

**IN THE COURT OF APPEAL FIJI**  
**ON APPEAL FROM THE HIGH COURT**

**CIVIL APPEAL NO. ABU 0034 of 2014**  
**(High Court Case No. HBC 208 of 2011)**

**BETWEEN** : **RUKSHANA BIBI KHAN** *Appellant*

**AND** : **APIMELEKI KUNAVULA**  
**SAVENACA WAINICAGI**  
**ISAIA GONEWAI**  
**PITA KEWA NACUVA** *Respondents*

**Coram** : **Basnayake, JA**  
**Almeida Guneratne, JA**  
**Kumar, JA**

**Counsel** : **Mr. N. Tuifagalele for the Appellant**  
**Mr. V. Singh for the Respondents**

**Date of Hearing** : **4 May 2016**

**Date of Judgment** : **27 May 2016**

**JUDGMENT**

**Basnayake JA**

[1] I agree with the reasons and conclusions of Almeida Guneratne JA.

## Almeida Guneratne JA

### The background facts and the Basis of the Appeal

- [2] This is a case where the High Court allowed the orders sought by the Plaintiffs (hereinafter referred to as the Respondents) by originating summons. The orders sought by the Respondents were:
- a. *That the Defendant (Appellant) give vacant possession of the properties comprised in Certificates of Title Numbers 7358 and 7317 being lots 29 and 30, respectively on Deposited plan number 1143 to the Plaintiffs.*
  - b. *The Defendant pay special damages in the sum of \$7,000 to the Plaintiffs.*
  - c. *The Defendant pay general damages for breach of covenants to pay rent and to attend to re-assessment of rent.*
  - d. *The Defendant pay mesne profits at the rate of \$25,800 per annum from the 01 January 2009 till possession is delivered up to the Plaintiffs.*
  - e. *Costs of this application be paid by the Defendant on a full indemnity basis.*

- [3] The basis on which the Respondents sought the said orders are set out fully in the Judgment of the High Court at paragraphs 5 to 11 thereof.

### The Facts

- [4] The Respondents sued as trustees of the Mataqali Naboka and made the application by originating summons for possession of the property comprised in Certificates of Title Nos. CT 7317 and CT 7358 (“the Titles”) as aforesaid.
- [5] The Respondents had acquired the Titles by a transfer from the Director of Lands dated 5<sup>th</sup> March 2003.

- [6] The history of how the said property had been transferred to the Respondent is set out in the Extempore Judgment in Lautoka High Court Action No. 270/2006 (vide : pages 407 - 411 of the Record of the High Court, (RHC) Volume 1).
- [7] Paragraphs 3 to 7 of the said judgment gives the chronology of the devolution of title:
- [i] Certificates of Title Nos. 7358 and 7317 were issued on the 20<sup>th</sup> September 1948 and 8<sup>th</sup> March 1949, to Oscar Bowyer Corbett.
  - [ii] Titles transferred to the Public Trustee as Administrator on 23<sup>rd</sup> October 1952, and then transferred on 23<sup>rd</sup> June 1964, to Annetta Marie Corbett.
  - [iii] Annetta Marie Corbett transferred the titles to Robin Hardy Yarrow and Grace Emily Yarrow on 25<sup>th</sup> November 1966.
  - [iv] Titles were transferred on the 12<sup>th</sup> October 1977, to the Director of Lands of Fiji.
  - [v] The Director of Lands granted a lease to Baravi Handicraft Limited which lease was registered against the titles on the 30<sup>th</sup> November 2001.
  - [vi] The lease granted to Baravi Handicraft limited was transferred to the Appellant in this case, Rukshana Bibi Khan which was consented to by the Director of Lands on the 12<sup>th</sup> of August 2002 and was registered against the original lease on the 19<sup>th</sup> September 2002.
  - [vii] On the 5<sup>th</sup> March 2003 the Director of Lands transferred the land under the titles to the trustees of the Mataqali Naboka, the Respondents in this case.
- [8] According to the above mentioned chronology the Appellant is a lessee of the Property, with the transfer of the lease from Baravi Handicraft Limited to her.

