IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

HBC 311 of 2003

BETWEEN: **MAYA WATI & SUNIL DEO SHARMA**

PLAINTIFFS/APPELLANTS

A N D: **TUKAI RASIGA**

DEFENDANT/RESPONDENT

Appearances:	Mr. Kumar M. for the Plaintiffs/Appellants
	In Person for the Defendant
Date of Hearing:	21 April 2023
Date of Ruling:	15 June 2023

RULING

INTRODUCTION

1. The plaintiffs/appellants (**"Wati and Sharma"**) are judgement creditors. They are seeking to enforce a judgement in their favour against the defendant/respondent. The judgement in question was an Order for vacant possession. It was handed down by Mr. Justice Byrnes on 26 September 2003 (**"2003 Order"**).

2. On 22 August 2022, some nineteen years or so after the 2003 Order, Wati and Sharma filed a Notice of Motion pursuant to Order 45 Rule 2(1)(a) before the Learned Master seeking the following Orders:

   (1) that leave be granted to the plaintiffs to issue a Writ of Possession against the Defendant

   (2) that police assistance be rendered to implement the Orders

3. The above application was supported by an affidavit of one Anirudh sworn on 18 August 2022. Anirudh annexes to his affidavit a copy of Power of Attorney No. 56461 which was granted to him on 21 November 2014 by Sharma. He also annexes a copy of Power of Attorney No.16154 which was given by Wati to Sharma and which was registered on 22 July 1988.

4. That application was opposed by an affidavit of Tukai Rasiga sworn on 08 September 2022.

5. Apparently, the matter was heard by the Master on 6 February 223.

MASTER'S RECORDS

6. The Master's notes for 06 February 2023 records the following:

> This is an application filed under Section 169 of Land Transfer Act.
>
> The Order was made on 26/09/2003 by J. Byrnes after hearing both parties in this matter. It has been 20 years now. The application seeking leave was filed only last year after 19 years from the date of the Order.
>
> The Counsel tenders the decision of the Court of Appeal in **Central Trading Co v Chandra Kanta** and states that it is not caught by section 4 of the Limitation Act.
>
> The Court of Appeal stated in that decision that, the Court to consider whether it is proper to grant leave.
>
> The **Plaintiff hasn't given any reasons whatsoever for the delay** which spans over 19 years after the Order was made. The Defendant has been living there for 19 years.
>
> Hence, I refuse to grant leave. The Plaintiff may have to consider other avenues to sue the Defendant for vacant possession of the property.
>
> No Cost.
>
> Sgd
>
> U.L. Mohammed Azhar
> Master of the High Court
> 6/02/2023

APPEAL OF MASTER'S DECISION

7. Before me now is a Summons on Directions of Appeal From Master filed by Wati and Sharma on 16 February 2023 (curiously dated 20 February 2023) pursuant to Order 59 Rule 17(2) of the High Court Rule 1988 together with a Notice and Grounds of Appeal filed earlier on 07 February 2023.

8. Order 59 Rule 17(2) provides that:

> The appellant shall, within 21 days of the filing of the notice of appeal, file and serve a summons returnable before a Judge for directions and a date for the hearing of the appeal.

9. At the hearing before me, many issues were raised by counsel casting aspersions on the manner in which the Learned Master had handled the matter.

10. In my view, the only issue to consider is whether or not the Master was correct in refusing to grant leave to Wati and Sharma to issue a Writ of Possession – considering that the application was filed after a lapse of twenty years or so since Byrnes J had granted the 2003 Order.

11. The Master's reason for refusing to grant leave to issue writ of possession appears to be based on the following:

    (a) there has been a delay of twenty years or so

(b) Wati and Sharma have not given any reasons for the delay of twenty years in making the application.

THE LAW

12. In **Central Trading Co v Chandra Kanta** Volume 23 (FLR) 274, the Fiji Court of Appeal had to consider whether section 4(4) of the Limitation Act applied to bar an application for leave to issue a writ of execution on a money judgement which was entered in 1961 and where no further action was taken for 16 years when leave was sought to issue a writ of execution. The High Court had refused leave.

13. Section 4(4) of the Limitation Act provides:

> 4.-(4) An action shall not be brought upon any judgment after the expiration of twelve years from the date on which the judgment became enforceable, and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.

14. Before the Fiji Court of Appeal in **Kanta**, the issue became whether a writ of execution is an "action" within the contemplation of section 4(4) of the Limitation Act.

