IN THE COURT OF APPEAL FIJI
[APPELLATE CIVIL JURISDICTION]

Civil Appeal No: ABU 0054 of 2015
(High Court Civil Action No.HBC 013 of 2013)

BETWEEN	:	**TERESA BOSHER**
		Appellant
AND	:	**GLENELG LIMITED**
		Respondent
Coram	:	**Basnayake, JA**
	:	**Prematilaka, JA**
	:	**Alfred, JA**
Counsel	:	**Ms. S. Kunatuba for the Appellant**
		Mr. N. Prasad for the Respondent
Dates of Hearing	:	**4 & 18 May 2017**
Date of Judgment	:	**26 May 2017**

JUDGMENT

Basnayake, JA

[1] I agree with the reasons given in the draft judgment of my noble brothers Prematilaka and Alfred JJA and their conclusions.

Prematilaka, JA

[2] I have perused the judgment of Alfred JA in draft and while agreeing with my brother Alfred JA that the appeal should be allowed and a new trial should be ordered along with the order for cost, I wish to add some observations of my own.

[3] After the hearing was concluded on 4 May 2017, the Court decided to hear the counsel for both parties again on 18 May 2017 only on the question whether the reliefs granted by the Learned High Court Judge could be sustained in view of the fact that they had been prayed for in the originating summons.

[4] Since it is common ground that the vacant possession of the premises at No. 24 Brewster Street has already been handed over to the Respondent by the Appellant (i.e. the first relief) following the Judgment of the High Court and was not a matter raised in appeal, it did not have to be considered at this stage by this Court.

[5] However, with regard to the second relief *i.e.* the order that the Appellant should pay FJD 25,650 with interest to the Respondent (along with FJD 1000 summarily assessed as costs as the third relief), the fundamental issue is whether that relief could have been granted in the absence of a specific prayer to that effect. Because, even assuming that the Judgment is correct in all other respects it cannot be sustained, if this issue is answered in the negative.

[6] This is on the principle of *ultra petita* which is used to refer to a decision of a court which grants more than what is asked for.

[7] The counsel for the Respondent conceded that the originating summons had not sought any relief relating to a monetary payment by the Appellant to the Respondent and therefore the High Court could not have ordered the Appellant to pay FJD 25,650 to the Respondent as per any relief prayed for by the Respondent.

[8] However, the Respondent's Counsel sought to justify the said award relying on Order 28 Rule 9 of the High Court Rules, 1988.

[9] Order 28 Rule 9 states *inter alia*

'Continuation of proceedings as if cause or matter begun by writ *(O.28, r.9)*

> *9.-(1) Where, in the case of a cause or matter begun by originating summons, it appears to the Court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause or matter had been begun by writ, it may order the proceedings to continue as if the cause or matter had been so begun and may, in particular, order that any affidavits shall stand as pleadings, with or without liberty to any of the parties to add thereto or to apply for particulars thereof.*
>
> *(2) Where the Court decides to make such an order, Order 25, rules 2 to 7, shall, with the omission of so much of rule 7(1) as requires parties to serve a notice specifying the orders and directions which they require and with any other necessary modifications, apply as if there had been a summons for directions in the proceedings and that order were one of the orders to be made thereon.'*

[10] The Counsel for the Respondent argued that though the matter begun by originating summons, the proceedings later continued as if the matter had begun by writ and therefore the affidavits stood as pleadings. The gist of his argument is that because the affidavit of Cecilia Laisani Keli dated 23 June 2014 sworn on behalf of the Respondent had stated that FJD 86,250 being the cost of repairs as set out in the Building Report annexed to the affidavit marked 'A' or any other sum determined by court, should be made payable by the Appellant to the Respondent, the High Court Judge was justified in awarding the sum of FJD 25,650.00.

[11] I am unable to agree with the aforesaid argument for two reasons, for it would otherwise amount to condoning a serious procedural irregularity.

[12] Firstly, there is nothing in the proceedings to demonstrate (as conceded by the Respondent's Counsel) that the High Court at any stage had made an order, for reasons given, that the instant cause or matter be continued as if it had begun by writ. In my view, the assertion in the impugned Judgment that the court has later allowed the parties to adduce evidence on matters of fact which they are at variance falls far short of what is contemplated under Order 28 Rule 9. As a matter of fact there is no reference to that effect either in the proceedings.

[13] Secondly, the court making an order under Order 28 Rule 9 may also in particular, order that any affidavits shall stand as pleadings. Therefore, I am of the view that no affidavits already filed in a matter or cause that begun by originating summons would *ipso facto* or automatically become pleadings in the proceedings subsequently permitted to be continued as if it had begun by writ. There must be an order by court to that effect. In this case the High Court had made no order that the aforesaid affidavit of Cecilia Laisani Keli dated 23 June 2014 should be treated as part of the pleadings.

[14] Therefore, I reject the argument of the Counsel for the Respondent that the award of FJD 25,650 could be justified based on Order 28 Rule 9 of High Court Rules as both prerequisites to sustain his argument are not satisfied according to the proceedings in the case.

[15] In the circumstances, the second relief *i.e.* the order that the Appellant should pay FJD 25,650 with interest to the Respondent along with FJD 1000 as summarily assessed costs as the third relief, should be set aside and the appeal be allowed accordingly.

