

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No: HBC 15 of 2015

BETWEEN : WALUSIO TABUYALEWA JNR

APPELLANT

AND : KELTON INVESTMENT LIMITED

RESPONDENT

Coram : The Hon Mr Justice David Alfred

Counsel : Ms. M. Chan for the Appellant
Mr S. Valenitabua on the instructions of M/S Singh & Singh, for the Respondent

Date of Hearing : 2 May 2017

Date of Judgment : 19 May 2017

JUDGMENT

1. Before I expound my judgment in the Appeal proper, I shall reproduce below my decision made on 31 March, 2017 on the Respondent's Summons to strike out the Appeal on the grounds that it :

- (i) Discloses no reasonable grounds of appeal.
 - (ii) Is frivolous or vexatious; or
 - (iii) Is an abuse of the process of the court.
2. The Summons was made pursuant to Order 18 Rule 18(1)(a) and Rule 18(2) of the Rules of the High Court.
3. After hearing the oral submissions of Counsel on both sides on 30 March 2017, I delivered my decision orally the next day as follows:

DECISION

- (1) The Respondent's summons to strike out the Notice of Appeal against the Master's Order is dismissed with costs summarily assessed at \$250.
- (2) The basis for the Summons, that the Appeal discloses no reasonable grounds of appeal was O.18 r. 18(1)(a) and the inherent jurisdiction of the court.
- (3) Both are inapplicable to the instant case which relates to something after a judgment or order has been given. In other words the appeal is not something that precedes the final judgment or order.
4. Having disposed of the preliminary issue, I proceed to the substantive matter. This is the Appellant's (Defendant) appeal against the Ruling of the Master given on 23 June 2016 (Ruling) that the Appellant (and or other Defendants in related cases) give vacant possession to the Plaintiff within 30 days.

5. The Notice of Appeal prays for the following orders:
 - (1) The Ruling of the Master given on 23 June 2016 be set aside; and
 - (2) All further proceedings be stayed.
 - (3) The Originating Summons (O.S.) be converted into a Writ of Summons.

6. The grounds of appeal include the following:
 - (1) The Master erred in failing to consider the triable issues which are as follows:-
 - (a) Whether the Appellant had any right to remain on the property.
 - (b) Whether the predecessor in title did promise to transfer the certificate of title concerned to the Appellant and other Defendants on or about 25 June 1995, which promise was cemented with gifts from the Appellant's ancestors.
 - (c) Whether the predecessors in title gave consent to the Appellant and/or his ancestors to occupy the land.
 - (2) The Master failed to give weight to the promissory and/or proprietary estoppel.
 - (3) The Master failed to give weight to the development by the Appellant and/or his ancestors who relied on the representation made by the representative of the predecessors in title that the land would be transferred to them.
 - (4) The Master failed to consider the Appellant and/or his ancestors could not have occupied the land without the consent of the predecessors in title

7. The hearing of the Appeal commenced with Counsel for the Appellant submitting that there were triable issues. They could not confirm that the original permission was in perpetuity but they make the assumption that there was permission. The Appellant/Defendants were invitees and there was some

licence or estoppel. The Master did not convert the O.S. into a writ action but concluded that no consent meant there were no triable issues.

8. Counsel for the Respondent then submitted. He referred to s.59(d) of the Indemnity, Guarantee and Bailment Act [IGB], Cap 232. He said gifts cannot override a statute. Equity does not help the Appellant if he does not comply with the law. There was no consent in perpetuity. The Appellant did not apply for a vesting order under s.78 of the Land Transfer Act (LTA) and there was no other way to defeat vacant possession. Either the Appellant or the Master had a discretion to convert the O.S. into a writ. The Appellant did not show any cause to stay e.g. a licence.
9. The Appellant's Counsel in her reply said it was fatal that the minute of the District Officer was not signed and was not by the donor.
10. At the conclusion of the arguments I informed I would take time for consideration. Having done so, I proceed to deliver my Judgment.
11. I am of opinion this Appeal will be determined on legal issues only, the resolution of which is facilitated by the fact that the relevant legal provisions have been stated lucidly and succinctly by the legal draftsman.
12. In my view, the grounds of appeal can be encapsulated into one determinant issue. It is this. Can the Appellant show cause why he is refusing to give possession of the land and can he prove to my satisfaction a right to the possession of the land?

13. I shall therefore start by considering s.59 of the IGB Act, which reads that “No action shall be brought – upon any contract or sale of lands, tenements or hereditaments or any interest in or concerning them; unless the agreement upon which such action is to be brought or some memorandum or note thereof is in writing and signed by the party to be charged therewith or some other person thereunto by him or her lawfully authorized” .
14. I then need to consider s.39(1) of the LTA. It provides that the registered proprietor of any land shall hold it absolutely free of all encumbrances except in case of fraud and subject to such encumbrances as may be notified on the register. I note there is no allegation of fraud here by the Appellant.
15. A careful perusal of the copy Certificate of Title (see Annexure “AAKI” of the Affidavit of Anthony Ah Koy) shows the transfer to the Respondent on 29 November 2012 and a mortgage after that on the same day to Bank of South Pacific. No other encumbrance is shown. The Respondent is the last registered proprietor of the land.
16. The cardinal principle of the Torrens system practised in this country as in countries from Australia and New Zealand to Malaysia is that of title by registration. So if the Respondent is shown as the proprietor on the register, it means the title to the land is vested in him.
17. S.169 of the LTA provides that the last registered proprietor of the land may summon any person in possession of land to show cause why the person summoned should not give up possession to the applicant. This the Respondent has done here, as it is legally entitled to do, by the O.S. heard by the Master.

18. Master Sharma has commendably set out comprehensively in his Ruling, the facts, the statutes and the decided cases. It is therefore otiose for me to repeat them in my Judgment.
19. In my view, the Master was correct in finding on the evidence before him, that there were no triable issues and in consequently not converting the O.S. into a Writ action. From start to finish, the Appellant's case was never that the Respondent had acquiesced in his possession, but that its predecessors in title had allegedly made promises to them and allowed them to build structures on the land. But the representations, if indeed they were made, were made by someone whose credentials had not been established. In any event, it was abundantly evident that no representation had been made by any representative of the Respondent, and there was nothing in writing from any Respondent's authorized representative as required by Law.
20. The Appellant's Counsel in her reply correctly conceded it was fatal to the Appellant's case that there was no signed document by a donor.
21. It was also fatal for the Appellant that he did not apply to the Registrar for a vesting order under s.78 of the LTA.
22. Finally, I opine that any alleged promissory or other equitable estoppel cannot stand in the light of the applicable legal position which is stated in Snell's Equity (29th edit) at page 576 as "No equity will arise if to enforce the right claimed would contravene some statute". Here it is as plain as a pikestaff that any equitable right raised will contravene both the IGB Act and the LTA.

23. At the end of the day, Counsel for the Appellant has not satisfied me why I would be justified in upsetting the Ruling.
24. In the result:
- (1) The Appeal is dismissed.
 - (2) The Final Orders, A,B,C and D made by the Master are affirmed.
 - (3) There shall be no order as to the costs of this Appeal.

Delivered at Suva this 19th day of May 2017.



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David Alfred
JUDGE of the High Court of Fiji