IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 241 of 2017

BETWEEN : **VINOD PATEL & COMPANY LIMITED**

PLAINTIFF

AND : **BLUE PACIFIC (FIJI) LIMITED**

DEFENDANT

Counsel	:	**Plaintiff:**	**Mr E. Narayan**
	:	**Defendant:**	**Mr B. Solanki**
Date of Hearing	:	**25.10.2019**	
Date of Judgment	:	**5.11.2019**	

JUDGMENT

INTRODUCTION

1. Plaintiff is in occupation of a business premises belonging to the Defendant and seeking a declaration that it is subject to a resultant trust, restraining order against Defendant from eviction of the premises and also seeking damages and stay of the action till arbitration is completed in terms of a tenancy agreement, that expired in 2007. Before this action, Defendant in HBC 198 of 2017 sought eviction of the Plaintiff from premises in terms of Section 169 of the Land Transport Act, 1971. An affidavit in opposition was filed by the Defendant in that HBC 198 of 2017 and a reply was also filed in that case. HBC 198 of 2017 awaits hearing for over two years, so what is left in that case is to hear that matter and make a determination by Master. The Plaintiff sought to consolidate eviction proceedings in terms of Section 169 of Land Transfer Act, 1971, with HBC 241 of 2017 in terms of Order 4 of High Court Rules of 1988. This is a discretionary remedy and Master had, rejected the application for consolidation and ruling was handed down on 3.10.2019. Plaintiff is seeking leave to appeal from that interlocutory decision.

FACTS

2. Plaintiff is a tenant and at the moment it does not have a valid written tenancy agreement with the Defendant. There was a pervious tenancy agreement and parties did not renew it after expiration of the previous agreement in 2007.

3. After expiration of tenancy agreement in 2007, some negotiations were conducted, but nothing conclusive was reached, but tenancy continued without any written agreement being signed by parties.

4. There was acceptance of implied tenancy between the parties through payment of rent and acceptance of the same. So, there was monthly tenancy in respect of the premises until the eviction notice was issued.

5. Eviction of Plaintiff was instituted on 5.7.2017 in terms of Section 169 of Land Transfer Act, 1970. All the affidavits were filed by 31.8.2017 and awaits hearing before Master. There were at least two summonses filed in that action for eviction and I do not want to comment on that action, for obvious reasons, but sufficient to state that I was informed that hearing of the eviction in HBC 198 of 2017 is fixed for **6.11.2019**.

6. This required the present leave to appeal to be determined before 6.11.2019 in order to prevent, further inordinate delay in the proceedings for eviction in terms of Section 169 of Land Transfer Act, 1971.

7. Plaintiff filed present action inter alia for declaration on the basis of resulting trust and for damages and for other orders on 17.8.2017 and Defendant who were the Plaintiff in eviction proceedings filed a defence and counter claim *inter alia* seeking eviction of the Plaintiff from the premises rented and also for damages and interest .

8. Plaintiff sought consolidation of eviction in terms of Section 169 of Land Transfer Act 1971, with HBC 241 of 2017, since Defendant in their counter claim as well as HBC 198 of 2017 seeking eviction of Plaintiff. So part of relief in both actions are similar in nature.

9. Master rejected the request for consolidation on 3.10.2019.

10. Having aggrieved by that interlocutory decision leave to appeal is sought from the interlocutory decision.

11. Plaintiff is also seeking stay of the proceedings in eviction. This application for leave to appeal was filed on 14.10.2019 and due to urgency both parties consented to proceed with the materials already filed before Master without any affidavit in opposition filed.

ANALYSIS

12. This is leave to appeal against decision of Master handed down on 3.10.2019. Court is reluctant to grant leave to appeal against interlocutory orders and it is an exception, to grant leave.

13. Order to stay will not arise if leave is rejected, so first issue to be determined in whether leave to appeal should be granted from Master's decision of 3.10.19. There is no dispute that it was an interlocutory decision hence the need of leave to appeal.

14. In recent Court of Appeal decision ***Parshotam Lawyers v Dilip Kumar (trading as Bianco Textiles)*** [2019] FJCA 176; ABU13.2019 (decided on 25 September 2019) , Calanchini P held,

> "The matters that should be considered in an application for leave to appeal the interlocutory decision delivered on 23 January 2017 are well-settled. In ***Totis Incorporated, Spor (Fiji) Limited and Richard Evanson –v- Clark and Sellers*** (unreported ABU 35 of 1996, 12 September 1996) at page 15 Tikaram P observed:
>
> *"It has long been settled law and practice that interlocutory orders and decisions will seldom be amenable to appeal. It is for this reason that leave to appeal against such orders is usually required.*
>
> ***Courts have repeatedly emphasised that appeals 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.***"
>
> *[10] In* ***Kelton Investments Ltd –v- Civil Aviation Authority of Fiji*** *[1995] FJCA 15; ABU 34 of 1995, 18 July 1995 Tikaram P had cause to visit this issue and in doing so referred to the reasoning of Murphy J in* ***Nieman –v- Electronic Industries Ltd*** *[1978] V.R. 431 who stated at page 441:*
>
> *"_ _ _ the Full Court (of the Victorian Supreme Court) held that leave should only be granted to appeal from an interlocutory judgment or order in cases where substantial injustice is done by the judgment or order itself. If the order was correct, then it follows that substantial injustice could not follow.* ***IF the order is deemed to be clearly wrong, this is not alone sufficient. It must be shown, in addition to affect a substantial injustice by its operation."***
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> *[11] In the Kelton Investments Ruling (supra) Tikaram P also noted that:*

