

**IN THE HIGH COURT OF FIJI**  
**WESTERN DIVISION AT LAUTOKA**  
**CIVIL JURISDICTION**

**CIVIL ACTION NO. HBC 127 OF 2016**

**BETWEEN** : **JOSUA MALINAVITILEVU NAULIVOU**, Company Director of Namara Village, Vuda, suing in his personal capacity as a member of the Yavusa Sabutoyatoya of Wayasewa in Yasawa and in a representative capacity for and on behalf of the Yavusa Sabutoyatoya of Wayasewa in Yasawa.

**PLAINTIFF/RESPONDENT**

**AND** : **RATU KITIONE EPARAMA TAVAIQIA**, on behalf of the Yavusa Sabutoyatoya of Viseisei, Vuda.

**FIRST DEFENDANT/APPLICANT**

**AND** : **ITAUKEI LAND TRUST BOARD**, a body corporate of Victoria Parade, Suva.

**SECOND DEFENDANT**

**AND** : **REGISTRAR OF TITLES**, of Suvavou House, Victoria Parade, Suva.

**THIRD DEFENDANT**

**Appearances** : Ms P. Low for the first defendant/applicant  
Mr I. Fa for the plaintiff/respondent  
Mr W. Mucunabitu for the second defendant  
Mr J. Mainavolau for the third defendant

**Date of Hearing** : 25 May 2020

**Date of Ruling** : 12 June 2020

**R U L I N G**

[On leave to appeal]

## Introduction

[01] This is an application for leave to appeal a judgment of this court (my judgment) dated 30 January 2020 delivered allowing the appeal.

[02] The first defendant/applicant (*'the applicant'*), by his *inter partes* summons supported by an affidavit of Jeremaia Natoko filed on 19 February 2020 (*'the application'*), seeks the following orders:

- a) *That leave be granted for the First Defendant to appeal the decision of the Honourable Justice Mr Ajmeer delivered on 30 January 2020 in the High Court of Fiji at Lautoka;*
- b) *In the event that this application for leave or any leave to appeal granted by the Honourable Court is not granted within 21 days from 30 January 2020 then a further order that the First Defendant/Proposed Applicant be granted an enlargement of time and serve a Notice of Appeal within 7 days from the date on which the said leave to appeal is granted;*
- c) *That the substantive matter in this case be stayed whilst this application for leave to appeal; and appeal heard and determined; and*
- d) *Such further or other orders this Honourable Court in the circumstances considers appropriate.*

[03] The plaintiff/respondent (*"the respondent"*) has filed an affidavit of Josua Malinavitilevu Naulivu, respondent himself in opposition.

[04] At the hearing, both parties made oral submissions and tendered their respective submissions as well.

[05] It will be noted that at the hearing Ms Low confirmed that the application for leave to appeal out of time was no longer pursued as the applicant had filed the leave to appeal application within the prescribed time limit of 21 days.

## The background

[06] The plaintiff (in these proceedings *"the respondent"*) brought a claim against the first defendant (in these proceedings *'the applicant'*), iTaukei Land Trust Board, the second defendant and the Registrar of Titles, the third defendant seeking certain declarations, among other things.

[07] On 24 October 2016, the applicant filed an application under O 18, R 18 of the High Court Rules 1988, as amended (*'HCR'*) to strike out the statement of claim

on the ground of *res judicata*. The learned Master (*'the Master'*) heard the application and delivered his ruling on 27 July 2018, whereby he struck out the respondent's claim. The respondent appealed the Master's decision to strike out the statement of claim to a Judge of the High Court.

[08] The respondent was successful in his appeal. On 30 January 2020, the Judge of the High Court [I] delivered the appeal judgment setting aside the Master's decision of 27 July 2018. The final outcome of the appeal judgment was as follows:

1. *Appeal allowed.*
2. *Master's order dated 27 July 2018 set aside.*
3. *Matter reinstated to take its normal course.*
4. *The first respondent shall pay cost of the appeal in the sum of \$2,000.00, which is summarily assessed within 21 days of the date of this judgment.*

[09] The applicant now seeks leave to appeal the appeal that judgment.

### Legal framework

[10] Of the time for appealing, Court of Appeal Rule ('CAR') 16 states:

#### *"Time for appealing*

*16 Subject to the provisions of this Rule, every notice of appeal or application for leave to appeal shall be filed and served under Rule 15 (4) within the following period (calculated from the date on which the judgment or order of the court below was pronounced), that is to say-*

*(a) in the case of an appeal from an interlocutory order, 21 days;*

*(b) in any other case, 6 weeks."*

[11] The Court of Appeal Act 1949 ("*CA Act*"), section 12 (2) (f) states (so far as relevant):

#### *"Appeals in civil cases*

*(2) No appeal shall lie-*

*...*

*(f) without the leave of the Judge or of the Court of Appeal from any interlocutory order or interlocutory judgment made or given by a Judge of the High Court except in the following cases, namely- ..."*

[12] CAR, 26 and 27 provides:

***"Applications to Court of Appeal***

*26 (1) Every application to a Judge of the Court of Appeal shall be by summons in chambers, and the provisions of the High Court Rules shall apply thereto.*

*(2) Any application to the Court of Appeal for leave to appeal (whether made before or after the expiration of the time for appealing) shall be made on notice to the party or parties affected.*

*(3) Wherever under these Rules an application may be made either to the court below or to the Court of Appeal it shall be made in the first instance to the court below.*

***Extension of time***

*27 The period for filing and serving a notice of appeal or an application for leave to appeal under Rule 16 may be extended by the court below or by the Court of Appeal."*

**Parties' submissions**

[13] Ms Low on behalf of the applicant submits that: leave to appeal is required to appeal any interlocutory judgment given by a Judge of the High Court. The judgment sought to be appealed will cause the first defendant (applicant) as substantial injustice. The decision of this court to set aside the Master's order and the current action is reinstated to take its normal course puts to an end a clearly defined issue in law, being abuse of the process of the court. The finding of this court was wrong, contrary to the extended doctrine of *res judicata* and abuse of the process.

