RATU EPELI KANAKANA, VILIAME ROKOVESA, MAKERETA WAQANIBAU, METUI MUDUNAVOSA, SIKELI KOROI, SERUPEPELI DAKAI, NIKOTIMO, DELAIVUNA, EPELI VAKALALABURE, JOSEVA, NAVARA, SAKIUSA TUBUNA v ATTORNEY-GENERAL OF FIJI, NATIVE LANDS COMMISSION, NATIVE LANDS TRUST BOARD (MISC0015 of 2011L)

COURT OF APPEAL — MISCELLANEOUS JURISDICTION

CALANCHINI AP

19, 30 March 2012

Practice and procedure — appeal — leave to file fresh notice of appeal — application to join second appellant — statutory time limit — appeal deemed abandoned — delay of 26 days — reasons for delay — chances of appeal succeeding — prejudice — joinder of party — Court of Appeal Act s 20(1)(b) — Court of Appeal Rules rr 16, 17(1), (1)(a), 17(2), 17(3) — iTaukei Land Trust Act s 4(1).

The applicants filed an appeal from a judgment delivered by the High Court, however they failed to comply with r 17(1)(a) of the Court of Appeal Rules. Consequently, the appeal was deemed abandoned. The applicants were at liberty to file a fresh notice of appeal before the expiration of 42 days, but they did not do so. Pursuant to r 17(3), no appeal could then be filed except with the leave of the Court of Appeal. The applicants applied for leave to file a fresh notice of appeal.

Held –

(1) The appeal is not wholly unmeritorious or wholly unlikely to succeed, and the grounds of appeal raised issues that could not be described as vexatious and frivolous. However in view of the delay of 26 days and the wholly unsatisfactory explanation of the delay, it was necessary for the applicants to establish something more than just a reasonable chance of success to conclude that leave should be given. The present appeal raises significant issues of considerable importance to traditional landowners in Fiji which should be considered by the Full Court.

(2) Any relief which was claimed by the Applicants was relief to which the Board was entitled jointly with them. As the Board had been joined in the proceedings in the court below, it is appropriate that the Board be given the opportunity to be heard at the appeal.

Application for leave to file fresh notice of appeal granted. iTaukei Land Trust Board joined as second appellant.

Cases referred to

Atami Beci and Others v Jonetani Kaukimoce and Others (Misc action No 2 of 2009 delivered 20 January 2010); *CM Van Stillevoldt BV v EL Carriers* [1983] 1 All ER 699; *Eroni Waqaitanoa v The Commissioner of Prisons* [1980] FCA 52; (1997) 43 FLR 245; *Mabo v Queensland* 175 CLR 1; *Narayan v Narayan* (unreported Misc. action No 14 of 2009 delivered 3 September 2010; *Native Land Trust Board v Ponipate Lesavua and Subramani* (unreported MISC action No 1 of 2004 delivered 18 March 2004); *Nowrich and Peterborough Building Society v Steed* [1991] 2 All ER 880; *Rupeni Silimuana Momoivalu v Telecom Fiji Limited* (unreported civil appeal No 37 of 2006 delivered on 7 September 2007), cited.

Reddy's Enterprises Ltd v Governor of the Reserve Bank of Fiji (1991) 3 FLR 73; *Tevita Fa v Tradewinds Marine Ltd and Another* (unreported civil appeal No 40 of 1994 delivered 18 November 1994), considered.

A Vakaloloma with K Vuataki for the Applicants.

R Green for the first and second Respondents.

L Macedru for the third Respondent.

Calanchini AP. By summons filed on 18 April 2011 the Applicants seek the following orders:

> ***"(a) That the Applicants be given leave to file fresh notice of appeal against the decision delivered by His Lordship Justice Inoke on 22 December 2010.***
>
> ***b) That Native Land Trust Board be Second Appellant on filing of fresh ground of appeal."***

The application was supported by an affidavit sworn by Kitione Vuataki on 15 April 2011. The application was opposed. An answering affidavit sworn by Siromi Dokonivalu on 11 May 2011 was filed on behalf of the First and Second Respondents. An affidavit sworn by Inoke Lutumailagi on 17 May 2011 was filed on behalf of the Third Respondent. A reply affidavit sworn by Kitione Vuataki on 17 May 2011 was filed shortly afterwards on behalf of the Applicants.

The first application is an application by the Applicants to file a fresh notice of appeal from the judgment delivered by the High Court on 22 December 2010. It was not disputed that the decision was a final judgment.

Pursuant to r 16 of the Court of Appeal Rules (the Rules) the Applicants were required to file and serve their notice of appeal with 42 days from the date on which the judgment was pronounced. The Applicants did file and serve a Notice and Grounds of Appeal on 2 February 2011. They were therefore within the time limit prescribed by r 16, although only just.

