

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

CIVIL APPEAL NO. ABU 019 of 2021

Suva High Court HBC 166 of 2018

BETWEEN : 1. PHILIP SATYANAND
2. PITA CILI
3. VILIAME VAKASAUCAU
4. PRITAM SINGH
5. THE GENERAL CONFERENCE OF THE
ASSEMBLIES OF GOD OF FIJI

APPELLANTS

AND : 1. AISAKE KUNANITU
2. WILLIAM GREEN KUNANITU
3. KINI TUIDRIVA
4. JIOSEFATI VAKALOLOMA
5. EVERGREEN CHRISTIAN CENTRE OF THE
ASSEMBLIES OF GOD INTERNATIONAL

RESPONDENTS

Coram : The Hon. Justice Filimone Jitoko

Counsel for the Appellant : Mr. I. Fa (Snr) and Mr. I. Fa (Jnr) [Fa & Co]

Counsel for the Respondent : Ms. L. Jackson [Jackson Bale Lawyers]

Date of Hearing : 16 October, 2023

Date of Ruling : 2 November, 2023

RULING

- [1] This is the Appellant’s Summons for renewal of application for leave to appeal from the refusal of the High Court to grant leave to appeal to the Appellant from its Ruling of 7 August, 2020 wherein the court refused the Appellant’s application to have two (2) preliminary issues tried before the hearing, under Order 33 r.3 of the High Court Rules.
- [2] The case is about a dispute between The General Conference of the Assemblies of God of Fiji (GCAOG Fiji) a religious body registered under the Religious Bodies Registration Act Chapter 68, and its executives, and the Evergreen Christian Centre Assemblies of God International (ECCAOG International), and its officials, previously a “*Local Assembly*” of the GCAOG Fiji within the meaning of its Constitution, but has, since 1 October 2011 broken away from AOG Fiji, over doctrinal differences. ECCAOG International has since been registered as a religious body under the Religious Bodies Registration Act.
- [3] At the heart of the dispute are the two (2) church properties, namely Lot 36 DP3291 (CT 1441) and Lot 37 DP3291 (CT1422) which had been acquired by the local congregations of the ECCAOG International, during the time when it was a “*Local Assembly*” of the GCAOG Fiji.
- [4] Section 1 of Article XIV of the GCAOG Fiji Constitution deals with “*church property*” and for completeness, I will cite the whole section as follows:

“Article XIV Property

Section 1. Church Property

- a. For the purpose of this section, the term “church property” means all or any part of the lands, building, tenements, or hereditament, purchased, leased and used for the benefit of the Assemblies of God of Fiji, and includes as such church buildings, pastors residences halls, and camp grounds.*
- b. For clarification, all other properties including furniture, conveniences, musical instruments, and other chattels, purchased and used for the benefit of the local church, shall be held by the*

local church in accordance with the provisions of its constitution and bylaws.

- c. All “church property” purchased by the Local Assembly shall be held in trust in the name of The General Conference of the Assemblies of God of Fiji.*
- d. All “church property” purchased by Divisional Councils shall be held in trust in the name of The General Conference of the Assemblies of God of Fiji.*
- e. All “church property” purchased by General Conference and/or Executive Committee shall be held in trust in the name of The General Conference of the Assemblies of God of Fiji.*
- f. All “church property” purchased by recognized Institutions of the Assemblies of God of Fiji shall be held in trust in the name of The General Conference of the Assemblies of God of Fiji.”*

[5] At its extra-ordinary meeting of 25 September, 2011, the ECCAOG International, passed, inter alia, Resolution 3 which stated;

“Approval for the Transfer of our two [2] church properties: Lot 36 CT 1441 & Lot 37 CT 1442 from the Trustees of the General Conference of the Assemblies of God of Fiji to the Trustees of Evergreen Christian Centre of the Assemblies of God of Fiji.

Objects & Reason:

This is appropriate and should be done as the normal and natural thing in severing our Affiliation with the General Conference of the AOG of Fiji as the Property belongs to our Congregation and the need to manage and take control our own properties. After all it is our church congregation that pays everything on the properties with no single cent/monies given by the General Conference of the Assemblies of God of Fiji. By approving the 2nd Resolution we are free and no longer bound by the AOG General Conference Constitution and administration. Furthermore, we are a registered Religious Body that has the legal right to operate and run our own business.

