

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

Civil Appeal No. ABU 062 of 2020  
(HBC 08 of 2016)

BETWEEN : MOHAMMED AIYUB KHAN  
*Appellant*

AND : 1. RAKESHWAR PRAKASH DEO  
2. I-TAUKEI LAND TRUST BOARD  
*Respondents*

Coram : Almeida Guneratne, JA

Counsel : Ms. S. Prasad for the Appellant  
: Mr. G. O'Driscoll for the 1<sup>st</sup> Respondent  
: Ms. L. Komaitai for the 2<sup>nd</sup> Respondent

Dates of Hearing : 21<sup>st</sup> January, 2021

Date of Ruling : 1<sup>st</sup> February, 2021

**RULING**

[1] This is an application seeking leave for extension of time to appeal and leave to appeal the judgment of the High Court dated 11<sup>th</sup> June, 2020.

- [2] The matter was initially taken for hearing on 25<sup>th</sup> November, 2020 and submissions having concluded I reserved my Ruling. Mr A. Nand appeared on behalf of the Appellant and Mr. S. P. Gosaiy and Ms. Komaitai for the 1<sup>st</sup> Respondent and 2<sup>nd</sup> Respondent respectively on that occasion.
- [3] On that occasion Mr. Nand submitted that, he was relying principally on Grounds 3 and 5 of the Grounds of Appeal urged by the Appellant for the success of his application and submitted that they constitute pure points of law.
- [4] Further, Mr. Nand submitted that, the Affidavit in opposition filed by the 1<sup>st</sup> Respondent dated 30<sup>th</sup> September, 2020 being an affidavit by a person said to be “the accountant of the 1<sup>st</sup> Respondent” is not one that is acceptable to the law and therefore this Court was obliged to reject it.
- [5] On that initial hearing date (25<sup>th</sup> November, 2020) Mr. Gosaiy’s (for the 1<sup>st</sup> Respondent) limited submission was that he would be relying on his written submissions dated 4<sup>th</sup> November, 2020 while Ms. Komaitai submitted that she would not be making any submissions. In fact, the 2<sup>nd</sup> Respondent had been discontinued from the proceedings in the High Court. (Vide: paragraph 20 of the judgment of the High Court.)
- [6] Consequently, having reserved my Ruling as earlier said, I felt some further oral submissions were needed, the reason why I had the matter relisted for further hearing. The matter was eventually taken on 21<sup>st</sup> January, 2021.
- [7] On 21<sup>st</sup> January 2021, Counsel for all parties submitted that they would be relying on the material already filed of record and moved for a Ruling on that basis.
- [8] Consequently, I reserved my Ruling which I said I would deliver on Notice.

### **The Material on Record**

- [9] The material is comprised of the respective supporting affidavits filed on behalf of the parties, the submissions and the Grounds of Appeal urged as against the impugned Judgment of the High Court. I also took into consideration two matters which were urged by Mr. Nand who appeared for the Appellant on 25<sup>th</sup> November, 2020 viz: that,
- (i) The supporting affidavit in opposition filed on behalf of the 1<sup>st</sup> Respondent was not acceptable in law.
  - (ii) The Appellant was relying principally on Grounds 3 and 5 urged in his grounds of appeal.

### **The acceptability in law of the said supporting affidavit filed on behalf of the 1<sup>st</sup> Respondent**

- [10] Taking first that issue, which was urged by Mr. Nand on 25<sup>th</sup> November, 2020 it is to be noted that, the said affidavit is by the Accountant of the 1<sup>st</sup> Respondent.
- [11] The Appellant has authorized the said Accountant to tender the said Affidavit, (Annex A'). Accordingly, I found the matter as not falling within my Ruling in Gulf Seafood (Fiji) Ltd v I-Taukei Land Trust Board (ABU 0079 of 2019), 28 August, 2020).
- [12] Consequently, however, having perused the 1<sup>st</sup> Respondent's said supporting affidavit in opposition, what has been averred in paragraph 6 therein struck me where it is stated that the deponent cannot comment on those matters.

### **What has not been denied must be deemed to have been admitted**

- [13] This is an inveterate principle of pleadings and evidence. Applying that principle, I have no hesitation in accepting the reasons for the delay given in paragraphs 4 – 9 of the

Appellant's affidavit, the delay itself being one day (vide: paragraph 10 of the Appellant's affidavit).

