

IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

Civil Action No.: HBA 01 of 2018

BETWEEN : **LUISA KORODRAU** of Nabuli Village, Technical Officer

APPELLANT

AND : **RO OIQI TUICOLO** of Nadali Village, Nausori, Businessman

RESPONDENT

Counsel : **Mr. Tuifagalele N for the Appellant**

Ms. Raikaci N for the Respondent

Date of Hearing : **27th March, 2018**

Date of Judgment : **28th March, 2018**

JUDGMENT

INTRODUCTION

- i. This is an appeal against an order of Learned Resident Magistrate (RM) on a preliminary issue of jurisdiction. The Respondent-Plaintiff (the Plaintiff) filed action in the court below seeking vacant possession of a house situated on an iTaukei Land. The Plaintiff had also sought injunctive relief. Without filing a defence the Appellant-Defendant (the Defendant) had raised a preliminary objection of jurisdiction of court below and had also filed a motion seeking strike out of the action for want of jurisdiction. The RM having dealt with the preliminary issue overruled it and this is the appeal from that decision.

FACTS

2. The Plaintiff filed statement of claim in the court below inter alia seeking vacant possession of a house. According to the Plaintiff the house was given for occupation to the Defendant, as it was vacant and the Defendant was also a relative of the Plaintiff.
3. Now the Plaintiff seeks vacant possession of the house and the Defendant is refusing to give it.

4. The Plaintiff also states that since he was appointed as head of Yavusa it is important to have meetings in the village and the only house that he had was this house where the Defendant reside.
5. There is no statement of defence filed. The Defendant filed an affidavit in support of the motion to strike out for want of jurisdiction.
6. The Plaintiff is also seeking injunctive relief and entire action is depended on the preliminary objection.
7. From the affidavit in support of the motion for strike out the Defendant states as follows
 - a. He is originaly from Nabuli village in Rewa.
 - b. The biological fathers of the parties are siblings.
 - c. The subject matter, the house, was a family house where all contributed and built in 1950s.
 - d. The house was vacant for more than 10 years and was used to keep chicken.
 - e. The Plaintiff had lived in Nadali and never lived in Nabuli.
 - f. He approached the Plaintiff 5 years ago, recognizing itaukei protocol to inform elders that he was moving to village and would be repairing and renovating family house.
 - g. After renovation the Plaintiff claimed the house and wanted him to vacate.
8. The RM overruled the preliminary objection regarding jurisdiction and delivered the judgment on 29th March, 2017.
9. Being aggrieved by the said decision the Defendant filed the Notice of Intension to Appeal and also Grounds of Appeal on 28th April, 2017 and the Grounds of Appeal are as follows:
 1. That the learned Magistrate erred in law and in fact when he dismissed the Defendant/Appellant's strike out application as he has no jurisdiction to preside over the substantive claim for title and eviction for land by the Plaintiff/Respondent in the first place.
 2. That the learned Magistrate erred in law and in fact by misinterpreting section 16(1)(d) and (h) of the Magistrates Court Act (Amendment) Promulgation 34 of 2007 that the issue in question which the Magistrates' Court has jurisdiction on is

the right over the house, but ignore that the Plaintiff/Respondent claims right and /or title over land which is beyond the jurisdiction of the Magistrate's Court.

3. That the learned Magistrates(sic) erred in law and in fact by failing to consider the submission of the Defendant /Appellant for the Plaintiff /Respondent to file a section 169 of the Land Transfer Act Cap 131 or Order 113 of the high Court Rules 1988 eviction application rather than filing eviction proceedings in the Magistrates Court.
 4. That the learned Magistrates(Sic) erred in law and in fact by failing to consider that the subject land is located within the village boundary and should have considered the submission of the Defendant/Appellant for this matter to be referred to the iTaukei Lands Commission pursuant to the provisions of the iTaukei Lands Act Cap 133.
10. The Appeal Ground 5 was withdrawn at the time of the hearing by the Defendant so it is not reproduced here.
 11. At the hearing the counsel for the Plaintiff raised an issue as to the failure to file Notice of Intension to Appeal within in 7 day stipulated time.

ANALYSIS

12. This Appeal needs to be dismissed *in limine* for failure to file Notice of Intension to Appeal within 7 days time period. The Notice and Grounds of Appeal were filed on 28th April, 2017 and Magistrates' Court Rules 1945, Order 37 rule 1 is clear that Notice of Intention to Appeal needs to be filed within 7 days from the judgment. The judgment was delivered on 29th of March, 2017.
13. In the absence of oral notice of intension to appeal , which had not happened. it is a requirement for any appellatnt to give Notice of Intension to Appeal within 7 days and if not an extension of that was needed. This had not been done.
14. This appeal is dismissed *in limine* for non-compliance of Order 37 rule 1 of the Magistrates' Court Rules 1945.

15. Without prejudice to the above position I will consider the merits of this matter for following reasons. This is an appeal from a decision of RM relating to a preliminary issue and it had taken almost one year for this matter to be heard in the High Court. This Appeal was allocated to me on 2.2.2018 and I am thankful to the both counsel for consenting to hearing of this appeal on 27.3.2018. So, if I dismiss this appeal without considering merits, there can be a further application for seeking extension of time to file Notice of Intension to Appeal and if that is granted again the appeal may be heard on merits in this court, while the matter is with the RM even without a statement of defence being filed, and also a pending application for injunctive relief. In such a scenario there will be inordinate delay in court below, which can be prevented by adjudicating the merits of the appeal despite my findings regarding failure to comply with Magistrates' Court Rules 1945.

