

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL ACTION NO HBC 130 OF 2023

IN THE MATTER of the Land Transfer Act
Cap 131 and under Section 169 of the
Land Transfer Act Cap 131

BETWEEN: **KHAIRUL NISHA aka KHAIRUL NISHA aka KHAIRUL NISHA** of 43 Shalimar Street,
Samabula, Suva, Domestic Duties

PLAINTIFF

AND: **KIRAN WATI** aka **KATHERINE SHAH** and **DAVID MORRISON CHRISTOPHER** both
of 43 Shalimar Street, both Occupation, unknown.

DEFENDANTS

Counsel: Shelvin Singh Lawyers for the Plaintiff
Amrit Chand Lawyers for the Defendants

Date of Hearing: 05th December 2023
Date of Judgment: 20th December 2023:

JUDGMENT

1. There are two applications before the Court filed by the parties:
 - I. Ex Parte Notice of Motion filed by the Plaintiffs on 11th September 2023 seeking the following orders:
 - I. Leave be granted to the Plaintiff to issue a Writ of Possession against the Defendants.
 - II. That the costs of the application be paid by the Defendants.

2. A Summons filed by the Defendants on 12th September 2023 seeking Stay Pending Appeal and Leave to Appeal out of time in the Court of Appeal against the judgment delivered by this Court on 8th of June 2023 seeking the following orders.
 - i. That the First and Second Defendants be granted leave to appeal or an enlargement of time to be given to the Defendants to file their Notice and Grounds of Appeal in the Fiji Court of Appeal, out of time, against the judgment delivered by this Learned Court on 8th June 2023.
 - ii. That the Judgment granted by this learned Court be stayed pending appeal.
 - iii. Costs be in the Cause.
 - iv. Any other orders this Court deems fit and just.

These Applications was set to be heard on 5th December 2023.

History

3. The Plaintiff is the registered owner of the property described as CT 9898, Lot 19 on DP 2320 and has been so registered since 1992, on the demise of her husband, the registered owner before her.
4. The First Defendant is the Plaintiff's daughter-in law and the Second Defendant is the Plaintiff's nephew.
5. The Defendants had been occupying part of the property for about 40 years
6. The Plaintiff maintains that there was a verbal license that the Defendants pay rent to her for their occupation of the said premises with the intention that this agreement be reduced to writing, however this was not done as the Defendant would not agree to this step being taken.
7. The property is stated by the Plaintiff to be in a state of disrepair and there is need for repair and the Plaintiff therefore needs the property to be vacated by the Defendants.
8. A Notice to Vacate the subject property was served on the Defendants on 10th March 2022, however the Defendants did not take heed of the Notice.

Originating Summons (Eviction Proceedings)

9. An Originating Summons with an Affidavit in Support was filed by the Plaintiff on 19th April 2022 seeking the following orders:

- (I) That the Defendants give up immediate vacant possession to the Plaintiff of the property comprised in CT 9698, Lot 19, DP 2320 of which the Plaintiff is the registered proprietor of which the Defendant occupies; and
- (II) That the costs of this application be paid by the Defendants to the Plaintiff.

Opposition

10. An Affidavit in Opposition was filed on behalf of both Defendants on 19th August 2022.

Hearing

11. The Originating Summons was heard on 27th February 2023 and judgment was delivered on 8th June 2023 and sealed on 23rd June 2023 (Date of Issue)

Judgment

12. In its judgment the High Court issued the following orders:

- (i) The Defendants to give up possession of the property contained in Lot 19 of DP 2320 of the Certificate of Title No 9698.
- (ii) The Defendants given 3 months from the date of this judgment to comply with order No.1.
- (iii) Defendants to jointly pay cost of \$1500 (One Thousand Five Hundred Dollars) to the Plaintiff within 14 days of this judgment. .

13. Both parties were represented at the hearing by counsels who filed written submissions to support the case advanced on behalf of their clients.

