

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CIVIL JURISDICTION

CASE NUMBER: HBC 267 OF 1992

BETWEEN: MOHAMMED AMEEN, MOHAMMED NAIM,
MOHAMMED RAHIM AND MOHAMMED SALIM

PLAINTIFFS

AND: LUSIANA RAVUTU KHAN

FIRST DEFENDANT

AND: FRANCIS JUNIOR QORO

SECOND DEFENDANT

AND: MOHAMMED RAZAK

THIRD DEFENDANT

AND: MOHAMMED SADIQ ALIAS MUNAM

FOURTH DEFENDANT

AND: SIKANDAR ALI KHAN

FIFTH DEFENDANT

AND: HASRAT ALI KHAN

SIXTH DEFENDANT

Appearances: Messrs Mishra Prakash & Associates for the plaintiffs.

M.K. Sahu Khan & Company for the 1st to 4th Defendants.

Sahu Khan & Sahu Khan Solicitors for the 5th and 6th Defendants.

Date / Place of Judgment: Friday 09 August, 2013 at Lautoka.

Judgment of: The Hon. Justice Anjala Wati.

RULING

CATCHWORDS:-

Summary Judgment- must be sustainable on facts and law- disputed questions of facts, if raised, must be tried orally- Questions of law, if raised, must not be misconceived and is not one which can shortly be shown to plainly unsustainable.

LEGISLATION:

The High Court Rules 1988 ("HCR").

The Stamp Duties Act Cap. 205.

The Indemnity, Guarantee and Bailment Act Cap. 232.

The Caveat

1. On 22 October 1993, the plaintiffs' withdrew the interim application for summary judgment against the 5th and the 6th defendants'. Except for any order as to costs made in favour/against these defendants', the interlocutory ruling shall otherwise not bind them. From the records, I gather that they are still parties to the main cause.

The Cause

2. The plaintiffs' have filed an application for summary judgment against the first four defendants' on the ground that there is no defence to the claim and any defence filed by the said defendants' are only a sham to delay the claim and judgment against them. The plaintiffs' are seeking judgment against the defendants jointly and severally.
3. The claim for summary judgment is for a sum of \$100.00 per day from 31st day of January 1991 to 30 day of November 1992 amounting to \$66 800.00; interest at the rate of 10 per centum per annum from the 1st day of December 1992 until the date of judgment; and costs of the action.

The Substantive Cause

4. By a writ, the plaintiffs' claim that pursuant to an agreement dated 21 November 1990, between the plaintiffs and the 1st and 2nd defendants', the plaintiffs' contracted and agreed to sell, transfer and assign all their rights, titles, estates, interests, powers and choses in action in Allied Transport Limited together with the buses BC 694, AH 043, AF600, AQ914, AL 516, and DO 411 with all parts and accessories.
5. In consideration, the 1st and 2nd defendants' had to pay to the plaintiffs' a sum of \$130,000 on or before 30 January, 1991. It was agreed that if payment of these monies were not paid within the stipulated timeframe, the defendants' were to pay an agreed compensation of \$100 per day from 31st January 1991.
6. The plaintiffs' claim that payment of the said purchase price and the agreed compensation was guaranteed by the 3rd to 6th defendants' under a guarantee endorsed in the agreement dated 21 November 1990. These defendants' had also, by the same guarantee, agreed to pay any cost incurred by the plaintiffs' in recovery of the purchase price and compensation.
7. The plaintiffs' allege that the 1st and 2nd defendants' have taken possession of the vehicles and are using the same to derive income and have not paid the plaintiffs' any monies.
8. The plaintiffs' therefore claimed a sum of \$130,000 from the defendants', compensation at a rate of \$100 per day, damages for breach of contract, costs of recovering the purchase price against the 3rd to 6th defendants', interest, and costs against the 1st and 2nd defendants'.
9. During the course of the interlocutory proceedings, the plaintiffs' informed the court that they are no longer seeking the sum of \$130,000 as the entire amount has been paid. The first sum of \$65 000 was paid on 5 October 1990 and the second sum of \$65 000 was paid on 1 December, 1992. The writ was filed on 15 September 1992.

