

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT

CIVIL APPEAL NO. ABU 112 of 2018
High Court No. HBC 034 of 2014

BETWEEN : **MISHRI PRASAD JAS**

Appellant

AND : **SANT RAM**
SHIU RAM

Respondents

Coram : Almeida Guneratne, JA

Counsel : Mr A Sen for the Appellant
Mr N Prasad for the Respondent

Date of Hearing : 18 May, 2020

Date of Ruling : 05 June, 2020

RULING

[1] This is an application for leave to appeal and enlargement of time to appeal against the judgment of the High Court dated 4 July, 2018 exercising its appellate jurisdiction against a decision of “the Master” dated 11 March, 2015.

- [2] Against the “Master’s decision” leave to appeal was sought by the Appellant which was refused by the learned High Court Judge which led to the present application for leave to appeal and extension of time to appeal against the judgment of the said High Court judgment of 4 July, 2018.

The Nature of the Proceedings initiated by way of Originating Summons

- [3] The Appellant is described as Appellant/ (Plaintiff/Intended Appellant). I shall not consume time in dwelling on the background as to how the Appellant came by way of that status. The captions provided in Sant Ram’s Affidavit in opposition dated 22 November, 2018 to the present leave to appeal application and the Affidavit in Reply dated 4 May, 2020 of Roshni Bala (the Appellant) reflect that background. The description of the parties given therein also bring out the nature of the dispute and the relationship of the parties in the context of that dispute.
- [4] The dispute simply boiled down to whether, within the framework of the Land Transfer Act (1971), the land involved held under CT 21230 was held as “tenants in common” or as “joint tenants”.
- [5] By originating summons the Appellant sought, *inter alia*, a declaration by “the Master” to sever the claim of the Respondents that the land is held as a “joint tenancy”.

The Master’s Decision

- [6] By his decision (11 March, 2015) “the Master” dismissed the Appellant’s summons to “sever the said joint tenancy” (vide: paragraph [36] of his Ruling).

The High Court Decision

- [7] For purposes of expediency and elucidation I shall reproduce below the material parts of the High Court decision as follows:

“7. *The Master did not say he dismissed the application because he did not have the power. The Plaintiff never objected to the Master hearing the*

matter and did not object that he had no jurisdiction. Finally she said there would be prejudice to the Defendants.

8. *The Plaintiff's Counsel in his reply said the parties never gave consent to the Master to extend his jurisdiction which they could not do in any event. There was no prejudice because the parties were sitting on the lots.*
9. *At the conclusion of the arguments I said I would take time for consideration. Having done so I shall now deliver my decision. The sole issue is whether there is anything for the Plaintiff/Intended Appellant Roshni Bala to appeal against the Ruling. The Master in his Ruling did not grant any of the declarations; neither did he order both Defendants to hand over the title to the Plaintiff; nor did he order both Defendant to execute the Transfer etc which were what the Originating Motion sought.*
10. *Instead the Master in the Ruling concluded the application to sever the joint tenancy is dismissed. Therefore, if I may say so with respect I fail to see what Counsel for the Plaintiff means when he says he is asking for the Ruling to be reversed on the grounds that the Master had no jurisdiction to grant the order (therein) under O.59 r.2 HCR. It is as clear as daylight that he granted no order whatsoever.*
11. *Consequently there is nothing for me to reverse, which disposes of this Application. As there is nothing to appeal, it follows there can be no reason to substitute Roshni Bala for the Plaintiff/Intended Appellant.*
12. *Before I pronounce my decision I shall deal with the issue of jurisdiction. My careful perusal of Order 59 rule 2 HCR leads me to opine that a Master has no jurisdiction with regard to the matters applied for in the Originating Motion (OM). But nothing turns on this in this matter for the simple reason the Master did not grant any of the reliefs sought in the OM.*
13. *In fine, I shall dismiss the Application, decline to grant any of the orders sought therein and shall order the Plaintiff/Intended Appellant to pay both Defendants, the costs of this Application (Summons) summarily assessed at \$750.00"*

[8] In that background matrix I shall proceed to my determination in the light of the submissions made by the respective Counsel.

Determination

[9] I propose to deal with the issues arising in this matter in the following order.

The Jurisdiction issue of “the Master” to have entertained the Appellant’s application by way of Originating Summons

[10] To begin with, it is the Appellant who invoked the jurisdiction of “the Master”. After the decision of “the Master” had turned adverse to him he was (before the High Court) and is now before this Court objecting to that jurisdiction.

[11] I cannot resist the comment in that regard that, the Appellant’s lament smacks of that proverbial situation of a man killing his parents and when charged with murder pleads for clemency on the ground that he has been rendered an orphan.

[12] Be that as it may, it is trite law that parties cannot even by consent confer jurisdiction on a Court which the legislature has not bestowed it with.

[13] While the Appellant’s conduct cannot be condoned, it is to the credit of the Respondents’ counsel who, as he submitted, while conceding that “the Master” could be said not to have had express power to have entertained the Appellant’s application by “originating summons”, nevertheless, had the jurisdiction (meaning “the power to decide”) to determine the matter placed before him. Counsel re-iterated in his oral submissions what he had said in his written submissions thus:

“(d) By doing this the Master had only to consider the legal question of whether there was a severance of Joint Tenancy. This became a chamber matter which he had jurisdiction to consider.

