

IN THE HIGH COURT OF FIJI

(WESTERN DIVISION) AT LAUTOKA

Civil Action No. HBC 230 of 2000/L

BETWEEN : **SAROJNI** also known as **SAROJNI LAL** also known as **SAROJNI SUCHIT** also known as **SAROJNI SAMUJ** also known as **SAROJNI SUCHIT DEVI** also known as **SAROJINI SUCHIT DEVI** of 21 Kikau Street, Samabula, Fiji, engaged in Domestic Duties and Administratrix of the **ESTATE OF SHANTI LAL SAMUJH** also known as **SHANTILAL** also known as **SHANTHILAL** of 21 Kikau Street, Samabula, Fiji, Deceased, Intestate.

PLAINTIFF/RESPONDENT

A N D : **NATIVE LAND TRUST BOARD** now known as **iTAUKEI LAND TRUST BOARD**, a body corporate established under the iTaukei Land Trust Board Act, Cap 134 and having its registered office at 431 Victoria Parade, Suva.

1st DEFENDANT/APPLICANT

A N D : **APISAI** and **BANSI**, both of Nawaka Village, Villager and Farmer in their own capacity as members of Tokatoka Vunaboboi, Mataqali Bua and **SUSU** also of Nawaka Village, Villager and Farmer, in his own capacity and in a representative capacity as Turaga ni Mataqali Bua, Tokatoka Vunaboboi, Nawaka Village, Nadi, Fiji.

2nd DEFENDANT

Counsel : Ms A L Komaitai with Mr P Nayare for applicant

Mr V M Prakash for respondent

Date of Hearing : 20 June 2016

Date of Ruling : 04 November 2016

R U L I N G

[On Reinstatement of Appeal]

Introduction

[01] This is an application filed by the original first defendant/applicant (the applicant) seeking reinstatement of appeal that was deemed abandoned. The application made pursuant to Order 2, Rule (1) and Order 3, Rule (4) of High Court Rules 1988 (HCR) seeks orders:

- *That the Appellant/Original 1st Defendant's appeal by way of Notice of Appeal filed on the 17th September, 2015 and deemed abandoned by the provisions of Order 59 rules 17 (2) and (3), be reinstated and restored to the cause list.*
- *That the Appellant/Original 1st Defendant be given unconditional leave to file summons returnable before a Judge for directions in accordance with the provisions of Order 59 Rule 17 (2).*
- *That cost of this application be in the cause.*

[02] The application is supported by an affidavit sworn by Tomasi Duanasali.

[03] The plaintiff/respondent (the respondent) opposes the application and filed affidavit in opposition of Ms Samujh.

[04] At hearing both parties made oral submissions and also filed their respective written submissions.

Background

[05] In 2000, the plaintiff brought this action against the defendants. The matter was tried before former Justice Phillips where her ladyship dismissed the action against the first defendant, iTLTB (the Board) or (the applicant) in this proceeding. In her ruling of 11th July 2008 she ordered that:

'That the Plaintiff's action against the NLTB is dismissed with costs in the sum of \$2000.00 to be paid to the NLTB.

The 2nd Defendants are to pay the Plaintiff the sum of \$20,000.00 inclusive of interest plus costs in the sum of \$2000.00.'

[06] The Plaintiff then appealed that judgment to the Court of Appeal. In June 2011, the Court of Appeal allowed the appeal and ordered that:

1. *The Appeal is allowed. The orders made by the Trial Judge, her Ladyship, Gwen Phillips, J are set aside.*
2. *The first Respondent pay to the appellant damages for breach of his entitlement to quiet enjoyment as determined by the Master.*
3. *The second Respondent pay damages to the Appellant for trespass to land and conversion of goods as determined by the Master.*
4. *With regard to the costs of Appellant before Madam Justice Phillips each respondent pay to the appellant costs assessed at \$1000 (total \$2000).*
5. *With regard to the costs of the Appellant in the Court of Appeal, each Respondent pay to the Appellant costs assessed at \$2000 (total \$4000).*

[07] The Board then filed a petition to the Supreme Court. However, in January 2011, the Supreme Court dismissing the petition ordered that:

'For the aforesaid reasons, we refuse special leave to appeal and dismiss the application filed by TLTB. In all the circumstances of this case, we do not make any order for costs.'

