

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT

Civil Appeal No. ABU 0066 of 2018
(High Court HBC Action No. 02 of 2017)

BETWEEN : **DHAN LAKSHMI**
Appellant

AND : **JIANKI GOUNDER**
1st Respondent

AND : **ROHIT KUMAR**
2nd Respondent

Coram : **Lecamwasam, JA**
Almeida Guneratne, JA
Jameel, JA

Counsel : **Mr. A. Kohli for the Appellant**
Mr. A. Sen for the Respondent

Date of Hearing : **04 February 2020**

Date of Judgment : **28 February 2020**

JUDGMENT

Lecamwasam JA

[1] I agree with the conclusions of Jameel JA.

Almeida Guneratne JA

[2] I agree with the proposed orders made by Jameel JA.

Jameel JA

[3] This is an appeal dated 27 July 2018, from the Judgment of the High Court dated 3 June 2018, dismissing the claim of the Appellant who sought an order of vacant possession, special damages, general damages, aggravated damages and indemnity costs against the Respondents.

[4] The Respondents had filed a Respondents' Notice dated 1 August 2018, challenging the failure of the learned trial Judge to award the Respondents costs upon the withdrawal by the Appellant of the action instituted against the Respondents under section 169 of the Land Transfer Act 1971, and the dismissal of the action in the High Court.

[5] The Appellant has challenged the judgment of the High Court on three grounds. However, when this appeal came up for hearing, Mr. Kohli learned Counsel for the Appellant, informed this Court that he had received instructions from his client to withdraw the appeal, and that he had previously informed Mr. Sen, learned Counsel for the Respondents that this appeal would not be pursued. Mr. Sen confirmed that Mr. Kohli had indeed informed him of this last month.

[6] Mr. Sen however submitted to this Court that despite the intimation by Mr Kohli to him that this appeal would be withdrawn, the Appellant had failed to comply with the mandatory provisions of the Court of Appeal Rules in respect of an application for withdrawal of an appeal.

[7] Further, the record of this Court shows that despite the assurance given by Mr. Kohli to Mr. Sen about the withdrawal of this appeal, written submissions of the Respondents had been filed in the Registry on 15 January 2020.

[8] In view of the withdrawal of the Appeal by the Appellant, what remains for this court to consider is the Respondents' Notice of Appeal dated 1 August 2018.

The award of costs upon dismissal of an action

[9] The matter remaining for determination by this Court is as contained in the Respondents' Notice. The issue is whether an Appellate Court may, or must award costs to a Respondent when the lower court failed to award costs despite the dismissal by it of the original action, and what quantum if any, an Appellate Court must award when an Appellant withdraws his appeal.

[10] Mr. Sen's submission was that the learned High Court Judge erred in failing to award costs despite having dismissed the Appellant's action. Paragraphs [24] to [29] of the Respondents' written submissions in this Court, are in respect of this matter.

Paragraph [27] states as follows:

"It is transparently clear from the nature of the proceedings that no action should have been brought against the respondents, It is also very clear that this action was brought to harass and intimidate the respondents who are living a very simple life and to terrorise them through legal action as they are very poor".

[11] Inherent in this submission, is an implied plea for indemnity costs. Indeed, this was specifically claimed in paragraphs [35] and [36] of the Respondents' Written Submissions in the court below, whereby the Respondents claimed a sum of \$15,000.00 as Indemnity costs. However, this was not claimed in either the Statement of Defence or the Respondents' Notice.

[12] In this regard, Mr. Kohli conceded up front that upon the withdrawal of this appeal, the Respondents would be entitled to costs of this appeal; his only reservation however was that it ought to be a reasonable sum. In view of the fact that the parties were unable to reach agreement on the quantum, it is for this Court to determine it.

[13] The award of costs is entirely a matter for the Judge's discretion. Order 62 r.3 (2) of the High Court Rules 1988 provides as follows:

“No party to any proceedings shall be entitled to recover any of the costs of those proceedings except under an order of court”.

Order 62 r.3 (3) provides as follows:

“If the court in the exercise of its discretion sees fit to make any order as to costs of any proceedings, the court shall order the costs to follow the event, except where it appears to the court that in the circumstances of the case some other order should be made as to the whole or part of the costs.”

[14] Accordingly, an appellate court will not interfere with the decision of a lower court in respect of costs, unless there are compelling reasons, which reflect a clear anomaly, or an aberration which amounts to a miscarriage of justice. An examination of the Judgement of the learned High Court Judge indicates that that there was no specific finding that the Plaintiff had instituted the action for ulterior motives, or on flimsy grounds. On the contrary, one of the findings of the learned High Court Judge as contained in paragraph 24 of the judgment that, *“the Appellant was unable to institute action when the landlord refuses to approve the survey plan”*.

[15] Mr. Sen was unable to point to any part of the High Court judgment which clearly indicated that the action was being dismissed because it was vexatious. In other words, there is no unequivocal finding by the learned Judge that the Appellant's claim was baseless, and that the Respondents were definitely in occupation outside the Appellant's land. Instead, it indicates that there was uncertainty in regard to the identity of the land in dispute because of the absence of a duly approved plan prepared under due authorization. Further, there was also no evidence that the failure to prepare an acceptable Plan was attributable to the Appellant. In this regard, it is in evidence that the Appellant had, by letter dated 21 July 2016 requested the i-Taukei Land Trust Board that she wished to have the land covered by the instrument of Tenancy surveyed and sought the assistance of the Board to survey the land. This indicates that the intention of the Appellant was to properly determine the boundaries of the land before making any allegations against the Respondents. However, the Appellant's attempts bore no fruit because the Board did not respond to this. In these circumstances, the failure of the learned High Court Judge to award costs despite the dismissal of the Appellant's action, does not appear to me, to be a matter which requires the intervention of this court, on the grounds raised by the Respondents.

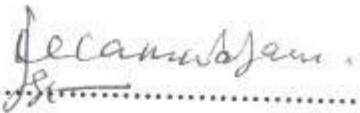
[16] Without causing prejudice to the Respondents, I think it is reasonable to assume, that this is probably why the learned High Court Judge held as follows:

“25. The Plaintiff's action is dismissed. No costs granted considering the circumstances of the case.”

[17] In the circumstances, I am of the view that what remains is for this Court to determine the costs due to be awarded in respect of the withdrawal of this appeal. For the reasons set out above, I am of the view that a sum of \$3000.00 is reasonable in all the circumstances of this appeal. Accordingly, a sum of \$3000.00 is ordered against the Appellant.


The Orders of the Court are:

1. *The Application for withdrawal of this Appeal is allowed, and the appeal is dismissed.*
2. *The Appellant will pay to the Respondents within 30 days from the date of this Judgement, costs in a sum of \$3000.00 as the costs of this appeal.*

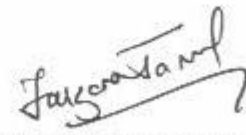

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Hon. Justice S. Lecamwasam
JUSTICE OF APPEAL




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Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL


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Hon. Justice F. Jameel
JUSTICE OF APPEAL