

In the High Court of Fiji
at Suva
Civil Jurisdiction

Civil Action no. HBC 283 of 2016

Jeanne Marie Darrah
Appellant

v

Desmond George Mongston, Moana Mongston

&

Leticia Mongston
Respondents

Counsel: Mr Shelvin Singh for the appellant
Mr R. Vananalagi for the respondents

Date of hearing: 21st November, 2018 and 7th March, 2019

Date of Ruling: 12th March, 2019

Ruling

1. The appellant appeals from the Ruling of the Master. She has filed notice and her grounds of appeal.
2. By originating summons, the appellant had sought vacant possession of the property in CT No. 10613, Lot 4 under section 169 and Or 113, on the ground that she is the registered proprietor of the property and the respondents are occupying the property without her consent or license. The first respondent, in his affidavit in opposition stated that he has been living on the property for the last 40 years. His late father was a caretaker of the property and built 3 houses on the property, which are worth approximately \$50,000.00.
3. The Master, in his Ruling held that it was not possible to grant an order on the Originating Summons, as the claims and allegations by the first respondent raise dispute and triable issues. The Master converted the appellant's originating summons to a writ action and entered the case for trial.
4. I requested counsel to address me on the question whether leave should have been first obtained to appeal the Ruling of the Master.

5. Mr Singh, counsel for the appellant submitted that the Master made a final order, as he did away with the originating summary procedure and converted the summons to a writ action. Mr Singh, in his written submissions has cited paragraph 20 of the Master's Ruling as follows:“.. *it has become appropriate that without making an order for dismissal of the Originating Summons ..I invoke the provisions of Order 28 Rule 9(1)..*”
6. Alverstone C.J in *Bozom v. Altrincham Urban District Council*,(1903) 1KB 547 stated at pp 548-549:

It seems to me that the real test for determining this question ought to be this: "Does, the judgment or Order as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is the, in my opinion, an interlocutory order..
7. Mr Singh cited the judgment of Basanayake J in *Lakshman v Estate Management Services Ltd*, [2015] FJCA 26; ABU 14.2012 (27 February 2015) for the proposition that leave to appeal is not required from an interlocutory order, where the appeal raises substantial issues.
8. In my view, the case cited is not relevant to the instant case and is distinguishable for the following reasons. Firstly, *Lakshman v Estate Management Services Ltd*, was concerned with an appeal from an interlocutory order of the High Court to the Court of Appeal.
9. Secondly, in that case, Calanchini P at paragraphs 7 and 8 of his judgment stated that :

..in appropriate cases this court has allowed an appeal to proceed even when leave to appeal has neither been sought nor granted before the appeal hearing (where) the appeal involves a question of law only”.(emphasis added)
10. In the present case, the Master, in converting the originating summons to a writ, has made an order on a matter of procedure.

11. I would note that Calanchini P in *Lakshman v Estate Management Services Ltd*, (*supra*) even “if it is accepted that the appeal to this Court involves a question of law only”:

it does not necessarily follow that leave should be granted. There are two reasons why, in this case, leave should not be granted. The first is the long established view expressed in this and other jurisdictions that an appellate court will not readily grant leave to appeal from an interlocutory order or judgment arising from the exercise of a judicial discretion.. Secondly, it has been said that even if it shown that the interlocutory decision was wrong, it will not be overturned unless substantial injustice would result should it be allowed to stand .. In this case there has been no error by the learned Judge in the exercise of his discretion. Furthermore, in any event there is no injustice in allowing the Respondent to pursue his private law claim against the Appellant by way of a trial on the pleadings and evidence in the High Court.

12. The Master did not dismiss the originating summons, but made order that the case proceeds in the High Court by way of a trial in order to hear “*the entire evidence*”. It is clear that he did not determine the matter in litigation. It follows and I hold that his Ruling is an interlocutory order.

13. Or 59, r 8(2) requires an appellant to obtain leave to appeal from an interlocutory order of the Master.

14. In my view, the appellant has failed to obtain leave in the first instance, to appeal the Ruling of the Master.

15. The appeal fails.

16. **Orders**

- a. The appeal of the appellant is dismissed.
- b. The appellant shall pay the respondent costs summarily assessed in a sum of \$ 1000.



A.L.B. Brito-Mutunayagam

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JUDGE

12th March, 2019