

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

CIVIL ACTION NO: HBC 140 of 2015

IN THE MATTER of an application for partition proceedings under section 119 of the Property Law Act, Cap 130

BETWEEN : **MOHAMMED RAFIQ** of California, USA, Retired.

PLAINTIFF/FIRST RESPONDENT

AND : **MAJIDAN** of 21 Tanoa Street, Flagstaff, Suva.

FIRST DEFENDANT/APPLICANT

AND : **MOHAMMED ISRAEL ISMAIL** of 1457 Oriole Avenue, San Leandro, California 94578, Occupation not known to Plaintiff.

MOHAMMED IQBAL ISMAIL 5359 Jarvis Avenue, Newark, California 94560, Occupation not known to Plaintiff and
MOHAMMED NAUSHAD ISMAIL of 5323 Jarvis Avenue, Newark, California 94560, Occupation not known to Plaintiff.

SECOND DEFENDANTS/SECOND RESPONDENTS

COUNSEL : Mr. Armish Pal for the Applicant
Mr. Shelvin Singh for the First Respondent

Date of Hearing : 17 February 2016

Date of Ruling : 16 March 2016

RULING

Introduction and Background

- [1] This is an application made by the Applicant, Majidan Ishak (also known as Majidan), in terms of the provisions of Order 59 Rule 11, read with Rule 8(2), of the High Court Rules 1988, for leave to appeal an interlocutory order or judgment of the Master of the High Court.
- [2] The application for leave to appeal is against a Ruling made by the Master of the High Court on 7 December 2015.
- [3] The proceedings before the Master is an application made by way of Originating Summons for partition under section 119 of the Property Law Act (Chapter 130). The action was instituted by the First Respondent, Mohammed Rafiq (the original Plaintiff in this matter), for partitioning of the property comprised in Crown Lease No. 2264, being Lot 20, Flagstaff Extension, Suva. The Applicant, Majidan Ishak, was named as the First Defendant in the said proceedings.
- [4] During the course of these proceedings the Applicant, Majidan Ishak, filed a Summons for striking out of the action on the basis that this action by nature of the remedies sought is a duplication of the Suva High Court Probate Action No. HPP 05 of 2012 and as such is an abuse of process.
- [5] The issue was taken up for hearing before the Master on 3 September 2015. Both the Applicant and the First Respondent were represented by counsel at the hearing.
- [6] On 7 December 2015 the Master of the High Court made order as follows:
 1. The First Defendant's (currently the Applicant) application to strike out the Plaintiff's (currently the First Respondent) Originating Summons on the grounds of abuse of court process is hereby struck out accordingly.
 2. The matter to take its normal course of action in terms of the law.

3. Grant costs summarily assessed at \$750 to be paid within 14 days.
- [7] These are the orders against which the Applicant is now seeking leave to appeal.
- [8] As stipulated in Order 59 Rule 11 of the High Court Rules 1988, the application has been made by way of a Summons, which is supported by an Affidavit deposed by the said Majidan Ishak. The said Summons and Affidavit in support were filed in court on 21 December 2015.
- [9] The Counsel for the First Respondent, Mohammed Rafiq, while objecting to the application, took up the position that the leave to appeal application is a purely legal issue and, as such, no Affidavits are required to be filed by him in response to the application.
- [10] This matter was taken up for hearing before me on 17 February 2016. Both counsel for Applicant and First Respondent were heard. The parties also filed detailed written submissions, and also referred to several case authorities, which I have had the benefit of perusing.
- [11] The Second Respondents, who have been named as the Second Defendants in the proceedings before the Master, were absent and unrepresented. They are said to be residing overseas. I find from the record that the said Second Respondents were absent and unrepresented even during the proceedings before the Master.

The Affidavit filed by Majidan Ishak

[12] The main issues that have been raised by the Applicant are found in the Affidavit in support for leave to appeal filed by her. The contents of the Affidavit, showing the very long history of these proceedings, are as follows:

1. She states that she is the First Defendant (currently the Applicant) in these proceedings and files this Affidavit in support of an application for leave to appeal the Decision of the Master in this matter which was pronounced on 7 December

2015 (she refers to the Master's Ruling as "The Decision"). A copy of the said Decision is annexed and marked as "A".

