

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

ACTION NO. HBC 100 of 2013

BETWEEN : GAYA PRASAD
Plaintiff

AND : DINESH PRASAD & ROSELYN.S. D. CHAND
Defendant

BEFORE : Hon. Justice Mayadunne Corea

COUNSEL : Mr. S. Kumar for the Plaintiff
Mr. N. Tuifagalele for the Defendant

Date of Hearing : 28th February, 2014

Date of Judgment : 16th April, 2014

DECISION

[1]. The plaintiff has filed a notice of motion dated 11.6.2013 seeking for an order to set aside the order the Master made on 5.6.13. The motion has been filed pursuant to Order 113 Rule 8.

Chronology of Events

- [2]. The plaintiff has filed an application under s169 of the Land transfer Act against the defendants on 12.4. 2013.
- The case was to be mentioned before the Master on 18.5.13. The plaintiff had not appeared and the Master had struck out the application.
 - The plaintiff thereafter had filed summons to restore the action with the date stamp of 14.5.13. The summons was to be mentioned before the Master on 5.6.13.

- On 23.5.13 an affidavit of service has been filed.
- The case had been mentioned on 5.6.13. On this day the defendant had not been present and the Master reinstated the application and issued eviction order as the defendant was not present. The said order had been sealed on 20.6.13.
- On 11.6.13, the defendant had filed a notice of motion pursuant to Order 113 Rule 8 of the High Court Rules of 1988. Seeking to set aside the order made by the court on 5.6.13.

[3]. For the purpose of this application the plaintiff in HBC 100/13 herein after will be called as the plaintiff respondent and the defendant in HBC 100/13 will be called as defendant applicant.

Affidavit of defendant applicant in this application

[4]. Defendant applicant in the affidavit in support of the Motion deposed inter alia:-

- That the plaintiff respondent is the father of the deponent and is living in America.
- Defendant had been served with summons to reinstate on 14.5.13.
- Deponent had an appointment with a specialist eye doctor. The doctor had given a medical which is annexed marked DP1.
- Deponent had stayed at home on 5.6.13.
- Deponent had mixed up the dates.
- As a result had not appeared in court and sought an order to set aside the Master's order dated 5.6.13.

The affidavit of Plaintiff Respondent in this application.

[5]. Plaintiff respondent among other things has filed an affidavit in opposition vehemently objecting to the application.

[6]. The deponent has deposed among other things:-

- That the plaintiff's original application was under s169.
- The order was made in the absence of the defendant applicant to this application. The said order had been sealed and served.
- That there is no provision under the Land Transfer Act s169 to set aside an order but only remedy is an appeal.
- That the defendant applicant cannot file this application under Order 113 Rule 8. Accordingly, the action cannot be maintained.
- That the medical certificate filed clearly states that the defendant applicant of this application can resume work on 5.6.13.
- That the power of attorney given to the defendant applicant to this case is revoked and annexes the revocation.
- That the affidavit filed is not endorsed as per the High Court Rules.
- That Order 113 of the High Court Rules will not apply when the eviction order is made under the Land Transfer Act S169.

[7]. At the hearing the plaintiff respondent vehemently objected to the maintainability of this action. The plaintiff respondent submitted that without appealing under Order 59, the defendant applicant cannot maintain this application under Order 113.

Determination

[8]. As the plaintiff respondent to the application has taken a preliminary objection pertaining to the maintainability of the action, the court will first determine the said opposition.

[9]. It was submitted that the original application to the court for eviction was made under Section 169 of the Land Transfer Act.

- [10]. As per the Master's order dated 5.6.13 which has been sealed on 20.6.13, the application under s169 of the Land Transfer Act has seen its finality.
- [11]. The Land Transfer Act is silent on the appeal procedure. When the statute itself does not give a right of appeal this court has to resort to the High Court Rules.
- [12]. Order 59 of the High Court Rules stipulates the jurisdiction of the Master under part II of the Order 59 the rules provide for the procedure for appeals from the Master.
- [13]. It was submitted to court that Order 59 specifically provides for appeals from the Master. It is also pertinent to note under Order 59 Rule 12 a notice of appeal has to be given by the intended appellant.
- [14]. In this case no notice of appeal has been filed and the defendant applicant to the application has filed a notice of motion and has attempted to invoke the High Court jurisdiction under Order 113 Rule 8.
- [15]. Court's attention was also drawn to document marked "DP 1" by the defendant applicant to this application. The said document is a Medical Certificate. However it is pertinent to note that the said document states "will be fit to resume duties on 5/6/13."
- [16]. The court observes that the section 169 application for reinstatement of the case was mentioned before the Master on 5.6.13 and the order for eviction made on the same date. As per the medical submitted the defendant applicant had been fit to resume work on that day. Under the circumstance court observes that the medical certificate marked "DPI" will have no use to the defendant applicant to purge default.
- [17]. In the absence of any other material, Court is inclined to think that the defendant applicant has not explained or given sufficient reasons for his non appearance on 5.6.13.
- [18]. The plaintiff respondent also submitted that the annexure marked "DP2" has no relevance to this application under S169 of the Land Transfer Act. It was also submitted that even the power of Attorney given to the defendant applicant of this application has been revoked.

[19]. The plaintiff respondent further submits that he has migrated to the United States and that he wished to see an end to the litigation and reap the benefits of the order that had been sealed on 20.6.13.

Conclusion

[20]. The court observes that Order 113 Rule 8 gives a discretionary power to court to exercise its discretionary jurisdiction.

[21]. However in exercising discretionary jurisdiction the court exercises it with caution. I am of the view that when there is specific provision provided under the High Court Rules, this court should not act under Order 113 Rule 8.

[22]. The defendant applicant has failed to attend the Court on 5.6.13. The medical submitted by him says he would be ready to resume duties on that day.

[23]. He has also failed to comply with Order 59 and no reason was given as to why the defendant applicant to this application failed to comply with Order 59.

[24]. For the above stated reasons, the court is inclined to accept the preliminary objection raised by the plaintiff respondent to this application. The defendant applicant's application to court pursuant to notice of motion dated 11.6.13 is dismissed with cost summarily assessed at \$600.00.



Maryanne Corea

Maryanne Corea

JUDGE

16.4.2014