

IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

Appeal Action No. 1 of 2013

**(On Appeal from Judgment/Ruling in
Suva High Court Civil Action No. 253
of 2011)**

BETWEEN : **ROHINESH KUMAR** (f/n Rabendra Kumar) of Lot 233 Tuirara
Subdivision, Nasinu

Appellant

AND : **MATELITA ROKOVI** of Waila Subdivision, Nausori, Domestic
Duties

Respondent

Appearance : Mr S Sharma for the Appellant
Ms T Rigsby for the Respondent

Date of Judgment: 14 October 2014

JUDGMENT

1. The Summons the Notice and Grounds of Appeal were filed by the Appellant on 18 February 2014 and sought the following orders:

1.1 The Judgment/Ruling delivered on 7 February 2012 (and sealed on 7 March 2012) by Master Amaratunga wherein the Learned Master

granted vacant possession of the property being Native Lease No. 22838 being Tuirara Subdivision Lot 233 as shown Lot 4 on SO. 1596 (the said property) be wholly set aside.

- 1.2 *That the Respondent/Plaintiff's application for vacant possession be dismissed with costs.*
- 1.3 *That the Respondent/Plaintiff pays to the Appellants/Defendant the costs of this appeal and of the High Court.*
- 1.4 *That the proceedings (including any enforcement proceedings) based on the said Ruling or Judgment is stayed pending hearing and determination of this appeal.*

2. The Grounds of Appeal urged by the Appellants/Defendants are as follows:

- 2.1 *The Learned Master erred in law and in fact in not holding that the Appellant had, in all the circumstances as disclosed in the evidence, shown cause pursuant to Section 172 of the Land Transfer Act and had a "right to possession" of the said property.*
- 2.2 *The Learned Master erred in law and in fact in failing to hold, in all the circumstances as disclosed by evidence that the Appellant/Defendant had established as "right to possession".*
- 2.3 *The Learned Master erred in law and in fact in dealing and treating the issue of "fraud" as the "main issue" for his determination and thereby erred in making "substantive" and purported findings of facts in relation to the issue of fraud, without and in the absence of "proper pleadings" and vivavoce evidence.*
- 2.4 *The Learned Master erred in law and in fact in:*

- (i) *not taking into account the clear existing equitable interest of the Appellant/Defendant and which was duly supported by a registered Caveat No. 733667 and registered on 5th July 2010;*
- (ii) *in holding that “no caveat existed” in respect of the said property, when such Caveat in favour of the Appellant/Defendant was duly registered and in place since 5th July 2010 and clearly remained in existence at the date when Summons for Ejectment was filed by the Respondent/Plaintiff in August 2011 and thereafter heard by the Learned Master;*
- (iii) *in not taking into account the existence of a Court Order in favour of the Appellant/Defendant, his mother and his siblings in Family Court Action No. 416 of 1990 dated 15th January 1991 and which Order by itself showed the “right to possession” of the said property on the part of the Appellant/Defendant, his mother and his siblings.*

2.5 *The Learned Master erred in law and in fact in not taking judicial notice of the proceedings in High Court Civil Action No. 141 of 2010 in which he had delivered a Ruling refusing to reinstate the Appellant/Defendant’s application for reinstatement on or about 21st July 2011.*

2.6 *The Learned Master erred in law and in fact in holding, in the absence of proper pleadings and a trial based on evidence, that the Appellants allegation of “fraud” was “mere conjecture” and without any acceptable evidence to show collusion or cause.*

2.7 *The Learned Master erred in law and in fact in holding on the totality of the evidence placed before him that there were arguable issues necessitating a proper trial and that the Respondent/Plaintiff’s*

application was, in all circumstances, misconceived and/or inappropriate for Summary adjudication pursuant to Section 169 of the Land Transfer Act.

2.8 *The Learned Master erred in law and in fact in his analysis and application of Section 38, 169 and 172 of the Land Transfer Act and/or his analysis and application of principles underlying these provisions and as established by the case authorities.”*

3. When the matter was taken for hearing Mr. Sharma counsel for the Appellant and Ms. Rigsby counsel for the Respondent made Oral Submission. Mr. Sharma tendered his submissions during the proceedings and Ms. Rigsby was granted 14 days to file her submission.

4. **Analysis, Findings and Conclusions**

4.1 The Appellant is the son of the previous owner of the property Rabendra Kumar.

4.2 The Appellant’s parents were divorced in the proceedings of the court ordered for the children and the wife to reside on the property for their life time and the Rabendra Kumar pays the Mortgage payments to the Housing Authority.

