

In the High Court of Fiji
At Suva
Civil Jurisdiction

Civil Action No. HBC 352 of 2015

Latchan Holdings Limited

Plaintiff

v

Keolapati Lagan

First Defendant

And

Prakash Lagan

Second Defendant

Counsel: Mr N. Lajendra for the plaintiff
Mr N. Sharma for the defendants

Date of hearing 25th June, 2019

Date of Ruling: 2nd October, 2019

Ruling

1. The defendants seek leave to appeal and stay of my interlocutory Ruling,(Ruling) of 9th April,2019, dismissing their application for striking out the plaintiff's claim, an interim injunction and vacant possession; and, ordering a second caveat to be lodged, security of costs and costs to be paid by the defendants.
2. The second defendant, in his affidavit in support states that my Ruling "*was not delivered in open Court and was left at the registry to be picked up by the parties after being advised by the Registry staff which was done on the 10th of April 2019*".
3. Rohit Latchan, in his affidavit in opposition on behalf of the plaintiff states that "*We were informed by High Court Registry of the date on which the Ruling was to be pronounced and we duly appeared on that date. The Ruling was delivered in open Court*".
4. It suffices to state that Mr Lajendra, counsel for the plaintiff was present in Court on 9th April,2019, when I delivered the Ruling.

5. The second defendant states that the following intended grounds of appeal raise important questions of law, in that I erred:

- i. *.. in dismissing the striking out application considering that the learned Judge could review the evidence of the illegal consideration and the enforceability of the alleged Sale and Purchase Agreement pursuant to Order 18 Rule 18 (1) (d) and the inherent jurisdiction of the Court.*
- ii. *..in dismissing the striking out application considering that the evidence available before the Learned Judge showed that the alleged Sale and Purchase Agreement was void for lack of certainty of consideration and vagueness of the description and hence unenforceable.*
- iii. *..in failing to exercise his discretion in not allowing the preliminary determination to be made as to the validity of the Sale and Purchase Agreement made on the 8h July 2014 between Late Ram Lagan and Latchan Holdings Limited considering the capacity of the parties executing the Sale and Purchase of the Purchaser and the Vendor, the validity of the consideration being the executed Mortgage provided by the Purchaser and the lapse of time of settlement.*
- iv. *..in allowing the application for security for costs and for a payment of \$7,500.00 as a security considering the fact that the 1st Defendant is a citizen of Fiji and is the last registered proprietor as the Administrator in the Estate of Ram Lagan in the properties .. over which the plaintiffs are seeking specific performance hence there was no risk to recovery costs by the plaintiff in the event that the costs were ordered against the defendants who were resident overseas.*
- v. *...in ordering costs in the sum of \$3,000.00 against the Defendants considering that the application for setting aside of the Ex- Parte orders and application for second caveat were inter- related and were made due to the plaintiff's actions rather than the defendants and given the estate was not earning any income.*

6. The first and second intended grounds of appeal contend that I did not review the evidence on the illegal consideration and the enforceability of the alleged Sale and Purchase Agreement,(SPA) pursuant to Or18,r.18(1)(d) and the inherent jurisdiction of Court. It is argued that the evidence showed that the SPA was unenforceable, as it was void for lack of certainty of consideration and vagueness of description.

7. The plaintiff, in its statement of claim seeks an order for specific performance of a SPA it entered into with the late Ram Lagan,(RL) to purchase two properties.

8. The defendants moved that the statement of claim be struck out on the ground that it does not disclose a reasonable cause of action and is an abuse of process.
9. I have summarised the contentions in the affidavits of the parties in that application in my Ruling.
10. I held that the matters raised clearly require oral evidence.
11. The answer to the contention that I could have reviewed the evidence is contained in Or 18, r18 (2), which states that no evidence shall be admissible in a striking out application.
12. Byrne J in *Vunisa v Director of Lands*, [2001] FJHC 235; HBC0414J.2000S (4 October 2001) said:

Rule 18 prohibits the tendering of any evidence in support of any party attempting to strike out or amend any pleading which is alleged to disclose no reasonable cause of action or defence. The purpose of the Rule is clear. It allows argument on the law only without permitting the Court to consider any evidence in support of an application to strike out. (emphasis added)

13. Mr Sharma, counsel for the defendants cited the following passage from the judgment of Pathik J in *Hussein –v- National Bank of Fiji* [1995] 41 Fiji LR 130:

A useful summary of some of the matters which a judge may in practice consider on an application for grant of leave is to be found in the judgment of MURPHY J in NIEMANN (supra) at p.441 which I adopt and they are as follows:-

- 1) *whether the issue raised is one of general importance or whether it simply depends upon the facts of the particular case;*
- 2) *whether there are involved in the case difficult questions of law, upon which different views have been expressed from time to time or as to which he has been "sorely troubled";*
- 3) *whether the order made has the effect of altering substantive rights of the parties or either of them; and*
- 4) *That as a general rule there is a strong presumption against granting leave to appeal from interlocutory orders or judgments which do not either directly or by their practical effect finally determine any substantive rights of either party."*(emphasis added, underlining mine)

