

IN THE HIGH COURT OF FIJI AT SUVA  
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 14 of 2011

BETWEEN : Ronita Rajeshini Singh aka Ranita Rajeshini  
Singh as Executrix and Trustee of the Estate of  
Shiv Wati.

Plaintiff

AND : Direndra Nath, of Verata, Nausori, Van Driver.

1<sup>st</sup> Defendant

AND : Ronal Rajnesh Singh of Verata, Nausori

2<sup>nd</sup> Defendant

COUNSEL : Mr. S. Singh for Plaintiff  
Mr. A. Vakaloloma for Defendants

Date of Hearing : 15<sup>th</sup> July, 2016

Date of Ruling : 22<sup>nd</sup> July, 2016

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# RULING

*(On the summonses for writ of possession, Joinder of parties and Stay pending appeal)*

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- [1] Original plaintiff (since deceased) filed this action by way of originating summons against the defendant (now the 1<sup>st</sup> defendant) seeking, inter alia, the following reliefs;
- A. An order that the property comprised in Certificate of Title No. 22710 being Lot 43 Sec III on Deposited Plan No. 126 be valued and the cost of the valuation be shared equally by the plaintiff and the defendant.
  - B. An order that the property comprised in Certificate of Title No. 22710 being Lot 43 Sec III on Deposited Plan No. 126 be sold by tender to the highest tenderer and the proceeds of sale to be shared equally between the parties.
- [2] In the judgment of 01<sup>st</sup> August, 2013 the court made inter alia, the following orders;
- 1. That within 28 days from the date of the judgment, the Plaintiff appoints a valuer to carry out valuation of the property, the valuer to be acceptable to the Defendant's solicitors.
  - 2. The costs of valuation to be shared between the parties.
  - 3. Opportunity should be given to the Defendant to purchase the half share of the Plaintiff within 90 days from the date of valuation.
  - 4. In the event Defendant not being able to purchase the share of the Plaintiff, the Plaintiff's solicitors shall advertise the property for sale by written tender in at least two issues of a newspaper circulating in Fiji.
  - 5. Tender shall be opened in the presence of Defendant's solicitors.
- [3] In making the above orders the court has considered the following conditions contained in the last will of Ram Nath, the father of the 1<sup>st</sup> defendant, on
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which the learned counsel for the plaintiff placed much reliance in justifying the 1<sup>st</sup> defendant's resistance against issuing the writ of possession.

[4] I hereby further direct:

- a. That my wife Siva Wati shall be given the 2 bedroom wooden iron structured house together with motor vehicle number BX772.
- b. That my son shall have the bigger 4 bedroom concrete house together with motor vehicle CZ 747.
- c. That neither my wife Shiva Wati nor my son Dhirendra Nath is to sell his or her share of property to an outsider.

[5] Since the 1<sup>st</sup> defendant failed to comply with the judgment of the court the plaintiff entered into a sale and purchase agreement with a third party as ordered by the court in its judgment and the plaintiff filed ex-parte notice of motion on 13<sup>th</sup> June, 2016 seeking leave to issue writ of possession against the defendant and on 29<sup>th</sup> July, 2015 the solicitors for the plaintiff filed summons seeking the following orders;

1. Ronita Rajeshni Singh be substituted as the plaintiff in these proceedings in place of Shiva Wati as the personal representative of the estate of Shiva Wati.
  2. The court order on the certificate of title Number 22710 being Lot 43 Sec III on DP 126 be removed at the time of the settlement of the transaction between the parties and the purchaser of the property.
  3. One half of the net sale proceeds to be deposited in to the Family Division of the Magistrate's Court of Fiji and be dealt with in terms of the Family Law Act 2003.
  4. The Chief Registrar of the High Court of Fiji do execute the transfer and the application for Capital Gains Tax clearance on behalf of the Defendant for the conveyance of certificate of title
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Number 22710 being Lot 43 Sec III on DP 126 to the Purchaser, Isikeli Senibuli and/or his nominee.

