

IN THE COURT OF APPEAL FIJI ISLANDS
AT SUVA

APPELATE JURISDICTION

Misc. Action No.10 of 2009

BEFORE THE ACTING PRESIDENT:

MR JUSTICE J. E. BYRNE

BETWEEN : **KRISHNA SAMI NAIDU AND ANOTHER**
(Appellants/Applicants)

AND : **SALIMAN KHAN (Respondent)**

COUNSEL: **Mr K. Maraiwai for the Applicants/Appellant**
Mr S. Parshotam and Ms M. Drova for the Respondent

Dates of Hearing : **7th and 30th October, 30th November 2009,**
27th January 2010.

Date of Ruling : **27th January 2010**

RULING

[1.0] On the 7th of November 2008, Madam Justice Scutt made the following orders in the High Court :

- 1) A Declaration that the Plaintiff (respondent) is entitled to possession of a BMW motor vehicle having registration Number ES 247 the property of K. Naidu Investment Propriety Ltd secured under a Bill of Sale to the third Defendant (Merchant Bank Finance).
- 2) A Declaration that the Plaintiff (Respondent) is entitled to sell and transfer ownership of the said vehicle to any purchaser.
- 3) An Order that in the event the Plaintiff (Respondent) sells the said vehicle:
 - a) the third Defendant (MBF) release the said vehicle from the Bill of Sale held by it over the vehicle.
 - b) the third Defendant gives notice to the Land Transport Authority of Fiji that it has no further financial claim interest in the said vehicle.
- 4) Cost of this application determined as follows:
 - a) costs to the plaintiff by the first defendant and second defendant in an amount and upon a basis to be determined.
 - b) as to the third defendant, costs reserved.

The order was not sealed until 31st of August 2009.

[2.0] A perusal of the Judge's notes of the hearing before her indicates that she heard no arguments on the issues between the parties. Consequently I cannot accept the claim made by the Applicant in an affidavit sworn on the 4th of September 2009 that the Appellants have merits in their case and that the Learned Judge erred in law and in fact in misinterpreting the facts. Likewise I cannot accept the assertion by the applicant that the Judge did not exercise her discretion in a way a reasonable Judge should.

[3.0] The affidavit goes on to claim that the Learned Judge "overlooked a few salient matters and that the said Order is bias (sic) and unfair, especially

regarding the fact that the said motor vehicle does not belong to me but it belongs to the second appellant who is not the Respondent's tenant and further that the said vehicle is under a Bill of sale with Merchant Bank Finance who was the third defendant in the said case and therefore it is prejudicial to all the Defendant's cause".

- [4.0] The meaning of the words I have just quoted is not clear to me nor does the deponent give any particulars of the matters claimed by him in his affidavit. This is the least that could be expected of him.
- [5.0] I have no doubt on the material before me that all the parties to this litigation understood the matters in issue between them. They were represented by Mr Subhash Parshotam for the Respondent (Plaintiff), Mr Gavin O'Driscoll for the applicant (first defendant) and K. Naidu Investment Proprietary Limited (second defendant) and Mr T. Tuitoga for the third defendant (Merchant Bank Finance).
- [6.0] The applicants changed their Solicitors in 2009 and the present solicitors on the record, Maraiwai Law, issued their summons seeking leave to appeal out of time and stay of execution nearly nine months after the Order was made in the High Court.
- [7.0] In his affidavit of the 4th of September 2009, (paragraphs 4 to 10) it appears that the applicants were ignorant of the rules of this Court and they were not advised of this by their Solicitors. That of course is a matter between the applicants and their Solicitors and no reason why the respondent should be prejudiced on account of it.
- [8.0] I am satisfied on the material that this was not a case which called on the Judge to exercise any discretion. Secondly it is clear from her notes that she was not invited to do anything but make the orders which she made.

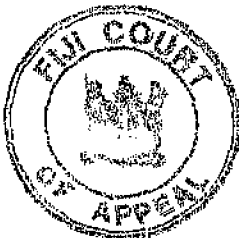
- [9.0] Consequently on the material before me on which I have not heard any submission from the applicant, the applicant has not suffered any injustice.
- [10] That in itself is sufficient reason to dispose of the applicant's summons but even of more significance is the fact that the applicants did not file their application until nine months after the order was made. By any reckoning this is an unreasonable period for which no acceptable explanation has been given. For this reason also I refuse the application.
- [11] There is however another matter which has caused me concern and that is the non-appearance by Mr Maraiwai for the applicant before me on the 27th of January 2010.
- [12] I had earlier listed the matter for argument on the 30th November 2009 but it was adjourned after I was told by Ms Drova for the respondent that Mr Maraiwai had phoned to say he was not well and would take a new date for the hearing.
- [13] I then fixed the application for hearing on 15th January 2010, on Mr Parshotam undertaking to inform Mr Maraiwai of the new date and my wish that this date be observed unless there were very good reasons for not doing so.
- [14] As the 15th of January was still in the legal vacation it was listed for hearing on the 18th of January but due to unforeseen circumstances I did not arrive back in Fiji until the afternoon of that date. It was therefore listed on the 27th of January at 10.00 am. The Registry of the Court by a letter of that date informed the applicant's solicitors of the new time for hearing.

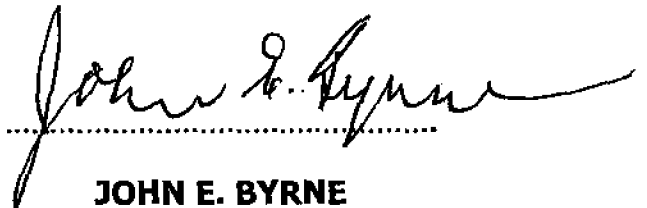
[15] By 10.15 am on the 27th of January there was no appearance either by Mr Maraiwai or any other counsel on behalf of the applicant. The Court registry then made enquiries from his office and was told that he was appearing in a Court at Labasa. I consider this most unprofessional and discourteous, the least Mr Maraiwai could have done was to seek a further adjournment by instructing some other lawyer to appear for him and explain his non- appearance.

[16] In the circumstances I proceeded to give an oral ruling on the application which I dismissed as being made too late. I also ordered the applicant to pay the respondents costs of \$1000.00 by the 10th of February 2010.

[17] I shall send a copy of this ruling to the Independent Legal Services Commission for its information.

Dated at Suva this 27th day of January 2010.




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JOHN E. BYRNE

Acting President, Fiji Court of Appeal