IN THE HIGH COURT OF FIJI
[WESTERN DIVISION] AT LAUTOKA
APPELLATE JURISDICTION

CIVIL ACTION NO. HBC 79 OF 2018

IN THE MATTER of an Appeal from the Decision of the Acting Master of the High Court of Fiji at Lautoka on the 11th day of April, 2018 in Civil Action No. HBC 79 of 2018

BETWEEN : **JITENDRA SINGH** of Johnson Road, Drasa, Lautoka, Farmer, in propria persona and as the sole Trustee of the **Estate of Satya Wati**, late of Johnson Road, Drasa, Lautoka, deceased, Testate.

APPELLANT/PLAINTIFF

A N D : **NARENDRA PRASAD** of 11901 Stering Crescent, North Delta BC, Canada, V4C – 7Y7 as the sole Executor and Trustee of the **Estate of Jhakri Prasad aka Jhakari Prasad**, deceased, Testate.

1ST RESPONDENT/1ST DEFENDANT

A N D : **THE REGISTRAR OF TITLES**

2ND RESPONDENT/2ND DEFENDANT

A N D : **THE ATTORNEY GENERAL OF FIJI**

3RD RESPONDENT/3RD DEFENDANT

Appearances : Ms S. Ravai for the plaintiff/appellant
No appearance for the defendant/respondent
Date of Hearing : 13 June 2018
Date of Judgment : 17 July 2018

JUDGMENT

Introduction

[01] This is a timely appeal against the learned Master's decision of 11 April 2018, striking out the action on his own motion (*'the decision'*).

[02] Since the claim was struck out before service on the defendants/respondents (*'the respondents'*) there was no appearance for or by the respondent.

[03] At the hearing, Ms Ravai of counsel, on behalf to the plaintiff/appellant (*'the appellant'*), orally argued the appeal and she also tendered her skeleton submission.

The Background to the Appeal

[04] On 11 April 2018, the appellant took out a writ of summons endorsed with the statement of claim against the respondents claiming amongst other things that the first respondent do forthwith release the original certificate of title numbers 38765 and 38766 to the appellant and general damages. At the same time, he also filed an *ex parte* notice of motion supported by an affidavit of the appellant. In that notice of motion, the appellant sought leave to serve the writ of summons beyond the jurisdiction of the court by way of registered post. The learned Master (*'the Master'*) heard the notice of motion and struck out the entire claim. The appellant, being aggrieved by that order, appeals to this court.

The Law

[05] Order 6, Rule 6 and Order 11 of the High Court Rules 1988, as amended (*'HCR'*) may be applicable to the application made by the appellant.

[06] The HCR, O 6, R 6, provides:

"**Issue of writ** (O 6, R 6)

> *6. No writ which is to be served out of the jurisdiction shall be issued without the leave of the Court; provided that if every claim made by a writ is*

one which by virtue of an enactment the High Court has power to hear and determine, notwithstanding that the person against whom the claim is made is not within the jurisdiction of the Court or that the wrongful act, neglect or default giving rise to the claim did not take place within its jurisdiction, the fore going provision shall not apply to the writ.

(2) Issue of a writ takes place upon its being sealed by an officer of the Registry.

(3) The officer by whom a concurrent writ is sealed must mark it as a concurrent writ with an official stamp.

(4) No writ shall be sealed unless at the time of tender thereof for sealing the person tendering it leaves at the Registry a copy thereof signed, where the plaintiff sues in person, by him or her or, where he or she does not so sue, by or on behalf of his or her solicitor and produces to an officer of the Registry a form of acknowledgment of service in Form 2 in Appendix 1 for service with the writ on each defendant." (Emphasis added)

[07] The HCR, O 11, generally provides provisions for service of process out of jurisdiction, which so far as relevant states:

"ORDER 11

ORDER 11-SERVICE OF PROCESS ETC, OUT OF THE JURISDICTION

***Principal cases in which service of writ out of jurisdiction is permissible** (O 11,R 1)*

1.-(1) If a writ is not a writ to which paragraph (2) of this Rule applies, service of a writ out of the jurisdiction is permissible with the leave of the Court if in the action begun by the writ-

...

(g) the whole subject matter of the action is land situate within the jurisdiction (with or without rents or profits) or the perpetuation of testimony relating to land so situate;

(h) the claim is brought to construe, rectify, set aside or enforce an act, deed, will, contract, obligation or liability affecting land situate within the jurisdiction;

...