**The relevance and application of the Supreme Court decision in NLTB v Ahmed Khan & Another (CBV 2 of 2013, 15 March, 2013).**

- [14] However, even if the delay of 1 day is to be regarded as negligible and reasons given for the delay are to be accepted, the fact of the matter is, the present application lies within the conspectus of an application seeking enlargement of time for leave to appeal.
- [15] Consequently, the matter falling squarely within section 20(1)(b) of the Court of Appeal Act, it was incumbent on me to have regard to the other relevant criteria laid down in the NLTB case (supra).

**The Criterion of Prejudice**

- [16] The 1<sup>st</sup> Respondent in his written submissions has contended that, "the Appellant is residing on the subject property for several years without paying any rent. He is using these Court proceedings as a basis to deny the 1<sup>st</sup> Respondent in getting vacant possession so that the property could be rented out "for the benefit of the beneficiaries" (vide: paragraph 23 of the 1<sup>st</sup> Respondent's written submissions dated 28<sup>th</sup> October, 2020).
- [17] As against that, the Appellant in his affidavit dated 28<sup>th</sup> July, 2020 is seen deposing thus:

*"15. That, in the event I do not succeed in my appeal the 1<sup>st</sup> Respondent will still be able to sell the property.*

*16. That, I am informed and verily believe that the price of the property has appreciated since I entered into the sale and purchase agreement to purchase the property for \$150,000.00.*

17. *That, if enlargement of time is not allowed then I will be prejudiced because I would be deprived of the property that I had intended to purchase for \$150,000.00”.*

- [18] Weighing the scales as between the 1<sup>st</sup> Respondent’s submission re-capped at paragraph [16] above as against the Appellant’s position reproduced in paragraph [17] above, without even a token averment controverting the 1<sup>st</sup> Respondent’s position that “rents had not been paid for several years,” I have no hesitation in saying that the prejudice criterion stood resolved in favour of the 1<sup>st</sup> Respondent.

#### **The Merits Criterion**

- [19] Even if one were to hold in balance the other criteria, interpreting the thinking in the NLTB case (supra), I have ruled in several decisions of mine that, “the merits criterion” need to be regarded as the decisive criterion. To refer to one decision I hark back to the Ruling in Abdul Munaf v Thakir Hussain (ABU 0014 of 2016).
- [20] Considering that factor I first looked at the grounds of appeal by the Appellant and secondly the Judgment of the High Court in issue.

#### **The Grounds of Appeal urged**

- [1] ***THAT*** *the Learned Trial Judge erred in law and in fact in coming to a finding “that the term sale of the property was subject to consent of beneficiaries of Estate of Ram Deo and Estate of Padma Wati is implied in Sale and Purchase agreement.”*
- [2] ***THAT*** *the Learned Trial Judge erred in law and in fact in not coming to a finding that by signing transfer on 31<sup>st</sup> of October, 2014 the Defendant had impliedly extended the Sale and Purchase agreement.*

- [3] **THAT** the Learned Trial Judge erred in law and in fact in not coming to a finding that by signing the transfer after the expiry of the Sale and Purchase agreement the defendant had waived clause 19 of the Sales and Purchase agreement.
- [4] **THAT** the Learned Trial Judge erred in law and in fact coming to a finding that that failure to obtain TLTB consent prior to expiry of the Sale and Purchase agreement made the Sale and Purchase agreement and transfer avoid.
- [5] **THAT** the Learned Trial Judge erred in law and in fact in not coming to a finding that the vendor as the sole trustee and administrator could sell the property provided the shares of the beneficiaries was distributed to the beneficiaries as per the Succession Probate and Administration Act.
- [6] **THAT** the Learned Trial Judge erred in law and in fact in not coming to a finding that the Sales and Purchase agreement could not be performed within the stipulated period due to the fault of the vendor in not being able to provide the lease and that the provisional lease was not issued until 7<sup>th</sup> of November, 2014.
- [7] **THAT** the Learned Trial Judge erred in law and in fact in holding that the Defendant did not sign or extend the Sales and Purchase Agreement given the terms of the Sales and Purchase Agreement and the fact that it was beyond the control of the purchaser.
- [8] **THAT** the Learned Trial Judge erred in Law and in fact in holding that the Plaintiff thereafter was not entitled to specific performance and or damages given that the sales and purchase could have proceeded given the above.....”

