

IN THE HIGH COURT OF FIJI

(WESTERN DIVISION) AT LAUTOKA

[APPELLATE JURISDICTION]

CIVIL ACTION NO. 54 OF 2013

(On an appeal from High Court of Fiji at Lautoka in the matter Civil Action No. HBC 54 of 2013)

BETWEEN : **MANJIT KAUR** of Votua, Ba, Domestic Duties

**APPELLANT
(Original Plaintiff)**

A N D : **SARJEET SINGH** of Lot 18, Votua, Ba.

**RESPONDENT
(Original Defendant)**

Counsel : Mr Rupesh Singh for plaintiff/appellant
Mr S K Ram for defendant/respondent

Date of Hearing : 10.08.2016

Date of Oral Judgment : 10.08.2016

Date of Written Reasons : 01.09.2016

J U D G M E N T

[Written Reasons]

Introduction

[01] On 10 August 2016 after hearing both parties I orally pronounced judgment allowing the appeal and said written reasons will be delivered shortly. These are my written reasons for allowing the appeal.

[02] This is an appeal against a decision of 13 April 2016 delivered by the learned Master striking out the appellant's originating summons for ejectment filed under section 169 of the Land Transfer Act.

[03] The appeal is filed within the prescribed time.

[04] At the appeal hearing, both counsel orally argued the appeal and only appellant tendered written submission. The respondent did not file any written submission.

The Facts

[05] Manjit Kaur, the appellant filed an Originating Summons dated the 3rd April 2013 ('the application') under section 169 of the Land Transfer Act ('LTA') for vacant possession against Sarjeet Singh, the respondent. The Appellant is the registered proprietor of the property. The respondent occupies a portion of that land together with the appellant.

[06] The application was served upon the respondent on 22 September 2013. The respondent accepted the service by acknowledging on the copies of the papers being served. The Respondent failed to appear before the Master's Court and the learned Master after hearing counsel for the applicant and reading the papers filed granted order in terms in absence of the respondent on 31 October 2013. The order was sealed on 4 July 2013. The sealed order was duly served on the respondent.

[07] On 10 December 2013 the appellant filed Writ of Possession against the respondent, which was duly served by the Court Sheriff.

[08] On 19 December 2013 the respondent through his solicitor filed a summons and sought to set aside the Order of ejectment that was entered against him.

[09] On 6 July 2015 the parties agreed to have the order for vacant possession granted on 31 October 2013 set aside. The appellant consented to set aside the possession order granted in default of appearance by the respondent. As a result, the Originating Summons was re-dated and re-served on the respondent's counsel. The matter

started afresh from here. The respondent counsel had agreed that the issue of service would not be raised from then on and will not be an issue before the Master.

The Background to Appeal

[10] After setting aside the order of ejectment, the learned Master granted 21 days for the respondent to file his affidavit in opposition and 14 days thereafter for the appellant to file affidavit in reply.

[11] The learned Master heard the application on 21 September 2015 and delivered his ruling on 13 April 2016 striking out the application on the ground that there was no evidence that the Summons was served 16 clear days before the hearing as required by Section 170 of the Land Transfer Act. The Learned Master at page 14 of his ruling states:

“Despite the skilful advocacy of Counsel for the Plaintiff, the conduct of the Plaintiff in deliberately deciding not to file the Affidavit of Service for the re-dated Original Summons on the Defendant is still not clear to me”.

[12] Being dissatisfied with the ruling, the appellant appeals to this court.

The Grounds of Appeal

[13] The grounds of appeal as urged at appeal may be stated as follows:

1. *THAT* the Learned Master of the High Court erred in law and in fact in holding that the Appellant/Original Plaintiff had to provide by way of filing an affidavit of service that the Respondent/Original Defendant was summoned to appear and show cause on a day not earlier than 16 days when,
 - 2.1 *THE* Respondent/Original Defendant was represented by counsel at all material times.
 - 2.2 *COUNSEL* for the Respondent/Original Defendant did not take any objection to service and time of service.

2. *THAT the Learned Master of the High Court erred in law and in fact in holding that proof of service needed to be proved even though the Respondent/Original Defendant appeared through Counsel and no objection was taken as to service in terms of Section 170 of the Land Transfer Act.*

The Law

[14] The relevant law to this appeal is section 170 of the Land Transfer Act, which states:

“170. The summons shall contain a description of the land and shall require the person summoned to appear at the court on a day not earlier than sixteen days after the service of summons.”

The Issue at Appeal

[15] The issue at appeal was that whether the learned Master erred in law and in fact in holding that there was non-compliance by the appellant with the provision of section 170 of the Land Transfer Act by failing to file affidavit of service of the re-dated application on the respondent especially when the respondent did not take any objection to service and time of service.

The Submissions

Appellant

[16] Mr Singh, counsel for the appellant submits that in the matter before the Master’s Court the defendant had appeared on a number of occasion and did not raise an issue of service and that it is deemed that the service was proper.

Respondent

[17] Mr Ram, appearing for the respondent submits that there was no dispute of service before the Learned Master even though he has struck out the application on that ground without considering the merits.

