IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 077 OF 2022
[Lautoka Civil Action No. HBM 32 of 2021]

BETWEEN	:	**BENNADETTE aka BERNADETTE CHINNA aka BERNADETTE SHANKARAN aka BERNADETTE EVELYN SHANKARAN** ***Appellant***
AND	:	**LEELA WATI aka LILAWATI SHANKARAN** ***1ST Respondent***
AND	:	**REGISTRAR OF TITLES** ***2ND Respondent***
AND	:	**DIRECTOR OF LANDS** ***3RD Respondent***
Coram	:	**Prematilaka, RJA** **Qetaki, JA** **Morgan, JA**
Counsel	:	**Mr. R. Vananalagi and Ms. J. Singh for the Appellant** **Mr. D. S. Naidu and Mr. K. Chand for the 1st Respondent** **Mr. S. Kant for the 2nd and 3rd Respondents**
Date of Hearing	:	**05 July 2024**
Date of Judgment	:	**26 July 2024**

JUDGMENT

Prematilaka, RJA

[1] I agree with reasons, conclusions and orders in the judgment of Morgan, JA.

Qetaki, JA

[2] I have considered the judgment of Honourable Morgan, JA in draft and I agree with it, the reasons and proposed orders.

Morgan, JA

Introduction

[3] This is an appeal against a Ruling of Justice Anare Tuilevuka ("the Judge") delivered at the High Court in Lautoka on the 28th of October 2022 ("the impugned ruling") dismissing an application by the Appellant to dissolve an order for an interim injunction granted by the Judge in the matter on the 11th of February 2022 ("the first ruling"). In the first ruling the Judge made the following orders:-

> 1. The first defendant or her servants and/or agents and/or employees are hereby restrained from dissipating, transferring, selling, dealing with, charging, mortgaging, assigning or disposing off the three properties in question which are all now comprised in Certificates of Title 22074, 22079 and 21906 until further orders of this Court.
>
> 2. The Registrar of Titles is hereby restrained from registering any dealing, or charge or instrument pertaining to the three properties in question which are all now comprised in Certificates of Title 22074, 22079 and 21906 until further orders of this Court.
>
> 3. The first defendant has succeeded in their application and are entitled to their costs which I summarily assess at $1,500 (one thousand five hundred dollars) only.
>
> 4. The first defendant is at liberty to file an application to dissolve the interim injunctive orders granted above.

[4] It is noted that although the Judge referred to the subject properties (hereinafter "the properties") as Certificates of Title it is evident from the court documents filed and the ruling itself that the properties are in fact State Leases. This oversight is not material to the issues in this appeal however.

[5] It was in pursuance of the fourth order above that the Appellant applied by Summons to dissolve the interim injunction and from which the impugned ruling arises.

[6] In the impugned ruling the Judge made the following orders against which the Appellant now appeals:-

> "12. In the final, I dismiss the application to dissolve the interim injunction. The plaintiff is to file and serve a Writ of Summons and Statement of Claim in twenty one days from the date of this ruling. Costs to the defendant which I summarily assess at $1,000.
>
> 13. The consolidation of this matter with other related matters will be formalized after the plaintiff has paid the costs ordered above and after the service of the Writ of Summons and Statement of Defence."

[7] By this appeal the Appellant asks that the impugned ruling be wholly set aside, varied and/or revoked and for orders that the interim injunction granted on the 11th February 2022 and continued on 28th February 2022 be dissolved with costs of this appeal.

[8] The Appellant relies on the following grounds in support of her appeal.

1. The Learned Judge erred in law in dismissing the application to dissolve the interim injunction granted on the 11th February, 2022 when:

   (i) There was an absence of an application for injunction: and/or

   (ii) Granting an interim injunction on a general prayer in the notice of motion for extension of caveat under any further order without such order being specified: and/or

   (iii) The granting of an injunction on the basis of (ii) above on his own initiative failed to comply with his duty to act fairly and reasonably by failing or neglecting to give the appellant an opportunity of addressing and/or responding to the issue of granting an interim injunction and taking into account irrelevant factors which was not raised/sought or argued by the 1st Respondent; and/or

   (iv) In granting the injunction in the absence of a substantive action; and/or

   (v) Allowing the 1st Respondent to file a fresh Writ of Summons which was an abuse of process.

