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

CIVIL APPEAL NO. ABU 114 of 2019
[HBC 357 of 2005]

BETWEEN : **MERE SELA ET AL**

Appellant

AND : **AUSTRALASIAN CONFERENCE ASSOCIATION LIMITED**

Respondent

Coram : **Almeida Guneratne, JA**

Counsel : **Mr N Tuifagalele for the Appellant**
Ms P Low for the Respondent

Date of Hearing : **29 July, 2020**

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

R U L I N G

[1] This is an application for leave to appeal and extension of time to appeal a final judgment of the High Court at Suva (dated 7 October, 2016).

[2] At the outset of the hearing, learned Counsel for the Appellant conceded that there has been a delay of three years but asked Court to consider the reasons addressed for the delay contained in the Affidavit of *Rusiate Amasia* dated 12 December, 2019 (one of the named Appellants). Those reasons are contained in paragraph 11 of the said affidavit and read thus:

> *"That we have hired a legal representative since the commencement of the proceedings in 2005 and he has neither advised us nor communicated with us on anything in relation to the case. I state that we were promised and guaranteed victory in the case but our present situation speaks otherwise. I further state that we noted from the hearing convened in 2016 that he had withdrew his representation but he never communicated that with us at any time. I further noted from that judgment that he continued to represent us during the convened hearing in 2016 but none of the Appellants either were present or asked to give evidence in court as we were not aware of that taking place then. Moreover, once the hearing was completed, I state that we were not aware of the implication of the judgment delivered on 7th October 2016 until we were served with a copy of the writ of possession by the Respondent."*

[3] Those reasons have been re-iterated in paragraph 6 of Appellant's written submissions filed on 3 July, 2020 on which learned Counsel for the Appellant stressed at the hearing.

[4] Opposing the Appellant's application, learned Counsel for the Respondent prevailed on Court to have regard to the affidavit of *Eparama Drou* dated 18 February, 2020 (in particular to what has been stated in paragraphs 17 and 18 thereof in the light of paragraph 13 of the Respondent's written submission dated 29 July, 2020.

> *"17. In response to paragraph 11 of Rusiate's affidavit, the Appellant and Defendants were represented by counsel and could have made the necessary enquiries with him as to the status of the High Court*

action. They were also made aware of the 2016 Order when they were served with the copy of the Order of 7 October 2016 on 21 November 2016 and again on 6 April 2018. I assisted the bailiff with service on both occasions. Annexed hereto marked ED5 is the Affidavit of Anirudh Kumar and marked ED6 the Affidavit of Muni Prasad with only the first annexure as there are 37 annexures in total.

18. Further in response, the Appellant and Defendants failed to take any necessary steps to file an Appeal or Leave to Appeal the 2016 Order and continued to illegally occupy the Respondent's land."

[5] Consequently, Counsel for the Respondent adverting as she did to "ED5" and "ED6" being annexures filed of record to the Appellant's own summons seeking enlargement of time to appeal submitted that,

(a) the lawyer's withdrawal from the case is on Record;

(b) the said withdrawal was due to the Appellant's failure to have given instructions;

(c) the Orders of Court had been served by a bailiff on some of the Appellants and acknowledged some of the Appellants whereabouts being not known.

[6] In reply the learned Counsel for the Appellants was heard to say that, there were as many as over 55 defendants in the case and the action itself was in the nature of a "class action" which was defended as such.

[7] If so, to my mind, that itself is a sufficient reason, in view of what I have recounted at paragraph 5 above, to hold that sufficient reasons for the delay have not been adduced.

[8] Accordingly, agreeing with the submissions of Respondent's Counsel I hold that, the threshold bar to adduce sufficient reasons for the delay has not been satisfied.

[9] At this point I pause to reflect on a recent ruling of the Supreme Court where, their Lordships' Court laid down as a proposition that, lawyers mistake should not visit upon party litigants. (*vide*: **Fiji Industries Ltd v. National Union of Factory and Commercial Workers** CBV 008 of 2016, 27 October 2017).

