

IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

Civil Action No. 116 of 2013

BETWEEN : **LEELA DEVI SHARMA, ATEN SHARMA, ASHIKA SHARMA,**
AMIT SHARMA all of Togobula, Nadroga.

Appellants

AND : **VEENA KIRAN SHARMA** of Navutu, Sigatoka, School Teacher.

Respondent

Appearances : Ms. Vasiti for Applicant
Respondents in Person
Date of Hearing : 04 December 2014

R U L I N G

INTRODUCTION

1. Vinod Sharma (“**Vinod**”) and Som Kishore Sharma (“**Som**”) are both now deceased. They were brothers. Their father’s name was Ashwani Kumar Sharma (“**Ashwani**”). Their mother’s name was Lila Wati Sharma (“**Lila**”). Ashwani had predeceased both sons and his wife, Lila.
2. Crown Lease No. 3991 was leased by Ashwani. Under his Last Will & Testament, Ashwani had bestowed the lease to Lila and also to his two sons, Vinod and Som.
3. Vinod was the executor of the Ashwani-estate. At some point after his appointment as executor of the estate, Vinod would grant a mortgage over Crown Lease No. 3991 to his wife, Vivita Nacewa (“**Nacewa**”). At some point in time also, Nacewa would exercise her power of sale as mortgagee and sell the land to her daughter, Veena Kiran.
4. Apparently, upon becoming registered proprietor of the land, Veena would enter into a tenancy agreement with the defendants, who were then residing on the land. The defendants are the surviving spouse and children of Som.
5. When the defendants fell into arrears on their rental, Veena Kiran filed eviction proceedings under section 169 of the Land Transfer Act (Cap 131). The section 169 application was heard by the Master.

THE MASTER'S RULING

6. The Master had made the following findings:-
- (i) that Veena Kiran Sharma was the last registered proprietor of the property having gained ownership through a mortgagee sale in October 2011.
 - (ii) the defendants were residing on the property at the time of the mortgagee sale.
 - (iii) the plaintiff entered into a tenancy agreement with the defendants, according to which the defendants had to pay bond of \$500 and a monthly rent of \$250.
 - (iv) the defendant had defaulted in their monthly payment and are in rental arrears of \$2,000.
 - (v) as a result, the plaintiff served a notice to vacate on 21 February 2013.
7. Although the defendants/intended appellants appeared at first to deny Veena Kiran's proprietorship, the Master observed that their counsel was not able to explain the ground, let alone adduce any evidence to challenge Kiran's proprietorship¹. Counsel did concede though that the property was acquired by Veena Kiran through a mortgagee sale².
8. The Master was satisfied that Veena Kiran Sharma was the last registered proprietor as evidenced by a certified true copy of Crown Lease No. 3991. The defendants were tenants and were in arrears of rent by \$2,000. He thereby granted Order in Terms of the application.
9. It appears to me that at some point after the Master had handed down his ruling, the intended appellants then instructed a solicitor to file a claim in the High Court seeking *inter-alia* a declaration that the mortgage and the transfer were fraudulent and on that basis, they also seek a "cancellation of the transfer".

APPLICATION NOW BEFORE ME

10. Before me is a Summons dated 10 June 2014 seeking leave for enlargement of time to appeal and to serve appeal of the Master's decision which was handed

¹The Master had noted as follows in his ruling:

4. The defendants appear to deny the plaintiff's proprietorship of the property. Mr. Vula counsel for the defendants submitted there had been some unusual transactions taken place according to endorsement sheet. However, he was unable to explain what the unusual transactions were. At hearing, I for the purpose of clarification asked Mr. Vula whether he is really denying the plaintiff's ownership in the property. He was evasive and could not give a straightforward answer to my question.

²The Master had observed:

5. The defendants had entered into a tenancy agreement with the plaintiff. All material averments in the plaintiff's affidavit in support are denied by the defendants. It will be noted that mere denials are not sufficient to rebut the assertion taken in the affidavit in support. However, the defendants admit that the property was later transferred by Mortgagee Sale Veena Kiran Sharma (the plaintiff) on 22 March 2012 under TMS No. 756800 (vide para 5 (e) of the defendants' affidavit in response).

down on 20 May 2014. As I have said, the intended appellants also seek leave to adduce fresh evidence.

11. Following are the specific orders which the intended appellant seeks:

- (i) that the Appellants/Applicants be given enlargement of time to appeal and serve the appeal if enlargement of time is required.
- (ii) that execution of Order sealed the 2nd day of June, 2014 against the A
- (iii) that Appellants/Applicants be given leave to adduce evidence that Crown Lease No. 3991 was leased by Ashwani Kumar Sharma who bestowed it under his will to his wife, and his two sons the Respondent's father and 1st Appellant's husband and 2nd to 3rd Appellant's father and that the Appellants have filed High Court proceedings alleging fraud in Respondent's father as Executor of Ashwani's Kumar Sharma's Estate purportedly mortgaging the Estate property to his wife who then sold it by mortgagee sale to her daughter the Respondent and that declarations are sought therein to cancel said fraudulent mortgage and transfer.
- (iv) such further or other Orders as the honourable Court may determine.
- (v) costs of this application be in the cause.