[08] The matter then was put before the Master of the High Court for assessment of damages. The Master assessed the damages and by his ruling of 2 January 2015 made the following orders:

- | | | |
|----|---|--------------------|
| a) | <i>Compensation for Building on the Land</i> | <i>\$83,000.00</i> |
| b) | <i>Damages for TLTB's breach of Lal's Right to Quiet Enjoyment of Land</i> | <i>\$ 8,000.00</i> |
| c) | <i>Loss of Income from the Production of Sugar Cane, Animals, Fruits & Vegetables</i> | <i>\$99,400.00</i> |
| d) | <i>2nd Defendant's conversion (severally)</i> | <i>\$10,000.00</i> |
| e) | <i>2nd Defendant's trespass</i> | <i>\$10,000.00</i> |

| | |
|---|----------------------------|
| f) Exemplary Damages | \$20,000.00 |
| Sub Total | <u>\$230,400.00</u> |
| g) Interest @4% from 1987 to date of Ruling | \$138,240.00 |
| h) Plus costs summarily assessed | \$ 2,0000.00 |
| i) Total damages & interests costs | <u>\$370,640.00</u> |

[09] The Board then wrongly appealed the Master's ruling on the quantum of damages to the Court of Appeal. However, The Court of Appeal by its order dated 14 May 2015 dismissed the appeal on the basis that the Court of Appeal has no jurisdiction under section 12 of the Court of Appeal Act to hear an appeal from the decision of the Master.

[10] Thereafter, the Board filed an application seeking leave to appeal out of time in the High Court. On 10 September 2015, this court [1] granted leave to the Board with the following Orders:

1. Leave is granted to the applicant to appeal out of time.
2. The applicant will file its appeal within seven days.
3. Execution of the judgment is allowed limited to the sum of \$125,000.00.
4. Stay is granted for the rest of the judgment amount.
5. Costs shall be in the cause.

[11] The Board's appeal against the award of damages has been deemed abandoned. This is because the Board did not file a summons for direction as is required by the High Court Rules governing appeals from a Master to a Judge of the High Court (Order 59, Rule 17).

[12] On 29 April 2016, the Board filed the current application to restore the Appeal.

Determination

- [13] The application before the court is to reinstate the appeal which was deemed abandoned pursuant to HCR O.59, r.17, which requires that the appellant must file and serve a summons for direction within 21 days after filing of the Notice of Appeal and Grounds of Appeal. The Board failed to comply with rule 17.
- [14] The crucial issue before me is that whether the court has discretion to restore an appeal that was deemed abandoned by operation of rule 17, HCR.
- [15] In the previous application filed by the applicant for leave to appeal out of time the award of damages made against it, I granted leave to the Board to appeal beyond the appealable period and also granted a limited stay on execution. The Board filed its notice of appeal on 17 September 2015. It should have filed the summons for direction as is required by rule 17 for fixing of a hearing date before a Judge by 8 October 2015. The length of delay between the date when the summons for direction was to be filed and the date of the current application is six and a half months.
- [16] When granting leave in the previous application for leave to appeal out of time and the stay of execution, I decided that there were some legal issues involved in the assessment of damages and that therefore grounds of appeal had some chance of success if the appeal were allowed.
- [17] Mr. Mishra, counsel for the respondent submits that when an appeal is deemed abandoned through failure to follow necessary steps, a fresh appeal is to be filed in a further six weeks. He cited the case of *General Machinery Hire Limited v Permanent Secretary for Labour, Industrial Relations and Productivity & Another* (FCA Mis Appeal No. 16 of 2006) where Fiji Court of Appeal set out the procedures that need to be adopted when an appeal is deemed abandoned. In that case the Court of Appeal in para 10 on page 3 states:

