

IN THE HIGH COURT OF FIJI
AT LABASA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL CASE NUMBER: **HBA 04 OF 2013**

BETWEEN: **VISHAL KUMAR** **APPELLANT**

AND: **AVIKASH PILLAY** **RESPONDENT**

Appearances: Mr. A. Ram for the appellant.
Mr. A. Sen for the respondent.

Date/Place of Hearing: Thursday 13 February 2014 at Labasa.

Date/Place of Judgment: Friday 14 February 2014 at Labasa.

Coram: The Hon. Justice Anjala Wati.

JUDGMENT

Catchwords:

S. 169 application for vacant possession – landlord and tenant- monthly tenant- need to give a month notice to terminate tenancy- need to prove service of notice-acceptance of rent after serving notice-effect of acceptance of rent-notice waived- tenancy intact-tenant has a legal basis to stay on the land.

Cases:

Shiu Kumar v. Anendra Prasad [unreported] Fiji High Court Civil Action No. 0061 of 2004.

Venkanna Narsingha Rao v. Henry E. Sanday [unreported] Fiji High Court Civil Action No. 19 of 1977.

Legislation:

The High Court Rules 1988 (“HCR”): Order 59 Rule 17(2), (3).

The Property Law Act (“PLA”): ss. 89(2) (b), 100(2).

The Indemnity, Guarantee and Bailment Act (“IGBA”): s. 59.

The Cause

1. On 1 May 2013, the respondent filed an application against the appellant for vacant possession of his land described as Certificate of Title 16093 known as “Naveria” (part

of) being Lot 8 on Plan No. 3189 and situated in the District of Savusavu in the Island of Vanualevu.

2. On 20 September 2013, the Master of the Labasa High Court granted an order for vacant possession. The appellant was granted six weeks to vacate the said premises.
3. The appellant, aggrieved at these orders, filed an appeal and an application for stay pending appeal.
4. It was the stay application that was set for hearing. I directed the parties that the appeal should be heard and the stay application will take its course depending on the verdict of the appeal. The parties agreed to proceed to hearing of the appeal.

Evidence before the Master

5. The respondent had filed an affidavit in support through which he had deposed that the appellant had been occupying the said property since he acquired ownership of the same on 1 March 2012. He stated that he needed vacant possession as he had to undertake urgent renovations. The appellant had been paying rental in the sum of \$400 per month but had been in default and distress had to be levied on 27 February 2013 to compel him to pay the same.
6. The respondent further deposed that a notice to vacate had been served on the appellant but he failed to give vacant possession. The appellant had no lawful right to continue to occupy the said property.
7. The appellant also filed an affidavit in reply and deposed that he had been in occupation of the property prior to the respondent becoming the registered proprietor. He said that he used to pay rent to the previous owner. Upon the respondent's purchase, he started paying rentals to him. He has been unable to find alternative premises since the service of the application and needs time to find a suitable alternative premise.

8. The appellant denied receiving the notice for vacant possession. He deposed that he had been paying rents at \$400 per month but due to the respondent asking for an increase in rent from December 2012, he was not accepting the rents. The respondent then levied distress on the unpaid rental at \$400 per month even though he was asking for \$500 per month.
9. The appellant deposed that it was illegal to ask for increase on rent on dwelling property, as there is a rental freeze on all dwellings under the Commerce Commission Decree No. 49 of 2010.
10. The appellant further stated that later on 22 March 2013 the rents from December 2012 to March 2013 were paid and accepted by the respondent. It was averred that the respondent had accepted rent all along and had even accepted rent for April 2013 and May 2013. Therefore even if the notice to vacate was served, it was void and of no effect.
11. In reply to the appellant's affidavit, the respondent had filed an affidavit in reply and stated that the appellant was served with the notice to vacate after which he made several approaches to the respondent to allow him to stay until December 2013. The appellant only paid the rent after he received the notice and distress. He has always been aware of the respondent seeking vacant possession.
12. The respondent stated that apart from the notice on 27 February 2013, the appellant had been given notices on 25 September 2012 and in March 2013. The 25 September service was witnessed by WPC 3548 Reshma and March 2013 notice was given by the Provincial Administrator Cakaudrove. The appellant is well aware that vacant possession is needed to carry out general maintenance as the bank needs engineer's certificate.

