

IN THE HIGH COURT OF THE REPUBLIC OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 221 OF 2012L

**IN THE MATTER OF SECTION 169 OF THE
LAND TRANSFER ACT [CAP 131]**

BETWEEN : **KAMLA PRASAD SHARMA & SHOBNA SHIRI LATA** both
of Vatulaulau, Stage 2, Ba, Priest and Domestic Duties
respectively.

PLAINTIFF

AND : **ANJILA KUMARI** of Vatulaulau, Stage 2, Ba, Domestic
Duties.

1ST DEFENDANT

AND : **ITAUKEI LAND TRUST BOARD** a statutory body duly
constituted under Itaukei Land Trust Board and having
its registered office in Suva.

2ND DEFENDANT

Before: Master M H Mohamed Ajmeer

Counsel:

Mr. N S Khan for the plaintiff

Mr Samuel K Ram for the 1st defendant

Mr S Jitoko for the 2nd defendant

Date of Hearing : 20 May 2013

Date of Ruling : 3 July 2014

R U L I N G

[On Penal Notice]

Introduction

- [1] On 11 February 2014 Nazeem Lawyers filed a notice of motion (“the application). The application is supported by an affidavit of Tazmeen Shazia Yusuf sworn on 10 February 2014 and filed on 11 February 2014 (Tazmeen affidavit) and a supplemental affidavit of Kamla Prasad Sharma sworn on 26 February 2014 and filed on 27 February 2014 (Kamla affidavit). Tazmeen affidavit annexes four documents marked “A”-“D” while Kamla affidavit one document marked “A”.
- [2] The application states that this application is made pursuant to the High Court Rules and the inherent jurisdiction of the Honourable Court. It will be noted that the application does not specify under which rule it is made.
- [3] The application seeks the following orders:
1. *That the Defendants Solicitors Messrs Samuel K Ram vary and/or amend the Order served on the Law Firm of **NAZEEM LAWYERS** deleting the name of **NAZEEM LAWYERS** from the Endorsement of Penal Notice.*
 2. *That the costs of this Application be paid by the Defendant Solicitors on an indemnity basis.*
- [4] The first defendant, Anjila Kumari vigorously opposes the application. She filed affidavit in response. Her affidavit annexes two documents marked “AK1” & “AK2”.
- [5] The second defendant did not oppose the application made by the plaintiff’s lawyers. Mr Jitoko indorsed the arguments advanced by Mr N S Khan.
- [6] The plaintiff filed written submissions. But the first defendant did not, albeit obtained time for that purpose.

Background

- [7] The plaintiff brought proceedings against the defendants under section 169 of the Land Transfer Act seeking immediate vacant possession of the property. Before hearing of the matter the plaintiff discontinued the action. The first defendant sought costs. The court then dismissed the action with costs to be agreed, if not, to be taxed (“the order”).
- [8] A sealed copy of the order was served on the Law Firm of NAZEEM LAWYERS (the plaintiff’s lawyers) on 29 January 2014. The Indorsement of Penal Notice in the sealed order states:

“INDORSMENT OF PENAL NOTICE”

TO: the above named Plaintiff and/or their solicitor
Messrs Nazeem Lawyers, Barrister & Solicitor, Ba.

If you neglect to obey this Order by the time therein limited or disobey this Order (as the case may be) you will be liable to process of execution for the purpose of compelling you to obey the same.” (Emphasis provided).

- [9] Nazeem Lawyers objected to the indorsement of penal notice and requested the first defendant’s solicitors Messrs Samuel K Ram to amend it. The first defendant’s solicitors refused to amend.
- [10] Nazeem Lawyers say the Penal Notice is incorrect and/or improper and or not in compliance with the High Court Rules. So, they filed the application to have it amended.
- [11] Mr Ram maintained that order is not against the solicitor. This is a cost order of the court. Solicitors must involve in the process.

Issue

- [12] Whether the Penal Notice filed and served by the 1st Defendant including the name of the Law Firm NAZEEM LAWYERS is correct and

proper and/or in compliance with the High Court Rules and if not should it be varied and/or amended.