[9] The Respondent's position was that the lessee has been in breach of the said lease, in that she did not pay rent to them and she failed to respond to their application for re-assessment of rent under clause 1 of the lease as well.

[10] The Respondents contended further that:

[i] On or about 15<sup>th</sup> November 2010, the Appellant was served with a notice to pay the outstanding rent amounting to \$7,000.00. The Appellant failed to make payment in the time given.

[ii] By a letter dated 14<sup>th</sup> December 2010, the Respondent served on the Appellant a notice requesting her to make payment and attend to the Respondent's request for re-assessment of rent in 30 days time. The Appellant was also put on notice that if she fails to comply with the notice, the said lease would be terminated and the Respondents would re-enter and take possession.

[iii] The Appellant failed to comply with the said notice of 14<sup>th</sup> December 2010.

[iv] By letter dated 17<sup>th</sup> February 2011, the Appellant was put on notice that the said lease is at an end and that she is required to vacate the said property and give possession to the Respondent.

[11] The Appellant denied that the Respondents are the registered proprietors of the said lands in question and that the Ministry of Lands is her landlord and more over that she was still the current registered lessee of the said lands.

[12] The learned High Court Judge having examined the documentary evidence arrived at the following findings of fact – viz:



- [a] That, the Director of Lands has transferred the land on two certificates of title to the Respondents;
- [b] That, the allegation of fraud in respect of the said transfer by the Director of Lands to the Respondents was a bare allegation not supported by evidence (indeed, I may add, an allegation of fraud being a serious matter, involving a statutory functionary at that, was a burden which was of an onerous nature)
- [c] That, in the result, the Appellant's only line of defence being that, there was an ongoing investigation in regard to the said allegation in support of which a letter issued by the Director of Lands dated 12<sup>th</sup> January, 2011 (vide annexure 'C' marked in the High Court proceedings) was produced, which shows, that an investigation was proceeding.
- [d] That, the Appellant's contention (which counsel reiterated in this appeal) viz: that, the Titles were deemed to have been cancelled, since the Director of Lands had written to the Registrar of Titles re: the approval of DP 5517 which is a purported amalgamation survey of the Titles "Cannot determine a deemed cancellation" on a letter so written until such cancellation was registered.
- [e] That, "It is evident from the documents produced by the Respondents that the Mataqali is the proprietor of the properties comprised in the Titles being Lot 29 and 30 and that the defendants has become a lessee of the Respondent because the said lease had been transferred by operation of Law on or about 5<sup>th</sup> March 2003.
- [f] Therefore the Appellant tendering rent to the Director of Lands seven (7) years after the said transfer of Titles do not create a defence for the Appellant.
- [g] Section 97 of the Property Law Act provides that the rent and benefit of the lessee's covenants run with the reversion. That is, the benefit and burden of the registered lease goes to the transferee of the title, the Respondents.

## **The Grounds of Appeal**

[13] The grounds of appeal are set out at page 2 of the Notice of Appeal dated 6<sup>th</sup> May 2014. (vide: Vol.1 of the Record of the High Court) which may be reproduced for convenience. Viz:

1. *The Learned Judge erred in fact and in law by failing to consider that the Appellant is a tenant/lessee of the Director of Lands.*
2. *The learned Judge erred in fact and in law by failing to consider that there was not contractual Lessor/Lessee agreement between the Appellant and the Respondents.*
3. *The Learned judge erred in fact and law when it failed to consider that the Director of Lands is the Appellant's landlord whom have consented to the transfer of the said lease to the Appellant from the previous owner and its subsequent mortgage to the Fiji Development Bank.*
4. *The learned Judge erred in fact and law by also failing to consider that the Appellant was a lessee of the director of Lands and not of the Respondents.*
5. *The learned Judge erred in fact and in law by allowing the Respondents' claim under Section 105 of the Property Law Act when there was no Lessor/Lessee agreement between the Appellant and the Respondents.*
6. *The learned Judge erred in fact and in law when it failed to consider that the Certificates of Title 7317 and 7358 had been cancelled and / or amalgamated by the Director of Lands and a new DP 5517 issued which allowed the issuance of two leases, one to the Appellant and the other to the Respondents.*

## **Application to adduce fresh evidence on Appeal**

[14] By a Summons dated 21<sup>st</sup> March, 2016, the Appellant has sought leave of this Court to adduce fresh evidence on appeal. The nature of the fresh evidence sought to be adduced and the reasons therefor are set out in her Affidavit sworn on 21<sup>st</sup> March 2016 filed in support of the said summons.