Submissions before the Master

13. Mr. Sen appearing for the respondent relied on the affidavit and argued that since there was no tenancy agreement between the parties, the appellant was a monthly tenant. He

was given a month's time to vacate. Now he does not have cause to remain on the property.

14. Mr. Ratule relying on his client's affidavit argued that his client was never served with the notice to vacate. His client did not endorse receipt of the notice. There is also no evidence of who served, when and where the service took place. The same applies to all the notice's alleged to have been served.
15. Mr. Ratule's second argument was that since rent was accepted, the tenancy was presumed to continue. The plaintiff waived the notice to vacate. Mr. Ratule argued that the defendant would eventually vacate but that some time is needed.

Decision of the Master

16. The Master found that the payment of monies in form of rent was not for future rent but for outstanding rent. The Master stated that the payment of outstanding rental did not indicate that there was a fresh tenancy between the parties. The Master stated that since the appellant conceded that the monies were paid as outstanding rent, there is no cause for him to stay on the land. All the defendant needed was time to vacate the premises.

Grounds of Appeal

17. The appellant raised 5 grounds of appeal:
 1. ***That the Learned Master erred in law and in fact in holding that the notice of termination was served on the appellant on 27th February 2013 when the said service was an issue.***
 2. ***That the Learned Master erred in law and in fact in holding that the notice of termination effectively terminated the appellant's tenancy.***
 3. ***That the Learned Master erred in law and in fact in holding that:-***
 - (a) ***the five rent receipts totalling \$2000.00 tendered by the appellant were for outstanding rents;***

(b) the last payment of rent on 1st May 2013 for the month of April represented arrears of rent;

(c) that the acceptance of rent did not re-confirm the appellant's tenancy;

(d) alternatively that the acceptance of rent did not create a fresh tenancy;

4. *That the Learned Master erred in law and in fact in holding that the payment of rent and its acceptance by the respondent after service of the notice of termination did not act as a waiver*
5. *That the Learned Master erred in law and in fact that in all the circumstances of the case including the issues raised, that the section 169 application was appropriate to conclude the matter.*

Submissions: Re: Preliminary Issue

18. Mr. Sen raised a preliminary objection that the appeal is not on foot because the appellant has not complied with Order 59 Rule 17(2) of the HCR. Mr. Sen argued that under the said legislative provision, Mr. Ram, after filing of the notice of appeal, ought to have, within 21 days, filed a summons returnable before a Judge for directions and a date for the hearing of the appeal. Mr. Sen argued that no summons was filed after the notice of appeal was filed and therefore the appeal is deemed abandoned under Order 59 Rule 17(3).
19. Mr. Sen argued that the novelty behind the rule is that when a notice is filed, the summons will enable the Court to give directions including directions for hearing. The Court will need to give directions as to the contents of the Court records. There would then be an orderly fashion in which the appeal would be heard.
20. Mr. Ram invited the Court to have a look at his notice of appeal and the part where it reads:

***“AND TAKE FURTHER NOTICE that you are required to attend before the judge in Chambers at the Labasa High Court on 28th day of October 2012 at 9’ o’ clock on hearing of the application by the appellant that”:*...**

Mr. Ram argued that the particular provision above should be treated as the summons that is required under Order 59 Rule 17(2) of the HCR. Mr. Ram argued that if one looks at the history of the proceedings, it would be revealed that the Master had control of the proceedings and there have been directions on the conduct of the appeal. Effectively, the Court has control of the appeal. The Court had the appeal before it to give directions as well.

21. Mr. Ram further argued that his notice of appeal has a summons in built in it and therefore there was no need for another summons. Mr. Ram says that the rule requires a summons to be filed within 21 days but that rule does not preclude a notice in the current form which contains the same provisions as a summons and serves the same purpose.

