HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

CIVIL ACTION No. 34 OF 2022

BETWEEN **BANK OF BARODA** a body corporate duly incorporated in India, having its Head Office at Mandvi, Baroda, India and duly registered in Fiji under the Companies Act 2015 and having its registered office at 86-88 Marks Street, Suva, Fiji.

PLAINTIFF

ROSALIA CHUTE of Lots 2 and 3 Matamakita Subdivision, Isa Lei Road, Lami, Businesswoman.

DEFENDANT

Representation **Ms. K. Singh** (Neel Shivam) for the Plaintiff.
Ms. L. Jackson (Jackson Bale Lawyers) for the Defendant.

Date of Hearing 24th August 2023.

Ruling

Introduction

[1] The Defendant has filed a summons for leave to appeal the Ex-tempore Ruling of the Master. She is seeking enlargement of time and leave to appeal the Master's orders. The Defendant is also seeking that this matter be stayed pending the final determination for leave to appeal.

[2] This action was filed on 21st January 2022 and is one where the Plaintiff filed Originating Summons (Expedited Form) under Order 88 of the High Court Rules 1988 seeking vacant possession of the property comprised and described in Native Lease No. 16044 Lots 2 and 3 Matamakita Subdivision, Lami, having an area of 2 roods and 29.7 perches (hereafter "the property"). On 18th February 2022 the Defendant filed Summons seeking that this matter be consolidated with and tried immediately after Civil Action No. 103 of 2021 and/or proceedings be stayed pending the Defendant's claim and Plaintiff's Counter-Claim in Civil Action No. 103 of 2021. Master Lal dealt with the Summons and on 18th August 2022 delivered an Ex-tempore Ruling dismissing the Defendant's application.

Brief History of the Matters

[3] The property was registered to a company referred to as Rosewood Limited. The Defendant divorced from her former husband in December 2001. On 17th March 2009 the Court of Appeal held that that the property was matrimonial property and that the Defendant was entitled half share in the matrimonial home which was $65,000.00. In August 2015 the property was transferred to Organic Earth (Fiji) Limited. The property was mortgaged with the Plaintiff. On 21st October 2020 the Plaintiff filed mortgagee action against the Defendant in terms of Order 88 rule1 of the High Court Rules seeking vacant possession of the property. On 26th March 2021 the Defendant initiated Writ action No 103 of 2021 against the Plaintiff. On 31st December 2021 the mortgagee action (under O.88) was struck out for non-compliance with the O.88 r. 2 (3) and O.88 r. 3 (2). On 21st January 2022 the Plaintiff filed fresh application seeking vacant possession against the defendant (Action No. 34 of 2022). On 18th February 2022 the Defendant filed application for consolidation.

Analysis

[4] The Interlocutory Ruling of the Master was delivered on 18th August 2022. It was open to the Defendant to appeal that Ruling with the leave of a Judge: O.59. r8 (2) HCR 1988. Any application for leave to appeal an interlocutory order of judgment is made by summons with supporting affidavit, filed and served within 14 days of the delivery of the order or judgment: O.59 r.11. An appeal is filed within 7 days from the date of the granting of leave to appeal: O.59 r.9 (b).

[5] The O.59 r. 10 of the HCR 1988 applies to the enlargement of time for Notice of Appeal or Cross Appeal and has no relevance to the Summons filed by the defendant seeking extension of time for Leave to Appeal. It should be noted that both O.59 r. 10 (2) of the HCR 1988 and rule 11 require the service of the application. Neither O.59 r. 8(1) nor O. 59 r. 10 (1) of the HCR 1988 allows the High Court to grant extension of time for leave to appeal against interlocutory decision. The O.59 r. 11 of the HCR 1988 deals with leave to appeal and there is no mention of enlargement of time or application for enlargement of time.