Post Judgment

14. On 12 July 2023 a Notice of Motion with an Affidavit in Support was filed by the Defendant, in person, seeking that the orders of the Court of 8th June 2023 and the order for vacant possession be stayed

15. On 18th August 2018 the Notice of Motion was withdrawn by the Defendants
16. A Notice of Change of Solicitors was filed on 18th August 2023 appointing Amrit Chand Lawyers to represent the Defendants in place of Torah Law.
17. An Ex parte Notice of Motion with Affidavit in Support was filed by the Plaintiff on 11th September 2023 pursuant to Order 45 Rule 2 of the High Court Rules 1988.
18. A Summons seeking Stay Pending Appeal and Leave to Appeal Out of Time with an Affidavit in Support was filed by the Defendants on 12th September 2023.
19. These Applications were called for mention on 9th and 17th November 2023 before the hearing date of 5th December 2023 was set, sufficient time was granted to the parties to file any documents they would rely on at the hearing of the Application.

APPLICATION FOR STAY AND LEAVE TO APPEAL OUT OF TIME

20. A Summons was filed by the Defendants pursuant to Order 45 Rule 10 of the High Court Rules 1988 on 12th September 2023, supported by an affidavit deposed jointly by the Defendants. The following orders were sought;
 - (i) That the 1st and 2nd Defendants be granted Leave to Appeal or an enlargement of time be given to the Defendants to file their Notice and Grounds of Appeal to the Fiji Court of Appeal out of time against the judgment delivered by the Learned Court on 6th June 2023.
 - (ii) That the Judgment granted by the learned Court be stayed pending appeal.

The Hearing

21. Both Applications were heard on 5th December 2023. The Plaintiff provided written submissions to support its position on both Applications, whilst the Defendants opted to make oral submissions only.
22. The Court notes an issue raised by the Defendants that whilst they had lodged their Application for Stay and Leave to Appeal Out of Time on 20th August 2023, it was only issued by the High Court Registry on 12th September 2023 resulting in substantial delay which was prejudicial to its case. Implicit in this submission is the allegation that other matters including that filed by the Plaintiff benefitted from the delay in having its

Application for Leave to Issue a Writ of Possession issued on 11th September 2023, even though they may have been lodged for filing in the Registry, later.

23. The Court noted the concern raised by the Defendants and took the following steps to address the alleged prejudice sustained by the delay;
 - (i) Allowed the Defendants to file a Supplementary Affidavit on 5th December 2023 setting out its concern on the delay it encountered on the issue of the Application it had submitted for filing on 20th August 2023.
 - (ii) Deferred the ruling on both Applications to 20th December 2023, to enable the Defendants to be served with the Ex Parte Motion for Leave to Issue a Writ of Possession (turning it Inter-Parte), so that the Defendants could have additional time to 15th December 2023 to respond to it, and the Plaintiff be allowed until 18th December 2023 for any further response, if required.

Analysis

24. The Court notes that the Application is made pursuant to Order 45 Rule 10 of the *High Court Rules 1988* on the grounds of matters which have occurred since the date of the judgment or order and the Court may by order grant such relief and on such terms as it thinks just.
25. The Defendants at the outset of the hearing also raised an issue that the Plaintiff had not filed an opposition to its Application. The Court finds this objection of little utility because circumstance has overtaken the need for such a requirement. The Court is now faced with a situation where its orders have not been heeded and the Plaintiff has filed an Ex Parte Motion for Leave to Issue a Writ of Summons. The Court finds the filing of this Motion as the clearest indication of the opposition of the Plaintiff.
26. The factors which the Court will consider when determining an application for an extension of time are well known – *Native Land Trust Board v Khan* [2013] FJSC 1 at 3 (as applied in *Fiji Industries Ltd v National Union of Factory and Commercial Workers-CBV 0008 of 2016*
 - (i) The reason for the failure to file within time.
 - (ii) The length of the delay.
 - (iii) Whether there is ground of merit justifying the appellate court's consideration?

- (iv) Whether there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?
 - (v) If time is enlarged will the Respondent be substantially prejudiced?
27. In order to determine the justice of any particular case the court should have regard to the whole history of the matter, including the conduct of the parties and since the reason for the delay is an important factor it is essential that the reason be properly explained – preferably on affidavit-so that the court is not having to speculate about why the time limit was not complied with-*Fiji Industries Ltd* –per Keith JA.
28. The Court has considered the Affidavit in Support for Leave and Stay filed on 12th September 2023 by the Defendants to elicit the reason for the delay in their filing their Notice of Appeal. The factors considered in the *Fiji Industries Ltd* case have to be applied to the primary grounds deposed by the Defendants for causing delay, bearing in mind the Supreme Court’s reminder that regardless of the factors identified, each case must be decided on its own facts with none of the factors required to be taken into account trumping any other.