4.3 Rabendra Kumar left to United States and he had executed a power of Attorney in the name of his brother Praveen Kumar in 1993 and he was responsible for complying with the orders of the court case pending at that time or thereafter as per paragraph 4 of the said Power of Attorney.

“4. To state pay settle, adjust, compound submit to Arbitration or for the decision of any competent court or Tribunal Board or officer and compromise all actions suits accounts reckoning claims demands and disputes whatsoever which now are or

hereafter small or may be depending between me and any person or persons corporation or corporations whomsoever in such manner in all respects as my attorney shall think fit.”

Paragraph 16 states:

“16. So far as I can lawfully give or delegate such powers directions and authorities respectively to sell transfer lease mortgage dispose of deal with and manage any property real or personal which may be or become vested in or administered or controlled by me alone or jointly with any other person or persons as a trustee assigned executor administrator director committee attorney agent substitute or delegate or in any fiduciary capacity whatsoever and to exercise any powers and directions bring and defend actions and proceedings control and administer any estate or funds execute and sign my deeds and instruments and generally to do any acts whether in my own name or in the name of any other person or persons which I could lawfully exercise execute sign do and cause to be done in any and every such capacity whether solely or jointly with any other person or persons.”

(emphasis mine)

At the outset it is important to address the issue of the powers conferred on the power of Attorney holder by Rabendra Kumar. The powers vested on power of Attorney holder were the powers of the Principal. The Power of Attorney holder is not empowered to exercise any right which was not with the principal. In this matter as admitted by the Respondent, the obligation over the Native Lease No. 22838 was to secure the property for life time possession of the Appellant and his family members. The Power of Attorney holder cannot exercise any power

which was limited by the divorce case. I refer to the paragraph 16 of the Power of Attorney in which the explicit words “I could lawfully execute sign do and cause to be done”. It is abundantly clear that there is an issue with regard to Transfer the Property in the name of the Respondent. It is an arguable issue which the Learned Master failed to consider. I also note it was divulged in the proceedings that the Respondent in this case is now the wife of the Power of Attorney Holder and at the time of the Transfer of the property he was having an affair with the Respondent as alleged by the Appellant. Taking all material into consideration I am of the view there are serious issues to be tried by the court with regard to the fraud and which establish a defence for the Appellant right to possession.

4.4 Having stated as above now I will consider submissions by both counsel. The application before the Master was under Section 169 of the Land Transfer Act and for the following reasons I accept the Appellant’s counsel’s submission that the appellant had shown a ‘right to possession’. It is clearly stated in the Section 169 of the Land Transfer Act the person in the possession should show cause why he should not give up the possession to the applicant who has filed a case under section 169.

Section 169 states:

“169. The following persons may summon any person in possession of land to appear before a judge in chambers to show cause why the person summoned should not give up possession to the applicant:

(a) the last registered proprietor of land;

(b).....

(c)”

In this matter last proprietor is Matelita Rokovi the Respondent who made the application.

4.5 The Summons for ejectment was filed by the Respondent before the Master on 30 August 2011 pursuant to Section 169 of the Land Transfer Act. I observe the following:

(a) *The Appellant lodged a caveat registered on 5 July 2010 (Caveat No. 733667) on the Property Native Lease 22838 prior to filing this action by the Respondent. I agree with the Counsel for the Appellant this shows the equitable interest and rights guaranteed to the Appellant.*

(b) *The equitable interest of the Appellant and his family members derives from the Suva Magistrate's Court Action No. 416 of 1990. (page 60 of the copy record) in paragraphs 1, 2 and 3 of the Decree Nisi:*

"1. That the Respondent and children to continue in occupation of the matrimonial home to be provided and maintain by petitioner until the Respondent and children's life time.

2. Further that the toilet and bathroom to be completed.

3. The court orders further that the petitioner to pay water and electricity charges and payment to Housing Authority Rent.

4.

5.”

The said order itself shows the right to possession of the property by the Appellant, his mother and the siblings. By effecting a Transfer in favour of the Respondent by the power of Attorney holder shows clearly there is an arguable issue with regard to the alleged fraudulent transfer. The Learned Master erred in law and fact by not taking this issue for the determination made by him. I reiterate the statements made by me in the paragraph 4.3 of this Judgment.

