

IN THE HIGH COURT OF FIJI

AT SUVA

APPELLATE JURISDICTION

Civil Appeal No. HBA 30 of 2020

(On an Appeal from a Ruling given by the Learned Magistrate at Suva on 26th May, 2020 in Civil Action No. 5 of 2018.)

BETWEEN: **JAI NAND KUMAR** of Lot 2 Nailuva Road, Suva, Businessman.

APPELLANT/PLAINTIFF

AND: **ANNA WONG** of Lot 2 Flat 3, Nailuva Road, Suva, Occupation unknown to the Plaintiff

RESPONDENT/DEFENDANT

Counsel : **Appellant: Mr. A. Chand**
 : **Respondent: Ms. I. Sauduadua**

Date of Judgment : **25.11.2021**

JUDGMENT

INTRODUCTION

This is an action for recovery of arrears of rentals and also for eviction of Respondent (Defendant) filed in court below. Appellant (Plaintiff) had obtained the orders for eviction as an interlocutory order. At the hearing in court below Defendant denied she was a tenant and or paid any money as bond or rental. Plaintiff became sole proprietor of the premises on 2.12.2016 after his wife transferred her undivided half share of the property to Plaintiff. Defendant's position was that she came to the premises on the invitation of the wife of Plaintiff in 2014 and remained with her till she left the premises. She said that she was evicted in 2018 upon service of interim order for eviction, in this action. There

was no proof of any kind of tenancy between Plaintiff and Defendant. In the analysis of evidence on balance of probability Plaintiff had failed to prove his claim based on tenancy or his claim for legal fees. Considering circumstances of the case I set aside the order of cost made against the Plaintiff. Subject to that Appeal is dismissed and order of the court below is affirmed.

Facts

1. Plaintiff and his ex-wife co-owned the property described in CT9968. It contained a permanent structure with three flats.
2. Plaintiff's ex-wife lived in one flat in above premises, since on or around 2013 till she left the premises for good.
3. Since 2013 the relationship between Plaintiff and his ex-wife was estranged and there was a DVRO (Domestic Violence Restraining Order) against the Plaintiff. This order was not produced but the fact of issuance of DVRO was admitted.
4. The co-ownership of the property with Plaintiff's ex-wife ended with she transferring her undivided share to Plaintiff on 2.12.2016.
5. Plaintiff through its former solicitors had issued a notice to the Defendant on or around 1.11.2017 to vacate the premises within one month and also to pay arrears of bills.
6. The said notice to vacate the premises did not state arrears of rentals and or tenancy.
7. On 16.1.2018 Plaintiff filed this action in court below for eviction and also for arrears of rentals from April, 2013 to December, 2017 at the rate of \$750 *per mensum*.
8. Defendant denied tenancy, and counter claimed for damages to her items in the eviction process.
9. At the hearing Plaintiff gave evidence and stated;
 - a. *Defendant came to premises in 2013 upon a paper advertisement he made offering the premises on rent. (No documents were produced).*

- b. *Defendant responded to such an advertisement and she paid \$1,500 to him as rental and bond.*
- c. *There was a tenancy agreement between parties (no tenancy agreement was produced).*
- d. *From 2014 his ex-wife occupied one flat in the same premises but no other tenant resided in the premises.*
- e. *The premises was an investment for Plaintiff.*

10. Defendant gave evidence and denied that she ever paid any rental and or entered premises as a tenant. Defendant stated inter alia

- a. *She came to premises on the invitation of Plaintiff's ex-wife for her security.*
- b. *Did not accept Plaintiff as landlord and did not respond to any paper advertisement.*
- c. *Entered premises in 2014 and by that time Plaintiff and his ex-wife were separated.*
- d. *Ex-wife lived in fear and DVRO was issued against Plaintiff.*
- e. *Did not receive any receipt for payment as she did not pay Plaintiff any rental or bond.*
- f. *Accepted that she received notice for eviction.*
- g. *There were things left on the property when she was evicted but could not give a value as to any damage as claimed in her counter claim.*

11. Defendant called another witness who confirmed that ex-wife of Plaintiff requested her to live in the premises for her safety. She also said the she could not live with her as she had a family, but visited the premises.

12. She had met Defendant in the premises where ex-wife of Plaintiff lived.

13. Ex-wife of Plaintiff was scared of Plaintiff and requested others to live with her for her safety, including the witness.
14. On 26.5.2020, court below delivered Judgment, where Statement of Claim was dismissed and the counter claim was also dismissed. Plaintiff was ordered to pay a summarily assessed cost of \$700.

