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IN THE FIJI COURT OF APPEAL
Civil Jurisdiction
Civil Appeal No. 53 of 1978

Between:

ABDUL AZIZ s/o Imam Buksh Appellant

and

- 1. MANIBEN BRIJLAL KAPADIA
d/o Ichharam
- 2. HANSABEN HARILAL KAPADIA
d/o Magan Lal Respondents

Mr. F.S. Lateef for the Appellant.
Mr. K. Chauhan for the Respondents.

Date of Hearing: 22nd November 1978.
Delivery of Judgment: 30/11/78

JUDGMENT OF THE COURT

Spring J.A.

The appellant appeals against an Order of the Supreme Court at Suva whereby the appellant was ordered to deliver up vacant possession of land and a dwelling house thereon situated on the corner of Waimanu Road and Stewart Street Suva.

Proceedings were taken under section 169 of the Land Transfer Act 1971 which reads -

" The following persons may summon any person in possession of land to appear before a judge in chambers to show cause why the person summoned should not give up possession to the applicant.....

- (a)
- (b)
- (c) a lessor against a lessee or tenant where a legal notice to quit has been given or the term of the lease has expired. "

A notice to quit dated 19th January 1978 requiring vacant possession of the said premises on the 28th February 1978 was served upon the appellant.

The respondents (who were the plaintiffs in the Supreme Court) filed two affidavits dated 20th June 1978 and 10th August 1978 respectively. The respondents are the duly appointed attorneys of the registered proprietors of the said land. The notice to quit was annexed to the affidavit dated 20th June 1978. The appellant filed four affidavits and acknowledged that he had been served with the notice to quit. The appellant denied that he was the tenant of the said premises and alleged that his wife was the lawful tenant.

Before leaving the matter of affidavits there is one matter upon which we wish to comment; that is regarding the quality of the affidavits filed by both parties herein. The affidavits were generally of a poor standard. We have noticed that not only in this appeal, but in other matters coming before this Court affidavits are filed in which the deponent speaks not only of what he knows but also of what he believes without giving the slightest intimation with regard to what his belief is founded upon. The affidavits in this case offend badly in this regard and cannot be relied upon; the deponents make statements on their "information and belief" without saying what their source of information and belief is and what they say is not confirmed in any way; they contain in some instances mixed questions of fact and law; and make bald statements deposing as to matters which it is the function of the Court to determine. We trust that counsel will ensure that in future affidavits will conform to the Rules of Court for the mutual benefit of all concerned.

Turning now to the originating summons filed under section 169 of the Land Transfer Act 1971 the learned Judge, in the Court below, found as follows -

" I have read the opposing affidavits filed in this matter.

I am not satisfied that the defendant has shown sufficient grounds why he should not vacate the premises owned by the plaintiffs. I accept that the defendant was in fact a monthly tenant of the plaintiffs whose tenancy was properly terminated by notice dated 19th January, 1978. Furthermore, the defendant has not satisfied this Court that the premises in question are protected under the Fair Rents Act.

In the result there will be an order for possession as prayed with costs. "

The appellant filed an appeal to this Court containing eleven grounds. At the hearing of the appeal all grounds of appeal were abandoned except ground 9 which reads as follows -

9. That the learned trial Judge did not take into consideration all evidence tendered by the Appellant and that if the learned trial Judge gave due and proper attention to these Affidavits he would have found that the Appellant was not the tenant of the Respondents and in any event because of grave conflicts arising out of several affidavits filed by the Appellant and the Respondents differed in material particular and in such event the only course open to the learned Judge was to refer this matter for trial by the Supreme Court in its original jurisdiction in open Court in the Supreme Court of Fiji.

The appellant sought leave to argue an additional ground of appeal and learned counsel for the respondents raised no objection to leave being granted by this Court to argue the additional ground of appeal which reads -

" That the learned trial judge erred in law in holding that the tenancy was terminated when there was no evidence of proof of service of the notice to quit which was essential to the jurisdiction of the Court."

It will be convenient to deal with the additional ground of appeal first. Mr. Lateef counsel for the appellant argued that there was no evidence adduced before the learned Judge in the Court below, as to when the notice to quit was served upon the appellant. In other words there was no proof before the Supreme Court as to the date that the tenancy terminated and it was the responsibility of the respondents to establish this fact.

