**IN THE HIGH COURT OF FIJI**
**(WESTERN DIVISION) AT LAUTOKA**
**CIVIL JURISDICTION**

**CIVIL APPEAL NO. HBC 249 OF 2020**

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| **BETWEEN** | : | **PRADEEP KUMAR** of Veiseisei, Lautoka.<br>**PLAINTIFF/ INTENDED APPELLANT** |
| **AND** | : | **ITAUKEI LAND TRUST BOARD** a Statutory Body duly established under the provisions of the ITaukei Land Trust Act Cap 134 of the Laws of Fiji having its head office at 431 Victoria Parade, Suva.<br>**1ST DEFENDANT/ INTENDED RESPONDENT** |
| **AND** | : | **AJAY NARAYAN SINGH** of Veiseisei, Lautoka.<br>**2ND DEFENDANT/ INTENDED RESPONDENT** |
| **APPEARANCES** | : | Ms. Chand for the Plaintiff<br>Ms. Raitamata for the Respondents |
| **DATE OF HEARING** | : | 10th May, 2022 |
| **DATE OF DECISION** | : | 20th July, 2022 |

## DECISION
**( On Leave to Appeal)**

1. The plaintiff – Intended Appellant ( the plaintiff), namely, PRADEEP KIMAR, on 06th October 2020 instituted this action against the 1st and 2nd Defendant- Intended Respondents ( the 1st & 2nd Defendants) by way of writ of Summons and the Statement of claim seeking reliefs, *inter-alia*, for;

   a. *A declaration that the 1st Defendant's attempt to refuse to issue to the Plaintiff necessary approval to enable further processing of Plaintiff's lease is unlawful, null and void and of no effect,*

   b. *An injunction restraining the 1st Defendant from proceeding any further with the Notice dated 23rd September, 2020 against the Plaintiff.*

   c. *Damages for unlawfully withholding the Plaintiff's necessary approvals for further processing of the Plaintiff's lease.*

   d. *A declaration that the Notice dated 23rd September, 2020 is without probable cause of action against the Plaintiff and an abuse of the 1st Defendant's power.*

e. *A declaration that the 2nd Defendant's Agreement for Lease No. 4/7/39624 be partially rescinded for mistake on the ground that apportion of it composites the Plaintiff's residential dwelling.*

f. *For an Order the 2nd Defendant surrender the Agreement for Lease No. 4/7/39624 to the 1st Defendant to enable the Plaintiff to rectify and correct the boundaries of both the Plaintiff and the 2nd Defendant.*

2. The Plaintiff also, simultaneously, filed an EX-PARTE NOTICE OF MOTION supported by an Affidavit sworn by him, along with documents marked as "PK 1" to "PK 14", seeking the following reliefs.

a. *AN INJUNCTION restraining the Defendants and/or his servants, and/ or agents and/or any other person/s from interfering with the quite enjoyment of the plaintiff's occupation on his residential dwelling.*

b. *AN INJUNCTION restraining the 1st Defendant from proceeding with the Notice dated23rd September, 2020 until the final determination of this matter.*

3. The application for injunction being supported by the Counsel for the Plaintiff before the learned Master (the Master) on 06th October 2020, the Master made an impromptu order refusing the injunctive relief. The impugned order reads as follows.

> "**Orders**
>
> *The Board (TLTB) has given agreement to lease to the **1st Defendant** (should **be read as Plaintiff).** The extent of the area is subject to survey.*
> *On the survey it was found that, the Plaintiff's septic tank is encroaching the adjacent lease.*
> *The TLTB has instructed the Plaintiff by letter sent to the Plaintiff, which is marked as "P K 11" that, the request of the Plaintiff can's be accommodated.*
> *The Board also warned the Plaintiff to amend the proposed survey plan and failing which shall warrant penalty.*
> *Finally the Board issued "Unlawful Occupation Notice" dated 23/9/20.*
> *Hence, injunction can't be granted against the "Breach Notice".*
> *I refuse the application for injunction."*
>
> ***U.L.Mohamed Azhar***
> ***Master of the High Court***
> ***06/10/2020.***

4. It is against the above Order, the Plaintiff has sought Leave to Appeal from this Court by filing his SUMMONS FOR LEAVE TO APPEL on 20th October 2020, supported by his Affidavit, together with documents marked and annexed as "PK 1" to "PK-16". The document annexed as "PK 16" contains 7, purported, grounds of appeal.

5. Order 59 rule 9 provides that an appeal from an order or judgment of the Master shall be filed and served within 21 days from the delivery of the order or judgment; or in the

case of an interlocutory order or judgment, within seven days from the date of granting of leave to appeal.

6. The present application is for leave to appeal pursuant to Order 59 rules 11 of the High Court Rules.

7. Order 59 rules 10 and 11 of the High Court Rules provide as follows:

> ***Rule 10*** *– (1) An application to enlarge the time period for filing and serving a notice of appeal or cross-appeal may be made to the Master before the expiration of that period and to a single judge after the expiration of that period.*
>
> *(2) An application under paragraph (1) shall be made by way of an inter-parte summons supported by an affidavit.*
>
> ***Rule 11*** *– Any application for leave to appeal an interlocutory order or judgment shall be made by summons with a supporting affidavit, filed and served within 14 days of the delivery of the order or judgment.*

8. The impugned Order being delivered on 6th October 2020 , this application for Leave to Appeal was filed on 20th October 2020 and served on the 2nd and 1st Defendants on 20th and 21st October 2020 respectively, as per the affidavits of service . Accordingly, the Affidavit in opposition on behalf of the 1st Defendant and the Affidavit in reply by the Plaintiff were duly filed. The 2nd Defendant was neither present nor represented and no Affidavit in opposition was filed by him or on his behalf.

