

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 164 OF 2014

IN THE MATTER of Mortgage Number
594225 Given by **Anil Kumar Rao** in favour
of **Australia And New Zealand Banking**
Group Limited over Property being Crown
Lease No. 15819, being Lot 1 Plan SO 4281
(part of) Navo and Nacaqara.

BETWEEN : **AUSTRALIA AND NEW ZEALAND BANKING GROUP**
LIMITED a duly constituted banking corporation having
its registered office in Melbourne, Australia and carrying
on business in Suva and having branches throughout Fiji.

Plaintiff

AND : **RAMESHWAR DUTT** off Queens Road, Lot 1 Malolo
Sector Road, Navo Nadi in the Republic of Fiji.

1st Defendant

AND : **ILISAPECI NASAQA** off Queens Road, Lot 1 Malolo Sector
Road, Navo Nadi in the Republic of Fiji.

2nd Defendant

AND : **ATECA PICKERING AND JOHN PICKERING** both of off
Queens Road, Lot 1 Malolo Sector Road, Navo Nadi in the
Republic of Fiji.

3rd Defendant

Counsel : Ms. B. Narayan for Respondent/ Plaintiff
Appellant/First Defendant appeared in person

Date of Hearing : 4 June 2015

Date of Ruling : 5 August 2015

Before : Hon. Justice Mr. R.S. S. Sapuvida

R U L I N G O N L E A V E T O A P P E A L

BACKGROUND FACTS

1. Plaintiff files the original action against the Defendants by way of Originating Summons on 9 October 2014.
2. The 1st Defendant right from the beginning appears in person and files his Affidavit in Response on 8 December 2014.
3. The Master hears the Summons inter partes on 11 February 2015.
4. Plaintiff files written submissions for the substantive matter on 20 February 2015.
5. The 1st Defendant files a Notice of Motion dated **9 March 2015 to strike out the Plaintiff's action.**
6. The 1st Defendant also files written submissions on 13 March 2015 for both, the substantive matter and for the motion above.
7. The Master takes the Notice of Motion referred in para 5 above for hearing on 2 April 2015, and dismisses the same.
8. The 1st Defendant files the instant application for leave to appeal the Master's decision dated 2 April 2015.
9. The Master pronounces Ruling on 27 April 2015 on substantive matter to deliver the vacant possession of the mortgaged property, i.e. the subject matter.
10. The 1st Defendant also files an application on 5 May 2015 to stay proceedings of the Master's Ruling.
11. The Court heard both the applications, i.e. for leave to appeal & the stay of proceedings on 4 June 2015, and stay of proceedings refused.
12. The 1st Defendant undertakes in open Court, to vacate the property and confer to hand over the vacant possession to the Plaintiff within 14 days from 4 June 2015.
13. Plaintiff undertakes not to execute the writ of possession until 14 days from 4 June 2015.
14. The 1st Defendant in the meantime prefers an application by way of summons to the Fiji Court of Appeal (**Civil Appeal No. ABU 0039 of 2015**) to stay the writ of possession.
15. The Fiji Court of Appeal on 23 June 2015 struck out the summons so filed by the 1st Defendant/Appellant.

PRESENT APPLICATION

16. Before me is the application referred in para 8 above, filed by the Appellant/1st Defendant (hereinafter referred to as the Appellant) for leave to appeal the interlocutory decision of the Master dated & delivered on 2 April 2015.
17. The Master by his Order dated 2 April 2015 dismissed the notice of motion filed by the Appellant on 11 March 2015 to strike out the Plaintiff's action.
18. The Master, after an inter-partes hearing, had already concluded the substantive action of the Plaintiff filed by way of Originating Summons dated 9 October 2014 and had fixed for Ruling, by the time the Appellant moved the Court to hear the above styled notice of motion to dismiss the action of the plaintiff.
19. The Appellant in his application and in the affidavit in support of the same for leave to appeal the interlocutory decision of the Master contends ;
 - i. That the Learned Acting Master erred in law and in fact by taking into irrelevant whilst dealing with the Interlocutory Application.
 - ii. That the Learned Acting Master erred in law and in fact by exceeding his powers by summarily striking out the appellant's Interlocutory Application.
 - iii. That the Learned Acting Master erred in law by striking out the Appellant's Interlocutory Application When there was no such application before him for striking out by the Respondent/Plaintiff.
20. The Plaintiff opposes the above, and filed an affidavit in opposition of Jonathan Stevens Filed on 12 May 2015 deposing the fact among other things that, the substantive matter was fully heard on 11 February 2015 and fixed for ruling by the Master way before the appellant's Motion.
21. On examination of the case record, it is found that the order of the Acting Master dated 2 April 2015, being the subject to the instant application of the Appellant , is a hand-written order which reads as follows;

"Counsels Submissions

The Defendant has filed a Notice of Motion to strike out the Summons for vacant possession. The Plaintiff objects that the matter has been heard".

Order

The Notice of Motion to strike out summons under Order 88 is dismissed since the matter is heard and fixed for Ruling”.

