

**MOSESE MASIREWA and Anor v COLONIAL MUTUAL LIFE
INSURANCE SOCIETY LTD and Anor**

5 HIGH COURT — CIVIL JURISDICTION

SCOTT J

25 April 2003

10 [2003] FJHC 5

**Practice and procedure — applications — application to strike out originating
summons — whether the statutory declaration were inconsistent — whether the
Defendants have breached the Penal Code and liable to prosecution, indictment,
15 sentence and punishment — mortgage proceedings — Land Transfer Act (Cap 131)
s 71.**

The Defendants filed an application to strike out the originating summons by the
Plaintiffs on the ground that it discloses no reasonable cause of action. The originating
20 summons sought an order for the Defendants to be liable for prosecution, indictment,
sentence and punishment for committing willful and corrupt perjury. The counsel for
Defendants submitted that the transfer accompanied by a statutory declaration by the
Plaintiff (mortgagee) in support of his affidavit was incorrect and unlawful and offended
the Statutory Declaration Act.

25 **Held** — (1) It appears from the comparison of the documents that the demand referred
to in the statutory declaration was not in fact a letter of demand for repayment of the
mortgage debt but a demand for vacant possession. It also appears that the statement in the
1998 letter that “the property has been sold by way of mortgagee sale” is on its face
inconsistent with the advertisement of the property for sale in May 1999. These
30 discrepancies raise a suspicion that the declarations may be incorrect.

(2) Whether or not there are indeed material inconsistencies in those affidavits cannot
have any bearing on the Plaintiffs’ rights as mortgagors. Since these affidavits were not
made by the Defendants they cannot provide any evidence of wrong doing by the
Defendants as alleged by the Plaintiff.

35 (3) The apparent errors in the statutory declaration as submitted materially did not
mislead the registrar or caused him to do something which he was not entitled to do. It is
clear from the statutory declaration that the Plaintiffs owed a substantial amount to the
mortgagee. Nothing had been paid towards repayment of the debt and following
advertisement by the mortgagee in exercise of the powers conferred under the mortgage,
the property had been transferred to a transferee whose offer to purchase the property had
40 been accepted.

(4) The proper venue for determining whether the Defendants committed a crime is the
criminal courts where evidence can be heard on oath and tested. Such a procedure is
wholly unsuited to proceedings commenced in a civil court by originating summons.

Application allowed.

Cases referred to:

45 *Imperial Tobacco Ltd v Attorney-General* [1981] AC 718; [1980] 1 All ER 866;
Amstrad Consumer Electronics Plc v British Phonographic Industry Ltd [1986]
FSR 159, cited.

50 *N. Nawaikula* for the Plaintiffs.

R. Lal for the Defendants.

Scott J. This is an application by the Defendants brought pursuant to the provisions of RHC O 18 r 18 (1) (a) (applied by O 18 r 18 (3)) to strike out the originating summons on the ground that it discloses no reasonable cause of action.

5 The present Plaintiffs were substituted for Timoci Naco by leave of the Court given in September 2002.

The originating summons seeks the following orders:

- 10 (1) An Order that the First Defendant Company is liable to prosecution, indictment and sentence and punishment as the said Company had committed wilful and corrupt perjury through its officer and/or Employee, the Second Defendant to declare that the Plaintiffs Crown Lease No. 2721 was sold in its letter dated 10th February 1998 when the declaration declared on 17th February 2000 is a contradiction and offends the Declaration Act.
- 15 (2) An order that the second Defendant is liable to prosecution, indictment and sentence and punishment as he had committed wilful and corrupt perjury, in that, the Second Defendant instructed the first Defendant's solicitors to write a letter to the Plaintiffs dated 10th February 1998 and the said letter is contrary to a statutory declaration declared 17th day of February 2000.
- 20 (3) An Order that the Defendants have breached the Penal Code and hence liable to prosecution, indictment, sentence and punishment.
- (4) An Order that the Defendants by their willful and misleading conduct prevented the Plaintiffs from having a fair trial thus causing substantial loss, stress and anxiety.
- 25 (5) An Order that based upon the weight of evidence against the Defendants contained in the affidavits filed in support of this application, the Defendants be prosecuted, indicted and punished for the criminal offence so committed according to law.
- (6) Costs.

30 Mr Nawaikula, without objection from Ms. Lal, asked me to read the prayer for relief as seeking declarations rather than orders and this seems a sensible approach to pleadings drafted by an unqualified litigant in person.

