

IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

CIVIL APPEAL NO: HBA 7 of 2015

BETWEEN : **SUDHA KUMARI** and **SUDHA KUMARI** as
Administratrix of the Estate of Surya Kumar
Deceased, Intestate.

Appellant

AND : **BALWANT RAM**

Respondent

BEFORE : The Hon. Mr Justice David Alfred

Counsel : Ms. M Vasiti for the Appellant
Mr. G O'Driscoll for the Respondent

Date of Hearing : 19 May 2015
Date of Judgment : 17 August 2015

JUDGMENT

1. This Appeal is brought by the Appellant who was the Plaintiff in the Court below against the decision of the learned Magistrate delivered on 25 November 2014 wherein he had dismissed the Appellant's claim against the Defendant (the present Respondent) for \$10,040.00 being rental arrears, interest thereon and costs.

2. The grounds of appeal are:
 - (a) *The Magistrate erred in law and in fact in not holding that the Respondent was required to pay rent beyond the initial term of 5 years; and*
 - (b) *He erred in law and in fact is not awarding the Appellant the sum claimed as outstanding rent from the Respondent for using and occupying the Appellant's property beyond the expiry of the lease.*

FACTUAL OUTLINE

3. The Statement of Claim of the Appellant alleged that the Respondent owed the Appellant the rental arrears for the period October 2012 to 11 June 2013, at the rate of \$1,200.00 per month which totaled \$10,040.00.
4. It was alleged that the Respondent had rented the Appellant's property known as Lot 33, Tiri Road, Nadawa, Nasinu (the property/premises as it will interchangeably be refer to).
5. The Respondent filed his Statement of Defence and Set Off. The Set Off does not concern the appeal. I only need to note that the Respondent is essentially saying that the Appellant is not entitled to receive rental as the lease had come to an end as at September 2012, he had received a notice to quit prior to October 2012, had therefore ceased to be a tenant and the Appellant could no longer claim any rental.
6. The Plaintiff in her reply to Statement of Defence and Set Off averred that the Respondent did not vacate the property at the expiry of the lease on 3 September 2007, continued to reside there despite being issued with a

notice to quit and therefore must be regarded as a monthly tenant, but had not paid the monthly rental from 3 September 2012 to 11 June 2013.

7. The matter came up for hearing before the Magistrate on 14 October 2014. The Appellant and Counsel were present, the Respondent and Counsel were not. The Magistrate struck out the Statement of Defence and the case proceeded for formal proof.

8. The evidence of the Appellant was summarized by the Magistrate in his Judgment and the relevant parts are reproduced below:

- (1) *The Plaintiff is the registered proprietor of one undivided half share and the administratrix of the other undivided half share in the estate of "Surya Kumar".*
- (2) *The said estate includes a land comprised in Housing Authority Sub lease No. 330445 Lot 33 on DP 6927, situated at Lot 33, Tiri Road, Nadawa, Nasinu.*
- (3) *On the 3rd of September 2007, an agreement to lease was entered between the (Appellant) and the (Respondent) for a term of five years at a monthly rent of \$1,200.00.*
- (4) *The (Respondent) resided on the said property since 03rd of September 2007.*
- (5) *The said lease came to an end on 03rd September 2012.*
- (6) *The Respondent was issued with Notice to Quit.*
- (7) *The Respondent did not vacate the property.*
- (8) *The Respondent resided on the said property from 03rd September 2012 to 11th June 2013 without paying the monthly rentals.*

(9) *The Respondent has neglected the (Appellant's) demand for payment of outstanding rental arrears.*

(10) *The accumulated rental arrears are \$10,040.00.*

9. The Exhibits tendered by the (Appellant) which are relevant here were the following:

Exhibit 3: Lease Agreement dated 14 April 1997.

Exhibit 4: Variation of Agreement of Lease between Sudha Kumari and Balwant Ram dated 1 September 2007.

