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IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0035 OF2006
(High Court Civil Action No. HBC 68/2001L)

BETWEEN:

MADHWAN KESHWAN
(f/n Keshwan Raman)

Appellant

AND:

KESHNI DEVI
(f/n Narsaiya)

First Respondent

AND:

SHAILEND R KRISHNA
(f/n Ram Krishna)

Second Respondent

AND:

REGISTRAR OF TITLES

Third Respondent

Coram: **Scott, JA**
McPherson, JA
Ford, JA

Date of Hearing: **16 March 2007**

Counsel: **Dr. M.S.D. Sahu Khan]**
Ms S. Sahu Khan] for the Appellant

Ms T. Draunidalo for the First Respondent
S.K. Ram for the Second Respondent
Ms M. Rakuita for the Third Respondent

Date of Judgment: **23 March 2007**

JUDGMENT OF SCOTT, FORD JJA

[1] The subject matter of these proceedings is a property consisting of a piece of land held under Crown Lease 227143 upon which is erected a substantial block of flats.

[2] The property belonged to Punamma (d/o Chinsami) who had three children. There were:

1. Madhari Narsaiya (daughter);
2. Sambagh Wati (daughter);
3. Madhwan Keshwan (son) (the appellant).

She also had one grandson, Samson Narayan Naidu, the son of Sambagh Wati.

[3] Punamma died on 16 August 1977. She devised the property to her three children and one grandson in equal shares. She appointed the appellant as the sole executor and trustee of her estate. At the time of her death, however, the appellant was still a minor and therefore letters of administration were granted to his aunt Madhavi Narsaiya and her husband Subarmani Narsaiya as his attorneys.

[4] In July 1985 the appellant (who by then had come of age) and Madhavi and Subarmani Narsaiya reached an agreement recorded in a deed dated 8 July 1985. According to the deed, the appellant was to pay Madhavi and Subarmani $10,500 in respect of expenses in incurred by them in administering the estate on his behalf.

Following payment the appellant was to apply for grant to him of probate of the estate.

[5] Madhavi Narsaiya who had one daughter, Keshni Devi (the first respondent) herself died on 14 February 2000. She left her entire estate to her daughter. At the time of her death distribution of Punamma's estate still had not taken place. According to the will the distribution date was to have been 1975.

[6] On 22 February 2001 Keshni Devi commenced proceedings by way of Originating Summons against her uncle, the appellant, in the High Court at Lautoka. She sought:

(1) An account by the appellant of the last 10 years of his administration of Punamma's estate;

(2) payment by the appellant to her of the sum of $10,500 still due under the 1985 agreement; and

(3) an order that Punamma's estate be distributed with Madhavi's one third share in the estate being paid to her.

[7] Unfortunately, there are a number of significant omissions in the appeal book and copies of several applications and orders have been left out. It appears however that the Originating Summons was first mentioned before a Judge on 22 February 2001. On 16 May 2003 counsel for the parties appeared and it appears that the defendant (appellant) was given 21 days to reply to the plaintiff's (first respondent's) affidavit filed in support of the Originating Summons. On 8 August 2003 the parties again appeared and the matter was adjourned to 5 September 2003.

[8] On 5 September 2003 the parties again appeared. The transcript of what then occurred is as follows:

> "Mr R. P. Singh for the Plaintiff
> K. Kumar 0/I Iqbal Khan for the Defendant
> Court: By Court order in June (sic) and para. (1) of summons of 22.2.01 and accounts to be furnished within 28 days. Defendant has 21 days to file affidavit in reply. Adjourned to 24.10.03 for mention only."

The words "in June" have probably being wrongly transcribed and should read "in terms."

[9] On 24 October 2003 the parties again appeared. The plaintiff was again represented by Mr R.P. Singh while the defendant was represented by "Messrs S. Sahu Khan." The matter was again adjourned.