“10. In the present case the first two aspects are overwhelmingly against a grant of leave. The overall delay is considerable. Twice an appeal was allowed to be deemed abandoned through failure to follow the necessary steps. Even after the second appeal was abandoned, the appellant has shown little sense of urgency. The Rules allow 42 days to file a fresh notice of appeal. Plainly the new solicitors needed time to assess the position of the appeal but they must have realised immediately that previous appeals had been deemed abandoned. At the time they filed a notice of change of solicitors, they were still in the period allowed. They should know the Rules. If it was not immediately apparent on the papers they had. It would have taken a moment’s enquiry of the registry to ascertain and they were within, but close to the end of, the 42 days time limit. Instead they sought an extension of time to pay security which they should have realised was already so delayed that the appeal in which it was ordered must have been deemed abandoned. This was not a case where they had to start from the beginning and ascertain if there were grounds for appeal. The notice and grounds had been filed twice previously and needed only to be copied and filed again immediately to preserve the position. Instead they failed to do anything until the time had expired and now have to make this application.

[18] In the above case twice an appeal was allowed to be deemed abandoned through failure to follow the necessary steps. Even after the second appeal was abandoned, the appellant showed little sense of urgency and the overall delay was considerable. In the circumstances the court refusing to restore the appeal indicated that the Rules (Court of Appeal Rules) allow 42 days to file a fresh notice of appeal. That case is not authority for the proposition that the court has no discretion to reinstate an appeal that was deemed abandoned through failure to follow necessary steps pursuant to the Rules. Therefore, the case cited by the respondent (above) has no application to the present application.

[19] In *Bele & Vaughan* (No. 2) [2012] Fam CAFC 125 (21 August 2012), the Family Court of Australia in considering an application to reinstating an appeal that was deemed abandoned pursuant to the Rules when the applicant failed to file books by the extended time outlined the principles (at paras 60-63 of its judgment) that apply to such an application as follows:

‘The reinstatement application

60. *I turn now to the first alternative order sought by the applicant, namely an order reinstating the appeal previously filed against the orders of Cronin J of 9 June 2010. To repeat, that appeal was deemed abandoned pursuant to r 22.21 of the Rules when the applicant failed to file appeal books by **the extended time of 18 November 2011.***

61. *The principles that apply to this application were considered in the relatively recent Full Court decision of Bemert & Swallow [2010] Fam CAFC 100; (2010) FLC 93-441. Significantly the Full Court concluded at 154:*

... [I]n our view, the discretion to reinstate an abandoned appeal is at large and no attempt should be made to limit the exercise of the discretion nor identify in any prescribed way the matters that should be taken into account.

62. *It was identified in Bemert & Swallow though that the principles applicable to the determination of an application for an extension of time, as set out, for example in the oft-cited judgment of McHugh J in Gallo v Dawson [1990] HCA 30; (1990) 93 ALR 479 apply equally to an application to reinstate an appeal. In Gallo v Dawson McHugh J said at 480:*

*The grant of an extension of time under this rule is not automatic. The object of the rule is to ensure that those Rules which fix times for doing acts do not become instruments of injustice. The discretion to extend time is given for the sole purpose of enabling the court or justice to do justice between the parties: see Hughes v National Trustees Executors & Agency Co of Australasia Ltd [1978] VicRp 27; [1978] VR 257 at 262. This means that the discretion can only be exercised in favour of an applicant upon proof that strict compliance with the rules will work an injustice upon the applicant. In order to determine whether the rules will work an injustice, it is necessary to have regard to the history of the proceedings, the conduct of the parties, the nature of the litigation, and the consequences for the parties of the grant or refusal of the application for extension of time: see Avery v No 2 Public Service Appeal Board [1973] 2 NZLR 86 at 92; Jess v Scott (1986) 12 FCR 187 at 194-5; 70 ALR 185. When the application is for an extension of time in which to file an appeal, **it is***

always necessary to consider the prospects of the applicant succeeding in the appeal: see Burns v Grigg [1967] VicRp 113; [1967] VR 871 at 872; Hughes, at 263-4; Mitchelson v Mitchelson (1979) 24 ALR 522 at 524. It is also necessary to bear in mind in such an application that, upon the expiry of the time for appealing, the respondent has "a vested right to retain the judgment" unless the application is granted: Vilenius v Heinagar (1962) 36 ALJR 200 at 201. It follows that, before the applicant can succeed in this application, there must be material upon which I can be satisfied that to refuse the application would constitute an injustice.