2. The Learned Judge erred in law and in fact in failing to find that the 1st Respondent had no legal right that was or was likely to be infringed or cause of action and further erred:

   (i) By holding that the 1st Respondent had a prima facie claim to the Estate of Ganesh Shankaran because of the testamentary bequest from which she stands to benefit and in the absence of Writ of Summons;

   (ii) By relying on the other actions before the Court to justify the grant of an injunction;

   (iii) The grant of injunction did not satisfy the principles enunciated in the ***American Cyanamid v Ethicon [1975] UKHL1; 1975 AC 396***.

3. The Learned Judge erred in law when in not dissolving the interim injunction, on the grounds of material non-disclosure by the 1st Respondent in particular that there was an action already before the High Court sitting at Lautoka being ***Action Number HBC No. 157 of 2015*** where in the 1st Respondent's Claim had been struck out and the only issue for determination is the Appellant's counter-claim.

4. The Learned Trial Judge earned law in not dissolving the injunction and by failing to consider:

   (i) The 1st Respondent had failed to comply with the orders of the Court requiring her to file a Writ of Summons and Statement of Claim and was in contempt;

   (ii) There was no application for consolidation when he so ordered.

5. The Learned Judge erred in law by misconstruing the submissions by the Appellant which he referred to at [paragraph 10] of his judgement which led him to hold *"I also acknowledge that the rules do provide that in exceptional urgent cases an interim injunction might be granted ex-parte with directions to file a serve writ of summons and Statement of Claim"* when this particular case did not warrant such a discretion which errors wholly or in part caused him to exercise his discretion against allowing the application in favour of the Appellant and erroneously holding that the circumstances allowed him.

Background

[9] The background of the action in the High Court was a dispute between competing Executors/Administrators of an estate (a daughter and daughter in law of the deceased) concerning the properties.

[10] As a consequence of the dispute the 1st Respondent had registered a caveat against the properties ("the caveat"). The Appellant filed a notice to remove the caveat and to protect the caveat the 1st Respondent filed an Exparte Notice of Motion for an Order to extend the caveat until further order of the Court and for costs and for any other order that the Court deemed just and equitable in the circumstances. (The underlying is mine.)

[11] In the first ruling the Judge noted at paragraph 6 of his ruling that he considered the following, to be key points, from the Affidavit filed in support of the Notice of Motion.

> "(i) The case concerns the estate of the late Ganesh Shankaran ("Shankaran")
>
> (ii) Shankaran died on 11 December 1986
>
> (iii) At the time of his death, Shankaran was the registered proprietor of State Lease No. 6476. This land has a total acreage of 13.7189 hectares.
>
> (iv) Shankaran's Last Will and Testatment is dated 25 November 1957
>
> (v) By the said Will, Shankaran had bequeathed his estate in equal shares to his wife Alumelu and also to his three children, namely, Vijay Shankaran ("Vijay" son), Prem Shankaran ("Prem" son) and Leela Wati ("Leela" daughter – plaintiff).
>
> (vi) Shankaran also appointed his wife, Alumelu, as executrix and trustee of the said Will upon his death (she was granted Probate No. 10518 on 13 August 1969).
>
> (vii) Alumelu later died on 05 April 2000 leaving the estate un-administered.
>
> (viii) Upon her death, letters of administration de-bonis-none of the estate of Shankaran was granted to Prem on 25 May 2001.
>
> (ix) Vijay died on 23 June 1995. Prem died on 14 May 2011.
>
> (x) Upon Prem's death, his surviving wife, Bernadette (first defendant) sole executrix and trustee of the estate.
>
> (xi) Notably, Shankaran had placed the following condition on his Will:
>
> (a) That his estate is to be distributed when his youngest child, Prem, attains the age of twenty-one ("period of distribution")
>
> (b) That Leela is only entitled to her equal share in the estate if she remains unmarried at the time of the "period of distribution", that is, when Prem attains the age of twenty-one.
>
> (xii) Prem was born on 16 July 1947. He attained the age of twenty-one on 16 July 1968. Leela married on 05 April 2000 when Prem was fifty-three years of age.

