

**IN THE COURT OF APPEAL, FIJI**  
**CIVIL APPELLATE JURISDICTION**

**Civil Appeal No. ABU 0079 of 2019**  
**High Court Civil Case No.472 OF 2007**

**BETWEEN** : **GULF SEA FOOD (FIJI) LIMITED**

**Appellant**

**AND** : **I-TAUKEILAND TRUST BOARD**

**Respondent**

**Coram** : **Almeida Guneratne, J.A**

**Counsel** : **Mr. E. Maopa for the Appellant**

: **Ms. L. Komaitai for the Respondent**

**Date of Hearing** : **31 July 2020**

**Date of Ruling** : **28 August 2020**

**RULING**

- [1] This is an application for extension of time to re-instate an appeal that had been “deemed abandoned”.
- [2] By its summons dated 18<sup>th</sup> October 2019 the Appellant’s Solicitors sought *inter alia* the following orders:-

- 1. That leave is granted to the Applicant/Appellant to extend time to appeal and for leave to appeal the judgment of the trial Judge in the High Court of Fiji, delivered by Justice Deepthi Amaratunga on 13<sup>th</sup> day of April, 2016.*
- 2. Alternatively, that leave is granted to the Applicant/Appellant to refile all necessary appeal document and the Records of the High Court already certified by the Registrar on the 17<sup>th</sup> May 2019 and to include the complete copies of the trial transcript (by the trial Judge) before forwarding the same to the Court of Appeal Registry for filing and serve the same to the respondent within 21 days.*
- 3. That leave is granted to the Applicant/Appellant to extend time to file and serve submission within 14 days.*
- 4. That cost be in the cause”.*

[3] The said summons was supported by the affidavit of Roger Black, the Managing Director of the Appellant Company, the contents of which I reproduce thus:

- “(1) I am the Managing Director of Gulf Sea Food (Fiji) Limited. I am duly authorized to swear this affidavit on behalf of the company. I annex herein copies of the company search and Certificate of company Registration No. 145 63 marked as annexure **RB 1**.*
- (2) That the company filed the notice and grounds of appeal on 12<sup>th</sup> May 2016 intending to appeal the final judgment of the trial judge Justice Deepthi Amaratunga delivered on 13<sup>th</sup> day of April 2016. I annex herein a copy of the notice appeal marked as annexure **RB 2**.*
- (3) That the security for cost was assessed and paid in the sum of \$3,000.00 on 29<sup>th</sup> January 2018. I annex herein a copy of acknowledgement of payment with a copy of BSP Bank cheque marked as annexure **RB 3**.*
- (4) I was informed by my solicitor and verily believed that the compilation of the Records of the High Court took more time than expected. I was*

*informed by my Solicitor and verily believed this is so as my counsel were liaising with my precious solicitor Fa & Co, and the Court of Appeal Registry to obtain some of the documents held in their possession. I annex herein copies of correspondence with Fa & Co, and the Registry respectively marked as annexure **RB 4 and RB 5.***

- (5) *I was informed by my solicitor and verily believed that once the draft list of the Records of the High Court were ready, it was sent for vetting to the staff of Court of Appeal Registry. The Registry then sent a precedent of the list of document that needed to be included in the Record of the High Court now marked as annexure **RB 6.***
- (6) *By letters dated January 31<sup>st</sup> and 20<sup>th</sup> February 2019 my solicitor informed the Registry (Court of Appeal and High Court) that some of the documents were not in their possession but still with Fa & Co. My solicitor requested copies and they would meet the requisite cost. I annex herein a copy of such letter marked as annexure **RB 7.***
- (7) *By letter dated 1<sup>st</sup> March 2019 the Registry informed my solicitor that the document requested was ready for collection upon payment of \$82.00 plus VAT. I annex herein a copy of such letter marked as annexure **RB 8.***
- (8) *By letter dated 28<sup>th</sup> March 2019 my solicitor informed the Registry (Ms Ulamila) that one of the Appellant's submission filed on 26.5.17 is missing from the final list of the Record. No response was received. I annex herein a copy of such letter marked as annexure **RB 9.***
- (9) *On 29<sup>th</sup> April 2019, the final IV Volumes of the Record of the High Court (4 bundles in each volume) were filed with the Court of Appeal Registry.*

