

IN THE HIGH COURT OF FIJI  
AT SUVA  
CIVIL JURISDICTION

HBC 390 of 2017

BETWEEN : ROSALIA CHUTE

PLAINTIFF

AND : KENNETH ROBERTS

1<sup>ST</sup> DEFENDANT

AND : ORGANIC EARTH (FIJI) LIMITED

2<sup>ND</sup> DEFENDANT

AND : SANGEETA REDDY

3<sup>RD</sup> DEFENDANT

AND : ROSEWOOD LIMITED

4<sup>TH</sup> DEFENDANT

**BEFORE** : M. Javed Mansoor, J

**COUNSEL** : Ms. N. Choo for the plaintiff  
Ms. B. Qioniwasa for the first and fourth defendants

**Date of Hearing** : 13 December 2019

**Date of Judgment** : 21 October 2022

# DECISION

*APPEAL Leave to appeal interlocutory decision of the master – Whether plaintiff's claims liable to be struck out against the second and third defendants – Order 18 rule 18 (1) of the High Court Rules 1988*

The following case is referred to in this decision:

*a) Roberts v Chute [2009] FJCA 4; ABU 0040.2007 (17 March 2009)*

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1. This is an application for leave to appeal the decision of the acting master delivered on 15 August 2019, who struck out the plaintiff's claims against the second and third defendants.
2. The plaintiff filed action against the first, second, third and fourth defendants. The action is related to the decision of the Court of Appeal (ABU 0040 of 2009) involving the plaintiff and the first defendant in regard to the distribution of properties following their divorce. The fraught history between the parties is evident by the several actions that preceded the present case.
3. The subject property is at Isa Lei Drive, and is described as lot 2 Matamakita subdivision in Lami which is subject to Native Lease No.16044 (the property). The property was purchased in the name of the fourth defendant, a limited liability company. The first defendant held the majority shares in the fourth defendant, while the plaintiff was a minority shareholder. However, the Court of Appeal, by its judgment, deemed the property as matrimonial property to be equally owned by the plaintiff and the first defendant.
4. The Court of Appeal judgment in ABU 0040 of 2009 was delivered on 17 March 2009. The appeal in that case was against orders for property division in a matrimonial dispute under the Matrimonial Causes Act (Cap.51, which has been repealed and replaced by the Family Law Act 2003) in HBC 283 of 2002. Kenneth AJ Roberts was the appellant in that appeal. The plaintiff, Rosalia L Chute, and another were the respondents. The Court of Appeal determined the plaintiff's share of the matrimonial property in this way: \$12,000.00 dollars in respect of the

car; \$100,000.00 in respect of the 100,000 shareholding in Mokosoi Products Limited, \$65,000.00 in respect of a half share in their former matrimonial home: the Isa Lei Drive property. The \$65,000.00 share of the subject property was arrived at after deducting the sum payable to the bank on the property mortgage. The total amount of \$177,000.00 was to be paid within 48 days. The plaintiff was awarded costs in a sum of \$10,000.00. The judgment was sealed on 19 March 2009

5. The plaintiff's claim is that the first defendant has not complied with the orders made by the Court of Appeal concerning the subject property.
6. The plaintiff stated that the first defendant colluded with the third defendant and transferred the property to the second defendant for a sum of \$220,000.00 in January 2015 when its market value was \$280,000.00 in 2009, and without passing a resolution by the fourth defendant. The plaintiff claimed that the transfer of the property in this way was fraudulent, and liable to be set aside. In her statement of claim she says that the third defendant was the controlling mind of the second defendant.
7. The plaintiff stated that after the transfer of the property, the second defendant immediately issued eviction proceedings against her. The documents filed by the plaintiff show that the third defendant filed action to evict the plaintiff from the property in HBC 260 of 2016. The High Court's refusal to grant orders to evict the plaintiff was appealed by the third defendant to the Court of Appeal in ABU 37 of 2018. The Court of Appeal gave its judgment on 7 June 2019 dismissing the appeal.
8. By her statement of claim, the plaintiff sought to restrain the second and third defendants from taking steps to evict her from the property and asked for an order that the transfer of lot 2 be deemed a fraudulent transfer and the sale be set aside. Alternatively, she asked for the property to be independently valued and for the plaintiff and the first defendant to be given equal shares in the property after giving credit for settlement of the mortgage and other property related payments. She also asked for damages.

