IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 223 of 2017

BETWEEN: **RONITA RAJESHNI A.K.A RANITA RAJESHNI SINGH** as Executor and Trustee for the Estate of **SHIVA WATI**

PLAINTIFF

A N D: **DHIRENDRA NATH**

FIRST DEFENDANT

A N D: **RONALD RAJESH SINGH**

SECOND DEFENDANT

Appearance	:	Mr. Shelvin Singh with Ms. Kerela Saumaki for the plaintiff Ms. Sunaali Ben with Ms. Hanrieta Yadraca for the first defendant.
Hearing:	:	Monday, 29th August 2022 at 9.30am
Decision	:	Friday, 21st October 2022 at 9.00am

DECISION

(A). INTRODUCTION

[1]. This is an application for leave to appeal from an 'interlocutory ruling' of the Master dated 29.11.2021 dismissing the first defendant's application for leave to file statement of defence out of time.

[2]. The application is made pursuant to Order 59, Rule 11 of the High Court Rules, 1988 and the inherent jurisdiction of the court.

[3]. The application for leave to appeal filed on 10.12.2021 is supported by an affidavit sworn by the first defendant on 09.10.2021.

[4]. The application is vigorously opposed by the plaintiff. An answering affidavit sworn by the plaintiff was filed on 28.01.2022.

[5]. Counsel for the plaintiff and the first defendant presented oral submissions on 29.08.2022. In addition to oral submissions, counsel for the plaintiff and the first defendant tendered written submissions for which I am most grateful.

(B) BACKGROUND

[6]. The plaintiff is the registered owner of one undivided half share in the property comprised in Certificate of Title No: 22710 being "Verata" Lot 43 Section III on DP No: 126 as the Executrix and Trustee of the estate of Shiva Wati.

[7]. The first defendant is the registered owner of the other one undivided half share in the said property. The second defendant is the occupier of Flat 2 on the said property.

[8]. By originating summons dated 17 January 2011 in High Court Civil Action No. 14 of 2011, the deceased plaintiff, Shiva Wati sought orders that the said property comprised in Certificate of Title No. 22710 being Lot 43 Section III on Deposited Plan No. 126 ("the property') be sold by tender to the highest tenderer and the proceeds of the sale be shared equally between the two parties. The Court made orders in these proceedings on 01 August 2013 allowing the sale of the said property.

[9]. On 19 November 2015, the following orders were made by consent between the deceased plaintiff Shiva Wati and the first defendant in relation to the property.

(1) The defendant executes the transfer of the property in the name of the purchaser and execute the application for Capital Gain Tax clearance within 14 days. If the defendant fails to do so within 14 days, then the Chief Registrar of the High Court of Fiji will execute the said transfer & Capital Gain Tax clearance.

(2) The defendant shall, within sixty (60) days from today, vacate the property and handover the property to the purchaser.

(3) The proceeds of the Sale will be deposited into court.

(4) The settlement amount is the Judgment of the Court.

[10]. The plaintiff by way of Writ of Summons dated 02 August 2017 filed a claim against the second defendant seeking an order for vacant possession. The first defendant has been joined as a nominal defendant.

[11]. The plaintiff filed two affidavits of service on 09 February 2018 proving service of the Writ of Summons on the defendants.

[12]. Even though the defendants retained counsel, they have failed to file and serve a statement of defence as required under the High Court Rules. The plaintiff then through his counsel filed an application to the Court by way of Ex-Parte Notice of Motion for leave to enter default judgment on 09 February 2018.

[13]. On 13 March 2018, an affidavit in reply was filed against the ex-parte application deposed by the first defendant, Dhirendra Nath .

[14]. The statement of defence filed on 13 March 2018 by the second defendant through Vakaloloma & Associates was not accepted and expunged by the court as it was filed out of time without seeking leave from the court.

[15]. After several adjournments of the application by the plaintiff for leave to enter default judgment, and before the matter could be fixed for hearing, the first defendant filed an application via motion dated 27 September 2018, seeking leave to file a statement of defence out of time.

