

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

**CIVIL APPEAL NO. ABU 119 of 2019**  
**High Court No. HBC 9 of 2018**

**BETWEEN** : **MEHMOOD KHAN**

***Appellant***

**AND** : **PAULIASI RATU**

***Respondent***

**Coram** : **Almeida Guneratne, JA**

**Counsel** : **Mr N Padarath for the Appellant**  
**Ms J Singh for the Respondent**

**Date of Hearing** : **15 May, 2020**

**Date of Ruling** : **29 May, 2020**

## RULING

- [1] This is an application for leave to appeal against the judgment of the High Court of Lautoka dated 24 September, 2019.
- [2] It is common ground that the Notice and Grounds of Appeal against the said Judgment were filed within time but served one day after the time they were required to be served on the Respondent.
- [3] Thus, I feel no constraint in saying that the Appellant has failed to adhere to strict compliance with the time limits requisite in law though it could be argued that there was “substantial compliance” taken together with the fact that there is no material on record to show that any prejudice had been caused to the Respondent in that wake.
- [4] Be that as it may, the established precedents which I have perused (some of which have been my own Rulings since the year 2014 sitting as a Single Judge of this Court) have entrenched that, the decisive criterion in granting leave to appeal is as to whether there is a “prospect of success in appeal if leave is granted” or whether there is an “arguable case” in seeking leave to appeal in an appellant’s quest to appeal.
- [5] In the course of oral submissions made before me, being in a quandary as to what test to adopt in granting leave to appeal Mr Padarath for the Appellant eloquently submitted that, while he concedes that there are two schools of Judicial thought, the *via media* to be struck lies in between thereby suggesting that, as a Single Judge of this Court I need only to see whether there is a “reasonable chance of success in the appeal” thus striking a chord with the criterion of an “arguable case”.

- [6] In my own mind, as I indicated to Counsel (both the Appellant and the Respondent) any case is arguable, otherwise there is no necessity for opposing parties to even appear. That is why, in so many of my Rulings I have opted for that second school of Judicial thought regarding the criterion of “an arguable case” to grant leave to appeal.
- [7] In the instant case, I strike that equation between “reasonable chance of prospect of success” and “an arguable case” as a balance to be struck.
- [8] Before I proceed further *suo sponte* I took the initiative to look at the Rulings of their Lordship’s Court (the Supreme Court) in considering applications for leave to appeal from Judgments of this Court, wherein it appears that it is a more stringent test their Lordships’ Court has applied.
- [9] Having said that, on the test I feel fortified in applying I now proceed to see whether the Appellant has a case in appeal for “reasonable chance of success” if leave is granted – the criterion I employ in determining this application.

### **Essential Undisputed Facts**

- [10] The Appellant is the owner of the land in question. The Respondent is married to the Appellant’s sister. The Respondent had come into possession of the land on the invitation or with the Appellant’s mother’s permission who was the Appellant’s predecessor in title. Upon the mother’s death the property having been devolved on the Appellant on a transfer gift by the mother, the Respondent was served with a notice to quit the land. Upon the Respondent refusing to do so, the Appellant instituted action in the High Court to have the Respondent ejected on the basis that the Respondent was a trespasser. At the time the Respondent had been in possession of the land for some forty odd years.
- [11] In those essential undisputed facts the High Court relying on several authorities as to what constitutes a trespasser dismissed the Appellant’s action. The present application for leave to appeal and enlargement of time to appeal is against that judgment of the High Court.

### **Submissions made on behalf of the Appellant**

[12] Learned Counsel for the Appellant (Mr Padarath) in both his written submissions dated 27 April, 2020 and oral submissions made on 15 May, 2020 submitted that, the learned Judge erred in that:

- (1) the learned Judge looked at the point of entry of the Respondent on the land in question relying as he did on the authorities the learned Judge went on but failing to have regard to the subsequent events that had surfaced on the death of the Appellant's mother who had invited and permitted the Respondent to enter and be in possession of the land, the subsequent events being the Appellant becoming the successor in title to the land on his mother's death who had terminated the Respondent's right to remain on the land by a Notice to Quit.
- (2) Consequently, Mr Padarath argued that the Appellant's devolved ownership rights had been ignored by the learned Judge thus contending that while he has no quarrel with the definition of a trespasser which the learned Judge went on, the learned Judge erred in applying those authorities to the facts and events of the instant case.
- (3) Mr Padarath also raised the issue of the impact of Section 13 of the Crown Lands Act in which context I addressed my mind to what has been highlighted at paragraphs 28 to 34 of his written submissions.