[6] The general provision contained in O.3 r. 4 of the HCR 1988 is applied in the present application seeking extension of time. O.3 r.4 of the HCR 1988 provides as follow:

"(1) The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is ***required or authorized by these rules****, or by any judgment, order or direction, to do any act in any proceeding". (my emphasis)*

[7] This is leave to appeal against the decision of Master delivered on 18th August 2022. A Court is reluctant to grant leave to appeal against interlocutory orders, it is an exception, to grant leave. Orders for stay will arise if leave is granted. The first issue to be determined in whether leave to appeal should be granted from Master's decision. It was an interlocutory decision therefore the need of leave to appeal.

[8] The law on leave to appeal interlocutory decisions is well settled by the Court of Appeal decision ***Parshotam Lawyers v Dilip Kumar (trading as Bianco Textiles)*** **[2019] FJCA 176; ABU13.2019 (decided on 25 September 2019),** where Calanchini P held,

> "The matters that should be considered in an application for leave to appeal the interlocutory decision delivered on 23 January 2017 are well-settled. In ***Totis Incorporated, Spor (Fiji) Limited and Richard Evanson –v- Clark and Sellers*** (unreported ABU 35 of 1996, 12 September 1996) at page 15 Tikaram P observed:
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> *"It has long been settled law and practice that interlocutory orders and decisions will seldom be amenable to appeal. It is for this reason that leave to appeal against such orders is usually required.*
>
> ***Courts have repeatedly emphasised that appeals against interlocutory orders and decisions will only rarely succeed.***
>
> *The Fiji Court of Appeal has consistently observed the above principle by granting* ***leave only in the most exceptional circumstances****."*
>
> *[10] In* ***Kelton Investments Ltd –v- Civil Aviation Authority of Fiji*** *[1995] FJCA 15; ABU 34 of 1995, 18 July 1995 Tikaram P had cause to visit this issue and in doing so referred to the reasoning of Murphy J in* ***Nieman –v- Electronic Industries Ltd*** *[1978] VicRp 44; [1978] V.R. 431 who stated at page 441:*
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> *"_ _ _ the Full Court (of the Victorian Supreme Court) held that leave should only be granted to appeal from an interlocutory judgment or order in cases where substantial injustice is done by the judgment or order itself. If the order was correct, then it follows that substantial injustice could not follow.* ***If the order is deemed to be clearly wrong, this is not alone sufficient. It must be shown, in addition to affect a substantial injustice by its operation."***
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> *[11] In the Kelton Investments Ruling (supra) Tikaram P also noted that:*

"If a final order or judgment is made or given and the Applicants are aggrieved they would have a right of appeal to the Court of Appeal against such order or judgment. Therefore no injustice can result from refusing leave to appeal."

[12] More recently this Court observed in ***Shankar –v- FNPF Investments Ltd*** *and Anr. [2017] FJCA 26; ABU 32 of 2016, 24 February 2017 at paragraph 16:*

"The principles to be applied for granting leave to appeal an interlocutory decision have been considered by the Courts on numerous occasions. ***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 be shown to be wrong it must also be shown that an injustice would flow if the impugned decision was allowed to stand. (****Nieman –v- Electronic Industries Ltd*** *[1978] VicRp 44; [1978] V.R. 431 and* ***Hussein –v- National Bank of Fiji*** *(1995) 41 Fiji L.R. 130).* "(Emphasis is mine)

[9] The leave to appeal fails for the following reasons:

(a) There is no substantive determination of right of either party through the Master's decision delivered on 18th August 2022. There is no right for a Party, to consolidate any action with another action and this is a discretionary remedy for appropriate case management and to reduce cost of the parties. Courts are reluctant to interfere with decisions on case management.

(b) There is no prejudice to Defendant if two the actions are heard separately. The Learned Master in her Ruling relied upon Justice Amaratunga's judgment of 13th January 2022 in Civil Action 103 of 2021 where His Lordship refused an injunction against Plaintiff from dealing with the property. The relevant information on the matter including a judgment on the injunction was before Master Lal to make a decision on the consolidation of the matters. The Plaintiff is exercising its rights as the mortgagee, due to default of the current mortgagor (Organic Earth (Fiji) Limited). They have filed originating summons (expedited form) seeking vacant possession of the property. A delay in determination of the said matter does not assist anybody, except persons who have no right to remain on the property. The Defendant if she has any right to be in possession of the property can submit to the Court when the matter is heard.

