

IN THE HIGH COURT OF FIJI AT SUVA
APPELLATE JURISDICTION

Civil Action No: HBC 289 of 2017

(On appeal from a final judgment of the Acting Master on 27 June 2019 at Suva in Civil Action No. HBC 289 of 2017)

BETWEEN : **LILA WATI aka LILA WATI SHARMA**
APPELLANT

AND : **HIRDEI WATI SHARMA and RAJIV SHARMA**
RESPONDENTS

BEFORE : M. Javed Mansoor, J

COUNSEL : Ms. S. Saumatua for the Appellant
: Ms. I. Lutu for the Respondents

Written Submissions : For the Appellant, filed on 19 November 2019
For the Respondents, filed on 12 December 2019

Date of Ruling : 31 January 2020

RULING

PRACTICE: High Court Rules 1988 – Land Transfer Act 1971 – enlargement of time to appeal decision of the Master – mistake by solicitor – eviction proceedings – allegation of fraudulent transfer by the land owner – Order 59 Rules 9 & 10 of the High Court Rules 1988 – Sections 38, 169 and 172 of the Land Transfer Act 1971

CASES REFERRED TO:

1. Native Land Trust Board v Ponipate Lesavua & Subramani [2004] FJCA 20, Civil Appeal ABU0001 of 2004S (18 March 2004)
2. Norwich and Peterborough Building Society v Steed [1991] 2 ALL ER 880
3. Mohammed Wahid Khan v Mohammed Yasad Ali [2015] FJHC 433; HBC 21.213 (11 June 2015)
4. Gatti v Shoosmith (1939) 3 All ER 916
5. Morris Hedstrom Limited v Liaquat Ali, Action No.153 of 1987; 3 April 1987

1. This is an application by the Appellant (as referred to in the caption) for extension of time to appeal the Acting Master's judgment dated 27 June 2019.
2. The Appellant instituted action against the Respondents by originating summons dated 6 October 2017, under section 169 of the Land Transfer Act 1971, seeking vacant possession of her land comprised in certificate of title No.17153 being lot 60 on deposited plan No.4257, containing an area of one rood two perches and nine tenths of a perch, situated at Qarase Road, Nadera, Nasinu. The Plaintiff's originating summons was supported by the affidavit of Chandra Kant Sharma – the Plaintiff's son – filed on 6 October 2017. He averred that he was the power of attorney holder for his mother, who was 83 years at the time of filing the affidavit in support, that she resided in Perth, Western Australia and that there was a single storey residential dwelling on the property, which was purchased in March 1977 by his father, Vijendra Sharma, who died on 8 March 1992; that the Plaintiff was granted letters of administration in 1993, in respect of Vijendra Sharma's estate; that, thereafter, the children of the Plaintiff and Vijendra Sharma executed deeds of renunciation relating to their interest in the property in favour of the Plaintiff; that in September 2015, the property was transferred in the name of the Plaintiff and that on 14 December 2016, the Registrar of Titles had accepted the transfer.

3. By affidavit in opposition filed on 20 November 2017, Hirdei Wati Sharma, averred on behalf of the Respondents that the second named Respondent is her son; that the registration of the transfer in the name of the Plaintiff was obtained by fraud; that the property was owned by her father in law, Vijendra Sharma; that she and her husband, Chandra Shekar Sharma, occupied the property, and erected and maintained a dwelling on the land; that she and her husband were asked by Vijendra Sharma to move into the property and that he assured them ownership of the property after his death; that the Plaintiff made her husband sign a paper before a lawyer on 24 November 1992, and that no explanation was given by the Plaintiff for doing so; that her husband signed such paper on the clear understanding that he will be the owner of Lot 60 as promised by Vijendra Sharma; that to her surprise she has seen a deed of renunciation purporting to have been signed by her husband on 24 November 1992; that she and her husband did not intend to give up their rights relating to Lot 60; that during his lifetime, her husband had requested the Plaintiff to transfer the property in his name and the Plaintiff had agreed to do so; that her husband never renounced his rights to the property; that the Plaintiff has obtained a fraudulent transfer of the property in her name and was trying to evict them, and that she has instructed her lawyers to file a separate action to challenge the fraudulent transfer in the name of the Plaintiff. A supplementary affidavit was filed on 10 July 2018 by Hirede Wati Sharma tendering a copy of the letters of administration issued in respect of the estate of her husband, Chandra Shekar Sharma.

