

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

**CIVIL APPEAL NO. ABU 117 OF 2017**  
**(High Court HBC 540 of 2007)**

**BETWEEN** : **DIANA GIESBRECHT**  
*Appellant*

**AND** : **ROWEENA GRACE CROSS**(aka Grace Bamlett)  
and **DOUGLAS BAMLETT**  
*Respondents*

**Coram** : **Calanchini P**

**Counsel** : **Mr A Rayawa for the Appellant**  
**Mr I Fa for the Respondents**

**Date of Hearing** : **27 March 2019**

**Date of Ruling** : **30 April 2019**

**RULING**

[1] There are in effect only two applications before the Court. The first is a renewed application for leave to appeal the interlocutory decision of the High Court delivered on 30 August 2018. The second application is a renewed application for a stay of execution

pending appeal. The applications were made by summons dated 9 November 2018 and were supported by an affidavit sworn on 9 November 2018 by Diana Giesbrecht. The applications were opposed. An answering affidavit sworn on 11 February 2019 by Rowena Grace Cross was filed on behalf of the Respondents. The parties filed written submissions prior to the hearing.

- [2] The first application is made pursuant to section 12(2) of the Court of Appeal Act 1949 (the Act) and Rule 26(3) of the Court of Appeal Rules (the Rules). The second application is made pursuant to Rules 34 and 26(3) of the Rules. Section 20(1) of the Act gives to a judge of the Court power to grant leave and a stay.
- [3] The background to the applications may be stated briefly. In a final judgment delivered on 21 August 2017 the High Court dismissed the appellant's claim against the respondents for loss and damages alleged to have been suffered as a result of her having invested monies in what the trial judge described as a "*Ponzi Scheme*."
- [4] On 26 September 2017 the appellant filed a timely notice of appeal against that judgment. Since then the appellant has complied with Rule 17 of the Rules. In accordance with Practice Direction No.1 of 2019, the appellant is required, if not already, to lodge the record for certification by the Registrar no later than 31 December 2019.
- [5] Subsequent to the final judgment the respondents applied by an amended summons dated 24 November 2017 to a Judge of the High Court in chambers for the following orders:-

- “1. That the Plaintiff show cause why Caveat No. 694271 lodged by the Plaintiff on CT 14839 Lot 1 on DP 4134 and Caveat No. 694272 lodged by the Plaintiff on CT 20724 Lot 1 on DP 4936 registered on 05.10.07 and extended by the court on 02.09.09 until further order, the properties of which the Defendants are the registered proprietors should not be removed forthwith.
2. That the Plaintiff show cause why Caveat No. 723809'A' lodged by the Plaintiff on CT 32065 Lot 47 on DP 8243 and registered on 17.09.09,

*the property of which Roweena Grace Cross the 1<sup>st</sup> named Defendant is the registered proprietor should not be removed forthwith.*

3. *That Caveat No.694271 registered on CT 14839 Lot 1 on DP 4134, Caveat No. 694272 registered on CT 20724 Lot 1 on DP 4936 and Caveat No. 723809'A' registered on CT 32065 Lot 47 on DP 8243 be removed forthwith."*

[6] The parties filed affidavits and Counsel presented submissions at a hearing before the same learned High Court Judge. On 30 August 2018 the High Court ordered that:

- "(1) The Registrar of Titles is to forthwith remove the caveat No.694271 lodged against Certificate of Title No.14839, the caveat No.694272 lodged against Certificate of Title No.20724 and the caveat No. 723809A lodged against Certificate of Title No. 32065.*
- (2) Plaintiff is to pay to the First and Second Defendants the costs of his summons summarily assessed at \$1,000.00."*

[7] Being dissatisfied with this decision the appellant filed an apparent timely summons in the High Court seeking an order that leave be granted to appeal what was referred to as the interlocutory judgment delivered by the High Court on 30 August 2018 and an order that a stay of execution be granted pending the determination of the appeal. Pursuant to section 12(2) of the Act and Rules 26(3) and 34 of the Rules, both applications were required to be made to the High Court in the first instance. In a Ruling delivered on 25 October 2018 the High Court refused both applications.

[8] The present applications before this Court are therefore renewed applications for leave to appeal and for stay pending appeal. I feel compelled to state that I am not entirely satisfied that the decision delivered on 25 October 2018 was an interlocutory decision. However the issue was not raised and the matter proceeded on the basis that the parties accepted that the decision was interlocutory.

[9] The draft notice of appeal setting out the grounds upon which the appellant would rely in the event that leave were granted was annexed to the affidavit filed in support of the



application. The draft notice of appeal seeks an order that decision delivered on 30 August 2018 be set aside on the ground the Judge was “*functus officio*”. The ground of appeal is specifically stated as follows:

*“The learned Trial Judge erred in law in failing to recuse himself on the ground of functus officio but went ahead and made a finding and delivered judgment on 30 August 2018 on an agreement his Lordship had previously adjudged in his Lordship’s judgment dated 24 August 2017.”*

[10] Therefore the first issue to be determined is whether leave to appeal the interlocutory decision delivered on 30 August 2018 should be granted on the sole ground that the Court was “*functus officio*” as a result of the final judgment delivered on 21 August 2017. It is important to recall that this application is not an appeal against the decision delivered on 25 October 2018 refusing leave to appeal. This is a renewed application for leave to appeal that is to be determined without having regard to the earlier decision of the court below refusing leave.

