

SAYED AHMAD HUSSAIN

v.

RESORT MANAGEMENT LIMITED

[HIGH COURT, 1990 (Palmer J) 9 January]

Civil Jurisdiction

Practice (Civil)- Legal Practitioners- duties in relation to applications for an adjournment.

On the date fixed for the hearing of an action for possession counsel retained by the Defendant failed to appear. In his place another counsel appeared whose instructions were limited to seeking an adjournment. Deprecating the practice of seeking adjournments without good cause the High Court stressed that counsel appearing must be fully instructed in the event that the application to adjourn was not granted.

Case cited:

Plastic Manufacturing (Fiji) Ltd. v. I.C.I. Fiji Ltd. (FCA Repts 84/457)

N. Arjun for the Plaintiff

K. Vuetaki for the Defendant

Action for possession in the High Court.

Palmer J:

By Originating Summons filed the 12th October 1989 the Plaintiff applied to the Court pursuant to Section 169 of the Land Transfer Act (Cap. 131) for an Order for vacant possession of certain land and building situated in Suva, commonly known as the Southern Cross Hotel. The Summons was duly served and on the return date, 3rd November, 1989 Mr Tevita Fa appeared for the Defendant. It was adjourned for 7 days to enable him to file an answering Affidavit. This was done on 10th November 1989 and when the matter was called on that day the Plaintiff urged for an early hearing on the grounds that a large amount of rent was then outstanding, amounting to some \$33,000 as of the 31st August 1989. Mr Fa stated that the matter was contested and would take some time to hear. I adjourned the matter to the Chief Registrar to fix a Hearing date. The Chief Registrar, after consultation with the Solicitors on both sides fixed a date for Hearing before myself for Wednesday the 29th November 1989. Subsequent to that fixing of the Hearing date Mr Fa approached the Chief Registrar and informed him that he was going to Tonga and would be away on the 29th November, 1989 and requested that another Hearing date be assigned. The Chief Registrar consulted with me

A and I, wishing to accommodate Mr Fa as much as possible notwithstanding the fact that there was only one week left before the court vacation, agreed to vacate the Hearing date and list it instead for Monday the 4th December upon being informed by the Chief Registrar that Mr Fa had indicated to him that he would be back in time for that date.

B Notwithstanding the foregoing, Mr Fa's office wrote to the Chief Registrar on the 28th November informing him that Mr Fa would be leaving for Tonga on the following day returning on Wednesday the 6th December and asking for another date to be assigned. The Chief Registrar replied to Mr Fa's firm on the 29th November reciting the history of the matter that I have just set out and commenting that the Plaintiff had made several requests for an urgent hearing before the beginning of the Court vacation. The Chief Registrar went to say as follows:

C "I subsequently spoke to both the Plaintiff's Solicitors and yourself in which Wednesday the 29th may be suitable. However at your insistence and on your assurance that you will return from Tonga before the 4th December, I further fixed the matter after consultation with Mr. Justice Palmer for the application to be heard on the 4th December 1989.

D However on subsequent telephone conversation on Monday 27th you said that you will be away in Tonga but you may be able to instruct another Counsel to appear for you. On this basis you were told that the Motion of Hearing will be issued. I wish to inform you that the matter is fixed for Monday the 4th December at 9.30 a.m. and I advise you to instruct Counsel to appear for you."

E When the matter was called before me at 9.30 a.m. on the 4th December 1989 Mr. Vuataki appeared for the Defendant and applied for an adjournment on the ground that Mr. Fa was in Tonga. Mr. Vuataki was aware of the correspondence with the Chief Registrar including his reply of the 29th November. He was unable to advance the matter beyond applying for the adjournment. The application was opposed by Counsel for the Plaintiff. I refused the application for adjournment. Mr. Vuataki then said that he was only instructed to seek adjournment and he had no instruction as to the substantive matter. He sought leave to withdraw. I granted him leave, observing that if those instructing him wished to leave their client unrepresented then that was a matter for them. I then proceed to hear the applicant.

F
G In Plastic Manufacturing (Fiji) Limited v. I.C.I. Fiji Ltd., (FCA Reps 84/457) the Court of Appeal dealt with a matter concerning a refusal of an adjournment and on page 8 of the Judgment said this:

"Here there was a totally unwarranted presumption apparently made by the Solicitors for the Appellant that an adjournment would be granted: they merely instructed Suva Counsel to ask for an

adjournment without providing Counsel with full instructions. Kearsley J was quite correct to observe that they have presumed that the adjournment would be granted.”

