

IN THE HIGH COURT OF FIJI
AT LABASA
CIVIL JURISDICTION
CIVIL ACTION NO. HBC 61 OF 2019

IN THE MATTER of Land Transfer Act Cap 131

AND

IN THE MATTER of Section 169 of the Land
Transfer Act Cap 131

BETWEEN: RAMESH CHAND SHARMA and RAJENDRA SHARMA

PLAINTIFFS

AND: RAJESH RISHI RAM

RESPONDENT

Appearance: Plaintiffs - Mr. D. Nair
Respondent - Mr. A. Sen

Date of Hearing : 9th November, 2020

Date of Judgment : 10th November, 2020

JUDGMENT

Introduction

[1] This is leave to appeal application of the Defendant against Master's decision delivered on 31.8.2020, rejecting, an application seeking to file a supplementary affidavit. The application was purportedly made in terms of Order 20 rule 5 and Order 32 rule 1 and rule 2 of the High Court Rules 1988(HCR). I used word purportedly as neither the said provisions, nor Order 20 rule 7 of HCR relied by counsel, at the hearing, has any relevance to the application before Master, and

or to this application before me to consider merits. Order 32 HCR is the mode of application, hence applied generally, but does not deal with supplementary affidavits. This is an action filed in terms of Section 169 of Land Transfer Act 1971. The procedure for eviction of a person from land is set out in Land Transfer Act 1971, under Chapter 24 which confers 'Special Jurisdiction' to court. The application prescribed under that Chapter is originating summons and HCR applies to issues that are not specifically dealt under Chapter 24 of Land Transfer Act 1971. The eviction procedure is consistent with Torrens System, where registration is held everything, subject to limited exceptions contained in the same Act. The procedure for eviction is simplified in terms of Section 169 of Land Transfer Act 1971 hence time is of essence in such procedure where, abuse of process to prolong occupation should be not be allowed. Summons for eviction in terms of Section 170 of Land Transfer Act 1971, Defendant is granted sixteen days from the service of the summons to appear in court, for summons. This is an extended time period to appear in court for summons under HCR, and meant to prepare for affidavit in opposition. Defendant was served summons for eviction on 21.12.2019 and affidavit in opposition filed on 17.4.2020. Order 28 rule 2 (6) of HCR, states that court is precluded from receiving evidence, other than three affidavits stated in preceding provisions of HCR, except where leave of the court granted to adduce additional affidavits. Master had correctly identified legal position and stated that there was discretion given to court to allow an additional affidavit. So the burden was shifted to the party seeking admission of supplementary affidavit to satisfy Master that discretion should be exercised in Defendant's favour. This application seeking leave is against Master's use of discretion refusing to accept supplementary affidavit of Defendant. All parties had filed their respective affidavits, and matter was fixed for hearing before Master when Defendant sought to file supplementary affidavit. Master had applied correct legal provision, and correctly rejected that application. When exercising discretionary power of the court under Order 28

rule 2(6) of HCR the court can consider nature of the action, contents of the proposed supplementary affidavit and relevance to action, reason for seeking supplementary affidavit, delay, prejudice to other party, effect of the filing supplementary affidavit to the action, etc. The cumulative effect of such factors can be considered in the exercise of general discretion in terms of Order 28 rule 2(6) HCR. Higher Courts rarely interferes with such exercise of discretion unless it is shown that the discretion was wrongly exercised and there is immediate prejudice which require intervention through leave to appeal from the interlocutory orders. The proposed supplementary affidavit is hearsay and should be struck off in limine. Apart from that Master had exercised discretion and given several reasons for rejection of the application of Defendant. I cannot see any reason to grant leave for such interlocutory decision when the merits of this appeal are doomed to fail for reasons given in this judgment. It was held and applied in Court of Appeal that '*Leave should not be granted as of course without consideration of the nature and circumstances of the particular case* (per High Court in *Ex parte Bucknell* [1936] HCA 67; (1936) 56 CLR 221'¹. It should also be noted that requirement for leave to appeal from Master's interlocutory decision is to discourage such applications.²(See Murphy J in *Niemann v. Electronic Industries Ltd* (1978) VR 431 at 441-2)

