

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No.: HBC 94 of 2018

BETWEEN : **SHAKUNTLA DEVI** of Hazrat Building, 61 Suva Street, Flat No. 8, Suva,
Fiji.

APPLICANT/ORIGINAL DEFENDANT

AND : **HARI KRISHNA THAKORLAL NARSEY** and **MAHENDRA KUMAR**
MOTIRAM, Businessmen and Medical Practitioner both of Suva and
RAJENDRA JAGMOHAN NARSEY of 40 Investigator Drive, Woodcraft SA
5126 Australia, Business Manager and **HEMANT JAGMOHAN NARSEY** of
17 Kansas Place, Toongabbie, NWS 2146, Australia, Computer Programmer.

RESPONDENTS/ORIGINAL PLAINTIFFS

Counsel : **Applicant:** Ms Naidu S
: **Respondent - Plaintiff:** Mr. M. Nand

Date of Hearing : 1 April, 2019 at 9.30am

Date of Judgment : 1 April, 2019 at 3.00pm

JUDGMENT

INTRODUCTION

1. The Applicant had filed this application through her solicitors seeking extension of time to file. Order 59 rule 8(1) of High Court Rules of 1988, states that there is a right of appeal from final order of Master to a judge. Order 59 rule 12 of High Court Rules of 1988 states that notice of appeal should be filed and the Applicant had not done so. The appeal should be filed and served within 21 days from Master's decision. (See Order 59 rule 9(a) of High Court Rules of 1988). When that is not done an application seeking extension of time can be made to a judge in terms of Order 59 rule 10 of High Court Rules of 1988. This action commenced before Master in terms of Section 169 of Land Transfer Act, 1971. Master heard contested applications made under Section 169 of Land Transfer Act, 1971 in terms of extended jurisdiction granted in terms of Order 59 rule 2(1) of High Court Rules of 1988. Master had heard the matter and delivered decision on 5th

December, 2018, granting order for eviction from the premises .The Applicant appeared in person before Master, and after eviction order was granted she had also filed a stay of execution. This stay of execution was refused due to not having an appeal against Master's decision, on 30th January, 2018. On 31st January, 2019 the Applicant had filed this application through her solicitors seeking extension of time to file Notice of Appeal.

ANALYSIS

2. This application seeking enlargement of time to file Notice of Appeal is filed in terms of Order 59 rule 10(1) High Court Rules of 1988 and Order 59 rule 10(2) High Court Rules of 1988, lays down the procedure. The application needs to be through inter parte summons supported by an affidavit and this was complied.
3. In order to seek extension of time the Applicant needs to fulfill following
 - a. Length of delay and an explanation as to delay.
 - b. Merits of prospective Appeal.
 - c. Prejudice to Respondent.

Length of Delay and Explanation

4. The present application is filed on following day after the refusal for stay of execution. The Applicant who had appeared without a legal practitioner had filed a stay application without filing Notice of Appeal in terms of Order 59 rule 9 (a) High Court Rules of 1988. Master's decision was delivered on 5.12.2018 and application for stay was filed on 19.12.2019 by the Applicant, who appeared in person. According to affidavit in support of this summon, she had filed a Notice of Appeal along with application for stay, but the evidence of record is otherwise. In my mind there is sufficient explanation as to the delay and there is no inordinate delay as correct procedure was followed a day after dismissal of application for stay, by solicitors.

Merits of Prospective appeal

5. In the affidavit in support there are intended grounds of Appeal and they are as follows:
 - a. All the parties who own the property in issue had not sworn affidavits. Two parties who own 1/5 each had not sworn affidavit in support of the eviction.
 - b. Master had erred in the decision that all owners of the property had given consent to the Plaintiff to proceed with eviction of the applicant.
 - c. Master had erred in holding that there existed a landlord and tenant relationship between parties.
6. At the hearing following additional grounds were added as merits:

- a. Plaintiffs are unknown to the Applicant and does not accept them as last registered owners of the property.
 - b. Plaintiffs had obtained the ownership due to fraud as one of the person had used two names in two memorials.
 - c. No letter of authority to the deponent to swear affidavit in support of the eviction, on behalf of other owners.
 - d. There was an illegal increase of rent by Plaintiffs.
 - e. Notice of eviction is given by unknown person.
 - f. Plaintiffs had previously filed an action and it was struck off and the Applicant was ordered to pay \$300 and it was not paid.
7. At the hearing counsel for the Applicant admitted that they had gone before Registrar of Title with the counsel of the Plaintiff and were satisfied with the names appearing in the Memorials of the tile as present owners and there were only four owners as per the records kept by Registrar of Title.
8. Applicant is disputing the ownership of the premises and title to the Plaintiffs, but in Torrens system registration grants a title that is recognized in law as unimpeachable or indefeasible.
9. Fels and another v Knowles and another ((1907) 26 NZLR 604) in the joint majority judgment (delivered by Edwards J) at p 619 as follows:

In the course of centuries of our English history there had grown up a complicated system of rules regulating dealings with and transfer of real property. The result was that every dealing necessitated a minute and careful inquiry into the preceding title, attended by great expense, and never resulting in absolute certainty to title. More especially the rules affecting the administration of trusts and the fact that notice, direct or constructive, of a breach of trust might result in grievous loss to wholly innocent persons were felt to bear very hardly, without sufficient compensating advantages. Impressed by this view of the matter, it occurred, now many years ago, to an ingenious gentleman in South Australia, Mr. Torrens, that the Merchant Shipping Acts supplied a model for which a scheme of land registration could be devised, by which all trusts should be excluded from the register, and under which a person dealing honestly with the registered proprietor should not be called upon to look further than the register, and should be entirely unaffected by any breach of trust committed by the registered proprietor with whom he dealt. From this genesis sprang the system of land registration which now prevails in all the Australian Colonies and is now

represented in this colony by "The Land Transfer Act 1885" and its amendments.'