4.6 The Appellant had alleged the fraud in his affidavit dated 11 October 2011 and no affidavit in reply was filed by the Respondent. The annexures filed with the said affidavit shows there are several issues to be decided on the alleged fraud and in absence of an affidavit the affidavit evidence of the Appellant is unchallenged. The Learned Master had come to a conclusion on finding of the fact and stated that the Respondent has indefeasible title. Further he had concluded the Appellant's allegation of the fraud was a mere conjuncture without any acceptable evidence to show collusion or cause. I disagree with the Learned Master. There was unchallenged ample evidence before him which is as satisfy to accept the Appellants allegations of a fraud which constitute an arguable defence. (unreported decided at 19 March 2004).

In Fiji Court of Appeal Case **Hardeo Prasad v Abdul Hamid** Civil Appeal No. ABU 0059 of 2003 unreported decided on 19 March 2004) the Court of Appeal had reviewed the principles applicable to Section 169 applications and it was stated:

“As has been remarked in other cases, provisions of this kind are common in many common law countries. There is a substantial amount of authority dealing with them and with the principles which apply when the procedure of summary judgment is invoked. The all important question always is

whether the Defendant can prove to the satisfaction of the judge a right to the possession of the land. These words have been the subject of some judicial gloss both in Fiji and elsewhere. For present purposes it is sufficient to refer to a decision relied upon by the primary judge in Morris Hedstrom Limited v. Liaquat Ali (Action No. 153/87) where the Supreme Court said (at p.2) that under s.172 the person summoned may show cause why he refuses to give up possession of the land and if he proves to the satisfaction of the Judge a right to possession or can establish an arguable defence the application will be dismissed with costs in his favour. The court added that that was not to say that final or incontrovertible proof of a right to remain in possession must be adduced. What was required was that some tangible evidence establishing a right or supporting an arguable case for such a right must be adduced. What we have called the gloss on the section derives from the summary nature of the proceedings instituted under s.169. Courts are always reluctant to give summary judgment in cases where a Defendant shows that he has some reasonably arguable defence or case which requires to be heard at a proper trial of the proceedings.”

As stated in the said Judgment I conclude the Appellant had established tangible right over the possession of the land for an arguable case. As such determining this matter the master had erred in law and fact and failed to apply the Principles applicable to Section 169 applications.

- 4.7 The procedure to be followed pursuant to Section 169 is to be adopted considering section 171 and 172 of the Land Transfer Act which provide:

“171. On the day appointed for the hearing of summons, if the person summoned does not appear, then upon proof to the

satisfaction of the Judge of the due service of such summons and upon proof of the title by the proprietor or lessor and, if any consent is necessary by the production and proof such consent, the judge may order immediate possession to be given to the Plaintiff; which order shall have the effect and may be enforced as a Judgment is ejectionment.”

Section 172 provide:

“172. If the person summoned appears he may show cause why he refuses to give possession of such land and, if he proves to the satisfaction of the Judge a right to the possession of the land, the judge shall dismiss the summons with costs, against the proprietor, mortgagee or lessor or he may make any order and impose any terms he may think fit.”

The Appellants affidavit divulges several questions of fact which the Learned Master should have inquired into. Both in Section 171 and 172 the word used is ‘may’ which clearly establish the intention of the Legislature when the Court should exercise its discretion considering the facts of each case. The relevant sections are not mandatory. In this matter the discretion of the court should have exercised infavour of the Appellant. Considering the facts which establish an arguable case.

The Appellant’s counsel had cited several authorities on this issue and I have taken those authorities into consideration in determining this case.

- 4.8 On the other hand the Respondent had submitted that there was no fraud established by the Appellant. However the Respondent had failed to file the affidavit in reply challenging the matters raised by the Appellants and there are

no material before me to consider the argument by the Respondent and Respondent fails.

The case cited by the Respondent Assets Company Ltd vs. Mere Roili [1905] AC 176 at P.120 is not relevant to the issue in this case. The Learned Master had to decide only whether the Appellant had established a case of fraud which is sufficient to establish an arguable defence which he failed to consider.

There are no merits in the submission of the Respondent.

Accordingly I make the following **Orders**:

1. *Appeal allowed and the orders sought in the summons filed on 18 February 2014 are granted.*
2. *The Respondent to pay summarily assessed cost of \$1500.00 to the Appellant within 30 days of this judgment.*

Delivered at Suva this 14th Day of October 2014.



.....
C. KOTIGALAGE
JUDGE

