

**IN THE COURT OF APPEAL**  
**APPELATE JURISDICTION**

**CIVIL APPEAL NO. ABU 0073 of 2013**

(On appeal after leave being granted from High Court No. HBC 298 of 2008)

**BETWEEN** : **SHAKUNTALA DEVI**  
*Appellant*

**AND** : **ALLAN RAJENDRA PRAKASH**  
**ROHITENDRA PRASAD**  
*Respondents*

**Coram** : **D. S. Lecamwasam JA**  
**Almeida Guneratne JA**  
**M. Corea JA**

**Counsel** : **Appellant in person**  
**Mr. J. Savou for the Respondents**

**Date of Hearing** : **4 September 2014**

**Date of Judgment** : **25 September 2014**

**J U D G M E N T**

**D. S. Lecamwasam JA**

I agree with the views expressed by my brother Justice Dr. Guneratne, in this case.

**Almeida Guneratne JA**

[1] This is an appeal (after leave) from an order of the High Court of Suva.

- [2] The Respondents had commenced proceedings on 5<sup>th</sup> September 2008 by summons seeking to evict the Appellant from the premises in question pursuant to Section 169 of the Land Transfer Act (Cap. 131) (hereinafter the LTA).
- [3] The Appellant opposed the Respondents' application by affidavit dated 3<sup>rd</sup> December, 2008.
- [4] When the case came up for hearing on 31<sup>st</sup> August, 2010 the Appellant was absent and unrepresented and upon reading the Summons together with the Supporting affidavit and on hearing submissions of Counsel for the Respondents, the learned High Court Judge had ordered vacant possession to be given to the Respondents in terms of Section 171 of the LTA.
- [5] On 20<sup>th</sup> September, 2010 the Court order had been executed through a registered bailiff and a full inventory of the items in the premises had been taken and the items had been stored under lock and key at the warehouse of the premises within the same building.
- [6] The Appellant filed notice of appeal dated 1<sup>st</sup> March, 2011 against the order of the High Court which was outside the time limit imposed by Rule 16 of the Court of Appeal Rules notwithstanding which Justice Chandra, sitting as a single Judge of this Court under Section 20(1)(a) and (b) of the Court of Appeal Act (Cap. 12), granted leave to appeal by His Lordship's order dated 30<sup>th</sup> October, 2013 on the applicable principles pertaining to applications for leave to appeal.
- [7] I now proceed to deal with the merits of the appeal.

**Basis on which the Order of the High Court had been obtained**

[8] The impugned order had been made pursuant to Section 169 read with Section 171 of the Land Transfer Act the terms of which may be reproduced here for convenience.

*"S.169.- 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) the last registered proprietor of the land;*

*(b) a lessor with power to re-enter where the lessee or tenant is in arrear for such period as may be provided in the lease and, in the absence of any such provision therein, when the lessee or tenant is in arrear for one month, whether there be or be not sufficient distress found on the premises to countervail such rent and whether or not any previous demand has been made for the rent;*

*(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."*

... ..

*"S.171.- On the day appointed for the hearing of the summons, if the person summoned does not appear, then upon proof to the satisfaction of the judge of the due service of such summons, and upon proof of the title by the proprietor or lessor and, if any consent is necessary, by the production and proof of such consent, the judge may order immediate possession to be given to the plaintiff, which order shall have the effect of and may be enforced as a judgment in ejectment."*

**Preliminary Observations**

[9] It is not disputed that, the Appellant was a monthly tenant of the premises in question and the application under Section 169 of the LTA was based on non-payment of rent.

- [10] As requisite in law the Respondents had given notice to quit the premises which notice is dated 1<sup>st</sup> July, 2008 which had been acknowledged by the Appellant. The proceedings in the High Court had commenced on 5<sup>th</sup> September, 2008. Accordingly, in so far as the said notice to quit is concerned I find there is no reason for the Appellant to complain.
- [11] In so far as the Respondents' attempts to have the Appellant evicted, they have had a chequered history but what is relevant for the purposes of this appeal is whether proper procedures had been followed.
- [12] In that regard, the learned High Court Judge had examined the Summons in the present case together with the supporting affidavit and had been satisfied that, the same was in good order. Thus, both as to Summons and the Notice to Quit, the procedural requirements in Section 176(1) of the LTA read with Sections 128 and 129 of the Property Law Act (Cap.130) had been complied with.
- [13] I have perused the relevant proceedings as revealed from the Record and find that, there has not been any misdirection on the learned High Court Judge's part in that regard.

