

IN THE HIGH COURT OF FIJI
(WESTERN DIVISION) AT LAUTOKA
CIVIL JURISDICTION

CIVIL APPEAL NO. HBC 172 OF 2015

(On appeal from the High Court of Fiji
at Lautoka in the matter Civil Action
No. HBC 172 of 2015)

BETWEEN : **RADHABAI** aka **RADHA BAI** of Malolo, Nadi, Domestic Duties
as the Sole Executrix and Trustee in the Estate of Abhimanyou
Lingam aka Abhimanyu Lingam late of Vuniyasi, Nadi, Market
Vendor, Deceased.

APPELLANT
[Original Plaintiff]

AND : **BALVEER SINGH** and **JAGINDRA SINGH** aka **JAGINDAR**
SINGH Trustees in the Estate of Gurdiyal Singh aka Gurudayal
Singh aka Gurdial Singh aka Hardayal Singh of Wailoku, Suva.

RESPONDENTS
[Original Defendants]

Appearances : Mr R. Singh for the plaintiff/appellant
Mr R. Singh for the defendants/respondents
Date of Hearing : 04 May 2018
Date of Ruling : 21 May 2018

R U L I N G

[on Leave to Appeal]

Introduction

[01] This is a timely application seeking leave to appeal the decision of the Learned Master (*the Master*) delivered on 20 January 2017. By his decision, the Master struck out the action (*the decision*). It is based that the statement of claim

discloses no reasonable cause of action against the defendants/respondents (*'the defendant'*).

[02] The defendant opposes the application.

[03] At the hearing, the matter was orally argued. Additionally, both parties have also filed submissions.

Background

[04] The background facts are as follows. Radhabai, the plaintiff, brought an action against Balveer Singh and Jagindra Singh, the defendant. In that action, the plaintiff challenged a foreclosure order allegedly obtained by the defendant on the land, the subject property. She pleaded that the foreclosure order was obtained without complying with the provisions of ss.73, 74 & 75 of the Land Transfer Act (*'LTA'*) and s.79 of the Property Law Act (*'PLA'*). The defendant filed a striking-out application to strike out the claim on the ground that the action was caught by limitation provided in s.4 of the Limitation Act (*'LA'*). In the proceedings before the Master, the plaintiff argued that she had a proper cause of action against the defendant and her claim was not caught by limitation. The Master did not agree with the plaintiff. He held against the plaintiff and struck out the action. The Master in his order at pages 17 and 18 said:

"(10) I note annexure and marked 'B', 'D' and 'E' of the Affidavit of "Radhabai" (the Plaintiff) filed on 20th May 2016.

It seems tolerably clear that the application for an Order for Foreclosure was registered on 02nd March 2000 on the Crown Lease No:- 12891. Dealing with the question this far, I would hold that in spite of the force with which Counsel for the Plaintiff put her submission, it is wrong to argue that 'the foreclosure is not complete hence the time has not started to run to challenge any foreclosure.'

Moreover, in accordance with Section 74 of the Land Transfer Act, the Registrar of Titles issued a Public Notice for Foreclosure to advertise in the News Proper.

The late Abhimanyou Lingam did not object and/or obtained an Injunction restraining the Mortgagee from exercising their rights and/or to restrain them to proceed with the Foreclosure.

Late Abhimanyou Lingam passed away on 29th May, 2009. Since year 2000 when the Foreclosure was registered till May, 2009 the late Abhimanyou during his lifetime has not filed any action challenging the validity of the Foreclosure.

The Plaintiff issued the Writ against the Defendants on 7th October, 2015. After a slumber of 15 long years the Plaintiff is now challenging the validity of the Foreclosure and seeking an account of the income derived from the said property and the Estate of Abhimanyou Lingam. Equity aids the vigilant and not those who slumber over their rights.

The Plaintiff does not allege fraud. The Plaintiff alleges that there has been a breach of Sections 73, 74 and 75 of the Land Transfer Act and seeks a declaration that the foreclosures granted in year 2000 which was 15 years ago is invalid and be cancelled accordingly. Moreover, the Plaintiff is claiming for accounts which go back beyond year 2000.

As correctly pointed out by Counsel for the Defendants, the Plaintiff's Claim is obnoxious to Section 4 (1) and (2) of the Limitation Act and therefore statute barred."

[05] The plaintiff seeks leave to appeal that decision.

Test for granting leave to appeal

[06] Lord Woolf MR said in *Swain v Hillman* [2001] 1 All ER 91 that a "real" prospect of success means the prospect of success must be realistic rather than fanciful.

[07] The court considering a request for permission is not required to analyse whether the grounds of proposed appeal will succeed, merely whether there is a real prospect of success (*Hunt v Peasegood* (2000) *The Times*, 20 October 2000).

Grounds of Appeal

[08] The plaintiff intends to appeal the decision on the following proposed grounds of appeal:

- (i) *The Learned Master of the High Court erred in law and in fact in holding that the action by the Appellant is statute barred by virtue of Section 4 (1) and (2) of the Limitation Act when Section 8 (2) of the Limitation Act permits various actions dealings with foreclosure may be instituted within 20 years from the date the right to foreclosure accrued.*
- (ii) *The Learned Master of the High Court erred in law and in fact in striking out the Appellant's cause of action when a reasonable cause of action was pleaded on the grounds that the Respondent had breached Sections 73, 74 and 75 of the Land Transfer Act and Section 79 of the Property Law Act when the Respondent foreclosed on the land comprised in Crown Lease Number 12891 known as Nacaqara & Navo in the District of Nadi, containing an area of 4399m² (hereinafter referred to as "the said land").*
- (iii) *The Learned Master of the High Court erred in law and in fact in finding that the cause of action by the Appellant was based on equity.*
- (iv) *The Learned Master of the High Court erred in law and in fact in not considering the legal effect and consequence of Section 8 (2) of the Limitation Act.*
- (v) *The Learned Master of the High Court erred in law and in fact in finding that the cause of action arose 15 years ago, when the Appellant was made aware of the cause of action, the breach of Section 73, 74 and 75 of the Land Transfer Act and Section 79 of the Property Law Act when the action was instituted.*

Discussion

[09] When considering whether to grant leave to appeal a decision, the Court will not analyse the proposed grounds of appeal with the view to determine the real success of the appeal if leave to appeal is granted.