(xiii) It appears that Prem had started subdividing the estate property whilst he was alive. Bernadette would carry on the work after the demise of Prem. This sub-division work is all still work in progress when Leela instituted these proceedings.

(xiv) Leela placed a caveat on the property on 08 October 2012."

The Proceedings before the High Court

[12] The 1st Respondent had commenced the proceedings by way of an Ex-Parte Notice of Motion to extend the caveat supported by an affidavit pursuant to Section 110 and 112 of the Land Transfer Act and Order 8 of the High Court Rules 1988.

[13] The Appellant was in due course served with the Notice and Affidavit in Support and on 14 December 2021 the Judge extended the caveat until the 25th January 2022 and gave directions for a hearing of the Notice on that date and directions for the filing of an affidavit of the Appellant in response. The Judge also ordered that the 1st Respondent file and serve a Writ of Summons and Statement of Claim within 14 days.

[14] At the time of the hearing on the 25 January 2022 the 1st Respondent had not filed a Writ of Summons and Statement of Claim as directed.

[15] At the hearing on the 25th January 2022 the Appellant submitted that the 1st Respondent's application to extend the caveat should not be allowed for the following reasons:-

a) The 1st Respondent had failed to properly commence the action by an originating process.

b) The 1st Respondent had failed to attach a copy of the caveat to her affidavit in support.

c) The 1st Respondent had failed in her said affidavit in support to disclose a pending matter in the High Court ("referred to in these proceedings and in this judgment as HBC 157 of 2015") where the 1st Respondent's Statement of Claim raised the same issues as were raised in the 1st Respondent's Affidavit in Support which Statement of Claim had been

struck out. This fact the Appellant submitted was a material non-disclosure preventing the granting of an order to extend the caveat.

[16] Significantly for the purposes of this appeal the Judge made the following comments with reference to the material non disclosure referred to above.

[17] In paragraph 20 of his judgment;-

> "…I would not exercise my discretion accordingly on account of the plaintiff's failure to comply with directions and also on account of the plaintiff's non-disclosure of the fact that there is a related proceeding pending before the Master…"

[18] Also at paragraph 26 of the judgement;-

> 26. "I agree with Mr. Narayan's submission that there is a duty placed on a litigant who makes an ex-parte application to make a full and frank disclosure of all material facts and to be candid and must state the facts clearly."

[19] The Judge accepted the Appellant's submissions set out above and decided based on the failure to commence the action by an originating process, the said material non-disclosure and the failure to attach a copy of the caveat with the application that the caveat should not be extended and it has now lapsed.

[20] Having reached the conclusion that the caveat should not be extended the Judge decided however that the matter should not end there. He noted that the 1st Respondent in her Notice of Motion had also prayed for any other order that the Court may deem just and equitable in the circumstances and on the basis of that prayer proceeded to grant the interim injunction which is the subject of this appeal.

Parties on appeal

[21] Although an appearance was made at the hearing before this Court for the 2nd and 3rd Respondents by Counsel from the Attorney General's Office they did not file written submissions nor address the Court at the hearing nor otherwise take part in the appeal.

Preliminary matter on appeal

[22] At the commencement of the Appeal Counsel for the 1st Respondent contended, as a preliminary matter, that the record of the proceedings certified by the Registrar of the High Court was incomplete. He submitted that he had not been consulted by the Appellant when the record was being prepared pursuant to Rule 18(3) of the Court of Appeal Rules. He did concede however that there had been correspondence between his firm and the Appellant's Solicitors regarding documents to be included in the record at the time of its preparation. He also acknowledged that he had received the Court Certified Record on the 14th June 2023 after it had been certified by the Registrar of the High Court on the 7th of June 2023, more than a year before the matter came up for hearing before this Court.