#### **The Substantive Issues to be determined in this Appeal**

- [14] Consequently, three principal issues require consideration in this appeal viz:
- (a) Whether, as urged by the Appellant, the Respondents (as plaintiffs) had locus standi to have sought an eviction order under Section 169 read with Section 171 of the LTA.
  - (b) Whether, in view of the letter dated 9<sup>th</sup> February, 2010 sent by the Appellant addressed to the Chief Registrar of the High Court her absence from Court could have been excused.

(c) Whether, the Appellant's claim that, in fact she had paid rents in advance covering the period in respect of the cause of action based on non-payment of rent could be sustained.

[15] I now proceed to deal with those issues seriatim as follows:

(a) Whether as urged by the Appellant, the Respondents (as plaintiffs) had locus standi to have sought an eviction order under Section 169 read with Section 171 of the LTA.

[16] The thrust of the Appellant's contention on this issue is, in as much as the Respondents' have described themselves as "Trustees of the estate of Ghurahu Prasad, deceased" whether the application for eviction could have been maintained and that in any event the Respondents do not possess title to the premises in question.

#### **Relevant Provisions of the LTA**

[17] In that context, it is necessary to look at the relevant and impacting provisions of the LTA at the outset.

Section 100 of the LTA decrees that,

*"The Personal representative of a deceased proprietor or the trustee ... shall hold the estate or interest in land in respect of which they are so registered ... shall be deemed to be the absolute proprietors thereof."*

Section 2 (which is the Interpretation section of the LTA) decrees that:

*"2 Personal representative means ... .. the Administrator for the time being of the estate of a deceased person."*

Section 93(4) enacts as follows:-

*"93(4). The title of every personal representative of a deceased proprietor registered under the provisions of this section shall relate back to and take effect from the date of death of the deceased proprietor."*

**The Applicability of the facts and evidence  
in the light of the aforesaid statutory provisions**

- [18] By his last will, Ghurahu Prasad, (the original proprietor and title holder of the premises in question) had initially appointed one Narendra Prakash (a son of the said Ghurahu Prasad) as the executor of his last will (vide: page 21 of the Record).
- [19] The said Narendra Prasad having died on 5<sup>th</sup> February, 1999 without fully administering Ghurahu Prasad's estate, the High Court at Suva had granted letters of administration (*de monis non*) to the Respondents (both sons of the deceased Ghurahu Prasad (vide: page 19 of the Case Record)).
- [20] The Respondents in terms of the aforesaid provisions had applied to be registered as the succeeding proprietors to Ghurahu Prasad's estate (vide : page 45 of the Case Record) and had subsequently been registered as such (vide: page 27 of the Case Record). This had been the position as at 9<sup>th</sup> July, 2007.
- [21] Thus, the application of the Respondents' (plaintiffs) before the High Court being in 5<sup>th</sup> September, 2008 after all the requisite steps being taken as recounted above, the Respondents as at 5<sup>th</sup> September, 2008 stood in the shoes of registered proprietors of the premises in question fitting the description of such proprietors of the estate of the said deceased (Ghurahu Prasad) as envisaged in Section 2 of the LTA exemplified further therein where a description as

proprietor or trustee is stated as to include “the personal representatives of such person.”

[22] On the basis of the factual context as recounted above and its application to the statutory legal provisions, I have no hesitation in holding that, the Respondents had legal standing to prefer their application to the High Court in terms of Section 169 read with Section 171 of the LTA.

[23] Consequently, I am of the view that, the reference in the caption to the Respondents as Trustees amounts to a mere misdescription and is Pro Non Scripto in as much as both in fact and in law, the Respondents in filing the impugned application before the High Court had locus standi to do so.