[15]

In so far as the reasons are concerned the Appellant states in her Affidavit that, she “conducted due diligence before the High Court hearing to acquire as much documents as possible which relates to (her) lease being state Lease No. 503051 and furthermore as regards the background relating to a transfer of land which allegedly includes (her) leased land as ..... claimed by the Respondents to be transferred to them by the State.” (Vide: Paragraph 3 of the said Affidavit). The proposed new documents have been marked as Annexures B, C and D to the said Affidavit. The Appellant avers that the said documents will prove that the following took place.

- i) *That certificate of title nos. 7317 and 7358 being Lots 29 and 30 on the DP 1143 have been duly amalgamated to form the newly surveyed plan being DP 5715 which contained Lots 1 to 7.*
- ii) *Compiled plan DP8716 was further approved which compilation of Lots 1, 2, 6 and 7.*
- iii) *The Appellant's state Lease No. 503051 which was previously owned by Baravi Handicraft Limited was registered against Lot 1 on DP8716 and not against CT Nos. 7315 and 7358 which has been duly amalgamated (hence no longer exist to date) to form DP 5715.*
- iv) *That the Respondents were transferred only a “piece of state land” according to clause 2.10 of the Agreement between Director of Lands, PWD and TLTB and not including the Appellant's leased area.*

#### **The Unsuccessful application to stay execution of the High Court Judgment**

[16]

After the High Court Judgment had been delivered, the Appellant had attempted to have the said Judgment stayed. She had sought to adduce this very evidence in those proceedings but she had failed in that bid. This is another bite she is attempting to have at the cherry.

#### **Claim of Due Diligence**

[17]

The Appellant claims that she conducted due diligence before the High Court hearing to procure the documents in question. Save for her bare assertion she



has not placed any material before this Court to show that the said new documents became available to her after the hearing before the High Court.

[18] Consequently, at least one of the three pre-conditions laid down in the English decision of **Ladd v Marshall** [1954] 3 ALLER 745 and adapted in **Chand v Chand** [2012] FJCA 22 by the Court of Appeal of Fiji, that is, the criterion of due diligence has not been satisfied in the instant case.

[19] Although with the consent of counsel the application to lead fresh evidence and the arguments on the merits were taken together, for the aforesaid reasons, this Court was not inclined to allow the application to adduce fresh evidence.

#### **Determination on the Merits**

[20] A letter written on behalf of the Director of Lands dated 12<sup>th</sup> January 2011, to the Registrar of Titles needs to be considered before a final determination in this appeal is made.

#### **The Letter of 12<sup>th</sup> January 2011 written by the Director of Lands to the Registrar of Titles.**

[21] It would be pertinent to reproduce the contents of the said letter at this point. It states thus:

*“12/10/1977 – Transfer Dealing 14987 to the Director of Lands endorsed respectively on CT 7317 and CT 7358 after the Land Acquisition were entertained on these titles and fully compensated for Road Upgrading purposes.*

*7/4/99 – Agreement between Director of Lands on behalf of PWD, Coral Coast and Native Land Trust Board 2.10 actually states “Transfer a piece of State Land Mataqali Naboka.*

*6/9/84 DP 7515 was approved which is an amalgamation survey of CT 7317 and CT 7358, formerly Lots 29 and 10 DP 1143.*



*\*\* Cancellation of CT 7317 and CT 7358 should have been entertained after the approval of DP 7515.*

*8/8/01 - DP 8716 was approved which is a Compiled Plan and Lots 1,2,6 & 7 DP 5715.*

*10/09/01 – Registered Lease 499974 to Baravi Handicraft Ltd for Lot 1 DP 8716 which was endorsed respectively on CT 7317 and CT 7358.*

*19/9/02 – Transfer of Lease, through sale, from Baravi Handicraft Ltd to Rukshana B Khan endorsed on Lease 503051.*