Submissions: Re: Appeal

22. On the appeal proper Mr. Ram argued that it was the duty of the respondent to have proven that he had served the appellant with a notice to vacate. Mr. Ram argued that since a summons for ejectment under s. 169 is a summary proceeding, the affidavit of service ought to have been attached to the affidavit in support of the summons for ejectment so that all the material materials were before the Court to make a determination in a summary proceeding. Having not done that, Mr. Ram argued that the respondent should have at least annexed the affidavit of service in the affidavit in reply because his client in his affidavit had denied having received the notice to vacate.
23. Mr. Ram also argued that his affidavit shows that his client paid rent on a monthly basis. That makes him a monthly tenant. For a monthly tenancy to be terminated, the appellant was entitled to one clear month’s notice but the notice to vacate upon which the respondent relied to issue a summons for ejectment gives the appellant 30 days notice to

vacate the premises. Mr. Ram contended that if the notice is dated 27 February 2013 then a months' notice would be a clear months notice and that month would be March 2013 and since March has 31 days in the month, a 30 day notice is defective.

24. Mr. Ram contended that even if it is accepted that the notice to vacate was served, that notice was waived. Mr. Ram stated that if the tenancy is deemed terminated in March 2013 then on 22 March 2013 his client paid rent for February 2013 and March 2013 (Receipt Numbers 24741 and 24742 respectively). Again on 01 May 2013, his client paid rent for April 2013. Mr. Ram said that these monies in the form of rent were accepted after the notice to vacate was allegedly served. Upon acceptance of the rent after service of notice to vacate, three matters arise. One, that if the notice to vacate took effect in April 2013 having terminated the tenancy in March 2013, then the acceptance of the rent for April 2014 waived the notice. Secondly, it could be deduced that a fresh tenancy was created as a result the notice to vacate of 27th February became defective and could not be utilized to eject the appellant. Thirdly, the continuance of the payment of the rent could mean that the tenancy continued without any interruption.
25. Mr. Ram argued that the Master erred when it failed to make any finding on his strong contention that his client was not served with a notice to vacate. He also argued that the Master also erred when it found that all the payments of rent were for outstanding rent. Mr. Ram argued that the March and April rent were not outstanding rent because it were paid after the notice to vacate was given and after the tenancy was purportedly terminated.
26. Mr. Ram contended that under s. 100(2) of the Property Law Act, if rent was to be accepted, the notice to vacate should have been expressed to be without prejudice to the notice. In that way the acceptance of rent would not operate as a waiver of the right to enforce the notice or create or revive a tenancy. Mr. Ram said that in the current case the rent was accepted and none of the receipts indicates that it was accepted without prejudice to the notice so the notice is waived, the old tenancy revived or a fresh tenancy was created. The notice was thus of no effect. Mr. Ram also relied on two cases to support his argument being *Shiu Kumar v. Anendra Prasad [unreported] Fiji High*

Court Civil Action Number HBC 0061 of 2004 and Venkanna Narsingha Rao v. Henry E. Sanday[unreported] High Court Civil Action Number 19 of 1977.

27. Mr. Ram submitted that although there is no tenancy agreement, the receipts are sufficient to indicate that the appellant was a monthly tenant. Mr. Sen's argument that there has to be a written tenancy under s. 59 of IGBA does not apply as the receipts are sufficient to constitute a note or memorandum in writing for the purposes of the said section.
28. Mr. Sen argued that since there is no proper appeal on foot he need not address the grounds of appeal. He stated that when a notice to vacate was served the tenancy was terminated. The appellant was holding over the property, enjoying the use and occupation of it and it is untenable for Mr. Ram to argue that a holding over tenant can stay in the property free of charge and would be exonerated from paying any rent.
29. Mr. Sen stated that the appellant was occupying the premises as a tenant at the will of the landlord. There was no tenancy agreement and as such under s. 59 of the IGBA, the tenant does not have a right to stay on the property as there was nothing in writing to enable him to show that he has some interest in the same.
30. Mr. Sen stated that s. 100(2) of the PLA and two cases cited by Mr. Ram applies to written tenancies and since there was no written tenancy between the parties neither of the legal source is applicable in this case.