Application for, and grant of, leave to serve writ out of jurisdiction (O 11,R 2)

2.-(1) An application for the grant of leave under Rule 1(1) must be supported by an affidavit stating-

(a) the grounds on which the application is made;

*(b) that **in the deponent's belief the plaintiff has a good cause of action;***

(c) in what place or country the defendant is, or probably may be found, and

*(d) where the application is made under Rule 1(1) (c), **the grounds for the deponent's belief that there is between the plaintiff and the person on whom a writ has been served a real issue which the plaintiff may reasonably ask the Court to try.***

(2) No such leave shall be granted unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction under this Order.

(3) An order granting under Rule 1 leave to serve a writ out of the jurisdiction must limit a time within which the defendant to be served must enter an appearance."

The Impugned Order

[08] Upon hearing the application for leave to serve out of jurisdiction, the Master made order striking out the entire claim. The Master's order is as follows (in its entirety):

"Orders

The Ord 11 R 2 requires the Good Cause of Action for a writ to be served out of jurisdiction.

This action of the plaintiff is stemming from the Ex Parte order of the court dated 12 October 2004 by Justice Singh.

However, the plaintiff didn't take step to serve the order on the defendant.

The plaintiff in the writ seeks order to transfer a particular Lot of the estate Land. However, the order of Justice Singh is nothing to do with the said prayer.

Hence, the leave could not be granted for the writ to be served as it lacks the cause of action.

The plaintiff should have acted under Ord 45 R 6 to serve the order and then to take step to execute the order.

Apart from this, the writ contains the statement of claim, which is improperly pleaded. (Ex, Court's order is just attached).

Considering all, I am of the view that the writ can't be amended under Ord 2 Hence, I dismiss the same."

Grounds of Appeal

[09] The appellant appeals the order on the following grounds of appeal:

1. *The Learned Acting Master erred in law and in fact in dismissing the Appellant's application under Order 11 of the High Court Rules by invoking Order 2 rule 2.*

2. *The Learned Acting Master erred in law and in fact is dismissing the Appellant's application under Order 11 of the High Court Rules by misreading the relevant provisions of the rules relating to Writ Actions.*

3. *The Learned Acting Master's decision is bad in law.*

4. *The Appellant/Plaintiff prays that the said decision by wholly set aside and leave be granted under Order 11 of the High Court Rules.*

The issue at Appeal

[10] The appeal concentrated on the question of whether it was proper for the Master to strike out the entire claim in an interlocutory proceedings seeking leave to serve the writ out of jurisdiction *ex mero motu* (on his own motion).

The Appellant's Submission

[11] The appellant's primary submission was that *Goundar v Fiesty Ltd* [2014] FJCA 20; ABU0001.2013 (5 March 2014) (*'Fiesty'*) constituted binding authority where Fiji Court of Appeal disagreed with the decision of the learned Judge in dismissing the entire action at the hearing of the application for injunction and further stated at para 10 of its Judgment that *'the decision of the court below does not indicate the High Court Order which it relied in the strike out of the Writ of Summons'* and further that *'any deficiency in the pleading can be cured by amendments to it at such initial stages without causing much difficulty to the other parties'*.

[12] It is further submitted that the learned Acting Master's decision to dismiss the Writ of Summons was wrong in law when in fact the application before him at the time was that of an interlocutory application for service out of jurisdiction under Order 11 which the learned Acting Master never dealt with at all and that the learned Acting Master's dismissal of Writ of Summons for reasons that the Writ cannot be amended under Order 2 Rule 2 is misconceived.

The Decision

[13] The appellant challenges the Master's decision on the four grounds of appeal. I will deal with each of the grounds in turn.

<u>*Ground 1:*</u>

1. The Learned Acting Master erred in law and in fact in dismissing the appellant's application under Order 11 of the High Court Rules by invoking Order 2 rule 2.

[14] The appellant submits that the learned Acting Master's decision to dismiss the Writ of Summons was wrong in law when in fact the application before him at the time was that of the interlocutory application for service out of jurisdiction under Order 11, which the Learned Acting Master never dealt with at all.

[15] The HCR, O 2, R 2, dealt with an application to set aside for irregularity, which provides:

> *"2.-(1) An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any*

fresh step after becoming aware of the irregularity.
(2) An application under this Rule may be made by summons or motion and the grounds of objection must be stated in the summons or notice of motion."

