

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 146 OF 2013

BETWEEN : **AIRPORTS FIJI LIMITED** a limited liability
company having its registered office in Namaka,
Nadi

PLAINTIFF/APPELLANT

A N D : **KALARA GONEYALI** of Quarters 123 Suva Street,
Oldtown, Namaka, Nadi, Security Officer

DEFENDANT/RESPONDENT

Appearance : Ms N Khan for appellant
Respondent in person

Date of Hearing : 16 March 2016

Date of Judgment : 13 April 2016

J U D G M E N T

Introduction

[01] This judgment relates to an appeal against the judgment of 18 December 2015 delivered by the Master of the High Court.

[02] Upon summons for direction being filed pursuant to Order 59, Rule 17 (2) of the High Court Rules 1988, as amended ('HCR') the court granted 14 days for the appellant to file and serve written submission and 14 days thereafter for the respondent to file and serve her written submissions with 7 days thereafter for the appellant to file and serve

submission in reply if necessary. Accordingly only the appellant filed written submission. The respondent did not file any.

The Grounds of Appeal

[03] The Appellant filed the following grounds of appeal:

- (i) The learned Master failed to refer to section 171 of the Land Transfer Act in holding that the “16 day” requirement had not been complied when the Respondent had filed her affidavit in reply on 10 September 2013, before the first call date of 18 September 2013, and made numerous attendances in Court thereafter before the hearing of the summons on 2 October 2015.
- (ii) The learned Master saying that the lack of proof of the date of service of the Originating Summons was fatal to the application despite the fact that the hearing of the summons was held more than 2 years after the first call date of the summons on 18 September 2013.
- (iii) The learned Master failed to give the Appellant an opportunity to file proof of the service of the summons as he was bound to do pursuant to section 170 of the Land Transfer Act.
- (iv) The learned Master failed to determine the merits of the Respondent’s arguments relating to her right to possession given that the Appellant had proven to be the last registered proprietor of the land.

The Background

[04] Pursuant to section 169 of the Land Transfer Act (‘LTA’) the plaintiff, Airport Fiji Limited (hereinafter sometime may be referred to as (*the appellant*)) as last registered proprietor of Quarters 123, Old Town, AFL Housing Estates (*“the house”*) took out proceedings in the High Court at Lautoka against Kalara Goneyali, the defendant (hereinafter sometime may be referred to as *‘the respondent’*) seeking immediate possession of the property.

[05] The appellant filed its summons for possession (*‘the application’*) on 14 August 2013. The summons was issued for service returnable on 18 September 2013 before the Master of the High Court for hearing.

[06] On 10 September 2013, just 7 days before the hearing, the respondent filed affidavit in reply.

[07] On 18 September 2013 the matter came up for hearing when counsel appearing for the appellant made application for adjournment of the hearing. The court adjourned the hearing to 23 October 2013 as there was no objection on the part of the respondent. Again, the matter was taken for hearing on 23 October 2013. Then counsel for the appellant sought adjournment on the ground that a matter is pending before the Employment Tribunal in respect of the same matter. On this occasion he sought adjournment until outcome of that matter. The respondent who appeared in person did not object to this application. As a result of it, the hearing did not proceed until 2 October 2015.

[08] On 2 October 2015 hearing proceeded before the Master. After hearing both parties’ arguments the Master reserved his ruling for 20 November 2015.

[09] The Master dismissed the application in limine with costs on the ground that the appellant had failed to comply with the second mandatory requirement of section 170 of the Land Transfer Act. The appellant appeals.

The Law

[10] The law that involves in this appeal is section 170 of the Land Transfer Act (*‘LTA’*) which provides:

“170. The summons shall contain a description of the land and shall require the person summoned to appear at the court on a day not earlier than sixteen days after the service of summons.”

Issue

- [11] The primary issue that needs determination of this court is that whether the learned Master erred in dismissing the application on the ground of non-compliance of the second requirement of section 170 of the LTA on the part of the appellant when there was no such issue before him for determination.