2. The parties to these proceedings are registered lessees of the property comprised in Crown Lease No. 2264, situated at 20, Tanoa Street, Flagstaff, Suva ("the Property"). All these parties are 1/3 owners in equal and undivided shares of the Property. A copy of the Crown Lease is annexed and marked as "B".
3. The original lessee of the Property was the late Kodhai (Kodhai Buksh) who is her father-in-law. The Plaintiff (currently the First Respondent) is a son of the late Kodhai.
4. The Second Defendants (currently the Second Respondents) are the grandchildren of the late Kodhai. They acquired ownership after Khairun Nisha, the administrator of the Estate of Mohammed Ismail, transferred shares to the Second Defendants who are children of Mohammed Ismail, another son of Kodhai.
5. Essentially, all parties acquired ownership rights and interest in the property through succession.
6. The Applicant states that she is the only co-owner who has been resident on the Property. The Plaintiff and the Second Defendants have not lived on the Property for well over three decades. However, she does not recall the exact number of years.
7. Prior to commencing the current proceedings, the Plaintiff had previously commenced Suva High Court Probate Action No. HPP 5/2012 ("the 2012 action"). This action was commenced by an Ex-parte Notice of Motion and Affidavit of Mohammed Rafiq (the Plaintiff) on 28 February 2012. Copy of the Ex-parte Notice of Motion and Affidavit of Mohammed Rafiq are annexed and marked as "C1" and "C2" respectively.

8. In the 2012 action the Plaintiff had sought the following Orders:
- a) *The Property namely Lot 21 Tanoa Street, Flagstaff, Suva to be valued to determine its current market value by an independent valuer appointed by the Plaintiff;*
 - b) *That the Property namely Lot 21 Tanoa Street, Flagstaff, Suva be sold on its market value;*
 - c) *The proceeds of the sales to be divided into 3 equal shares and to be paid to the executrix of the estates of the 2 deceased beneficiaries and one third share to the Plaintiff.*
 - d) *Costs on indemnity basis.*
9. On 21 January 2013, Master Amaratunga (as Justice Amaratunga was at the time), made orders for the valuation and sale of the Property. Annexed and marked as "D" is a copy of the said order.
10. Subsequently on 2 April 2013 her Solicitors filed an application in the 2012 action for the orders of 21 January 2013 to be set aside. This application was supported by an Affidavit deposed to by the Applicant. The application (the Summons) and the Affidavit in support is annexed and marked as "E1" and "E2" respectively.
11. An additional application for stay of the sale of the property was filed by her Lawyers on 29 April 2013. Annexed and marked as "F" is the said Summons filed in the application.
12. On 6 May 2013, Justice Amaratunga made the following orders:
- a) That the Order of the Master of the High Court of Suva, made on 21 January 2013 be set aside;

- b) That the 1st and 2nd Respondent are granted 21 days to file Affidavit in opposition in respect of the Notice of Motion filed by the Plaintiff on 28 February 2012 and its supporting Affidavit;
- c) The Notice of Motion filed by the Plaintiff on 28 February 2012 be reheard;
- d) This matter is adjourned to 3 June 2013.

A copy of the Order is annexed and marked as "G".

- 13. On 7 June 2013, Justice Amaratunga made additional Orders, including an Order that the matter be allocated before a Judge. A copy of the Order is annexed and marked as "H".
- 14. On 2 October 2013, the Plaintiff filed a Notice of Motion to Enter Judgment, together with an Affidavit in support of Teresia Qionibaravi. A copy of Notice of the Motion to Enter Judgment and supporting Affidavit is annexed and marked as "I1" and "I2" respectively.
- 15. The Applicant filed an Affidavit in opposition to this application and a copy of this is annexed and marked as "J".
- 16. The matter was then called before Justice Kotigalage, on 8 November 2013, whereupon the Court dismissed and struck out the 2012 action. A copy of the said Order is annexed and marked as "K".
- 17. Subsequently, on 3 January 2014, the Plaintiff's Solicitors filed an application for the reinstatement of the 2012 action. Annexed and marked as "L1 and "L2" is the Notice of Motion to Reinstate and an Affidavit in support.
- 18. The application to reinstate was heard before Justice Kotigalage, on 11 April 2014, on which day the Plaintiff's Counsel did not appear. Upon hearing the submission of her Lawyers, the application to reinstate was dismissed and struck out. Annexed and marked as "M" is a copy of this Order.