The Law and Discussion

[13] I will briefly summarize the law relating to indorsement of penal notice. Order 45 Rule 6 (4) of the High Court Rules deals with indorsement of penal notice. That rule provides that:

“(4) There must be indorsed on the copy of an order served under this rule a notice informing the person on whom the copy is served-

(a) in the case of service under paragraph (2), that if he neglects to obey the order within the time specified therein, or, if the order is to abstain from doing an act, that if he disobeys the order, he is liable to process of execution to compel him to obey it, and

(b) in the case of service under paragraph (3), that if the body corporate neglects to obey the order within the time so specified or, if the order is to abstain from doing an act, that if the body corporate disobeys the order, he is liable to process of execution to compel the body to obey it”.

[14] It is notable that the High Court Rules do not provide a format of penal notice. But, nonetheless the **Practice Direction No. 3 of 2000** issued by Justice Anthony Gates (as he then was) with respect settling of orders for sealing gives guidelines as to how penal notice should be indorsed. Where on page 5 and 6 it is directed that:

“Penal Endorsement”

Many orders presented for sealing which the litigant may need to enforce do not carry a Penal Notice [Ord. 45 r. 6(4); R 237 (4) Matrimonial Causes (High Court) Rules Cap 51]. They should do so. It is advisable that this be presented in a box at the end of the order, **in order that the warning notice be drawn fairly to the attention of the litigant who is to obey the order.** The notice should not be in small print.

PENAL NOTICE

If you the above-named defendant disobey this order you will be liable for process of execution for the purpose of compelling you to obey the same.

There are special wordings for indorsement, depending on the circumstances required, which are set out in the White Book at ord. 45. It is to be hoped that Counsel will be able to follow these principles in order to avoid delays in the sealing of orders.” (Emphasis provided).

- [15] The purpose of penal notice is to inform the person on whom the copy of order served that if he disobeys the order, he will be liable for process of execution to compel him to obey it.
- [16] In this case the plaintiff withdrew the action. First defendant sought costs. The parties could not settle the issue of cost at that time. The court then dismissed the action with costs to be taxed, if not agreed. It will be noted that there was no order for cost against the plaintiff’s solicitors. The cost order was made only against the plaintiff. The plaintiff withdrew the action on his own volition hence he must pay the incurred cost claimed by the first defendant.
- [17] The action is now dismissed. However, the issue of cost is still pending. Messrs Nazeem Lawyers were acting for the plaintiff. They are the plaintiff’s solicitors so long as their appointment to act for the plaintiff remains valid. An appointment of solicitor to act for a party will remain in force until the matter is finally terminated, or that appointment is revoked or withdrawn. Otherwise, an appointment to act as solicitor will cease upon the death of the party who gave that appointment.
- [18] The sealed order that was served on the Law Firm of Nazeem Lawyers carries an indorsement of penal notice. The penal notice addresses as follows:
- “TO: The above-named plaintiff and/or their solicitor Messrs Nazeem Lawyers, Barrister & Solicitor, Ba”.** (Emphasis provided)
- [19] Mr Nazeem Khan submitted that the Honourable Chief Justice makes it absolutely clear that the Penal Notice be presented in a box at the

end of the order, in order that the warning notice be drawn up fairly **to the attention of the litigant who is to obey the Order.** The Practice Direction makes it clear that the warning is to the Litigant, not the lawyer of the litigant.

[20] Paradoxically, Mr Samuel K Ram contended that the order is not against the solicitor. This is a cost order of the court. The solicitors must involve in the process. Therefore the penal notice may be addressed either to the plaintiff or his solicitors. He seemed to rely on Ord. 23, Ord. 24, r. 16 and Ord. 45 of the High Court Rules 1988.

[21] Ord. 23 deals with security for costs of action. Ord. 23, r. 1 provides:

“1.-(1) Where, on the application of a defendant to an action or other proceeding in the High Court, it appears to the Court-

(a) that the plaintiff is ordinarily resident out of the jurisdiction, or

(b) that the plaintiff (not being a plaintiff who is suing in a representative capacity) is a nominal plaintiff who is suing for the benefit of some other person and that there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so, or

(c) subject to paragraph (2), that the plaintiff's address is not stated in the writ or other originating process or is incorrectly stated therein, or

(d) that the plaintiff has changed his address during the course of the proceedings with a view to evading the consequences of the litigation,

then if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceeding as it thinks just”.

[22] The plaintiff resides within the jurisdiction. The summons for ejectment filed by the plaintiff states the plaintiff's address. In any event there was no application by the first defendant for security for cost of action under Ord. 23. Therefore in my judgment Ord. 23 has no application to the present case.