[16]. An affidavit in opposition was filed by the plaintiff on 16 January 2019, with the reply filed by the defendant's solicitors on 31 January 2019. The matter was heard before the Acting Master and a ruling was delivered on 29 November 2021, in which the Master dismissed the first defendant's application to file and serve a statement of defence out of time.

[17]. Being aggrieved by the said decision, the first defendant filed the current application for leave to appeal.

(C) THE LEGISLATIVE PROVISION

[18]. The legislative provision requiring leave to appeal from interlocutory orders or Judgments is contained in Order 59, rule 11 of the High Court Rules, 1988.

[19]. The Order 59, rule 11 is in these terms;

Application for Leave to Appeal (*O.59, r.11*)

11. Any application for leave to appeal an interlocutory order or judgment shall be made by Summons with a supporting affidavit, filed and served within 14 days of the delivery of the order or judgment.

(D) THE LEGISLATIVE POLICY

[20]. The legislation having provided that there should be no appeal from an interlocutory Judgment, except by leave of the Court, the prima facie presumption is against appeals from interlocutory Judgments, and in favor of the correction of the decision in question, that is, that there has been a proper exercise of its discretion by the primary court. This Court is not at liberty to ignore the legislative policy against appeals from interlocutory Judgments evident in Order 59, rule 11 of the High Court Rules, 1988.

(E) THE PRINCIPLES

[21]. I think I should state what I perceive to be the principles that should guide the court and the considerations that it should take into account, in deciding whether or not leave to appeal should be granted in a case such as this.

[22]. Before coming to consider that question, however, I think two preliminary matters should be noted. First, that, if leave to be given, the appeal would involve a consideration by the court of the exercise of a discretion vested in the learned Master.

[23]. Secondly, the exercise of the discretion vested in the learned Master was on a point of practice or procedure.

[24]. What principles then should guide the Court, or what considerations should it take into account, in deciding whether it should grant or refuse to appeal from an interlocutory Judgment which determines legal and substantive rights?

[25]. The principles which should guide a court when sitting on appeal from a discretionary Order were expressed by the full Court in **Niemann v Electrical Industries Ltd**[1] . They are;

- *The Order appealed from must be seen to be clearly wrong or, at least, attended with sufficient doubt as to whether it is right or wrong, and*
- *Substantial injustice be a direct consequence of the Order.*

[26]. The same Court applied "**Niemann**" in **B.H.P. Petroleum Pty. Ltd. v. Oil Basins Limited** [2] . The principles were expressed shortly by King J as follows at (p762);

> *".... these principles are that on an application to the full Court leave to appeal from an interlocutory Order should be granted only where; (a) the decision was*

[1] (1978) VR 431
[2] (1985) VR 756

attended with sufficient doubt to justify granting leave, and in addition, (b) substantial injustice would be done by leaving the decision unreversed."

[27]. The leading authority is "Niemann" (supra). In that case the full court considered and dismissed an application for leave to appeal from a decision of a Judge refusing application by Summons for dismissal of plaintiff's actions for want of prosecution. The major Judgment of the Court was that of Murphy J.

[28]. In the illuminating Judgment of Murphy J. in "**Niemman**" (Supra) contained the very significant passage following;

> *"On an application for leave" the Full Court ought not, in my opinion, to be required, before granting leave, to determine the issue in question, or to decide whether the primary Judge's discretion miscarried. That would be to duplicate the work of the Court. The requirement for leave is designed to reduce appeals from interlocutory orders as much as possible. If leave can only be granted, following an examination of the merits of the matter and a decision that the order made by the primary Judge was "wrong", and the matter goes then to be decided on the merits by another Full Court, the object of the legislature is negated, and absurdity is the result. C.f. Lane v Esdaile (1891) A.C. 210 per Lord Halsbury L.C. at p.212.*
>
> *It therefore appears to me that in using the word 'wrong' in Perry v Smith and in the Darrell Lea case, the Full Court must have used it in a sense which included the decisions 'attended with sufficient doubt', to use the Privy Council phrase, from which decisions substantial injustice flowed.".*