5. On the date of the settlement, the Defendant does give vacant possession of the property to the purchaser and/or his nominee.
6. Costs of this application.

[6] When the above summons was mentioned on 08<sup>th</sup> October, 2015 both parties were represented by their respective counsel who consented to the substitution of Ronita Rajeshni Singh in the room of deceased Shiva Wati and the application was fixed for hearing on 19<sup>th</sup> November, 2015.

[7] When the application was taken up for hearing the learned counsel for the defendant informed court that the defendant claims compensation for improvements and the learned counsel for the plaintiff submitted that the issue of compensation for improvements would be decided at the time of the distribution of the proceeds of the sale. Subject to the right of the defendant to claim compensation for improvements the parties settled the dispute between them on the following terms;

1. The defendant shall execute the transfer of the property in the name of the purchaser and execute the Capital Gains Tax clearance within 14 days. If he fails to do it within 14 days the Chief Registrar will execute the said transfer and Capital Gains Tax Clearance.
2. The defendant shall within 60 days from today vacate the property and hand over the property to the purchaser.
3. The proceeds of the sale will be deposited to the credit of the case.

[8] The court ordered that the above settlement amounts to a judgment of the court.

[9] Since the 1<sup>st</sup> defendant failed and/or refused to execute the transfer as promised the plaintiff with leave of the court instituted committal

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proceedings and after hearing the 1<sup>st</sup> defendant the court by its ruling dated 30<sup>th</sup> June, 2016 imposed on him \$7500.00 and also a default sentence of 2 months was also imposed on him.

[10] Mr. Vakaloloma, on behalf of the 1<sup>st</sup> defendant on 07<sup>th</sup> July, 2016 filed inter-parte notice of motion along with the notice of change of solicitors seeking to stay the operation of the ruling dated 30<sup>th</sup> June, 2016.

[11] The only ground averred in the affidavit filed in support of the notice of motion is that his father has imposed a condition on the beneficiaries of the last will that the property cannot be sold to an outsider. This court has on several occasions decided that since the court has made an order to sell the property to an outsider if the 1<sup>st</sup> defendant fails to purchase it within the time prescribed in the judgment, the condition contained in the last will that the property cannot be sold to an outsider cannot be pleaded over and over again as an excuse not to comply with the judgment of the court. The 1<sup>st</sup> defendant if he was dissatisfied with the judgment he should have preferred an appeal against it. Since the 1<sup>st</sup> defendant has sought not to challenge the propriety of the said judgment in a higher forum he is bound by the findings of the court.

[12] On the other hand the 1<sup>st</sup> defendant gave an undertaking to the court that he would execute a transfer in the name of the person who has agreed to purchase the property which he failed to do. When the court makes an order that the terms of settlement have the effect of an order or a judgment of the court although it is not a judgment or order given after considering the merits of the case parties are bound by such terms. Once the undertaking is given by the defendant to the court that he would execute a transfer in favour of the purchaser and to hand him over the vacant possession of the property he cannot later resile from it. If he does, he is in contempt of court.

[13] Apart from this ground the 1<sup>st</sup> defendant has not been able to adduce any other ground in support of his application for stay pending appeal.

[14] It is also important to note that there are no materials on record to show that an appeal has already been preferred against the ruling nor is there an application for leave to appeal filed.

[15] For grounds aforementioned I see no reason for the court to stay the operation of the ruling made on 30<sup>th</sup> June, 2016.

[16] The next issue is whether the plaintiff is entitled for leave to issue writ of possession against the 1<sup>st</sup> defendant. The ex-parte notice of motion was filed by the plaintiff in terms of the Order 45 rule 2 of the High Court Rules 1988 which provides as follows;

(1) Subject to the provisions of these Rules, a judgment or order for the giving of possession of land may be enforced by one or more of the following means, that is to say-

(a) writ of possession;

(b) in a case in which rule 4 applies, an order of committal;

(c) in such a case, writ of sequestration.