Analysis

[2] Defendant is seeking leave to appeal against Master's interlocutory decision refusing to accept supplementary affidavit. Defendant is granted an opportunity to file an affidavit in opposition and sufficient time granted for that and this action filed on 17.12.2020 in terms of Section 169 of Land Transfer Act 1971 was

¹ *Kelton Investments Ltd v Civil Aviation Authority of Fiji* [1995] FJCA 15; ABU0034D.95S (18 July 1995)

² Ibid Fiji Court of Appeal quoted and applied principles often quoted decision , where it held 'The requirement for leave is designed to reduce appeals from interlocutory orders as much as possible (per Murphy J in *Niemann v. Electronic Industries Ltd* (1978) VR 431 at 441-2)'

fixed for hearing when the application for leave to file supplementary affidavit was made by Defendant.

- [3] It is Master's case management decision to allow additional material and postpone hearings of this nature considering circumstances of the action. UK Supreme Court decision the this fact was reiterated by Chief Justice Neuberger in ***Revenue and Customs Commissioners v BPP Holdings Ltd and others***[2017] 4 All ER 756 cited the following quote with authority to emphasis the importance of case management .

“It is appropriate to state the words of Lawrence Collins LJ in ***Fattal v Walbrook Trustee (Jersey) Ltd*** [2008] EWCA Civ 427, [2008] All ER (D) 109 (May) (at [33]):

*'[A]n appellate court should not interfere with case management decisions by a judge who has applied the correct principles and who has taken into account matters which should be taken into account and left out of account matters which are irrelevant, **unless the court is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge.**'*(emphasis mine)

- [4] Considering the discretion to reject supplementary affidavit was part of case management and not to allow parties to delay and abuse the process, the decision of Master will rarely be subjected to an appeal, unless the decision was *'plainly wrong'* and or it was *'outside the generous ambit of discretion entrusted'* to Master.

- [5] In my judgment Master's decision to disallow supplementary affidavit nearly after five months after summons was served for eviction was neither plainly wrong decision nor it was outside Master's jurisdiction in terms of Order 28 rule

2(6) of HCR. So this application seeking leave to appeal needs to be struck off in limine with cost.

[6] The application is for eviction from commercial premises and delay in determination prejudice Plaintiff unfavorably, and person in possession enjoys the benefits, these are factors which court cannot shut its eyes and allow Defendant to abuse the process.

[7] Without prejudice to above, when an application seeking leave to appeal, is sought from interlocutory decision of Master for the granting leave is rare. The applicant must not only show that the interlocutory order was wrong but also it caused prejudice.

[8] Appeal from interlocutory decisions are not encouraged, specially parties with deep pockets, and or parties who can obviously benefit from prolonged delay such as overstay in commercial property by parties etc. It should be noted that the court is granted jurisdiction to determine applications for eviction swiftly and because of this interlocutory application already hearing fixed for April 2020 was delayed for more than seven months, and remains so.

[9] Fiji Court of Appeal in ***Kelton Investments Ltd v Civil Aviation Authority of Fiji*** [1995] FJCA 15; ABU0034D.95S (18 July 1995) held,³

*'I am mindful that Courts have repeatedly emphasised that appeals against interlocutory orders and decisions will only rarely succeed. As far as the lower courts are concerned granting of leave to appeal against interlocutory orders would be seen to be encouraging appeals (see ***Hubball v Everitt and Sons (Limited)*** [1900] 16 TLR 168).*

³ Referred in ***Costerfield Ltd v Denarau International Ltd*** [2018] FJHC 55; HBC214.2012 (7 February 2018) Justice Anare Tuilevuka.

Even where leave is not required the policy of appellate courts has been to uphold interlocutory decisions and orders of the trial Judge - see for example Ashmore v Corp of Lloyd's [1992] 2 All ER 486 where a Judge's decision to order trial of a preliminary issue was restored by the House of Lords.

