IN THE COURT OF APPEAL, FIJI

[APPELLATE JURISDICTION]

Civil Appeal No. ABU 003 of 2020

(HBC No. 271 of 2018)

BETWEEN : **ORISI VUKINAVANUA**

Appellant

AND : **ILAISA VUNAMOTU**

1st Respondent

AND : **FREESOUL REAL ESTATE DEVELOPMENT (FIJI) PTE LTD**

2nd Respondent

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

3rd Respondent

AND : **MATAQALI NARUKUSA**

4th Respondent

AND : **THE DESCENDANTS OF PAULINA LEWAIA**

5th Respondent

AND : **THE I-TAUKEI LAND AND FISHERIES COMMISSION THROUGH THE OFFICIAL ATTORNEY GENERAL OF FIJI, SUVAVOU HOUSE, SUVA OFFICE**

Interested Parties

Coram	:	**Almeida Guneratne, JA**
Counsel	:	**Mr. A. K. Singh for the Appellant** **Ms. O. Solimailagi with Ms. M. Ali for the Respondent**
Date of Hearing	:	**20 March 2020 (vacated but parties agreeing to a Ruling on the Written Submissions filed)**
Date of Ruling	:	**29 May 2020**

RULING

Brief Prelude to the circumstances that occasioned the ensuing Ruling

[1] When the matter was taken before me for hearing on 20 March 2020. Appellant was absent and unrepresented but Appellant's Counsel had sought the indulgence of Court to excuse his absence on his inability to be present in Court on account of the restrictions of movement due to COVID 19. Although the respective Counsel for the Respondents moved for a Ruling to be given on the written submissions already filed on behalf of parties, I declined to do the same given the situation that had arisen in the country. However, having made order for a further call over date 0n 18 May, 2020, I directed the Registrar to ascertain from the Appellant's counsel whether he would be amenable to have the matter determined on the basis of the said written submissions already filed by the parties.

[2] In response to that, I felt fortified in the fact that Counsel for the Appellant had agreed to that, subject to the rider that he be given 14 days to reply the Respondents' written submissions which application I granted. I have now before me the Appellant's submissions dated 14 May, 2020 in reply to the Respondents' submissions.

[3] Accordingly, having gone through the sets of written submissions filed by parties, and having given my mind to the matters adduced therein, I now proceed to give my Ruling while vacating the Order made by me on 20 March, 2020.

The Backdrop to the present Matter

[4] Arising out of a dispute between various i-taukei land owning units over the ownership of three parcels of i-taukei land, the Appellant as a representative of the Mataqali Taubere of Yavusa Taubere (MTYT) claimed that the three parcels of land are registered in the Register of Native Lands (RNL) to the MTYT and therefore being the "true native owner" thereof, the allotment of the said three parcels of land were given to the 1st , 4th and 5th Respondents for their limited use and occupation "dependent units". The appellant (as plaintiff) had further claimed that the aforementioned Respondents (defendants) had leased out portions of the said lands to the 2nd Respondent (defendant) which they could not have done without the prior consent of the plaintiff (the MTYT).

[5] Thereafter, the interested parties (Respondent) had filed affidavits which appeared to have revealed to the learned High Court Judge as confirming that an RNL had been issued to the alleged "dependent units" (following surveys) which had resulted in the learned Judge observing that once an RNL is issued, the defendant unit becomes a fully-fledged Land Owner Unit (LOU) with exclusive rights of ownership.

[6] It is in that initial background of facts, the learned Judge, having examined the statements of claim by the plaintiff, had perused the applications made by the 1st Respondent and the 2nd, 4th and 5th Respondents who in unison had moved to have the claim of the plaintiff (Appellant) struck out on the basis that the plaintiff's claim disclosed no "reasonable cause of action".

[7] The learned Judge in his impugned determination (order/judgment) held thus:

> *"17. Now, it may or may not be open yet to the plaintiffs to challenge the facts deposed to in the affidavits above. However, this is not the forum to challenge the facts in question. Those facts will need to be challenged through the procedures set out in the relevant i-Taukei Lands Trust Act 1940 and the (i-Taukei Reserves) Regulations 1940 and any other relevant subsidiary regulation.*
>
> *18. While I agree that I should only look at the facts as pleaded in the claim in striking out a claim on the ground that it discloses no reasonable cause of action, it is still an abuse of process to raise public law issues in a writ claim.*
>
> *19. In the final, I strike out the claim. I award costs to all the defendants as well as the interested party which I summarily assess at $500.00 (five hundred dollars) each."*

In the Aftermath of the said determination by the High Court

[8] The Plaintiff appealed against the said determination of the High Court.

[9] The matter of the said appeal having been mentioned on a call-over date before His Lordship, Justice Suresh Chandra, presumably to fix dates for hearing of the said appeal, it is when the Respondents had taken-up the Stand that, the impugned Judgment/Order of the High Court was interlocutory and not final and therefore the Appellant (plaintiff) was not entitled to maintain the appeal without having sought leave to appeal in the first instance that, His Lordship (Justice Chandra) had directed that written submissions be filed by parties on the matter (vide: His Lordship's direction on 18 February, 2020).

[10] It is in consequence thereof that, the Appellant within the 14 days directed by His Lordship filed his written submissions on 28/02/20. Although the Respondents written submissions were due as at 13th March, 2020, though not complied with (strictly), I took note of the fact that they were filed subsequently.

[11] In that regard, I gave my mind to the concept of "strict compliance" as opposed to "substantial compliance".

