



## JUDGMENT

### Lecamwasam, JA

[1] The factual background which led to the instant appeal in brief is as follows:- the first and second plaintiffs purchased Horseshoe Bay Investment Pty Ltd (the 3<sup>rd</sup> plaintiff) which is the registered proprietor of certificate of title No.26169 (CT 26169) being Lot 7 on DP 6618. Although the purchase was complete, the first and second plaintiffs later discovered that despite provisions for easement appearing in certain documents affecting CT 26169, in reality no legal easement existed to access the land. The first and second plaintiffs requested the first defendant, who is a director of the second defendant company (which is engaged in the business of land development, subdivision, and sales to prospective buyers) through which the plaintiffs bought the land in question, to remedy the situation. The first defendant did not respond to the said request positively. Although the Plaintiffs had complained to almost all the relevant authorities they state that it was to no avail.

[2] Against this background, by summons dated 7 January 2013, (as per paragraph 3 of the learned High Court Judge's judgment) plaintiffs sought a judicial remedy and moved for trial on the following preliminary issues:

*3. By summons filed on 7 January, 2013, the plaintiff filed summons for trial on the following preliminary issues:*

- i. Does Lot 7 have appurtenant to it an easement over Lot 8 DP 6618?*
- ii. Does Lot 7 have any right to an appurtenant easement of right of way over area "B", being part of Lot 6 DP 6618?*
- iii. Does Lot 7 have any right to an appurtenant easement of right of way over "Balance CT 20728?"*
- iv. Does Lot 7 have any right to an appurtenant easement of right way over the "linking easement" connecting Lot 8 DP 6618 to the public road?*

[3] As per the statement of claim, in addition to the above preliminary issues raised by the plaintiffs, I find that the plaintiffs have sought substantive relief by way of special

damages, general damages, punitive damages etc and an order of court granting legal access from Labasa highway to the beach front at Lot 29 DP 6804.

[4] Plaintiffs claim that the denial of an easement from CT 26169 to the existing road way, i.e. Lot 8 in DP 6618 and Lot 29 in DP 6804, caused them to suffer damage, which prompted them to file action to claim special damages, punitive damages, and an order granting legal access from the Labasa highway to the beach front Lot 29 DP 6804.

[5] Defendants denied the position taken up by the Plaintiffs. They state that the plaintiffs have physical access from the main highway on to their property and approximately 150 meters of beach frontage as well.

[6] The learned High Court Judge of Lautoka having heard the case filed by the plaintiffs, made the following orders in regard to the preliminary issues raised by the Plaintiffs:

- a) *Lot 7 of DP 6618 has a legal easement of a right of way over Easement B on Lot 6 and Lot 8 of DP 6618, as set out in easement certificate No. 277726.*
- b) *Lot 7 of DP 6618 has a legal easement of a right of way over Lots 1, 3, 4 and 5 of DP 4765, as provided out in easement certificate No. 282541.*
- c) *Lot 7 of DP 6618 has a legal access easement over Lot 1 of DP 5755, in terms of access certificate No. 423133.*
- d) *Lot 7 of DP 6618 has legal access to the Savusavu Trans insular Highway.*
- e) *Lot 7 of DP 6618 has no legal right to an easement over Lot 29 of DP 6804 comprised in certificate of title No. 29050.*
- f) *The plaintiffs shall pay the defendants costs in a sum of \$ 6000 summarily assessed within 21 days of this judgment.*

[7] Being aggrieved by the above orders, the plaintiffs (appellants in this instance) filed the instant appeal on the following grounds of appeal:-

- “1) ***THAT*** *the learned Judge erred in law by failing to give effect to the guiding principle of certainty under the Land Transfer Act [Cap 131] by failing to determine that strict compliances with statutory forms for an easement was required for the creation of a legal easement.*

