

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No.: HBC 89 of 2017

BETWEEN : **SERU TARALAILAI** of Vunato, Lautoka.

1ST PLAINTIFF

AND : **TEVITA TARALAILAI** of 109 Grantham Road, Raiwaqa, Suva.

2ND PLAINTIFF

AND : **ALESI TARALAILAI** of 109 Grantham Road, Raiwaqa, Suva.

DEFENDANT

Counsel : **Plaintiff: Mr. Mark Anthony**

Defendant: Mr. Niubalavu. P

Date of Hearing : **23.09.2020**

Date of Judgment : **30.10.2020**

JUDGMENT

INTRODUCTION

1. This is an appeal against Master's decision disallowing an extension of time for Defendant to execute a transfer of a property belonging to her late mother's estate and the place where she resides. First Plaintiff is the administrator of the estate and had filed this action to sell the property in terms of Section 119 of Property Law Act 1971. Master had granted orders on 23.11.2017, upon settlement between the parties, where time period was given for the Defendant to execute transfer but, this needed an extension as there were number of issues that required settlement. Housing Authority's consent was a prerequisite for transfer of property and it was obtained 18.4.2018. First Plaintiff is the administrator and a minority beneficiary of the estate of late Vaita Korarapa. Master while refusing the extension of time held that Defendant had provided 'sufficient' reasons as to why she could not complete settlement within time allocated. I agree with the said finding of Master. Having decided so, Master did not allow the extension to time. So the appeal is allowed and set aside Master's

decision and grant further 30 days to complete settlement of the transfer of the property, from today.

FACTS

2. First Plaintiff is administrator and minority beneficiary of 1/3 share of estate of late of Vaista Kororapa. The Defendant and second Plaintiffs, are the equal remaining 2/3 share beneficiaries.
3. Plaintiffs instituted this action for sale of property belonging to estate of late Vasita Kororapa, comprised in the Title of Housing sub –lese no 234329 , being Lot 17 on DP No 3609 (The Property).
4. Daughter of late Vasita Kororapa, second Defendant occupies in the Property and she is beneficiary of 1/3 share of said property and also desired to purchase it from the estate.
5. Plaintiff filed originating summons in terms of Section 119 of Property Law Act seeking sale of the Property and alternatively to carry out valuation of the property. The Plaintiff also sought an order to sell the Property to the best price obtained from any of the parties to the action.
6. There are orders sought for distribution of property in terms of Law. Accordingly, Plaintiff sought only 1/3 share of the proceeds of the sale and majority share of 2/3 inherited to Defendant and Second Plaintiff.
7. Originating summons were not heard as parties had entered to a terms of settlement and this was presented to court and Master granted orders accordingly.
8. Following orders were made by Master in terms of settlement between the parties
 - “1. The property comprised in Housing Authority Lease No 234329 as Lot 17 on Deposited Plan No 3609 situate in the Province of Rewa and City of Suva comprising an area of 5.4 perches be sold to the Defendant Alesi Nailolo Tralailai for consideration amount of \$40,000(hereinafter referred to as the said property).
 2. The 1st Plaintiff being the administrator of the estate of Vaista Kororapa.... To execute the Sale and Purchase Agreement of the said property together with the Defendant within 14 days.
 3. The Defendant is at liberty to engage the services of her choice of solicitors to carry out her instructions in terms of the conveyancing transaction the said property.
 4. The settlement of the said property shall be effected within 60 days counting from the date of execution of the sales and purchase agreement.....

In the event if the Defendant fails to attend to settlement within 60 days from the date of execution of the sale and purchase agreement the Plaintiff will be entitled to sell the property to the highest bidder.”

9. On 4.7.2018 second Defendant filed a motion seeking settlement of transfer be extended, with an affidavit in support informing the court the circumstances and behaviour of Plaintiff regarding the sale of property.
10. Defendant had made an application for extension of time with and affidavit in support and said affidavit stated inter alia,
 - a. On the same day when parties entered for sale and purchase agreement she had lodged an application for loan to Housing Authority.
 - b. Numerous correspondence with Housing Authority after said lodgment.
 - c. Offer letter from Housing Authority was received on 18.4.2018
 - d. The settlement date was accordingly set for 21.4.2018.
 - e. 30.5.2018 first Plaintiff's solicitors informed Defendant that first Plaintiff had already accepted a tender of \$100,000 for the same property.
 - f. Defendant's solicitors Requested settlement with Defendant on 4.6.2018, through extension of time for settlement with attached offer of Housing Authority
 - g. Numerous emails requesting settlement/ extension of time on 5.6.2018.
 - h. Emails and letters requesting settlement and extension of time on 12.6.2018.
 - i. Informed an offer of \$60,000 was accepted by first Plaintiff on 18.6.2018.
11. Plaintiff objected to the said application and filed affidavit in opposition which stated inter alia,
 - a. Sale and purchase agreement between Plaintiff and second Defendant 23.2.2018.
 - b. Plaintiff was not advised of any settlement within said 60 day period from 23.2.2018.
 - c. On 30.5.2016 he received a tender of \$100,000 for the Property from an interested party.
 - d. Requested his solicitors to write to the second Defendant regarding settlement for \$100,000 with said prospective purchaser.
 - e. Later he informed Defendant, that he had accepted a new offer for \$60,000 from another buyer and this was accepted.
 - f. Upon execution of documents purchaser had paid initial deposit of \$12,055.00.
 - g. Housing authority had not granted them consent to execute the transfer so transfer could not be completed. Housing Authority had refused the consent for transfer to third party for \$60,000.

