

THE COURT OF APPEAL, FIJI
[ON APPEAL FROM THE HIGH COURT]

Civil Appeal No. ABU 042 of 2020
(HBC No. 144 of 2015)

BETWEEN : **SUNIL GUPTA SEN**
Appellant

AND : **RAIDU BHIM KRISHNA**
RAMESH NAIDU
Respondents

Coram : **Almeida Guneratne, JA**

Counsel : **Mr. N. K. Padarath for the Appellant**
: **Mr. E. Maopa for the Respondents**

Date of Hearing : **14 October 2020**

Date of Ruling : **26 October 2020**

RULING

Introduction

[1] This is an application filed by the Respondents to strike out the Appellant's appeal against the decision of the High Court dated 1st May, 2020. By that decision the High Court determined two preliminary issues under Order 33 Rule 3 of the High Court Rules (1988) on the invitation of the parties which issues had been raised at the pre-trial conference.

The two Preliminary issues

[2] They were:

(A) Whether the Plaintiff (Appellant) is prevented from instituting this action pursuant to Section 59(d) of the Indemnity Guarantee and Bailment Act (Cap 332)?

(B) Whether the action herein is Statute barred pursuant to Section 4 of the Limitation Act?

The Plaintiff's (Appellant's) claim

[3] Based on the facts averred in his statement of claim the Appellant claimed against the Respondents (defendants) jointly and severally for:-

a) A declaration that the Plaintiff is the owner of and has exclusive right of possession of approximately 1000m² in area of land compromised in CT 20584 and more clearly defined and demarcated as Lot 1 on DP 5563.

(b) An order requiring the Defendants to take all steps necessary to transfer approximately 1000m² in area of land compromised in CT 20584 and more clearly defined and demarcated as Lot 1 on DP 5563.

(c) An order requiring the Defendants to take all steps to regularize the subdivision as per Deposited Plan No. 5563 and have issued a separate title over the land defined and demarcated as Lot 1 on DP 5563 into the name of the Plaintiff.

(d) The Defendants and/or their servants and/or their agents be restrained from selling, alienating or in any way dealing with the land under Lot 1 on DP 5563.

(e) Interest on 10% per annum from the date of the breach to the date of judgment under the Law Reform (Miscellaneous Provisions) (Death and Interest) Act Cap 29, Laws of Fiji on all sums awarded.

(f) Costs.

The Defendants (Respondents) Counter-claim

[4] Whilst denying the Appellant's claim, the Respondents, premised on the averments contained in their Statement of Defense, prayed for:-

(a) Special damages in the sum of \$4,250.00

(b) General damages for:

- (i) Trespass and or Encroachment;*
- (ii) Frustration and mental distress;*

(c) A Declaration that the portion of the estate land in dispute is part of the estate of Krishna Raidu and the Plaintiff has no interest therefrom.

(d) Injunction against the Plaintiff not to interfere whatsoever with the estate land in dispute and or the peaceful enjoyment of the whole estate land.

(e) Interest at the rate of 6% under the Law Reform (Miscellaneous Provisions) (Death & Interest) Cap 29.

(f) Further or any other orders the Court deems just and necessary.

Orders made by the High Court in its decision

[5] At the conclusion of the hearing on the said two preliminary issues, the learned Judge upheld the Respondents' contentions on preliminary issue (A) regarding it was not necessary to deal with preliminary issue (B) and made His Lordship's Orders thus:-

"Orders

- 1. The plaintiff's claim is dismissed.*
- 2. The defendants' are entitled to costs and the costs are reserved for a later decision.*
- 3. Mention on 15th May, 2020 to fix a hearing date for the defendants' counterclaim".*

[6] It is against that decision of the High Court the Appellant preferred the present Appeal to this Court.

[7] Pending the Appeal the Respondents filed the present application relying on the provisions of the Court of Appeal Act (Cap. 12).

Was the decision of the High Court comprised in its Orders Interlocutory or final in nature?

[8] That is the question that awaits a determination by this Court.

The Respondents' Position

[9] Mr. Maopa on behalf of the Respondents in his brief opening submissions (while relying on his written submissions dated 26 August, 2020) submitted that, the impugned decision of the High Court is interlocutory in nature and therefore the Appellant was not entitled to lodge a direct appeal against it without seeking and obtaining leave of this Court to appeal.

The Appellant's Response

[10] As against the Respondents contention Mr. Padarath for the Appellant submitted that:-

On a reading of Order 33 Rule 7 of the High Court Act (Cap 13A), and its application to the Appellant's claim the matter stood at an end.

The Respondents' Submissions in Reply

[11] Mr. Maopa in reply submitted that,

- (a) The High Court in its decision only disposed of the Appellant's claim and the action was still alive.
- (b) The situation might have been different if the Respondents' counter claim was also dismissed.
- (c) The appellant's claim as well as the Respondents' counter claim were interlinked and constituted "the action".
- (d) Therefore, Order 33 Rule 7 was not conclusive of "the action".
- (e) Accordingly, on the "Application test" which has been established in the Fijian jurisprudence, the decision of the High Court in question was interlocutory in nature.