See also Rand & Rand [2009] FamCAFC 88 and Batey-Elton & Elton [2009] FamCAFC 101.

63. Thus, the fundamental issue is whether reinstatement of the appeal is necessary to enable the court to do justice between the parties, and in looking at where the justice of the case lies, there are a number of factors that may be relevant to take into account. For example, whether there are adequate reasons which explain the delay, or the failure to comply with the relevant timeframe, whether there is a substantial issue to be raised on appeal, if there is any hardship or injustice to the respondent that cannot be compensated by orders for costs or otherwise, the history of the proceedings, the conduct of the parties in the proceedings, the nature of the litigation, and the consequences for the parties of a grant or a refusal of the application.'

[20] Returning to the application that is before me, I have adequately considered the principles applicable to an application for extension of time to appeal. I do not wish to repeat those here. However, I will only consider the explanation given by the applicant in its affidavit for the present purpose.

[21] It is seen that the court has wider discretion to reinstate an appeal that is deemed abandoned pursuant to O.59, r.17 of the HCR.

Adequate explanation

[22] The affidavit in support of this application contains evidence which explains the failure to file and serve a summons for directions as is required by rule 17. The applicant states in its affidavit that Mr. Inoke Lutumailagi, the Legal Officer who had conduct of the matter and

appearing for the applicant went on medical leave and that the other Legal Officer stationed in Nadi Office was only attending to High Court cases called in the Lautoka High Court that were under the carriage of the Legal Officer who was on medical leave. There were no instructions to file any summons for direction.

[23] In short, the explanation for non-compliance has been that the Legal Officer who was on medical leave could not give instructions as to the filing of the summons for direction to the Acting Legal Officer.

[24] It was immediately obvious that the Legal Officer who was on sick leave would not be able to give instructions to the Acting Officer. I am satisfied that the explanation given by the applicant in its affidavit is adequate and that there was no blatant disregard for the rule.

The merits of the appeal

[25] The proposed “grounds” of appeal sought to be relied upon in relation to appeal have the prospects of the applicant succeeding in the appeal, and I refer to and repeat what I have said about the merits of those “grounds” sought to be reinstated in my previous decision on the application for extension of time to appeal made on 10 September 2015, and for example in paragraph 22.

Prejudice to the Respondent if application is granted

[26] The respondent will not be prejudiced, if the appeal is reinstated, because the applicant has paid substantive amount of the judgment sum (\$125,000.00) pursuant to my order made when granting leave to appeal beyond the prescribed period.

Conclusion

[27] The court has unfettered discretion to reinstate an appeal that was deemed abandoned for the failure to file and served summons for direction as is required by O.59, r.17 of the HCR. Bearing in mind that I have already granted the leave to the applicant to appeal out of time

the learned Master's ruling on assessment of damages, I propose to reinstate the appeal that was deemed abandoned pursuant to rule 17 for all of the reasons that I have articulated herein with costs to be paid, which I summarily assess at \$600.00, by the applicant to the respondent within 21 days from the date of this ruling. The applicant is to file and serve summons for direction as required under rule 17 within 21 days from the date of this ruling.

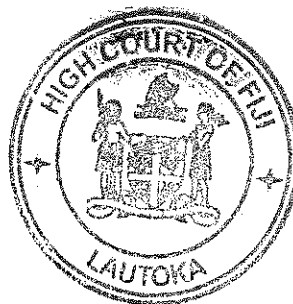
The Final outcome

1. Appeal reinstated.
2. Applicant will file and serve summons for direction within 21 days from today (4.11.2016).
3. Applicant will pay summarily assessed costs of \$600.00 to the respondent in 21 days from today (4.11.2016).

M H Mohamed Ajmeer 4/11/16

M H Mohamed Ajmeer

JUDGE



At Lautoka

4th of November 2016