9. The second and third defendants filed a summons on 16 January 2018 seeking to strike out the plaintiff's case against them in terms of Order 18 rule 18 (1) (a), (b) and (d) of the High Court Rules 1988. The grounds pleaded in the strike out application are that the action discloses no cause of action, that the action is scandalous, frivolous or vexatious and that it is otherwise an abuse of the process of court.
10. In her affidavit in support on behalf of the second and third defendants, Sangeeta Devi Reddy – Bridgeman averred that she is a director of Organic Earth (Fiji) Limited, the second defendant. She averred that the second defendant is the registered proprietor of the property and that the property was purchased from the fourth defendant. She averred that the second defendant has been sued to prevent it from enjoying the property illegally occupied by the plaintiff. She was of the belief that the plaintiff was paid a sum equivalent to her share of the property. She said that the plaintiff's action relates to claims that accrued prior to the sale of the property, and that these were issues between the plaintiff and the first and fourth defendants. She said that the sale of the land was carried out after solicitors obtained the necessary approvals from the authorities. She asked for orders to be made in terms of the summons.
11. Rosalia Chute, the plaintiff, said in her affidavit in opposition that the property was sold by the fourth defendant without her knowledge and without a special resolution of the company, while she was residing on the property. She averred that the Court of Appeal directed the mortgage sum to be deducted from the valuation of the property and for the balance to be equally divided between the plaintiff and the first defendant. She stated that the transfer of the property to the second defendant was not an arms-length transaction, and was crafted to deprive her of her rights to the property. She said that she filed a Domestic Violence Restraining Order (DVRO) against the first and third defendants in the Magistrate Court, and that subsequently the third defendant was discharged.
12. The acting master struck out the claim against the second and third defendants. The ruling reasoned that the plaintiff's entitlement to the property was determined by the Court of Appeal in ABU 0040 of 2009, and that she was paid a

sum of \$187,000 on 5 October 2015 in settlement of her entitlement. Therefore, the acting master concluded, the proceeding against the second and third could not be maintained. The action against them was held to be scandalous, frivolous, vexatious and an abuse of the process of court.

13. The plaintiff applied for leave to appeal the master's decision and filed her notice of appeal and proposed grounds of appeal on 28 August 2019. She proposed to raise eight grounds of appeal. All of these need not be restated. The plaintiff's main contentions were that the acting master failed to consider that she had settled the Westpac mortgage in a sum of \$228,095.53 and that though the master had concluded that she was paid a sum of \$187,000.00 in terms of the Court of Appeal judgment, this was deposited to the account of the family court in October 2015 pending outcome of the family court proceedings. The grounds of appeal also stated that the master failed to take into account significant issues to be tried against the first and third defendants, and that there is a claim of fraud against those defendants. She also stated that a judgment setting aside the transfer of the property would have a bearing on the second and third defendants.
14. The plaintiff asked *inter alia* for leave to appeal the interlocutory ruling delivered by the acting master on 15 August 2019 and for a stay of proceedings in the subject matter until the leave application is determined. The defendants did not file affidavits opposing leave. On 12 November 2019, counsel for the first and fourth defendants submitted that they had no objection to leave being granted to the plaintiff to appeal the acting master's decision. The second and third defendants were not present on that day. The acting master's decision was stayed until determination of the leave application.
15. The plaintiff and the first and fourth defendants were represented at the hearing of the appeal. The parties did not file written submissions. The second and third defendants did not attend the hearing. Mr. D. Toganivalu appeared for the second and third defendants on 24 September 2019. Thereafter, there was no appearance for those two defendants. After the hearing, a notice of change of

solicitors was filed by Hanif Tuitoga on 1 April 2020 on behalf of the second and third defendants in place of solicitors, Toganivalu & Valenitabua.