[6] This followed closely the suspension, by the Credential Committee of the GCAOG Fiji, of the leading officials of the ECCAOG International on 7 June 2011 and finally the letter of

termination and withdrawal of the Credentials of the leader of the break-away group, Rev Aisake Kunanitu, as a pastor in the church, on 1 September 2011.

- [7] In response to the three (3) Resolutions passed by the ECCAOG International at its meeting of 25 September, 2011, and specifically Resolution 3 on the church properties, the General Secretary of the GCAOG Fiji emphasized that:

“The Constitution of the General Conference of the Assemblies of God of Fiji under Article XIV Section 1c stipulates that ‘All Church property purchased by the Local Assembly shall be held in trust in the name of the General Conference of the Assemblies of God of Fiji.’”

- [8] There subsequently was a passing off action successfully instituted by the GCAOG Fiji against the ECCAOG International, for the use of the words *“Assemblies of God of Fiji”*.

- [9] Eviction proceedings and vacant possession on both properties, Lot 36 DP3291 (CT13441) and Lot 37 DP3291 (CT13442), was sought and successfully obtained by GCAOG Fiji, the appellant, and on 1 June 2018, through a Writ of Possession, it took possession of the properties.

- [10] The respondents on 6 June 2019 filed their Statement of Claim (HBC 166 of 2018) against the GCAOG Fiji and its officials claiming constructive trust and proprietary estoppel, and sought injunctive and declaratory reliefs and/or compensation for their forceful and unlawful possession of the two properties.

- [11] It is against this backdrop that the Counsel for the Appellants had sought O.33 r.3 proceedings

- [12] Order 33 r. 3 states:

“The court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact or partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.”

Leave to Appeal

- [13] Both counsel agree that the 21 February, 2021 Ruling of the High Court in refusing leave to the Appellants' (Plaintiffs') application for leave to appeal its earlier Ruling of 7 August 2020, is an interlocutory judgment. There is no issue also that this leave to appeal to this court is compliant with section 12 (2) (f) of the Court of Appeal Act and Rule 26 (3) of the Court of Appeal Rules.

Arguments Against Granting of Leave

- [14] Counsel for the Respondents submitted with support from leading authorities both local and Australian cases, the strong presumption against granting leave to appeal from interlocutory orders. The Fiji Court of Appeal decision referred to, the judgment of Tikaram P in **Totis Incorporated Sport (Fiji) Limited and Richard Evanson v Clark and Sellers** (unreported ABU 35 of 1996, 12 September 1996) at page 15, stated the principle thus:

“It has long been settled law and practice that interlocutory orders and decisions will be seldom be amenable to appeal. It is for this reason that have to appeal against such orders is usually required.”

Courts have repeatedly emphasized that appeals against interlocutory orders and decisions will only rarely succeed.

The Fiji Court of Appeal has consistently observed the above principle by granting leave only in the most exceptional circumstances.”

- [15] The issue of delay in dispensing of justice by the irreverent challenge to orders of Judges of the first instance was highlighted in the New South Wales case. **In re the Will of F. B. Gilbert (Deceased)** 46 SR NSW 318 as per Jordan CJ at p.325: see para 3.9

*“... as was pointed out by this Court in **In re Ryan**, there is a material difference between an exercise of discretion on a point of practice or procedure and an exercise of discretion which determines substantive rights. In the former class of case, if a tight rein were not kept upon interference with the orders of judges of first instance, the result would be disastrous to*

the proper administration of justice. The disposal of cases could be delayed indefinitely, if a litigant with a long purse or a litigious disposition could, at will, in effect transfer all exercises of discretion in interlocutory applications from a judge in chambers to a Court of Appeal. But an appeal from an exercise of a so-called discretion which is determinative of legal rights stands in a somewhat less stringent than those adopted in matters of practice. Leave should only be granted to appeal from an interlocutory judgment or order, in cases where substantial injustice is done by the judgment or order itself. If the order was correct that it follows that substantial injustice could not follow.”