(c) There are no exceptional reasons shown for granting of this leave to appeal. There were no such grounds adduced in the affidavit in support or at the hearing. The Writ action commenced after the first action for vacant possession through summons was instituted. albeit it was struck out. The

Plaintiff's promptly filed fresh action. There are no exceptional reason to delay the determination of that summons for eviction.

(d) There is no substantial injustice to Defendant by not allowing consolidation, in fact the delay is causing substantial injustice to the Plaintiff, the mortgagee who has lent monies and is not able to exercise its powers as a mortgagee until the determination of the Order 88 proceedings. The Defendant for her part continues to remain in occupation of the property. I also note what Justice Amaratunga noted in his judgment dealing with the injunction application by the Defendant against the Plaintiff noted in para 85 " *Plaintiff had waited more than five years to allege fraud of Defendant in this action. Defendant is mortgagee of the property. There was no serious question regarding registration of mortgage and allegation of frauds as pleaded in statement of claim. Even if I am wrong, balance of convenience favours Defendant. The strength of Plaintiffs action against mortgagee on affidavit evidence does not favour Plaintiff to obtain the injunctive relief against mortgagee. Defendant had examined Court of Appeal judgment before execution of the mortgage. When Plaintiff became aware of the transfer of the Property delay in action of fraud was not explained. Defendant was exercising its rights as mortgagee to sell the property. The Property was never owned by Plaintiff or her ex-husband, but a legal entity Rosewood. Either was no distribution of shares in Rosewood. So Rosewood had transferred the Property to another legal entity in 2015 and though the Plaintiff was aware of that no allegation of fraud was made against Defendant, till mortgagee sale to allege fraud...*" The reference by Justice Amaratunga above to the Plaintiff is the Defendant in this matter and the reference to the Defendant is the Bank, the Plaintiff in this matter.

[10] The submission of the Defendant was that since counterclaim in Civil Action No. 103 of 2021 contains identical questions of law and facts with the facts and reliefs sought in this Action by the Plaintiff (Bank) that the two actions should be consolidated. This may not be always a rule. If this is permitted any disgruntled party may institute an action by way of writ, to frustrate process of vacant possession, thus seeking consolidation. It will defeat the purpose of expedited form of action under Order 88 and the rights of a mortgagee will be stifled. The Plaintiff in this matter is the mortgagee. The Defendant is not the mortgagor. The mortgagor is Organic Earth (Fiji) Limited. I am of the view that the Plaintiff can seek vacant possession in terms of Order 88, irrespective of similar counter claim in Civil Action 103 of 2021.

[11] Even if there is some overlapping in both actions the Learned Master can exercise discretion to separate two matters when one action is in expedited form and other is not so and when determination of one matter will simplify the issues in the other matter. It is obvious that if vacant possession is granted counterclaim in Civil Action 103 of 2021 becomes redundant, but the claim for damages and other relief can be sustained. It was discretionary for the Master to consolidate the two actions, and there is no reason to vary. Consolidation of action is a discretionary remedy. The Learned Master exercised her

discretion. She took into consideration the relevant factors. I am reluctant to interfere with the decision of the Learned Master on the issue of consolidation of the matters.

Conclusion

[12] The Defendant's leave to appeal and the stay application is struck out. Costs is summarily assessed at $2000.00 and is to be paid within 30 days.

Court Orders:

(a) The summons seeking leave to appeal against the Master's decision delivered on 18th August 2022 is struck out.

(b) Costs of this action is summarily assessed at $2000.00 and is to be paid within 30 days. To be paid by Defendant.

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Chaitanya Lakshman

Acting Puisne Judge

6th November 2023

HIGH COURT OF FIJI SUVA