4. In reply, Chandra Kant Sharma denied the allegations of fraud, and averred *inter alia* that notwithstanding the 1st named Respondent lodging a caveat on the property on 9 December 2015, the Registrar of Titles registered the transfer; that his father Vijendra Prasad did not have a good relationship with his brother, Chandra Shekar Sharma; that his father never met or communicated with the 1st named Respondent; that the houses on both lots 60 & 61 were built and maintained by his father; subsequently, the Plaintiff extended the houses and fully furnished it at her expense; that the property was given to his brother to occupy only because he did not have the financial means to build his own house, and that no guarantees were made that the house would be transferred to him; that his father intended all his property in Fiji to go to the Plaintiff; that the deeds of renunciation were executed by all of the siblings in favour of the Plaintiff so that she has the means to look after herself; that neither Hirede Wati Sharma nor her husband raised the issue of ownership of the property previously; that his brother had a good command of the English language and would have understood the terms of the deed of renunciation; that the writ of summons filed

by the Plaintiff contained false and misleading allegations, and that the Plaintiff is old and needs the money urgently to pay for her care.

5. The matter was heard on 21 November 2018, and the Acting Master delivered Judgment on 27 June 2019, dismissing the application and stating that the matter could not be disposed on affidavits alone. The Appellant – not having filed a timely appeal – seeks enlargement of time to appeal the judgment of the Acting Master. The application for enlargement of time is supported by Setavana Saumatua, a solicitor of Lateef & Lateef Lawyers.
6. In Setavana Saumatua's affidavit in support, it was averred on behalf of the Appellant, that instructions were obtained from the Appellant via email on 3 July 2019, to appeal the said judgment; when such instructions were received, the solicitor was of the view that because it was a final judgment, the appeal was to be lodged in the Court of Appeal and, therefore, there were six weeks (42 days) in which to file the notice & grounds of appeal; that the Appellant's solicitor made it known to the Respondent's solicitor that the Appellant intended to appeal the Acting Master's decision; that when the Appellant's law firm tried to file the notice and grounds of appeal at the Court of Appeal registry on 26 July 2019, the solicitors were advised by the registry to file the appeal in the High Court; that it was at that point that the solicitor realised the mistake and that Order 59 Rule 9 of the High Court Rules 1988 made provision for appealing a Judgment of the Master within 21 days of its delivery; that such 21 day period for appealing expired on 18 July 2019; that the objective of the Court is to determine the matter on merit rather than on mere technicalities; that the Appellant was not directly responsible for the delay in filing and serving the notice & grounds of appeal and, therefore, should not be penalised for the delay, that this application was made as soon as the error was discovered and that the delay in filing was 12 days; the Appellant has genuine and meritorious grounds of appeal and that these grounds have a high likelihood of success, should enlargement of time be granted; that the Respondents will not be prejudiced by this application as they continue to reside on the Appellant's property without rent; and that on the other hand, the Appellant would be prejudiced, if this application is not granted, as she would not be able to have the benefit of her property, which the Acting Master has ruled should be heard under oath orally.
7. The Respondents opposed the Appellant's application by its affidavit in opposition filed on 28 August 2019 and averred *inter alia* that the Appellant's solicitors realised that they were out of time only when the Respondent's solicitors advised them and that the Appellant has no meritorious grounds for

making this application for leave to appeal out of time. On behalf of the Appellant, her solicitor, Setavana Saumatua, replied by affidavit filed on 5 September 2019.