Appeal Grounds 1 and 2 - are considered together as they are inter-related and issue is the jurisdiction of the Magistrate's Court.

16. The claim of the Plaintiff is not regarding the title to the land as it is an admitted fact that the land on which the house is situated is an iTaukei Land.
17. The Plaintiff claims vacant possession of the house and without filing a statement of defence the Defendant is raising a preliminary objection as to the jurisdiction of the Magistrate's Court.
18. The jurisdiction of the Magistrate's Court is contained in Section 16 of the Magistrate's Court Act 1944 and Section 16(1)(d) states as follows
- 'in all suits involving trespass to land or for the recovery of land (including any building or part thereof) irrespective of its value, where no relationship of landlord and tenant has at any time existed between any of the parties to the suit in respect of the land or any part of the land (including any building or part thereof);'* (emphasis added)
19. There is no allegation of land lord and tenant relationship between the parties even in the affidavits filed by the parties. In any event since there was no statement of defence filed

the RM needed only to examine the Statement of Claim to determine the preliminary objection.

20. The Plaintiff is claiming vacant possession of a house situated on an ilaukei Land. On the face of statement of claim it is a claim that Magistrate's Court can make a determination in terms of Section 16(1)(d) of the Magistrates' Court Act 1944 and it does not fall within Section 16(2) of the said Act.
21. I agree with findings of court below on this issue.

Appeal Ground 3

22. In terms of Section 169 of the Land Transfer Act 1971 a person can summon any person in possession of land
 - a. When there is registered title and the person is last registered proprietor
 - b. Where the person summoning is the lessor with power to re-enter.
 - c. Where he is the lessor against tenant or lessee with legal notice to quit has been given or term of lease had expired.
23. So any person can be evicted from a land where there is a registered title or when there is a lease, in terms of Section 169 of the Land Transfer Act 1971, but even in such an instance this is not an exclusive jurisdiction that prevents other modes of eviction.
24. In contrary to the argument of the Defendant the jurisdiction of the High Court in terms of Section 169 is an optional remedy. (see Section 172 of Land Transfer Act 1971)
25. By the same token, jurisdiction of the High Court in terms of Order 113 of the High Court Rules of 1988 is also an optional remedy, and had not excluded jurisdiction of Magistrate's Court in terms of Magistrates' Court Act 1944.
26. The Supreme Court Practice (UK) (1988) at p 1470 states

'113/1-8/1 Scope of Order - This Order does not provide a new remedy but rather a new procedure for the recovery of possession of land which is in wrongful occupation by trespassers. Its machinery is designed to

overcome the apparent shortcomings of the present procedural law in two respects, namely,

- (a) By providing the procedure for claiming possession of land where not every wrongful occupier can reasonably be identified, the Order overcomes the question whether an order for possession of land can be made and enforced in ex parte proceedings in which no person is named as a defendant.....*
- (b) By Shortening the steps and the time taken for obtaining a final order for possession of land, the Order overcomes the question whether such an order can be made on an interlocutory application or only by way of final judgment or order ...'*

- 27. The procedure contained in Order 113 of the High Court Rules of 1988, is no way a prohibition for a party to seek redress by filing a statement of claim in appropriate court for vacant possession and also for damages.
- 28. It should also be borne in mind neither Section 169 of the Land Transfer Act 1971 nor Order 113 of the High Court Rules of 1988 provide a claimant to seek damages from the person against whom eviction is sought. So a person who desire to claim for damages may opt for a procedure other than Section 169 of Land Transfer Act 1971 or Order 113 of the High Court Rules of 1988. In the absence of statutory prohibition the jurisdiction is with the respective court to deal with such a claim.

Appeal Ground 4

- 29. The counsel for the Defendant at the hearing referred to Section 3 of the iTaukei Lands Act, but said provision inter alia stated '*.....and in the event of any dispute arising for legal decision in which the question of tenure of land amongst native Fijians is relevant, all Courts of law shall decide such disputes according to such regulations or custom and usage which shall be ascertained as a matter of fact by the examination of witness capable of throwing light thereupon.*' In terms of the said provision there is no prohibition for any court of law, and the contention of want of jurisdiction to Magistrate's Court fails.

30. Since the appeal ground 5 was withdrawn at the hearing it is not considered, but suffice to state that it was not raised in the court below and in any event that it is not an issue of jurisdiction but an issue relating to evidence. To make a determination as to said ground RM should first have jurisdiction and if not it cannot be dealt.

CONCLUSION

31. Considering the material before the court below, I cannot see any merits in all the Grounds of Appeal. I affirm the decision of the RM and dismiss the appeal with cost summarily assessed at \$1,000 to be paid within 30 days. Considering the delay of one year, from the date of interlocutory decision, I direct SCO to send the matter to relevant RM forthwith and make a further direction to the RM to take necessary actions to expedite the matter.

FINAL ORDERS

- a. The Appeal is dismissed the decision of the learned Resident Magistrate delivered on 29th March, 2017 is affirmed.
- b. The cost of this appeal is summarily assessed at \$1,000. (To be paid within 30 days).
- c. Direction for SCO to transmit the file to the relevant Magistrate's Court forthwith.
- d. The Resident Magistrate is directed to take necessary steps to expedite the matter.

Dated at Suva this 28th day of March, 2018.



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Justice Deepthi Amaratunga
High Court, Suva