

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

CIVIL ACTION HBC NO. 99 OF 2013

IN THE MATTER of an Appeal from the Judgment and/or Decision of His Lordship the Judge Mr Justice **MOHAMED AJMEER** of Lautoka High Court on the 2nd day of May, 2017 in Civil Action No. 99 of 2013.

BETWEEN : **MILIANA NEIVALU** of Moala Village, Nadi, Domestic Duties for and on behalf of herself and the members of Rororo Family.

PLAINTIFFS/APPLICANTS

AND : **ILAMI LUTUMAILAGI** and **JOELI LUMUNI** all of Moala Village, Nadi, Driver and Farmer respectively as Trustees of Mataqali Nalubati.

DEFENDANTS/RESPONDENTS

Appearances : Ms P. Mataika for the plaintiffs/applicants
Mr E. Sailo for the defendants/respondents

Date of Hearing : 28 March 2018

Date of Ruling : 28 March 2018

R U L I N G

[Leave to appeal out of time]

Introduction

[01] Before me is an application for leave to appeal out of time of my judgment delivered on 2 May 2017 (*the application*). I delivered the judgment making a declaratory order in favour of the plaintiffs that that they are entitled to use Nukuvatu Island as their '*danudanu*' and eating place (*'the judgment'*). In that judgment, I found, having accepted the Commissioner Maxwell's definition of

danudanu, that the sole right of planting any *danudanu* is vested in the person who first planted it and his descendants. I also found that *danudanu* right includes only planting and eating and nothing else. As a result, I refused the following declarations:-

- a. *A declaration that plaintiffs are entitled to remove and sell sand on Nukuvoatu Island as part of their danudanu rights.*
- b. *An Injunction restraining the defendants and on their servants, agents or howsoever from preventing the plaintiffs from removing and selling sand from Nukuvoatu Island and or in any way harassing the plaintiffs concerning such removal.*

[02] The application is made pursuant to Rules 26 (3) of the Court of Appeal Rules (CAR). Rule 26 (3) provides that:

"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." [Emphasis provided]

[03] The plaintiffs/applicants (hereinafter *the applicant*) rely on the affidavit of Miliana Neivalu sworn and filed herein. The grounds relied upon by the applicant are as follows:

1. *Judgment was read out on 5th May 2017, written copy given to Applicants counsel on 15th May 2017, but due to inability to communicate Applicant did not receive Judgment until served by Respondents on 13th June 2017.*
2. *Time to Appeal had expired by 13th June 2017 and Applicant and Counsel had to prepare appeal grounds.*

3. *Appeal Concerns incidence of danudanu rights which the lower Court had restricted to planting and eating rights when Applicant had submitted that Planting including clearing sand from area to be planted and eating right included future development rights to sell such sand and "eat" from it.*
4. *The appeal also involved important point of river sand owned by the State dumped on iTaukei land and whether license is needed for danudanu right owners to clear such sand before planting.*

[04] When the hearing was taken up before me, the defendants/respondents (hereinafter *the respondent*) sought 7 days to file their objection to the application. The respondent did not file any objection before the hearing, albeit sufficient time was given to them. I disallowed the respondent's application seeking adjournment enabling them to file their response/objection and ordered the parties to go ahead with the hearing.

Grounds of Appeal

[05] The applicant proposes to appeal the judgment on the following grounds of appeal:

1. *The Learned Judge erred in law and in fact in not accepting that Nukuvatu Island is solely owned by Tokatoka Nalubati and not with Mataqali Nalubati.*
2. *The Learned Judge erred in law and in fact in not accepting that an incident of planting is the right to clear the danudanu area of river sand covering it.*
3. *The Learned Judge erred in law and in fact in requiring plaintiffs to have a license to remove sand covering their danudanu.*

4. *The Learned Judge erred in law and in fact in not accepting that an incident of danudanu rights in the right to future evolution of future development rights to include sale of things covering danudanu area.*
5. *The Learned Judge erred in law and in fact in not granting damages and costs as claimed.*