The Judgment of the High Court – Conclusion reached, Orders made and the Antecedent Reasons

“Conclusion

82. This Court finds that:-

- (i) *SP Agreement dated 8 October 2013, is void ab initio for want of TLTB consent;*
- (ii) *Even if SP Agreement was valid it was subject to consent of beneficiaries of Estate of Ram Deo and Estate of Padma Wati in which case the transaction could not proceed for lack of consent from one of the beneficiaries.*
- (iii) *SP Agreement was never extended by Defendant beyond 7 October 2014, and Defendant did not sign and Extension document.*
- (iv) *Defendant did not execute Application for Consent to Transfer on 16 October 2014 [Exhibit P5]*
- (v) *Defendant did not grant Plaintiff Power of Attorney.*
- (vi) *Tenancy Agreement entered between Plaintiff and Defendant was void ab initio due to lack of TLTB's consent.*

83, This Court holds that:-

- (i) *Plaintiff is not entitled to specific performance of the SP Agreement.*
- (ii) *Plaintiff is not entitled to damages claimed from the Defendant for reasons stated at paragraph 68 to 78 of this Judgment.*

- (iii) *Defendant is not entitled to rental income arising out of the Tenancy Agreement or damages for reasons stated at paragraph 79 of this Judgment.*"

**Orders**

85. *I make following Orders:-*

- (i) *Plaintiff's claim is dismissed and struck out;*  
(ii) *Defendant's counter-claim is dismissed and struck out.*  
(iii) *Each party bear their own cost of this action."*

**Antecedent Reasons adduced by the High Court**

62. *On or about 20 October 2014, Sarju Prasad, Esquire sent a fresh Transfer to Defendant in Canberra for signing by him which was signed by Defendant in Canberra.*
63. *This Court accepts Defendant's evidence that he signed the Transfer in erroneous belief that SP Agreement had not expired and Sarju Prasad, Esquire will get all beneficiaries consent.*
64. *Mere fact that Defendant signed Transfer does not amount to extension of SP Agreement or save the SP Agreement and Transfer becoming void ab initio for lack of TLTB's consent.*
65. *Plaintiff gave evidence that he obtained TLTB's consent for the Transfer on 17 October 2014 (Exhibit P5).*
66. *Defendant denied signing the Application for Consent to Transfer on 16 October 2014, as he was not in Fiji at that time or at anytime in 2014.*
67. *This Court has no hesitation in holding that Defendant was not present in Fiji and he did not sign the Application for Consent to Transfer (Exhibit P5) for the simple reason that, if he was present in Fiji on 16 October 2014, then why was the Transfer sent to him in Canberra for his signature as appears from Exhibit P4 (Transfer signed by Defendant on 31 October 2014, in Canberra).*



### Power of Attorney

68. *This Court accepts Defendant's evidence that he did not give Plaintiff any Power of Attorney and he did not sign Power of Attorney which he revoked as soon as he became aware about the Power of Attorney.*

### Tenancy Agreement

69. *Plaintiff and Defendant gave evidence that they entered into Tenancy Agreement for Plaintiff to occupy the property.*
70. *No Tenancy Agreement was produced in evidence.*
71. *Also, no evidence was produced to show that LLTB granted consent to the Tenancy Agreement as required under section 12 i'aukei Land Trust Act 1940, which makes any Tenancy Agreement between the Plaintiff and Defendant null and void.*
72. *Therefore Plaintiff's claim for loss of rental paid to Defendant is to be refused.*

### Damages Claimed by Plaintiff

73. *Plaintiff's claims for cost of repairs to Defendant's building which he was occupying*
74. *No evidence has been led, either documentary or otherwise to show what repairs were carried out or value of repairs carried out.*
75. *Even if Plaintiff did carry out repairs he had been using the property for his own use and benefit.*
76. *Hence, Plaintiff's claim for repairs is refused.*
77. *No evidence has been led on loss from Sale of his outboard engine and twin cab or payment of insurance and as such this claim is refused.*
78. *All costs paid by Plaintiff in respect to the transaction was to be paid by him under the SP Agreement and because of the joint SP Agreement has been held as null and void his claim for legal fees, consent fees, valuation cost, cost of preparation of documents, stamp duty and search cost is refused.*

### **Defendant's Counterclaim**

79. *Defendant's counter-claim for rent under Rental Agreement is refused on the ground that Agreement is void for lack of TLTB consent.*

### **Assessment of the Grounds of Appeal urged against the judgment (Conclusion, Orders and the antecedent reasoning contained in the judgment**

- [21] At the outset I feel no constraint in saying that I did not confine myself to grounds 3 and 5 (Mr.) Nand on 25<sup>th</sup> November, urged but went beyond in considering all the grounds urged in appeal taking them as a whole.
- [22] Having done so, I found that the findings of the High Court fell into two broad categories viz:
- (a) findings on the law.
  - (b) findings on facts.