Alfred, JA

[16] This is an appeal from the decision of the learned trial Judge, who on 24 July 2015 gave judgment in favour of the Plaintiff (Respondent) on its Originating Summons (O.S) as follows:-

(i) The Defendant (Appellant) shall handover possession of the Brewster Street property to the Plaintiff.

(ii) The Defendant shall pay $25,650 to the Plaintiff with interest thereon.

(iii) The Defendant shall pay the Plaintiff, $1,000 as costs summarily assessed.

[17] It is common ground between the parties that (i) above has been complied with and does not trouble us in this appeal. To consider (ii) and (iii) above necessitates perusing the O.S to which I now turn.

[18] The O.S. seeks the determination of the High Court on the following:

(1) By an agreement dated 7 October 2003 made between the Plaintiff and the Defendant (the Respondent and the Appellant respectively herein) it was provided, inter alia:-

(a) The Plaintiff repay to the Defendant a loan made by the Defendant to the Plaintiff of $150,000 over a period of 20 years.

(b) During the period of the loan, the Defendant was to lease the Plaintiff's property known as 24 Brewster Street, Suva (the property) subject to the terms of the agreement.

(2) An order that the Defendant give a full account of the moneys paid or accounted for towards the repayment of the loan and the amount claimed so as to effect early repayment.

(3) An order that the Defendant give access to the property to the Plaintiff's representatives and workmen to assess its condition and estimate the costs of repairs the responsibility of the Defendant.

(4) Any consequential orders.

[19] The Amended Grounds of Appeal filed by the Appellant (Defendant) contained 19 grounds of which only the following need concern us in this Appeal in the light of the decision I am reaching here.

Ground 7: That the trial judge erred in fact and in law when he deducted $86,000 in repairs and maintenance estimated by the Building Consultant from the loan repayment and ordered the Appellant to pay the balance of $26,000 (sic) to the Respondent.

Ground 8: That the trial judge erred in law and facts when he decided in favor of the Respondent (Plaintiff in the High Court) that the Appellant should pay $86,000 (eighty six thousand dollars) as repairs and maintenance of 24 Brewster Street property based on the Building Consultant Assessment Report on Repairs and Maintenance.

Ground 13: That the trial Judge erred in law when he did not take into account Section 6 of the Occupiers Liability Act (Act) that the landlord is obligated by law to pay for repairs and maintenance which in this case should be the Respondent.

[20] I shall take the ground 13 first. Counsel for the Appellant is in error when she contends so. In fact s.6 (1) of the Act states that *"where the tenancy agreement puts on the landlord an obligation to maintain or repair the premises……"*

[21] This necessitates perusing the Agreement to Lease dated 7 October 2003 (Lease). There can be no resort to the contra proferentem rule here, because I am advised the lease was drafted by the brother of the 2 sisters who are each the protagonist on each side. A perusal of the Lease discloses the following:

(a) Clause 5: The lessor is to pay and maintain insurance for the premises for their full insured value.
(b) Clause 10: The lessee shall attend to the repairs and damage to the premises by fair wear and tear etc.

[22] In my opinion, Clause 5 only imposes an obligation on the lessor to insure. It cannot be tantamount to an obligation to repair. Clause 10 places this obligation squarely on the shoulders of the lessee, the Appellant.

[23] Having disposed of the above, I now turn to grounds 7 and 8 which prove less easy to decide. In page 12 of the notes of proceedings for 4 June 2015, by the learned Judge I find recorded the evidence of the Plaintiff's witness No.2, Bissun Prasad, the quantity surveyor. The Judge does not state that he was cross-examined by Counsel for the Defendant. The record thereafter only states, "Evidence for the Plaintiff is over."

[24] However, I am unable to affirm the relief granted by the learned Judge when it is noted that the same were not prayed for in the O.S.

[25] O.28 r. 9(1) of the Rules of the High Court, under which the instant O.S. was filed, provides that if it appears to the Court at any stage of proceedings, that the proceedings should be continued as if the matter had been begun by writ, it may order the proceedings to continue as if the matter had been so begun and may order that any affidavit shall stand as pleadings. A perusal of the notes of proceedings recorded by the learned Judge does not show that he had made any order as above. It is merely stated in para (2) of the Judgment that "the plaintiff instituted this action by filing originating summons. However, the Court has later allowed the parties to adduce evidence on matters of fact which they are at variance". It was conceded by Counsel for the Respondent that no such order was made by the learned Judge. Counsel for the Appellant said the O.S. was never converted to a writ and she never consented to it. On this omission alone the Judgment cannot stand.

[26] In the result, I am constrained to allow this appeal and to set aside the orders (ii) and (iii) made by the learned Judge.

The Orders of this Court are that:

1. *The Appeal is allowed.*

2. *The case is remitted to the High Court to be heard by way of a new trial by a different Judge in line with our decision.*

3. *The costs of this appeal summarily assessed at $1,500 and the costs below of $1,000 shall be paid by the Respondent to the Appellant.*

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Hon. Mr. Justice E. Basnayake
JUSTICE OF APPEAL

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL

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Hon. Mr. Justice David Alfred
JUSTICE OF APPEAL