In the respondents' affidavit dated 20th June 1978 in paragraph 4 thereof it is stated -

"That by a Notice dated the 19th day of January 1978 and served upon the Defendant, the Defendant's said tenancy was terminated and the Defendant was thereby required to quit and deliver up the vacant possession of the said premises on the 28th day of February, 1978 or at the expiration of his tenancy which would have expired next after the service of

the said notice. A copy of the said Notice is annexed hereto and marked "A". "

The Notice to quit reads -

"Mr. Abdul Aziz,
Trading as "Suva Girls Hostel",
Corner of Waimanu Road and
Stewart Street,
SUVA.

Dear Sir,

Re: C.T. 2190 - Your Landlord Maniben
Kapadia and Hansaben Kapadia

As Solicitors for MRS. MANIBEN KAPADIA (Daughter of Icharam) and MRS. HANSABEN KAPADIA (Daughter of Maganlal) both of Suva, housewives, your Landlords we give you one month's notice effective from 31st day of January, 1978 and expiring on the 28th day of February, 1978 or at the expiration of your tenancy which will expire next after the end of one month from the service of this notice to quit and deliver up to them or to any person they may appoint the vacant possession of all that house premises situate at the corner of Waimanu Road and Stewart Street, Suva, comprised in the C.T. No. 2190 and occupied by you as monthly tenant.

AND TAKE FURTHER NOTICE that if you failed to comply with this notice, our instructions are to institute legal proceedings for your eviction therefrom.

Yours faithfully

CHAUHAN & CO. "

The appellant in his affidavit dated 28th July 1978' paragraph 2 said -

"2. THAT a Notice to Quit dated the 19th January 1978 and served on me as alleged in paragraph 4 of the Affidavit of the Plaintiffs is wrong and bad in law and consequently ineffective. "

The appellant did not, so far as the record reveals, raise, before the Court below, the point that the respondents had failed to prove when the tenancy was terminated. Mr. Lateef submitted that the learned Judge in the Court below, before he could make the appropriate order under section 169 of the Land Transfer Act, should have had proof as to the date of the termination of the tenancy. Mr. Chauhan submitted that this point had not been

raised before the learned Judge who had found -

"I accept that the defendant was in fact a monthly tenant of the plaintiffs whose tenancy was properly terminated by notice dated 19th January, 1978. "

The point we are called upon to decide is whether the point now taken by counsel for appellant, and which was not taken in the Court below, goes to jurisdiction and was fatal to the application before the Court. In our view the respondents had deposed to the fact that the appellant was their tenant; they had pleaded that the tenancy had been determined by a notice to quit; and it was incumbent upon them to prove that the tenancy had been terminated according to law and prove when the notice actually expired. It was stated by this Court in Vallabh Das Premji v. Vinod Lal, Nanki and Koki (F.C.A. C.A. 70/1974):

"Proof of service of a notice to quit on a date when it will, according to its terms, be effective to terminate the tenancy, is essential to the jurisdiction of the court, in a case of this nature, to make the ejection order applied for. Section 169 of the Act lists among the persons who may avail themselves of this summary procedure "a lessor against a lessee or tenant where a legal notice to quit has been given. " Its legality in this context must include its effectiveness, and to the decision of the question the date of its service is in most cases, and certainly is in the present case, a vitally relevant consideration. Though these applications are directed to be made in Chambers, they are not interlocutory and are concerned with the important matter of the right to the possession of land, and where the date of service of a notice to quit is in issue, it would be quite wrong, in our opinion, to seek to establish it by statements of information and belief. "

Accordingly, in our view the lack of proof of the date of service is fatal to the application before the Supreme Court. We do not therefore have to consider the other ground of appeal; in view of the course we propose to follow it is proper that we refrain from so doing.

As we have stated the appellant did not raise the foregoing argument at the close of the respondents' case in the Court below nor was it included in the grounds of appeal furnished to this Court. However, we are for the reasons given impelled to allow the appeal but in the circumstances without costs.

Accordingly the Order in the Court below is rescinded and the application dismissed.

By virtue of section 172 of the Land Transfer Act the dismissal does not prejudice the right of the respondents to take any other proceeding to which they may otherwise be entitled but in case that course is desired we give leave to proceed again under the relevant sections of the Act.

Maddean
.....
VICE PRESIDENT

[Signature]
.....
JUDGE OF APPEAL

[Signature]
.....
JUDGE OF APPEAL

SUVA,

1978.