15. The Court relied on **W.T Lamb & Sons v Rider** [1948] 2 K.B. 331 and held that the word "action" as it appears in section 4(4) – while it obviously includes the right to sue on a judgement, does not include the right to issue execution under a judgement – the two being distinguishable. Accordingly – a writ of execution is not caught under the twelve year limitation period under section 4(4) of the Limitation Act which meant that the High Court had erred in holding that the writ of execution was barred under section 4(4).

16. Given that, on the authority of **Kanta**, a writ of execution is not caught under the twelve year limitation under section 4(4) – does that mean that a writ of execution is not subject to any limitation?

17. To answer this question, I now turn to Order 46 Rule 2 (1) (a) of the High Court Rules 1988 which clearly was not considered in **Kanta**. Order 46 Rule 2(1)(a) provides:

> A writ of execution to enforce a judgment or order may not issue without the leave of the Court in the following cases, that is to say where six years or more have elapsed since the date of the judgment or order.

18. Notably, Order 46 Rule 1 defines writ of execution to include a writ of possession. The question then becomes, under what circumstances might this Court grant leave to a judgement creditor who seeks leave to issue a writ of execution to enforce a judgement which was entered more than six years ago?

19. In **Patel v Singh** [2002] EWCA Civ 1938, the English Court of Appeal had to consider the very same question in terms of the then applicable English Order 46 Rule 2 (1)[i] of the Rules of the Supreme Court which is similar in wording to Fiji's Order 46 Rule 2 (1) (a) above.

THE APPROACH IN PATEL v SINGH

20. In the above case, a money judgement was obtained on 08 September 1992. The judgement creditor made some attempt to enforce the judgement by a writ of *fieri facias* in 1994. However, this proved

abortive. The main reason for that was because the judgement debtor was then residing and working in Germany and her exact whereabouts were not known.

21. So, on 01 May 2022, some ten years following the 1992 money judgement, the judgement creditor then filed an application for leave to issue writ of execution under Order 46 Rule 2(1) (a). This application was first heard before Master Ungley who found and reasoned as follows (my own summary and simplification of the facts):

(a) the Court has a discretion as to whether or not to grant leave under Order 46 Rule 2(1)[ii]

(b) in her supporting statement, the Judgement Creditor had highlighted that:

(i) she was unable to enforce the Writ of Fifa as the Judgement Debtor was in Germany and her exact whereabouts were unknown and any attempt to enforce the judgement would have proven abortive.

(ii) however, the judgement debtor's residence and whereabouts became known to the judgement creditor in 2002 and the judgement creditor now believes that the judgement debtor has the means to satisfy the outstanding judgement

(e) the fact that the judgement debtor was in Germany is not sufficient reason (**National Westminster Bank v Powney** [1991] Ch 339).

(f) the judgement creditor did not even attempt to track him down. There being no such evidence, the discretion to extend time cannot be invoked[iii].

22. On appeal of Master Ungley's decision, Jack J allowed the appeal on the following reasoning:

(a) Order 46 rule 2(1) does not include any guidance as to how the grant or refusal of permission should be determined.

(b) he agreed with what he called the statement of principle set out by Evans-Lombe J in **Duer v Frazer** [2001] 1 WLR 919 at page 925, paragraph 25, that the court will not extend time beyond six years save where it is demonstrably just to do so. The judge said in paragraph 28 of his judgment:

> "I would not interpret that as meaning simply that it must be shown to be just, I would ascribe a stronger meaning to demonstrably than that, such as plainly. I consider that this is necessary to give effect to the judgment of the Court of Appeal in **Powney**.

(c) the Master misdirected himself as to the law by holding that exceptional circumstances must be shown before leave can be granted.

(d) the judgement creditor had taken steps to execute the judgment, but could not find the judgement debtor, who, as the judgement creditor heard, was working in Germany. The judgement creditor then had no further news of the judgement debtor until they met in the autumn of last year.

(e) if the judgement creditor had located the debtor in Germany, the enforcement in Germany would have required the defendant to instruct German lawyers. That could have been an intimidating prospect.

(f) the debtor has paid nothing against the judgment; he has done nothing to explain his position to the court; he has not suggested that he has suffered any particular prejudice.

(g) the factors are closely balanced. The creditor has demonstrated sufficiently that it is just that she be allowed to take further steps to recover what is due to her.