14. Calanchini P in *Shankar v FNPF Investments Ltd* ,[2017] FJCA 26; ABU32.2016 (24 February 2017) held that a dismissal of a “*striking out application did not affect the substantive rights of either parties*” (emphasis added) He said :
- ...There is a general presumption against granting leave to appeal an interlocutory decision and that presumption is strengthened when the judgment or order does not either directly or indirectly finally determine any substantive right of either party. The interlocutory decision must not only be shown to be wrong but it must also be shown that an injustice would flow if the impugned decision was allowed to stand (Niemann –v- Electronic Industries Ltd[1978] VR 431). See: Hussein –v- National Bank of Fiji [1995] 41 Fiji LR 130..(emphasis added)*
15. In *Lakshman v Estate Management Services Ltd*, [2015] FJCA 26; ABU 14.2012 (27 February,2015) Calanchini P stated that “*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.*”(emphasis added)
16. The contention in the third proposed ground of appeal that I failed to exercise my discretion and permit a preliminary determination on the validity of the SPA is factually incorrect. A preliminary issue was not raised by the defendants.
17. The fourth and final grounds state that my order for security for costs and costs to be paid by the defendants is wrong, as the first defendant is a citizen of Fiji and as Administrator of the estate of RL is the last registered proprietor of the properties, in respect of which the plaintiffs are seeking specific performance. Hence there was no risk to the recovery of costs by the plaintiff.
18. The defendants are admittedly resident out of the jurisdiction. In the exercise of my discretion, I awarded security for costs to be paid to the plaintiff and costs of \$ 3000 summarily assessed to be paid by the defendants to the plaintiff.
19. In my view, the proposed grounds of appeal do not raise important questions of law.

20. On the difference in the exercise of discretion on a point of procedure and an exercise of discretion which determines substantive rights, Pathik J in *Hussein v National Bank of Fiji*, (*supra*) cited the following passage from the judgment of Jordan C.J. in *In re the WILL OF F.B. GILBERT (deceased)*, 46 SR NSW p. 318 at 323:
- In the former class of case, if a tight rein were not kept upon interference with the orders of Judges of first instance, the result would be disastrous to the proper administration of justice. The disposal of cases could be delayed interminably, and costs heaped up indefinitely, if a litigant with a long purse or a litigious disposition could, at will, in effect transfer all exercises of discretion in interlocutory applications from a Judge in Chambers to a Court of Appeal. But an appeal from an exercise of a so-called discretion which is determinative of legal rights stands in a somewhat different position.* (emphasis added)
21. Sir Moti Tikaram in *National Insurance Co of Fiji Ltd v Premier Apparels Ltd*, [1998] FJCA 15; ABU 0014D.98S (19 March 1998) held that “*Appellate Courts do not normally interfere with the lower Court's exercise of discretion especially with matters of practice and procedure*”. (emphasis added)
22. The second defendant, in his affidavit in support for leave to appeal states that substantial injustice has been done, as the validity of the SPA is an issue. By refusing the summons filed by the defendants for vacant possession of the estate properties and release of titles, I have “*practically determined finally the substantive right of the Defendants*” to the estate property and allowing a caveat to be filed, I have protected the plaintiff's interest.
23. I declined the summons for vacant possession and release of titles, as that relief was sought in the counterclaim of the defendants and would “*virtually (bring) about the final relief..wanted*”, as stated in *Wakaya Ltd v Chambers*, (Civil Appeal No. CBV0008/11).
24. I allowed the application for a caveat, as the plaintiff has a caveatable interest.
25. It has been held that the Court will exercise its discretion to grant leave only if substantial injustice would result from the impugned order.

26. Calanchini P in *Lakshman v Estate Management Services Ltd*, (*supra*) stated that :

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[(*Fong Sun Development-v-Minson Fiji Ltd* (unreported CBV 7 of 1997;1 March 1998)] *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* (*Niemann – v- Electronic Industries Ltd*[1978] VR 431). *In this case there has been no error by the learned Judge in the exercise of his discretion.*.(emphasis added)

27. I will now address the factors Courts conventionally address in an application for a stay.

28. The affidavit in support has failed to state on what basis the appeal will be rendered nugatory.

29. The second defendant states that if a stay is not granted, there will be more prejudice to the defendants, as the first defendant is defending the interest of the estate of late RL, “*which does not earn any income and has been denied the opportunity to enter and generate income from their Estate properties*”. The balance of convenience is in favor of the defendant as the first defendant, his elderly 74 year old mother is facing health challenges and is struggling to enjoy the income of the estate left by his deceased father, as the plaintiffs have taken possession illegally without any settlement being carried out.

30. In my view, it has not been established that the first defendant will be injuriously affected by the stay.

31. *Ward v Chandra*, [2011] FJSC 8; CBV0010 (20 April 2011) concerned a dispute arising from a sale and purchase agreement. Gates CJ said:

*This is not shown to be a case where a stay is required in order to preserve the subject matter of the litigation: per Brennan J in *Jennings Construction Ltd v Burgundy Investments Pty Ltd* No. 1 [1968] 161 CLR 685. No dire consequences are alleged to flow from the lack of stay. Nor will either party face ruin without a stay: *Linotype-Hell Finance Ltd v Baker* [1992] 4 All E.R. 887.*

The appeal courts will be careful to ensure that an appellant or petitioner does not 'park' his litigation in the appeal court, without prosecution, for purposes of delay or for the avoidance of confirmed indebtedness.

32. The issues involved in this case do not affect third parties. There is no novelty here. Neither the public interest nor the nature of issues are significant .
33. The balance of convenience favors that the application for stay be refused and the case proceeds to trial to determine the claims of the plaintiff and defendants.
34. Sir Moti Tikaram in *Harifam Ltd v Fong Holdings Ltd*, Civil Appeal No. ABU0057 of 1996 S(2 May,1997) stated that the “Court’s policy has been to uphold interlocutory decision of the trial judge unless they are plainly wrong. This policy is based on the need to eliminate delays and bring about finality in the disposal of the substantive issues”.

35. *Orders*

- (a) The application for leave to appeal and stay of proceedings is declined.
- (b) The defendants shall pay the plaintiff costs summarily assessed in a sum of \$ 1000.



A.L.B. Brito-Mutunayagam
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JUDGE
2nd October, 2019