- (10) *I was informed by my solicitor and verily believed that sometimes in early May 2019 he went through one for the draft copies of the Record of the High Court in their office to prepare a draft submission and he discovered that the record of the trial transcript is incomplete as it contains only the transcript of the plaintiff's, Roger Black, evidence. There was no trial transcript for the defendant's on the record. Hence, the trial transcript is incomplete.*
- (11) *I was informed by my Solicitor and verily believe that he contacted the Court of Appeal Registry and spoke to one Sandhya regarding the incomplete trial transcript and she confirmed that the final Record in their possession did not have complete trial transcript for the defendant's witnesses hence being absent in the bundle.*
- (12) *By letter dated 31<sup>st</sup> May 2019 my solicitor wrote to the Deputy Registrar of the High Court informing him of the incomplete trial transcript in this appeal. I annex herein a copy of the letter marked as annexure RB 10.*
- (13) *By letter dated 10<sup>th</sup> July 2019 from Ms. Ranjani of the Court of Appeal Registry informing that the transcript of the trial proceedings is ready for collection upon payment of \$2160 plus VAT. I annex herein a copy of such letter marked as annexure RB 11.*
- (14) *By letter dated 17<sup>th</sup> July 2019 my solicitor informed Ms. Ranjani that the delay was caused due to the trial transcript not fully prepared and completed in time. I annex herein a copy of such letter marked as annexure RB 12.*
- (15) *I verily believed that the delay was caused by the High Court for failing to fully complete the trial transcript in time.*

(16) *That I paid the pending document (trial transcript) and the same was collected by the agent for my solicitor, I verily believed that the full and completed Record of the High Court is ready for filing. I annex herein a copy of the revenue receipt marked as annexure RB 13.*

(17) *I therefore urge the court to grant orders in term of the summon therein”*

[4] An affidavit in answer (in opposition) was filed by one Semi Senikuraciri, Litigation Assistant of the Respondent Board viz:

*“I, SEMI SENIKURACIRI of Vuci Road, Nausori in the Republic of Fiji Islands, Litigation Assistant, in reply to the Affidavit of Roger Black dated (hereinafter referred to as the “Said Affidavit”) deposed on 8<sup>th</sup> August 2019. make oath and say as follows:*

- 1. That I am employed by the Respondent (“Board”) as its Litigation Assistant at its Head Office and in that capacity, I am authorized to make and swear this affidavit for and on behalf of the Board.*
- 2. That the current Leave to appeal Out of Time is the second application by the Appellant for non-compliance to the Court Rules and Practice. The initial appeal was Gulf Seafood (Fiji Ltd v NLTB ABU 94 of 2016.*
- 3. The Appellant was granted leave by the Court of Appeal on 20<sup>th</sup> December 2017 to file its appeal in ABU 94 of 2016. The Appellant was given 28 days to file and serve Notice and Grounds of Appeal from the date of the ruling.*
- 4. The Appellant files its Notice and Grounds of Appeal on 28<sup>th</sup> December 2018 for ABU 94 of 2016.*
- 5. The Appellant filed for Security for Costs on 5<sup>th</sup> January 2018 for call over before the Chief Registrar on 23<sup>rd</sup> January 2018. Security for Costs was fixed at \$3000 and payment was made accordingly.*