[10] On 19 November 2003 solicitors for the plaintiff appeared before Byrne J. There was no appearance by the defendant. The Judge made orders in terms of the two remaining claims in the Originating Summons.

[11] On 20 July 2004 an ex-parte summons was filed by the plaintiff. A copy was handed to us during the hearing of the appeal by Ms Draunidalo. We were not supplied with a copy of the supporting affidavit. The summons sought the following orders:

> "1. THAT all that property on Crown lease Number 227143 situate at Lautoka as part of the estate of Punamma,

deceased be sold by the Plaintiff in trust and the proceeds thereof be paid to the Plaintiff ('Sale');

That the Plaintiff in person is, immediately after the Sale, legally and beneficially entitled to one third equal share in all of the proceeds of the Sale ('Share');

2. THAT the Plaintiff may immediately after the Sale use in whatever manner whatsoever her Share;

3. THAT apart from the Share, the Plaintiff will hold in trust the remainder of the proceeds of the Sale ('Remainder') until the Defendant fully accounts to her on how the assets of the Estate of Punamma, deceased have been used, developed and/or distributed ('Account').

4. THAT the Account will ultimately determine how the Remainder is to be distributed in accordance with the last Will and Testament of the said Punamma (dated 21 June, 1977);

5. THAT as soon as is practicable after the Account, the Plaintiff will apply to this Honourable court to approve the proposed distribution of the Remainder;

6. THAT the defendant pay the costs of this application on a Solicitor/Client full indemnity basis;

Any other Order which this Honourable Court deems fit in the circumstances."

[12] On 22 July 2004 counsel for the plaintiff told the Court that none of the Court's orders (presumably those of 5 September 2003 and 19 November 2003) had been complied with. The defendant had been served again.

[13] During August, October and November 2004 the matter was mentioned in Court on five further occasions. On two of these occasions the defendant was represented by counsel. On 8 December 2004 the Court made a further "order in terms of summons". It is clear from the judgment of the High Court on appeal, dated 24 March 2006, that the summons referred to was the summons filed on 20 July 2004.

[14] On about 8 September 2005 a second ex-parte application came before the Court. We were not supplied with the copy of the application or the supporting affidavit. According to the judgment, the plaintiff sought an order that she:

> "..... be at a liberty to apply and obtain provisional crown lease for the land comprised in Crown Lease number 227143 situated at Lautoka upon the grounds set forth in the affidavit."

The Court made an order in terms of the application on 8 September 2005.

[15] On 17 January 2006 the defendant filed the application with which this appeal is concerned. The defendant sought orders that the High Court set aside its orders made on 19 November 2003 [para.10 above] and 8
September 2005 [para. 14] there was no application to set aside the order dated 5 September 2003. At the hearing of the Motion on 13

March 2006 the defendant was given leave to amend his application to include a request that the Court also set aside the order made on 8 December 2004. On 24 March 2006 the High Court dismissed the application. This is an appeal against that dismissal.

[16] In his first affidavit filed in support of the application, the defendant accepted that he had received a "notice to hear Originating Summons" in March 2003. He then instructed Messrs Iqbal Khan and Associates to act on his behalf. Despite inquiries made by Samson (who did not file any evidence) he had still heard nothing from Iqbal Khan and Associates when, in December 2005, he learnt " that certain orders were made in the matter against me". After Iqbal Khan and Associates refused to explain what had happened he went to his present solicitors.

[17] In para. 9(ix) of his affidavit the defendant deposed:

> "... from the Court records it appears that there had been certain formal appearances on my behalf by counsel on various dates since 16 May 2003 and which I presume were on instructions of the said solicitors (Messrs Iqbal Khan and Associates) but I was never again informed by the said solicitors what I was expected to do and, not being conversant with Court proceedings and/or requirements I relied absolutely on my said solicitors."

[18] In his second supporting affidavit filed in February 2006, the defendant deposed that he believed that :

> "There was no evidence before the Court that the Originating Summons was served on or that counsel appearing had instructions on my behalf and from the search made by my

present solicitors there was no acknowledgement of service of the Originating Summons dated 22 February 2001."