The Hearing in Question

[12] Notwithstanding that lapse on the part of the Respondents concerned I moved on to consider the impugned order/judgment of the High Court to ascertain whether it amounted to an interlocutory or a final order in the light of the established principles and precedents.

[13] That being the only issue before at this hearing I gave my mind to the plethora of Case law (precedents) as to the tests employed to ascertain whether an order/judgment is final or interlocutory in which regard I gave my mind to the celebrated decision in **White v Brunton** (1984) QB 570, wherein it was held that, the Courts were committed to what had come to be regarded as "the application approach" as opposed to "an order approach" in determining whether an order was interlocutory or final.

[14] In Fiji, the Court of Appeal in **Suresh Charan v Shah** (1995) 41 FLR 65, followed **White v Brunton** (supra) and "the application approach". It was held that, that approach looks at the nature of the application rather than the Order actually made. An Order is treated as final if the entire cause or matter would be finally determined whichever way the Court decided the application. Although at various stages in the judicial development in Fiji the "order approach" had been followed (vide: **Jetpatch Works (Fiji) Ltd. v. The Permanent Secretary for Works and Energy and Others** [2004] 1 FCA 213, the pre-ponderance of precedents has been in favour of

the "Application approach"003B **Suresh Charan v Shah** (supra); **Shore Buses Ltd v Minister for Labour** [1995] FCA, ABU 0055]; **Gounder v Minister of Health** [2008] FJCA 40, all (full) Court of Appeal decisions. Vide: also the Single Judge ruling in **Fai Insurance Ltd. V. Rajendra Prasad Brothers Ltd**, (Civil Appeal No. ABU 0032 of 2004S, 12 August, 2004) per Scott, J and **Chief Registrar v Devanesh Prakash Sharma & R. Patel Lawyers**, Civil Appeal ABU 86 of 2014, 27 January, 2016, per Calanchini, P.

[15] In **Gounder v. Minister of Health** (supra) the full Court of Appeal adapting the "Application approach" stated thus:

> *"Where proceedings are commenced in the High Court in the Courts original jurisdiction and the matter proceeds to hearing and Judgment and the Judge proceeds to make final orders or declarations, the Judgment and Orders are not interlocutory."*

(at paragraph 37 of the Judgment). At paragraph 38 the Court gave several examples of interlocutory applications.

[16] To the said examples of interlocutory orders given in **Gounder's case** may be added a Ruling made by the Commission under the Legal Practitioners Decree of 2009 as per the Ruling in **Chief Registrar v. Devanesh Prakash et al** (supra) per Calanchini, P.

[17] As against that, in **White v Brunton** (supra) itself, where the claim had been for re-imbursement by the defendant of moneys expended by the plaintiff on the construction of a private road, the question whether the defendant was under a contractual liability in respect of that expenditure being heard as a preliminary issue, it was held that the ensuing decision on the said preliminary issue was not a decision preliminary to a final order but was to be treated as a final order of this Court. In **Fai Insurances (Fiji) Ltd v. Rajendra Prasad Brother Ltd.** (supra), the plaintiff had

commenced proceedings by way of originating summons and sought declarations that an exclusion clause in its policy of insurance with the defendant did not apply to loss and damage which it said it had suffered as a result of a riot. It also sought damages. The issues for determination by the Court then being listed, only the penultimate issue as to whether the Court should order payment of an admitted amount of a sum related to damages was determined. The judgment did not include an assessment of damages. On these facts Scott, J sitting as a Single Judge of the Court of Appeal was of the view that the order of the High Court was 'final'. In that case, Scott J had regard to Order 59 Rule 1A (4) of the English Rules of Procedure which provides that, "Where the trial of a cause or matter is divided into parts a Judgment or Order made at the end of any part shall be treated as if made at the end of the complete hearing or trial". It is to be noted that, the said English Rules (generally referred to as "the White Book") are adopted in terms of the provisions of Section 24 of the High Court Act and Rules (Cap.13A).

[18] The words "as if made at the end of the complete hearing or trial" carry significance in the context of the ""Application approach" in determining whether an impugned order is to be treated as "interlocutory or final".

[19] Having said that, I recall at this point Lord Denning's remarks on the aforesaid approaches when he said: "This question of 'final 'or 'interlocutory' is so uncertain that the only thing for practitioners to do is to look up the practice books and see what has been decided on the point." (vide: **Salter Rex v. Ghosh**) [1971]2QB 597 at 601).

[20] I had on an earlier occasion also expressed the thinking reflected above.

[21] However, I did have regard to the decision in **Miller v National Bank of Vanuatu** referred to in the list of authorities tendered on behalf of the 2nd to 4th Respondents, notwithstanding which I hold the view (agreeing with the Appellant's contention)

that, once a claim of a substantive nature is struck out totally, the suit had been brought to an end.

Conclusion

[22] For the aforesaid reasons, I hold that, the Respondents' objection based on their argument that, the Appellant had misconceived his remedy (if any) in having come by way of a final appeal and not having sought leave to appeal in the first instance is not entitled to succeed.

[23] Accordingly, I reject the Respondents objection to the Appellant's present Application to appeal.

Orders of the Court:

1. The objections to the Appeal (of the Plaintiff-Appellant) are rejected thereby leaving it open for the parties to argue the substantive matter before the Full Court on the substantive merits as urged in the proposed Grounds of Appeal.

2. The Appellant may advise himself to take future steps to prosecute this appeal as requisite in law.

3. In the circumstances of the issue, being essentially a matter of law, I make no order as to costs.

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Almeida Guneratne

JUSTICE OF APPEAL