[16] There was no application before the Master to set aside the proceedings for irregularity pursuant to Rule 2. It appears that the Master has assumed jurisdiction under that rule on his own initiative. Order 2 does not empower the Master to act on his own motion to set aside any proceedings, any step taken in any proceedings or any document, judgment or order. The Master should have invoked jurisdiction under O 2 without any application by a party to the proceedings. Instead, he should have concentrated on the application that was before him. In my opinion, ground 1 has merit.

<u>Ground 2</u>

The Learned Acting Master erred in law and in fact is dismissing the Appellant's application under Order 11 of the High Court Rules by misreading the relevant provisions of the rules relating to Writ Actions.

[17] It is argued on behalf of the appellant that the learned Acting Master's dismissal of the Writ of Summons for reasons that the said Writ cannot be amended under O 2, R 2 is misconceived.

[18] The appellant sought leave of the court to serve the writ of summons out of jurisdiction. The HCR, O 11, explains the matters that must be considered in an application for leave to serve out of jurisdiction. In such an application, the applicant must state on affidavit that:

(a) the grounds on which the application is made;

(b) that in the deponent's belief the plaintiff has a good cause of action;

(c) in what place or country the defendant is, or probably may be found; and

(d) where the application is made under rule 1(1) (c), the grounds for the deponent's belief that there is between the plaintiff and the person on whom a writ has been served a real issue which the plaintiff may reasonably ask the Court to try.

[19] The Master struck out the entire claim stating that:

"This action of the plaintiff is stemming from the Ex Parte order of the court dated 12 October 2004 by Justice Singh.

However, the plaintiff didn't take step to serve the order on the defendant.

The plaintiff in the writ seeks order to transfer a particular Lot of the estate Land. However, the order of Justice Singh is nothing to do with the said prayer.

However, the leave could not be granted for the writ to be served as it lacks the cause of action."

[20] It is true that the statement of claim attaches an *ex parte* order delivered by Singh, J (as he was then) on 12 October 2004, in an action between the appellant (as plaintiff) and the respondent (as defendant). His order reads:

(a) That the Estate of **JHAKRI PRASAD** also known as **JHAKARI PRASAD** son of Sheoraj late of Drasa, Lautoka, Deceased, Cultivator be wound up within six months.

(b) That all proper accounts of the said Estate of **JHAKRI PRASAD** also known as **JHAKARI PRASAD** son of Sheoraj late of Drasa, Lautoka, Deceased, Cultivator be delivered;

(c) That costs of this application to be paid to the Plaintiffs out of the Estate of **JHAKRI PRASAD** also known as **JHAKARI PRASAD** son of Sheoraj late of Drasa, Lautoka, Deceased.

[21] The appellant has issued a writ of summons. In that he seeks among other things:

(A) An Order that the first defendant do forthwith release the original certificates of Title Numbers 38765 and 38766 to the plaintiff.

(B) In lieu of (A) above the second defendant do forthwith issue Provisional Titles over Certificate of Titles Numbers 38765 and 38766 and release the same unto the plaintiff.

(C) An order that the first defendant do within 42 days of receipt of the orders of this Honourable Court execute and release unto the

plaintiff the necessary transfer forms to enable registration of Certificate of Title numbers 38765 and 38766 unto the name of the plaintiff.

(D) In lieu of (c) above the Deputy Registrar of the High Court, Lautoka do execute all transfer documents to effect registration of Certificate of Title Numbers 38765 and 38766 unto the plaintiff.

(E) General damages

(F) Costs on a solicitor/client indemnity basis.

(G) Any other relief which in the opinion of this Honourable Court is just and expedient.

[22] Having decided that the appellant's action was stemming from the previous *ex parte* order granted between the same parties, the Master struck out the entire claim on the basis that it lacks the cause of action.

[23] The current writ seeks totally different relief, not the same relief that was granted on *ex parte* basis in the earlier action between the same parties. The appellant does not seek execution of that order either. He claims entirely different relief on different cause of action in the new action. Since the appellant does not seek execution of the previous order the question of service of that order on the respondent pursuant to the HCR, O 45, R 6. Rule 6 (2) (a) states that: ... *'an order shall not be enforced under Rule 4 unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question ...'* .

