised by my solicitors and verily believe that non-compliance of the Rules should not negate my right to be heard. I am further advised that I have strong and meritorious grounds of Appeal of significant public interest that ought to be heard and decided upon by a competent court of law".

Assessment of the Factual Content contained in the said Affidavits

[8] I cannot agree with Ms. Komaitai that no sufficient reasons are before this Court to allow the Appellant's application for enlargement of time to have the copy record certified, because demonstrably the resulting situation had been brought about by a breakdown of communications between the Appellant and the Appellant's lawyers. Accordingly, while I have no hesitation in saying that that was a lapse on the part of the Appellant's lawyers. I am convinced that the Appellant's given reasons adequately explain "the breakdown of communications".

[9] In passing, I wish to comment on Ms. Komaitai's submission that; this is an appeal that had been earlier – "deemed to have been abandoned".

“Deemed to have been abandoned?”

[10] By whom? I could not see on the Record any Court order to that effect.

[11] Without making any further comment on that aspect, I gave my mind to what the Appellant has averred at paragraph [20] of the Affidavit of 20 February, 2020. Therein the Appellant avers thus:

*“I am further advised by my solicitors and verily believe that the Respondent's solicitors have agreed to the Copy Records filed and are ready to proceed for trial. Attached herewith and marked as “JB 9” a copy of the letter issued by TLTB dated 07 February 2020”.*

[12] In that letter of the Respondent, although I could not see where the Respondent's Solicitors have said that they are “ready to proceed to (Trial)” although they “had agreed to the Copy Records filed”, thus arguably implying that they were ready for trial.

[13] After the Respondent had agreed to the Copy Records being filed, from the said letter (dated 7 February, 2020), the lawyers had taken time till 2<sup>nd</sup> March, 2020 to have filed summons for enlargement of time to appeal.

[14] Thus, in the circumstances of the history of the case, I consider that delay of three weeks as not being inordinate.

[15] The Appellant has deposed thus in the Affidavit dated 20 February, 2020.

*“I humbly pray that this oversight on my solicitor's part should not deprive me of my cry for justice and I further pray that also that these rules should not deprive my right to be heard.”*

[16] Mr. Lanyon for the Appellant stressed on that aspect in his submissions which I saw support for in the Supreme Court Judgment in the case of Fiji Industries Ltd v. National Union of Factory and Commercial Workers (CBV 008 of 2016, Supreme Court minutes of 27 October, 2017 per His Lordship Justice Keith).

[17] In that case, writing for the Supreme Court, His Lordship Justice Keith (Chandra and Calanchini, JJs' agreeing) propounded thus:

“Conclusion

*As I said at the beginning of this judgment, it would not be usual for leave to appeal against a refusal to extend the time for filing a notice of appeal to be given. However, in this judgment, I have endeavoured to summarise the principles of the law of Fiji in this area, and I have responded to Guneratne JA's request for the Supreme Court to address his view about the impact of mistakes made by lawyers. In my opinion, that issue is a matter of substantial general interest to the administration of civil justice, and I would therefore give the company leave to appeal... ”*

[18] That was a case involving “a mistake” made by the lawyers in construing a Practice Direction as distinct from “a breakdown of Communications” between the Appellant and the lawyers in the instant case.

[19] However, whether that ought to be determined as being a distinction or a distinction without a difference in “the facts and circumstances of the present case” (a factor His Lordship Justice Keith in the Fiji Industries case (supra) laid down), I leave for the full Court to determine for which reason I allow the Appellant's application and consequently, if the full Court should find in favour of the Appellant paving the way for the full Court to consider the Appeal on its merits against the impugned Judgment of the High Court on issues such as:

(a) In as much as, the Respondent having initially given him an "agricultural lease" and in refusing to renew it on the basis of "a changed policy" whether:

- (i) That defeated the Appellant's legitimate expectations;
- (ii) Notwithstanding the fact that the Respondent is a statutory functionary estoppel could have operated against it.

[20] Those are important matters of public interest.

#### Conclusion

[21] For the aforesaid reasons, I proceed to make my orders as follows:-

#### Orders of Court:

1. The Application of the Appellant to have the copy records certified and proceed to appeal the Judgment of the High Court in issue is allowed.
2. However, having regard to the background facts and circumstances of this matter, in the exercise of this Court's discretion, treating this matter as an exception to the rule that, costs follow the event, I order the Appellant to pay costs of this Application a sum of \$1,500.00 to the Respondent within 28 days of this Ruling.
3. Should the Appellant fail to comply with the aforesaid Order 2, in pursuance of the provisions of Section 20(1) of the Court of Appeal Act (Cap.12) read with the Rules made thereunder, particularly Rule 17 thereof, the Appeal would be struck off for non-compliance with the said Order and/or for non-prosecution and/or as being deemed to have been abandoned.



4. The Registrar is directed to submit the file/brief to this Court after the expiry of the time limit as stated in Orders 2 and 3 above to make consequential orders.



*Almeida Guneratne*

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**Almeida Guneratne**

**JUSTICE OF APPEAL**