[12] Mr. Maopa thus concluded that, the Appellant needed to have sought and obtained leave to appeal the High Court decision. In failing to do so, "the appeal" was liable to be struck down.

Assessment of the rival submissions

- [13] Learned Counsel for the Respondents' in his written submissions has referred to and relied on several authorities in support of his contention.
- [14] Woodstock Homes (Fiji) Ltd v Rajesh [2008] FJCA 104 dealt with an appeal from a decision dismissing an application to set aside a default judgment.
- [15] The other authorities referred to are in relation to the two rival schools of judicial thought as to what should be the approach, "the application" or "the order" approach, making a case in favour of the "application approach" on the basis of the English case in White v. Brunton [1984] QB 570 and the leading case in Fiji (Vide: Gounder v. Minister for Health [2008] FJCA 40).

[16] I pause at this point in saying that I have no quarrel with the principles enunciated in those cases nor do I need to concern myself with the said rival schools of Judicial thought.

[17] Having said that, while I affirm what I enunciated in the case of Gary Stephens & Others v Aren Joseph Nunnik [ABU 075 of 2014, 26 February, 2016) (which Counsel for the Appellant referred to in his submissions, even in regard to the concept of “split trial”, which I dealt with in that case). I found that the instant case, in the facts and circumstances of it, stand on a different footing requiring a precedent to be set down.

[18] With that objective in mind I proceed to make my determination with reasons therefor as follows:

Determination

[19] I begin by first looking at Order 33 Rule 3 of the High Court Rules which decrees thus:-

Time, etc. of trial of questions or issues (O.33.r.3)

“3. The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.”

[20] Next, I gave my mind to Order 33 Rule 7 of the said High Court Rules which states thus:

Dismissal of action, etc. after decision of preliminary issue (O.33, r.7)

“7. If it appears to the Court that the decision of any question or issue arising in a cause or matter and tried separately from the cause or matter substantially disposes of the cause or matter or renders the trial

of the cause or matter unnecessary, it may dismiss the cause or matter or make such other order to give such judgment therein as may be just.”

- [21] Finally, I looked at Order 15 of the High Court Act (and Rules) as to Causes of Action, Counter Claim and Parties.

Joinder of Causes of Action (O. 15, r.1)

1. *“(1) Subject to rule 5(1), a plaintiff may in one action claim relief against the same defendant in respect of more than one cause of action –*
 - (a) If the plaintiff claims, and the defendant is alleged to be liable, in the same capacity in respect of all the causes of action, or*
 - (b) If the plaintiff claims or the defendant is alleged to be liable in the capacity of executor or administrator of an estate in respect of one or more of the causes of action and in his personal capacity but with reference to the same estate in respect of all the others, or*
 - (c) With the leave of the Court.*
2. *An application for leave under this rule must be made ex parte by affidavit before the issue of the writ or originating summons, as the case may be, and the affidavit must state the grounds of the application.*

Counterclaim against plaintiff (O. 15, r.2)

2. *(1) Subject to rule 5(2), a defendant in any action who alleges that he has any claim or is entitled to any relief or remedy against a plaintiff in the action in respect of any matter (whenever and however arising) may, instead of bringing a separate action, make a counterclaim in respect of that matter; and where he does so he must add the counterclaim to his defence.*
 - (2) Rule 1 shall apply in relation to a counterclaim as if the counterclaim were a separate action and as if the person making the counterclaim were the plaintiff and the person against whom it is made a defendant.*

(3) A counterclaim may be proceeded with notwithstanding that judgment is given for the plaintiff in the action or that the action is stayed, discontinued or dismissed”.

Application of the said Rules to the instant case

- [22] On an application of the said Rules taken collectively, I have no hesitation in concluding that, on the “application test” (or even for that matter, on the rival “order test”) the Appellant’s action had stood dismissed.
- [23] When the learned High Court Judge in his orders gave a mention date, it was for the Respondents to proceed with their counter-claim. There was no causal link between the Appellant’s action that stood dismissed and the Respondents counter-claim which stood to be determined as “a separate action” in the capacity of plaintiffs.
- [24] The Appellant’s claim was determined “finally to his detriment and his option was to air his grievance by way of appeal for which he was not required to seek and obtain leave for that purpose.

Conclusion

- [25] On the basis of the reasoning above, I conclude that, the decision of the High Court was final and not interlocutory in so far as the Appellant was concerned.
- [26] Consequently, I lay down as a proposition for precedential value that, when a plaintiff’s action is dismissed, irrespective of there being a counter-claim by a defendant, there being no action kept alive as far as such plaintiff was concerned, such order dismissing his action was final and not interlocutory for which leave to appeal was not required.

[27] Accordingly, I proceed to make my orders in this matter as follows:

Orders of Court:

1. The Respondents' application to strike out the Appellant's appeal against the decision of the High Court dated 1st May 2020, is refused and accordingly dismissed.
2. On the principle that, Costs follow the event, the Respondents shall pay as costs of this event to the Appellant a sum of \$1,500.00 within 21 days from the date of this Ruling.
3. The Registrar is directed to have this case mentioned on 26 November, 2020 to fix dates for the hearing of the Appeal.



Almeida Guneratne

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Almeida Guneratne
JUSTICE OF APPEAL