The Defence

10. The 1st and 2nd defendants' say that the contract pursuant to which the claim is brought is unenforceable against them as their signatures to the contract was not witnessed by a competent witness.
11. The 1st and 2nd defendants' also assert that the contract is unenforceable for want of payment of Stamp Duties under the Stamp Duties Act of Fiji.
12. The 3rd and 4th defendants' admitted executing a guarantee as pleaded by the plaintiffs' but they contend that the guarantee relied on by the plaintiffs' against them is unenforceable as it was a condition precedent of the sale that the 5th and 6th defendants' would also guarantee the payment of the purchase price and the compensation and that all of them would be jointly and severally liable. The 4th and 5th defendants' were only prepared to execute the guarantee on the express undertakings given to them that the 5th and 6th defendants' will also execute the guarantee and since the 5th and 6th defendants' did not execute the same, the guarantee executed by the 4th and 5th defendants' cannot be enforceable against them.
13. The 5th defendant denied executing any guarantee in favour of the purchase price and the agreed compensation. The 5th defendant says that the guarantee is not enforceable against him for want of writing under the Indemnity, Guarantee and Bailment Act of Fiji.
14. The 1st to 5th defendants' also assert that the whole sale transaction was tainted with nullity as there was no consent obtained from the Transport Control Board for the sale. The contract thus is void and unenforceable.
15. The 1st to 5th defendants' further said that after the writ was issued there was a memorandum between the 1st named plaintiff and the 5th and the 6th defendants' that the sum of \$65,000 which was sitting in Mr. G. P. Shankar's trust account was to be released to the 1st named plaintiff. It was further agreed that any action and other applications for judgment be adjourned until 31st January 1993 and to be further adjourned if Mr. G.P. Shankar who was in overseas at the time was not back in the country.

16. The 6th defendant denies ever entering into a guarantee of any form as claimed. The 6th defendant asserted that any such guarantee from him ought to have been in writing pursuant to the Indemnity, Guarantee and Bailment Act of Fiji and since there was no written guarantee, any action under any form of guarantee is unenforceable against him.
17. The 6th defendant denies making any payment to the plaintiffs'.

The Law, the Submissions and the Analysis

18. It is convenient if I separate the issues raised by the various defendants' and determine whether it has been established by any of the defendants' that there is a fair case for their defence or that there are reasonable grounds for setting up the defence, or even a fair probability that they have a bona fide defence. I need to ascertain whether it is clear from the issues raised that there is no real substantial question to be tried or there is no dispute as to facts and law and that the plaintiff is entitled to judgment.
19. In respect of all the defendants' it is prudent to first of all deal with the agreement and the guarantee itself. The question is whether the agreement and the guarantee are admissible and enforceable at this interlocutory stage under the Stamp Duties Act Cap 205. In other words I have to find whether the agreement and the guarantee are available to the plaintiffs' in law and equity from which a relief for summary judgment can be obtained.
20. S. 41 of the Stamp Duties Act states that:

'Except as aforesaid, no instrument executed in Fiji or relating (wheresoever executed) to any property situate or to any matter or thing done or to be done in any part of Fiji shall, except in criminal proceedings, be pleaded or given in evidence or admitted to be good, useful or available in law or equity, unless it is duly stamped in accordance with the law in force at the time when it was first executed'.

Underlining is Mine for Emphasis

21. S. 2 of the Act defines instrument and property. Instrument includes every written document and property includes all property, whether real or leasehold.
22. Section 100 of the Act states that:

“Any document which ought to bear a stamp under the provisions of this Part shall not be of any validity unless and until it is properly stamped nor shall any judge, magistrate or officer of any court allow such document to be used, although no exception be raised thereto, unless such document has been first duly stamped”.