19. Later on 6 November 2014, the Plaintiff filed a Notice of Intention to Proceed. A copy of this Notice is annexed as "N".
20. On 12 November 2014, the Applicant's Lawyers wrote to the High Court Registry informing the Registry that the 2012 action had been struck out and that the notice of intention to proceed ought not to have been accepted and that only documents related to reinstatement or an appeal could be accepted. A copy of this letter is annexed and marked as "O".
21. On 19 November 2014, the High Court Civil Registry issued correspondence to the Plaintiff's Lawyers stating that:
- a) The matter had been struck out
 - b) To move the matter the Plaintiff either had to file an application for reinstatement or file an appeal
- A copy of the letter is annexed and marked as "P".
22. That was the last active action taken in the 2012 action which is about 5 months prior to the commencement of the proceedings in the instant case.
23. Subsequently, on 16 April 2015, the Plaintiff commenced these proceedings seeking essentially orders which she believes are a duplication of the orders that the Plaintiff sought in the 2012 action.
24. Consequently she had instructed her Solicitors to file an application for this action to be struck out. That was done by her Lawyers and Decision pronounced by the Master on 7 December 2015.

25. In the Decision the Master held that there was so duplication and so that there was no abuse of process. He has allowed the said proceedings to continue. Her application to strike out was dismissed.
26. The Applicant states that she is not satisfied with the Decision and has asked her Solicitors to appeal the Decision.
27. She says further that her Solicitors have reviewed the Decision and have advised her that there are reasons to appeal the Decision. The reasons have been encompassed in the draft Notices and Grounds of Appeal which is annexed and marked as "Q".
28. The Grounds of Appeal as stated in the draft annexed are legal in nature and her Solicitors will discuss them at length in Court. However, she understands that those are the grounds that she will be relying on and they are the reasons for her grievance.
29. One of the key matters that her Solicitors have advised her is that the Decision does not appear to have taken into consideration the submissions, including the legal authorities relied on by her Lawyers. A copy of the written submission is annexed and marked as "R".
30. A perusal of Decision and the submission will clearly indicate that none of the legal authorities relied by her solicitors was discussed in the Decision.
31. The Applicant states that she does not believe that this application will prejudice the Plaintiff in any manner that would be unreasonable. She is said to have a genuine grievance, based on which she is appealing. The balance lies in her favour. Not having leave granted will mean that she will have to defend a legal action which otherwise she would not have to do if her appeal succeeds.
32. She says that she has not delayed in bringing this application and is within time.

33. She does not believe that there is any reason why leave should not be granted for her to appeal.

34. For the reasons contained in her Affidavit, she is seeking that leave to appeal the Decision of the Master be granted.

Legal Provisions and Analysis

[13] Order 59 Rule 8(2) of the High Court Rules 1988 provides as follows:

No appeal shall lie from an interlocutory order or judgment of the Master to a single judge of the High Court without the leave of a single judge of the High Court which may be granted or refused upon the papers filed.

[14] Order 59 Rule 11 of the Rules states:

Any application for leave to appeal an interlocutory order or judgment shall be made by summons with supporting affidavit, filed and served within 14 days of the delivery of the order or judgment.

[15] As per Order 59 Rule 9 of the Rules:

An appeal from an order or judgment of the Master shall be filed and served within the following period-

(a) 21 days from the date of the delivery of an order or judgment; or

(b) In the case of an interlocutory order or judgment, within 7 days from the granting of leave to appeal.

[16] In this matter the Summons and Affidavit in support, deposed by Majidan Ishak, were filed in court on 21 December 2015. This is strictly within the 14 day time period stipulated in Order 59 Rule 11 of the High Court Rules for filing of same. Counsel for the Applicant submitted that, based on the exclusion of the Legal Vacation [which commenced on Monday 14 December 2015 and concluded on Friday 15 January 2016 (both dates inclusive)], in the computation of the times appointed and allowed by the High Court Rules for amending, delivering or filing of any pleadings, the last date for filing and service of the

Summons and Affidavit for leave to appeal was 22 January 2016. Court is satisfied that the Summons and Affidavit in support was duly served on the First Respondent, within the stipulated time period.

[17] In determining the principles upon which a leave to appeal application is to be decided, it is pertinent to refer to the following dicta of His Lordship Justice Murphy in **Niemann v. Electronic Industries Ltd** [1978] VR 431, at page 441:

- i) “Whether the issue raised is one of general importune or whether is simply depends upon the facts of the particular case;
- ii) Whether there are involved in the case difficult questions of law, upon which different views have been expressed from time to time or as to which he has been sorely troubled;
- iii) Whether the order made has the effect of altering substantive rights of the parties or either of them; and
- iv) That as a general rule there is a strong presumption against granting leave to appeal from interlocutory orders or judgment which do not either directly or by their practical effect finally determine any substantive rights of either party.”