[10] The plaintiff submits that: the defendant had failed to meet the requirements of the law before the application for foreclosure was made, therefore the order

which was granted for foreclosure was irregular and should be set aside and that can only be full[y] decided upon providing evidence at trial. Therefore the court in stating that there is no reasonable cause of action is clearly wrong thus fulfilling the test for leave to appeal Master's decision.

[11] On the other hand, the defendant argues that: the appellant cannot open the issue of the validity of foreclosure which was registered in 2000 except in the case of fraud which is not the case in this matter. The appellant has not pleaded any fraud and therefore her appeal is bound to fail.

[12] I have carefully considered the proposed grounds of appeal and the submissions advanced by the parties.

[13] I find that the proposed grounds of appeal raise two legal issues. First, whether the foreclosures order is to be set aside on the grounds that it obtained without following the procedures set out in ss. 73, 74 and 75 of the Land Transfer Act and s.79 of the Property Law Act. Second, what is the limitation period applicable to a claim founded on foreclosure?

[14] Section 8 (2) of the Limitation Act states:

"(2) No foreclosure action in respect of mortgaged personal property shall be brought after the expiration of twenty years from the date on which the right to foreclose accrued, provided that if, after that date the mortgagee was in possession of the mortgaged property, the right to foreclose on the property which was in his possession shall not, for the purposes of this subsection, be deemed to have accrued until the date on which his or her possession discontinued." (Emphasis provided)

[15] The defendant argues that the applicable law to the plaintiff's action in respect of limitation is s.4 (2) of the Limitation Act, which states:

"(2) An action for an account shall not be brought in respect of any matter which arose more than six years before the commencement of the action." (Emphasis provided)

[16] The Master had struck out the action on the basis that the action is statute barred by virtue of s.4 (2) of the Limitation Act. S. 4 (2) speaks of the action for an account. An action for the account must not be brought after 6 years.

- [17] The time limited for a foreclosure action in respect of mortgaged property is 20 years from the date on which the right to foreclose accrued.
- [18] The action brought by the plaintiff is primarily based on foreclosure. The claim on accounts appears to be ancillary to the primary claim.
- [19] The submission of the plaintiff is that the Master was clearly wrong when striking out the action on the issue of limitation, an issue that can only be fully decided upon providing evidence at trial.
- [20] The court should take into account an appellant's strong feelings of injustice when considering whether to grant permission, at least those feelings are arguably objectively justified (*Malcolm v MacKenzie* [2004] EWCA Civ 584, LTL 18).
- [21] The plaintiff in her affidavit states that she had suffered loss and damage as the defendants have illegally taken control and possession of the land.
- [22] Where the argument involves a substantial point of law which does not admit of a plain and obvious answer, it may be best not to have it determined on a striking-out application. In the striking-out application, the Master had determined a limitation issue, a point of law when there were conflicting arguments as to the relevant provision applicable to the claim brought by the plaintiff. The plaintiff argued that section 8 (2) of the LA was the applicable provision as far as the limitation period is concerned, and not section 4 (2) of that Act as argued by the defendant. The point of law raised in the striking-out application does not admit of a plain and obvious answer. Therefore, it would be better deal with any substantial point of law as a preliminary issue.
- [23] After hearing full argument on the proposed grounds of appeal, I am persuaded that the proposed grounds of appeal raise some arguable legal points and that there is a real prospect of success on an appeal.

Conclusion

- [24] The foregoing reasons, I would grant leave to the plaintiff to appeal the Master's decision of 20 January 2017, which struck out the claim on the basis that the plaintiff has failed to disclose a reasonable cause of action against the defendant

as the claim is statute barred. Accordingly, the plaintiff will file and serve a notice of appeal on the defendant within 7 days of the date of this ruling. Further, the plaintiff will file and serve a summons seeking directions and a date for the hearing of the appeal within 21 days of the date of this ruling. I would order the costs shall be in the cause.

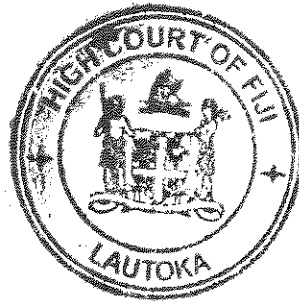
The Result

1. Leave to appeal the Master's decision of 20 January 2017 granted.
2. The plaintiff must file and serve a notice of appeal within 7 days of the date of this ruling.
3. The plaintiff must file and serve a summons to seek directions and a date for the hearing of the appeal.
4. The cost shall be in the cause.

M. H. Mohamed Ajmeer
21/5/18

M. H. Mohamed Ajmeer

JUDGE



At Lautoka

21 May 2018

Solicitors:

For the appellant: M/s Patel & Sharma Lawyers, Barristers & Solicitors

For the respondents: M/s Sherani & Co.