[24] The questions to be considered in an application for service out of jurisdiction are found in the HCR, O 11, R 2 (1), which include the deponent's belief that the plaintiff has a good cause of action and that there is between the plaintiff and the defendant a real issue which the plaintiff may reasonably ask the court to try. It would be sufficient for the applicant (plaintiff) to state on the affidavit that he or she has a good cause of action and that there is a real issue between the plaintiff and the defendant which the applicant may reasonably ask the court to try. The plaintiff is not required to prove anything at this state. What is important here is the plaintiff's belief that he has a good cause of action and that there is a real issue between him and the defendant.

[25] However, the HCR, O 11, R 2 (2), states that: *'no such leave shall be granted unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction under this Order.'*

[26] Madam Nazhat Shameem, J (as she was then) highlights the principles relevant to service out of jurisdiction in *Patel v Patel* [1999] FJHC 171; HBC312.1999 (30 November 1999) citing the Hagen's case that:

> *"Now that leave has been granted for service of the writ out of jurisdiction, the onus is on the Defendants to satisfy the court that the writ should now be set aside.*
>
> In **The Hagen** (1908 - 10) All ER 21, the House of Lords referring to the principles relevant to **service out of jurisdiction** said (per Farwell LJ at p.26):
>
> > ***"the first principle was whether or not a foreigner who owes no allegiance to these courts, should be brought to this country to contest his rights, should be considered a very serious issue. The second principle was, that if there was any doubt about the appropriate jurisdiction, that doubt ought to be resolved in favour of the foreigner. The third principle was that since an ex parte application was normally made for service out of jurisdiction, the fullest disclosure was necessary, and failure to make a full disclosure would justify a discharge of the order."***

[27] The appellant's claim is based on an estate property which is situate in Lautoka, Fiji. The jurisdictional issue is unlikely to arise. There is no doubt about the appropriate jurisdiction. The respondent is Fijian and now is resident in Canada. The appellant in the affidavit in support of his application for service out of the jurisdiction deposes (by verifying the contents of the statement of claim) to the grounds for believing that there is an arguable case and that there is a real issue which it is reasonable for the court to try between the appellant and the respondent. The appellant further shows that the respondent is a necessary party to the action. The Master has failed to consider these principles and factors as set out in the HCR, O 11, R 2, when considering an application for leave to serve the writ out of the jurisdiction. Instead, he has considered some extraneous grounds. It has led him to the dismissal of the appellant's substantive claim on his own initiative without dealing with the application that was before him.

[28] For the reasons I have given above, I find that ground 2 also has merit.

Ground 3

The Learned Acting Master's decision is bad in law

[29] Ms Ravai of counsel for the appellant submits that the dismissal of the substantive action at an interlocutory stage without dealing with the interlocutory application before it and in doing so without specifying which particular Order or rules the dismissal is made by the learned Acting Master is clearly bad in law. She refers to me the case of *Goundar v Fiesty Ltd* (above) in support of her argument.

[30] In *Goundar*, Fiji Court of Appeal disagreed with the decision of the High Court dismissing the entire action at the interlocutory hearing of the application for injunction and noted (at para 10) that:

> *"Any deficiency in the pleading can be cured by amendments to it at such initial stages without causing much difficulty to other parties. The decision of the court below does not indicate the High Court Order which it relied in the strike out of Writ of Summons. In terms of Order 18 rule 18(1) (a) when the pleading does not disclose a reasonable cause of action, this should be brought to the notice of the party and if the party is unable to cure it after a hearing of that issue and or after proper directions, the action can be struck out as a final resort. In the statements of defence, it was stated that the Plaintiff's claim lacked merit and also stated that since the Plaintiff failed to obtain consent of the Director of Lands the action is an abuse of process. The issue of merit in action cannot be decided at the interim injunction hearing, and it has to be determined at the trial and cannot be a reason to strike out. None of the defendants sought to strike out the action for any of the reasons contained in Order 18 rule 18 of the High Court Rules at the said hearing."*

[31] It is well settled that the jurisdiction to strike out was to be used sparingly. The reason is that the exercise of the jurisdiction deprives a party of its right to have the matter determined by a court of law, a right guaranteed under section 15 (2) of the Constitution, and of its ability to strengthen its case through the process of

disclosure and other court procedures such as request for further information. It has always been true that the examination and cross-examination of witnesses often changes the complexion of a case. It will be often impossible to be sure, in advance of litigation, whether any particular pleading has a good cause of action. The accepted rule is that striking out was limited to plain and obvious cases where there was no point in having a trial.