Analysis

15. Plaintiff instituted this action in court below for eviction of Defendant and also claiming arrears or rentals amounting \$42,750¹ on the basis \$750 *per mensum*.
16. Plaintiff became sole proprietor of CT9968 where Defendant and also ex-wife of Defendant resided on 2.12.2016. Till then he was a co-owner who had opted not to stay in the property.
17. According to Plaintiff it was an investment and it contained three flats. If so why wasn't it rented to any person for a period of over five years was not explained.
18. Plaintiff said that he advertised the flats for rent and it is highly improbable that only Defendant responded to an advertisement on a daily paper.
19. Premises is located in highly sought after, residential area and on the evidence of Plaintiff he had not explained why he did not immediately proceeded to evict Defendant if she failed to pay rent after first payment of \$1,500, in 2013.
20. Plaintiff could not produce any Tenancy Agreement between the parties. Why he waited more than four years to evict a tenant from a premises in the suburbs of main city is beyond comprehension, and not a behaviour of a reasonable person.
21. Plaintiff as a co-owner was not precluded from eviction of defaulting tenant and also recovery of rentals.
22. Analysis of evidence of Plaintiff indicate that Defendant was never a tenant and he had not accepted him as landlord.

¹ As per Statement of Claim paragraph 8, filed in the court below which was not contained in copy record.

23. This is evidenced from his long term inaction towards occupation of Defendant and also his version of facts are inconsistent with his own admitted facts.
24. Plaintiff had issued an eviction notice on 1.11. 2017, but in this eviction there was no request to pay any arrears or rentals. This was a letter written by a solicitor hence it is unlikely that such a letter would not request for arrears of rentals. It only asked the Defendant to pay for "bills in arrears". The natural meaning was electricity and water bills to be settled before vacation.
25. Said 'eviction notice' also warned the Defendant that if she does not vacate the premises within the stipulated time in the notice she will be liable for cost of such litigation.
26. So, in the analysis of evidence it is clear that there was no tenancy agreement between the parties. Hence the claim for arrears of rentals from 2013 to 2017 cannot succeed.
27. Plaintiff in the statement of claim asked for \$5000 as legal fees, but this was not sought in the evidence.
28. Plaintiff had sought cost against Defendant. Plaintiff is entitled to eviction of Defendant as sole proprietor from 2.12.2016. He had not done so and waited till 11.1.2018. The only reason I can deduce from the available evidence is that Defendant had lived with his estranged wife in the premises till the Divorce was obtained in 2017 and her departure from premises. On the balance of probability it is proved that Defendant came to property on invitation of co-owner who was ex-wife of Plaintiff.
29. Defendant had remained on the property even after Plaintiff obtained transfer of his ex-wife's undivided half share till she left the premises and even after she left.

Appeal Ground 1: That the Court erred in law and fact by failing to take into consideration of all evidences that were tendered and produced in court by the Appellant/Plaintiff in support of his case.

Court below had dealt evidence. In any event I have analysed evidence above and Plaintiff had failed to prove his claim based on arrears of rents.

He had not given evidence to prove his claim for legal fees.

Appeal Ground 2: That the Court erred in law and fact by failing to consider that The Appellant/Plaintiff has provided the receipts for the Bond and the first rental payment received from the Respondent/Defendant, the complaint lodged to Fiji Competition and Consumer Commission (FCCC) by the Respondent showing that she was a tenant on the Appellant's/Plaintiff's property.

The fact that Plaintiff produced some documents as receipts and also eviction notices does not prove existence of them. Defendant denied them and in the analysis of evidence they cannot be accepted when you apply test of probability as to existence of them. All the evidence needs to be analyzed along with this evidence of Plaintiff. Especially Plaintiff's own eviction notice dated 1.11.2017 which was admitted by Defendant had failed to state Defendant as a tenant and or for arrears of rents. As stated in this judgment this letter was written by a solicitor and there was no reason to omit arrears or rentals if she was a tenant. By the same token, there was no reference to any earlier notices to vacate, hence these purported notices issued in 2013 and purported receipt for \$1,500 cannot be accepted.