8. When this matter came up on 4 November 2019, counsel for both parties sought time to file written submissions and stated that they would not be making oral submissions. Instead, counsel agreed to rely on their respective written submissions in regard to the application for enlargement of time.
9. It was submitted on behalf of the Appellant *inter alia* that her husband Vijendra died in 1992, without a valid will and that she inherited a share of the subject property; that the Appellant's children renounced their rights to the property by executing deeds of renunciation in 1992; that the deeds of renunciation were registered with the Registrar of Titles in December 2016; that when the Appellant wanted to sell the house, the Respondent refused to move from the property; and, thereupon, the Appellant made an application to the Acting Master seeking the eviction of the Respondents in terms of section 169 of the Land Transfer Act, which was refused.
10. Counsel for the Respondent submitted that the Appellant's solicitors had ample time to file their notice of appeal, that the reasons given by the Appellant's solicitors depicted the negligence of the Appellant's solicitors, and referred to the case of Native Land Trust Board v Ponipate Lesavua & Subramani¹ in which the Court stated that solicitors or counsels who carelessly and without adequate justification allow the time for filing a notice of appeal to pass, may well be held responsible. In that case, however, despite the Court's observation that the delay could not be excused, the application to extend the time for filing the appeal was granted, as Court had regard to the relatively short period and the absence of prejudice to the respondent.
11. An appeal from an order of the Master has to be filed and served within 21 days from the date of the delivery of the order or judgment². Order 59 Rule 10(1) states that an application to enlarge the time period for filing and serving a notice of appeal or cross-appeal may be made to the Master before the expiration of that period and to a single Judge after the expiration of that period.

¹ [2004] FJCA 20, Civil Appeal ABU0001 of 2004S (18 March 2004)

² Order 59 Rule 9

12. The factors normally taken into account in allowing an enlargement of time are set out in Norwich and Peterborough Building Society v Steed³. These factors are the length of delay, the reason for the delay, the chances of the appeal succeeding if the time for appeal is extended and the degree of prejudice to the Respondent if the Application is granted. In that case, the application for extension of time was some six and a half months late.
13. The Master's judgment was on 27 June 2019, and the appeal should have been lodged on or before 18 July 2019. However, the application for enlargement of time was lodged by the Appellant only on 31 July 2019. The length of delay, therefore, is not long. In the opinion of the Court, this delay does not seem unreasonable, especially, in the context explained by the Appellant. I accept the explanation that this delay was an honest mistake and it was not due to fault that can directly be attributed to the Appellant, who gave her solicitor fairly early instructions by email. The solicitor, however, was under a misapprehension. Though this should not have happened, the Appellant should not be punished for such error on the part of the solicitor. In the case of Mohammed Wahid Khan v Mohammed Yasad Ali⁴, the court stated that the lawyer's mistake should not be held against the Plaintiff, if there are merits in the proposed grounds and his appeal rights should not solely depend on the mistake of his counsel. In Gatti v Shoosmith⁵, the UK Court of Appeal said that an extension of time can be granted, in appropriate circumstances, even though the failure to appeal in time was due to a mistake on the part of a legal adviser. In Gatti v Shoosmith, owing to a misreading of the rule, the applicant was late in entering an appeal by a short period, but their Lordships exercised their discretion to grant leave to appeal without being concerned with any question as to the merits of the matter or the probability of success or otherwise.
14. I am of the view that this is a fit case, considering the particular facts of this case, in which to exercise the Court's discretion and permit the Appellant to lodge the appeal even without a consideration of the merits. Each case must depend on its own facts, and no proposition is made here for a general rule that leaves out consideration of the merits. Having said that, an understanding of the positions taken by the parties before the Acting Master is not out of place, and may reveal the thinking that led to the judgment sought to be appealed.