Exhibit 5: Variation of Agreement to Lease dated 3 September 2007.

Exhibit 6: Notice to Quit dated 6 September 2012.

Exhibit 7: Notice to Quit dated 7 February 2013.

Exhibit 8: Receipt No. 212921.

10. The Magistrate in his grounds of judgment which he entitled "Analysis" considered the contention of the Appellant that because the Respondent did not vacate the property, he was to be regarded as a monthly tenant and therefore the Appellant had a right of distress for rental arrears:

He held as follows:

(a) The burden of establishing a monthly tenancy was on the Appellant.

(b) The monthly tenancy would arise when a tenant remains in possession after the expiration of a contractual tenancy, by payment of rent on a monthly basis.

(c) The tender and acceptance of rent on a monthly basis after the expiration of the agreement to lease is consistent with the concept of a monthly tenancy.

- (d) *No payment was made by the Respondent by way of rent or for use and occupation on a monthly basis after the expiration of the initial term of 5 years.*
- (e) *Therefore no monthly tenancy had been established and the Appellant had no right of distress for rental arrears.*

11. From this decision the Appellant appealed to the High Court where the Appeal came up before me on 19 May 2015. This time Counsel appeared for the Respondent as also did Counsel for the Appellant.

12. Appellant's Counsel made the following arguments in her oral submission:

- (a) *The lease ended on 1 September 2012 but the Respondent continued to remain on the property till 11 June 2013.*
- (b) *The Respondent paid in December 2012, a sum of \$1,200.00 being rent for September 2012.*
- (c) *A notice to quit dated 6 September 2012 was sent to the Respondent asking him to quit not later than 6 October 2012.*
- (d) *The Magistrate had erred in saying that no rent was paid after the expiry of the initial 5 years.*
- (e) *Finally, the Magistrate erred in failing to note that the Respondent had occupied and derived income by remaining on the property, and therefore the Appellant was entitled to rent for the period of occupation.*

13. Counsel relied on the authority of **Peter Ian Knight and Rosalia Lusiana Chute ... Plaintiffs** and **Nasir Khan ... Defendant** in Labasa

High Court Case: HBC 60 of 2009, an unreported decision of Anjala Wati J delivered on 23 January 2015 and asked for the appeal to be allowed.

14. The Respondent's Counsel in his submission stated as follows:

(a) The Appellant had in 2009 made an Application to evict the Respondent which the Court had dismissed as per the Ruling of Master Tuilevuka (produced).

(b) Since there had been a notice to quit, the claim should be for mesne profits and not for rent. Because mesne profits had not been claimed, the Magistrate had correctly decided the case on the material before him.

(c) The Magistrate was not asked to consider an alternative remedy and had no basis to consider mesne profits.

(d) In another action, vide Suva Civil Action No: HBC 63 of 2013 where the present Appellant was the Plaintiff and the Respondent was the Defendant, Amaratunga J had, like the Master in the Application in (a) above, found there was no monthly tenancy.

15. Counsel therefore asked for the Appeal to be dismissed.

16. Counsel for the Appellant in her reply said that the contention of the Respondent in the case in paragraph 14(d) above was there was renewal of the lease but the Court had said there was no renewal of the lease and the most the Respondent was entitled to was a monthly tenancy.

17. Appellant's Counsel emphasized she was not asking for mesne profits. As the Respondent had stayed on, the Appellant is entitled to rental arrears. She concluded by stating the Statement of Defence had been struck out.