Ms Lal in support of her application referred me to the affidavit of the first named Plaintiff filed in support of the originating summons on 27 June 2002.

35 This affidavit reveals:

- 40 (i) that mortgagee proceedings for possession of 37 Namuka Street Samabula (HBC 444 of 1998S) were commenced by the 1st Defendant herein on 9 September 1998 and were dismissed on 15 April 1999 as appears from Ex C "for non compliance with the mandatory requirements of O 88 r 3.
- (ii) that the Plaintiffs herein themselves commenced proceedings (HBC 63 of 1999S) with a view to restraining the mortgagee from exercising its powers of sale but that the proceedings were finally adjourned sine die in June 2000 without any injunction having been granted.
- 45 (iii) during the pendency of HBC 63/99 the mortgagee, in purported exercise of its powers under the mortgage sold 37 Namuka Street to Krishna Sami Gounder and transferred the property to the purchaser (Ex E).
- (iv) That the transfer was accompanied by a statutory declaration by the mortgagee (Ex D) which the first named Plaintiff herein avers in para 9
50 of his supporting affidavit to be "incorrect and unlawful" and "offends the Statutory Declaration Act."

Ms Lal first pointed out that the statutory declaration does not, as claimed by the first named Plaintiff, claim that the property in question was twice advertised in 1999. Although plainly rather poorly drafted the relevant paragraph, para 6, is not in fact, as it stands, false.

5 Ms Lal did not address me on the discrepancies between paras 4 and 6 of the statutory declaration and a letter dated 10 February 1998 sent by Sahu Khan and Sahu Khan, solicitors to the Plaintiffs, a copy of which is the fourth document in Ex G to the supporting affidavit.

10 From comparison of these documents it appears fairly clear that the demand referred to in para 4 of the statutory declaration was not in fact a letter of demand for repayment of the mortgage debt but a demand for vacant possession. It also appears that the statement in the 1998 letter that “the property has been sold by way of mortgagee sale” is on its face inconsistent with the advertisement of the
15 property for sale in May 1999.

In my opinion these apparent discrepancies at least raise a suspicion that the statutory declaration may in fact, in certain particulars, be incorrect.

20 Second however, Ms Lal than submitted that even if the statutory declaration was found to be incorrect it did not contain errors which had resulted in any detriment to the Plaintiffs since the statutory declaration was a purely procedural requirement. She stressed that the 1st Defendant as mortgagee became entitled to sell the property not because of the existence of the statutory declaration but because the Plaintiffs had not repaid the debt which they owed to the Defendants
25 and which was secured by the mortgage.

Third, Ms Lal suggested that the Plaintiffs were misguidedly raising a matter now which should have been raised by them in the civil proceedings mentioned by them in their supporting affidavit, but which were not.

30 In his well presented written submission in answer Mr Nawaikula first referred to the principles governing this type of application. He emphasised that the court will only exercise its power to strike out in plain and obvious cases. He suggested this was not such a case.

In para 6 of his written submission Mr Nawaikula confirmed that the gist of the Plaintiffs complaint was the allegedly incorrect and unlawful statutory
35 declaration. He also referred to paras 12 and 13 of the first named Plaintiff’s supporting affidavit in which he alleged inconsistencies in two affidavits filed by Krishna Sami Gounder, the purchaser of the property. These affidavits, together with the other documents filed were said in para 14 to:

40 provide undeniable evidence that both Defendants have breached the Oaths Act Cap 42, the Statutory Declaration Act Cap 43 and the Penal Code.

As a result, it was claimed in paragraph 15:

45 the Plaintiffs were disadvantaged in their cause to maintain their property and denied a fair hearing and thus lost their family home.

Whether of not there are indeed material inconsistencies in those affidavits cannot, in my view, possibly have any bearing on the Plaintiffs’ rights as mortgagors. Since these affidavits were not made by the Defendants they cannot provide any evidence of wrong doing by the Defendants as alleged by the
50 Plaintiff. It is perhaps for that reason that Mr. Nawaikula principally relied on para 9 of the supporting affidavit as the gist of the Plaintiffs’ complaint.

The statutory declaration which is the object of complaint is that declaration which is required by the note to Form 12 which is the form for a transfer by a mortgagee exercising its power of sale prescribed by s 71 of the Land Transfer Act (Cap 131).