[10] But, this is a case where as the very affidavits filed by parties reveal, the fault lay fairly and squarely on the Appellants having failed to instruct lawyers.

[11] In that context, in this very session in another Ruling (*viz:* **Jone Batinika -v- iTaukei Land Trust Board** (ABU 007 of 2020, 14th August 2020). I held that, "a breakdown of communications" between lawyers and clients could be considered as a sufficient ground to excuse delay. This case however stands on a different footing for the reasons I have articulated at paragraph [10] above.

[12] Before I proceed to consider whether there are sufficient merits to grant the present application (notwithstanding the criteria relating to the length of delay [conceded by the Appellant] and reasons for the delay [which I have rejected]) I addressed the criterion of "prejudice" to parties as addressed by past precedents.

[13] In that regard, learned Counsel for the Appellant submitted that, the Respondent having obtained possession of the land in question, to date has done nothing on it.

Utendi, fruendi, abutendi

[14] What has been declared to be one's own, such a person is free to do what that person wants which is expressed in the legal maxim referred to above. (use, enjoy and (even) destroy) I add, if so, even not to do anything thereon.

[15] Accordingly, I reject that argument of the Appellant without saying anything more.

On the Merits

[16] Learned Counsel for the Appellant in assailing the impugned judgment of the High Court (dated 7 October, 2016) submitted on two counts *viz*:

(a) On procedural matters

(b) On the substantive issue of the claimed rights.

[17] I shall deal first with the procedural matters,

[18] The Appellant submitted that, there was an earlier judgment of the very High Court (as per Coventry, JA dated 31 January, 2007) touching on the very issues which were before Amaratunga JA, reflected in his impugned judgment of 7 October, 2016 and therefore the High Court was rendered *functus* when it delivered its said impugned judgment of 7 October, 2016.

[19] This is what (in essence) Coventry JA had held in his said judgment.

> *"[58] The original permission was in perpetuity subject to the performance of custom obligations. It was a grant for that group of Solomon Island people and their descendants. For the estoppel to continue then there must be*
>
> *(a) continuity of occupation;*
> *(b) by the direct descendants of the original grantees; and*
> *(c) the due performance of the custom obligations.*
>
> *[59] In effect, three conditions. If any of these is not observed the right to remain on the land will be lost. Further, if a direct descendant has never lived on the land or has already moved to live elsewhere then he or she is not protected. Similarly if a direct descendant now living on the land moves off the land in future then he or she cannot return with the protection of the estoppel.*
>
> *[60] In these circumstances, referring to the amended Originating Summons:*
>
> *1. I refuse to make a declaration that "the plaintiff is entitled to possession of the whole of the land described in Certificate of Title No. CT 7168";*
>
> *2. I do make a declaration the plaintiffs are estopped from removing those defendants who are the original grantees or the direct descendants of the original grantees and who currently live on the land from that part of the land described in paragraph [x] above according to the conditions set out in paragraph [y].*
>
> *3. Given my findings in 1 and 2 above I need not make a declaration whether or not any purported transfer by*

Tamavua land owners in respect of the said land confers any interest paramount to the plaintiff's title.

4. I refuse to make an order for Writ of Possession of the said land. I acknowledge that Writs of Possession can issue in respect of those defendants who are not the original grantees or their direct descendants once individually identified.

5. No other orders are required.

[61] Given my findings in this case I do not need to consider the detailed and well researched representations on both the history of this land and the constitutional rights of the defendants presented by the Fiji Human Rights Commission. Nor need I consider whether or not there was a "land grab" at any time or any question of "Waimiha Sawmilling Company fraud".”

[20] Justice Amaratunga in his judgment prefaced initially thus:

“The Ruling delivered on 6 September 2007 by his Lordship Justice Coventry, explained further word direct descendants in following manner:

‘... in my judgment, the estoppels can only extend to the original grantees of the chiefly permission to occupy and their direct descendants... The original person was in perpetuity ... For the estoppels to continue then there must be:

a) Continuity of Occupation
b) By the direct descendants of the original grantees and
c) The due performance of the custom obligations.”