However the Applicants failed to comply with r 17 (1) (a) which requires any prospective appellant within 7 days after service of the notice of appeal to (i) file a copy of the notice endorsed with a certificate of the date of service of the notice and (ii) apply to the Registrar to fix an amount as security for the prosecution of the appeal.

The Applicants did not comply with either of these requirements and as a result the appeal was deemed abandoned as and from 9 February 2011 pursuant to r 17 (2). However the Applicants were at liberty to file a fresh notice of appeal before the expiration of 42 days calculated from the date on which the appeal was deemed to have been abandoned. That date was 9 February 2011. As a result the Applicants could have filed a fresh notice of appeal at any time up to and including 23 March 2011. The Applicants did not file a fresh notice of appeal within that time.

The consequence of that failure was that pursuant to r 17 (3) no appeal could be filed after 23 March 2011 except with the leave of the Court of Appeal. The jurisdiction of the Court in respect of applications for an extension of time to file a notice of appeal may be exercised by a judge of the Court under section 20 (1) (b) of the Court of Appeal Act (the Act).

The Applicants commenced proceedings in the High Court in 1999. The proceedings were commenced by writ with a Statement of Claim annexed to the writ. In 2006 the Statement of Claim was amended by leave.

The Applicants sued on their own behalf and on behalf of their constituent units and members for their common interest in, and grievance and remedy in respect of, what was referred to in the judgment as the '*Suva lands*.' The specific interest was their hereditary interest in the native titles owned by their forefathers before the advent of Europeans onto the Suva lands. Their grievance was that they no longer occupied the Suva lands nor have they received adequate compensation for their loss. In remedy they sought compensation for their losses and return of such lands in the hands of the Government which could be returned.

The learned Judge briefly summarised the bases of the claim made by the Applicants. The first basis of the Applicants' claim was that the sale of any part or the whole of the Suva lands by their chiefs did not extinguish native title. It was also claimed that their ancestral chiefs had no right to sell such lands.

The second basis of their claim was that although the chiefs ceded sovereignty and '*radical title*' over the Suva lands to Queen Victoria and her successors, they had not ceded beneficial proprietorship of the soil. The Deed of Cession dated 10 October 1874 did not extinguish Native Title or the hereditary estates.

The third basis of the claim is that the State, as successors of the Crown owed the Applicants a fiduciary duty to properly ascertain native title and protect their interests. It was alleged that the State breached its fiduciary obligations by engaging in unconscionable conduct amounting to equitable fraud.

The fourth basis of the claim was that as a result of the breaches to which reference has been made in the preceding paragraph, the Applicants were relocated to the village of Suvavou which was land belonging to other native owners. They lost occupancy of the Suva lands without surrender or extinguishment of their title.

The fifth basis of the claim was that the then Governor had promised on behalf of the Crown that native interests would be taken into account along with other related undertakings and promises. It was claimed that these promises and undertakings were inherited by the State. As a result the State owed to them a duty to correct historical errors and to return State land to the Applicants. They claimed compensation from the State for the lands not returned to them and for their fishing grounds.

Prior to the trial, two interlocutory applications had decided that the Applicants did have a cause of action and that the High Court did have jurisdiction to hear the action. The claim was not statute barred. It would appear that neither of those interlocutory decisions had been challenged by appeal.

For the reasons stated in his judgment the learned judge concluded that Native title to all of the Suva lands had been extinguished and that all the claims of the Applicants must fail and all relief claimed was refused.

The Applicants are seeking leave to file a fresh notice of appeal seeking an order that the judgment be set aside and judgment entered for the Applicants on the following grounds:

'1. The Learned Judge erred in law and or in fact in not accepting oral evidence of Plaintiff units' witnesses as to boundaries of their ancestral lands in the claim area.

'2. The Learned Judge erred in law and/or in fact is not accepting inalienability of native title of the Plaintiff units as to their ancestral lands in the claim area.

'3. The Learned Judge erred in law and/or in fact in not accepting that native title in the claim area was not extinguished by sale before 10th October, 1874.

'4. The Learned Judge erred in law and/or in fact in not accepting that native title in the claim area was not extinguished by cession of 10th October, 1874.

'5. The Learned Judged erred in law and/or in fact in overlooking or disallowing claims of breaches of fiduciary obligations by the Crown in the claim area and the State breaching its duty to correct such breaches.

'6. The Learned Judge erred in law and/or in fact in dismissing the Plaintiff units' claims as to their fishing rights areas.'

The Appeal by the Applicants was deemed abandoned for non-compliance with r 17 (1), followed by failure to comply with r 17 (2). Then under r 17 (3) they could not proceed without leave of this Court. In determining whether leave

should be given to the Applicants to file a fresh notice of appeal, it is necessary to consider the established principles that the Courts have developed for such applications.