[11] The ground of appeal raises the issue of “*functus officio*.” The Oxford Dictionary of Law provides that “a person who has discharged his duty and whose office or authority is at an end is said to be “*functus officio*.” There is also a statement that “*once a judgment has been given the judge is functus officio and he has no power to make changes in his decision which can only be questioned by others in the further courts of appeal.*” That definition does provide a useful starting point in this application.

[12] There is no doubt that the judgment delivered by the High Court on 24 August 2017 was a final judgment. The dispute between the parties based on the pleadings and the evidence adduced at the trial was determined in that final judgment. The Court dismissed the appellant’s claim for damages.

[13] However, the judgment that is the subject of the present appeal is concerned with caveats. It would appear that in October 2007 the appellant lodged caveats on two properties of which the respondents were the registered proprietors. Later in 2010 the appellant lodged

a caveat on a third property of which the first respondent was the registered proprietor. Ordinarily the process by which the respondents could have the caveats removed is prescribed in section 110(1) of the Land Transfer Act 1971. This section allows a caveatee to apply to the Registrar for the removal of the caveat. Upon receiving such an application the Registrar is required to notify the caveator that the caveat is to be withdrawn within 21 days from the date of service of the notice.

[14] After 21 days has elapsed the Registrar shall remove the caveat from the Register unless an order of the Court extending the time for withdrawal of the caveat has been previously served on the Registrar. Section 110(3) provides that a caveator whether before or after receipt of a notice from the Registrar under section 110(1) may apply by inter partes summons to the Court for an extension of time beyond 21 days. Upon proof of service and appropriate evidence the Court may make such order as it sees fit either ex parte or otherwise.

[15] In accordance with section 110(3) of the Land Transfer Act the caveator (the appellant) filed a summons dated 7 August 2009 under civil action No. 540 of 2007 seeking an order that the two caveats be extended indefinitely. On 2 September 2009 the High Court ordered that there be an extension of time to withdraw the caveats until further order of the Court. The order was made ex parte but presumably on the basis that the Judge was satisfied as to service and evidence.

[16] The effect of the order was that the caveats would remain on the two titles until the High Court ordered otherwise. There was no further action required by the caveator in order to have the time extended for the removal of the caveats. It was for the caveatees to take the next step. There were two courses open to the caveatees. The first was to apply to have the ex parte order set aside under Order 32 Rule 5 and 6 of the High Court Rules. The second course open to the caveatees was to apply to have the caveats removed under section 109(2) of the Land Transfer Act.



- [17] The issue of the caveats was not raised nor considered at the trial or in the final judgment of the High Court delivered on 24 August 2017. However subsequent to the final judgment the respondents applied by summons filed on 10 November 2017 for the removal of the caveats forthwith. An amended summons was filed on 24 November 2017 seeking orders under section 109(2) of the Land Transfer Act that the caveator appellant show cause why the 3 caveats should not be removed. The application by the respondents was in effect an application to have the ex parte dated 2 September 2009 discharged and for the caveats to be removed. By its terms the orders made on 2 September 2009 could only be discharged by the High Court. The High Court granted the application and ordered the removal of the caveats.
- [18] The appellant challenges the order on the basis that the High Court had become "*functus officio*" when it delivered the final judgment in August 2017. The appellant seeks leave to appeal on that basis alone.
- [19] In my judgment the issue of the removal of the caveat under section 109(2) of the Land Transfer Act is a distinct and separate proceeding. Whether the caveat proceedings should have been commenced by way of separate originating process is not really the issue. Whether the respondent should have made an application to have the ex parte order set aside does not impact on the ground of appeal relied upon by the appellant. The issue of the removal of the caveats fell outside the determination of the issues raised by the pleadings. There is a strong argument for concluding that on that issue the High Court was not *functus officio*. In my judgment leave to appeal should be refused.
- [20] I therefore refuse leave to appeal the orders in the judgment delivered on 30 August 2018. It is as a result unnecessary to consider the application for a stay. The interim stay granted on 27 March 2019 is discharged. The appellant should pay costs to the respondents in the sum of \$3000.00 within 28 days from the date of this Ruling.

Orders:

1. Leave to appeal is refused.
2. Interim stay granted on 27 March 2019 is discharged.
3. Appellant to pay costs to the Respondents in the sum of \$3000.00 within 28 days from the date of this Ruling.



*W. Calanchini*

Hon. Mr Justice W Calanchini  
PRESIDENT, COURT OF APPEAL