16. In the absence of opposition to the plaintiff's application for leave, there seems to be no reason to deny the plaintiff leave to appeal the acting master's judgment. However, it is apt to give consideration to the master's decision to strike out the plaintiff's claims against the second and third defendants. In doing so, it is necessary to consider the respective pleadings of the parties. The Court of Appeal judgment on the family proceedings from which this proceeding stems is also relevant in deciding the matter.
17. In October 2015, the first defendant deposited a sum of \$187,000.00 to the credit of the family court proceedings (13/SUV/0622) between the plaintiff and the first defendant. The acting master's decision to strike out the plaintiff's claims against the second and third defendants is on the basis the plaintiff's claims have been settled. The plaintiff denies this and asserts that a sum of \$187,000.00 was deposited to the credit of the family court. This is a matter to be established by evidence.
18. The plaintiff averred that she was left to settle the outstanding mortgage debt in a sum of 228,095.53. She says she settled leases on the subject property after the first defendant went abroad without complying with the Court of Appeal orders. She claimed that after she settled the rental arrears and the Westpac mortgage on the property, the first and third defendants had attempted to arbitrarily evict her from the property.
19. The applicant stated that the property was bought by the second defendant at a grossly understated value of \$220,000.00 in January 2015 when the current market value was very much higher. She stated that the property was valued at \$280,000.00 in 2009 and this was stated in the Court of Appeal judgment. She stated that an adverse judgment against the first and fourth defendants will have the effect of setting aside the sale and transfer of the property and that the decision would have a significant bearing on the second and third defendants. She stated that her action against the defendants would determine whether they

are *bonfide* purchasers for value or whether there was fraud involved in the sale of the property.

20. It is important to consider whether the second and third defendants had notice of the dispute concerning the property, and if there was notice, as to what legal effect ensues. The plaintiff pleaded that the third defendant was in a *de facto* relationship with the first defendant. This is confirmed by an affidavit filed on 7 May 2014 by Sangeeta Devi Reddy in the family division of the Magistrate Court. The affidavit indicates that she was a director of the second defendant at the time the affidavit was filed in that proceeding. On the basis of the material before court, it would seem that the third defendant could have been aware of the property related dispute between the plaintiff and the first defendant at the time of the transfer of the property from the fourth defendant to the second defendant, in which the third defendant is a director.
  
21. The power to strike out is a summary power which should be exercised only in plain and obvious cases. The acting master has not considered the plaintiff's claim based on the settlement of the mortgage debt. The Court of Appeal arrived at the respective share of \$65,000.00 to be given to the plaintiff and the first defendant after deducting the then mortgage debt of \$140,000.00. By the time the mortgage was settled, as claimed by the plaintiff, the debt may have accumulated in value; these are matters on which findings can be made on the basis of evidence placed before court. The settlement of the mortgage seems to have been omitted from consideration in the acting master's decision. The claims contained in the statement of claim are of a serious nature. The plaintiff has alleged fraud in the transfer of the property. The issues that the pleadings appear to raise have to be settled by the evidence of the parties. On the basis of the pleadings and the material before court, the extreme measure of striking out the action is not suited. The acting master's ruling must, therefore, be set aside. Regretfully, the court acknowledges, the adjudication of this matter has taken much longer than it should have. The appeal will be dealt with expeditiously so that the writ action need not be held up any further. Proceedings before the master are stayed until such time.

**ORDER**

- A. Leave is granted to appeal the ruling of the acting master delivered on 15 August 2019.
- B. Proceedings before the master are stayed until the determination of the appeal.
- C. The parties will bear their own costs.

Delivered at **Suva** on this **21<sup>st</sup>** day of **October, 2022**.



M. Javed Mansoor  
Judge