- [16] The Respondents also referred to other Court of Appeal cases of **Kelton Investments Limited and Tappoo Limited v Civil Aviation Authority of Fiji and Motibhai & Company Limited** [1995] FJCA 15; ABU 34d of 1995 (18 July, 1995) and **Dinesh Shankar v FNPF Investments Limited and Venture Capital Partners (Fiji) Limited** [2017] FJCA 26; ABU 32.2016 (24 February 2017) which adopted the principles set out in the Supreme Court of Victoria case of **Niemann v Electronic Industries Ltd** (1978) VR 431 where Murphy J at p.441 has alluded to an earlier case of **Perry v Smith** (1901) VLR 66 where the court held that leave should only be granted in cases where substantial injustice is done by the judgment or the order itself, continuing:

“...If the order was correct, then it follows that the substantial injustice could not follow. If the Order is seen to be clearly wrong, this is not alone sufficient. It must be shown, in addition, to effect a substantial injustice by its operations.”

He concluded thus:

“It appears to me that greater emphasis must lie on the issue of the substantial injustice directly consequent on the order. Accordingly, if the effect of the Order is to change substantive rights, or finally to put an end to the action so as to effect a substantial injustice if the order was wrong, it may easily be seen that leave to appeal should be given.”

- [17] In respect of the present application the Respondents contends that the Court before deciding to grant the Appellant’s leave to appeal application, it must be satisfied that:

- “(a) *The Ruling of the lower Court delivered on 07 August 2020 was wrong, and*
- (b) *That substantial injustice would result in the orders made on 07 August 2020 were allowed to stand.*”

[18] The Respondents submit that the High Court’s Ruling of 7 August 2020, was right given that the Court’s final determination of the contentions issues between the parties are ones of mixed law and facts and will require witnesses to adduce evidence.

[19] Secondly, the counsel for the Respondents’ further submits, there will be no substantial injustice to the Appellants that will ensue if the Ruling of 7 August 2020 were allowed to stand and the matter proceeded to a full hearing, in that:

- (i) their rights to defend the Respondents’ claim will not be extinguished by the Ruling,
- (ii) there has not been a change to their rights since the Ruling, and
- (iii) their defence to the claim remain unaffected.

Arguments for Granting of Leave

[20] For their part, the Appellants stressed it is trite law that in deciding whether to grant or otherwise an application for leave to appeal, a major consideration is whether an appellant has good grounds of appeal with good prospects of being successful. Counsel referred to the principle summarised by Calanchini J in **Denarau Corporation Limited v Slatter & Gutherine Co Ltd** [2013] FCA 64 stating:

“Leave will be more readily granted when legal rights as distinct from matters of practice and procedure are involved and some injustice may be caused.”

[21] This being an interlocutory judgment of the High Court, the Appellants are seeking redress

pursuant to section 12 (2) (f) of the Court of Appeal Act. It is well established in the High Court with authorities in **Khan v Suva City Council** [2011] FJHC 272; **Patel v Kant** [2014] FJHC 252 that the test in the application for leave for appeal from interlocutory judgments or orders if it meets the threshold requirements of the following:

- (i) substantial injustice would be caused to the party seeking to appeal if the Order or Ruling is allowed to stand,
- (ii) that the Order or Ruling being appealed will put an end the action or a clearly defined issue in the action: **Fiji Roads Authority v MWH New Zealand Ltd** HBC 249/2016, including the final determination of a substantive right of a party: **Dinesh Shankar v FNPF Investments Limited & Or** (supra), and
- (iii) the Appellants show that the intended appeal has some realistic prospect of succeeding.

[22] In determining (iii), the Court is not required to analyse whether the grounds of proposed appeal will succeed, but merely whether there is a real prospect of success: **Hunt v Pearsegood** (2000) The Times 20-Oct-2000; and “*real prospect of success means that the prospect of success must be realistic rather than fanciful*”: **Swain v Hillman** 1 All ER 91.

The Application of Order 33 R 3 of the High Court Rules

[23] Both counsel referred to the Supreme Court case of **Fiji Electricity Authority v Punjas Flour Ltd** [2022] FJSC 37; CBV0013. 2019 (26 August 2022) as the authority of how O.33 r.3 is to be applied.