22. It is therefore needn't to explain with more emphasis the fact that the substantive matter between two parties including that of the Appellant had been heard and fixed for Ruling by the Master well before the notice of motion to strike out the Plaintiff's summons was filed by the Appellant.
23. Nevertheless, the Appellant contends in the present application that, it was otherwise.
24. The facts on which the Appellant relies upon as he deposes in his Affidavit, in his oral submissions at the hearing, and in the written submissions he filed in support of the leave application, are as follows;
 - That on 11th March 2015 he filed Notice of Motion and Affidavit to support his application to strike out the plaintiff's action.
 - That the clerk at the Registry informed him that the Master refused to accept his application on the ground that the matter was adjourned to 10th April 2015 for Ruling.
 - That the Appellant wrote a letter to the Court stating that the Master allowed him to file Interlocutory Application on 3rd March 2015 after his submissions.
 - That on 20th March 2015 the Deputy Registrar wrote to him stating that the Master has directed that his application will be heard on 2nd April 2015.
 - That on 2nd April the Master summarily dismissed his application after asking the provisions of the High Court Rules on which he filed his application.
 - That on 11th February 2015, the date of Hearing, the Counsel for the Plaintiff proceeded to submit her argument and Appellant raised preliminary objection on the ground that the consent of the Director of Lands was not obtained to institute the action.
 - That after Appellant raised the preliminary objection he sat down and then the Counsel for the Plaintiff submitted that the consent of the Director of Lands can be obtained at any time prior to the Ruling of the Court.
 - That, thereafter the Master adjourned the matter to 24th February 2015 for Mention allowing the Plaintiff to obtain the consent of the

Director of Lands without giving the Appellant any chance to submit his argument on substantive matter.

- That, the Appellant did not submit any further argument as he was of the opinion that the Master will allow him to submit his arguments on the substantive matter at the later stage.
 - That, on 18th February 2015 the Plaintiff filed a Supplementary Affidavit annexing the consent of the Director of Lands.
 - That, on 24th February 2015 the Honorable Master again adjourned the matter for mention on 3rd March 2015 allowing the Plaintiff to adduce evidence.
 - That, on 3rd March 2015 the Master adjourned the matter for Ruling on 10th April 2015. Thereafter Appellant submitted that the matter was not heard as it was adjourned right after he raised the issue of Section 13 of the Crown Lands Act.
 - That, he further wanted time to file an Interlocutory Application and the Master then allowed him to file the same and to file submission.
 - That, he submitted that he has valid and arguable grounds to appeal with reasonable prospect of success, and thereby he seeks the following relief:-
 - (a). that the action herein filed by the plaintiff be struck out with costs; alternatively,
 - (b). that the action herein filed by the Plaintiff pending before the Master of the Lautoka High Court be stayed and/or adjourned sine die with liberty to restore to the cause list until the determination of the Civil Action being action number 193 of 2012 pending before this Court.
25. The Appellant further submits that neither there was an application before Court by the Plaintiff for striking out his application nor did they make any oral submissions to strike out his application and yet, the Master simply dismissed his application without hearing.
26. The Appellant also submits that, should the matter was heard, then the Master ought not to have granted time to the Plaintiff to adduce further evidence.
27. The appellant has submitted the following case authorities in support of his instant application.
- Prasad -v- Mohammed (3 June 2005)
 - Subramani & Anor -v- Dharam Sheela & 3 Others [1982] 28 Fiji LR 82

- Smart -v- Qelesai (2012) FJHC 844 HBC 201 OF 2012L
 - Bhawis Pratap -v- Christian Mission Fellowship (ABU 0093.2005)
 - Goundar -v- Fiesrt Ltd (2014) FJCA; ABU 0001.13
 - Pacific Green Industries (Fiji) Ltd -v- Sun Insurance Company Ltd
Civil Action No. HBC 090/2005
 - Safari Lodge Fiji Ltd -v- Rosedale Ltd C/A No. 319 of 1999 By
Justice Jocelyn Scutt
 - Smith -v- Cosworth Casting Processes Ltd (1997) 4 ALL ER 840
 - Reddy Enterprises Ltd -v- The Government of Reserve Bank of Fiji
28. Having examined the case authorities submitted by the Appellant, it is necessary to emphasize the fact that all the above cited case authorities unfortunately are not helpful to the Appellant's instant leave application and yet, supports the discretion administered by the Master in rightfully dismissing the Appellant's Notice of Motion which is being the issue in the Appellant's leave application before me.
 29. In opposing the application, the Plaintiff relies on the Affidavit in Opposition sworn by Jonathan Stevens on 11 May 2015 and filed on 12 May 2015.
 30. Counsel for Plaintiff also expresses in her oral submissions at the hearing and in the written submissions later filed, the fact that the Learned Master had by his decision dated 2 April 2015 struck out the Notice of Motion dated 9 March 2015 and filed on 11 March 2015 since the substantive action, that is, Plaintiff's Originating Summons filed on 09 October 2014 had already been heard on 11 February 2015, and the Motion was therefore rightfully not entertained by the Master.
 31. Even the Plaintiff's above view is incorrect for the reason that, as the Master did entertain the Motion filed by the appellant on 2 April 2015.
 32. The contention by the Appellant here, that the hearing in the substantive action was not complete is also not correct.
 33. The matter was fully heard as deposed in the Affidavit in Opposition of Jonathan Stevens filed on 12 May 2015 at paragraph 10 and also the minutes entered in the Case Record regarding the chronology of events itself reflect the fact that the Master had already acted to hear the substantive matter inter partes.
 34. The Appellant's further contention that, on 24 February 2015 the learned Master had adjourned the matter for 3 March 2015 to allow the Plaintiff to adduce further evidence is also not correct.