6. *The Board had received a letter from the Appellant's Solicitors dated 2<sup>nd</sup> July 2018 regarding the documents to be part of the Court Record. Letter dated 2<sup>nd</sup> July 2018 annexed and marked "A". In that listing included the Judges Notes.*
7. *The Board replied to the Appellant's Solicitors for an inclusion Supplementary Bundle of Documents on the 26<sup>th</sup> July 2018 which is annexed and marked 'B'.*
8. *The Appellant has sufficient time from July 2018 to finalise the High Court Copy Records with the Court of Appeal Registry.*
9. *In response to paragraphs 8 to 16 of the Affidavit, the Appellant is shifting the blame to the Court of Appeal Registry for a blunder that they are responsible for.*
10. *Upon enquiring with the Court Registry, the Court of Appeal Registry has confirmed the Appellant did not comply with the Court of Appeal Practice Direction No.1 of 2008 in respect to the filing of the submissions within 6 weeks from the uplifting of the copy records.*
11. *In Appellant's affidavit is misleading as he has not informed the Court when the former appeal of ABU/ No.94 of 2016 was abandoned and the reasons why the appeal was abandoned, instead the Appellant's affidavit has focused the blame on the registry on the missing transcript from the High Court Trial.*
12. *In my experience of compiling copy records (in respect of the missing trial transcript – Judges Notes), it is the duty of the Counsel in carriage or the Firm to check that all documents are present and if a document is missing, we have to liaise with the Court Registry immediately before lodging the Final Copy Records for certification by the Chief Registrar.*
13. *The fault is not on the court of Appeal Registry but on the solicitors, in any event, once the Copy Records is filed, the Appellant could have taken steps to file a Supplementary Copy Records for the missing documents.*
14. *The Appellant has been given leave to appeal once already in ABU 94 of 2016 and has failed to prosecute the appeal properly due to their own actions, not the Court of Appeal Registry. If the Appellant had gone through the Judges*

*Notes while photocopy, it would have picked up the missing pages and liaised with the Court of Appeal Registry.*

- 15. Once the Copy Records has been filed with the Court of Appeal Registry, there is a timeline that everyone has to be accountable too.*
- 16. The Copy Records were filed with the Court of Appeal Registry on 29<sup>th</sup> April 2019 and the Appellant has failed to inform us in their Affidavit if it has been uplifted from the Registry or if so when was it uplifted.*
- 17. If the Copy Records were in fact uplifted, the Appellant was supposed to file its submission within 6 weeks from the uplifting of the Copy Records.*
- 18. The current application for leave to appeal out of time is the second attempt from the Appellant seeking the leave of the Court of Appeal and is merely abusing the court process due to its own actions or inaction.*
- 19. The Respondent strongly objects to the application for leave by the Appellant and seeks that the application be dismissed with costs to the Respondent”.*

#### Judicial Reception to affidavits filed by Litigation Assistants or Solicitors’ Clerks

- [5] The judicial thinking in that regard is reflected in a plethora of decisions, which in a recent ruling His Lordship, Kamal Kumar, (ACJ) noted. (Vide: Habib Bank Limited v Mehboob Raza and Ors; HBC 53.2005 (26 May 2020).
- [6] The propositions emanating from those decisions I extract as follows:-

(i) “Too often solicitors allow their law clerks to swear affidavits because it is all too convenient. Such conduct must be discouraged. It trespasses the demarcation between the client and Solicitor roles”

(Dr) Ramon Fermin Angco v (Dr) Sachinda Mudaliar & Ors (HBC 26 of 1997)

(ii) In Deo v Singh [2005] FJHC 23, it was noted that, “The swearing of affidavits in contested proceedings appears with alarming

regularity before the Courts”. [2018]FJHC 198. To the like effect is the case of Mishra Prakash & Associated v Nagan Engineering [Fiji] Ltd [2018] FJHC 198]

- (iii) The decisions in Tavo v Enasio [2019] FJHC 40, Media Metro Ltd, [2016] FJHC 1073 have all followed the earlier cited cases.

- [7] Having surveyed, inter alia those decisions, His Lordship observed thus:

*“Courts have time and again condemned filing of Affidavits by Law Clerks and Legal Executives employed by Solicitors but it seems that some Legal Practitioners have no regard to what is being said by the Court. This Court has time and again expressed its concern regarding filing of Affidavits by Solicitor’s clerk”*

- [8] Consequently, the impugned affidavit (at paragraph 26 of the said Ruling) was struck out.

Establishment of a judicial precedent through *cursus curiae* of the High Court

- [9] That consistent *cursus curiae* of the High Court I unhesitatingly adopt for the jurisprudence of the Court of Appeal thereby setting a precedent leaving it open for the full Court to determine on the issue subject also to any view that the Supreme Court may express in the future.

- [10] Consequently, the proposition I lay down is that, “Solicitors Clerks”, whichever label that they may attach to themselves (as “litigation assistants” or otherwise) affidavits filed by them in a cause will not be considered the only exception to that being if there was some acceptable reason such as causes beyond control where a party litigant was unable to swear such an affidavit.