Niemann's case has been applied by the Full Court of Victoria in **Monash University v Berg**[3] and **B.H.P Petroleum Pty Ltd v Oil Basins Ltd**[4]

[29]. I feel compelled to add that the question whether or not leave to appeal should be given is a separate and distinct question from the considerations of the appeal itself, if leave to be given. The following passage in "**Fredericks v May**[5]" of Walsh J is illuminating.

> *"It is not in doubt that if the Court forms a clear opinion that the appeal cannot succeed, leave to appeal should be refused. But it is clear, in my opinion, that the Court does not determine, and should not determine, an application for leave to appeal, where it has adopted for convenience the course of hearing full argument as on an appeal, simply by forming an opinion whether the Judgment which the applicant seeks to challenge was right or wrong and by refusing or granting*

[3] (1984) V.R 383
[4] (1985) V.R 756.
[5] 47 A.L.J.R. 362 at 364

leave accordingly. That would have practical effect of giving the applicant the benefit of an appeal as of right."

[30]. Sir Moti Tikaram, in the Fiji Court of Appeal decision in **Kelton Investments Ltd v Civil Aviation Authority of Fiji**[6] said;

> *I am mindful that Courts have repeatedly emphasized that appeals against interlocutory orders and decision will only rarely succeed. As far as the lower Courts are concerned granting of leave to appeal against interlocutory orders would be seen to be encouraging appeals (see Hubbal v Everitt and Sons Limited (1900) 16 FLR 1680)*
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> *Even where leave is not required the policy of appellate courts has been to uphold interlocutory decision and orders of the Trial Judge – see for example Ashmore v Corp of Llod's (1992) 2 ALL ER 486 where a Judge's decision to order trial of a preliminary issue was restored by the house of Lords.*

In **Darrel Lea (vic) Pty Ltd v Union Assurance Society of Australia**[7] , the full court of the Supreme Court of Victoria said ;

> *"We think it is plain from the terms of the Judgment to which we have already referred that the Full Court was stating that error of law in the order does not in itself constitute substantial injustice but that it is the result flowing from the erroneous order that is the important matter in determining whether substantial injustice will result."*

In **Chandrika Prasad v Republic of Fiji & Attorney General**[8] , the High court of Fiji in dealing with an application for leave to appeal to set aside interlocutory order said;

> *"In an application for leave to appeal the order to be appealed from must be seen to be clearly wrong or at least attended with sufficient doubt and causing some substantial injustice before leave will be granted see Rogerson v Law Society of the Northern Territory (1993) 88 NTE 1 at 5 – 33, Nieman v Electronic Industries Ltd (1978) VR 451, Nationwide News Pty Ltd (t/a Cnetralian Advocate) v Bradshaw (1986) 31 NTR 1.*
>
> *Fiji's legislative policy against appeals form interlocutory orders appears to be similar inter alia to that of the State of Victoria , Perry v Smith (1902) 27 VLR*

[6] (1995) FJCA 15 ABU 00341A.958 18 July 1995
[7] (169) VR 401
[8] (2000) Vol -02 FJHC 81p

66 at 68, and also with appeals to the High Court of Australia, see Ex parte Bucknell (1936) HCA 67 at 223.

If it is necessary for instance to expose a patent mistake of law in the judgment or to show that the result of the decision is so unreasonable or unjust as to demonstrate error, then leave will be given Niemann (Supra) at 432. It is not sufficient for an appeal court to gauge, that when faced with the same material or situation, it would have decided the matter different. The Court must be satisfied that the decision is clearly wrong.

Leave could be given for an exceptional circumstance such as if the Order has the effect of determining the rights of the parties Buckneel (Supra) at 225, Dunstan v Simmie & Co Pty Ltd (1978) VR 669 at 670. This is not the case here. Leave could also be given if "substantial injustice would result from allowing the order, which it is sought to impugn to stand ...."