[14] Mr Fa, on the other hand, on behalf of the respondent contends that: the first defendant's application is premised on the court's judgment of 30 January 2020, being interlocutory orders. This is in fact not the case. The orders of 30 January 2020 are final orders of the court and, therefore, no leave is required to appeal the

same. He relied on *Goundar v The Ministry of Health* [2008] FJCA 40; ABU0075.2006S (9 July 2008).

## Discussion

- [15] The applicant intends to appeal the judgment delivered on 30 January 2020 setting aside the Master's decision to striking out the respondent's claim.
- [16] The judgment of 30 January 2020 was delivered on appeal from the Master's interlocutory order dated 27 July 2018.
- [17] The applicant did not directly appeal the judgment of this court to the Court of Appeal within 6 weeks, as required by CAR 16 (b). The appeal judgment was delivered on 30 January 2020. The applicant could have filed and served their appeal in the Court of Appeal by 11 March 2020. However, they seek leave to appeal the judgment, which was delivered on appeal. The applicant thinks that the appeal was from an interlocutory ruling of the Master, therefore, the judgment delivered in the appeal proceedings was also an interlocutory judgment.
- [18] The question then arises whether a judgment delivered in appeal proceedings, which finally disposes of the appeal, is an interlocutory judgment.
- [19] Generally, a '*final judgment*' refers to a court's last action that settles the rights of the parties and disposes of all issues in controversy, except for the award of costs.
- [20] There is no right of appeal without the leave of the Judge or of the Court of Appeal from any interlocutory order or interlocutory judgment (see: *CA Act, s.12 (2) (f)*).
- [21] Time for appealing in the case of an appeal from an interlocutory order is 21 days; and in any other case is 6 weeks from the date on which the judgment or order of the court below (High Court) was pronounced (see: *CAR, 16*).
- [22] The applicant has filed the leave to appeal application within 21 days from the date on which the judgment was pronounced. The basis for this application is that the judgment the applicant intends to appeal against is an interlocutory judgment.

[23] The Fiji Court of Appeal in *Goundar v Minister for Health*, above differentiated final judgments from that of interlocutory orders. At paragraphs 37 and 38, the Court said:

“ ...

37. *This is the position. Where proceedings are commenced in the High Court in the Court's original jurisdiction and the matter proceeds to hearing and judgment and the judge proceeds to make final orders or declarations, the judgment and orders are not interlocutory.*

38. *Every other application to the High Court should be considered interlocutory and a litigant dissatisfied with the ruling or order or declaration of the Court needs leave to appeal to that ruling order or declaration. The following are examples of interlocutory applications:*

1. *an application to stay proceedings;*
2. *an application to strike out a pleading;*
3. *an application for an extension of time in which to commence proceedings;*
4. *an application for leave to appeal;*
5. *the refusal of an application to set aside a default judgment;*
6. *an application for leave to apply for judicial review.*

...”

[24] The proceedings were commenced in the High Court in the Court's appellate jurisdiction and the appeal proceeded to hearing and judgment and the court proceeded to make final the judgment. This judgment is not interlocutory because it finally disposes of the appeal settling all the issues raised in the appeal.

[25] The judgment delivered by this Court on appeal, in my opinion, is a final judgment. The applicant could have appealed it to the Court of Appeal within 6 weeks from the date on which the judgment was entered, without obtaining leave to appeal. It follows that no leave is required to appeal a final judgment or order.

## **Conclusion**

[26] Having considered the application, the affidavits filed by both parties, the oral and written submissions of the parties, I conclude that the leave to appeal the final judgment of this court pronounced on appeal on 30 January

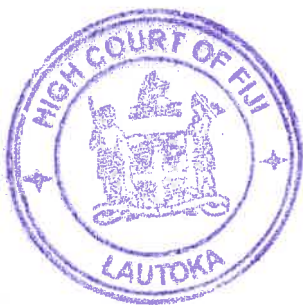
2020 is a misconceived one. There is no need to obtain leave of the court to appeal the final judgment pronounced on appeal. I would accordingly dismiss the application with summarily assessed costs of \$1,500.00 payable by the applicant (first defendant) to the respondent (plaintiff) within 21 days.

[27] There is no application for leave to appeal out of time for me to consider. Counsel for the applicant informed the court that she is not pursuing the application for leave to appeal out of time.

[28] The application to stay the substantive matter in this case whilst this application for leave to appeal and appeal heard and determined has become redundant, as I have decided to dismiss the application for leave to appeal. I would accordingly dismiss the stay application.

#### **The result**

1. Leave to appeal application dismissed.
2. Application for stay the substantive matter dismissed.
3. Applicant (first defendant) shall pay the summarily assessed costs of \$1,500.00 to the respondent (plaintiff) within 21 days.



*M. H. Mohamed Ajmeer*  
12/6/20

**M. H. Mohamed Ajmeer**

**JUDGE**

**At Lautoka  
12 June 2020**

#### Solicitors:

Howards Lawyers for the first defendant/applicant

Fa & Company, Barristers & Solicitors for the plaintiff/respondent