[32] The Master had struck out the substantive claim on the basis that the writ of summons discloses no good cause of action. It is because the writ had an attachment of a previous court order made in an action between the parties. By looking at the attached previous court order, the Master had thought the appellant was attempting to implement that order by bringing a new action. That is why he states in his order that the appellant had failed to serve the order on the respondent as required by the HCR, O 45, R 6 (2) (a). The previous order has nothing to do with the current action. The appellant seeks different relief in the current action, not the same relief granted in the previous action.

[33] The Master had struck out the substantive claim in the interlocutory hearing of an application for leave to serve the writ out of jurisdiction without any application to that effect. In that process, the Master had failed to consider the application that was before him and make an order according to law. It was not open for the Master to strike out the substantive claim on his own motion in an interlocutory application hearing, especially when there was no application for striking out the claim.

[34] It must be emphasised that the mechanism for weeding out hopeless or frivolous cases at an early stage or at an interlocutory proceedings, especially when there is no such an application, should not be engaged, for such a course affects the right to access to court.

[35] The Master's decision made striking out the substantive action in an interlocutory hearing without any application to that effect cannot stand in law. It should be set aside. So I do. I accordingly reinstate the substantive matter back to cause list.

[36] The appellant asks this court to grant leave to serve the writ out of the jurisdiction under the HCR, O 11, R 2. I now turn to the grounds of appeal number 4.

<u>*Ground 4*</u>

The Appellant/Plaintiff prays that the said decision be wholly set aside and leave be granted under Order 11 of the High Court Rules.

[37] In appeal, the appellate court may exercise all the powers vested in the court below (see the Court of Appeal Rules, R 22). I now consider the appellant's application for leave to issue and serve the writ of summons out of jurisdiction as it was filed before me.

[38] The application is supported by an affidavit of Jitendra Singh, the appellant, sworn on 6 April 2018.

[39] The appellant in his affidavit provides the respondent's overseas address for service and states that he is verifying the contents of the writ of summons. The writ of summons particularises the facts relevant to the relief sought. The writ shows the cause of action relates to a property which is situate in Fiji. It is unlikely a jurisdictional issue would be raised in the action as the dispute involves a property in Fiji and the respondent was/is a citizen of Fiji and now resident in Canada.

[40] The HCR, O 11, R 1, enables service of a writ out the jurisdiction (with the leave of the court) if in the action begun by the writ the whole subject matter of the action is land situate within the jurisdiction.

[41] The appellant has brought the writ action in respect of the land, which is situate within the jurisdiction.

[42] It is the appellant's belief that he has a good cause of action and that there is a real issue between the respondent and him. The pleadings show that the respondent is a necessary party to the action.

[43] Upon a cursory look at the writ of summons in conjunction with the supporting affidavit, I am satisfied that the writ discloses a good cause of action against the respondent and that he is a necessary party to the action

[44] In my view, the appellant has satisfied all the requirements that must be met when applying for service out of the jurisdiction under the HCR, O 11, R 2. I would, therefore, grant leave to the appellant to issue the writ and serve the same out of the jurisdiction. If the respondent feels that the court should have granted the leave, he may make an application to set aside the granting of the leave.

Conclusion

[45] For all these reasons, I would allow the appeal and set aside the Master's decision dated 11 April 2018, made dismissing the substantive action. I accordingly restore the action back to the cause list. Further, I grant leave to the appellant to serve the writ out of the jurisdiction by way of registered post. In all the circumstances, I would make no order as to costs.

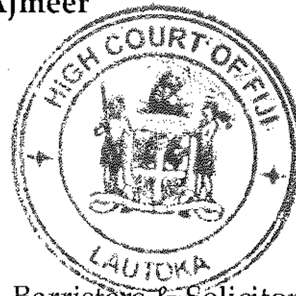
The results

1. Appeal allowed.
2. The claim shall be reinstated.
3. Leave to serve the Writ out of the jurisdiction is granted.
4. The matter shall take its course.
5. No order as to costs.

17/07/18
....

M.H. Mohamed Ajmeer

JUDGE



At Lautoka
17 July 2018
Solicitors:
For the plaintiff/appellant: M/s Fazilat Shah Legal, Barristers & Solicitors