Grounds (i) and (ii)-Delay and Length of Delay

29. In addressing these grounds the Defendants response maybe summarized,
- (i) The Defendants (initial) counsel, did not file the appeal in time and demanded additional funds, funds which the Defendants did not have.
 - (ii) The Defendants counsel did not return the funds (\$2000.00) paid to it, so they had difficulty engaging another lawyer, within the allowable appeal period.
 - (iii) They sought assistance from the Chief Registrar and they opted to file a stay application *in person* on 12th July 2023
 - (iv) The reason for not filing of the Notice for Grounds of Appeal in time was solely due to the fault of the lawyer. Had the Defendants had the knowledge they would have taken action expediently.
 - (v) The Defendants then engaged current counsels who advised them properly on what had to be done.
 - (vi) The Defendants contend that the delay of 33 days to file the Application does not prejudice the Plaintiff in any way.

Delay-Conduct of Counsel

30. The Court notes that the primary cause of delay relied on by the Defendants as the failure or refusal of their counsel to file their Notice of Appeal within time.

31. There is no rule that just because the litigant has not been at fault, he can escape the consequences of a mistake on the part of its lawyers. Nor is there any rule that because lawyers are expected not to make the sort of mistake which results in a notice of appeal not being filed in time, the litigant can never escape the consequences of such a mistake. It depends on the facts of such case- *Gatti v Shoosmith* [1939] 3 ALL ER 916 at 919 (as applied in *Industries Ltd Fiji* -CBV 0008 of 2016)
32. Bearing in mind this general principle, the Court does not accept the bald assertion by the Defendants that the delay is caused entirely by the failure of counsel to file the Notice of Appeal, in time, and that, the delay does not prejudice the Plaintiff in any way for the following reasons;
- (I) The reason for counsel not filing the Notice of Appeal in time was due to a disagreement about fees. The Court is of the view that this disagreement cannot be elevated into a unilateral mistake of counsel, but is something that the Defendants, must bear some responsibility for, too. Counsel had represented the Defendants, without any problems until the eviction hearing before this Court on 27th February 2023. Disagreement about fees appeared to have surfaced after the judgment was issued on 8th June 2023 and sealed on 23rd June 2023, against the Defendants.
 - (II) Whilst the Defendants allege that a proper Application for Stay and for Leave to Appeal Out of Time was only made after the engagement of current counsel on or after 18th August 2023 , the Court notes that counsels largely re-assert the grounds their predecessor had argued, without success, in the earlier hearing of 27th February 2023.
 - (III) Cumulatively, the delay was prejudicial to the Plaintiff, firstly, because the order of this Court, remains unenforced despite the Defendants being allowed a period of 3 months to comply with the orders, sealed on 23rd June 2023. The delay continues until the determination of the Defendants Application for Stay and Leave to Appeal Out of Time. The Court does not accept the submission that the Plaintiff has suffered no prejudice. This submission is, at best, misdirected in that the Defendants are no longer just dealing with the execution of the primary eviction orders issued by this Court on 23rd June 2023, but with its enforcement due to non-compliance for which an Application by the Plaintiff is also before this Court.

Grounds (iii) and (iv) -Meritorious Ground and whether Ground of Appeal will Succeed?