[24] Before I part with that aspect of the matter, I venture to reflect on what might have prompted the Appellant to challenge the Respondents’ locus to maintain the impugned application.

#### **Differences between the law of Fiji and certain other Jurisdictions**

[25] No doubt there are jurisdictions across the globe where the view is held that, upon the death of the property owner, title vests automatically in the heirs and not on the Administrators or Executors of a deceased’s estate.

[26] Suffice it to say that, the applicable law in Fiji is to be ascertained and applied within the four corners of the LTA.

[27] Accordingly, I hold that, the Respondents had locus standi to have instituted the impugned application under Section 169 read with Section 171 of the LTA.

[28] I now move to the other issue that requires consideration by this Court.

Re : Whether, in view of the letter dated 9<sup>th</sup> February 2010 sent by the Appellant addressed to the Chief Registrar of the High Court her absence from court could have been excused

[29] By that letter the Appellant had informed the Chief Registrar of the High Court (Supported by affidavit) that, she would not be able to be present in Court for the hearing in as much as she would be out of the country for a duration of one year and therefore not to take up the case in her absence.

[30] However, apparently, the said communication had not been brought to the attention of the learned High Court Judge by the Chief Registrar. Consequently, the case had been taken up ex-parte and decided on 31<sup>st</sup> August, 2010.

[31] Two questions need to be addressed in this context. First, was the Chief Registrar obliged to have brought the said letter to the attention of the learned High Court Judge? Secondly, assuming the Chief Registrar had such an obligation was the learned Judge obliged to respond to the request made in the said letter?

**Relevance or Otherwise of the Maxim Actus Curiae Neminem Gravabit**

[32] It is trite law that, “an act of the Court shall not prejudice any man” (actus curiae neminem gravabit).

[33] The Chief Registrar is not a Court but the Chief Administrative Officer attached to Court although he performs certain quasi judicial functions at times. It is also an established proposition in law that the maxim actus curiae neminem gravabit has application only to acts of Court and has no application to administrative functions. See in this connection the decision of the Supreme Court of Sri Lanka



in Madurusinghe v. Madurusinghe [1988] 2 Sri Lanka LR 142 where this matter has been comprehensively considered in the light of Brown's Legal Maxims, Treaties on Interpretation Statutes and Law Lexicons.

[34] Accordingly, even assuming that, the Chief Registrar's act of not bringing the said letter to the attention of the Judge may have prejudiced the Appellant, for had it been brought to the learned Judge's attention, he may well have exercised discretion in fixing a date for hearing beyond 10<sup>th</sup> February, 2011, the same cannot be a ground for setting aside the impugned judgment of 31<sup>st</sup> August, 2010.

[35] Secondly, ever assuming for purposes of argument that, the Chief Registrar had an obligation to have brought the said letter to the attention of the learned Judge, there was certainly no legal obligation on the part of the Judge to have responded to the request contained in the said letter although her E-Ticket and copies of entries in her passport showing her arrival in Mumbai on 11<sup>th</sup> February, 2010 and departure for Mumbai on 5<sup>th</sup> February, 2011 had been annexed to her said letter dated 9<sup>th</sup> February, 2010.

[36] No doubt it has been said in the late 1930s' by Abraham, CJ writing for the Supreme Court of Ceylon (as Sri Lanka then was) that, "Courts are Courts of Justice not academies of law"[1938 (39) NLR] However, "Justice has to be done according to law."

[37] The law does not impose any duty on a trial Judge to act on a letter (even supported by affidavit and other documents) to postpone a case.