(h) appeal allowed. Leave granted to issue writ of execution.

23. The judgement debtor then appealed Jack J's decision to the English Court of Appeal. In the final, the English Court of Appeal allowed the appeal and set aside Jack J's decision and restored Master Ungley's decision. The Court reasoned as follows:

(a) in all the cases on the exercise of discretion after the expiry of six years, something more is needed to justify the exercise of discretion in favour of the judgment creditor who has allowed six years to elapse since judgment.

(b) the starting point is - there has been the six-year passage of time which is now equal to the applicable limitation period if the judgment were sought to be enforced by a fresh action.

(c) the policy underlying section 24 must be that the judgment creditor has to get on with enforcing his judgment. Similarly there can be no issue of a writ of execution pursuant to Order 46 rule 2(1)(a) after six years without the court's permission.

(d) whether a writ of execution will be allowed to be issued is a procedural matter. (**Lowsley v Forbes** [1999] 1 AC 329). However, the court still has a discretion as intended by the law

(e) so, while the judgement creditor is free to issue execution of his judgement within the six-year period, that freedom is removed after the expiry of the period.

(f) it is then left to the court to decide whether to allow the judgment creditor to proceed with one form of execution, the issuing of a writ of execution.

(g) the policy of the rule is that, after six years, permission will not be given and that is underlined by the provisions of Order 46 rule 4(2), **requiring the judgment creditor to explain his delay.**

(h) in contrast, **the judgment debtor should not be required to file evidence to state what prejudice, if any, he has suffered by the delay**.

(i) therefore, consistent with **Powney**, the starting position is that the lapse of six years may, and will ordinarily, in itself justify refusing the judgment creditor permission to issue the writ of execution.

(j) however, the judgment creditor can justify the granting of permission by showing that the circumstances of his or her case takes it out of the ordinary.

(k) thus, the judgment creditor might be able to point, for example, to the fact that for many years the judgment debtor was thought to have no money and so was not worth powder and shot but that, on the judgment creditor winning the lottery or having some other change of financial fortune, it has become worthwhile for the judgment creditor to seek to pursue the judgment debtor.

(l) while there is no express guidance or qualification in Order 46 rule 2(1)(a), in truth, what both the Master and the judge were doing was to consider whether there was something in the circumstances of the case which took it out of the general rule.

(k) accordingly, Jack J was wrong to find that the Master had misdirected himself on the law by looking for "exceptional circumstances". This is because, by looking for "exceptional circumstances", the Master was looking for the presence of something to take the case out of the ordinary rule.

(l) the way the judge dealt with the facts is open to serious criticism[iv].

IS THERE ANYTHING TO TAKE THIS CASE OUT OF THE ORDINARY RULE?

24. Notably, Wati and Sharma have resided in the United States of America for many years. They left Fiji for the United States some years before the 2003 Order.

25. For many years, Wati and Sharma did not bother to levy execution on the 2003 order until of late, when they appeared before the Learned Master on 06 February 2023 to seek an order for Writ of Possession.

26. The Master, apparently was of the view that Wati and Deo had waited too long to enforce the 2003 order. He remarked that Wati and Deo may have to engage other means to enforce the 2003 order.

27. Why Wati and Deo waited too long – one can only speculate.

28. Apparently, the property is all comprised in an *i*-TLTB residential lease. This residential lease will expire on 01 January 2024.

29. According to Mr. Rasina, he and Wati and Deo had entered into a Sale and Purchase Agreement on the property in question. However, that agreement was not fully executed by Wati and Deo and was, accordingly, never presented to *i*-TLTB for the Section 12 regulatory consent.

30. At some point, Mr. Rasina and Wati and Deo then entered into an informal arrangement where Mr. Rasina would agree to stay on the property and look after it as caretakers.

31. Apparently, Wati and Deo did visit Fiji in 2014 and came to the property to inspect it. They did have a brief conversation with Rasina but there was nothing said about Rasina vacating the property.

32. Clearly, Mr. Rasina cannot justify any claim to remain on the property based on the purported Sale and Purchase Agreement that he had entered into with Wati and Deo because that Agreement was never fully executed and was never consented to by the *i*-TLTB. However, as the English Court of Appeal said in **Patel v Singh** [2002] EWCA Civ 1938, the policy of Order 46 Rule (2)(1)(a) is that, after six years, permission will not be given.