Discussion and Decision

- [06] The applicant seeks leave to appeal outside the appealable period of my judgment delivered on 2 May 2017 and a copy of the written judgment was issued to the applicant on 15 May 2017.
- [07] A final judgment or order of the High Court may be appealed to the Court of Appeal within 6 weeks from the date on which the judgment or order was pronounced.
- [08] In this particular case, I take 15 May 2017, the date on which the copy of the written judgment was released to the applicant, as the date the judgment was pronounced.
- [09] The copy of the judgment was issued to the applicant on 15 May 2017. The appealable period of 6 weeks expired on 26 June 2017. The applicant has filed the application for leave to appeal out of time has been filed on 06 March 2018. The length of delay is about 8 months and 8 days (if I exclude the legal vacation period, the length of delay is 7 months and 8 days).
- [10] The applicant filed an application for leave to appeal out of time in the Court of Appeal on 17 June 2017. That application was dismissed by the Court of Appeal on 26 February 2018. The applicant should have made her application for leave to appeal to this court in the first instance. The applicant had mistakenly filed the

application for leave to appeal in the Court of Appeal without filing the application in this court in the first instance as required by Rule 26 (3) ,CAR.

[11] The applicant in her affidavit avers the reasons for the delay. At para 14-15 of her affidavit, the applicant states:

“... ”

14. *That upon reading the Judgment of Civil action number 99 of 2013 on 13th June 2017 and it being explained to me by my Solicitors, I noticed that the Honourable Judge had asked that my family, the Rororo family, owned the Danudanu over Nukuwatu Island but that such right includes only planting and eating and nothing else and that a license was needed for my family to remove the sand from our Danudanu.*
 15. *That I believe it is an incident of planting to remove the sand covering the land to be planted and that I need no license to remove such land.*
 16. *That further I believe that my family has further development rights as an incident of such “danudanu” to be able to sell the sand upon removal.*
 17. *That I therefore believe that I have good arguable appeal grounds which I have annexed marked “MN-2”.*
 18. *That I believe that my appeal raised important points of law regarding:-*
 - a) *Ownership of river sand;*
 - b) *Incidents of Danudanu (eating) rights; and*
 - c) *Future development rights*
 19. *That on the 17th of June 2017, my Solicitors filed a Summons for leave to appeal in the Court of Appeal.*
 20. *That I have been advised by my Solicitors that this was heard on the 26th of February 2018 and a preliminary issue was raised by the Court of Appeal Judge Justice Chandra that the matter was to be filled at first instance in the High Court.*
- ...”

[12] By the proposed appeal, the applicant seeks a legal interpretation of ‘danudanu’ right. The ‘danudanu’ right has not been legally interpreted so far. It is not succinctly clear whether such right includes sale of sand upon extraction. In my judgment, I have considered only the Commissioner Maxwell’s definition of danudanu right.

[13] The grounds of appeal raise important points of law such as ownership of river sand, incidents of *danudanu* (eating) rights and future development rights.

[14] The court will grant leave to appeal out of time when the proposed grounds of appeal raise important legal issues. The applicant is seeking a legal interpretation of the *danudanu* right. I am satisfied that the proposed grounds of appeal raise important legal issues and seek legal interpretation of *danudanu* rights. I would, therefore, grant leave to appeal my judgment dated 2 May 2017 out of time. The applicant must file her appeal within 14 days from the date of this ruling.

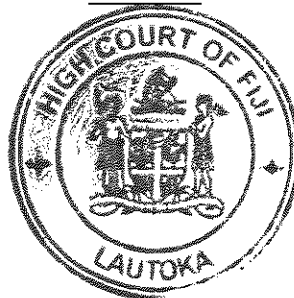
The Outcome

1. Leave is granted to the applicant to appeal my judgment dated 2 May 2017 out of time.
2. The applicant is to file and serve notice of appeal within 14 days from the date of this ruling.
3. No order as to costs.

M. H. Mohamed Ajmeer
28/3/18

.....
M. H. Mohamed Ajmeer

JUDGE



At Lautoka

28 March 2018

Solicitors:

For plaintiffs/applicants: M/s Vuataki Law, Barristers & Solicitors

For defendants/respondents: M/s KLaw, Chambers & Partners