The following extracts taken from pages 3 and 4 of the written submissions made by the Applicants' Counsel are also pertinent:

'.....

5.2 The requirement for leave is designed to reduce appeals from interlocutory orders as much as possible (per Murphy J in Niemann v. Electronic Industries Ltd (1978) VR 431 at 441-2). The legislature has evinced a policy against bringing of interlocutory appeals except where the Court, acting judicially, finds reason to grant leave (Decor Corp v. Dart Industries [1991] FCA 655 104 ALR 62 at 623 lines 29-31).

5.3 Leave should not be granted as of course without consideration of the nature and circumstances of the particular case (per High Court in Exparte Bucknell [1936] HCA 67; (1936) 56 CLR 221 at 224).

5.4 There is a material difference between an exercise of discretion on a point of practice or procedure and an exercise of discretion which determines substantive rights. The appellant contends the Order of 10 May 1995 determines substantive rights.

5.5 Even "if the order is seen to be clearly wrong, this is not alone sufficient. It must be shown, in addition, to effect a substantial injustice by its operation" (per Murphy J in the Niemann case at page 441). The appellant contends the order of 10 May 1995 determines substantive rights.

5.6 In Darrel Lea v. Union Assurance (169) VR 401 at 409 the Full Court of the Supreme Court of Victoria said:

"We think it is plain from the terms of the judgment to which we have already referred that the Full Court was stating that error of law in the order does not in itself constitute substantial injustice, but that it is the result flowing from the erroneous order that is the important matter in determining whether substantial injustice will result."

[10] Considering principles laid down in Fiji Court of Appeal regarding interlocutory decisions and the granting of leave generally I consider proposed merits of the appeal and success of that briefly.

Merits of the proposed appeal

Proposed Ground 1

[11] There is no right for any party to file supplementary affidavits once the respective parties to an originating summons, had completed filing of affidavit of support, affidavit in opposition and affidavit in reply. Master had correctly referred to legal position contained in Order 28 rule 2(6) of HCR where leave of the court is required to file supplementary affidavits.

[12] Granting and refusal of supplementary affidavit is discretionary power of the court. Master had correctly held that it should be exercised judiciously.

[13] Defendant does not have a right to seek additional affidavit, especially after five months from service of summons for eviction. Justification for such additional facts, should be done in the affidavit in support of the application. This was not done.

[14] Perusal of that affidavit in support of summons filed on 22.5.2020 indicates that no such materials were submitted. In said affidavit in support states,

‘I am entitled to have my supplementary affidavit filed because the information contained in my supplementary affidavit contained material which was not in my possession at the time of filing my affidavit in opposition’

[15] Master had considered this and stated in the decision at paragraph 10, the lack of explanation as a factor to reject the request.

[16] Court needs to balance the interest of both parties and ‘interest of justice’ is not to allow unlimited access to file material to court, once they have exhausted the opportunity given by law.

[17] Master held that exceptional circumstances needs to be shown to adduce additional material in terms of Order 28 rule 2(6) of HCR. This is not correct, but that error will not change the decision of Master as Master had considered it alternatively in paragraph 11 and several other reasons to reject the application of Defendant.

[18] Even if I consider the facts afresh exercising my discretion, Defendant had failed to establish justification for granting leave in terms of Order 28 rule 2(6) of HCR, for reasons given in this judgment.

Proposed Ground 2

[19] Master had rightly held that Order 20 of HCR had no application. Order 20 of HCR deals with amendment of pleadings.

[20] An originating summons or affidavit is not considered as pleadings (See (1960) 1 All ER720 Lewis v Packer)

[21] In Lewis v Packer [1960] 1 All ER 720 [1960] 1 All ER 720

“..the originating summons was not a statement of claim and RSC, Ord 20, r 10, did not apply to it. It had sometimes been said that the affidavit in support of an originating summons was equivalent to a statement of claim, but it was not in fact a statement of claim and compliance with the requirements of proof under RSC, Ord 55, r 5A, was sufficient for an originating summons brought under that rule.”

