In the High Court of Fiji

At Suva

Civil Jurisdiction

Civil Action No. HBC 248 of 2017

The Ah Koy Christian Trust Fund

Plaintiff

v

Naliva Mareu & Family and Other Occupants

Defendant

Counsel: Ms S. Prasad for the plaintiff

Mr R. Vananalagi for the Defendant

Date of hearing: 17th September,2020

Date of Judgment: 14th November,2022

Ruling

1. The plaintiff's summons seeks leave to appeal my Ruling of 4th December,2019, enlargement of time to file notice and grounds of appeal and stay of my Ruling pending the determination of the appeal.

2. The supporting affidavit sets out the proposed grounds of appeal as follows:

    i. The learned trial Judge erred in law and in fact when he erroneously held that the application for leave which was filed within the prescribed time and compliant with the Rules and the subsequent failure to serve the application within the prescribed time (one working day late) was not amenable to a discretionary relief by the Court on and the Appellant's application under Order 2 Rule 1 of the HCR.

ii. *Further or alternatively, the learned trial Judge failed to consider and uphold that the application for leave to appeal was filed within time in court and that here was substantial compliance with the Rules; the failure to serve by one working day on the defendant was not a fundamental defect that that did not lend itself to curative orders and the exercise of the discretion under O 2 r 1.*

iii. *The learned trial judge erred in not considering the following circumstances prior to the exercise of his purported discretion under O 2 r 1 of HCR.*

   a. *The Plaintiff in the proceedings had served the application for leave on the solicitors for the defendant albeit one working day late and no prejudice had accrued to the defendant;*
   b. *The Plaintiff's application was, for the delay in service by a working day, was otherwise compliant with the rules.*

iv. *Without prejudice and alternatively to the other grounds of appeal, the Judgment of the Master the subject of appeal is not an Interlocutory Judgment but a final judgment and therefore not amenable for the requirement of leave and can be appealed within the prescribed time as of right.*

3. I declined the plaintiff's application for leave to appeal an Interlocutory Ruling of the Acting Master converting the originating summons(filed in terms of Section 169) to a writ, as the plaintiff's application was not served on the defendant within 14 days of the Master's Ruling in terms of Or 59, r11.

4. The proposed grounds of appeal argue that the failure to serve the summons on the defendant was not a fundamental defect, but an irregularity that could be rectified under Or 2, r 1.

5. Ms Prasad, counsel for the plaintiff cited the cases of ***Tawake v Fiji Air Ltd,*** [1996] FJHC 165; HBC 0058d.95S (5 December,1996) as followed in ***Claunch v One Hundred Sands Ltd***, [2019] FJHC 999; Civil Action 50 of 2019 (18 October 2019) .

6. In the first case, the plaintiff had obtained leave before the Deputy Registrar to issue writs on the defendant out of jurisdiction. Fatiaki J (as he then was) held that it was an appropriate case for the exercise of his discretion under Order 2 r.1 .

7. It was held that the failure to serve a sealed copy of the originating summons on the second defendant did not cause injustice and was an irregularity which could be cured under Or 2, r 2 in ***Claunch v One Hundred Sands Ltd,*** (*supra*).

8. The irregularity was curable in the cases cited, as the High Court Rules do not impose a time limit for service of a writ nor a sealed copy of an originating summons.

9. In contrast, the "***Rules in Part II of Order 59 have imposed a strict timetable for the filing and serving of documents at the Registry and on the Respondents***"(emphasis added), as Calanchini J (as he then was) emphasized in ***Gay v Resolution Trust Corporation*** [2010] FJHC 68; HBA01.2009 (26 February, 2010) . He stated further that:

> *. The purpose of the Rules was obviously to avoid delay at the interlocutory stage of civil proceedings and to make such appeals more efficient.*

10. In ***Panache Investment Ltd v New India Assurance***, [2015] FJHC 523; HBC 56.2014 (17 July 2015) Sapuvida J said;

> *I am of the firm view that the time limit of mandatory nature stipulated under any Order or Rule or Procedure is to be strictly followed and honored by any party but not to be dishonored and make haphazard (hit – or – miss) applications anticipating anything and taking things just for granted.*
>
> *I am therefore observe with emphasis here that, the Defendant in the instant case is guilty of lashes for filing the present application at the expiration of the time limit stipulated under Order 59 rule 11 and seeking Leave for appeal the Ruling of the Master even without submitting any plea for extension of time and/or for not explaining reasons for the delay caused in the same.*
>
> *Therefore, I decide that it is not necessary to explore the demerits of the ruling of the Master when the application effected by the defendant by way of summons dated 5 February 2015 before me is from the beginning misconceived in law.*

11. The law in respect of appeals from interlocutory rulings is settled.

12. In ***Kelton Investment Ltd & Tapoo Ltd v Civil Aviation Authority of Fiji,*** Civil Appeal No. ABU 0034 of 1995(18 July,1995) Tikaram P stated :

> *The Courts have thrown their weight against appeals from interlocutory orders or decisions for very good reasons and hence leave to appeal are not readily given. …. In my view the intended appeal would have minimal or no prospect of success if leave were granted. I am also of the view that the Applicants will not suffer an irreparable harm if stay is not granted.*

13. Calanchini P in ***Shankar v FNPF Investments Ltd*** ,[2017] FJCA 26; ABU32.2016 (24 February 2017) at paragraph 16 said:

> .. ***There is a general presumption against granting leave to appeal an interlocutory decision and that presumption is strengthened when the judgment or order does not either directly or indirectly finally determine any substantive right of either party. The interlocutory decision must not only by shown to be wrong but it must also be shown that an injustice would flow if the impugned decision was allowed to stand*** *(**Niemann –v- Electronic Industries Ltd** [1978] VR 431). See: **Hussein –v- National Bank of Fiji** [1995] 41 Fiji LR 130.*

14. In the present case, the defendants, (members of the Lami Assembly of God) relied on a promise made by a trustee the plaintiff that they could stay on the property. The reply filed on behalf of the plaintiff states that a promise was made to a Pastor in his personal capacity. The issue is as to whom the promise was made, the defendant. The Acting Master held that the issues raised by the defendant needs to be resolved by evidence.

15. In my view, the plaintiff will not suffer injustice, as its application for vacant possession will be determined after a trial.

16. As Calanchini P stated in ***Lakshman v Estate Management Services Ltd,*** [2015] FJCA 26; ABU 14.2012 (27 February, 2015) "***there is no injustice in allowing the Respondent to pursue his private law claim against the Appellant by way of a trial on the pleadings and evidence in the High Court".***(emphasis added)

And in ***Shankar v FNPF Investments Ltd***, (*supra*) the dismissal of the striking out application "***did not affect the substantive rights of either party. Its effect was to enable FNPFIL to proceed with its action in the High Court and to allow Shankar and Venture Capital to defend the claim*** (emphasis added)

17. I decline the plaintiff's summons for leave to appeal and stay.

18. ***Orders***

a. The plaintiff's summons seeks leave to appeal my Ruling of 4th December,2019, and stay of my Ruling declined

b. The plaintiff shall pay the defendant costs summarily assessed in a sum of $ 1000.00 within 15 days of this Ruling

A.L.B. Brito-Mutunayagam
JUDGE
14th November,2022