[23] Counsel for the 1st Respondent submitted that his agents had raised this issue when the matter came up before a Single Judge of this Court for mention and assignment of a hearing date. There was no record of this on the Court File however.

[24] Counsel for the 1st Respondent stated that he wished to hand in a bundle of documents pertaining to a related court action which he considered should be added to the Record, for the assistance of the Court. Counsel for the Appellant objected to the documents being handed in and submitted that the documents the 1st Respondent was attempting to put before this Court were not documents that the Judge had before him when he made the impugned ruling.

[25] The Court adjourned for a short time to consider the 1st Respondent's application. The Court considered the 1st Respondent's application to be irregular to say the least. The 1st Respondent had received the Certified Record more than a year before the hearing and did not make any application prior to the hearing for amendment of the record.

[26] Taking this into consideration and the objection and submissions of the Appellant against the Court receiving the documents this Court declined to accept the documents and proceeded with the hearing of the appeal.

[27] The Judge had initially directed when the application to extend the caveat had first come before him on the 14th December 2021 that the 1st Respondent file a Writ of

Summons and Statement of Claim within 14 days. The 1st Respondent did not comply with this direction.

Discussion

[28] I will now consider the Appellants grounds of appeal.

Ground 1 – Absence of application and no substantive action

[29] I will say at the outset, for reasons expressed later in this judgment, that it was not appropriate in the circumstances of this case for the Judge to grant an interim injunction under the general fair and equitable prayer in the Notice of Motion to extend the caveat referred to above. The 1st Respondent had not filed a writ of summons and statement of claim as ordered by the Judge upon which an application for interim injunction could be based nor was there any application before the Court for an interim injunction.

[30] Having rightly refused the application to extend the caveat it is evident that the Judge was seeking to err on the side of caution by granting the interim injunction with liberty to the Appellant to file an application to dissolve. The Judge should not have proceeded in this manner on basic principles of fairness alone. The Appellant was not given the opportunity to be heard when the interim injunction was granted and was burdened with the task of having to apply for the interim injunction to be dissolved.

[31] Having said that, the predominant issue raised under the Appellant's first ground of appeal is whether the Judge was correct in granting the interim injunction in the first ruling and refusing to dissolve the injunction in the impugned ruling when there was no cause of action before him which entitled the 1st Respondent to the substantive relief of an injunction.

[32] The Judge had found that the proceedings filed by the 1st Respondent seeking to extend the caveat must be dismissed because it was filed as if it was as an interlocutory proceedings without being supported by a proper originating process.

[33] The Judge had also accepted as noted above that the 1st Respondent's Statement of Claim in HBC 157 of 2015 had been struck out.

[34] There was therefore no cause of action before him when he made the interim injunction or when he refused the application to dissolve the injunction. Indeed the 1st Respondent had failed to comply with directions of the Judge in this respect.

[35] The Appellant citing a number of established English authorities contended that an injunction application is generally required to be accompanied by a writ, summons and affidavit. I agree with this proposition.

[36] Counsel also referred this Court to a decision of the Supreme Court in **Wakaya Limited v Chambers (2012) FSC9** where the Supreme Court made the following statement:-

> "Therefore in absence of a cause of action the granting of the interim injunction was erroneous and consequently the refusal to dissolve same would also be erroneous"

[37] Although the Appellant's Counterclaim in HBC 157 of 2015 was extant the Appellant's counterclaim in that action did not comprise a cause of action to the 1st Respondent. Her Statement of Claim in that action had been struck out.

[38] For the reasons set out above I hold that the Judge had erred in law by granting the interim injunction in his first ruling and refusing to dissolve the injunction in the impugned ruling when there was no cause of action before him which entitled the 1st Respondent the substantive relief of an injunction. Even if this were not the case, I consider that the Judge erred, applying settled principles, in granting the interim injunction and declining to dissolve it which I discuss in considering the remaining grounds of appeal.