[22] So proposed ground 2 has not merits at all.

Proposed Ground 3

[23] If the Defendant required additional material other than what was generally allowed under law leave of the court is required. Defendant was required to justify necessity with good reasons. For this, one needs to consider the contents of the supplementary affidavit. Master had considered the contents and rejected it.

[24] Perusal of proposed supplementary affidavit of Defendant shows that it contains facts which are hearsay which is disallowed in terms of Order 41 rule 5(1) HCR and needs to be struck off *in limine*. The material facts stated in paragraphs 9, 10, 11, 12, 14 and 15 are all beliefs of Defendant and or hearsay which are disallowed in an affidavit in opposition in terms of Order 41 rule 5(1) HCR.

[25] Without prejudice to above, this type of an affidavit can also be struck off in terms of Order 41 rule 6 of HCR as it is frivolous, oppressive and or contents are Defendant's beliefs which are not facts that can be sworn as evidence in this action. Further, they are irrelevant to establish a right for Defendant for possession. No fraud is alleged against the last registered proprietors of the property. Any irrelevant affidavit can be struck off even after filing, so Master was correct in rejecting this supplementary affidavit.

[26] Even if I am wrong on above, Plaintiff filed this action in terms of Section 169 of Land Transfer Act 1971 on 17.12.2019. This is an abridged, process where Plaintiff files originating summons in terms of Land Transfer Act 1971 seeking eviction of a party. Eviction proceedings in terms of section 169 of Land Transfer Act 1971, by way of originating summons can be instituted only by the parties

stated in said provision of the law. The essential requirement in such summons are also stated in the said Act.

[27] Such originating summons is required to identify the land and or premises, and parties to such an action. For this purpose affidavit in support of the originating summons was filed. Defendant was served both originating summons and the affidavit in support, and having understood the contents Plaintiff had filed an affidavit in opposition.

[28] Plaintiff had filed affidavit in reply and Master had fixed the matter for hearing. The hearing before Master is brief. Master is required under Section 170 of Land Transfer Act 1971 of the Plaintiff to consider whether Defendant have a right to possession of land. Generally such action should complete hearing within 3 – 4 months. By contrast this action prolonged more than 11 months without hearing.

[29] Jurisdiction in terms of Section 169 of Land Transfer Act 1971 is a 'Special Jurisdiction' in terms of part 24 of the said Act. This jurisdiction is part and parcel of infeasibility of title.

[30] I have perused the supplementary affidavit where Defendant is alleging fraud against a third party by a previous $\frac{1}{2}$ share owner who had transferred his rights to the first named Plaintiff. So there is no allegation at all regarding remaining $\frac{1}{2}$ share of undivided share. Since co owners own the property in common, such an allegation of fraud cannot create any right for the Defendants to possession or prolong their possession. This type of allegation of fraud regarding pervious proprietor cannot deprive indefeasibility of title of the Plaintiffs.

[31] This property where eviction was sought is a commercial property hence delay in this application is beneficial to party in occupation. The due process of law takes some time and shortened process under special jurisdiction under chapter 24 of Land Transfer Act 1971 was created for that.

[32] An allegation of fraud by Defendants was regarding alleged fraud last will of a half share of co-owner. This last will was not challenged and probate was also granted and property had transferred to first named plaintiff and there is no allegation of fraud against him.

Conclusion

[33] Master had refused Defendant's supplementary evidence. Master had stated that exceptional reasons are needed to allow supplementary affidavit, and this is not the correct position. But that was not the sole reason for rejection. Master had applied correct law despite above error and had exercised her discretion properly. The appeal grounds are doomed to fail and this application for leave is refused. Cost of this application is summarily assessed at \$1,000 to be paid within 28 days by the Defendant.

Final Orders

- a. Leave to appeal refused
- b. Defendant to pay a cost of \$1,000 to Plaintiffs within 28 days.
- c. Master is directed to give priority to this matter and conclude hearing.




Deepthi Amaratunga
Judge