[19] Dr Sahu Khan filed extensive written submissions in support of the application. His principal submissions were:

(a) That the service of the Originating Summons on the appellant had been defective and that therefore the proceedings were a nullity:

(b) That the plaintiff's notice of intention to proceed with the hearing of the Originating Summons did not comply with the rules and therefore the subsequent orders were irregular;

(c) That Samson should also have been joined as a defendant;

(d) That the Originating Summons procedure was unsuited to the proceedings in view of the substantial issues of fact between the parties; and

(e) That the claim under the deed was statute barred.

[20] The High Court rejected the suggestion that the proceedings were a nullity. The Judge found that it was "patently clear... that the defendant was well aware of the existence and nature of the proceedings." Any defect in the manner in which service was effected was immaterial and inconsequential "in view of the defendant's appearances before the Court."

[21] So far as alleged irregularity was concerned the High Court pointed out that no complaint of irregularity had been made by counsel at any of the several appearances after the orders had been made.

[22] In his written submissions filed in this Court Dr Sahu Khan again argued that the proceedings were a nullity and that the orders which were made were irregular. In our view, however, both these submissions are untenable and the High Court was right to reject them.

[23] Although the High Court has no inherent jurisdiction to set aside its own orders (Firm of RMKRM v. Firm of MRMVL [1926] AC 761, 771) it does have the power to set aside an order which has been made against a person without that person having had notice of the application (Craig v Kanssen [1943] 1 KB 256).

[24] Proceedings in chambers are governed by Order 32 of the High Court Rules. Order 32 Rule 5 (1) provides:

> "Where any party to a summons fails to attend on the first or resumed hearing thereof the Court may proceed in his absence....."

O. 32 of 5 (3) provides:

> "Where the Court.... proceeded in the absence of a party then, provided any order made on the hearing has not been perfected, the Court, if satisfied that it is just to do so, may re-hear the summons".

[25] In the present case counsel appeared and consented to the order made in terms of paragraph 1 of the Originating Summons on 5 September 2003. No application has ever been made to set aside that order. Following a number of adjournments at which they appeared, counsel for the defendant failed to appear on 19 November 2003 when the orders in the terms of the two remaining claims in the Originating Summons were made. It has not been argued that the Court was not entitled to act under the provisions of O.32 r.5(1) and no application has ever been made within the terms of O 35 r.5(2).

[26] Dr Sahu Khan's submissions on nullity and irregularity also involve two other important considerations. The first is that RHC 02 r.1 specifically provides that irregularity does not, as a general rule, nullify the proceedings. Secondly, an application to set aside for irregularity must be made within a reasonable time of the party becoming aware of the irregularity and before any other step is taken in the proceedings (O.2 r.2).

[27] Dr Sahu Khan's suggestion that there had been a total failure to serve the appellant (a suggestion hard to accept in view of the affidavit of service of Vandana Archari filed on 7 December 2001) and that therefore the proceedings were a nullity also overlooks the rule that a party who in fact appears on a summons cannot, after the summons has been heard and dealt with, be heard to complain that the service was defective (Boyle v Sacker (1888) 39 Ch D 249).

[28] We find the suggestion that there was no evidence that Messrs Iqbal Khan and Associates were acting on behalf of the appellant unattractive, to say the least. We are not aware that it has ever been

the practice for Courts to have to satisfy themselves as to the existence or precise extent of the instructions held by counsel appearing before them. It is well understood that counsel are officers of the Court, and therefore the duty must clearly lie on counsel to ensure that the Court is not led into misapprehension. It can hardly be doubted that counsel are regarded as having apparent authority as agents of their clients (and see also Smits v. Roach [2006] HCA 36). We are unable to accept that counsel who appeared at every stage in this matter did not have authority to bind the appellant. It follows that if there were irregularities then they were waived and if orders were made in default of appearance no application to set aside those orders was promptly made and before any further step was taken in the proceedings. The grounds of appeal which involve submissions to the contrary must fail.