Ground 2 – Injunctive relief

[39] Having evidently erred on the side of caution by granting the interim injunction, the Judge had the opportunity to re-visit more comprehensively the justification and merits of the injunction when considering the Appellant's application to dissolve the injunction.

[40] The Appellant correctly submitted in respect of this ground, that the law in Fiji regarding the granting of interlocutory injunctions, including the exercise of the Court's discretion in such matters, was well settled. Generally, it was submitted that

the law followed and applied the principles enunciated in **American Cyanamid v Ethicon** (ibid) ("the American Cyanamid case") and that is in considering whether to grant injunctive relief a court must make an enquiry as to whether there is:

a) a serious question to be tried

b) damages could be an adequate remedy; and

c) the balance of convenience favours the grant or refusal of the injunction.

[41] The underlying difficulty with the Judge's rulings is that as I have found there were no proceedings before him at the time he made his rulings which comprised a cause of action upon which an injunction could be based. The action before the Judge was a miscellaneous proceedings conceived by way of Notice of Motion and supporting affidavits to extend a caveat.

[42] To assist the 1st Respondent in this regard the Judge had directed the 1st Respondent to file a Writ of Summons and Statement of Claim on the 14th December 2021.

[43] The 1st Respondent did not file a Writ of Summons and Statement of Claim until after the hearing on the 25th of January 2022 and one day before the first ruling was handed down on the 11th of February 2022 which was highly irregular. The judge did not have this Writ of Summons and Statement of Claim before him at the time he made his first ruling or his impugned ruling.

[44] It is evident however that this was not the Writ of Summons and Statement of Claim that the Judge had in mind when he made his direction on 14 December 2021 because he repeated the direction for the 1st Respondent to file and serve a Writ of Summons and Statement of Claim in the impugned ruling.

[45] The Judge considered from the affidavits filed in support of the Notice of Motion to extend the caveat that the 1st Respondent had "prima facie disclosed" that she had a beneficial entitlement to a portion of the property and that there were serious issues to be tried. The Appellant has argued that the Affidavit evidence read together with the Affidavits filed by the Appellant in opposition did not entitle the Judge to reach this conclusion either initially in granting the injunction or when declining to dissolve it.

[46] The Appellant's arguments are persuasive however this Court need not determine this issue. This issue may need determination in other proceedings however it was not a matter which required final determination in the current proceedings. The only proceeding before the Judge was the miscellaneous proceeding to extend the caveat and he had already ruled that those proceedings had failed and awarded costs in favour of the Appellant accordingly. I agree with the Appellant's submissions in respect of the first principle above in the American Cyanamid case that there was no serious question to be tried in the proceedings before the Court and on this ground the injunction should not have been granted in the first ruling and should have been dissolved in the impugned ruling.

[47] Whilst appreciating the Judge's concern to protect the interest of the 1st Respondent, that did not justify the Judge anticipating the outcome of substantive issues, even on a prima facie basis, without proper pleadings including an application for an injunction before him.

[48] I also do not consider that the Judge properly determined whether damages would have been an adequate remedy in terms of the second principle in the American Cyanamid case above.

[49] The only finding of the Judge with regard to damages was the following at paragraph 33 of the first ruling:-

> "I am of the view that damages would not be an adequate remedy in this case as the land in question is part of the inheritance which Leela has been given by her late father and is unique in that sense. It must have some sentimental value to Leela"

There was no evidence at all in support of this statement regarding the sentimental value or uniqueness of the land. In any event there is no consideration of how damages would not be adequate.

[50] The Judge also failed to consider whether the 1st Respondent had the ability to adequately compensate the Appellant in the event that the injunction was dissolved. There was no adequate undertaking supported by evidence in this respect. The only evidence before the Court in this regard was a statement by the 1st Respondent in the

affidavit in support of the application to extend the caveat "that I further give my usual undertaking as to damages".

[51] I note and concur with the following statement of this Court in this regard in **Natural Waters of Viti Limited v. Crystal Clear ABU0011A.2004S (26 November 2004)**

> "Applicants for interim injunction who offer an undertaking as to damages should always proffer sufficient evidence of their financial position. The court needs this information in order to assess the balance of convenience and whether damages would be an adequate remedy."