Discussion

- [12] This appeal relates to a ruling of the Learned Master delivered on 18 December 2015 dismissing the appellant's application for vacant possession of the house of which the appellant is the registered proprietor. The appellant filed its notice of appeal on 7 January 2015. Therefore it is a timely appeal. There was no dispute in this aspect.
- [13] Appeal lies to the High Court against the Master's final decision ('HCR, O.59, r. 9 (a)'). The appeal must be filed within 21 days from the date of the delivery of an order or judgment.
- [14] The learned Master delivered his ruling after hearing the appellant's application. He heavily relied on the case authority of **Atunaisa Tavuto v Sumeshwar Singh** (Action No. HBC 0332 of 1997L) where, the summons was defective in not properly describing the subject property and the summons was omitted to the obligation that *'the person to appear on a day not earlier than sixteen days after the service of the summons'* as mandated by section 170 of the Act, Justice Madraiwiwi (as he was then) disposed of an application filed under section 169 without considering the parties substantive arguments.
- [15] It will be noted that Atunaisa's case was not considered by Prakash J, in **Wati v Vinod** [2000] Fiji Law Rp 56; [2000] 1 FLR 263 (20 October 2000) where his Lordship observed that it is not clear what Justice

Madraiwiwi had meant in stating that the summons is defective in not properly describing the subject property.

[16] At page 16 of his ruling the learned Master states that:

'In view of the approach, I have adopted, I do not think that there is any need for me to express my views on the merits of the Defendant's arguments relating to her right to possession. It will be at best a matter of academic interest only or at worst an exercise in futility to discuss the merits of the Defendant's arguments relating to her right to possession.

Essentially that is all I have to say.'

[17] He then concludes:

"For the reason which I have endeavoured to explain, I venture to say beyond a per adventure that the second mandatory requirement of Section 170 of the Land Transfer Act and the legal consequences that flow from non-compliance defeat the Plaintiff's claim for vacant possession.

Therefore, the Defendant needs not show any evidence of a cause to remain on the property since this matter can go no further. I cannot see any other just way to finish the matter than to follow the law.

Accordingly, there is no alternate but to dismiss the Originating Summons.

[18] It is germane to note that there was no preliminary issue raised by the respondent on either ground that that the appellant was not given sufficient time to file an affidavit in reply to show cause as required by section 170 or that there was no affidavit of service filed in prove of service.

[19] The appellant submits that at no time did the Respondent raise any issue that she was not given sufficient time to file an affidavit in reply to show cause. In fact, the Respondent had filed her affidavit a full

week before the first call date of 18 September 2013. The Respondent also did not file an application under Order 2 Rule 2 of the High Court Rules 1988 for any irregularity in the proceedings. The appellant cited the case of **Rokovi v Kumar** [2011] FJHC 1492; HBC 253.2011.

[20] The respondent appeared in person throughout the appeal proceedings. She repeatedly told the court that, without mentioning any name, her counsel will appear on the next date to represent her, but no counsel appeared for her until conclusion of the appeal hearing. The court granted 14 days to file her written submissions. However she did not file any. Instead she stated that she is going to settle the matter with the appellant.

[21] The appellant filed its application before the Master on 14 August 2013. The hearing date of the application was on 18 September 2013. The respondent filed a substantive affidavit in reply to appellant's application on 10 September 2013, which was 7 days before the hearing date of 18 September 2013. The hearing of the application did not proceed on 18 September 2013. After a number of adjournments on the application of the appellant the hearing eventually took place on 2 October 2015. The learned Master dismissed the appellant's application on the ground that the appellant failed to comply with the second mandatory requirement of section 170 of the LTA that the application must require the person summoned (the respondent in this instance) to appear at the court on a day not earlier than sixteen days after the service of the application.

[22] The appellant's application carries '**a note to the respondent**' that reads:

'NOTE TO THE DEFENDANT'

It is necessary for you to enter an appearance, but if you do not attend either in person or by your solicitor at the time and place above-mentioned, such order will be made and proceedings taken as the Master may think just and expedient.

The defendant is to appear not earlier than 16 days after the service of the summons.'