The Decision

[18] This appeal arises out of a decision of 13 April 2016 delivered by the learned Master of the High Court dismissing the section 169 application filed by the appellant on the ground that the appellant failed to file affidavit of service of the re-dated originating summons.

[19] The only issue that was raised in the appeal is that whether the learned Master erred in law and in fact in dismissing the appellant's summary application on the sole ground of non-compliance by the appellant with the provision of section 170 of the Land Transfer Act, especially when there was no such objection raised by the respondent.

[20] It will be noted that the learned Master struck the appellant's application for possession some 3 years after the same was filed on the ground that was never raised before him.

[21] The appellant filed his application seeking vacant possession of the property on 3 April 2013. This was served on the respondent and he failed to appear before the court to show cause why he should not give up possession to the appellant. After hearing counsel and reading the papers filed the learned Master granted order of ejectment on 31 October 2013. On application by the respondent the ejectment order was set aside on 6 July 2015 and at the same time the originating summons was re-dated and served on the counsel who appeared for the respondent. His counsel accepted service on his behalf. Counsel for the respondent agreed that the issue of service and when the same was served will not be raised. The respondent filed his affidavit in opposition and appellant his affidavit in reply. However, on 13 April 2016 the learned Master, after hearing the matter, struck out the application on the ground that the appellant failed to file affidavit of service of the re-dated originating summons. The learned Master concludes his ruling as follows:

"For the reason which I have endeavoured to explain, I venture to say beyond a peradventure that the second mandatory requirement

of Section 170 of the Land transfer Act and the legal consequences that flow from non-compliance defeat the Plaintiff's claim for vacant possession.

Therefore, the Defendant needs not show any evidence of a cause to remain on the property since this matter can go no further. I cannot see any other just way to finish the matter than to follow the law.

Accordingly, there is no alternate but to dismiss the Originating Summons”.

[22] S.170 of the Land Transfer Act calls for the summons to contain a description of the land and to require the person summoned to appear at the court on **a day not earlier than sixteen days after the service of summons.**

[23] The issue that there has been non-compliance with the above section was never raised before the learned Master by the respondent.

[24] Mr Ram, counsel appearing for the respondent graciously acceded that the respondent did not at any stage raise any objection or issue on service of the re-dated originating summons and that service was duly accepted by the respondent.

[25] A similar issue arose in the case of ***Raza Properties Ltd v Pioneer Supplies Limited*** HBC 11 of 2010, a case cited by appellant, where the Court on the issue of service stated:

“The Affidavit was served to the Defendant on the 29th March 2010. Although this service was not in accordance with Act in that it was not at least sixteen clear days before the hearing date. This point did not become an issue and in any event this was cured by the fact that the matter was not heard until some three months later. And I commend the parties for not raising this as an issue.” (Emphasis added).

[26] In **Madhwan Keshwan v Keshni Devi, Shailendra R Krishna & Registrar of Titles** [2007] ABU 35/06 (apf HBC 68/01L) 23 March 2007 Fiji Court of Appeal held:

*“No objection by counsel that originating summons was not served despite numerous appearances in Court, irregularity does not, as a general rule, nullify the proceedings. It also overlooks the rule that a party who in fact appears on a summons cannot, after the summons has been heard or dealt with, be heard to complain that the service was defective (**Boyle v Sacker** (1888) 39 Ch D 249). If there were irregularities they were waived. But party complaining should have taken steps within a reasonable time of the party becoming aware of the irregularity and before any other step is taken in the proceedings within O.2 r.2: per Scott & Ford, JJA (majority)”.*

[27] Recently, in **Airports Fiji Ltd v Goneyali** [2016] FJHC 262; HBC 146/2013 (13 April 2016) dealing with a similar situation I held (at page 9 in para 34) that:

{34} Returning to the matter at hand, there was no dispute between the parties as to whether the appellant's application was defective in not complying with the second requirement of section 170 that the summons (application) must require the person summoned (the respondent) to appear at the court on a day not earlier than sixteen days after the service of summons. However, the learned Master had dealt with an issue which was never raised before him to be resolved. No objection by the respondent that the appellant's application was defective as a result of non-compliance of second requirement of section 170. If there were irregularities they were waived. The courts should not pronounce on abstract questions of law when there is no dispute to be resolved. In the circumstances the learned Master had erred in dismissing the appellant's application without considering its merits. Therefore the learned Master's ruling of 18 December 2015 is liable to be set aside. So I do.'

Conclusion

[28] I adopt the above reasoning to this appeal and conclude that the learned Master fell into error in dismissing the appellant's application without considering its merits on the ground that it was defective in not filing affidavit of service in compliance of section 170 of the Land Transfer Act when there was no such issue before him for determination. I would therefore set aside the learned Master's ruling of 13 April 2016 that struck out the appellant's application for possession. In all the circumstance I make no order as to costs.

[29] Both parties made application that this matter maybe heard before another Master or I might hear. Referring the matter to another Master would cause further delay, for I decide to hear the matter afresh.

Final Outcome

- (i) Appeal allowed.
- (ii) Master's decision dated 13 April 2016 set aside.
- (iii) No order as to costs.

M H Mohamed Ajmeer
1/9/16

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M H Mohamed Ajmeer

At Lautoka

1st September 2016