[18] It must be emphasized that it is only in “the most exceptional circumstances” will leave be granted to appeal, from an interlocutory order or decision. In **Totis Inc. Sport (Fiji) Limited v. John Leonard Clark & Another** Fiji Court of Appeal Civil Appeal No. ABU 35 of 1996S, His Lordship Justice Tikaram, President Fiji Court of Appeal, expressed as follows:

“It has been long settled law and practice that interlocutory orders and decisions will seldom be amendable to appeal. Courts have repeatedly emphasized that appeal against interlocutory orders and decisions will only rarely succeed. The Fiji Court of Appeal has consistently observed the above principle by granting leave only in the most exceptional circumstances.”

[19] In the case of **Bank of Hawaii v. Maxwell John Reynolds** [1998] 44 FLR 138, Fiji High Court Civil Action (29 June 1998), His Lordship Justice Pathik, referred to the following

passages from the judgment in *Ex parte Bucknell* (1936) 56 C.L.R. 221 at 225, which His Lordships regarded as pertinent.

“At the same time it must be remembered that the prima facie presumption is against appeals from interlocutory orders, and, therefore, an application for leave to appeal [under section 5(1)(a)] should not be granted as of course without consideration of the nature and circumstances of the particular case. It would be unwise to attempt an exhaustive statement of the consideration which should be regarded as a justification for granting of leave to appeal in the case of an interlocutory order, but it is desirable that, without doing this, an indication should be given of the matters which the court regards as relevant upon an application for leave to appeal from an interlocutory judgment.”

“But any statement of the matters which would justify granting leave to appeal must be subject to one important qualification which applies to all cases. It is this. The Court will examine each case and, unless the circumstances are exceptional, it will not grant leave if it forms a clear opinion adverse to the success of the proposed appeal.”

[20] His Lordship Justice Pathik further stated that on leave to appeal the following extract from the decision of the President, Fiji Court of Appeal, in *Kelton Investments Limited and Tappoo Limited v Civil Aviation Authority of Fiji & Another* (Civil Appeal No. 51/95), is also relevant and adopted the same view to the facts and circumstances of the case.

“The Courts have thrown their weight against appeals from interlocutory orders or decisions for very good reasons and hence leave to appeal is not readily given. Having read the affidavits filed and considered the submissions made I am not persuaded that this application should be treated as an exception. In my view the intended appeal would have minimal or no prospect of success if leave were granted. I am also of the view that the Applicants will not suffer an irreparable harm if stay is not granted.”

[21] Lord Woolf MR held in *Swain v Hillman* [2001] All ER 91 that a ‘real’ prospect of success means that prospect of success must be realistic rather than fanciful. The

court considering a request for permission is not required to analyse whether the proposed grounds of appeal will succeed, but merely there is a real prospect of success.

[22] Therefore, it has now been well established that these are some of the factors that Court needs to take into consideration when dealing with such applications. It is clear and apparent that it is only in the most exceptional circumstances will leave be granted to appeal, from an interlocutory order or decision.

[23] In determining whether any such circumstances exist in this case for the granting of leave to appeal, Court has to necessarily examine the merits of this application for leave to appeal. For this purpose it is important to go through the Grounds of Appeal. Following are the proposed Grounds of Appeal which the Applicant is relying upon in this case.

1. The Master erred in law and in fact that there was no duplication of proceedings by the Plaintiff in commencing this within action. The First Defendant says this for the following reasons:
 - a. The Master acknowledged in paragraph 22 of the Decision that the orders sought in HPP Action No. 05 of 2012 and this within action are *“very much similar or almost same to the orders presently being sought on the pending HBC Case file No. 140 of 2015.”*
2. The Master erred in law and in fact in holding that the commencement of these within proceedings after the conclusion of HPP 5 of 2012 defeats the principle of duplication and abuse of process whilst at the same time determining that the orders sought in the 2 actions were similar. The Master failed to consider or give adequate considerations to the authority of ***Frank Bernard Shaw v Fiji Development Bank*** Suva High Court Action No. HBC 70 of 2008 (22 July 2008) wherein the High Court held that the commencement of a new action after the striking out of a previous action was tantamount to duplication.
3. The Master erred in law and in fact in failing to consider entirely or to give relevant consideration to the legal submissions of the First Defendant in respect of the First

Defendant's summons in particular the failure of the Master to consider entirely or to give relevant considerations the authorities of

