

**IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION**

Civil Action # HBC 165 of 2021

IN THE MATTER of an
application under Section 169 of
the Land Transfer Act.

BETWEEN: MOHAMMED AYUB KHAN of 98 Whitford Road, Hinchinbrook, NSW
2168.

APPLICANT/PLAINTIFF

AND: MRS UDAY NARAYAN & MITLESH NARAYAN both of Lakena,
Manoca, Nausori, Fiji.

RESPONDENTS/DEFENDANTS

Representation

Plaintiff: Mr. S. Valenitabua (Karunaratne Lawyers).

Defendants: Mr. V. Maharaj (Vijay Maharaj Lawyers).

Date of Hearing: 19th February 2025.

Ruling

A. Introduction

- [1] The Applicant/Plaintiff filed summons seeking extension of time to file application for leave to appeal and for stay of execution pending the application for extension of time and for leave to appeal. The extension of time to file an application for leave to appeal is against my interlocutory ruling delivered on 29th August 2024.

B. Brief History of the Matter

- [2] On hearing an ex-parte motion on 25th January 2024 and submissions by Mr. D. Kumar (then Plaintiff's lawyer) relying on the affidavit and the orders of Justice Brito on 11th May 2023 granting vacant possession of the said property, I granted orders in terms. On 29th January 2024 Mr. Maharaj emailed the Registry informing that his clients appeal is pending in the Fiji Court of Appeal. He also informed me that there is a pending matter in respect of the same land before the Agricultural Tribunal. On 30th January 2024 I directed both parties be served a NOAH (Notice of Adjourned Hearing) and the matter be called on 5th February 2024 and the execution of writ of possession be put on hold. Both lawyers were served the NOAH.
- [3] On 5th February 2024, Mr. Maharaj appeared, for the Respondents/Defendants. There was no appearance for the Plaintiff. Mr. Maharaj informed me of the stay by the Agricultural Tribunal and that the subject land was agricultural land. I set aside the ex-

parte orders. Mr Maharaj submitted that the Plaintiff's seemed to have misled the Court. I directed the motion be heard inter parte and served on the Defendants. The Defendants were given 14 days to respond. The Plaintiff was given 1 month to reply.

- [4] Upon hearing the parties on 29th August 2024, I refuse leave to issue writ of possession against the Defendants for property comprised in State Lease No. 23093, Lot 1 on SO 4843 Lakena/Manoca (pt of) formerly Lot 2 on SO 2176, District of Bau. I granted stay of proceedings pending determination by the Court of Appeal and the Agricultural Tribunal. The Plaintiff was to pay the Defendants \$2000.00 as costs within 21 days. The costs were summarily assessed.

C Determination

- [5] The decision that is the subject of this matter is an interlocutory ruling. The Plaintiff/Applicant conceded this. In **Habib Bank Ltd v Raza [2020] FJHC 369; HBC53.2005 (26 May 2020)**, His Lordship Kamal Kumar the acting Chief Justice (as he then was) stated as follows and I quote the relevant portion:

“3.1 The case authorities in respect to Appeals against interlocutory orders have been stated in **Gosai v. Nadi Town Council [2008] FJCA 1.ABU116.2005 (22 February 2008)** as follows:-

“28. *APPEAL ON INTERLOCUTORY DECISION*

*In coming to the decision that the appeal should be refused; the Court has also had reference to the High Court's decision in **Heffernan v. Byrne and Ors HCF Civil Action No. HBM 105 of 2007 (19 February 2008)**. There, in refusing leave to appeal against an interlocutory decision, His Lordship set out a comprehensive collocation of the authorities, referring to **Kelton Investments Limited an[d] Tappoo Limited v. Civil Aviation Authority of Fiji and Motibhai & Company Limited [1995] FJCA 15, ABU 0034d.95s; Edmund March & Ors v. Puran Sundarjee & Ors Civil Appeal ABU 0025 of 2000; and KR Latchan Brothers Limited v. Transport Control Board and Tui Davuilevu Buses Limited Civil Appeal No. 12 of 1994 (Full Court)**.*

29. *As His Lordship observed, in **Edmund March & Ors** this Court said:- As stated by Sir Moti Tikaram, President Fiji Court of Appeal in **Totis Incorporated, Sport (Fiji) Limited & Richard Evanson v. John Leonard Clark & John Lockwood Sellers (Civ. App. No. 33 of 1996 p. 15)**:*

It has long been settled law and practice that interlocutory orders and decisions will seldom be amenable to appeal. Courts have repeatedly emphasized that appeals against interlocutory orders and decisions will only rarely succeed. The Fiji Court of Appeal has consistently observed the above principle by granting leave only in the most exceptional circumstances.

30. *Further, as His Lordship also noted, in **KR Latchan Brothers Limited** a Full Court of Appeal (Tikaram, Quillam and Savage JJ) said:*

“ ... The control of proceedings is always a matter for the trial Judge. We adopt what was said by the House of Lords in

Ashmore v. Corp. of Lloyd's [1992] 2 All ER 486- Furthermore, the decision or ruling of the trial judge on an interlocutory matter or any other decision made by him in the course of the trial should be upheld by an appellate court unless his decision was plainly wrong since he was in a far better position to determine the most appropriate method of conducting the proceedings.”

[6] The principles governing leave to appeal out of time are set out in **McCaig v Manu [2012] FJSC 18; CBV0002.2012 (27 August 2012)** as the factors to be considered which are:

- (i) *The reason for the failure to file within time.*
- (ii) *The length of the delay.*
- (iii) *Whether there is a ground of merit justifying the appellate court's consideration.*
- (iv) *Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?*
- (v) *If time is enlarged, will the Respondent be unfairly prejudiced?*

[7] An affidavit of the Applicant/Plaintiff was filed on 7th November 2024 in support of the summons for extension of time. I find no valid reason advanced by the Applicant/Plaintiff for the failure to file within time. The length of the delay is over 2 months (over 60 days). No grounds of appeal were annexed for me to assess whether they are likely to succeed. I find that the Respondents/Defendants will be unfairly prejudiced if time is enlarged and stay is granted. It would mean enforcement of vacant possession orders.

[8] The Applicants/Plaintiff's application for extension of time to file application for leave to appeal and for stay of execution pending the application for extension of time and for leave to appeal is refused. I summarily assess costs in favour of the Respondents/Defendants to be paid by the Applicant/Plaintiff as \$2000.00. It is to be paid within 21 days.

D. Court Orders

(a) The application for extension of time to file application for leave to appeal and for stay of execution pending the application for extension of time and for leave to appeal by the Applicant/Plaintiff is refused.

(b) Applicant/Plaintiff to pay Respondents/Defendants \$2000.00 as costs within 21 days. The costs have been summarily assessed.

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Chaitanya S.C.A. Lakshman
Puisne Judge

27th February 2025

