IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 59 of 1977

Between:

1. MOTI LAL s/o Ram Adhin
2. UGENDRA PRASAD s/o Palahad
3. SURENDRA LAL s/o Moti Lal

Appellants

- and -

EMPEROR TIMBER INDUSTRIES LIMITED

Respondent

V. Parmanandam for Appellants.
P.I. Knight for Respondent.

Date of Hearing: 2.3.78.
Date of Judgment: 22.3.78.

JUDGMENT OF THE COURT

Marsack, J.A.

On 20th January 1977 the respondent took action against the appellants in the Supreme Court claiming a total of $31,097.63, mainly for the sale and purchase of timber. The appellants filed a Statement of Defence admitting liability for $30,610.99, but

denying liability for two small items for cartage and legal fees. They also counter-claimed for $39,733.04 for breach of another contract for the sale and purchase of timber. On the 18th October 1977 the parties appeared before Mr. Justice Tuivaga in Chambers, and respondent asked for judgment to be given summarily for the sum of $30,610.99 but did not press its claim for cartage and legal fees. Counsel for the appellants submitted that the matter was not one which could be dealt with summarily and asked that it be tried in open Court. Tuivaga, J. then made the following order :

> " Final judgment for admitted amounts i.e. $30,610.99 and costs of application. Defendant to pursue Counterclaim and set-off in a separate action."

On 10th November 1977 the appellants lodged notice of appeal. On 6th December 1977 application was made by appellants to the Court to fix security for costs and also for stay of execution pending appeal. Mr. Justice Kermode made an order fixing security for costs and also staying execution pending appeal.

Grounds of appeal are that the learned Judge of first instance erred in law in:

(a) entering judgment for the respondent and

(b) ordering that the appellants pursue the counterclaim in a separate action.

At the outset it must be stated that there appears to be some confusion as to what is the actual effect of the learned Judge's order; whether it means that the counterclaim is to be dealt with in a separate hearing before that Court, or that the appellants are obliged to institute fresh proceedings by way of writ of summons and statement of claim. As we have come to a definite conclusion as to what course should be followed we do not think it necessary to express any opinion on those points.

It is quite clear in our view that the learned Judge was fully entitled to enter judgment in favour of the plaintiff (respondent) as he did. Liability for the amount for which he gave judgment was fully admitted by the appellants; there were no conditions or qualifications attached to the admission; and accordingly there was no reason why judgment in favour of respondent should not be entered at once. Order 15 rule 2 of the Supreme Court Rules definitely provides that a counterclaim may be proceeded with notwithstanding that judgment is given for the plaintiff in the action.

Some point was raised in the argument before us to the effect that the transactions involved in the counterclaim were entirely separate and were in no sense connected. It is perfectly true that the two transactions concerned the sale of two different lots of timber, so that the terms

of one sale had no connection with the terms of the other. At the same time it can properly be said that there was some association between the two contracts in that they both arose in the ordinary course of dealing between the parties in their lines of business.

In our view the learned Judge was right in entering judgment in favour of the respondent for the sum admittedly owing, and also in ordering that the appellants' claim against the respondent be heard separately though there was no need to throw upon the appellants the responsiblity of starting proceedings anew by the issue of a writ and statement of claim. They are entitled to a hearing on the counterclaim which has already been filed after pleadings in respect of it have been completed.

The only further question which arises is that of stay of proceedings. In that connection we refer to the judgment of the Master of the Rolls in Sheppards & Co. v. Wilkinson and Jarvis (1889) 6 T.L.R.13 :

> " If it was clear that the claim must succeed, and there was really no defence to it, and the plaintiff would only be put to expense in proving his claim, then there ought to be judgment on the claim, but the matter must be so dealt with that defendants who had a plausible counter-claim must not be injured. That could be done by staying execution on the judgment until the counter-claim had been tried. "

Here it could be said, we think, that the appellants have at least a "plausible" counterclaim and as we have said, though it arises under a separate contract, it was part of the course of dealing between the parties in the particular commodity: therefore there should be a stay of proceedings pending the hearing of that counterclaim. At the same time the stay must not be used for the purpose of delay; steps should be taken to prosecute that claim with all due diligence.

There will accordingly be an order

(a) that the counterclaim be heard in the Court in which it was lodged;

(b) that there be stay of execution pending determination of the counterclaim, or further order of the Court.

Counsel suggested that the two small items in the Statement of Claim not dealt with, relate in fact to the counterclaim and if that is so they can be raised again in the appellants' pleading to the counterclaim. Costs of the appeal will follow the event of the proceedings on the counterclaim.

(Sgd.) T.J. Gould
VICE PRESIDENT

(Sgd.) Charles C. Marsack
JUDGE OF APPEAL

(Sgd.) T. Henry
JUDGE OF APPEAL

SUVA,
22nd March, 1978.