- h. When second Defendant was informed about the default through the solicitors, she had given reasons for delay beyond 60 day time period to the Plaintiff through solicitors.
12. Defendant filed a motion seeking extension of time by further 30 days for settlement, which was objected, on the facts stated in the affidavit in opposition.
13. Master held that Defendant had provided sufficient reasons for her inability to execute settlement within 60 days from entering in to sale and purchase agreement.
14. Master delivered decision refusing the extension sought. This is an appeal, having obtained extension of time and leave from this court.

ANALYSIS

15. This is an appeal from Master's decision delivered on 8.11.2019 where request for extension of time to execute the settlement of the transfer was refused.
16. The Application for extension was made in terms of Order 3 rule 4 of High Court Rules 1988 (HCR).
17. Order 3 rule 4 (1) and rule 4(2) of HCR grants a general discretion to court to extend any time period authorized by HCR or by any '*judgment, order or directions to do any act in any proceedings*'
18. This is an action filed by way of originating summons. Master made orders in this action on 23.11.2017 in terms of power granted in Order 59 rule 2(e) of HCR. Accordingly, Master is empowered to make any order or judgment with consent of the parties.
19. Once an order is made by the court irrespective of whether it was by consent or otherwise Order 3 rule 4 of HCR applies and court can exercise the general discretion regarding extension of time.
20. Supreme Court Practice (UK) (White Book)1988(Vol 1) p18 states,
'The making of a consent order requiring a party to comply with the terms of the order within a specified time, failinw which his claim would be struck out , does not preclude the parties returning to the court to ask for an extension of time (*Greater London Council v Rush and Tomkins* (1984)81 L.S. Gaz. 2624(CA))'.
21. The purpose of Order 3 rule 4 of HCR is to extend time in order to prevent injustice to a party by strictly adhering to time period. This is general discretionary power of court.
22. Supreme Court Practice (UK) (White Book) Vol 2 at p1270 states,

‘Although an order is headed “by consent” , it is in every case a question whether there was a true binding contract between the parties or whether it is an order of the Court to which the parties agreed or to which they did not object or to which one side submitted , and if such be the case, the jurisdiction of the Court to grant an extension of time to do a specified act under O.3 r.5 not ousted(*Siebe Gorman & Co Ltd v Pneupac Ltd* [1982] 1 W.L.R 185;[1982] 4 All E.R. 377 C.A)’.

23. Lord Denning in *Siebe Gorman & Co Ltd v Pneupac Ltd* [1982] 1 All ER 377 at p 380 Held,

“I would add this. As Eveleigh LJ said early on in this appeal, when people do not object to an order of this kind, it is always on the terms that it is subject to the rules of court which enable an extension of time to be made. Under RSC Ord 3, r 5(1)—

'The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these rules, or by any judgment, order or direction, to do any act in any proceedings.'

A consent order of this kind is subject to the power of the court to extend the time. It seems to me that the master in this case acted as all experienced practice masters act. He extended the time for the specific affidavit to be filed. I think he was quite right. I would allow the appeal and restore the master's order.”

24. Courts inherently possess power to extend a time period when there are circumstances warrant for that. The basis of Order 3 rule 4 of HCR is to prevent an injustice and this is the paramount consideration. Court should not allow unenforceable or impossible scenarios to take control of the outcome and allow injustice to Defendant. Defendant received Housing Authority's offer on 18.4.2018 which was outside 60 day time. Without that no settlement could executed in relation to this property.
25. No consent order and or even judgment can predict all the possible scenarios and make provisions for all possibilities, when time periods are set out by court or by consent. When the court had set out time periods in an order it can be extended upon a request. First Plaintiff cannot enter in to a sale and purchase agreement without granting Defendant a reasonable extension considering the circumstances of the case.
26. First Plaintiff had clearly knew about the issues relating transfer such as arrears of rentals on the property. As the Administrator he should know the issues relating to the estate property and granting of loan for the purchase was contingent on all the issues.
27. First Plaintiff and Defendant had entered in to a sale and purchase agreement on 23.2.2018. This sale and purchase agreement was in pursuant to orders made by Master on 23.11.2017. So the parties are bound by terms of the said sale and purchase agreement, but at the same time for completion of the transaction was determined by an order of the court.

