

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

CIVIL APPEAL NO. ABU0008 of 2021

(Lautoka Civil Action No: HBC 58 of 2005

consolidated with HBC 74 of 2005)

BETWEEN : **KAWAKAWADAWA (FIJI) LIMITED** *Appellant*

AND : **TAVEUNI ESTATES** *Respondent*

Coram : (Dr) Almeida Guneratne, P

Counsel : Ms R. Pranjivan and Ms S Lodhia for the Appellant
Mr S. Valenitabua for the Respondent

Date of Hearing : 12th October, 2022

Date of Ruling : 9th November, 2022

RULING

[1] The High Court by its ruling dismissed an application by the Appellant that, the substantive action filed by the Respondent be stayed until the hearing and determination of two appeals pending in this Court bearing Nos. ABU0045 of 2018 and ABU0056 of 2018.

- [2] The reference to the said ABU (Court of Appeal) cases, is there in the Respondent's submissions and in the Ruling of the High Court that is sought to be put in review presently (vide: paragraph 3 of the said Ruling under review).
- [3] Having studied the matter, on the material on Record, I did not feel the necessity to delve into the history behind the said two appeals, given the issue involved in the present application before me, but shall make reference to the said two cases at a later stage.
- [4] I felt fortified in taking that stance on giving my mind to the basis upon which the Appellant has preferred the present application and the edifice on which the Respondent has objected thereto.
- [5] Consequently, I proceed to consider the aspects in this matter that I felt I was required to consider and deal with in the background of the impugned judgment of the High Court that has been put in issue before this Court.
- [6] It is in that background conspectus, when this matter came up for hearing on 12th October, 2022 that, Counsel, submitting that they will be relying on their respective written submissions filed of record, moved for and made brief oral submissions following on the said written submissions.

The gist of the Respondent's submissions

(who sought a right of pre-audience for he had filed a striking out application)

- [7] The Respondent's learned Counsel submitted thus:-

The Delay

- (i) Labelling as the 1st issue he wished to raise, Counsel submitted that, the initial “*stay order*” involved in the case being refused by the High Court, yet, leave to appeal to the Court of Appeal being granted, that right the Appellant had failed to make use of, being 77 days late in doing so.

[8] The Appellant’s counsel conceded the Respondent’s arguments on the said aspect.

Respondent’s contention that, the impugned High Court judgment being interlocutory in nature (undisputed by the Appellant), Notice of Appeal should have been filed and served within 21 days as mandated by the Rules

[9] Appellant’s Counsel’s submissions on that was that, the Respondent’s reliance on Section 20(1)(j) and/or (g) of the Court of Appeal Act was misconceived and therefore, “*a striking out application*” cannot be allowed.

Respondent’s counter argument thereto

[10] In a brief rejoinder, learned Counsel for the Respondent submitted that, even if the wrong provisions had been cited, the admission on the part of the Appellant that, the present application was out of time by 77 days, that was sufficient to have it struck out.

[11] I do not see the reason why the Respondent said “*even if the wrong provisions had been cited*” because, Section 20(1)(g) of “the Act” covers a situation where a single Judge is conferred with power to dismiss an appeal “*for other causes specified in the rules.*”

[12] Consequently, the Respondent’s position being that, the Appellant was in breach of Rule 16(a), the Respondent was in fact within his right to have come under Section 20(1)(g) of “*the Act.*”

Respondent’s contention that, the Appellant’s grounds of appeal (as urged in the Notice of Appeal) have gone beyond the basis on which the High Court had granted leave to appeal against its impugned (interlocutory) judgment dated 11th June, 2020.

[13] The learned Judge in his ruling dated 11th November, 2020 in granting leave to appeal its judgment dated 11th June, 2020 held thus:

“ _ _ _ in view of the stay of the Judgment in HBC 543/2004, I grant the defendant leave to appeal my Ruling of 11 June, 2020 on ground stated in paragraph 1 (c) (iv) above.”

(vide: paragraph 7 of the ruling dated 11th November, 2020)

[14] The said ground referred to by the learned Judge was *“If the ruling (that is, the Ruling of 11th June 2020) stands the Application would suffer grave injustice for the reason(s) (that) the Respondent obtained a stay of execution of the Transfer Orders conditional on it delivering to AMB the certificates of title to those lots, as a consequence of which the Respondent remains reinstated as a proprietor of those lots.”*

[15] It is on that basis that the Respondent argued strenuously that, the other grounds on which leave to appeal was sought against the High Court judgment of 11th June, 2020 must be struck out.

Determination

[16] I agree that grounds 1 and 2 of the Notice of Appeal must be struck out. But, I am unable to subscribe to the Respondent’s contention that the other grounds must be struck out.

[17] How could the final Court look at only the said ground referred to at paragraph [13] above in isolation? The said ground is intrinsically connected to what the Appellant had urged in paragraph 1(c) (i) to (iii) and indeed in paragraph 1(v) (A), (B) and (C) of the Appellant’s grounds.

Not grounds presented “on the fly”

[18] To borrow an expression from the full Court decision in **Life Insurance Corporation of India –v- Arbitration Tribunal & Others [2008] ABU 69 of 2006**, those grounds cannot be regarded as grounds presented “on the fly.” I hold that the said grounds referred to in paragraph [16] above of this Ruling come well within the parameters of Rule 5 of the Court of Appeal Rules.

Re: **(i) the chances of success or merits of appeal and (ii) the prejudice criterion (relatively assessed)**

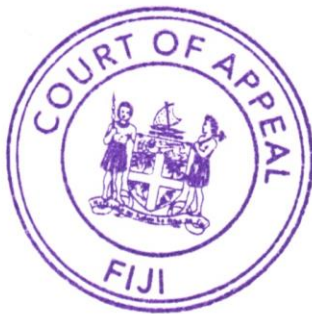
[19] The matter of the appeal is before the full Court for determination on the basis of what I have articulated in paragraph [16] above of this Ruling. On the prejudice criterion, the learned High Court Judge’s view recapped by me in paragraph [14] of this Ruling, I endorse fully.

[20] In the overall analysis of the issues involved, while I do agree with the Respondent that, the Appellant has been in breach of compliance with the procedural rules of Court, on the decisive criterion of reasonable (or arguable) prospects of success in appeal, (vide: **NLTB –v- Khan** [2013] FJSC 1 per Gates, P.), I proceed to make my orders as follows.

Orders of Court

[1] *The Respondent’s application to strike out the Appellant’s Notice of Appeal is rejected and/or dismissed save as in in regard to grounds 1 and 2 urged in the Appellant’s said Notice of Appeal filed on 17th February, 2021, which grounds as urged therein are disallowed.*

- [2] *The Registrar of this Court is directed to fix a call over date in terms of the Rules of Court to set time lines for the filing of written submissions and to fix a hearing date for the hearing of the appeal before the full Court.*
- [3] *The Registrar is further directed to make available the material (files) pertaining to ABU/0045/2018 and ABU/056/2018 to the full Court at the hearing of the appeal.*
- [4] *For the reasons stated in paragraph [19] of this Ruling and Order 1 above, I make no order as to costs.*



Almeida Guneratne

HON JUSTICE ALMEIDA GUNERATNE
PRESIDENT, COURT OF APPEAL