- [23] There has been a gap of two years between the first hearing date of 18 September 2013 and 2 October 2015, the date on which the hearing was actually eventuated.
- [24] The respondent did not raise any preliminary issues in respect of non-compliance by the appellant with the provisions of section 170 of the LTA.
- [25] Section 170 states that the application must contain a description of the land and must require the respondent to appear at the court on a day not earlier than sixteen days after the service of summons.
- [26] There were no issues before the learned Master that: (a) the appellant's application fails to describe the subject property and that (b) the appellant's application did not require the respondent to appear at court not earlier than 16 days as mandated in section 170 of the LTA.
- [27] The respondent filed her affidavit in reply 7 days before the first hearing date. She had appeared and participated in the proceedings without any objection or raising any preliminary issues in relation to the application until the hearing which came about after little over two years. She did not even file an application to strike out under O.2, r.2 of the HCR.
- [28] In *Rokovi* (supra) Master Amaratunga (as he then was) stated at para [9] that:

[9] *When the matter was called on the first day the Defendant sought 21 days to file and serve an affidavit in opposition and this was granted and the hearing was fixed for 30th November 2011. So, the Defendant had ample time to file an affidavit in opposition. Any shortfall on the service of summons was adequately compensated as the Defendant was granted 21 days from the date that appeared on the summons and no prejudice is caused by the non-compliance*

with the requirement of at least 16 days as stipulated in the Section 170 of the Land Transfer Act.'

[29] In the matter at hand the respondent never raised any objection on the service of the application or proof of service. She did not take any objection regarding the appellant's application even though she had more than two years to do so. The application was taken up for hearing only after years of the application was filed.

[30] Obviously, the learned Master had dismissed the application as if a preliminary issue was raised by the respondent that the application was defective due to non-compliance with the requirement of at least 16 days as stipulated in s. 170.

[31] The courts decide disputes between the parties and they do not pronounce on question of law when there is no dispute to be resolved.

[32] In **Ainsbury v Millington** [1987] 1 All ER 929 at 930-931, [1987] 1 WLR 379 at 381 Lord Bridge of Harwich said:

'It has always been a fundamental feature of our judicial system that the courts decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved.'

Different considerations may arise in relation to what are called "friendly actions" and conceivably in relation to proceedings instituted specifically as a test case.'

[33] In **Madhwan Keshwan v Keshni Devi, Shailendra R Krishna & Registrar of Titles** [2007] ABU 35/06 (apf HBC 68/01L) 23 March 2007 Fiji Court of Appeal held:

*"No objection by counsel that originating summons was not served despite numerous appearances in Court, irregularity does not, as a general rule, nullify the proceedings. It also overlooks the rule that a party who in fact appears on a summons cannot, after the summons has been heard or dealt with, be heard to complain that the service was defective (**Boyle v Sacker** (1888) 39 Ch D 249). If there were*

irregularities they were waived. But party complaining should have taken steps within a reasonable time of the party becoming aware of the irregularity and before any other step is taken in the proceedings within O.2 r.2: per Scott & Ford, JJA (majority)”.

[34] Returning to the matter at hand, there was no dispute between the parties as to whether the appellant’s application was defective in not complying with the second requirement of section 170 that the summons (application) must require the person summoned (the respondent) to appear at the court on a day not earlier than sixteen days after the service of summons. However, the learned Master had dealt with an issue which was never raised before him to be resolved. No objection by the respondent that the appellant’s application was defective as a result of non-compliance of second requirement of section 170. If there were irregularities they were waived. The courts should not pronounce on abstract questions of law when there is no dispute to be resolved. In the circumstances the learned Master had erred in dismissing the appellant’s application without considering its merits. Therefore the learned Master’s ruling of 18 December 2015 is liable to be set aside. So I do.

The appellant’s application considered on merits

[35] I now proceed to consider the merits of the appellant’s application and to give final judgment. The Appeal Court has power to do so. The Appeal Court may make any order, on such terms as the Court thinks just, to ensure the determination on the merits of the real question in controversy between the parties, see Rule 22 (4) of the Court of Appeal Rules.

[36] As the last registered proprietor the appellant brought summary proceedings pursuant to section 169 of the LTA for the recovery of possession of the house. The application has been supported with an

affidavit sworn by Josateki Nalukuya, the Business Development Officer Housing Estates employed by the appellant.

- [37]** Section 169 mandates that the application must demand the respondent to show cause why he should not deliver up possession of the house the respondent occupies to the appellant. The application filed by appellant calls for the respondent to show cause why he should not give up possession of the house to the appellant. Therefore the requirement of section 169 has been complied with. There was no dispute in this regard.
- [38]** In accordance with section 170 of the LTA the application must described the land and must require the respondent to appear at the court on a day not earlier than sixteen days after the service of summons.
- [39]** The application provides description of the land with Crown Lease and lot numbers and quarters' numbers. There has been sufficient description of the land. This satisfies first requirement of section 170 that the application must give description of the land to which the application relates. There was no dispute between the parties in this regard as well.
- [40]** The application was served on the respondent. She filed an affidavit in reply sworn by herself 7 days before the hearing date of 18 September 2013. The hearing did not proceed on that date as the appellant sought adjournment on the ground that a matter is pending before the Employment Tribunal. The respondent did not raise any issue regarding service of summons or giving at least 16 days after the service of summons to appear in court to answer the application.
- [41]** It will be noted that the respondent did not deny that the appellant is the registered proprietor of the subject property.