Underlining is Mine for Emphasis

23. The plaintiffs’ say that the property has passed on the 1st and 2nd defendants’ and payment has been made for the property. The defendants’ thus are estopped from claiming that the agreement is unenforceable or from relying on the Stamp Duties Act. The plaintiffs’ further say that they are willing to pay any duty the Court assesses as payable. The plaintiffs’ say that the defendants’ have to prove that the stamp duty is payable and that it was not paid. The plaintiffs’ further rely on clause 4 of the agreement to say that all such taxes, assessments and levies or other due as from the date of the execution was to be borne and paid by the purchasers.
24. The question of the validity and enforceability of the sale and purchase agreement has been raised. This is a question in law. It is clear from s. 41 that the subject agreement cannot at this stage be used for a summary judgment for want of being properly stamped. At no point in time has the court ordered under s. 100 that the agreement be stamped. So as such at this stage the said agreement cannot be used for any form of relief or remedy.
25. Whether or not the agreement was stamped is a matter of evidence as no such evidence thus far has been produced to indicate compliance of s. 41 of the Stamp Duties Act. It is the duty of the plaintiffs’ to prove that the agreement was stamped and not for the defendants’ to prove the negative.

26. Further, neither party has comprehensively argued that this is one agreement which is by law capable of being stamped and validated after the execution.
27. I do not wish to find from my reading of the Stamp Duties Act any answers to this question of law as the parties must be given an opportunity to address the Court on this issue. If the Court is empowered to make such orders for stamping after execution, it may be a matter that the parties should be allowed to address before the hearing of the substantive cause.
28. I do not find that the defendants' argument on the point of law misconceived. It is arguable in law and I do not find it a point of law which can be shortly shown to be plainly unsustainable.
29. The plaintiffs' claim is for compensation arising under the agreement. That agreement cannot be, under s. 41 of the Act, admissible at this stage, to grant the plaintiffs' summary judgment.
30. The plaintiffs' reliance on estoppel on the basis that the defendants' had taken possession of the property, are enjoying the same and paid the consideration together with reliance on clause 4 of the agreement that they agreed to pay the taxes is unsustainable because the defence of estoppel cannot be available when there is a statutory bar. The statute bars the use of any agreement or the admitting of the same in Court unless there is compliance of the Stamp Duties Act. The duty to have the document stamped is a statutory duty and it is against public policy to adduce actions of a party to the contract to plead estoppel to avoid the statutory duty. Stamp duty is government revenue and no one apart from the state has the powers to waive compliance of the same.
31. The second issue raised by the 1st and 2nd defendants' is that their signatures in the contract were not witnessed by a competent witness and as such the contract is null and void.
32. The 1st and 2nd defendants further say that the contents of the said document were not explained to them.

33. Without prejudice to the defendants' defence, I must say that there is no law requiring that the agreement for sale of property be witnessed by a competent witness.
34. The issue of non est factum does not appear bona fide. The defendants' are of full capacity. They knew about the sale and so that is why they paid the sum of \$130,000. They have been indisputably retaining the property and enjoying the benefit. For them to avoid their part of the bargain under the same contract pursuant to which they are relishing the fruits on the grounds of non est factum is unsustainable.
35. The 3rd and the 4th defendants' have raised the Indemnity, Guarantee and Bailment Act and asserted that the guarantee which they signed is invalid and unenforceable. The 3rd and 4th defendants argue that it was condition precedent to the sale that the 5th and 6th defendants' were also to be guarantors to the debt and the proposed compensation. They argue that since the 5th and the 6th defendants' did not execute the agreement as agreed by all the parties, the guarantee is invalid and unenforceable against them.
36. The preamble of the agreement states that it was a condition precedent to the sale that the payment of the purchase monies be unconditionally guaranteed by the 3rd to 6th defendants'. In this preamble there is no mention of payment of any compensation to be unconditionally guaranteed. However in the guarantee agreement, the 3rd and the 4th defendants' agree to pay the purchase price, the compensation and the interest and the costs incurred in recovering the purchase price, the compensation, and the interest.
37. It is a question of fact which cannot be resolved by the affidavit evidence whether it was also a condition precedent of the sale that all the 3rd to 6th defendants' would be guarantors to the claim for compensation, interests and costs. If the oral evidence indicates that it was or that it was the common understanding that the other defendants' will also be co-sureties then the 3rd and 4th defendants' argument in law is meritorious under s. 22 of the Indemnity, Guarantee and Bailment Act. The sections states that *"where a person gives a guarantee upon a contract that the creditor shall not act upon it until another person has joined in as co-surety, the guarantee is not valid if that other person does not join"*.
38. From the 3rd and 4th defendants' perspective, that question, whether the plaintiffs' should have, before disposing the property under sale, ensured that the other two defendants'

join as sureties is very important as it will have the effect of negating their liability or at the least the quantum as under s. 24 of the Act, the co-sureties are liable to contribute equally.