Merit of Appeal Grounds

33. The Court has evaluated the Proposed Notice of Appeal and Grounds of Appeal attached to the Affidavit in Support filed by the Defendant on 12 September 2023, (Annexure 1) to determine whether they merit further consideration by the Court of Appeal, these being;
- (i) That the learned Court had erred in law by failing to consider that the Defendants had an interest in the land as an owner of the property and the flat in which the Defendants had been residing –CT 9698, Lot 19, DP 2320 and had been residing on it for over 40 years.
 - (ii) That the learned Court had erred in law and fact in properly analyzing that the said property CT 9698, Lot 19, DP 2320 was a family property where the whole generation of families of the later Mohammed Rauf resided, especially the Appellants.
 - (iii) The Court failed to analyze the fact that the Defendants had carried out the capital investment on the property from the time the Defendants had been residing on the said property as the Defendants had treated the said flat and property as their own dwelling.
34. These issues were raised by the Defendants at the eviction hearing on 6th June 2023 and were addressed by this Court in its judgment, and it finds no reason to depart from it. It has found the written submissions provided by the Plaintiff at the hearing on 5th December 2023 of assistance, on this point. The Court finds;
- (i) On the issue of the ownership rights asserted by the Defendants over the subject property,(Appeal Grounds 1 and 2), the Court adopts the ruling in *Khan v Devi* [2016] FJHC 1106 that the law does not recognize a concept of family property where the rights of ownership are shared amongst family members, nor does the law acknowledge that by the mere fact of doing work on the asset of one party to the relationship, the other party will acquire a beneficial or equitable interest in the property, rather this must be determined in terms of the existing law of trusts. There are no special doctrine of equity applicable to this field alone.
 - (ii) The Court notes the assertion of capital investment raised by the Defendants in Appeal Ground 3 and finds no reason also to depart from its earlier finding of 23rd June 2023 on this point, on assessing merit, that

being the evidence of such investment were of limited value with no proof of expenditure prior to 2020. The probative value of this evidence was further reduced by it not being provided by an independent contractor, but by the Defendants own business. This Court finds no basis for departing from its conclusion that this ground was not based on principle, but rather formulated for the purpose of rebuttal against the signing of a Lease Agreement and could not therefore create a form of Proprietary Estoppel.

35. The Court does not find any merit in of any of the grounds of appeal to warrant enlargement of time for leave to appeal out of time to the Court of Appeal. .

Ground (v) Enlargement of Time and Prejudice

36. This ground has already been addressed against the Defendants

Application for Stay

37. On the issue of stay of execution of the judgment the Court notes that Order 45 Rule 10 vests it with a discretion to order relief, if matters have occurred since the date of the judgment on such terms as it thinks just.
38. The principles for stay sought under this Rule are well established. As affirmed in *Solomoni Naqa v Fiji Electricity Authority* – Civil Action 237 of 2002 these are;
- (i) A successful litigant should not rightly be deprived of the fruits of his litigation.
 - (ii) The power to grant a stay is discretionary.
 - (iii) The power is unfettered.
 - (iv) The Applicant needs to show special circumstance.
39. The requirement to establish a special circumstance is necessary to prevent the appeal, if successful, from being nugatory.
40. The Court finds that no such special circumstance is established to warrant the exercise of its discretion to grant stay. As alluded to earlier, the Application for Stay, is misdirected because even if leave to appeal were granted and the appeal succeed, any outcome would be nugatory because the circumstance for which stay is currently sought, that being against the eviction orders of this Court of 23rd June 2023, has passed and this Court is now dealing with the issue of the enforcement of those orders due to non-compliance by the Defendants , which is the subject of a separate Application before this Court..

NOTICE OF MOTION FOR LEAVE TO ISSUE A WRIT OF POSSESSION

41. The Defendants at the hearing of 5th December 2023 did not file written submissions against this Application and limited itself to oral submissions.
42. Counsels were aware from the mention hearings on 9th and 17th November 2023, when the hearing date for 5th December 2023 was set, that both Applications would be heard on that date. No opposition were raised formally by the Defendants at the hearing, against the Application for Leave to Issue a Writ of Possession.
43. An objection on the lack of service of the Ex Parte Notice of Motion was only raised by counsel after making oral submissions to the Court on the issue of Leave and this was formally raised in the Supplementary Affidavit filed by the First Defendant, together with the complaint on the issue of delay from the Registry, with the leave of the Court on 5th December 2023.
44. These issues were addressed by the Court as outlined by the Court in paragraph 24 of this Ruling.