[24] It is, in my view, important to set out the Supreme Court’s judgment on the procedure and process under it, in some details, to assist the court in deciding the application before it. After citing the relevant provisions, the Supreme Court stated as follows:

“97 *The word “may” used in the said Order shows that an order to try a preliminary issue cannot be obtained as of right. Further, the word “may” has conferred power on the court either to allow or refuse such an application.*

98 *Further, by the use of the words “or otherwise” legislature made provision for any party to make an application to obtain an order to try the issues before the trial. Thus, the said Order casts a duty on the court to judicially evaluate such an application and make an appropriate Order by using judicial discretion. Hence, in order to use judicial discretion to evaluate such an application, it is necessary to have materials before court.*

99 *Moreover, such an application should justify the court to try the preliminary issues before the trial. In this regard, such an applicant should satisfy court that trying the preliminary issues at the first instance shall dispose the case or substantial part of the case, and thereby, it will reduce the time taken to decide the case and the costs of the parties involved in the litigation. Further, the words “and may give directions as to the manner in which the question or issue shall be stated.” Hence, Order 33 rule 3 requires the court to evaluate the materials before it and make an appropriate order.*

100. *Furthermore, once such an application is made under Order 33 rule 3, it should be served on the other party so that the other party can either consent to the said application or oppose it. Thereafter, the court should hear the parties and make an appropriate Order.*

101 *Moreover, the courts will not try issues before the trial which are complicated and mixed with law and facts. A similar view was expressed in *Salim v iTaukei Land Trust Board* where it was held:*

“The issue is mixed law and fact and needs the hearing of the witnesses in this matter by the court. This type of case is not justified to deal in terms of Order 33 of the High Court Rules of 1988, as the matter is not complicated and will not serve any purpose except the delay and cost by proceeding this path. It is the court that needs to decide there is no need to proceed with Order 33 of the High Court Rules of 1988.”

[25] The Court in support of the reservation expressed in **Salim v iTaukei Land Trust Board** [2014] FHC 217; HBC 37.2012 (28 March 2014), also referred to Lord Wilberforce’s view on the same in **Tilling and Another v Whiteman** [1979] 1 All ER 737 sy [[738 – 739, holding that:

“I, with others of your Lordships, have often protested against the practice of allowing preliminary points to be taken, since this course frequently adds to difficulties of courts of appeal and tend to increase the cost and time of legal proceedings. If this practice cannot be confined to cases where the facts are complicated and the legal issues short and easily decided, cases outside this guiding principle should at least be exceptional.”

[26] The Supreme Court in the end, agreed that in the circumstances of the case, an application to invoke the discretionary powers of the court under O.33 r.3 was in order.

Analysis

[27] The Respondents’ Statement of Claim of 6 June 2019 sought injunctive and declaratory reliefs against the Appellants from evicting them from the two (2) church properties (Lot 36 DP 3291 CT 13441, and Lot 37 DP 3291, CT 13442) together with a declaration that they are beneficial owners and, finally an order for the Appellants to transfer to the Respondents these properties.

[28] In the pleadings before the court, the Appellants averred that the 1st to 4th Respondents were at the time of the acquisition of the two properties, members of the GCAOG Fiji, and also the 5th Respondent, the ECCAOG International was a “*Local Assembly*” of the 5th Appellant, and that under Article XIV for the GCAOG Fiji Constitution, all church properties purchased or acquired by the “*Local Assembly*” are held in trust in the name of the GCAOG Fiji.

[29] The Respondents on the other hand, assert that they have beneficial rights to the properties by virtue of the fact that they, and the members of the “*Local Assembly*” now the ECCAOG International, had purchased the properties themselves notwithstanding the provisions of the GCAOG Fiji Constitution. The Respondents’, arguments in this regard are based on the equitable remedies of constructive trust and proprietary estoppel , although, as the Appellants correctly pointed out, the Respondents had not, in the pleadings, given any particulars or details to support their equitable remedies propositions.

[30] It is in this context that the Court views the two preliminary issues raised by the Appellant's in their O.33 r.3 application, to wit:

- “1. Whether the 1st – 4th Respondents as former members of the 5th Appellant by virtue of their voluntary actions to sever ties with the 5th Appellant and to set up their own church outside the 5th Appellant, are entitled to lay beneficial claim in law to the church properties, in particular CT 13441 and CT 13442 and any improvements thereon, they had occupied and used whilst being members of a local church under the 5th Appellant; and*
- 2. Whether the 5th Respondent, a church set up by the 1st – 4th Respondents, outside and independent of the 5th Appellant's Constitution, is entitled to lay any beneficial claim in law to the church properties, in particular, CT 13441 and CT 13442 and any improvements thereon, used by the 1st – 4th Respondents being members of the local church under the 5th Appellant?”*

[31] It seems to me, that the issues raised as preliminary issues to be decided by the Court in the Appellants' O.33 r.3 application, are essentially legal issues pertaining to the interpretation of the GCAOG Fiji Constitution and to the proprietary rights and interests of the Church and its members that arise thereto. Counsel for the Respondents submit that other provisions of the 5th Appellant's Constitution showed and intended that the 5th Respondent was always meant to be the ultimate beneficiary of the properties. This too is a legal issue that can be addressed together with the preliminaries.