"If a final order or judgment is made or given and the Applicants are aggrieved they would have a right of appeal to the Court of Appeal against such order or judgment. Therefore no injustice can result from refusing leave to appeal."

[12] More recently this Court observed in ***Shankar –v- FNPF Investments Ltd*** *and Anr. [2017] FJCA 26; ABU 32 of 2016, 24 February 2017 at paragraph 16:*

"The principles to be applied for granting leave to appeal an interlocutory decision have been considered by the Courts on numerous occasions. ***There is a general presumption against granting leave to appeal an interlocutory decision*** *and that presumption is strengthened when the judgment or order does not either directly or indirectly finally determine any substantive right of either party. The interlocutory decision must not only be shown to be wrong it must also be shown that an injustice would flow if the impugned decision was allowed to stand. (****Nieman –v- Electronic Industries Ltd*** *[1978] V.R. 431 and* ***Hussein –v- National Bank of Fiji*** *(1995) 41 Fiji L.R. 130)."*(emphasis is mine)

15. This leave to appeal fails on the face of it for following reasons;

a. There is no substantive determination of right of either party through Master's decision handed down on 3.10.2019. There is no right for a Party, to consolidate any action with another action and this is discretionary remedy for proper case management and also to reduce cost of the parties. Courts are reluctant to interfere with decisions on case management.

b. The default position is that two separate actions should be tried separately, this was so when two actions are procedurally not identical, as in this case. Eviction procedure in terms of Section 169 of Land Transport Act, 1971 are statutorily determined e.g. time to file response, hearing, requirement of summons, forms etc. It should also be noted that no damages can be claimed in such proceedings as in a writ of summons. Procedure is in an action in terms of Section 169 of Land Transfer Act, 1971 is different to writ of summons filed in HBC 241 of 2017 which High Court Rules of 1988 applies. All the reliefs under civil action can be claimed in this action including declaratory relief. These type of reliefs are not within the scope of HBC 198 of 2019. So two different procedures can be dealt separately without any conflict.

c. There is no prejudice to Plaintiff if two actions are heard separately, in fact it would be beneficial as eviction in terms of Section 169 of Land Transfer Act, 1971 awaits a hearing for too long and determination of that would end the proceedings of that matter before Master, but it is not the end of the road, for the Plaintiff. There are sufficient safeguards to any aggrieved party before Master. Delay of determination of

said eviction cannot help anybody, except an illegal occupant or squatter who cannot submit a right to remain in property.

d. There are no exceptional reasons shown for granting of this leave to appeal. There were no such grounds adduced in the affidavit in support or at the hearing. Writ action commenced after action for eviction through summons was instituted. There are no exceptional reason to delay determination of that summons for eviction which is long overdue.

e. There is no substantial injustice to Plaintiff by not allowing consolidation, in fact by delaying there is substantial injustice to Defendant who is registered proprietor who awaits determination in eviction proceedings, while Plaintiff is conducting his business on the property of the Defendant.

f. Even if the order of Master not to consolidate was wrong, Plaintiff needs further qualification that such wrong order created injustice. In contrary, Plaintiff's position was that Master had not considered that Defendant in the counter claim and claim in eviction are similar. In the Master's decision there is no indication that this fact was considered, but this will not make the order wrong and even if that was wrong Plaintiff needed to show further requirement of injustice. Plaintiff had failed both requirements. Non consideration of a fact can lead to substantive denial of justice when considering other facts, and circumstances. The failure to consider that there was an overlap of one claim was not determinant factor to state final decision not to consolidate was wrong. In my judgment Defendant is entitled to claim for eviction in any proceeding instituted by a tenant who was on monthly tenancy. This will not prejudice landlord's right to seek eviction in terms of Section 169 of Land Transfer Act, and if that fails an action for eviction through a writ can proceed.

16. The contention of Plaintiff was that since counterclaim in Action HBC 241 of 2017 and the eviction proceedings in terms of Section 169 of Land Transfer Act, 1970 are same that the two actions should be consolidated. This may not be always a rule. If so any disgruntled tenant may institute an action by way of writ, to frustrate eviction, thus seeking consolidation. If that happens fast track eviction in terms of section 169 of Land Transfer Act, 1971 will become redundant. In my judgment Defendant can seek eviction proceeding in terms of Section 169 of Land Transfer Act 1971, irrespective of similar counter claim in HBC 241 of 2017.