- [11] In the instant case, the Respondent being a statutory body, I could not see any reason why some executive officer could not have filed the affidavit, which its “Litigation Assistant” filed.
- [12] Accordingly, I reject the said affidavit filed by the Respondent’s “litigation assistant”.
- [13] There being no counter affidavit to take into consideration, I accept the reasons for the delay adduced in the Affidavit of the Appellant’s Managing Director (particularly at paragraphs 7 to 15 thereof) and what he has averred in regard to the prejudice criterion. That leaves me to address the merits criterion.

The Merits Criterion – Reasonable Prospect of Success or Arguable Case?

- [14] This last hurdle an appellant is obliged to overcome has been variously described and which in some earlier rulings I had referred to as the “decisive criterion”. a view I have had to qualify to some extent in the light of some of the thinking reflected in the Supreme Court judgment in Fiji Industries Ltd v National Union of Factory And Commercial Workers (as per His Lordship Justice Keith) CBV 008 of 2016, 27 October, 2017.
- [15] Be that as it may, in as much as I have already determined on the other criteria as stated in paragraph [13] above, I looked at the “merits criterion” to see whether there is “an arguable case” which has been my preferred view which I re-iterated in a recent Ruling (vide: I-Taukei Land Trust Board v Salesbhi Geeta Ram, ABU 59/2018, 29 May, 2020).
- [16] That case involved “the Board’s” decision in determining as to, in the circumstances of that case, having regard to the provisions of the I-TLTB Act and the Regulations of 1984 made thereunder, there was a “a renewed lease” or “a new lease”.
- [17] That, in my view, amounted to an “arguable case” for which reason I granted leave.

Is there “an arguable case” in the instant case?

- [18] The Applicant/Appellant submitted that it has “good prospect” in succeeding in appeal. Learned Counsel adverted to the Notice and Grounds of Appeal attached to the written submissions dated 18 February 2020 in that regard.

The Grounds of Appeal urged

- [19] It was urged thus:

*“1. The learned trial Judge was wrong in law in finding (at paragraph 53 and 54 of the judgment) that:*

*“53. The Plaintiff’s contention that there should be a de-reservation prior to AL, was not supported by statutory provision or any case law. In contrary Section 15 the Act states that a lease for a native reserve in terms of Regulation 33 of the Act can be issued.*

*54. The said provision states as follows*

*‘Land in native reserve not to be alienated*

*16.-(1) Subject to the provisions of the Crown Acquisition of Lands Act, the Forest Act, the Petroleum (Exploration and Exploitation) Act, the Mining Act, and to the provisions of this section, no land in any native reserve shall be leased or otherwise disposed of.*

*(2) Leases or licences may with the consent of the native owners be granted by the Board to native Fijians in accordance with regulations made under section 33(emphasis is mine)”*

*because the Appellant contends that Section 16(1) of the i-Taukei Land Trust Act prohibits the leasing or otherwise disposing of land in any native reserve without first de-reserving such land pursuant to Section 17 of the Act.*

*2. The Learned trial Judge was wrong in law in holding (paragraphs 57,58 and 60) of the judgment) that an agreement to lease could be issued under Regulation 12 made pursuant to Section 33 of the i-Taukei Land Trust Act prohibits the*

*leasing or otherwise disposing of land in any native reserve without first de-reserving such land pursuant to section 17 of the Act.*

*3. The learned trial Judge was wrong in law in not accepting (at paragraph 61 of the judgment) that "the requirements in section 17(1) was pre-requisite for agreement to lease" because the Appellant contends that section 16(1) of the i-Taukei Land Trust Act prohibits the leasing or otherwise disposing of land in any native reserve without first de-reserving such land pursuant to section 17 of the Act.*

*4. The learned trial Judge was wrong in law in holding (at paragraph 62 of the judgment) that "de-reservation cannot be pre-requisite for an agreement to lease issued in terms of Regulation 12 of the Act, as it was 'subject to survey' because the Appellant contends that section 16(1) of the i-Taukei Land Trust Act prohibits the leasing or otherwise disposing of land in any native reserve without first de-reserving such land pursuant to section 17 of the Act.*