(F) CONSIDERATION

[31]. Bearing those considerations in mind, I now turn to consider the application in the case before me.

[32]. The grounds set out in the "Proposed Notice of Appeal" are:

1. *That the Master of the High Court erred in fact and in law by declaring the Proposed statement of defence as not disclosing sufficient meritorious defence without hearing the defendant as part of substantive matter.*

2. *The Master of the High Court Erred in findings where she failed to consider the reasons of the delay in filing the application which was sworn in the Affidavit dated 28 September 2018.*

3. *The Master of the High Court erred in holding the medical report of the first defendant as an unmeritorious reason for delay.*

4. *The Master of the High Court erred in fact and in law by making a Ruling on the substantive matter rather than the interlocutory matter and without jurisdiction held that the First Defendant's proposed Statement of Defence did not disclose meritorious grounds of Defence thus dismissing the application.*

5. *That the Master has erred in law in fact while considering the irrelevant facts in its Interlocutory Ruling as the Defence is already on foot in the High Court.*

[33]. The action before the Master was commenced by writ issued by the plaintiff on 02.08.2017. By the statement of claim endorsed on the writ of the plaintiff claimed the following:

(A) The second defendant do vacate and give up vacant possession of the property comprised in Certificate of Title No: - 22710 being "Verata" Lot 43 Sec III DP No: 126 to the plaintiff.

(B) Damages

(C) Costs.

[34]. The plaintiff had not pleaded any cause of action against the first defendant. The plaintiff had not sought any relief against the first defendant. The first defendant has been joined as a nominal defendant. In the statement of claim there is no issue raised between the plaintiff and the first defendant. The plaintiff has primarily sought an order against the second defendant for vacant possession of the land described in Certificate of Title Number – 22710. The nub of the plaintiff's claim is that the second defendant is in unlawful possession of the land.

[35]. The Master by ruling delivered on 29.11.2021 had refused the first defendant's application dated 27.09.2018 for leave to file statement of defence out of time.

[36]. A perusal of the Ruling of the Master reveals: (Reference is made to paragraph (09) to (14) of the Ruling).

9. Later, on 19 November 2015, the First Defendant was ordered to execute the transfer of the property in the name of the purchaser and execute the application for Capital Gains tax clearance within 14 days.

The first defendant was further ordered to vacate the property.

10. The first defendant now in his proposed statement of defence denies having knowledge of the court order for sale in 2011. He further denies agreeing to vacate the property.

11. With there being a court order existing for Dhirendra Nath to vacate the property within 60 days from 19 November 2015 and no appeal filed against the decision, I do not find the proposed statement of defence discloses sufficient meritorious defence.

12. I do not find the defendant shown sufficient cause why he should be allowed to file his statement of defence out of time.

13. *He is only a nominal defendant in the current proceeding and there are no orders specially sought against him.*

14. *For aforementioned reasons, the first defendant's application shall fail and is dismissed with cost.*

[37]. The Master posed the following questions:

- *He is only a nominal defendant in the current proceedings and there are no orders specially sought against him.*

- *I do not find that the defendant shown sufficient cause why he should be allowed to file his statement of defence.*

[38]. The Master went on to say that: [paragraph (6) of the Ruling]

> *"The first defendant's application is made pursuant to Order 14 Rule 4 of the High Court Rules. There is no application for summary judgment by the plaintiff hence I find Order 14 Rule 4 not to be an appropriate rule which the first defendant can rely upon."*

[39]. I do not see any justifiable reason why the first defendant should be allowed to file a statement of defence in opposition to the claim for vacant possession made against the second defendant. It will not lead to a decision of the real matter in controversy. The statement of defence of the first defendant is not necessary for the purpose of determining the real question in controversy between the plaintiff and the second defendant. There is no cause of action pleaded against the first defendant in the plaintiff's statement of claim and no relief is sought against the first defendant. Therefore, the first defendant has nothing to defend. There is no claim raised in the statement of claim against the first defendant to obtain money or property, or to justify the enforcement of a legal right against the first defendant. The proposed statement of defence speaks of the followings; (1) there was no agreement to vacate the property (2) the first defendant does not have any knowledge of any order for sale made by the court in the year 2011. It is difficult to understand how this is relevant to the real controversy between the plaintiff and the second defendant.