**What is not prohibited may be permitted**

- [38] Of course, although there is no provision in law that obliges a Court to act on a letter sent to it by a party to litigation, there is no prohibition either in entertaining the same should a court be inclined to exercise discretion in the interest of justice. What is not prohibited may be permitted.
- [39] Suffice it to say that, the Courts of Fiji have been pursuing this liberal approach in a spirit of justice.
- [40] As Chief Justice Earl Warren [1891 – 194] once said, "It is the spirit and not the form of law that keeps Justice alive."
- [41] In the instant case however, the Appellant had no legal right to insist that the said letter should have been acted upon.
- [42] Accordingly, I cannot find any misdirection and/or non-direction in fact or in law by the learned High Court Judge in regard to the said letter dated 9<sup>th</sup> February, 2010, having regard to the terms of Section 171 of the LTA and, I find nothing in the High Court Act or the High Court Rules either that suggests otherwise.

**Lacunae in the law and the need for Law Reform**

- [43] At this point I pause to reflect on the fact that, against ex parte proceedings that result in the context of section 171 of the LTA, particularly in circumstances such as in the present case, the law does not provide an easy procedure for an aggrieved party to have her default purged.

- [44] In view of the stringent nature of the provisions of the LTA, I would welcome the day the legislature in the future addresses this matter.
- [45] I now proceed to consider the third issue that arises for consideration : Whether, the Appellant's claim that, in fact she had paid rents in advance covering the period in respect of the cause of action based on non-payment of rent could be sustained.
- [46] It is necessary to peruse the contents of the Appellant's affidavit where she claims to have paid rents in advance covering the period in respect of which the cause of action based on non-payment of rent has been alleged by the Respondents.
- [47] The Appellant claims that prior to her leaving Fiji to India that she paid rent in advance up to February, 2011 into the bank account of Ghurahu Prasad, the father of the Respondents. The Respondents have denied this. Indeed, the application of the Respondents was based on non-payment of rent.

#### **Test for tenancy and payment of Rents**

- [48] The test for a claim of tenancy is the payment of rents and the test for payment of rents is the production of rent receipts if payment is denied.
- [49] In the present case the Appellant has not annexed any rent receipts to her said letter dated 9<sup>th</sup> February, 2010 or to her affidavit.
- [50] In the result there is only the Appellant's assertion that she paid rents.

- [51] If there was provision in the law to have an inquiry to have an ex parte order given in the context of Section 171 of the LTA Act set aside on cause shown, an affected party may well be in a position to produce rent receipts.
- [52] Of course, in the instant case the Appellant submitted to Court that, her rent receipts along with other belongings had been destroyed suggesting that, that might have been done by the Respondents.
- [53] The resulting position is that, there is no available evidence on record of payment of rents as claimed by the Appellant. The case of Prasad v. Hamid [2004] FJCA 10 lends assistance in this context.
- [54] I have gone through the written submissions of the Appellant and the Respondents and the authorities cited on behalf of the Respondents as well.
- [55] The Appellant claims that, the inventory prepared for the purposes of this case is false and claims the value of several items from the Respondents. Even after the conclusion of the hearing the Appellant has addressed a letter dated 12<sup>th</sup> September 2014 to this Court in this connection along with certain allegations against the Respondent's lawyers. This is a claim and matters the Appellant would have to pursue in some other action. This Court is not in a position to entertain such a claim nor the alleged cost of renovations etc. she is claimed to have effected on the premises in question in which regard the cases of B.S. Shankar & Co. Ltd. V. Nur Ahmed & Co. Ltd [2003] FJHC 274 and Ram Chand & Others v. Ram Chandra [Civil Appeal No. 21/02S] cited on behalf of the Respondents have a bearing.

[56] For the aforesaid reasons this Appeal shall stand dismissed but in all the circumstances of this case there shall be no costs.

**M. Corea JA**

I have considered the Judgment. I also agree with the findings and conclusions of Justice Dr. Guneratne.

**The Orders of the Court are:**

1. The order dated 31<sup>st</sup> August, 2010 of the High Court of Suva in HBC 298 of 2008 is affirmed and the Appeal dismissed.
2. No costs.



*D. S. Lecamwasam*

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Hon. Justice D. S. Lecamwasam  
**Justice of Appeal**

*Almeida Guneratne*

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Hon. Justice Almeida Guneratne  
**Justice of Appeal**

*M. Corea*

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Hon. Justice M. Corea  
**Justice of Appeal**