- a. **Frank Bernard Shaw v Fiji Development Bank** Suva High Court Action No. HBC70 of 2008 (22 July 2008);
 - b. **Trade Air Engineering (West) Limited v Laisa Taga & Ors.** Fiji Court of Appeal Civil Action Appeal No. 62 of 2006;
 - c. **Wilson v. Housing Authority** Suva High Court Action No. 412 of 2012 (8 June 2005).
4. The Master erred in law and in fact in failing to give appropriate consideration to the Plaintiff's material non-disclosure of the HPP 05 of 2012 to the Court in the Affidavit in support of the Originating Summons.
 5. The Master erred in law and in fact in holding that there was no abuse of process by the Plaintiff in commencing this within action. The First Defendant relies on grounds 1, 2 and 3 above in support of this ground.
 6. The Master erred in law and in fact in holding that the doctrine of res judicata did not apply when in fact parties had been before a Court of competent jurisdiction (in Suva High Court in Action No. HPP 05 of 2012) and had an opportunity of raising related issues. The Plaintiff lost this opportunity by contumelious conduct, that is, repeated non-appearance and repeated non-compliance with the High Court Rules.
 7. The Master erred in law and in fact in holding that the First Defendant would not be prejudiced if the within proceedings were allowed to continue. The First Defendant essentially has to answer the same claim she has had to answer in HPP 05 of 2012 and as a result is put to additional costs, expenses and unnecessary litigation.

[24] I have carefully perused the Ruling made by the Master of the High Court. He has considered the following as the issues which court needs to determine:

1. Whether the Plaintiff's Originating Summons, filed on 16 April 2015, is an abuse of process of the court?
2. Whether the Plaintiff's are attempting to re-litigate or duplicate the issues within the present pending HBC Case No. 140 of 2015, arising out of the High Court Probate Action HPP No. 05 of 2012 and relies on the principles of res-judicata?
3. Whether there will be any issue of prejudice arising?

[25] In his Ruling he has examined the legal definition of "abuse of process of court". Taking into consideration all facts and circumstances of the application before him, he has come to the conclusion that there is no abuse of the court process in the instant case. He says the High Court Probate Action HPP No. 05 of 2012 was dismissed and struck out by Court on the application made by the First Defendant himself (the Applicant in the present proceedings). Since the High Court Probate Action HPP No. 05 of 2012 is not pending for deliberation any longer, the Master has come to the finding that there is no duplication of proceedings. Since there is no duplication of proceedings the Master has held that the doctrine of res-judicata would not be applicable. Since he has come to the finding that there is no duplication of proceedings and no abuse of the court process, he has concluded that no prejudice would be caused to the Applicant.

[26] Taking into consideration the above factors, I am of the view that the Master has correctly analysed all the relevant issues in this case. I find no exceptional circumstances for the granting of leave to appeal the Ruling made by the Master. Having read the affidavit filed by the Applicant and considered all the submissions made, I am not persuaded that this application should be treated as an exception.

Conclusion

[27] For all the aforesaid reasons this Court is of the view that leave to appeal should not be granted in this case. Accordingly the application for leave to appeal is dismissed.

[28] I now turn to the issue of costs. In his submissions before this court, Mr. Shelvin Singh, Counsel for the First Respondent, made reference to an e-mail sent by him, on 5 January 2016, to Mr. Armish Pal, Counsel for the Applicant. Therein he states that he has taken instructions from his client and he views the leave to appeal application as frivolous and a nuisance. He adds that there is no merit in pursuing the striking out. The only purpose of the leave to appeal and any eventual appeal by the First Respondent will serve to delay the proceedings and the inevitable that the property has to be settled in terms of section 119 of the Property Law Act. Accordingly, he states that his client's expected costs of the appeal to be FJ\$ 10,000 + VAT. He is seeking full indemnity costs on the basis of the Calderbank principle. Furthermore, he adds "If your client withdraws the application now, my client will not seek any costs of the appeal."

[29] Court has considered the above. Indeed the First Respondent is entitled to costs. However, neither in the manner nor in the quantum referred to by his Counsel. Accordingly I order costs summarily assessed at \$1000.

[30] Accordingly, I make the following Orders:

ORDERS

1. The application made by the Applicant for leave to appeal is dismissed.
2. I grant costs summarily assessed at \$1000, to be paid on or before 30 March 2016.

Dated this 16th day of March 2016, at Suva.




Riyaz Hamza

JUDGE

HIGH COURT OF FIJI