28. As the consent orders entered by Master had not stipulated a method to consider 'highest bidder', first Plaintiff cannot decide it without giving even notice of the price to all the beneficiaries in terms of the settlement between the parties.
29. It should be noted that all the parties desired to sell the estate property to the Defendant for a consideration of \$40,000 which was an obvious discounted price, among the parties and outside offers cannot be compared with this price to determine they were 'highest' offers.
30. The time period given was 60 days from entering in to sale and purchase agreement, but this is not inflexible depending on the circumstances. The time period expired on or about 24.4.2018. Defendants through solicitors were seeking extensions from first Plaintiff in terms of the sale and purchase agreement which allowed extension of time by consent of the first Plaintiff.
31. So the Defendant was justified in not seeking orders of the court in the first instance as there was provision to extend the time period, in terms of sale and purchase agreement, entered on 23.2.2018.
32. If there was no time period stated in the orders of the court parties were at liberty to stipulate a time period and or rely on reasonable time period depending on the circumstances. In contrast a time period was stipulated by court in the orders made by Master on 23.11.2017 and it was 60 days from the entering sale and purchase agreement.
33. So the time 60 day time period contained in the orders of the Master made on 23.11.2017 can either be extended by parties by mutual consent, or if such a consent is not granted can make an application to the court either before or after expiration of time period.
34. In this instance Defendant could not fulfill the requirement to execute the transfer of the Property within 60 days from 21.2.2018, the day on which, sale and purchase agreement was entered between first Plaintiff and Defendant.
35. The affidavit in support of the motion seeking extension had supplied ample evidence that Defendant had requested for extension of time and settlement from 4.6.2018, but first Plaintiff had unfairly refused it.
36. First Plaintiff's solicitors had indicated initially that he had accepted an offer for \$100,000 but subsequently informed that he had accepted an offer for \$60,000 and had also entered in to a sale and purchase agreement and had also accepted an advance.
37. First Plaintiff informed Defendant on 30.5.2018 he had accepted an offer for \$100,000 which is significantly higher than the price stated in the sale and purchase agreement 7 days later on 7.6.2018 which was only \$60,000.

38. First Plaintiff is administrator of the property and he cannot and should not act detrimental to the interest of the beneficiaries.
39. Plaintiff is administrator of the estate and in that regard a trustee, hence he has fiduciary obligations towards all the beneficiaries including Defendant.
40. Apart from that his actions are governed by statutory and common law (equity). First Plaintiff had informed Defendant about the offer for \$100,000 and acceptance of the same but had strangely refrained from informing the subsequent offer of \$60,000. This reduction of the price had happened within seven days as the sale and purchase agreement for \$60,000 was entered on 7.6.2018 when first Plaintiff was fully aware of Defendant's request for extension and he could only sell to the highest bidder in terms of the agreement.
41. First Plaintiff must co-corporate with Defendant and also provide any additional requirements in order to execute the transfer of the property. There were requirements such as arrears of rentals and an engineering certificate etc. So the delay of the Defendant's was partly contributed by actions beyond her control. First Plaintiff as the administrator cannot and should not act in detriment to beneficiaries.
42. In this case Master held that Defendant had provided sufficient reasons as to the delay in settlement. The 60 day time period was what the parties had indicated at the time they reached amicable settlement. It should be borne in mind once the said settlement was converted to an 'order' of the court, if the parties cannot grant extension of time it can be granted by court in order to prevent injustice from the said orders.
43. In the circumstances it is clear that first Plaintiff had not sought even from Defendant whether she was willing to accept a price of \$60,000. So he was unable to establish before Master that it was the highest bidder. Master had held that no tenders were called by first Plaintiff.
44. There is no evidence that first Plaintiff had terminated sale and purchase agreement entered on 21.2.2018. Without termination of the same he cannot enter in to a second sale and purchase agreement, for which Housing Authority had refused consent.
45. Without Housing Authority's consent no settlement for property could be executed. Only Defendant had obtained it.
46. In the circumstances Defendant's request for extension of time is granted and it is 30 days from 30.10.2020.

CONCLUSION

47. Court can extend time period granted in order entered through consent of the parties. Extension will depend on reasons for seeking extension. Master had stated that Defendant had provided sufficient reasons for delay. I agree with that finding of Master. Allowing extension in terms of Order 3 rule 5 of HCR is to prevent injustice to party through strict compliance with time period. Defendant obtained the offer from Housing Authority, after expiration of 60 day time period hence Defendant could not have completed settlement within 60 days from entering of sale and purchase agreement, as Housing authority had given an offer only 18.4.2018. So appeal is allowed. Masters decision of 8.11.2019 is set aside. Defendant is granted 30 days from today (30.10.2020) No order as to costs.

FINAL ORDERS

- a. Appeal allowed.
- b. Master's decision made on 8.11.2019 is set aside.
- c. Defendant is granted 30 days from this order (30.10.2020) to finalize the settlement.
- d. No costs.

Dated at Suva this 30th day of October, 2020.



Justice Deepthi Amaratunga
High Court, Suva