

IN THE HIGH COURT OF FIJI AT SUVA
FAMILY DIVISION

Civil Action No. HBC 335 of 2012

IN THE MATTER of an application under Section 169 of Part XXIV of the Land Transfer Act Cap 131 for an Order for **Immediate Vacant Possession.**

BETWEEN : **SHAINAZ BIBI** of 509 Ratu Mara Road, Nabua, Domestic Duties.

RESPONDENT/PLAINTIFF

AND : **MUKESH NAIDU** and **VARSHA PRIYA YANTESH** both of 119 Sawau Road, Bayview Heights, Suva, Businessman and Domestic Duties respectively.

APPELLANTS/DEFENDANTS

Counsels : **Mr O'Driscoll** for the **Respondent/Plaintiff**
Ms Tabuakuro L for the **Appellants/Defendants**

Date of Hearing: 4th July 2013

INTER-LOCUTORY
JUDGMENT

1. Summons for Leave to Appeal out of time was filed on 13th May 2013 by the Appellants/Defendants and sought the following orders:

- (i) *That the Appellants/Defendants be granted leave to file Notice of Appeal out of time unconditionally;*
 - (ii) *The costs of the Appeal be costs in the cause;*
 - (iii) *Any further or other orders that the court may seem just.*
2. The said application was made in pursuant to Order 59 Rule 10(1) and (2) and the inherent jurisdiction of this court.
3. The first named Appellant/Defendant Mukesh Naidu averred in his affidavit dated 13th May 2013 inter-alia the following:
- 3.1 The 1st named Appellant is duly authorized by the other Appellant to make and swear the affidavit.
 - 3.2 The Learned Master of the High Court ordered to give the vacant possession of the property in Certificate of Title No. 30526 on the application by the Respondent under Section 169 of the Land Transfer Act Cap 131. The Learned Master's Order was annexed to the affidavit marked "A".
 - 3.3 The said Order was made by the Learned Master on 26th February 2013 due to non appearance by the Defendant's Solicitor.
 - 3.4 The Appellant/Defendant averred that his previous solicitor arrived at 2.30pm due to his heavy work schedule and by then vacant possession order was already made.
 - 3.5 The Appellant/Defendant previous solicitor made an application to set aside the said order which was ruled against the Defendants on 13th May 2013.
 - 3.6 The present solicitor had advised the Appellant/Defendant's previous solicitor should have appealed the decision of the Master pursuant to Order 59 Rule 9 of the High Court Rules and not to set aside the Order.
 - 3.7 The Appellant/Defendant averred that he was advised by the present Solicitors that in pursuant to Order 59 Rule 9 that the time period to appeal expired on the 19th March 2013 (after 21 days from the delivery of the order).
 - 3.8 It was further averred that due to previous solicitor's error, the Appellant/Defendant was out of time to file an appeal against the said order of the Master.

4. I am not agreeable with the position taken up by the present solicitors that the Appellants/Defendants had the right of appeal under Order 59 Rule 9. Order 59 Rule 9 applies against a final order or judgment of the Master.
5. The order made by the Learned Master on 26th February 2013 was an ex-parte order. As such the correct procedure was to make an application before the Master to set aside the order which the Appellants/Defendants failed to do so. As such there is no merit to consider the summons before me in pursuant to Order 59 Rule 10 (1) and (2) and the application made there under is an abuse of process.
6. In the case of *Rajendra Prasad Udit Misra v. The Director of Public Prosecution* Case No. 0050 of 2010 (unreported) decided on 8th June 2012, it was stated:

“Appropriate Procedure”

It appears that the procedure adopted in this case is flawed. The 9th defendant is seeking to vacate an order made against him ex parte. The ex parte order was made by the Learned High Court Judge at Lautoka. The 9th defendant without first seeking to vacate the ex parte order by the same judge or in the same court has filed an appeal in the Court of Appeal.

[14] In *Wea Records Ltd., v. Visions Channel 4 Ltd., and Others* (1983) 1 WLR 721 Sir John Donaldson M.R. with Dunn and Purchas L.JJ agreeing, **dismissed the appeal, not on the merits but on the grounds that it is an abuse of the process of the court.** Sir John Donaldson M.R. held that **“in terms of jurisdiction, there can be no doubt this court can hear an appeal from an order made by the High Court upon an ex parte application. This jurisdiction is conferred by section 16(1) of the Supreme Court Act 1981. Equally, there is no doubt that the High Court has power to review and to discharge or vary any order which has been made ex parte. This jurisdiction is inherent in the provisional nature of any order made ex parte.**

The Court of Appeal hears appeals from orders and judgments. It does not hear original applications save to the extent that these are ancillary to an appeal, and save in respect of an entirely anomalous form of proceeding in relation to the grant of leave to apply to the Divisional Court for judicial review... **Ex parte orders are essentially provisional in nature. They are made by the Judge on the basis of evidence and submissions emanating from one side only. Despite the fact that the applicant is under a duty to make full disclosure of all relevant information in his possession, whether or not it assists his application, this is no basis for making a definitive order and every Judge knows this. He expects at a later stage to be given an opportunity to review his provisional order in the light of evidence and argument adduced by the other side**

and, in so doing, he is not hearing an appeal from himself and in no way feels inhibited from discharging or varying his original order.

This being the case it is difficult, if not impossible, to think of circumstances in which it would be proper to appeal to this court against an ex parte order without first giving the Judge who made it or, if he was not available, another High Court Judge an opportunity of reviewing it in the light of argument from the defendant and reaching a decision. This is the appropriate procedure even when an order is not provisional, but is made at the trial in the absence of one party” (emphasis added). (Also *Vint vs. Hudspith* [1885] 29 Ch. D. 322)”.

It was also stated:

“[15] The case under review is an appeal filed in the Court of Appeal, Fiji. This appeal was to vacate an ex parte order made by the Learned High Court Judge at Lautoka. By filing this appeal in the Court of Appeal, the 9th defendant expected the Court of Appeal to review the ex parte order of the Learned High Court Judge of Lautoka. Instead the 9th defendant should have first sought a remedy from the same court that made the ex parte order.....”

This court too, exercised Appellate Jurisdiction and the Appellants/Defendants should have first sought a remedy from the Learned Master that made the ex parte order.

7. Having concluded as above, there is no necessity to consider the other issues raised with regard to summons for Appeal out of time.
8. Accordingly, I make the following Orders:
 - (i) **Summons for Leave to Appeal Out of Time filed on 13th May 2013 dismissed;**
 - (ii) **The Appellants/Defendants are ordered to pay summarily assessed costs of \$1,000 to the Respondent/Plaintiff.**

Delivered at Suva this 5th Day of August, 2013.

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C. Kotigalage
JUDGE