(e) Order 59 r.2 allows for the Master to hear chamber matters with a few exceptions which are;

- (i) Injunctions, other than injunctions by consent or in connection with or ancillary to charging others;*
- (ii) Proceedings involving the liberty of the subject;*
- (iii) Criminal proceedings;*
- (iv) Proceedings under the Family Law Act 2003;*

- (v) *Appeals from Magistrates' Courts or any other tribunal;*
- (vi) *Applications for leave to seek judicial review; or*
- (vii) *Applications for constitutional redress;*

- (f) *These exceptions do not cover the Master's ability to hear chamber matters heard on affidavit evidence to answer a legal question posed.*
- (g) *With Intended Plaintiff's Originating Motion amended to only consider a question of law the Master had jurisdiction to hear the same.*

[14] At this point I have to say that the High Court had not addressed the issue in that perspective, nevertheless, in the result, it cannot be faulted on the jurisdiction issue as articulated at paragraphs [7] and [8] of its decision.

[15] Consequently, I reject the arguments advanced by learned Counsel for the Appellant on the issue of jurisdiction of "the Master" and leave it open as a question of law to be determined by the full Court or the Supreme Court as to whether "the Master" in the context of a matter arising within the framework of the Land Transfer Act, "initiated by originating summons" could nevertheless have entertained it as a matter that could be dealt with as a "matter in chambers".

[16] I say that for the reason that, I am not inclined to grant leave to appeal to the Appellant on the said jurisdiction issue. I shall elaborate on that at the conclusion of this determination.

Does the High Court Decision bear Scrutiny?

[17] The learned High Court Judge held thus:

"The sole issue is whether there is anything for the ...Appellant ...to appeal against ...The Master ...did not grant any of the declarations, neither did he order both Defendants to hand over the title to the plaintiff, nor did he order both Defendant(s) to execute the transfer etc which were what the originating motion sought." (Paragraph [9]).

Instead the Master in the Ruling concluded 'the application to sever the joint tenancy is dismissed.'

Consequently there is nothing for me to reverse ... (paragraph [11]).

In time I shall dismiss the application, decline to grant any of the order sought therein ... (paragraph [13]).

- [18] How could it be said that, the Appellant had nothing to appeal against when “the Master” had in his decision dismissed the Appellant’s application to sever the joint tenancy? Was not there that crucial substantive issue on the merits for the learned Judge to either affirm or to reverse the Master’s decision given the fact that, even assuming “the Master” had no jurisdiction to deal with the said matter that had been put before him by originating summons but could have been argued that “the Master” had jurisdiction to deal with it on the exercise of his jurisdiction “in Chambers”?
- [19] For the aforesaid reasons I am of the view that, at the hearing before me, the issue of the Master’s jurisdiction being reduced to a red-herring, which in any event, I have already held the Appellant was not entitled to raise (having himself invoked that jurisdiction), the substantive issue on the merits was whether there was “a joint tenancy” or “a common tenancy”, in which regard “the Master” dismissed the Appellant’s application to ‘sever the joint tenancy’ (and therefore constituting a decision that affected the Appellant’s claim). In holding that “there is nothing for me to reverse”, the learned High Court Judge non-directed and/or misdirected himself.

In the matter of the Application for Leave to Appeal and Extension of time to appeal

- [20] The criteria in that regard are well settled in the Fijian judicial jurisprudence the decisive criterion being as to whether there is “an arguable issue involved” perhaps the only other criterion to address being prejudice to parties (by-passing the other considerations such as “length of delay” and “reasons for the delay”).

- [21] In so far as the “prejudice” criterion is concerned all parties involved are in occupation of the several lots on the land in question. This is not disputed.
- [22] In regard to the overriding criterion as to whether there is an “arguable issue”, I have no doubt in the facts and circumstances of this case, that criterion stands established viz: whether those facts and circumstances establish “a joint tenancy” or “a common tenancy”
- [23] Sitting as a Single Judge it is not my function to point out to errors in “the Master’s” decision, ironically being said that he had acted without jurisdiction and the learned High Court Judge having declined (in effect) to assume jurisdiction on the merits.
- [24] Having said that I proceed to draw my conclusions and make my determination as follows:
1. The Appellant’s contention in regard to the jurisdiction of “the Master” is rejected.
 2. The High Court Judge’s decision as articulated by me at paragraph [19] of this Ruling amounts to “a non-direction” and/or “a misdirection”.
 3. Taking into consideration what I have articulated at paragraph [20] to [23] above of this Ruling, I am inclined to allow this application for leave having regard also to **paragraph 4 only** of the Appellant’s (Roshni Bala’s) Affidavit dated 4 May, 2020 and the Affidavit of Sant Ram’s (the first named Respondent) dated 23 November, 2018 in general.
 4. Consequently, I am of the view that, there are intricate issues for the full Court (arising in this case) to go into (including the scope and content of Order 59 Rule 2 of the High Court Act, should the full Court see it necessary to express its views thereon.

[25] Accordingly, I proceed to make my Orders as follows:

Orders of Court

1. *Leave to appeal and extension of time to appeal the judgment of the High Court dated 4 July 2018 (as well the decision of “the Master” dated 11 March, 2015) is granted.*
2. *Taking into consideration the Appellant’s conduct in pressing the argument regarding “the jurisdiction issue” I order the Appellant to pay costs to the Respondents in a sum of \$750.00 each within 28 days of Notice of this Ruling as an exceptional situation to the principle that costs follow the event.*
3. *Upon compliance with Order 2 above, the Appellant may advise himself as to the consequential steps he should take as prescribed by law to prosecute this Appeal.*



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Almeida Guneratne
JUSTICE OF APPEAL