- 2) **THAT** the learned Judge erred in law by delivering a judgment which is internally inconsistent by making orders numbered 5(a) to 5(d) without proper reasoning to support the said orders;
- 3) **THAT** the learned Judge erred in law in determining that the Appellant's Lot 7 of DP 6618 had a legal easement of a right of way over Easement B on Lot 6 and Lot 8 of DP 6618 which is set out in Easement Certificate No. 277726 as Lot 8 is not listed as a servient tenement as required by section 158 of the Land Transfer Act; Easement B is not recorded as servient tenement in the first schedule in the said Easement Certificate; only on Deposited Plan 6618; rectification by the Registrar of Titles is ultra vires the power in section 131(2) of the Land Transfer Act and there was no evidence before the Court below of the registered proprietors consent to any variation, this is contrary to the requirements of Section 159(1) of the Land Transfer Act and case laws that require the same for the creation of a legal easement. Furthermore, Section 159 of the Land Transfer Act requires that the registration of a certificate of easement in a subdivision assumes that the dominant and servient tenement have the same proprietor, if not a Grant of Easement under section 49 in form 8 of the Land Transfer Act is the appropriate form for a creation and registration. This statutory requirement was not complied with in this case thus the Appellant cannot have legal access to Easement B and Lot 8 on DP 6618 until the order numbered 5(a) has been corrected.
- 4) **THAT** the learned Judge erred in law in determining that the Appellant's Lot 7 on DP 6618 had a legal easement of a right of way over Lots 1, 3, 4 and 5 of DP 4765 as provided out in easement certificate No.282541 as the Appellant does not have legal access to Easement B and Lot 8 (as per ground No.3) which connects the Appellant to the said Lots.
- 5) **THAT** the learned Judge erred in law in determining that the Appellant's Lot 7 of DP 6618 had a legal access easement over Lot 1 of DP 5755 as per access certificate NO.423133 as the Appellant does not have legal access to Easement B and Lot 8 (as per ground No.3) which connects the Appellant to the said Lot 1 of DP 5755.
- 6) **THAT** the learned Judge erred in law in determining that the Appellant's Lot 7 of DP 6618 had a legal access easement over Lot 1 of DP 5755 as per access certificate No. 423133 as Lot 7 of DP 6618 is not a dominant tenement in the 1<sup>st</sup> schedule in the access certificate No.423133 and the Memorial on the Appellant's Certificate of Title is not signed by the Registrar, which is contrary to section 24 of the Land Transfer Act.
- 7) **THAT** the learned Judge erred in law in determining that the Appellant's Lot 7 of DP 6618 had legal access to the Savusavu Transingular Highway

*as the Appellant does not have legal access to Easement B and Lot 8 (as per ground No.3) which connects the Appellant to the said Highway.*

- 8) **THAT** *the learned Judge erred in law in determining that the Appellant's Lot 7 on DP 6618 has no access to Lot 29 of DP 6804 comprised in certificate title No. 29050 recorded as a servient tenement described as "bal CT 20728" on the appurtenant easement in instrument 277726 as this would result in the Appellant not being able to access the nature reserve at Lot 12 on DP 6804 and the foreshore reserve at Savusavu Bay contrary to Provision 9 of the General Provisions of the Town and Country Planning Act 139.*
- 9) **THAT** *the learned Judge erred in law in ordering costs against the Appellant."*

[8] At the argument stage before us, the Appellants stated that they will not be pursuing grounds of appeal 1 and 2.

[9] It appears therefore, that the Appellants challenge only Order 5 (e) of the judgment of the High Court. The dispute is in regard to the right of way over Lot 8 to Lot 7 (Appellants' land) in the nature of a clearly delineated legal easement.

[10] The Appellants alleged Lot 7 is legally inaccessible despite the easements registered on each certificate. The Respondents reject this contention. However, it is not in dispute that the Plaintiffs have physical access to easement B and Lot 8.

[11] I now advert to paragraphs 4-7 of the written submissions of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents which state thus:-

*"4. In the High Court the Appellants submitted that the pie-shaped easement B, and Lot 8 were not shown as servient tenements of Lot 7 in the first schedule of easement certificate no. 277726.*

*5. The state through its Counsel in the High Court submitted that even though there appeared to be an anomaly in the first schedule of easement certificate no. 277726 in that it does not specifically mention Lot 8 and easement B, the matter was laid to rest in the attached DP*

*6618 which made it clear that Lot 7 had an easement for right of way over Lot 8 and easement B. DP 6618 was registered plan which was valid and binding.*

*6. In the High Court, Counsel for the respondents made extensive submissions to demonstrate that easement certificate no. 277726 clearly granted a right of way easement in favour of Lot 7 over Lot B and easement B. The document needed to be read not in piece meal or selectively but in its entirety, by reference to all its parts. Viz: the certification in the first two paragraphs, the first schedule, the second schedule and to the colouring and memoranda shown on the annexed plan DP 6618.*

*7. On the coloured diagram in the annexed plan, DP 6618, the pie-shaped easement B was shown to be part of Lot 6, which was a servient tenement listed in the first schedule and all its portion, the easement for right of way had been granted pursuant to condition 1 of the second schedule. ie... over and along that part of the servient tenement shown colored... on the said deposited plan.”*

[12] The above submissions are reflected in the judgment of the learned High Court Judge at paras 4.16-4.17 which state:-

*“4.16 The second schedule is titled "CONDITIONS OF THE GRANT OF EASEMENTS.." and grants right of way over the "servient tenement shown coloured green and purple on the said Deposited Plan".  
4.17 In my judgment, "Easement B" and Lot 8 are clearly delineated and distinctively coloured in DP 6618 attached to easement certificate no 277726”*

[13] The above clearly demonstrates that the disputed tenements were depicted in colour in certain documents, which would have assisted the learned High Court Judge to arrive at his conclusion on an ocular inspection of the same. It is unfortunate that this Court did not get the opportunity of examining the above documents in colour, although we went to the extent of calling for the original record from the High Court Registry. Though Mr. Patel had tendered these documents to court at a later stage, we found that the said documents were in Grayscale, thus depriving the court of examining the prints in colour in order to acquire a better understanding of the issue.