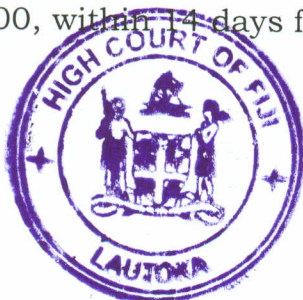
35. The matter was adjourned as the Master had sought certain clarification from the Plaintiff before the delivery of his Judgment. The Court has the discretion to call for further clarifications needed before delivery of Judgment and that is all that the Plaintiff had complied with, to clarify an issue that had been raised by the Master.
36. The Master's decision to allow the Plaintiff to obtain the consent of the Director of Lands is well within the law, and that does not mean that the hearing is further postponed. The Master had only wanted to get a further clarification from the Plaintiff with regard to the fact whether or not the consent of the Director of Lands has been granted.
37. On ascertaining the question whether the prior consent of Director of Lands would require prior to the institution of proceedings, it is noteworthy to observe what has been held by Byrne J in **Civil Aviation Authority of Fiji Islands -v- Limalevu Apisai, Civil Action No. HBC 268 OF 2005L**, when his Lordship said:
- "The consent of the Director of Lands to commence the proceedings can be obtained any time before the land is actually "dealt with" by the Court – Mohammed Rasul -v- Jeet Singh & Hazara Singh – 10 F.L.R. 16."*
- We interpolate here that this was a decision of Hammet Acting CJ who held that land is not dealt with by the Court until an order has been made or judgment of Court delivered".*
38. The Appellant had filed his interlocutory application via a Notice of Motion after the substantive matter was already heard and therefore rightfully had struck out by the Master for abuse of process under Order 18 of the High Court Rules 1988. By the Motion, the Appellant sought to strike out the Plaintiff's action herein or alternatively to be stayed or adjourned pending the determination of other Civil Action No. 193 of 2012 to which the Plaintiff is not a party to.
39. The application to strike out ought to have been filed by the Appellant (First Defendant) prior to the substantive action (that is, the Originating Summons) having been fixed for hearing or at least before the hearing was conducted on 11 February 2015.
40. What the Appellant sought to achieve by the Motion to strike out had already been submitted as grounds for opposition to the Originating Summons by the Appellant.(see para 2 above)
41. In this respect the Plaintiff refers to the Affidavit in Response that was filed by the Appellant on 9 December 2014 in opposing the Plaintiff's originating Summons for vacant possession. At paragraph 23 of the Affidavit, the Appellant relied on two grounds for opposing the Plaintiff's action for vacant possession, i.e. the Plaintiff failed to obtain consent from the Lands Department to carry out the mortgage sale. (which allegation was shown to be incorrect as annexure "I" of the Plaintiff's Affidavit in Support of the Originating Summons filed on 9

October 2014 contains a copy of the form of Transfer by Mortgage in Exercise of Power of Sale which had been duly consented by the Director of Lands).

42. The second ground relied on by the Appellant was that there is a civil action pending to be determined if the transfer from the late Ravindra Narayan (former owner of Title of the mortgaged property) to Anil Kumar Rao (present registered owner and the mortgagor) was fraudulent. This is the other Civil Action No. 193 of 2012 referred to in the Motion on the basis of which the Appellant seeks to stay the Plaintiff's action herein.
43. Hence the issue of civil action no. 193 of 2012 had already been raised in this matter by the Appellant at the hearing on 11 February 2015 and more-fully considered by the Master in his Extempore Ruling later delivered on 27 April 2015.
44. The Master therefore did not err in any manner in exercising his discretion on a matter of practice and procedure to strike out the Motion as abuse of process as obviously the Appellant was abusing the process by filing this subsequent Motion in effect to raise the same issue again which had already been heard by the Master at the Hearing on 11 February 2015 as reflects rightfully even in the Extempore Ruling delivered on 27 April 2015 which is not the matter to be dealt with by me in the instant Ruling.
45. For the above reasons I decide that the Notice of Motion for Leave to Appeal filed by the Appellant is wholly unmeritorious in form and substance, and it further carries abuse of process which then amounts to be struck out and dismissed.

FINAL ORDERS

- a. The Notice of Motion for Leave to Appeal the Order of Master dated 2 April 2015, filed by the Appellant is hereby struck out and dismissed.
- b. The Appellant shall pay costs to the Plaintiff summarily assessed FJ\$1000.00, within 14 days from this Order.



Justice R.S.S. Sapuvida

Dated on this 5th day of August 2015 at Lautoka.