A

and further on the. Court said:

“We are satisfied that Kearsley J took the appropriate course in the circumstances : he was quite right to refuse the Appellant’s application for the adjournment made on flimsy and unsubstantiated grounds and with a rather cavalier approach to the Court.”

B

The appeal was dismissed with costs.

Matters have not improved since then. It is a common, almost daily, experience to have Counsel appear on the day set down for hearing of a matter and apply for an adjournment. Often on the flimsiest grounds. Frequently the application is made in matters which are very old and/or in which there have been numerous previous adjournments. In many of these cases it appears that the interests of the client are enjoying a very low priority over the convenience of Counsel; moreover, the essential need for the Court to conduct its business with despatch and in an organised fashion is totally ignored by those making these kind of applications. I am not of course referring to those cases where there is a genuine reason for the adjournment, such as the illness etc of an essential witness or something of that kind, or where the parties are genuinely negotiating, albeit late in the day, with some prospect of the matter being settled. Invariably on the occasions I am referring to, the practitioner applying for adjournment on behalf of the Counsel who has the carriage of the matter has no instructions apart from seeking the adjournment and usually has no knowledge of the substantive matter whatsoever. He is therefore not in any position to deal with the situation that might arise if the application were to be refused.

C

D

E

There appears to be an impression abroad-at least among some practitioners - that the Court’s sole function when an adjournment is sought is to rubber-stamp that request with approval. It seems to be thought that Counsel only need to apply for an adjournment on however flimsy grounds and however late in the piece and the court is then obliged to organise its own business accordingly. The present case is a particularly blatant one as appears from the facts briefly stated above and affords an opportunity for the Court to state unequivocally that those practitioners who are in the belief just stated need to be disabused of it firmly. Some Counsel who choose to go overseas or make themselves otherwise unavailable after a matter has been fixed for hearing deem it sufficient to send someone else merely to let the Judge know that they are not going to be there. This contemptuous attitude to the Court will no longer be tolerated. It is axiomatic that counsel seeking an adjournment, like anyone making any application, should be in a position to deal with the situation that might arise if the application were to be refused. Apart from the discourtesy to the Court and apart from the effect

F

G

HIGH COURT

upon the interests of those Practitioner's clients the present practice is hurtful to other litigants who are waiting for Court time to have their cases heard.

- A I now turn to the merits of the present application for possession. Pursuant to Section 171 of the Land Transfer Act Cap.131 if there is no appearance for the Defendant the Plaintiff in order to obtain an Order for possession must prove to the satisfaction of the Judge the due service of the Summons and his title. On the evidence before me I am satisfied that the Summons was duly served and that the Plaintiff is the registered proprietor of the land comprised in CT Vol. 45, Folio 4410 known as allotment 3 Section XVII (part of) situated in the Township of Suva.

- B It may be mentioned that two affidavits were filed on behalf of the Defendant, but from the clear and express wording of Sections 171 and 172 of the Act it is clear in my view that it is for the person summoned to appear and show cause and prove to the satisfaction of the Judge a right to the possession of the land if he wishes to oppose the application. This has not been done in the present case and accordingly I propose to make an Order for possession. However notwithstanding the conduct of the Defendant's Counsel I am prepared to grant the Defendant one indulgence: the property in question had in fact been leased to the Defendant and the Plaintiff had resumed possession thereof pursuant to the lease agreement on the grounds of substantial arrears of rent. Because of this circumstance I am prepared to give the Defendant an opportunity to demonstrate his bona fides and retain possession of the land and premises pending the resolution of the issues arising out of the lease agreement. On the evidence before me the arrears of rent are now in the order of \$40,000.

- D The Order I make accordingly is as follows:

- E The Plaintiff is to have immediate possession of the land comprised in CT. Vol 45, Folio 4410 being allotment Section XVII (part of) situated in the City of Suva; the execution of this Order to be stayed until further Order if the Defendant pays the sum of \$40,000 into Court not later than 16th January 1990. Defendant to pay the costs of this application.

(Conditional Order for possession)

G