The power to give leave to file a fresh notice of appeal is discretionary and should be exercised judicially. In exercising the discretion, the court takes into account (a) the length of the delay, (b) the reasons for the delay, (c) the chances of the appeal succeeding if leave is granted and (d) prejudice to the Respondents.

However, before considering in detail these four factors, it is important to keep in mind the following observation by Griffiths LJ in *CM Van Stillevoldt BV v EL Carriers Inc* [1983] 1 All ER 699 at 703:

> ***'It cannot be overstressed that adherence to the timetable provided by the rules is essential to the orderly conduct of business in the Court of Appeal. _ _ _ and I take this opportunity now to warn the profession that the attitude of the court to the previous lax practices is hardening in order to ensure for the benefit of all litigants that the business of the Court of Appeal is conducted in an expeditions and orderly manner.'***

Similar views have been expressed by this Court on a number of occasions, one of the more recent being in the decision in *Rupeni Silimuana Momoivalu v Telecom Fiji Limited* (unreported civil appeal No 37 of 2006 delivered on 7 September 2007).

Turning first to the length of the delay. The Applicants filed their application for leave to file a fresh notice of appeal on 18 April 2011. This was some 26 days after the date on which the appeal was deemed to have been abandoned under r 17 (2). In *Tevita Fa v Tradewinds Marine Ltd and Another* (unreported civil appeal No 40 of 1994 delivered 18 November 1994) Thompson JA at page 3 observed:

> ***'The application for leave to appeal was filed only 4 days after the end of the period of six weeks. That is a very short period but time limits are set with the intention that they should be observed and even lateness of only four days requires a satisfactory explanation before an extension of time can properly be granted.'***

As Counsel for the Respondent pointed out, a considerable amount of time had passed since the court below had delivered judgment. As Lord Donaldson MR in *Norwich & Peterborough Building Society v Steed* [1991] 2 All ER 880 observed at 885:

> ***'Once the time for appealing has elapsed, the respondent who was successful in the court below is entitled to regard the judgment in his favour as being final. If he is to be deprived of this entitlement, it can only be on the basis of a discretionary balancing exercise, however blameless may be the delay on the part of the would-be appellant.***
> _ _ _
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> In *Palata Investments Ltd v Burt & Sinfield Ltd* [1985] 2 All ER 517 the delay was only three days and it was fully explained. In such circumstances the balancing exercise would be unlikely to come down on the side of refusing an extension of time, but in an extreme case of lack of merit it could do so. _ _ _
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> _ _ _ ***In Palata's case the delay was as short as could be and was wholly excusable. The merits therefore played little part. In*** *Rawashdeh v Lane* (1988) 40 EG 100 the delay was very much longer – it was six weeks in fact – and was not wholly excusable. Much more merit was required to overcome it.'

Turning then to the explanation for the delay in the present case. The explanations appear to be set out in paragraphs 8 to 10 of the affidavit of Kitione Vuataki sworn on 15 April 2011.

They are confusing in the sense that the deponent has not understood the effect of r 17. The appeal could not be deemed abandoned on 3 February 2011 when the Notice and Grounds of Appeal had been filed within time on 2 February 2011. The appeal was deemed abandoned on 9 February 2011 when the Appellant failed to comply with r 17 (i). The explanation for that non-compliance and for the failure to comply with r 17 (2) appear to be related to problems arising out of the management of the legal practice of the Applicants' legal practitioner.

However, in my judgment, there is much merit in the comments of Pathik J in *Eroni Waqaitanoa v The Commissioner of Prisons* [1980] FCA 52; [1997] 43 FLR 245 at 248:

> ***'First of all, Court is not concerned with the manner in which Counsel runs his practice, but he does owe a duty to his client to act diligently and not come up with the type of reasons advanced and expect the Court to grant him an indulgence.'***

Here the delay was 26 days and was certainly not what may be described as '*wholly excusable*.' In effect the explanation for the delay was not of itself sufficient to justify the exercise of the discretion to grant leave to the Applicants.

Notwithstanding the length of the delay and the wholly unsatisfactory explanation put forward on behalf of the Applicants the exercise of the discretion does, in this case, depend to some extent on the merits of the proposed appeal. As Thompson JA in the **Tevita Fa** decision (supra) at page 3 stated:

> ***'However as important as the need for a satisfactory explanation of the lateness is the need for the applicant to show that he has a reasonable chance of success if time is extended and the appeal proceeds.'***

The extent to which I am required to assess the chances of success in considering whether to grant leave is similar to the assessment that is made when a stay of execution is sought. To that end it is useful to keep in mind the observation of Tikaram RJA in *Reddy's Enterprises Ltd v Governor of the Reserve Bank of Fiji* (1991) 37 FLR 73 at 82:

> ***'It is not my function to assess the actual merits of the appeal but if prima facie it is obvious that the appeal is wholly unmeritorious or wholly unlikely to succeed then it would be appropriate for me to say so. _ _ _ The important point is whether there is a serious question for adjudication as opposed to it being frivolous or vexatious.'***

I am satisfied, having read the judgment of the learned trial judge, the grounds of appeal and the affidavit in support, that the appeal is not wholly unmeritorious or wholly unlikely to succeed.