Appeal Ground 3: That the Court erred in law and fact by failing to consider that all these while the Respondent/Defendant resided on the Appellant's/Plaintiff's property for 4 years 10 months and benefitted and enjoyed for free from the Appellant's/Plaintiff's property without paying any rent to the Appellant/Plaintiff and further Court failed to indicate on what basis has the Respondent/Defendant stayed in the property after the Appellant/Plaintiff became sole proprietor

In the statement of claim as well as in evidence Plaintiff claimed only for arrears of rent at the rate of \$750 *pe. mensum*. There was no other claim for damages or on unjust enrichment etc. As Plaintiff could not prove that Defendant was a tenant his claim is stuck off.

Appeal Ground 4: That the Court erred in failing to consider that the Respondent/Defendant had no permission to reside in the property by the

Appellant/Plaintiff where the Appellant/Plaintiff had to take eviction orders from the Court to evict Respondent/Defendant from the premises

Defendant in her evidence stated that she came to premises on the invitation of Plaintiff's ex-wife in 2014 and had stayed there till 2018. This position passes test of consistency as well as test of probability in the analysis of evidence before court below. There is no number of witnesses you need to prove a fact. Defendant's position was corroborated by her witness and this witness can be relied as her credibility was not diminished in cross examination.

Appeal Ground 5: That the Court erred in fact by failing to consider that the Respondent/Defendant was advised by Appellant's/Plaintiff's previous solicitors to clear the utility bills which clearly indicate that the Respondent/Defendant was a tenant.

This ground has no merit. Clearing of utility bills is fully consistent with a person who had come to the premises on invitation of a co-owner and remained so till co ownership ended, and departure of such co-owner. The fact remained why such a letter failed to name her as tenant or mention anything about tenancy and or arrears of rentals. It is improbable to write a letter by a solicitor to clear bills and another letter to seek arrears of rentals. This letter had failed to mention about previous letters produced in court to establish tenancy.

Appeal Ground 6 : The Court erred in law by failing to make any discussion on Joint Tenancy as to whether the Respondent/Defendant had any authority to reside based on the consensus of both joint tenants.

Section 34 of Land Transfer Act 1971 states;

Co-ownership

“34.-(1) Subject to the provisions of any law for the time being in force relating to trusts and to the provisions of Part XV, **unless the contrary intention is expressed in the instrument of title, where**

two or more persons are registered as proprietors of any estate or interest in land subject to the provisions of this Act, they shall be **deemed to be entitled to the same as tenants in common**, and on the death of any one of such proprietors there shall be no right of survivorship in the other or others and the share of such deceased proprietor shall pass to his personal representative.

(2) Where two or more person are entitled as tenants in common to any estate or interest in land subject to the provisions of this Act, they shall **unless the contrary intention is expressed in the instrument of title, be deemed to hold the same in undivided equal shares.**”(Emphasis added).

Accordingly there was no express intention stated where Plaintiff and his ex-wife’s name appeared on memorial from 5.3.2010 till 2.12.2016 when undivided half share of Plaintiff’s wife was transferred to Plaintiff.

So there was no issue of joint tenancy and court below did not discuss this legal position.

Appeal Ground 7: That the Court erred in law by ordering the costs of \$700.00 to be paid to the Respondent/Defendant by Appellant/Plaintiff, which is excessive in nature considering the loss suffered by the Appellant/Plaintiff all these while due to Respondent/Defendant occupying and residing on the property for free for more than four years.

There is some merit in this ground though this is a discretionary remedy. Both parties are to be blamed equally in this scenario. Plaintiff had made a false claim for arrears or rent. Similarly Defendant who had come to the premises on the invitation of Plaintiff’s ex-wife cannot remain in the premises when she left. So Plaintiff had to seek legal assistance. In my mind both parties had to spend money, due to others conduct. So the order for cost against Plaintiff is set aside.

Conclusion

Defendant was never a tenant of Plaintiff. She had come to the premises on the invitation by Plaintiff’s ex-wife, for her protection but had

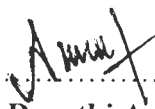
there even after she had left the premises. Appeal is dismissed subject to setting aside of the order for cost. Considering circumstances of this case I do not order a cost for this appeal.

FINAL ORDERS:

- a. Cost order made against Appellant (Plaintiff) is set aside.
- b. Appeal is dismissed subject to above variation. Decision made on 26.5.2020 affirmed, apart from order as to cost.
- c. No order as to the Cost of this appeal

Dated at Suva this 25th day of November, 2021.




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Justice Deepthi Amaratunga
High Court, Suva