12. The application is supported by an affidavit of Amit Sharma sworn on 10 June 2014.

FRESH EVIDENCE SOUGHT TO BE ADDUCED

13. As stated above, the intended appellant wishes to adduce evidence on appeal to establish that both the mortgage and the transfer were carried out fraudulently.

14. It appears that the intended appellants have already instituted proceedings in the High Court alleging fraud. The allegations are that Vinod acted fraudulently in giving a mortgage over the estate land to his wife Vivita Nacewa. It is also alleged that Nacewa then committed another act of fraud in the manner in which she had sold the land to her daughter, purportedly under a mortgagee sale.

15. In their pending claim, the intended appellants are seeking *inter alia* a declaration that the mortgage and the transfer were fraudulent and on that basis, they are seeking a cancellation of the transfer.

OBSERVATIONS

16. Undoubtedly, the very evidence of fraud which the intended appellants are seeking to adduce in this application will also be crucial in their pending writ action against Veena Kiran.

17. There are two allegations involved here:

- (i) the first is the allegation that the mortgage given by Vinod to his spouse, Vivita Nacewa, was a fraudulent mortgage designed to defeat the interests of the intended appellants as beneficiaries in the estate of Ashwani.
- (ii) the second is the allegation that the mortgagee sale by Vivita to her daughter Veena Kiran was exercised fraudulently.

18. The intended appellants are not challenging the finding that they ever entered into a tenancy agreement with Veena Kiran. One wonders why they would enter into that tenancy agreement if they would also challenge her proprietorship.

19. The question I ask is whether or not the pendency of the intended appellant's civil claim is enough to sustain a right to possession for the time being in the defendants.

20. The Fiji Court of Appeal in **Dinesh Jamnadas Lalji and Anor v Honson Limited** F.C.A. Civ. App. 22/85 as per Mishra J.A. said:

"At the hearing, the appellants' main submission was that, as proceedings relating to the same matter were already before the Supreme Court, the application should be dismissed. The learned Judge, quite correctly in our view, held that existence of such proceedings was, by itself, not a cause sufficient to resist an application under section 169 of the Land Transfer Act." (emphasis added).

21. Also in **Muthusami s/o Ram Swamy v Nausori Town Council (Civ. App. No. 23/86 F.C.A.)** Mishra J.A. expressed the same view as above in the following words:

".....that mere institution of proceedings by Writ did not by itself shut out a claim under section 169 of the Land Transfer Act in a proper case. It was for the appellant to show, on affidavit evidence, some right to remain in possession which would make the granting of an order under section 169 procedure improper."

Although the defendant has alleged fraud, and which is also the subject matter of the said action instituted by the defendant, there are no complicated questions of fact to be investigated. The procedure under s 169 is most appropriate here. On this aspect in *Ram Narayan s/o Durga Prasad v Moti Ram s/o Ram Charan* (Civ. App. No. 16/83 FCA) Gould J.P. said:

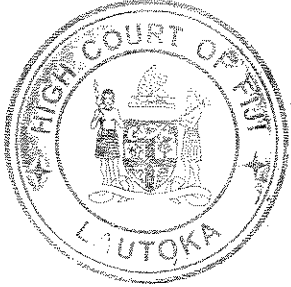
"... the summary procedure has been provided in the Land Transfer Act and, where the issues involved are straight forward, and particularly where there are no complicated issues of fact, a litigant is entitled to have his application decided in that way."

(my emphasis)

22. Clearly, from these authorities, the pendency of related Writ proceedings is not – by itself – sufficient to shut out a section 169 claim.
23. The factors which a Court must take into account in considering whether or not to grant leave to appeal out of time are were set out by the Honourable Chief Justice in **McCaig v Manu** [2012] FJSC 18; CBV0002.2012 (27 August 2012) as follows:
- (i) the reason for the failure to file within time
 - (ii) the length of the delay.
 - (iii) whether there is a ground of merit justifying the appellate court's consideration.
 - (iv) where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?
 - (v) if time is enlarged, will the Respondent be unfairly prejudiced?
24. Guided by the above, I am of the view that the same reasoning in **Dinesh Jamnadas Lalji and Anor** (supra) and **Muthusami** (supra) is/are ground enough to reject the intended appellants' application for leave to appeal out of time. In saying this, I am particularly influenced by the fact that they already have a civil action on foot in which the allegation of fraud will be tried out. Having said that, I think the allegation of fraud will better tried out in that pending civil action than it can ever be before a court sitting as an appellate one. Fraud, after all, is a triable issue.
25. I am also influenced by the fact that the allegations of fraud are against those persons, one of whom is deceased, who were not parties in the section 169 matter.
26. On the same token, the intended appellants will suffer absolutely no prejudice if I decline both applications for leave to appeal out of time and for leave to adduce further evidence because, as I have said above, the same evidence will take centre stage in the trial of the pending civil action. Furthermore, there is nothing in the decision of the Master that can possibly estopp the intended appellants from pursuing any aspect of their civil claim.

CONCLUSION

27. Application dismissed. Costs to the Respondent, Veena Kiran, which I summarily assess at \$1,000 (one thousand dollars only).



A handwritten signature in black ink, appearing to be "AT", written over a dotted line.

Anare Tuilevuka
JUDGE
28 June 2016