

IN THE HIGH COURT OF FIJI AT LAUTOKA
[WESTERN DIVISION]

Appeal No. 26 of 2013

ON APPEAL from decision of Master MH Ajmeer in the High
Court of Fiji at
Lautoka in Civil Action No. 68 of 2013

BETWEEN: **RAJESH KUMAR** of Saweni, Lautoka

APPELLANT

AND: **NAWIN PRASAD SHARMA** of Vuda Lautoka, Unemployed

RESPONDENT

Appearances : Mrs Patel V for **Appellant**
Mr Singh R for **Respondent**

Date of Hearing: 21st May 2014

Ruling

Introduction

1. By the Notice of motion dated 19th May 2014 the Appellant sought to adduce fresh evidence of Mrs Unise Druavesi, Acting Esate Officer of iTaukei Land Trust Board (TLTB).
2. This application is made under Order 55 rule 7(2) and Order 3 rule 4(1) of the High Court Rules 1988 and under the Inherent Jurisdiction of the Court.
3. The Appellants Notice of Motion is supported by an affidavit sworn by the Appellant on 20th May 2014.
4. In his affidavit the Appellant has deposed;
 - i) That the Respondent by way of misrepresentation and fraud obtained the lease of the subject property in his sole name.

- ii) That after receiving the notice to vacate from the Respondent the Appellant went and inquired with TLTB office in Lautoka and was informed by Mrs Unise Druavesi that the Respondent had informed their office that he passed away.
 - iii) That the misrepresentation by the Respondent of the Appellant passing was submitted to the Master in Civil Action No 68 of 2013, however in his Judgement Honourable Master stated in paragraph 18 that any sort of allegation made by the Appellant in regard to misrepresentation could not be accepted as TLTB would have requested a death certificate.
 - iv) That after speaking to Mrs Unise Druavesi the Appellant believe that TLTB did not ask for death certificate. If they had done so, native Lease No 29367 would never have been issued in the Respondents name.
 - v) That the Appellant crave leave of Court to adduce further evidence on question of fact by calling Mrs Unise Druavesi, Acting Estate Officer of iTaukei Land Trust Board, Nadi.
 - vi) That the Appellant believe the oral evidence of Mrs Druavesi will have a substantial bearing on the outcome of the Appeal and will prevent a substantial miscarriage of Justice in this case.
5. The Appellants application to adduce fresh evidence is opposed by the Learned Counsel for the Respondent and the parties have filed written submission on this issue with leave of the court subsequent to the oral submission being made on 21st May 2014.

Law

6. This is an application made under Order 55 rule 7 (2) which reads as follows
- "The Court shall have power to receive further evidence on question of fact, and the evidence may be given in such manner as the court may direct either by oral examination in Court, by affidavit, by deposition taken before examiner or in some other manner"*
7. It is contended by the Learned Counsel for the Respondent that the principal to be applied when adducing or considering whether fresh evidence can be admitted at Appeal is contained **Ladd V Marshall [1954] 3 All ER 745**
8. He submits further that the Supreme Court Practice 1999 paragraph 59/10/11 (P.1063) in relation to Appeals to the Court of Appeal would be significant in this matter.