39. If I were the trial judge, I would also be interested in ascertaining what the parties intended by the term “unconditional guarantee” and whether that term has the effect of negating any argument by the 3rd and 4th defendants’ that the 5th and 6th defendants’ were to be co-sureties or did the term unconditional guarantee was applicable to the terms of the sale only.
40. Having read the guarantee document, I find that the parties have contracted out of the statute by the clause which reads that *“It is expressly agreed that no term or condition or other provision whatsoever shall by operation of law or otherwise be implied herein”*. It is always a triable issue as to what extent the Courts will uphold clauses where parties contract out of a provision of the statute. There are many factors on which depends the answer to this question. I guess it is not appropriate for me to decide this issue as it is triable as to what arrangement existed between the parties in respect of the guarantee and how did this clause come about.
41. I also notice that the liabilities of the guarantors are joint and several in the guarantee as opposed to the statutory liabilities of guarantors to be equal. If the Court upholds the guarantee in its entire form as valid, then the argument of the 3rd and 4th defendants’ may not hold substance because in any event whether or not the 5th and 6th defendants’ were intended to be co-sureties, the liability of the 3rd and 4th defendants’ will not be affected, if it was proved that they were people of deeper pocket and that the plaintiffs’ would have looked to them for payment of the entire compensation under the plaintiffs’ contractual rights to recover the monies jointly or severally.
42. With all the questions surrounding the circumstances of the guarantee, I find, that the 3rd and 4th defendants’ have a real defence to the claim for the compensation, interest and costs. There defence is not a sham.

Costs

43. All the defendants' including the 5th and the 6th have asked for costs against the plaintiffs' for bringing the action for summary judgment. The 5th and the 6th defendants' say that the claim for summary judgment was only withdrawn against them after they filed a defence and the affidavit. They say that they have incurred costs in preparing and filing the documents.
44. Indeed, unless the case is one where there is no arguable defence, a claim for Order 14 is sustainable but in this case I find that after the defendants' had raised their defence and filed affidavits to show the basis on which they were opposing the claim, it was clearly discernible that the questions of law and facts will effectively sword off any claim for summary judgment. I would have expected the plaintiffs' to have then relinquished their application for summary judgment and geared towards disposing the substantive cause.
45. Most interlocutory applications in our system delays the final disposal of the cases. Due to the many interlocutory applications, case management is affected not only in the particular case but in many other cases in which progress could have been made had it not been for interlocutory applications and judges time consumed in resolving those applications in other matters.
46. The defendants' are certainly entitled to costs. Given the fact that the application for summary judgment was withdrawn against the 5th and the 6th defendants', the order for costs, which I intend to make summarily, will be at variance.

Final Order

47. In the final analysis, I find that the application for summary judgment is unsustainable on the above premises. I therefore dismiss the application for summary judgment and order that the plaintiffs' pays to the 1st to 4th defendants' total costs in the sum of \$550 and to the 5th and 6th defendants' total costs in the sum of \$150.
48. The total costs awarded against the plaintiffs' is \$700 which sum must be paid to the defendants' within 21 days.

49. The plaintiffs' are jointly and severally liable for the costs. The costs must be equally apportioned amongst the defendants based on the sums awarded to them, shall there be any dispute on the same.
50. The matter shall now take its normal course. I gather from the records that the next process perhaps is the pre-trial conference. The parties are to conduct the pre-trial conference and list the summons to enter the action down for trial before the Master.
51. Any application for stamping of the contract under the Stamp Duties Act shall, at the discretion of the Master, be disposed by the Master or a Judge of the Civil Division in Lautoka.
52. Ordered Accordingly.

Anjala Wati

Judge

09.08.2013

To:

1. *Mishra Prakash & Associates for the plaintiffs'.*
2. *M. K. Sahu Khan & Company for the 1st to 4th defendants'.*
3. *Sahu Khan & Sahu Khan for the 5th and 6th defendants'.*
4. *File: HBC 267 of 1992.*