[21] Then His Lordship reasoned as follows:

“5. The word ‘direct descendants’ was further explained in the ruling of 6th September, 2007. So all the three criteria, stated earlier, has to be fulfilled to remain in possession of the land under estoppel. The writ of possession, could only be issued to defendants ‘individually identified’ in the hearing. So, the order for eviction cannot be applied to any person not ‘individually identified’ according to the judgment delivered on 31st January, 2007.

6. This identification of Defendants, was done by the Plaintiff through the 3 witnesses called by them. The Plaintiff also proved the

position of the three criteria set in the ruling that defined the word direct descendant. So the proof contrary to that needs to be elicited, by the Defendants if they satisfy the three criteria laid in the said ruling. This is a matter for the Defendants to prove. They have failed to prove estoppel to remain in possession as direct descendants. The Plaintiff is entitled for the judgment for eviction of all the Defendants individually identified as persons who are not direct descendants, but in their evidence they had admitted that nine of the Defendants fulfilled the criteria for estoppels, while 3 were dead and no action was taken for substitution of them. So no evidence was presented about the said dead parties and no order for possession could be issued according to the aforesaid determinations made by Justice Coventry. Neither the dead parties nor successors for the deceased were individually identified to determine whether they were 'direct descendants'."

[22] Having reasoned so, His Lordship concluded and made his final orders as follows:

*"**CONCLUSION***

12. No evidence was elicited about 3 Defendants to identify their interests as direct descendants as they were dead. Apart from that 2 defendants had already left voluntarily so there is no need to issue eviction of said two Defendants. Only 9 of the 35 named Defendant, who were individually identified, together with their children, grandchildren, etc., qualify under the criteria for estoppel and can remain on the land to continue as set out by his Lordship Justice Coventry in his Lordship's Judgment dated 31st January, 2007 and Ruling on this matter dated 6 September 2007. The other Defendants (except the dead parties and parties who had left) should give up the possession. Considering the facts of this case I do not award a cost for the hearing before me.

FINAL ORDERS

a. The 26 named Defendants who are in occupation of the Plaintiff's land (CT 7168) to give up occupation immediately. (They are MERE SELA, SEMI VEIMATEYAKI, TAINA VEIMATEYAKI, SALOTE RAMATAU, MERE DICKSON, SERU CAMA, MOSESE TUIMASALA, VILOMENA LEWATABU, KONI M, JONE TAWAKE, SALOTE B TAWAKE, RUSIATE AMASIA, ANA VECENA, ASAELI VALEMEI, MAKERETA VALEMEI, VILIVE RAINIMA, NANCY RAINIMA, RUSIATE MATAI, SEREIMA MATAI, JOE RAKAI, LITEA RAKAI, SECI KIRIKITI, ULAMILA KIRIKITI, EMELE ADI, MOSESE BELE LAISENIA, MAKETRETA N, WAME BUA.

b. The 9 Defendants namely Cathy, Demesi Kokowau Tikotani, Merelita Kokowau Tikotani, Saravina Karawa, Joji Oba, Inise L, Sovita Nasemira, Mereani Nasemira, Mosese Bale Laisenia

(together with their children, grandchildren, etc. of the original grantees) who has the right to possession subject to continuation of the rituals performed by them in accordance with the customs.

My Determination on that issue

[23] His Lordship, Justice Amaratunga looked at the conditions envisaged by Conventy, J and dealt with them. It was incumbent on his Lordship to look at them and come to a conclusion which he in fact did, for, there were open questions which had not reached any finality. Thus, how could an argument based on *functus* have been raised in such a scenario?

The Scope and Content of the principle of "*functus officio*"

[24] Very briefly, that Latin phrase means *"no longer having power or jurisdiction because the power has been exercised"* (Law Dictionary, 2nd ed, P.H. Collins, page 104).

[25] On the basis of what I have recounted above, I find it an incomprehensible proposition (by any stretch of imagination to argue) that, Justice Amaratunga when His Lordship assumed jurisdiction of the matter before him was "*functus*."