[42] The issue that is to be resolved by the court is that whether the respondent is entitled to possession of the property.

[43] According to the appellant's affidavit: The appellant is the registered owner of the property by virtue of Crown Lease No.3469. The respondent is an employee of the appellant. She was severely affected by the floods in March 2012. She was then residing at Waqadra. In April 2012 the respondent approach the appellant for assistance to provide her and her family with accommodation. The appellant then offered the respondent accommodation. She wished to continue with the occupation of the house. The appellant wanted the responded to sign the standard Tenancy Agreement. All except a few employees pay the market rental of \$450 per month. The respondent refused to sign the Tenancy Agreement. In July the appellant wrote a letter to the respondent and informed that since she was not willing to sign the tenancy agreement, the appellant considered her to be staying illegally in the house and that it would proceed with Notice to Quit and initiate summary proceedings for vacant possession. On 12 July 2012 the appellant called upon the respondent to quit and deliver up vacant possession of the property. The respondent refused to vacate. On 2 April the appellant sent to the respondent rental arrears notice for \$5,400.00. On 20 May 2013, the appellant served a second notice to quit on the respondent. The respondent still refused. The appellant originated section 169 proceedings to eject the respondent from the property.

[44] According to the respondent: She attempted to pay the rent but the appellant refused to accept the same. There is a pending employment matter relating to the same issue before the Employment Relations Tribunal relation to the issue of rental that should be paid by the members of the FPSA occupying the appellant's quarters and is awaiting decision. She is an FPSA member. An interim relief of status quo in respect of the rental that was paid before the appellant decided to increase the same to market value be maintained in respect of all

members of the FPSA until the substantive decision is delivered by the Employment Tribunal. Her position is that she is entitled to occupy the quarters as an employee of the appellant.

[45] I now venture to determine the respondent's right to occupy the property. Since the respondent does not dispute that the appellant is the last registered proprietor of the subject property, the burden then shifts to the respondent to prove her right to possession of the property.

[46] I could gather a couple reasons the respondent intended to rely on to resist the appellant's application for immediate vacant possession, namely (i) that an employment matter relating to the issue of rental that should be paid by the members of FPSA occupying the appellant's quarters is pending before the Employment Tribunal; (ii) She is lawfully entitled to occupy the quarters as an employee of the appellant.

[47] Pending an employment matter before the Employment Tribunal is not a bar to initiate proceedings for the recovery of possession of the property. A matter for the determination of the rent payable by FPSA members occupying the appellant's quarters is pending before the Employment Tribunal will give right to possession for the respondent to occupy the property without payment of rent. I am not satisfied with the first reason that rent issue is to be resolved by the Employment Tribunal giving right to possession of the property to the respondent.

[48] The second reason the respondent gives for occupying the property is that she is entitled to occupy the quarters as an employee of the appellant. The respondent is occupying the quarters without any Tenancy Agreement and without paying rent. An employee cannot occupy his or her employer's property without permission of the employer. An employer is not obliged to provide accommodation to his or her employee unless it is a term of the employment contract. The respondent does not state that the appellant agreed to provide free

accommodation to her (the respondent). Therefore I am also not satisfied with the respondent's second reason that as an employee of the appellant she is entitled to occupy the quarters.

[59] The respondent fails to establish her right to possess the quarters. As a result I would make order immediate possession of the property to be given to the appellant. I make no order as to costs.

Final outcome

- (i) Appeal allowed.
- (ii) Master's ruling dated 18/12/2015 is set aside.
- (iii) Judgment is entered in favour of the appellant.
- (iv) The respondent to vacate the quarters forthwith.
- (v) No order as to costs.

M H Mohamed Ajmeer
.....13/4/16
M H Mohamed Ajmeer

JUDGE

**At Lautoka
13 April 2016**

