

JOHN KOBEE and Anor v PUBLIC TRUSTEE and 2 Ors

HIGH COURT — CIVIL JURISDICTION

5 SCOTT J

19 February 2003

[2003] FJHC 40

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Real property — right of way — summons to dissolve order of interim injunction — motion ex parte for injunction — order of injunction — whether plaintiffs have established a legal claim on right of way — whether right of way has been registered — whether right of way had existed and recognised — Land Transfer Act (Cap 131) ss 39, 49, 159.

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The Plaintiffs filed a motion ex parte seeking an injunction to prevent the 1st and 2nd Defendants from interfering with the use by the Plaintiffs of the alleged right of way. The court granted the interim injunction without hearing the Defendant. The court ordered that the injunction remain in place until the trial of this action or further order. The Defendants filed summons to dissolve the interim injunction on the ground that the Plaintiff had no arguable claim to the right of way.

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Held — (1) Given Fiji's Torrens system of registration of title to land and the provisions of the Land Transfer Act, the Plaintiff was not able to establish a legal claim to the right of way whether by prescription or in any other manner. In the absence of any payment or other act of part performance, it is difficult to see how the Plaintiff's could claim against the 2nd Defendant in personam.

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(2) The Plaintiffs had an adequate opportunity to prove their claim against the Defendants. They have failed to take it. It is right to allow the Defendant of the unrestrained use of his land due to the weakness of the Plaintiff's case.

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Interim injunction set aside.

Cases referred to

Ex parte Abrams (1884) 50 LT 184, cited.

Westpac Banking Corporation v Adi Mahesh Prasad Civ App No ABU 27 of 1997S, considered.

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K. Brewer for the Plaintiffs.

R. Matebalavu for the 2nd Defendant.

No appearance for the 1st and 3rd Defendants.

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Scott J. In May 1996 these proceedings were commenced by generally endorsed writ.

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As appears from the writ the subject matter of the litigation is an alleged right of way across CT 3528, a piece of land adjacent to the Sigatoka river. Sigatoka is in the Western Division. Order 4 Rule 1(1) of the 1988 High Court Rules (as amended by LN 73/97) reads as follows:

Proceedings must ordinarily be commenced in the High Court Registry located in the Division in which the cause of action arises.

These proceedings should have been begun in Lautoka.

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On 10 June 1996 the Plaintiffs filed a motion *ex parte* seeking an injunction to prevent the 1st and 2nd Defendants from interfering with the use by the Plaintiffs of the alleged right of way.

Order 29 r 1(1) and (2) (as amended by LN 61/91) read as follows:

- (1) An application for the grant of an interim injunction may be made by any party to a cause or matter before or after the trial of the cause or matter whether or not a claim for the injunction was included in that party's writ....
- 5 (2) Where the applicant is the Plaintiff and the case is one of urgency and the delay caused by proceeding in the ordinary way would entail irreparable or serious mischief such application may be made *ex parte* on affidavit but except as aforesaid such application must be made by notice of motion or summons.

10 Paragraph 24 of the supporting affidavit filed by the 1st Plaintiff asserted that there was "great urgency" in restoring the Plaintiff's claimed right of way.

Order 8 r 2 (2) provides that:

unless the Court gives leave to the contrary there must be at least 2 clear days between the service of a notice of motion and the day named in the notice for hearing the notice.

15 The combined effect of O 29 r (1) and (2) and O 8 r 2 (2) is that a Plaintiff wishing to proceed *ex parte* must satisfy the court (a) that 2 days notice would result in "irreparable or serious mischief" and (b) that anything less than the total abridgement of the 2 days notice would result in "irreparable or serious mischief".

20 No attempt was made by the Plaintiffs to satisfy these two requirements.

On 10 June 1996 a judge of this court granted the interim injunction without hearing the Defendant. The court ordered that the injunction remain in place "until the trial of this action or further order". No findings of fact are recorded on the file.

25 As repeatedly emphasised by the courts interim injunctions should not be allowed to continue indefinitely; they should generally be granted until a certain day, usually the next motion day which in the Fiji High Court is a Friday morning (see *ex parte Abrams* (1884) 50 LT 184). Recently the Fiji Court of Appeal in *Westpac Banking Corporation v Adi Mahesh Prasad* Civ App ABU 27 of 1997S
30 (FCA Repts 99/1) stated:

We add that if in any case... the Court sees fit to grant an *ex parte* injunction the matter should be adjourned for no longer than a day or so. A period of 6 weeks which was the period in this case was far too long.

35 In the present case no adjournment date was specified at all and five and half years have elapsed since the order was made.

On 24 July 1996 a summons to dissolve the interim injunction, supported by affidavit, was filed by the 2nd Defendant. In para 26 of his affidavit the 2nd
40 Defendant stated:

No public right of way has been formed or created legally over the land comprised in CT 3528.