(ii) The other procedural matter raised on behalf of the Appellant was that, there being so many defendants on the land in question and some having become deceased whether the Orders made by first Coventry, J and by Amaratunga, J could have been made which I understood to be an argument carrying the trappings of how could a Court make orders on a (partially) dead docket without substitution.

[26] No doubt an intricate issue, but I was struck by the way His Lordship (Justice Amaratunga) is seen to have responded to the same. His Lordship (in that regard) said thus:

"7. The dead Defendants are Ms. Wainisi Tagi (D7), Mr. Lui Wedth (D11) and Ms. Salome Didroko (D22).

8. *Apart from that 2 Defendants had already left the land voluntarily, since the institution of the action and they were Sulio Magiti (D25) and Ms. Vasemaca Qoli (D26).*

9. *This leaves with only 35 Defendants and in the Evidence of the 1st witness 9 Defendants were admitted as direct descendants of the grantees. Further, the said 9 Defendants were admittedly in occupation of the land for a long time. These were (D9) Cathy, (D15) Demesi Kokowau Tikotani, (D16) Merelita Kokowau Tikotani, (D17) Saravina Karawa (D20) Joji Oba, (D21) Inise L, (D35) Sovita Nasemira, (D36) Mereani Nasemira, (D 38) Mosese Bele Laisenia, (D40) Wame Bua. According to the last witness called for the Plaintiff all of them are also performing customary obligations.*

10. *The Plaintiff in its evidence stated that 3 of the Defendants are dead so their names needed to be struck out as Defendants since there were no applications to substitute them. I have granted them time to substitute but the Plaintiff did not do so and continued the hearing. In the circumstances no order could be made against said parties or their relatives who remain in possession based on the deceased Defendants.*

11. *The Plaintiff's Witness Nemani Turagabeci, said that Plaintiff's Land (Tamavua-i-Wai) and people living on that land is known to him .He said that he lived with them for 23 years and knew about the community and also collected rent from them. These facts were not disputed in the cross-examination. He was a person who had knowledge about the Defendants to identify them individually. There was no evidence to contradict the evidence presented by the Plaintiff. On the balance of probability the Plaintiff has proved that there are 26 individually identified Defendants who do not qualify to remain in possession according to the determinations of the Justice Coventry in this case. They are MERE SELA, SEMI VEIMATEYAKI, TAINA VEIMATEYAKI, SALOTE RAMATAU, MERE DICKSON, SERU CAMA, MOSESE TUIMASALA, VILOMENA LEWATABU, KONI M, JONE TAWAKE, SALOTE B TAWAKE, RUSIATE AMASIA, ANA VECENA, ASAELI VALEMEI, MAKERETA VALEMEI, VILIVE RAINIMA, NANCY RAINIMA, RUSIATE MATAI, SEREIMA MATAI, JOE RAKAI, LITEA RAKAI, SECI KIRIKITI, ULAMILA KIRIKITI, EMELE ADI, MOSESE BELE LAISENIA, MAKETRETA N, WAME BUA."*

[27] I totally condone that approach while hastening to add that, it was the Appellants action to start with and then the Appeal. It was then left to the surviving defendants/appellants to take steps for substitution if they wished to have proceeded with their appeal.

[28] Accordingly, I reject that ground urged on behalf of the Appellant as well.

The final issue to be addressed

[28] That is, in regard to the substantive rights claimed by the Appellants to see whether there are merits to be addressed in order to grant the present application.

[29] Having looked at the grounds of appeal urged, I found that those grounds have been addressed earlier as well though considered in the context of what I dealt with as being procedural matters.

Conclusion

[30] On the basis of the aforesaid reasons, taken cumulatively, I saw no reason to grant the Appellants' present application and proceed to make my Orders as follows:

Orders of the Court

1) *The application for leave to appeal and extension of time to appeal the Judgment of the High Court dated 7 October, 2016 is refused and accordingly dismissed.*

2) *The Appellants on record are ordered to pay a sum of $2,500.00 to the Respondent within 28 days of this Ruling.*

Almeida Guneratne
JUSTICE OF APPEAL