There was no such evidence before the Court in this case.

[52] The Judge held in both rulings that the balance of convenience supported the granting of an injunction without saying how. This was a fundamental error in law. He should have explained why he considered the balance of convenience favoured injunctive relief over damages.

[53] In the New Zealand Court of Appeal case of **Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd, [1985] 2 NZLR 129** Cooke, J stated the following regarding the balance of convenience:-

> "Whether there is a serious question to be tried and the balance of convenience are two broad questions providing an accepted framework for approaching these applications. As the NWL speeches bring out, the balance of convenience can have a very wide ambit. In any event the two heads are not exhaustive. Marshalling considerations under them is an aid to determining, as regards the grant or refusal of an interim injunction, where overall justice lies. In every case the Judge has finally to stand back and ask himself that question. At this final stage, if he has found the balance of convenience overwhelmingly or very clearly one way – as the Chief Justice did here – it will usually be right to be guided accordingly. But if the other rival considerations are still fairly evenly poised, regard to the relative strengths of the cases of the parties will usually be appropriate. We use the word "usually" deliberately and do not attempt any more precise formula: an interlocutory decision of this kind is essentially discretionary and it's solution cannot be governed and is not much simplified by generalities."

I adopt this approach specified by Cooke, J in that case.

[54] In the present matter the Judge did not undertake any such analysis when deciding to grant the injunction on the balance of convenience. He simply said that the balance

of convenience favoured injunction relief without any proper analysis of the facts, albeit limited facts, before him and in doing so erred in law.

Ground 3 – Material non-disclosure

[55] It was accepted by the Judge that in making the ex-parte application to extend the caveat the 1st Respondent had failed to disclose to the Court that a Statement of Claim by the 1st Respondent in HBC 157 of 2015 claiming the same rights as sought in the Respondents Affidavit in Support of the application for extension of caveat had been struck out.

[56] Further the Judge in his first ruling agreed with the Appellant's submission that there was a duty on a litigant who makes an ex-parte application to make full and frank disclosure of all material facts and to be candid and state the facts clearly. The Judge accepted this failure on the part of the 1st Respondent to disclose HBC 157 of 2015 as a reason for declining to extend the caveat. He must therefore have accepted that the non disclosure was material.

[57] This Court acknowledges the maxim "He who comes to equity must come with clean hands." The Appellant in her written submissions referred the Court to a number of discussions to illustrate that the Courts have consistently upheld this maxim and how it should be applied. I am grateful to the Counsel for the Appellant for this however I need not consider those cases in the circumstances of this appeal.

[58] The Judge had accepted in his ruling's that there had been a material non-disclosure by the 1st Respondent and this being the case the Judge should not have granted the interim injunction or declined the Appellant's application for its dissolution.

Grounds 4 and 5

[59] In view of my findings above I need not consider these grounds other than to say that the Judge erred in making the statements he made in the impugned ruling regarding consolidation when there was no formal application for consolidation before him specifying which cases should be consolidated and why.

Conclusion

[60] For the reasons set out above I allow the appeal.

[61] The 1st Respondent may of course if she wishes and has not already done so apply for consolidation of any other outstanding proceedings before the High Court and also if she considers she has grounds apply for an injunction in those proceedings.

Orders

This Court makes the following orders:-

a) Apart from the orders for costs the orders of the Honourable Tuilevuka, J made in the High Court at Lautoka on the 11th February and 28th October, 2022 are hereby set aside.

b) The 1st Respondent is to pay the Appellant costs of this appeal in the sum of $3,000.00 within 21 days of the date of this Judgement.

Hon. Justice Chandana Prematilaka
RESIDENT JUSTICE OF APPEAL

COURT OF APPEAL FIJI

Hon. Justice Alipate Qetaki
JUSTICE OF APPEAL

Hon. Justice Walton Morgan
JUSTICE OF APPEAL

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