[23] Mr. Ram also argued pursuant to Ord. 24, r. 16 committal proceedings may be taken against the solicitors. As such penal notice may be addressed to the solicitors.

[24] Ord. 24, r.16 provides:

“16.-(1) If any party who is required by any of the foregoing rules, or by any order made thereunder, to make discovery of documents or to produce any documents for the purpose of inspection or any other purpose, fails to comply with any provision of that rule or with that order, as the case may be, then, without prejudice, in the case of a failure to comply with any such provision, to rules 3(2) and 11(1),-

(a) that party shall not be entitled subsequently to produce a document in respect of which default was made without the leave of the Court, and

(b) the Court may make such order as it thinks just including, in particular, an order that the action be dismissed or, as the case may be, an order that the defence be struck out and judgment be entered accordingly.

(2) If any party against whom an order for discovery or production of documents is made fails to comply with it, then, without prejudice to paragraph (1), he shall be liable to committal.

(3) Service on a party’s barrister and solicitor of an order for discovery or production of documents made against that party shall be sufficient service to found an application for committal of the party disobeying the order, but the party may show in answer to the application that he had no notice or knowledge of the order.

(4) A barrister and solicitor on whom such an order made against his client is served and who fails without reasonable excuse to give notice thereof to his client shall be liable to committal” (Emphasis provided).

[25] Ord. 25 r. 16 deals with orders to discovery of documents or to produce any documents for the purpose of inspection. And, if a barrister and solicitor on whom such an order made against his client is served fails without any reasonable excuse to give notice thereof to his client shall be liable to committal. That situation did not arise in this case. The court did not make any order to discovery of documents against the plaintiff. Ord. 25, r. 16 has therefore no application as well in this case. Hence the argument that penal notice may be addressed to the plaintiff’s solicitors is groundless.

[26] Returning to Ord. 45, r. 6 (4) of the High Court Rules. According to that rule, there must be indorsed on the copy of an order served under this rule a notice informing **the person on whom the copy is served**. The rule does not prescribe how the indorsement of penal notice should be drawn up. If you want to know how penal notice

should be drawn up, you must seek recourse to the Practice Direction No. 3 of 2000. Specimen of penal notice prescribed in that Practice Direction may be changed *mutatis mutandis* to suit each case.

[27] Upon withdrawal of the matter the court made order that, **the matter be dismissed with costs to be agreed, if not, to be taxed.** Obviously, the court made cost order against the plaintiff, not against the plaintiff's solicitors, Nazeem Lawyers. The person on whom the copy is to be served is the plaintiff. The copy of the order may be served on the plaintiff through his solicitors as they still act for him. This does not mean that the plaintiff's solicitors are the persons on whom the copy is served.

[28] Penal notice could be addressed to the plaintiff's solicitors, if the court had made cost order or any other order against the plaintiff's solicitors. In the absence of any order, cost or otherwise against the plaintiff's solicitors penal notice cannot be addressed to the plaintiff's solicitors.

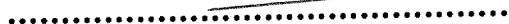
Conclusion

[29] For the reasons set out above, I conclude that the penal notice that is to be presented in a box at the end of the order must be drawn up fairly to the attention of the litigant who is to obey the order, not to the attention of the solicitors in the absence of any order against them. The penal notice that appears in the box at the end of the order served on Messrs Nazeem Lawyers drawing to the attention of .../ **“or their Solicitor Messrs Nazeem Lawyers, Barrister & Solicitor, Ba”** is incorrect, improper and not in compliance with Order 45 Rule 6 (4) of the High Court Rules read with Practice Direction No.3 of 2000. Therefore the sealed copy of the order served on the Firm of Nazeem Lawyers on 29 January 2014 must be amended by deleting the name of Nazeem Lawyers from the indorsement of penal notice. Having considered all the circumstances, I would make no order as to costs.

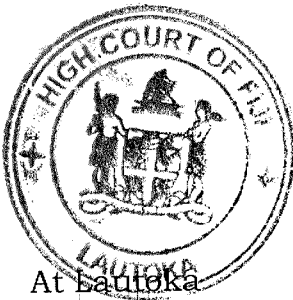
Final Orders

- a) I make orders in terms of notice of motion filed by the plaintiff on 11 February 2014;
- b) I make no order as to cost;
- c) Orders accordingly.

M H Mohamed Ajmeer



M H Mohamed Ajmeer
Master of the High Court



At Lautoka

03/07/14