

IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0053 OF 1996

(High Court Civil Action No. HBC0023 of 1996)

BETWEEN:

RAJ PATI

APPELLANT

-and-

HARI PRATAP AND
DIRECTOR OF LANDS

RESPONDENTS

Mr. V. Mishra for the Appellant
Mr. H. A. Shah for the 1st Respondent

Date and Place of Hearing : 13 May 1997, Suva
Date of Delivery of Judgment : 16 May 1997

JUDGMENT OF THE COURT

This is an appeal by a defendant from an interlocutory injunction granted by Sadal J. in a land dispute. The appeal lies of right under s.12(2)(f)(ii) of the Court of Appeal Act.

The injunction was originally granted ex parte on 2 February 1996 on an application by notice of motion supported by the plaintiff's Affidavit. The ex parte injunction ordered:-

"that the first defendant and/or her servants agents or howsoever be restrained from interfering with the Plaintiff's peaceful and quiet enjoyment of Native Lease being NLTB Ref. No. 4/1/2680 situate at Namau, Ba until the 1st day of March 1996."

The first defendant opposed the continuation of the injunction and, following a hearing, Sadal J. on 4 September held that the injunction should be extended until the final hearing and determination of the action.

The plaintiff is the lessee of native land at Namau under a provisional approval notice dated 22 June 1966. His land is on the western side of an access road shown on DP7207. The first defendant, the now appellant, is the administratrix of the estate of her late husband Ram Bodh and as such is the lessee under Crown Lease (LD Ref. 4/1/1077) of land on the eastern side of the same access road. The second defendant was the Director of Lands.

The land in dispute is a narrow strip on the western side of the access road with an area of 1860sq metres (1 rood, 33.5 perches), described in the statement of claim and the plaintiff's affidavit as "the subject property". It is State land and a road reserve.

The plaintiff relied on his possession since 1966 (statement of claim para 3, affidavit of 24 January 1966 para 5). His possession was not disputed (statement of defence para 3(a), (c), counter claim paras 8, 9, 10, affidavit of the first defendant's son of 22 March 1996 para 6).

The first defendant claimed title to the subject property, under her Crown Lease and sought in her counter claim an order requiring the plaintiff to vacate and an injunction to restrain him from entering.

It appears that the dispute arose late in 1995 or early in 1996. The plaintiff's initial response was to lodge an application on 12 January with the Agricultural Tribunal, Lautoka under s.22(1)(i) of the Agricultural Landlord and Tenant Act (ALTA) to fix the boundary between his land and the land of the first defendant. His second response was to commence proceedings in the High Court for an interlocutory injunction to protect his possession pending the decisions of the High Court and the Tribunal.

The Tribunal gave its decision on 2 August 1996 summarily dismissing the plaintiff's application on the ground that there was "no common boundary between the applicant and the first respondent" (the present appellant). Under s.22(1)(i) of ALTA "no appeal shall lie in relation to such decision which shall be final and conclusive for the purposes of this Act".

Moreover under s.61(1) of ALTA the determination of a Tribunal shall not be "called in question in any court of law", and under s.62(2) such a determination "shall be admitted in evidence in any court of law ... as prima facie evidence of the facts contained therein". It is also possible that the determination was a *res judicata* between these parties, but this question was not argued, and it is not necessary to express any final view on it.

The decision of the Tribunal that there was no common boundary between the land of the appellant and that of the plaintiff established, in the circumstances of this case, at least prima facie, that the appellant had no title to the subject property and that her boundary was the eastern edge of the access road. The plaintiff had no documentary title to the subject property and, despite his long possession, did not have a good title against the Director of Lands. See State Lands Act ss.32, 33. However a person in possession of land "has a perfectly good title against all the world but the rightful owner". See Perry v Clissold [1907] AC 73 at 79. The plaintiff therefore had a good title against the appellant who failed to show any title at all, and the High Court was entitled to grant an appropriate injunction. The appeal therefore fails in substance.

Counsel for the appellant also raised procedural objections to the order of Sadal J. extending the injunction. The first was that the injunction was not correctly framed because it only restrained the appellant from interfering with the plaintiff's peaceful and quiet enjoyment of his native lease, and did not apply to the subject property at all. The point was well taken, but does not assist the appellant. The statement of claim sought an injunction to protect the plaintiff's possession of the subject property, but the notice of motion was in the wrong form, and the judge made his orders in the terms sought by the notice of motion. The judge's intention was clear, and this is a proper case for the Court to amend the order although there has been no cross appeal or respondent's notice. See CAR r.22(4).

The other objection was that the plaintiff had not filed a summons seeking an extension of the ex parte injunction as required by HCR O.32 r.1. This is a general rule which appears to apply to

applications to continue an ex parte injunction but HCR O.29 r.1(2) is a special rule which is directly applicable in such cases. Rule 1(1) provides:-

“An application for the grant of an injunction may be made by any party to a cause or matter before the trial of the cause or matter”

Sub r.(2) provides:-

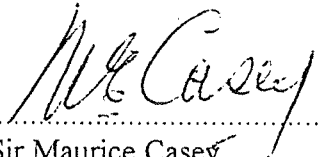
“Where the applicant is the plaintiff and the case is one of urgency such application may be made ex parte on affidavit but, except as aforesaid, such application must be made by motion or summons.”

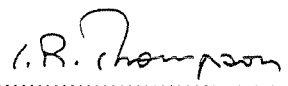
Applications to continue ex parte injunctions may therefore be made either by notice of motion or by summons, and there was no procedural irregularity in this case. In any event non-compliance of the type alleged would be a mere irregularity which, under HCR O.2, would not nullify the proceedings. The original notice of motion was kept alive by orders of the judge commencing with his direction for service of all documents on the defendants made when he granted the ex parte injunction on 2 February.

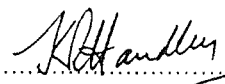
In our opinion, subject to a variation in the order below, the appeal should be dismissed. The variation will give effect to the clear intention of Sadal J. and does not affect the respondent's entitlement to the costs of this appeal. There was no need for the appellant to come to this Court to have the order corrected. This could have been done by Sadal J. at any time under the slip rule (HCR O.20 r.10) or under the Court's inherent jurisdiction. The following orders should be made:-

1. Order of Mr. Justice Sadal of 4 September 1996 varied by substituting an order that the first defendant, by herself, her servants and agents be restrained from interfering with the plaintiff's peaceful and quiet enjoyment of the thin strip of land between Native Lease Ref. 4/1/2680 situate at Namau, Ba, and the public access road to the east shown in DP7207 until the final hearing and determination of this action.

2. Appellant to pay the first respondent's costs of this appeal.


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Sir Maurice Casey
Judge of Appeal


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Mr. Justice I. R. Thompson
Judge of Appeal


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Mr. Justice Handley
Judge of Appeal