9. However, it is argued by the learned Counsel for the Appellant that **Ladd V Marshall** is not authority for application for leave to adduce fresh evidence in the High Court under Order 55 r 7(2). She submits that it is authority for application for leave to adduce further evidence in the Court of Appeal and that "no special circumstances" has to be established by the Appellant in the absence of any such proviso in O 55 r 7(2).
10. In her written submission she states further that the Appellant was represented by a different firm of Solicitors at the time and that he should not suffer any injustice due to any perceived shortcoming on the part of his previous legal advisers.
11. She also submits that the Appellant had notified the Court on the 7th March 2014 that the Appellant would be making an application to adduce further evidence and that the Appellant does not require the "Leave" of the Court in order to make the application and prays that the Court to admit further evidence because the appeal is a complete rehearing and fresh matters which were not before the Master may be adduced in evidence.
12. If I am to accept the submissions of the learned Counsel for the Appellant the High Court will have no discretion in allowing a party to adduce further evidence on questions of fact at Appeals pending before it. Any party will be at liberty to adduce further evidence at Appeals without the leave of the court and all appeals will be converted to rehearings.
13. This I think is not what is meant by Order 55 r 7 (2). It is my view that the words "**The Court shall have power to receive further evidence.....**" clearly indicates the discretion the Court is vested with in allowing an Appellant to adduce fresh evidence. The "**Power**" is vested with the Court in order to exercise it in a judicial manner and therefore the Court should consider the guidelines laid down by the authorities to do so. Though Order 55 r 7 (2) does not refer to any "**special circumstances**" in allowing a party to adduce fresh evidence at Appeal, in exercising the discretion the court will have to see whether the Appellants application is backed by reasonable grounds and whether any prejudice or injustice will be caused to the Respondent if such an application is allowed.
14. It is my view in considering the above factors it is appropriate for the court to consider the guidelines laid down in **Ladd V Marshall** in this type of applications. Therefore I disagree with the Appellants opinion that it only applies to appeals from High Court to the Court of Appeal which I think is misconceived.

15. Due to the reasons set out in the above paragraphs I will consider the principles laid down in **Ladd V Marshall** in allowing fresh evidence at the Appeal stage of a case.

In the said case of page 748 Lord Denning outlined them in the following passage;

"In order to justify the reception of fresh evidence or a new trial, three conditions must be filled:

First, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial:

Second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive:

Third, the evidence must be such as is presumably to be believed, or in other words, it may be apparently credible, although it need not be incontrovertible."

16. In this matter the Appellant is seeking to adduce evidence of an officer of iTLTB to prove that a false statement of his death is recorded in an inspection report.

17. The Appellant has raised this issue in his supplementary affidavit sworn on 17th July 2013 and filed in the Masters Court – HBC Action No 68 of 2013.

18. Hon. Master has dealt with this issue in his judgement and stated as follows:

"There is no evidence placed before me to show that the plaintiff falsely represented that the defendant had already died in order to get a new lease in favour of the plaintiff. Therefore, the allegation of false representation raised by the defendant cannot be accepted" (page 6 paragraph 18).

19. In considering the said judgement it is very clear that the Appellant has raised this issue of misrepresentation by the Respondent at the iTLTB before the Honourable Master but failed to adduce the evidence which he is now seeking to adduce.

20. It is evident from the above facts that the evidence of the iTLTB officer could have been obtained by the Appellant at the Masters Court hearing with reasonable diligence.

21. The evidence the Appellant is now seeking to adduce does not relate to matters which have occurred after the date of the trial.

22. In the written submissions of the Appellant it is stated that the appellant should not suffer any injustice due to any perceived shortcoming on the part of his previous legal advisor
23. This in my view is an admission and an indication that there was a lapse on the part of the Appellants Counsel at the hearing before the Hon Master and now they are seeking to adduce fresh evidence to rectify that lapse. It is clear that all material times the Appellant had the information and evidence available with him however they choose not to adduce these facts before the Master of High Court and now attempting to provide answers to the findings in the judgement pronounced by the Honourable Master.
24. If this type of Application is encouraged any party will get an opportunity of calling evidence which was available before a hearing but not adduced at the hearing to nullify the finds in a judgement.
25. In my view such a situation will lead to a casual attitude in adducing evidence and cause prejudice to the party in whose favour a judgement is entered.
26. For the reasons set out above, I make the following orders:
 - a) Notice of Motion dated 26th May 2014 be struck out and dismissed.
 - b) Appellant to pay cost summarily assessed at \$300 to the Respondent.


L.S. Abeygunaratne

Judge

28/05/2014