The first defendant has given an undertaking to the court on 19.11.2015 ;

1. *The defendant shall execute the transfer of the property in the name of the purchaser and execute the Capital Gains Tax clearance within 14 days. If he fails to do it within 14 dates the Chief Registrar will execute the said transfer and Capital Gains Tax Clearance.*

2. *The defendant shall within 60 days from today vacate the property and hand over the property to the purchaser.*

3. *The proceeds of the sale will be deposited to the credit of the case.*

[40]. **It is true that the order of the court is to hand over the possession of the property to the purchaser and not to the plaintiff.**

[41]. In my view, the first defendant being a nominal defendant has no entitlement or right to advance the defence of the second defend in the claim for vacant possession filed against the second defendant by the plaintiff. The first defendant is the co-owner of the property and the first defendant has not shown that substantial injustice will result from allowing the order to stand. The effect of the order of the Master did not cause substantial injustice to the first defendant. Even if the Order of the Master is seen to be clearly wrong, this is not sufficient alone. It must be shown in addition by way of affidavit evidence, to effect a substantial injustice by its operation. It is plain from the judgment of the Full Court in Niemann (supra) that an error of law in the order does not in itself constitute substantial injustice, but that it is the result flowing from the erroneous order that is the important matter in determining whether substantial injustice will result. I am not satisfied that the order of the Master dated 29.11.2021 dismissing the first defendant's application seeking leave to file statement of defence out of time determined the substantive rights of the first defendant.

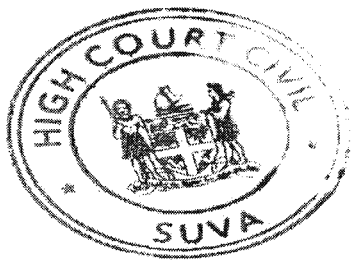
[42]. I reiterate that there is no judgment or order to hand over the possession to the plaintiff. The court has not ordered the first defendant to hand over the possession to the plaintiff. **The plaintiff cannot evict or apply for writ of possession against the first defendant. Equally, the plaintiff has no legal basis to enter default judgment against the nominal first defendant. Therefore, even if the Master's order is wrong, I am not persuaded that the first defendant would suffer any substantial injustice if the decision stands. [I note with concern that there is a fundamental defect in the plaintiff's notice of motion for leave to enter default judgment. The plaintiff seeks leave to enter default judgment against both defendants ??? I wish to emphasize that there is no legal basis for entering a default judgment against a nominal defendant. Besides, there is no provision in the High Court Rules, 1988 enabling a party to enter a default judgment against a nominal defendant.]** The first defendant is entitled to four bedroom concrete house on the properly. The first defendant acquired the joint ownership of the property through the last Will and the testament of his father, late Ram Nath. **The plaintiff is not the sole owner of the property**. I fail to see how the plaintiff alone could institute the action claiming vacant possession against the second defendant. The first defendant ought to have joined as the second plaintiff whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated.

[43]. I conclude that most of the first defendants grounds of appeal are not strongly arguable and **do not** indicate that the decision of the Master was attended with sufficient doubt to justify the grant of leave. The proposed grounds of appeal also **do not** indicate that they and the decision alter or affect substantive rights of the first defendant and do not meet "Niemann" [supra] test.

ORDERS

1. The application for leave to appeal is declined.

2. I make no order as to costs.



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Jude Nanayakkara
JUDGE

High Court – Suva
Friday, 21st October 2022