9. There is no dispute between the parties with regard to the nature of the impugned Order made by the Master (whether it is final or interlocutory). The compliance by the Plaintiff as far as the date of filing, and serving the leave to appeal application on the 1st Defendant is also not in issue.

10. Unarguably, the impugned order is an interlocutory order, which requires the leave of the Court to appeal, as provided by Order 59 rule 11 of the High Court Rules 1988.

11. I refer to the following case law authorities cited very often as far as the question of leave to appeal is concerned, which I find would throw some light in arriving at the most justifiable decision in this matter.

In ***Kelton Investment Ltd & Tapoo Ltd v Civil Aviation Authority of Fiji and Motibhai & Company Limited Civil Appeal No. ABU 0034 of 1995*** the Court of Appeal observed as follows;

> *"The Courts have thrown their weight against appeals from interlocutory orders or decisions for very good reasons and hence leave to appeal are not readily given. Having read the affidavits filed and considered the submissions made I am not persuaded that this application should be treated as an exception. In my view the intended appeal would have minimal or no prospect of success if leave were granted. I am also of the view that the Applicants will not suffer an irreparable harm if stay is not granted".*

In the case of ***Ex parte Bucknell [1936] HCA 67; (56 CLR 221 at page 224)*** it was held:

> *"At the same time it must be remembered that the prima facie presumption is against appeals from interlocutory orders, and, therefore, an application for leave to appeal under section 35(1)(a) should not be granted as of course without consideration of the nature and circumstances of the particular case. It would be unwise to attempt an exhaustive statement of the considerations which should be regarded as a justification for granting leave to appeal in the case of an interlocutory order, but it is desirable that, without doing this, an indication should be given of the matters which the court regards as relevant upon an application for leave to appeal from an interlocutory judgment".*

In ***Dunstan v Simmie & Co Pty Ltd 1978 VR 649 at 670*** it was held:

> *"....although the discretion to grant leave cannot be fettered, leave is only likely to be given in a case where the determination of the primary issue puts an end to the action or at least to a clearly defined issue or where, to use the language of the Full Court in Darrel Lea (Vic.) Pty Ltd v Union Assurance Society of Australia Ltd., (1969) V.R. 401, substantial injustice would result from allowing the order, which it is sought to impugn, to stand."*

In ***Niemann v. Electronic Industries Ltd. [1978] V.R. 431 at page 441*** where Supreme Court of Victoria (Full Court) held as follows:

> *".....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 then it follows that 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 affect a substantial injustice by its operation.*
>
> *It appears to me that greater emphasis is therefore must be on the issue of 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 be more easily seen that leave to appeal should be given".*

In the case of ***Khan v Suva City Council [2011] FJHC 272; HBC406.2008 (13th May 2011)*** the following observations were made in regard to applications for leave to appeal;

> *"It is trite law that leave will not generally be granted from an interlocutory order unless the Court sees that substantial injustice will be done to the applicant.*
>
> *Further in an application for leave to appeal, it is incumbent on the applicant to show that the intended appeal will have some realistic prospect of succeeding".*

12. The Plaintiff does not dispute that the extent of the land given to him under his Agreement for lease was subject to survey. He also does not deny the fact that his Septic tank stands within the land that is covered by the 2nd Defendant's Agreement for lease.

The 1st Defendant Board seems to have acted and had correspondence with the Plaintiff relying on the intimation by the 2nd Defendant that he was prepared to forego the strip of his land where the Plaintiff's Septic Tank stands and in turn to have an access road through the land covered by the Plaintiff's lease. But the 2nd Defendant appears to have subsequently withdrawn from that offer made by him, propriety and/ or legality of which need to be gone into and decided at the trial and not by way of an appeal now. However, this is not a serious question to warrant the intervention of an appellate forum by obtaining leave.

According to what has transpired so far, I don't find any reason to pin the blame on the 1st Defendant Board for the stance taken by it and sending the "PK 11" and "PK14" notices to the Plaintiff when it was revealed that the Plaintiff's Septic Tank sits on the 2nd Defendant's land, and it was constructed without the consent/ approval of the 1st Defendant Board. I don't see any serious question exists to be tried at the Appeal.

13. It is clear from the above decisions, that the appeals from interlocutory orders are discouraged. In the instant matter, rights of the parties have not yet been fully and finally adjudicated. If it is the Plaintiff's assertion that he has a right to have his Septic Tank over the adjacent land covered by the 2nd Defendant's Agreement for lease, and such right emanates from the undertaking or promise , purportedly, given by the 1st Defendant through its correspondences, the plaintiff can vindicate it at the trial.

14. The Plaintiff also can agitate his so-called right in a final appeal. The 1st Defendant cannot be restrained from performing its ordinary functions, by way of an injunction as prayed for by the plaintiff.

15. I find that the purported grounds of Appeal are devoid of merits and no serious questions emanate out of them to warrant the intervention by way of an appeal.

a. The Plaintiff's leave to appeal application filed on 6th October 2020 fails and the same is hereby dismissed.

b. The Plaintiff shall, within 14 days from today, pay the 1st Defendant a sum of $ 400.00 being the summarily assessed costs.

HIGH COURT OF FIJI
LAUTOKA

**A.M. Mohammed Mackie**
**Judge**

**At High Court Lautoka this 20th day of July, 2022**

**SOLICITORS:**
**For the Plaintiff:** **Messrs Anishini Chand Lawyers**
**For the Defendants:** **Itaukei Land Trust Board**