The Law and Analysis

31. First of all I am obliged to deal with the preliminary issue raised under Order 59 Rule 17 (2) of the HCR. It is argued that the appeal is not properly on foot. Order 59 Rule 17 reads as follows:

“(1) The appellant shall, upon serving the notice of appeal on the party or parties to the appeal, file an affidavit of service within 7 days of such appeal.

(2) *The appellant shall, within 21 days of filing of notice of appeal, file and serve a summons returnable before a judge for directions and a date for the hearing of the appeal.*

(3) *If this rule is not complied with, the appeal is deemed to have been abandoned”.*

32. I must explain the purpose of Order 59 Rule 17 (2) and (3). Traditionally and even now when notices of appeal are prepared it does not have a provision where the Court Registry could endorse a returnable date for Court. As a result, after the filing of the notice, the appellant’s and/or their solicitors would either not bring the appeal before a Judge for directions and hearing or be slow in doing so. The appeal would thus lie in the Registry while the appellant’s and/or their lawyers would either forget about it or just simply deliberately not move the matter forward.

33. The purpose of the rule 17(2) is that where the notice of appeal does not bear a provision to endorse returnable date before a Judge, a summons must be filed within 21days before a judge for directions and hearing of the appeal. If the summons is not filed to move the appeal, the appeal would be deemed abandoned under Rule 17(3). The rule was specifically to avoid appellant’s using the Court system to “park” their cases.

34. The notice of appeal that Mr. Ram drafted has a provision where he sought a returnable date before a Judge for directions to be given on the hearing. That provision thus has served the purpose for which the rule was created. The notice appears as follows:

“Notice and Grounds of Appeal

TAKE NOTICE that the abovenamed appellant intends to appeal against the decision of the Master given on the 20th day of September 2013, ordering that:-

1. ...
2. ...
3. ...

AND TAKE FURTHER NOTICE that you are required to attend before the Judge in Chambers at the Labasa High Court on 28th day of October 2013 at 9' 0' clock forenoon on hearing of the application by the appellant that:-

1. ...
2. ...
3. ...
4. ...

AND TAKE NOTICE that the Grounds of Appeal are as follows....”

35. In the notice of appeal, the Court Registry gave Mr. Ram a returnable date as 28 October 2013. Since the stay application was filed on the same day, the two matters were called in Court and not left in abeyance. The Master had been handling the cases and had listed the stay application before me for hearing. The appeal application was sent to me as well when I directed that the appeal be heard.
36. In effect, Mr. Ram’s notice of appeal has also served the purpose for which Rule 17 (2) was enacted. Due to the nature of his drafting of the notice of appeal, he need not file another summons as required under Rule 17(2) and ask for another Court date because Mr. Ram had already obtained a Court date and his appeal was properly in Court and monitored by the Master.
37. The nature of the drafting of the notice of appeal made the compliance of Rule 17 (2) redundant. The Master had been monitoring this file too and directions were being given so I do not find that there is non-compliance of the rules or any prejudicial effect on the respondent.
38. Mr. Sen has stated that he does not have the benefit of the Court records. None is needed. The appeal from the Master must be filed in the same file although a different appeal number is assigned. The entire file is given to the Judge for hearing of the appeal. The judge will have before him the original file. If the Judge feels that for some reasons the hearings notes be transcribed then that could be done but where the Judges are in a

position to proceed on the handwritten notes, the prerogative is the judge's. I am not convinced that Mr. Sen is prejudiced because there is no Court record. He has all the materials in his file to argue his appeal.

39. I find that the appeal is properly on foot.
40. I will now address the appeal proper. The first two grounds of appeal relates to the aspect of notice to terminate the tenancy. The appellant's contention always had been that he was not served with the notice to vacate. The respondent maintained that the appellant was served.
41. The Master of the Court did not make a finding on whether or not the notice to vacate was served. The Master did not even address the issue of service. The only issue that he addressed was whether the payments of the rent amounted to a waiver of the notice to vacate and a fresh tenancy created.
42. I thus do not understand why grounds 1 and 2 of the appeal seem to make a suggestion that the Master made a finding on the issue of whether or not the notice was served.
43. What the Master ought to have done was to make a finding on the aspect of service. The onus to prove service was on the respondent. Service is proved by an affidavit of service being filed in Court. There is no evidence as to who served the notice, when it was served and on whom it was served. There is no affidavit of service evidencing this issue in contention. The respondent thus did not discharge the onus he had on himself.
44. The appellant was paying rentals monthly so his tenancy could be terminated under section 89 (2) (b) upon a months' notice: **PLA**. The section reads:

“ In the absence of any express agreement between the parties, a tenancy of no fixed duration in respect of which the rent is payable weekly, monthly, yearly or for any

other recurring period may be terminated by either party giving to the other written notice as follows:

(a) ...