10. In *Assets Co Ltd v Mere Roihi (Consolidated Appeals)* ([1905] AC 176) the principles contained in Sections 39, 40 and 41 of the Land Transport Act (in the said case analogous provisions in NZ Land Transfer Act were dealt, as opposed to indigenous people's rights to land in terms of the said Act) were described as 'unimpeachability' of the title. The same principles are most commonly described as 'indefeasibility' of title, too. In *Fraser v Walker and Others* [1967] 1 All ER 649 the word 'indefeasibility' was dealt by the Privy Council as regard to the analogous provisions contained in the Land Transfer Act of New Zealand and the earlier decision of *Assets Co Ltd v Mere Roihi (Consolidated Appeals)* ([1905] AC 176) was also considered in this later decision. In the said decision it was held that this concept of 'indefeasibility' is central to the system of registration found in the Land Transfer Act. In *Fraser v Walker and Others* (supra) at page 652 the following appears:

"It is these sections which, together with those next referred to, confer on the registered proprietor what has come to be called "indefeasibility of title". The expression, not used in the Act itself, is a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys. This conception is central in the system of registration. It does not involve that the registered proprietor is protected against any claim whatsoever; as will be seen later, there are provisions by which the entry on which he relies may be cancelled or corrected, or he may be exposed to claims in personam. These are matters not to be overlooked when a total description of his rights is required; but as registered proprietor, and while he remains such, no adverse claim (except as specifically admitted) may be brought against him.

III. Those sections of the Land Transfer Act, 1952, which state the effect of the certificate of title. The principal section on this subject is s 75. The certificate, unless the register shows otherwise, is to be conclusive evidence that the person named in it is seized of or as taking estate or interest [sic] in the land therein described as seized or possessed of that land for the estate or interest therein specified and that the property comprised in the certificate has been duly brought under the Act. This section is of a similar character to those last discussed; it creates another--a probative--aspect of "indefeasibility", none the less effective though, as later provisions show, there are means by which the certificate may be cancelled or its owner compelled to hold it on trust or to deliver it up through an action in personam." (emphasis is mine)

- II. So the registration and names of owners of property cannot be contested in eviction procedure before Master.

12. Even if Master had erred in finding that all the owners had consented to the Plaintiffs to institute proceedings that will not be material to quash the final eviction order as Applicant had not shown a right to remain in the property.
13. The Applicant does not have a tenancy agreement and at the hearing admitted that she had not paid rent for a long period. She said her rent was not accepted. Arrears of rent is not an issue before Master. It is a separate issue that can be dealt in a separate action.
14. The illegality of increase of rent is also not an issue that can be raised in eviction proceeding in terms of section 172 of Land Transfer Act, 1971 what needs to be established is "right to the possession of the land."
15. Counsel for the Plaintiff said that authority of the affidavit in support was not raised before Master hence it cannot be raised for the first time in Appeal. I agree with that. Even if I am wrong on that there is no requirement for all the owners to be party to eviction. If so, when one of the co-owners cannot be found it will give a squatter or tenant or trespasser to enjoy the property indefinitely till all the owners make a joint application.
16. Whether the Applicant is tenant or not her right to remain in premises needs to be established to defeat the application for eviction. There is no tenancy agreement so she can be evicted with notice and it is trite law. There is no legal requirement that notice to quit needs to be served by a person known to Applicant.
17. She accepts that she was given a notice to quit and that notice is attached to the affidavit in support of the summons for eviction. Further, said notice to quit annexed as HTN2 at paragraph 4 stated that said notice had annexed a copy of Title No 5890 which indicated the owners of the property. Applicant had ample notice as to owners of property if she desired to dispute title through an action.
18. The Applicant also said that she was not paid \$300 which was ordered in a previous application, but counsel for Plaintiff said it was paid, but Applicant had repeatedly defaulted two previous cost orders from Master and also from Judge. So, there is no merit in this as well there are outstanding cost orders totaling 1,500 to be paid by Applicant. So it is an abuse for her to file this summons for enlargement without payment of costs ordered by court.
19. Having considered submission, it is axiomatic that neither the grounds of appeal in the intended appeal nor the additional grounds submitted has any merit.
20. The counsel for the Applicant stated that there is no prejudice to the Plaintiffs as she had already delivered possession of the premises. I agree with that, but without any merits extending time to file Notice of Appeal would be futile and would result in waste of

litigants money and time. The cost of this application is summarily assessed at \$1,000 to be paid within 21 days.

FINAL ORDER

- a. The summons seeking enlargement time filed on 31.01.2019 is struck off.
- b. The cost of this application is summarily assessed at \$1,000 to be paid within 21 days.

Dated at Suva this 1st day of April, 2019.



Justice Deepthi Amaratunga
Justice Deepthi Amaratunga
High Court, Suva