### **Submissions made on behalf of the Respondent**

[13] Ms J Singh for the Respondent while drawing my attention to her written submissions dated 4 May, 2020 which she re-iterated in her oral submissions made on 15 May, 2020 submitted, the gist of which I summarise as follows:

- (1) The Appellant had initiated proceedings in the Magistrate's Court purporting to be under Section 16 of the Magistrates Court Act, which, as the Respondent's written submissions reveal has conceded that the Magistrate had jurisdiction to make a

determination thereon. (I shall refrain from commenting on that in as much as the said issue was not argued before me).

- (2) The matter thereafter having gone before the High Court for a determination as to whether the Respondent could be regarded as a trespasser or not, the High Court having determined that, the Respondent cannot be regarded as a trespasser, learned Counsel for the Respondent contended that, the questions raised by the Appellant's Counsel in seeking leave to appeal are misconceived and/or lack merit (suggesting that there was no prospect of success in appeal should leave to appeal be granted) in which regard Ms Singh in her written submissions referred to several authorities which she re-iterated in her oral submissions.
- (3) Ms Singh has also raised the issue that, the Respondent admittedly having been in possession for several long years on the land in question, the impact of **Sections 169 and 172** of the Land Transfer Act read with **Section 125** also warranted consideration.
- (4) My attention was also drawn to what has been submitted in paragraphs 5.2 to 5.9 of the Respondent's written submissions dated 4 May 2020 and paragraphs 4.2 to 4.4 as well.

### **Reply submissions on behalf of the Appellant**

[14] In his reply submissions Mr Padarath focused on:

- (a) page 59 of the Magistrate's copy record (which was not available to me)
- (b) the Appellant's mother's gift to the Appellant where no suspicion or doubt has been cast.
- (c) **In conclusion**, submitting, (adverting to paragraph 15 of his written submissions) that; the error in the learned High Judge's judgment is that he looked at the aspect of the point of entry by the Respondent on the land in question, given permission to so enter by the Appellant's mother but had

not addressed the Appellant's right to have the Respondent evicted on the basis that the Appellant had become the rightful owner of the land and without his leave and licence the Respondent had no right to remain in possession of the land.

### **Determination**

[15] Having heard the submissions made by Counsel for both parties, I have no hesitation in saying that, on the rival contentions advanced by them, this is a matter that cries for the granting of leave to appeal for the full Court to decide finally.

[16] Apart from and in addition to the issues/questions raised by respective Counsel, reading between the lines of the said issues and/or questions I, *suo sponte*, am driven to raise questions/ issues for the full Court to consider and for Counsel for the parties to address on which I pose thus:-

(1) the permission/invitation having been given by the Appellant's mother (who was the initial holder in title of the land in question) as to whether upon her death, in any event, the said permission/invitation was extinguished upon her death?

(2) If so, was not the appellant as the successor in title to the said property of his mother entitled to have the Respondent evicted on notice subject only to whatever claims (interest) he might have had on equitable grounds to remain until compensation for improvements on the said land he might have effected, being a *bona fide possessor* (initially) but changing his character to a *mala fide possessor* upon being asked to vacate by the Appellant?

[17] I dare say, while in my view the issue raised by me at paragraph (16) (1) is a legal issue constituting as it does a "Question of Law" in terms of Section 12(3) of the Court of Appeal Act (Cap 12) in so far as the question raised in paragraph (16) (2) above is concerned, it involves questions of fact and evidence, I direct the Registrar to make available to the full Court the entire proceedings of the Magistrate's Court and the High Court as well.

## **Conclusion**


[18] For the aforesaid reasons, while I grant leave to appeal against the impugned Judgment of the High Court, in so far as consequential steps flowing therefrom are concerned, the Appellant may advise himself on the steps he is obliged to take in terms of the applicable provisions of the law, Rules of Court and relevant Practice Directions.

[19] Before parting with this Ruling, I wish to place on Record the forensic effort made by Ms Singh who informed Court that this was her first appearance in the Court of Appeal the sentiments I expressed from the bench with which Mr Padarath also acknowledged.

## **Orders of Court**

1. Leave to Appeal and extension of time to Appeal is granted.
2. Consequently, the Appellant is required to take steps to prosecute this Appeal as prescribed by law.
3. Having given my mind to the rival contentions of Counsel for parties and the arguable issues raised I am not inclined to make any order for costs in this application.



  
Almeida Guneratne  
JUSTICE OF APPEAL