### **Re: The Findings on the law**

- [23] The Learned High Court Judge found in effect and in the result that, (i) for the extension of the period in the sale and purchase agreement, no consent had been obtained by the 2<sup>nd</sup> Respondent and, also, (ii) the consent of "the beneficiaries in question had not been obtained.
- [24] On that aspect I could not find on Record any material (which parties relied on for a Ruling) that was urged on behalf of the Appellant, (although (Mr.) Nand on 25<sup>th</sup> November, 2020 had submitted that there were pure questions of law that were being urged before this Court) that could have formed any basis to place the said findings of the High Court under scrutiny.

[25] In so far as (i) the consent of the 2<sup>nd</sup> Respondent is concerned, Section 12 (1) of the Native (now i'aukei) Land Trust Act No. 12 of 1940 (as severally amended), lays down such consent as a mandatory pre-condition.

[26] Where the consent of the beneficiaries were concerned, the High Court held as follows:

“47. Even though Executor of an Estate is not required to obtain consent of beneficiaries to deal with the Estate property, there is nothing stopping the Executor from entering into conditional SP Agreement which makes “consent of beneficiaries” a pre-condition for sale of Estate’s property.

48. Since, there is no express condition in relation to consent of beneficiaries in the SP Agreement this Court will have to determine if such condition was an implied term of the SP Agreement.

51. This Court therefore finds that the term sale of the Property was subject to consent of beneficiaries of Estate of Ram Deo and Estate of Padma Wati is implied in the SP Agreement.”

[27] I have no hesitation in endorsing that view in the absence of any evidence that the Executor was acting adverse to the interests of the beneficiaries of the Estate.

#### **The finding of fact by the High Court**

[28] The High Court found as findings of fact that:-

(a) There was no consent of the beneficiaries concerned the only evidence being that “the common solicitors were making arrangements to seek consent” (and therefore there being no such consent)”

(b) As regards whether 1<sup>st</sup> Respondent had come to Fiji to sign any document to extend the period of the SP Agreement, (the Trial Judge accepted the 1<sup>st</sup> Respondent's evidence)

(c) Then, the alleged signing of the transfer document on 8/10/2013 and/or on 20/10/2014 in Canberra, that, they were signed in the erroneous belief that the Agreement had not expired, the consent of the beneficiaries concerned also having not been obtained, apart from also the 2<sup>nd</sup> Respondent's consent not having been obtained therefor.

[29] All those matters pertain to findings of fact and it is an established principle in law that an Appellate Court would be slow to interfere with them unless there are exceptional reasons for doing so,

[30] For my part I could not find any such exceptional reasons.

[31] Consequently, I was not satisfied that there is "an arguable case" for the Applicant (Appellant) as contemplated by Lord Diplock in Inland Revenue Commissioners v. National Federation of Self Employed and Small Business Ltd [1981] 2 ALLER 93 at p. 106 (which was of course said in the context of an application for Leave to make an application for judicial review).

#### **Determination and Conclusion**

[32] On an overall consideration of the criteria in an application for enlargement of time to appeal, for the reasons articulated above, I am not inclined to grant the Appellant's (Applicant's) application for enlargement of time to appeal the judgment of the High Court.

### Mere Hope as opposed to a legitimate expectation

- [33] The Appellant may well have had "a hope." But, to invest that hope with a right in law to have sought "specific performance", the Appellant was required to satisfy antecedent legal requirements (conditions precedent) which the Appellant failed to do.
- [34] That is the thinking and rationale underlying the learned High Court Judge's conclusion, orders and antecedent reasoning which, for easy elucidation I recapped earlier.
- [35] Indeed, the matter of granting or refusing extension of time to appeal is one of judicial discretion.

### Scope and Content of the exercise of judicial discretion

- [36] In the English case of Gatty v. Shoosmith [1939] ALLER 916, which has been cited consistently in the Courts of Fiji, Greene, M.R. stated "The discretion of the Court being, as I conceive it, a perfectly free one, the only question is whether, upon the facts of this particular case, that discretion should be exercised."
- [37] I would transpose the words, upon the facts of this particular case should that discretion be exercised in granting the application for extension of time to appeal.
- [38] On the basis of the foregoing analysis I am not inclined to grant the Applicant's (Appellant) said application.

Orders of Court:

1. The application of the Appellant (Applicant) seeking enlargement of time to appeal the impugned judgment of the High Court is Refused and/or dismissed.
2. Given the fact that the 2<sup>nd</sup> Respondent in the entirety of the proceedings being a nominal party, no costs shall be ordered in the 2<sup>nd</sup> Respondent's favour while I order as costs to be paid by the Applicant (Appellant) to the 1<sup>st</sup> Respondent a sum of \$1,000 on the principle that costs follow the event.



*Almeida Guneratne*

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Almeida Guneratne  
JUSTICE OF APPEAL