

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. 3 of 2018

IN THE MATTER of an application for possession of land under section 169 of the
Land Transfer Act 1971.

BETWEEN

LISA BERNADETTE VERMANDE and **BRYCE SERU** of Matalaqeri, Savusavu, in the
Republic of Fiji, Domestic Duties and Businessman respectively.

PLAINTIFFS

AND

JOELI DAVETA of 13 Damu Place, Tamavua, Suva, in the Republic of Fiji,
occupation unknown.

DEFENDANT

Counsel : Ms L. Jackson of the Plaintiffs
Mr J. Lenien for the Defendant.

Date of Hearing : 22nd March, 2019

Date of Ruling : 24th April, 2019

RULING

[1] There are four different application before this court which I will consider together in this ruling. They are;

1. Application for stay pending the determination of appeal;
2. Summons for directions pursuant to Order 59 rule 17(2) of the High Court Rules 1988;
3. Application for the reinstatement of the appeal which is deemed to have been abandoned under Order 59 rule 17(3) of the High Court Rules 1988; and
4. Application of the plaintiffs seeking leave to issue writ of possession against the defendant.

[2] I will first deal with the application of the defendant to have the appeal, which is deemed to have been abandoned, reinstated.

[3] The plaintiffs filed this originating summons pursuant to section 169 of the Land Transfer Act 1971 seeking an order;

that the defendant immediately give up vacant possession to the plaintiffs of all the land comprised and described in Certificate of Title No. 23137 being Lot 13 on Deposited Plan No. 4671 situated at 13 Damu Place, Tamavua, Suva, Fiji of which the plaintiffs are the registered proprietors and that the costs of the application be summarily assessed and paid by the defendant to the plaintiffs within a prescribed period.

[4] The defendant's position is that the second named plaintiff made his mother-in-law to sign a document purporting to be a transfer of FNPF funds to pay Suva City Council rates. The learned Master of the High Court for the reasons given by her in the judgment held that there is no basis to hold that the transfer was done fraudulently.

[5] The defendant filed notice and grounds of appeal 28th January, 2019 and the grounds of appeal relied on by the defendant are as follows;

1. That the acting Master erred in law and in fact in holding that the contents of the defendant's affidavit in opposition do not establish any resemblance of fraud without properly taking into account and/or giving little or no weight to the evidence provided by the defendant.
2. That the acting Master erred in law and in fact in failing to consider evidence she ought to have considered.
3. That the acting Master erred in law and in fact in considering affidavit evidence she ought not to have considered.
4. That the acting Master erred in law and in fact by holding in paragraph 13 of her judgment "... As per the payment authority, \$29,755.41 was paid to the plaintiff for renovations which fact has not been disputed by the defendant", when in fact the defendant under the Court Rules and Procedure would not be entitled to respond or dispute the evidence.
5. That the acting Master failed to properly consider and/or apply the relevant principles of law as enunciated in Supreme Court case *Morris Hedstrom Limited v Liaquat Ali* (Action No. 153/87 at P2) when there is overwhelming evidence the defendant has met the threshold outlined in the said case.
6. That the acting Master failed to consider the defendant's submissions to convert action to a writ in spite of the overwhelming evidence showing there are serious triable issues between the parties that can only be resolved by testing the evidence and cross-examining the witnesses.

[6] Order 59 rule 17 of the High Court Rules 1988 provides:

- (1) The appellant shall, upon serving the notice of appeal on the party or parties to the appeal, file an affidavit of service within 7 days of such service.
- (2) The appellant shall, within 21 days of the filing of the notice of appeal, file and serve a summons returnable before a judge for directions and a date for the hearing of the appeal.
- (3) If this rule is not complied with, the appeal is deemed to have been abandoned.