17. The said argument of Plaintiff fails due following reasons

a. Plaintiff in HBC 241of 2017 is seeking inter alia declaratory relief. Declaratory relief can be sought on a point of law or any other issue without a cause of action being

pleaded. Order 15 rule 18 of High Court Rules of 1988 allows a party to seek declaratory relief without a 'consequential relief'. So, this can lead to person seeking only a declaration without pleading a cause of action. Such declaration, can be a determination of point of law or a particular position or status. The scope of said High Court Rule, which allows only a declaratory relief, is broad, but cannot be used frustrate or abuse the process of the court. An action in terms of Section 169 of Land Transfer Act, 1971 is recognition of indefeasibility of title and to provide speedy relief. A defendant is in such an action is given sixteen days to establish a right to remain on land (See Section 170 of Land Transfer Act, 1971). There is no room for Defendant in such an action to seek declaration in terms of Section 171 of said Act. So, such Defendant though not prevented from seeking a declaration in a writ of summons filed separately, is not allowed to merge or consolidate two action. Such a consolidation would be allowing a thing directly disallowed through indirect means. There is no restriction on a person sought to be evicted in terms of Section 169 of Land Transfer Act, 1971from seeking a declaratory relief relating to said property , but both actions cannot be consolidated, so as to delay a fast tracked proceedings, so as to lose its utility, to establish ownership.

b. Even if there was some overlapping in both actions Master can exercise discretion to separate two matters when one action is fast tracked and other is not so of when determination of one matter will simplify the issues in the other matter. It is obvious that if eviction is granted counterclaim in HBC 241 of 2017 becomes redundant, but the claim for damages and interest can sustain. It was discretionary for Master to grant consolidate two actions, and there is no reason to vary.

18. Consolidation of action is a discretionary remedy. Appellate courts are reluctant to interfere with the discretionary order unless there are grounds.

19. Plaintiff states that Master had not considered Order 4 of High Court Rules of 1988 in the decision handed down on 3.10.2012 and had not considered factors in the exercise of discretion.

20. Though Order 4 was quoted in the ruling factors stated in Order 4 were not applied, in the decision. In order to grant leave and stay Plaintiff should show that by doing that he was prejudiced. There was no averment in the affidavit in support indicating prejudice to Plaintiff by not consolidating two actions.

21. The factors to be considered for consolidation are;

a. That some common question of law or fact arises in both or all of them , or

b. That the right to relief claimed therein are in respect of or arise out of the same transaction or series of transaction, or

c. That for some other reason it is desirable to make an order under this rule

"The main purpose of consolidation is to save costs and time and therefore it will not usually be ordered unless there is ....."[1] and this is the reason for exercising judicial discretion to save time and money and for proper case management.

22. In my mind application for consolidation of eviction procedure in terms of Section 169 of Land Transfer Act 1971 with HBC 241 of 2017 serves no purpose and should be dismissed *in limine* as there is no save as to costs. The fact that eviction was common fact and or relief arose from tenancy is not sufficient to grant consolidation.

23. Eviction procedure contained in Sections 169-173 are 'Special Procedure' under Chapter 24 of Land Transfer Act, 1971.

24. The application for eviction is by way of '*summons*' in terms of Section 169 and it is a chamber application and different from procedure for originating summons.

25. When an application for 'summons' for eviction is filed what is required in such summons are also contained in the Section 170 of Land Transfer Act 1971 and also time for a party to show a right to remain in the property is 16 days which is longer than a originating summons, but hearing is confined to a limited scope.

26. So the special procedure contained in the chapter 25 of the Land Transfer Act, 1971 cannot be deviated and if consolidated that would be the result. If this consolidation allowed, that will lead to abuse so that tenant can remain on a property for a long period without establishing a right to remain on premises.

27. It is clear that there will not be any save of cost or time as affidavits were filed as late as 31.8.2017 and that matter awaits a determination.

28. So even without considering factors stated in Order 4 of High Court Rules 1988 court can refuse the application of consolidation when the two matters are procedurally cannot be consolidated as in this case.

[1] Supreme Court Practice 1988 p 27 4/9/1

CONCLUSION

Plaintiff's leave to application as well as stay of eviction proceedings lacks any merit and dismissed. Since tenant had instituted an action seeking a declaration and also damages prior to determination of eviction procedure, landlord can seek eviction which can be dealt accordingly depending on the decision of eviction proceeding in terms of Section 169 of Land Transfer Act, 1971. Stay of proceedings refused. There is no valid tenancy agreement after 2007, reference to arbitration does not arise. Cost of this leave to appeal is summarily assessed at $2,500 to be paid within 21 days.

FINAL ORDERS

a. Summons seeking leave to appeal against Master's decision handed down on 3.10.2019 is struck off.
b. Cost of this action is summarily assessed at $2,500 to be paid within 21 days from today.

Dated at Suva this 5th day of November, 2019.

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Justice Deepthi Amaratunga
High Court, Suva