[32] In my view, and following the guidelines set out in the **Fiji Electricity Authority** case (supra), so long as the court is convinced that the preliminary issues are straight forward and if dealt with first, may facilitate the resolution of the case, without proceeding to a full hearing, then it is an appropriate occasion for the court to seriously consider an O.33 r.3 application. Although it must be said, that rule 3 does state that the question or issue to be addressed can be *“of fact or law or partly of fact and partly of law.”*

[33] It is not, as averred by the Respondents, a primary requirement that the Court has first to be satisfied before exercising its discretion in favour of O.33 r.3, that the determination of the preliminary issues will bring an end to the action. Nor is the conclusion of the High Court, to

whit: “In my view, the court should not try issues as preliminary issues unless the entire matter could be disposed of whichever the way the issues are answered,” correct interpretation of O. 33 r.3 and especially in the light of the Supreme Court’s decision in the **Fiji Electricity Authority** (supra). As Winter J pointedly stated in **Naqa v FEA** C.A. No. HBC 0237.2002:

“...Order 33 Rule 3 and 4 allow the Court to isolate any particular issues or questions for separate trial thus eliminating or reducing the delay and expense in determining an entire matter where a preliminary issue might be decisive of the litigation.

If I am satisfied that such an order would have the beneficial effect of expediting the hearing and eliminating the need for expensive trial preparation resulting in substantial saving of costs then it would be sensible for me to grant the order.”

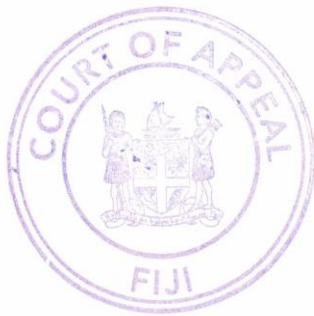
[34] To order a trial of preliminary issues under O.33 r.3 is an exercise of discretionary powers by the Court having taken all the evidence available into consideration and bearing in mind the nature of the issues to be addressed, to the savings as expense and time, as it relates to both the litigants and the Court and efficacy in case management. The parties are on equal footing. This Court’s judgment in **Rev. Sairusi Kamanalagi Soqeta & Ors v. Rev. Paula Tikoinakau & Ors** CA No 21 of 1993, is persuasive to the arguments in favour of granting the leave being sought.

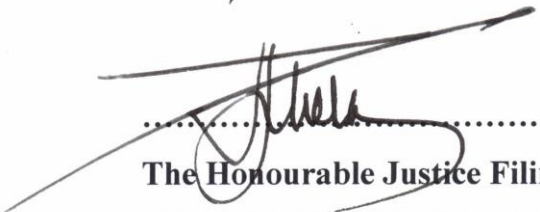
[35] The threshold requirements laid down in **Khan v SCC** (supra) and **Patel v Kant** (supra) for leave to appeal from interlocutory judgments are satisfied, in that, if the Ruling stands, and the matter not dealt with expeditiously and fairly, it would greatly prejudice the Appellants as well as the Respondents, in the time and money that will be expended; that there is a possibility that the determination of the substantive rights of the parties may put an end to the action; and there is, in any case, a realistic prospect of the appeal succeeding.

[36] I am in the end, satisfied that there is merit in application for leave to appeal and I therefore make the following Orders:

1. That leave be and is hereby granted, to the 1st – 5th Appellants to appeal the decision of Seneviratne J of 7th August 2020.

2. *That there be a Stay of the proceedings on Civil Action HBC 166 of 2018 until the determination of the appeal.*
3. *There be enlargement of time granted, if necessary, to file and serve the Notice and Grounds of Appeal.*
4. *Costs in the cause.*




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The Honourable Justice Filmone Jitoko
PRESIDENT, COURT OF APPEAL