(b) *where the rent is payable for any recurring period of less than one year, notice for a period at least equal to one rent period under the tenancy and expiring at any time, whether at the end of a rent period or not”.*

45. A notice to quit is necessary under section 89 (2) (b) of the Property Law Act to terminate a tenancy. I cannot find any evidence of service and thus I find that the notice to vacate was not served and that the tenancy was never terminated. If the tenancy was not terminated, the appellant has shown sufficient right to stay on the property as a tenant.

46. The notice that was served was the notice to vacate. At no place does the notice indicate that the tenancy is terminated. Even if I accept that the notice to vacate amounts to notice to quit, and even if I find that the notice was served, that notice was waived upon the acceptance of the rent for March and April, 2013. These rents were paid after the notice to vacate was allegedly served on the appellant. I make this finding pursuant to s. 100(2) of the PLA which reads:

“After the giving of a notice to quit acceptance of rent expressed to be without prejudice to the notice shall not operate as a waiver of the right to enforce the notice or create or revive a tenancy”.

47. These payment of rent for March 2013 and April 2013 and the acceptance of the same without expressly stating that it is on a without prejudice basis constitutes a waiver of the notice and the tenancy deemed to continue. Another notice to terminate the tenancy was required in May 2013 as the old notice could not be relied on. Since the old tenancy

continued, the appellant had a right to stay on the property as a tenant: *Shiu Kumar (supra)*.

48. I do not find any notice to quit in April 2013 or May 2013 served on the appellant or at all. It follows that the tenancy existed and the appellant at the time of the hearing of the s. 169 application had shown a cause to stay on the land.
49. In *Venkanna (supra)* the Court held that *“acceptance of rent for any period after the determination created a new tenancy and a further notice determining the new tenancy would have to be given before the plaintiff can seek an order for possession”*
50. I also need to address whether there is a requirement for a written tenancy. S. 89 (2) (b) of the PLA applies in absence of any express agreement. For the appellant to show that he has a cause to stay on the land he needed to prove that he was a monthly tenant. Mr. Sen had submitted before the Master that the appellant was a monthly tenant. I do not understand why he would change his argument at the appellant level. The receipts given to the appellant upon payment of the rents indicate that he was a monthly tenant and there does not have to be a written tenancy agreement between the parties for the appellant to claim a right as a tenant. The receipts are sufficient to constitute a note or memorandum in writing under s. 59 of the IGBA, if I were to hold that the section applies to this case.
51. The orders for vacant possession could not have been made upon the facts of the case. I set aside the orders of the Master in full. This does not prejudice the plaintiff from taking any other proceedings of a same or different nature to seek vacant possession.

Costs

52. The appellant is staying on the property and there is no evidence before me that he is still paying rental. Mr. Ram agreed that there are some arrears of rent. If the tenant is to be removed, a proper notice to quit must be given and a summons for ejectment issued again to obtain vacant possession. At this stage, apart from levying distress, the respondent will not have any other means to recover the rent and any proceedings to recover the

same will be definitely costly. I do not think that any order for costs against the respondent even though the appellant is successful is justified.

Final Orders

53. In the final analysis, I allow the appeal on the grounds that the appellant was an existing tenant of the property which was subject to vacant possession and as such he had a right to stay on the same. He had shown sufficient cause to stay on the property. The orders for vacant possession by the Master are thus set aside.
54. Each party must bear their own costs.

Anjala Wati
Judge
14.02.2014

To:

1. *Mr. A. Ram for the Appellant.*
2. *Mr. A. Sen for the Respondent.*
3. *File: HBA 04 of 2013.*