[29] In his second group of grounds of appeal Dr Sahu Khan argued that the Court had exceeded the powers conferred upon it by the Land Transfer Act (Cap.131) and that all three respondents had failed to comply with various provisions of the Act. Dr Sahu Khan's arguments are set out in very considerable detail in his written submissions and need not now be repeated. We believe that they can be dealt with shortly.

[30] In the first place, it is an important bear in mind that this is not an appeal against the orders of the High Court which the defendant was seeking to set aside; it is an appeal against the refusal of his application. Therefore, the correctness in law of the orders made (whether involving the property or the deed) which could only be challenged on appeal and which have not been so challenged, is not in

question. Secondly, unless set aside on appeal, the orders of a superior court such as the High Court of Fiji are presumed to be valid (See ex parte Williams (1934) 51 CLR 545, 550; Cameron v Cole (1943) 68 CLR 571 and also DPP v T [2006] 3 All ER 471). Thirdly, the orders involving the provisions of the Land Transfer Act (those set out at paragraphs [11] and [14] above] were permissive rather than mandatory and were made following the defendant's persistent failure to comply with the orders of the Court made (one of them by consent) in September and November 2003. Finally, as is clear from the affidavits by the first and second respondents, the property has now, as a matter of fact, been sold and the second respondent is its registered owner. That state of affairs cannot be undone by this appeal.

[31] At paragraph 13 (xxxvii) of his written submissions to us Dr Sahu Khan suggested that:

> "The purported consideration as to the sale of the property to a third party namely the second respondent was irrelevant to the appellant's application to set aside judgment and/or orders......"

As is evident from paragraph [32] of the judgment, the High Court's concern was principally directed at the defendant's action commenced in the High Court at Suva in January 2006. This involved exactly the same property with which the High Court at Lautoka had already dealt. We share the High Court's concern at the course the defendant took.

[32] The defendant's appeal faces a further fundamental procedural difficulty. Section 12(2)(f) of the Court of Appeal Act (Cap.12) is clear:

> "No appeal shall lie - without the leave of the Judge or of the Court of Appeal from any interlocutory order or interlocutory judgment made or given by a Judge of the High Court except (not applicable)."

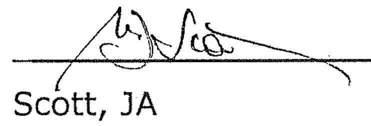
Although this Court is yet finally to decide between the "order" and "application" approach to the classification of interlocutory orders, it is plain to us that whichever test is applied, the High Court's refusal to set aside its earlier orders was interlocutory. Despite this, however, there has never been an application for leave to file this appeal either to the High Court or to this Court.

[33] For the reasons we have given we have not found it necessary to address each of the very detailed grounds of appeal advanced by Dr Sahu Khan. If, as he contends the High Court exceeded its powers to the detriment of the defendant , then the defendant's remedy was to appeal. Instead of taking that course he simply disregarded the orders made and then, very much later, sought to have them set aside. We are satisfied that no good reason was advanced to the High Court for taking such a course and that the High Court was right to dismiss the application.

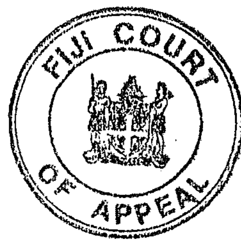
<u>Result</u>

1. Appeal dismissed

2. First and second respondent's costs assessed at $2,000.00 each.



Scott, JA



Ford, JA

Solicitors:

Sahu Khan and Sahu Khan Solicitors, Ba for the Appellant
Patel and Sharma, Solicitors, Nadi for the First Respondent
Samuel K Ram Solicitors, Ba for the Second Respondent
Office of the Attorney General Chambers, Suva for the
Third Respondent

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