The grounds of appeal raise a number of issues including (a) the inalienability of native title so far as it relates to the Applicants' ancestral claim to the Suva lands, (b) whether native title had been extinguished by sale prior to 10 October 1874, (c) whether native title was extinguished by the Deed of Cession and (d) whether there has been or are continuing breaches of a fiduciary obligation by the Crown or the State.

In his judgment the learned judge has quoted extensively from a number of source documents going as far back as 9 November 1856. The Deed of Cession together with reports and correspondence are referred to and extensive quotations from those documents have been included. The findings of fact and conclusions start on page 86 at paragraph 100. In my judgment the grounds of appeal raise issues that could not be described as vexatious and frivolous.

However, in view of the delay and the wholly unsatisfactory explanation for the delay, it is necessary for the Applicants to establish something more than just reasonable chance of success to conclude that leave should be given. On this

point the Applicants have made extensive written submissions. Although I have some reservations about the application of *Mabo v Queensland (No 2)(The Mabo Case)* (1992) 175 CLR 1 to the facts and in general to the position of iTaukei land in Fiji, there is no doubt that the appeal also raises significant issues of considerable importance to traditional landowners in Fiji.

In *Native Land Trust Board v Ponipate Lesavua and Subramani* (unreported MISC. action No 1 of 2004 delivered 18 March 2004) Tompkins JA noted that although the delay could not be excused there were issues of general importance that warranted the appeal proceeding. Similarly, in *Atami Beci and Others v Jonetani Kaukimoce and Others* (Misc. action No 2 of 2009 delivered 20 January 2010), the application for leave to appeal out of time was filed at least one month outside the prescribed period. The reasons were considered by Byrne AP to be unsatisfactory. However the learned President stated:

> ***'In my judgment the questions of law raised in this application merit the considerations of the Full Court and I shall therefore grant leave to appeal out of time primarily because of the important questions of law involved.'***

Again in *Narayan v Narayan* (unreported Misc. action No 14 of 2009 delivered 3 September 2010) the delay was some months and the explanation again was unsatisfactory. Byrne AP stated:

> ***'This leads me to the conclusion that it is desirable in the interest of justice that the Full Court should consider this question _ _ _.'***

I am satisfied that the present appeal raises significant issues which should be considered by the Full Court.

There is no real prejudice to the Respondents by allowing the appeal to proceed. The Applicants did demonstrate an intention to appeal and had initially filed a notice and grounds of appeal within time.

As a result I propose to grant the application for leave to file a fresh notice of appeal subject to costs to be paid by the Applicants to the First and Second Respondents. The Respondents have not in any way contributed to the failure by the Applicants to comply with the Rules. The third Respondent was not directly involved in the first application.

The other application by the Applicants is to join the iTaukei Land Trust Board as a second appellant. This application is effectively made under O 15 r 4 of the High Court Rules.

In respect of this application it is appropriate to refer to section 4 (1) of the iTaukei Land Trust Act Cap 134 which states:

> ***'The control of all native land shall be vested in the Board and all such land shall be administered by the Board for the benefit of the iTaukei owners.'***

In view of this provision I am prepared to accept that any relief which was claimed by the Applicants was relief to which the Board was entitled jointly with them. As the Board had been joined in the proceedings in the court below, it is appropriate that the Board be given the opportunity to be heard at the appeal. Counsel appearing for the Board did not oppose the application and indicated that the Board would abide the decision of this Court. There will be no order for costs in respect of that application.

The Applicants have succeeded on their summons. I order that the Board be joined as the Second Appellant. I grant leave for them to file a fresh notice of appeal on condition that they pay the costs of the First and Second Respondents fixed at $1,800.00 by Friday 27 April 2012 and file the said notice and grounds of appeal by the same date.

Order

1. The iTaukei Land Trust Board is joined as Second Appellant.

2. The Applicants are given leave to file a fresh notice of appeal on the condition that (a) they pay the costs of this application in the sum of $1800.00 to the First and Second Respondents by 27 April 2012.
3. The fresh Notice and Grounds of Appeal is to be in the form of exhibit B annexed to the affidavit of Kitione Vuataki sworn on 15 April 2011.

Application granted.