(2) A writ of possession to enforce a judgment or order for the giving of possession of any land shall not be issued without the leave of the Court except where the judgment or order was given or made in a mortgage action to which Order 88 applies.

(3) Such leave shall not be granted unless it is shown that every person in actual possession of the whole or any part of the land has received such notice of the proceedings as appears to the Court sufficient to enable him to apply to the Court for any relief to which he may be entitled.

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(4) A writ of possession may include provision for enforcing the payment of any money adjudged or ordered to be paid by the judgment or order which is to be enforced by the writ.

[17] In terms of the above provisions writ of possession can be issued only where there is a judgment or order for the giving of possession of a land. In the instant case the original plaintiff (now deceased) instituted these proceedings in the capacity of the executrix of the estate of Ram Nath seeking to dispose of the properties of the estate and to divide the proceeds among the beneficiaries. The judgment of the court and also the settlement entered into between the parties thereafter are to the effect that the property in question should be sold and the proceeds of the sale to be distributed among the beneficiaries.

[18] The present writ of possession is sought by the plaintiff pursuant to the orders made by the court on 19<sup>th</sup> November, 2015 based on the terms of settlement recorded by the parties. The order relevant to the present application for writ of possession reads as follows;

The defendant shall within 60 days from today vacate the property and hand over the property to the purchaser.

[19] The order of the court is to hand over the possession of the property to the purchaser and not to the plaintiff. It appears from the affidavit filed in support of the ex-parte notice of motion that this application for writ of possession has been made on the basis that the court had ordered the 1<sup>st</sup> defendant to handover the possession to the plaintiff. Since, no such order has been made by the court the application for writ of possession is liable to be refused.

[20] The next matter for determination is the application of the joinder of Ronal Rajnesh Singh as a party to this action.

[21] When this application was made by the plaintiff the party sought to be added failed to appear in court. The court therefore, allowed the application for joinder and made him the 2<sup>nd</sup> defendant. Later, it was brought to the notice of the court that the affidavit of service had not been filed of record by the plaintiff. Although, there was an averment in the affidavit of the party sought to be added to the effect that summons had been served on him, the court vacated the said order and allowed the 2<sup>nd</sup> defendant address court on the question whether he should be made a party or not for the reason that the plaintiff did not file the affidavit of service.

[22] Order 15 rule 6(2) provides:

Subject to the provisions of this rule, at any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application-

- (a) order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party;
  - (b) order any of the following persons to be added as a party, namely-
    - (i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, or
    - (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.
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[23] The above provisions permit the court only to add any person as a party to a cause or matter before adjudicating upon the matters in dispute between the parties. The main purpose of this provision is to facilitate all matters in issue between the parties and any dispute connected with the matters in dispute between a party to the action and any other person, to be determined effectually and completely and to avoid multiplicity of actions.

[24] In this case the addition of a party was sought by the plaintiff only at the stage of execution of the judgment. The learned counsel for the plaintiff relied on paragraph 8 of the affidavit of Ronal Rajnesh Singh filed on the day of the hearing wherein it is averred that he filed a joinder application to advocate his rights in the property, but I do not see any such application in the record. However, since the law does not provide for the addition of a party at the stage of execution of the judgment, even with consent, the application for the addition of Ronal Rajnesh Singh must necessarily fail.

[25] For the reasons aforementioned I make the following orders.

ORDERS.

1. Application for leave to issue writ of possessions is refused.
2. Application to add Ronal Rajnesh Singh as a party to the action is refused.
3. Application for the stay of the operation of the ruling dated 30<sup>th</sup> June, 2016 is refused.
4. There will be no order for costs of these applications.



*[Signature]*  
Eiyone Seneviratne,

JUDGE

22<sup>nd</sup> July, 2016.