³ [1991] 2 All ER 880

⁴ [2015] FJHC 433; HBC 21.213 (11 June 2015)

⁵ (1939) 3 All ER 916

15. The reasoning of the Acting Master is that the allegations before her should be heard under oath orally and that the matter could not be determined on affidavit evidence alone. This appears to be due to the Respondents' claim that they have an interest in the property, and that the Appellant has fraudulently transferred the property to her name. If the Respondents have shown cause to the satisfaction of the Master⁶, then it could be said that the Master has correctly held that the matter is of such a nature that it could not be determined by affidavit evidence alone. Such cause must be shown with credible evidence, and mere assertions disputing the title of an applicant seeking an eviction order will not suffice.
16. Section 172 of the Land Transfer Act states that if the person summoned appears, he or she may show cause why he or she refuses to give possession of such land and, if he or she proves to the satisfaction of the Judge a right to the possession of the land, the Judge shall dismiss the summons with costs.
17. On behalf of the Respondents, it was submitted that they have an interest in the land and that the Appellant had fraudulently transferred the Respondent's property to herself, and a writ action (HBC 204 of 2018) was filed against the Appellant to set aside the alleged fraudulent transfer of the property. The assertion of the Respondents is that the Plaintiff's husband, Vijendra Prasad, had assured the 1st named Respondent's husband, Chandra Shekar Sharma, that ownership of the house would be transferred to him, and that her husband, who had no intention of transferring her share, was misled into signing a document, which had later turned out to be the deed of renunciation by which the Plaintiff acquired rights to the property from the share of Chandra Shekar Sharma.
18. Whether Chandra Shekar Sharma was deceived into signing the deed of renunciation or whether Vijendra Prasad promised ownership of the property to his son are not matters on which the 1st named Respondent could convincingly testify; those were matters particularly within Vijendra Prasad's knowledge, and there does not seem to be independent evidence that he made those claims against the Plaintiff at any time. There is also no evidence on record that the Respondents constructed the dwelling on the property, as averred in the affidavit in opposition of Hirdei Wati Sharma, which claim was denied on behalf of the Appellant.

⁶ Section 172 of the Land Transfer Act 1971

19. The Appellant is the last registered proprietor of the land. An instrument registered under the Act confers conclusive evidence of title⁷. Such registration grants a title recognised in law as unimpeachable or indefeasible. If an occupier of land is to successfully set up a competing title to that of the registered proprietor that can only be done by cogent evidence that could affirmatively impeach such title. In this case, it would seem that the Master was concerned by the Appellant's delay in registering title to the property with the Registrar of Titles; though the renunciations were executed in 1992, these were registered with the Registrar of Titles in 2016. Notwithstanding this delay, a title once registered is protected by law. No instrument of title registered under the Land Transfer Act can be impeached or defeated by reason or on account of any informality or in any application or document or in any proceedings previous to the registration of the instrument of title⁸.
20. In Morris Hedstrom Limited v Liaquat Ali⁹, the Court (then known as the Supreme Court) stated, *"Under Section 172, the person summoned may show cause why he refuses to give possession of the land and if he proves to the satisfaction of the Judge a right to possession or can establish an arguable defence the application will be dismissed with costs in his favour. The defendants must show on affidavit evidence some right to possession which would preclude the granting of an order for possession under the Section 169 procedure. That is not to say that final or incontrovertible proof of a right to remain in possession must be adduced. What is required is some tangible evidence establishing a right or supporting an arguable case for such a right, must be adduced"*. The Court also went on to say, *"Taking the defendant's claim regarding prior proceedings first, the Fiji Court of Appeal has made it quite clear that the existence of other proceedings before the Court is not in itself a cause sufficient to resist an application under Section 169 of the Land Transfer Act"*.
21. For these reasons, the Court is of the opinion that there is also merit in the Appellant's application to appeal out of time. The Respondents are in occupation of the property, and the prejudice that could result to them as a result of allowing this application is limited.

⁷ Section 38, Land Transfer Act

⁸ Section 38, Land Transfer Act

⁹ Action No.153 of 1987; 3 April 1987

Orders

- A. The Appellant is granted an enlargement of time to file and serve the notice and grounds of appeal

- B. The Respondents are directed to pay the Appellant costs summarily assessed in a sum of \$1,000.00 within 14 days of this ruling.

Delivered at Suva this 31st day of January, 2020



M. Javed Mansoor

Justice M. Javed Mansoor
Judge of the High Court