*19/9/02 – Mortgage of Lease under Rukshana Bibi Khan to Fiji Development Bank and endorsed on L 503051.*

*5/3/03 Registered Transfer Dealing 522434 to Trustees of Mataqali Naboka endorsed respectively on CT 7317 and CT 7358”*

**Assessment of the Learned Trial Judge’s Findings in the light of the contents of the said letter.**

[22]

I shall now take the findings of the trial Judge as against what has been stated in the said letter seriatim:

- (a) I saw no reason to disagree with the learned Judge’s finding recapped above at paragraph 12(a).
- (b) Likewise, in regard to the finding recapped above in paragraph 12(b).
- (c) In regard to the learned Judge’s finding recapped in paragraph 12 (c) above, I agree that only an investigation was proceeding. But how was that fact to be construed? In my view, there was no finality in that regard had been reached at the time the parties went to Court. That was by originating summons dated 15<sup>th</sup> January 2011. The letter written by the Director of Lands, to the Registrar of Titles was dated 12<sup>th</sup> January, 2011 (just three days prior to 15<sup>th</sup> January 2011). There is no evidence on record that the factual matrix had changed during that intervening period of three days.

(d) In so far as the trial Judge's findings re-capped in this judgment at paragraph (d) above are concerned, I agree with the reasons stated therein that, a deemed cancellation of the two certificates of title 7317 and 7358 could not have been decided on a letter written until such cancellation was registered.

But, the aspect that weighed with me was, given the nebulous state in which the Respondents went to Court by originating summons, whether the learned Judge could have made the orders which he eventually made.

(e) Viewed from that perspective while I have no problem with the trial Judge's findings in paragraphs (e) to (g) as recapped above, I have no hesitation in concluding that, for the reasons stated above, the suit filed by the Respondents on 12<sup>th</sup> January, 2011 by originating summons could not have and was not capable of any determination of the contested issues between the parties.

### **Conclusion**

[23] For the reasons articulated above in this judgment, I am of the view that, the suit initiated by originating summons could not have been and/or was not capable of determination as the learned Judge did in making the orders he made.

[24] In arriving at my conclusion, I have considered the submissions of both Counsel and the authorities referred to by them.

[25] Before parting with this judgment I feel obliged to comment that, although, at first blush, looking at the grounds of appeal urged by the appellant, the appeal appeared to be a matter that called for a detailed inquiry into the scope of the provisions of the Property Law Act Cap 130 (PLA) particularly Sections 97 and 105 thereof and the provisions of the Land Transfer Act, Cap 131 (LTA), among

other legislation, the matter ultimately stood reduced to very much less as would be apparent from the approach I have adapted.

[26] For the aforesaid reasons I set aside the judgment of the learned High Court Judge and allow the appeal. The Respondents are directed to file a statement of claim within 21 days of this Judgment. The action may then proceed on the basis of the High Court Rules.

[27] In view of the fact, that there was a genuine dispute as to what portion of the Titles was transferred to the Respondents, on the face of the letter dated 12 January 2011, from the Director of Lands, the Trial Judge should have converted the action to a writ action instead of deciding the case on Affidavit evidence only.

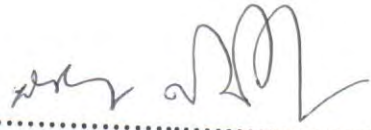
**Kamal Kumar, JA**

[28] I agree with the reasons and conclusions of Guneratne JA.

**Orders of the Court:**

1. *The judgment of the High Court dated 24<sup>th</sup> April, 2014, is set aside and the appeal is allowed.*
2. *The Respondents are directed to file a Statement of Claim within 21 days of this judgment and thereafter the action is to proceed on the basis of the High Court Rules.*
3. *The Respondents shall pay as costs of this appeal a sum of \$1,000 to the Appellant in all the circumstances of this case.*





.....  
**Hon. Mr. Justice E. L. Basnayake**  
**Justice of Appeal**



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**Hon. Mr. Justice Almeida Guneratne**  
**Justice of Appeal**



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**Hon. Mr. Justice Kamal Kumar**  
**Justice of Appeal**