18. At the conclusion of the hearing, I reserved my decision to a date to be fixed. I now proceed to deliver my judgment.
19. There is really only one issue before me in this Appeal and it is this. Is the Appellant entitled to claim from the Respondent and is the Respondent liable to pay rent for the period from the expiry of the lease to the date of his vacating the property. The material period is September 2012 to 11 June 2013. However, the Appellant is not claiming for the month of September 2012 because the Appellant has received payment of the rent for that month, from the Respondent as per Exhibit 8, the receipt headed "*without prejudice to the notice to quit dated 6 September 20*". Therefore the claim starts to run from the month of October 2012.
20. In the course of reaching my decision I have perused the following:
- (i) The Appeal Record.
 - (ii) Written submission of the Appellant.
 - (iii) The Ruling of Master Tuilevuka referred to in paragraph 14(a) above.
 - (iv) The Judgment of Amaratunga J referred to in paragraph 14(d) above.
21. The legal position applicable to the instant Appeal from Halsbury's Laws of England (4th edition) volume 27 appears to be the following:
- (1) Rent is a payment which a tenant is bound by contract to make to his landlord for the use of the property let.**

(2) The landlord may recover in an action for mesne profits in respect of the (tenant's) continued occupation after the expiry of his legal right to occupy the premises.

22. A Practical Approach to Landlord and Tenant (6th edition) by Garner and Frith says "mesne profits are a special form of damages payable to the landlord for losses incurred due to a tenant staying in possession after the tenancy has ended".
23. Having read the Ruling of Master Tuilevuka, I find it is not relevant to the present appeal.
24. Having read the Judgment of Amaratunga J, I accept my learned brother's conclusions as follows:
- (i) The contention of the (Respondent) that the lease was renewed cannot be accepted.**
 - (ii) There was clear indication of the (Appellant) not to renew the term of the lease for another 5 years from September 2012.**
 - (iii) Accepting rent might indicate a monthly tenancy but with one month's notice it had come to an end.**
 - (iv) Even a monthly tenancy cannot be established considering the facts of this case.**
25. By his judgment dated 14 May 2013, the Judge granted the (Appellant) immediate possession of the premises.
26. I have perused the judgment of Wati J, referred to above. In that case the Plaintiffs had inter alia, claimed for vacant possession and mesne

profits. The judge had held that since the occupation of the property had continued on the basis of the second agreement, she did not find that the Defendant was a trespasser on the property and that the Plaintiffs were therefore not entitled to mesne profits for the unlawful occupation. I accept what my learned sister has said.

27. In the above circumstances the Respondent cannot be considered a tenant. When the tenancy expired by effluxion of time without an extension or a fresh tenancy, he was holding over as a trespasser when he refused to quit the premises as demanded by the Appellant. He was no longer a tenant. Therefore the Appellant could not claim any further rental from him. Because the Respondent had become a trespasser all that the Appellant could claim from him was mesne profits for the occupation and use of the premises. This is not and cannot be considered as rent or arrears of rent in the absence of a tenancy agreement between the Appellant and Respondent.
28. At the end of the day the outcome of the Appeal is made more apparent by the Appellant's consistent and constant stand right from the Statement of Claim to the Grounds of Appeal through to the submission in the Appeal that her only claim is for arrears of rent. She is bound by her pleadings. If she were entitled to make any claim, it could only have been for mesne profits. However, having never made any claim for mesne profits at all, she cannot now be awarded the same.
29. My decision has been made easier because of the decision of the English Court of Appeal in: **Stirling v Leadenhall Residential 2 Ltd** [2001] 3 All ER at page 660 where Judge LJ (as he then was) in the course of his judgment said that it is necessary to highlight the distinction between payments of rent and payments of mesne profits; mesne profits are

emphatically not rent; that the language of 2 English Acts unsurprisingly identify payments in respect of occupation after the termination of the tenancy as mesne profits. The Acts are not applicable in Fiji, but there is no reason not to consider the identification made.

30. I therefore uphold the Magistrate's decision for different reasons because the Appellant had not in her Statement of Claim prayed for mesne profits but only for rental arrears.
31. In the event, the Appeal is hereby dismissed with costs which I summarily assess at \$1,500.00 to be paid by the Appellant to the Respondent.

Dated at Suva this 17th of August 2015



David Alfred
JUDGE
High Court of Fiji
Suva