Analysis

45. An Ex Parte Notice of Motion and an Affidavit in Support deposed by the Plaintiff was filed on 11th September 2023 pursuant to Order 45 Rule 2 of the High Court Rules 1988. It states;

“...2-(1) Subject to the provisions of these Rules, a judgment or order for the giving of possession of land maybe enforced by one or more of the following means, that is to say-

- (a) writ of possession;*
- (b) in a case which rule 4 applies, an order of committal;*
- (c) in such a case , writ of sequestration*

(2) A writ of possession to enforce a judgment for the giving of possession of any land shall not be issued without the leave of the Court except where the judgment or order was given or made at a mortgage action to which Order 88 applies...”

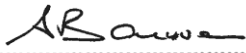
46. No Affidavit in Opposition was filed by the Defendants initially however the Court took the unusual step of allowing the Defendants to file an Affidavit in Opposition by 15th December 2023, due to the allegation raised about the delay in the issue by the Registry of the Application for Stay and to Appeal Out of Time, which they allege prejudiced the timely issue and hearing of their Application.
47. In the Affidavit in Response for Leave to Issue Writ of Possession filed on 15th December 2023 the Defendants re-state some of the grounds they had advanced in the Eviction hearing (to augment oral submissions made on 5th December 2023) and added other grounds;
- (i) The Second Defendant is currently in remand from the month of October;
 - (ii) Does not deny that there is an eviction order, but that she and the other Defendant have been harshly treated by this Court by the issue of an eviction order from their family home for more than 40 years;
 - (iii) The Plaintiff is totally unaware of the eviction proceedings and rather it is her son and grandson who are the instigators;
 - (iv) The Notice to Vacate of March 2022 of a premise they occupying for over 40 years caught them by surprise.
48. The rights deposed by the Defendants were appropriate for consideration at an Eviction hearing however, that stage has passed and what the Defendants have to address is why the Court ought not grant leave to issue a Writ of Possession to enforce the Eviction Orders of 23rd June 2023, which have not been complied with. The rights vested on the Defendants under this Rule are limited, bearing in mind that a Court has a duty to facilitate the execution and enforcement of its orders-*Bekana Islands Resort Ltd v Blake*-Civil Action No HBC 76 of 2014.
49. It has been said, on a strict reading of Order 45 Rule 2, that the Defendant has no right to show cause why leave should not be granted by the Court to issue a Writ of Possession. There is clearly an implied intention by the legislature that the Defendants should not have the right to be heard before granting leave to issue writ of possession- *Bekana Islands Resort Ltd v Blake*-Civil Action No HBC 76 of 2014
50. The Court has allowed the Defendants to show cause in this situation because of the peculiar problem they have encountered in this matter with the late issue of documents from the Registry, however having done so, the Court has a duty to apply the law correctly.

51. Before granting leave to issue a Writ of Possession to enforce the Eviction Orders of this Court for the giving of possession of the land the Court must show that the persons in active possession of the land have received a Notice pursuant to Order 45 Rule 2(3).
52. The Plaintiff was directed on 12th December 2023 to ensure that the Defendants were served with the Notice of Motion seeking Leave to Issue a Writ of Possession and for the Defendants to file any material in opposition they want the Court to consider on or before 15th December 2023.
53. The Defendants have now filed an Affidavit in Response for Leave to Issue Writ of *Possession* on 15th December 2023 confirming to the Court that Order 45 Rule 2(3) has been complied with. The First Defendant has deposed the said affidavit on behalf of the other Defendant also, her son, and do not deny that they are aware of the existence of an Eviction Order against them.
54. As the Plaintiff states in her Affidavit in Reply in Response to the Defendants filed on 18th December 2023, it is only important that the Defendants knows about the Eviction Order and not complain about the correctness of the Order as she is the registered owner and she wants the Defendants out from her property.
55. The Court has considered the Affidavit in Opposition filed by the Defendants and the Reply filed by the Plaintiff and it is of the view that the threshold position for the grant of Leave to Issue a Writ of Possession has been satisfied.

FINAL ORDERS

1. **The Summons for Stay and Leave to Appeal Out of Time issued on 12th September 2023 is refused.**
2. **The Motion for Leave to issue a Writ of Possession against the Defendants in respect of the land described as Certificate of Title 9898, Lot 19 on DP 2320 issued on 12th September 2023 is granted.**
3. **No orders as to costs on both Applications.**




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Savenaca Banuve
Judge of the High Court