33. The judgment creditor is required to explain his delay. It is not for the judgement debtor to file evidence to state what prejudice he has suffered by the delay. In that regard. The Master was correct when he held that Wati and Sharma had not given any reasons for the delay. In other words, there was nothing placed before him to invoke his discretion to consider the question as to whether or not to grant leave. The Affidavit of Anirudh sworn on 18 August 2022 and which was before the Master, does not utter a single word to explain the delay. All it says is that Rasiga is still in occupation in defiance of the 2003 Order

34. Even if some reason had been placed before the Master to explain the delay, the Master would then have to assess whether the reason(s) given were sufficient "to take the case out of the ordinary rule" – the ordinary rule being that – leave should not ordinarily be granted after a lapse of six years or more.

35. Before me, the appellant has tried to offer some explanation as to why there was a delay of twenty years. They even blamed the demise of their former lawyer, the late Mr. Anu Patel for the delay. Mr. Patel, from memory, only passed away in 2014 or 2015. At the time he passed on, the judgement would already have been more than ten years old.

CONCLUSION

36. The Master's approach was consistent with **Patel v Singh** [2002] EWCA Civ 1938. Appeal dismissed. Costs to the Respondent which I summarily assess at $300 – 00 (three hundred dollars only).

.....

Anare Tuilevuka

JUDGE

Lautoka

15 June 2023

[i] Order 46 rule 2(1) of the then applicable (English) Rules of the Supreme Court, contained as it is in Schedule 1 to the (English) Civil Procedure Rules provides:

"A writ of execution to enforce a judgment or order may not issue without the permission of the court in the following cases, that is to say:-

(a) where 6 years or more have elapsed since the date of the judgment or order..."

[ii] as the Court said:

From that rule it is plain that the court has a discretion whether or not to give that permission. The primary issue raised on this appeal is as to the circumstances in which it is appropriate for such permission to be given.

[iii] The Master when refusing permission to appeal said:

"The judgement was obtained in 1992, a writ of fieri facias was issued in 1994 but not executed because the judgment creditor thought the judgment debtor was in Germany. There was no evidence of any attempts to trace the judgment debtor and accordingly no material to invoke the discretion to extend time."

[iv] As the English Court of Appeal noted:

It was for the judgement creditor to justify her delay. I can understand that when she discovered Mr. Singh had moved to Germany she regarded that as an obstacle to her proceeding on her writ of execution. The obvious thing for her to have done at that point would have been to go to an English solicitor to obtain help. The solicitor would perhaps have advised her to register her judgment in Germany as a signatory, like this country, to the Brussels Convention, and as to the steps that could be taken to discover Mr. Singh's whereabouts in Germany. But, as Mr. Crosfill frankly accepted, she appears to have done nothing at all once she discovered that Mr. Singh was in Germany. The judge takes account of the fact that until recently Miss Patel was unrepresented, but she does not suggest in her witness statement that she could not afford to go to solicitors. She has had solicitors acting for her from at least as early as January this year. The judge suggested that German lawyers would need to be instructed, and that that could have been an intimidatory prospect. But the logical first step, as I have indicated, was to go to English solicitors, and that she never did. I would add that these days there are firms of English solicitors who have offices in Germany and German partners. Instead it is conceded that Miss Patel did nothing. She does not explain why, and the judge was merely speculating as to difficulties that there might have been for her through Mr. Singh having gone to Germany.

...but the inadequacies of Miss Patel's evidence do not stop there. She says in her witness statement that Mr. Singh's residence is now known to her. That is apparently a reference to her knowledge in January of this year. She refers to a recent contact at a social function. She does not expressly link that knowledge with that contact. Nor, it would appear from the letter of 22nd October 2001, could she do so. That letter refers to numerous occasions, including a social function, when Mr. Singh was, it is claimed, harassed or threatened by Miss Patel's mother and other members of her family. Nowhere does Miss Patel expressly state when she first knew, or how she knew, that Mr. Singh was back in this country. We know that over six months elapsed between the date of the letter and the making of the application which came before the Master, and that delay is wholly unexplained.

In my judgment, the judge could not properly treat as insubstantial the failure to comply with the obligation in the rules to explain the delay. In my opinion, the inadequate witness statement of Miss Patel in itself disentitled her from obtaining permission from the Master, as he explained when refusing permission to appeal.