In para 37 he deposed:

45 ... the residents, including the first Defendant had not at all recognised any right of the Plaintiffs to use the access way. Nor can it be reasonably accepted that usage over the years of the access way by the residents and by neighbouring property owners confers similar rights.

50 On 20 August 1996 an affidavit in reply was filed. The affiant was Marcus P Oliver, the second named Plaintiffs' managing director. In paras 4, 16(c) and 26 he stated that the right of way over the 2nd Defendants land had existed and been recognised for over 35 years however no basis for this assertion was offered.

On 20 March 1997 the 1st Defendant also filed a summons to set aside the interim injunction. It was supported by an affidavit by the Assistant Public Trustee, Peni Taganekurukuru. Among other assertions it was deposed that CT 3528 is private freehold land over which no easement has ever been created. On 5 29 December 1999 the first named Plaintiff answered. In para 6 of his affidavit Mr Kobbe stated:

... the original owner of the property now owned by the Plaintiff was originally owned by Mr Christopher Work as executor, an ancestor of the Work family with whom 10 the Plaintiffs are now engaged in a dispute in this matter. It was subsequently transferred to the Plaintiffs. From our examination of the property at the time prior to purchase the track already existed and was being used by other adjoining property owners who are also isolated from the nearest public access road and by people wishing to use the beach. We were never informed by the Work family nor by the second Defendant that 15 there was no access or right of access to the public road. In any event, I strongly believe that if the Work family had originally sold CT 5616 it must have been implicit in such a purchase that there would be a right of access to a public road. To deprive the Plaintiffs of equal right is unjust.

For various reasons, none of them particularly good, the motions to dissolve 20 the interim injunction were not heard until 17 February 2003. In the intervening years a statement of claim was filed and defences were also filed by the 1st and 2nd Defendants. There were numerous applications and affidavits, none of which advanced the matter further.

On 17 February 2003 I reminded Ms Brewer that, in the words of the Fiji Court 25 of Appeal in *Westpac v Prasad* (above):

During the period of the adjournment [following the grant of the ex parte injunction] the Defendant shall be served with notice of the order and copies of the application and affidavits relied upon before the Judge who grant the relief... These enable [the 30 Defendant], if it be so advised, to make submissions as to why the injunction granted *ex parte* should not be continued. *When the matter comes back into the list it will not be for the Defendant to establish why the injunction should be dissolved. It carries no onus. Instead the Plaintiff has the task of persuading the Court that the circumstances of the case are such as to require the injunction to be continued.*" [Emphasis added.]

I pointed out to Ms Brewer that in his first affidavit filed in 1996 the first named 35 Plaintiff principally relied on the existence of a right of way (see especially para 26). By December 1999 he appeared (para 6) to be relying on an implied right of access which it would be unfair to deny him.

When confronted with the requirements of ss 39, 49 and 159 of the Land 40 Transfer Act (Cap 131) to which reference had been made by the Assistant Public Trustee Ms Brewer was forced to concede that there was no instrument creating the claimed right of way and that no right of way had ever been registered against the 2nd Defendant's land. In the alternative to compliance with statutory requirements Ms Brewer was forced to depend on what she claimed was an 45 acquisition of the right by prescription.

Opposing the further extension of the injunction, Mr Rabo stressed the length of time to which the 2nd Defendant had been subject to the interim injunction. He also submitted that the Plaintiffs had no arguable claim to the right of way. So far as damages were concerned there seems to be no difficulty about reaching the 50 Plaintiffs' land by river and accordingly damages would be a more than adequate remedy if a breach of a right of way was established.

In her reply, Ms Brewer suggested that the balance of convenience favoured the Plaintiffs and that more harm would be done to the Plaintiffs than to the 2nd Defendant if the injunction was lifted.

5 Given Fiji's Torrens system of registration of title to land and the provisions of the Land Transfer Act, already referred to, particularly s 39(2), I cannot foresee the Plaintiffs being able to establish a legal claim to the right of way whether by prescription or in any other manner. In the absence of any payment or other act of part performance it is difficult to see how the Plaintiffs could claim against the 2nd Defendant *in personam*.

10 As I see it the Plaintiffs were rather lucky to obtain the interim injunction in 1996 and were very fortunate that no application to set it aside was heard until almost 6 years later. During those years the Plaintiffs, who had the carriage of the action, did little to advance it. A summons for directions was not taken out until January 2003. No discovery or inspection has yet taken place. No pre-trial
15 conference has been convened. No trial date has been fixed.

In my opinion the Plaintiffs have had a more than adequate opportunity to prove their claim against the Defendants. They have failed to take it. Given what I find to be fairly obvious weaknesses in their case I do not think it would be right to allow the 2nd Defendant to be deprived of the unrestrained use of his land any
20 longer.

The interim injunction granted on 10 June 1996 will be set aside forthwith.

Interim injunction set aside.

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