5 The note requires that the mortgagee furnish a declaration “setting out the facts relating to the exercise of the power of sale and default up to the date of transfer”. The prescribed form may, by s 71, “be accepted by the Registrar as sufficient evidence that the power has been duly exercised and he shall not be bound or
10 required to call for proof that the power has been properly exercised.”

Paragraph 6 of the statutory declaration states that the property was advertised for sale on 22 May 1999. That this is indeed the case can be seen by referring to a copy of the advertisement which is the third document in Ex E to the supporting affidavit.

15 Paragraph 6 also states, somewhat sloppily, that the property was also advertised on “Thursday 16 October”. A copy of an advertisement for the property appeared on Thursday October 16 1997 as may be seen from the penultimate document to Ex B in the supporting affidavit.

20 A copy of the mortgage is the third document in Ex G to the supporting affidavit. Although it is not disputed that a mortgagee has in law a duty to the mortgagor to secure a fair price for the mortgaged property which is being sold a requirement that the property be advertised or advertised more than once is not itself a term of the mortgage document.

25 For reasons that are obvious s 71 does not impose a duty on the registrar to enquire into the precise circumstances or manner in which the mortgagee has exercised its powers. It does not seem to me to be arguable that the apparent errors in the statutory declaration as submitted materially misled the registrar or caused him to do something which he was not entitled to do. As is abundantly
30 clear from the statutory declaration and as is not challenged, the Plaintiffs owed a substantial amount to the mortgagee, nothing had been paid towards repayment of the debt and following advertisement by the mortgagee, in exercise of the powers conferred under the mortgage, the property had been transferred to a transferee whose offer to purchase the property had been accepted.

35 In my opinion the Plaintiffs’ central argument based on the apparent errors in the statutory declaration is unsustainable.

Two further points may be made. When asked by me to identify the “hearing” referred to in para 15 of the supporting affidavit which it was alleged was unfair,
40 Mr Nawaikula could only point to civil action HBC 444 of 1988. In view however of the fact that those proceedings were resolved in favour of the present Plaintiffs that argument must fail.

There is finally briefly to be considered the whole question of the Court’s discretion in circumstances such as these. Although Mr Nawaikula dropped the
45 reference to the Oaths Act in para 14 of the supporting affidavit he continued to rely on alleged breaches of the Statutory Declarations Act and the Penal Code.

Under s 121 of the Penal Code (Cap 17) a person:

50 who knowingly and wilfully makes a statement false in a material particular and the statement is made –

(a) in a statutory declaration..... is guilty of a misdemeanour.

In order to prove that the offence has been committed a prosecutor has to prove:

- (i) that the statement when made was false;
- (ii) that the statement was false in a material particular; and
- 5 (iii) that the statement was knowingly and wilfully made.

The proper venue for determining the truth of such questions is the criminal courts where evidence can be heard on oath and tested. Such a procedure is wholly unsuited to proceedings commenced in a civil court by originating summons.

- 10 Furthermore, it is well established that a declaration should not be granted in a civil court to a defendant in criminal proceedings on the ground that the facts alleged by the prosecution do not in law prove the offence charged since to make such a declaration would be to usurp the functions of the criminal court (see *Imperial Tobacco Limited v Attorney-General* [1981] AC 718; [1980] 1 All ER
- 15 866 and *Amstrad Consumer Electrics Plc v British Phonographic Industry Ltd* [1986] F S R 159).

- In the present case, although the position is reversed, I am satisfied that the same principle obtains. Here, a civil court is being asked to declare that certain events constituted a crime. Control of prosecutions is vested in the Director of
- 20 Public Prosecutions (Constitution 1997, s 114 and Penal Code, s 71). The proper venue for the trial of offences contrary to s 121 of the Penal Code is the Magistrates' Court (see Criminal Procedure Code (Cap 21) and First Schedule and Electable Offences Decree 22/1988, s 3 and Schedule).

- Nothing that I have been told causes me to think that on the facts alleged by
- 25 the Plaintiffs this Court should usurp the functions of the Director of Public Prosecutions and the Criminal Courts by inquiring into the Plaintiffs' allegations with a view to making the declarations sought. If, after reading this ruling the Plaintiffs are still of the view that the Defendants committed some sort of criminal offence when submitting the statutory declaration complained of then
- 30 they should report the matter to the Police. As a last resort they could commence a private prosecution.

The application succeeds. The originating summons is struck out as disclosing no reasonable cause of action.

- 35 *Application allowed.*

40

45

50