*5. The learned trial Judge was wrong in law in concluding (paragraph 70 of the judgment) that "the agreement to lease entered (into) between the Plaintiff and the Defendant was not contrary to section 15 and 16 and Regulation 12 in terms of section 33 of the Act" because the Appellant contends that section 16(1) of the i-Taukei Land Trust Act prohibits the leasing or otherwise disposing of land in any native reserve without first de-reserving such land pursuant to section 17 of the Act.*

*6. The learned trial Judge was wrong in law in assuming, holding or otherwise concluding that the landowners could enter into a valid and binding agreement with the Appellant over land in native reserve because the Appellant contends that the only legal entity that can enter into such an agreement is the i-Taukei Land Trust Board by virtue of section 4(1) of the i-Taukei Land Trust Act.*

7. *The learned Trial Judge was wrong in law and in fact in concluding that “The Defendant was not negligent in the process of granting the (agreement to lease) to the Plaintiff” because such a conclusion is not supported by the law (sections 16(1) and 17 of the Act) and the facts.*

8. *The learned trial Judge was wrong in law in finding that the Defendant was entitled to its counter claim because the Appellant contends that the agreement to lease on which such a claim is based is illegal and of no legal effect for the reasons given above and cannot support such claim”.*

#### Respondent’s submissions on the Criterion of ‘Merits’

- [20] Learned Counsel for the Respondent relied on and re-iterated what has been stated in the written submissions dated 22 June 2020 thus:

#### *“Merit of the Appeal*

*30. There are no merits in the Appellant’s Grounds of Appeal. The ruling by His Lordship, Justice Amaratunga are in two folds that the de-reservation is not a requisite to the Agreement for Lease issued under Regulation 12 of the i-Taukei Land Trust (Lease and License Regulation 1984 as it was subject to survey. The Learned Judge also stated that even if his reliance on the law in wrong, it was not the conduct of the Board that led to the failure of the prawn farming but it was because of the sour and bad relationship that the Landowners and the Plaintiff had developed towards each other that cause the failure of the business and not the Board’s action”.*

#### Assessment of the relative Contentions advanced by respective Counsel

- [21] Taking first the Contentions of the Appellant, on a perusal of what was urged, the following issues, to my mind, appear to warrant to be “arguable points” viz:

- (i) Should there be a de-reservation prior to alienation (or not) in the context of Sections 15 and 16 of the Native (now i-Taukei Land Act) read with Regulation 3 made under the Act and taken together with the provisions of Section 17 of the Act as well?
- (ii) Consequently, could an agreement to lease have been issued under Regulation 12 pursuant to Section 33 of “the Act” (Cap.134)?
- (iii) In the background of those issues, (if they should be answered in favour of the Appellant) could it have been held that, the landowners could enter into a valid and binding agreement with the Appellant over land in native reserve if in fact (and in law) the only legal entity that could have entered into such an agreement was “the Board” by virtue of Section 4(1) of “the Act”?

[22] As against that, learned Counsel for the Respondent (re-iterating what is contained in the written submissions, which I have re-capped above at paragraph [20] contended that, the ruling by His Lordship (the learned High Court Judge) “are in two folds that the de-reservation is not a requisite to the Agreement for (the) lease issued under Regulation 12 of the i-Taukei Land Trust Act” as it was subject to a survey”.

[23] Sitting as a Single Judge it is not my role to find “any error” in the High Court Judgment but rather to see whether there are “arguable points” for the full court to look into.

[24] In the facts and circumstances of this case I am inclined to grant orders sought in the alternative (that is Order 2 and Order 3 sought in the Applicant’s Summons).

[25] In the result, I proceed to make my Orders as follows:-

Orders of Court:

1. Leave to appeal is granted as stated in paragraph [24] above.
2. The Applicant/Appellant is cautioned that, failure on its part to comply with the terms of Order 1 above, the appeal will be struck off for non-compliance with Orders of this Court and/or non-prosecution of the appeal and/or on the basis that the appeal has been abandoned and the matter will be taken off the Cause List without any further notice.



.....  
**Almeida Guneratne**  
**JUSTICE OF APPEAL**