- [7] The defendant filed the notice and grounds of appeal on 28th January, 2019 and summons for directions was filed on 20th February, 2019 that is on the 23rd day after the filing of the notice and grounds of appeal.
- [8] The explanation offered by the defendant is that after filing the summons for directions his solicitors requested the registry to issue it the same day so that they could serve it on the plaintiff but they were asked to come at about 4.00pm and when they went to the registry at 4.00pm the solicitors were informed that the summons were still in the file and could not be issued. In the affidavit in support the defendant avers further that that this delay is an inadvertent mistake on the part of the registry. The delay is in fact on the part of the solicitors of the defendant who failed to file the notice and grounds of appeal within the period prescribed by law. The delay may not be long but when a party fails to file and serve the notice and grounds of appeal within the prescribed period that appeal is deemed to have been abandoned. The defendant, therefore, is not entitled to fault the registry for the delay in filing the notice and grounds of appeal.
- [9] The next issue for determination is whether the court has power to reinstate an appeal which is deemed to have been abandoned under Order 57 rule 19 of the High Court Rules 1988. In my view once an appeal is abandoned there is no appeal on foot to reinstate. In the case of *Deo v Ascot Motors Proprietary Ltd* [2011] FJHC 782; Action 331.2008 (18 November 2011) Justice Calanchini said whether there is any jurisdiction vested in the Court to entertain an application to re-instate the appeal has not yet been decided.
- [10] The learned counsel for the appellant in support of the application for reinstatement of the appeal which is deemed to have been abandoned cited the following decisions of Justice Ajmeer allowing applications for reinstatement:
- **Sarojini v Native Land Trust Board** [2016] FJHC 1018; HBC230.2000 4 November 2016)
 - **Radhabai v Singh** [2018] FJHC 779; HBC172.2015 (20 August 2018)
- [11] In arriving at the conclusion that the court has power to reinstate an appeal which is deemed to have been abandoned Justice Ajmeer relied on some Australian decisions where such reinstatements have been allowed.

- [12] In **Sarojini v Native Land Trust Board** (*supra*) the court cited the decision in *Bele & Vaughan* (No. 2) [2012] Fam CAFC 125 (21 August 2012). It appears from the decision in the said case the Australian Court has gone on the basis that the court has a discretion to reinstate an appeal which is deemed to have been abandoned.
- [13] High Court Rules 1988 does not confer discretionary power on the court to reinstate appeals which are deemed to have been abandoned. There are instances where the legislature has provided for extension of time when a party fails to do an act within the period prescribed by a statute. The legislature in this instance in its own wisdom has thought it is not proper or necessary to make provisions allowing an appellant who fails to comply with Order 59 rule 17 of the High Court Rules 1988, to make an application for the reinstatement of his appeal which is deemed to have been abandoned.
- [14] The court cannot introduce new provisions of law to statutes and also the court cannot confer powers which are not provided for by the statute, on it. That is the duty of the legislature. If there was provision for the reinstatement of appeals which is deemed to have been abandoned the court can always be guided by the previous decisions in the exercise of its discretionary power. For the reasons set out above I cannot agree with the decisions of Justice Ajmeer in the two cases cited above.
- [15] I am therefore of the view that the court has no power to reinstate an appeal which is deemed to have been abandoned. The defendant who abandons his appeal is not without a remedy. If the appeal is deemed to have been abandoned under order 59 rule 17 of the High Court rules 1988 the defendant if he so wishes can make an application for extension of time.
- [16] I will now consider the other applications made by the parties. Since the court has decided that the court has no power to order the reinstatement of the appeal which is deemed to have been abandoned the stay of proceedings pending the determination of the appeal and summons for directions do not arise for consideration.
- [17] The plaintiff filed notice of motion seeking leave to issue writ of possession. The following are the orders sought by the plaintiff:
1. That leave be granted to the plaintiffs to issue a writ of possession against the defendant to give immediate vacant possession of the

plaintiff's property comprised and described in Certificate of Title No. 23137 being Lot 13 on Deposited Plan No. 4671 situated at 13 Damu Place, Tamavua, Suva, Fiji.

2. That the costs of this application be paid by the defendant.

[18] Once the application for reinstatement of the appeal which is deemed to have been abandoned is refused there is no appeal on foot. The plaintiffs are therefore, entitled to execute the judgment of the learned Master of the High Court dated 21st January, 2019.

[19] The court accordingly, makes the following orders:

1. The application for the reinstatement of the appeal which is deemed to have been abandoned is refused.
2. Application for stay pending appeal and the orders sought in the summons for directions are also refused.
3. The plaintiffs are granted leave to issue writ of possession against the defendant.
4. The defendant is ordered to pay \$1000.00 to the plaintiff as costs of these applications.




Lyone Seneviratne

JUDGE

24th April, 2019