[14] As suggested by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, the documents no doubt needed to be read not piecemeal or selectively but in its entirety. I add that such reading should also take note of the markings such as the colouring in the document. On perusal of all relevant documents, I am satisfied that all the issues raised in appeal relate to rights over real property, which could only be determined on facts. Hence, I am of the view that it is nothing but fair to refer this matter to the Registrar of Titles. The Registrar of Titles should conduct a thorough inquiry into the factual veracity of the claims in order to bring about a solution as per the provisions of the impacting statutory provisions and to report back to the High Court within a reasonable period of time.

[15] I feel fortified in that view because, it is clear from a perusal of the preliminary issues and the substantive reliefs sought by the plaintiffs in the statement of claim that even if the court deals with the preliminary issues, as prayed for by the plaintiffs, that will not see an end to the litigation between the parties, as other substantive reliefs such as damages needed to be dealt with. The purpose of trying preliminary issues at the outset is to determine if it could decisively bring the litigation between the parties to an end. While the parties to this appeal have not invited this Court to decide on the appropriateness of dealing with the preliminary issues by the learned High Court Judge, this being an appeal from a preliminary ruling of the High Court, it is pertinent to rely on McKechnie J. in **Campion & Ors. v South Tipperary County Council** [2015] IESC 79 which states the objective of a preliminary hearing as follows:

*“...a preliminary direction order is intended to largely, if not fully resolve, not simply those issues which are the subject matter of the direction, but also to have a significant follow on effect on the other issues in the case. On occasion it might be the case for good reason that only a single controversy can be resolved in this way, but normally the process is designed to have a much wider impact than that.”*

[16] The above judgment also sets out the legal position regarding invoking the jurisdiction of court to dispose of certain issues as preliminary issues. The considerations include but are not limited to the following: *“There must result from such a process a saving of time and cost, when the same is contrasted with any other suggested method by which the issues*

*may be disposed of: in default with a unitary trial of the entire action. In the absence of admissions, appropriate evidence will usually be necessary in this regard: impressions of what might or might not be, will not be sufficient.*

*The greater the impact which a decision on the preliminary issue(s) is likely to have, on the entire case, the stronger will be the argument for making the requested order.*

*Conversely if irrespective of the courts decision on that issue(s), there should remain for determination a number of other substantial issues or issue(s) of a substantial nature, the less convincing will be the argument for making such an order.”*

[17] On the strength of the above, on the issue at hand, I find that, even if the preliminary issues were to be dealt with, the claim for other reliefs continues to subsist. Hence I am convinced in answering the issues as suggested by the plaintiff that, the matter (the proceedings could not have stood as being terminated). Neither is it prudent for this Court to engage in what is in essence a factual inquiry, which a trial court is best placed to deal with.

[18] By the reference to the Registrar of Titles, he is required to take steps in terms of section 159 of the Land Transfer Act No.19 of 1971, as amended, to clarify and resolve all issues raised and anomalies led by the plaintiffs, which will assist the High Court to make an accurate finding of facts. Therefore, I order that this case be sent back to the High Court, to enable the High Court to proceed with the main trial (if needed) on receipt of the report of the Registrar of Titles. In view of this order, it is redundant to answer the grounds of appeal.

[19] Accordingly, the case to be returned to the High Court to enable the Registrar of Titles to furnish a report as suggested in my judgment.



**Almeida-Guneratne, JA**

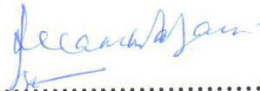
[20] I agree with the reasoning, conclusions and the proposed orders contained in His Lordship's judgment.

**Jameel, JA**

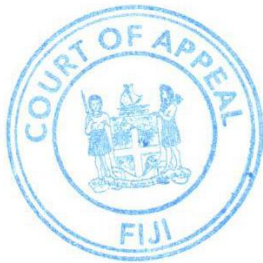
[21] I agree with orders proposed by Lecamwasam, JA.

**Orders of the Court:**

1. *The case is to be returned to the High Court to enable the Registrar of Titles to furnish a report.*
2. *Parties to bear their own costs.*



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**Hon. Justice S. Lecamwasam**  
**JUSTICE OF APPEAL**



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**Hon. Justice Almeida Guneratne**  
**JUSTICE OF APPEAL**



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**Hon. Justice Farzana Jameel**  
**JUSTICE OF APPEAL**