IN THE HIGH COURT OF FIJI AT LAUTOKA

APPELLATE JURISDICTION

Civil Action No. HBC 71 of 2017

BETWEEN

NAREND KUMAR (aka **BISSUN DUTT**) and **JASMA WATI** both of Sabeto, Nadi but presently of Waqadra, Nadi, Supervisor and Domestic Duties.

PLAINTIFF

AND

JAIRU DEEN (aka **PIPI**) and **SALIAM DEAN** both of Sabeto, Nadi, Occupation not known to the plaintiffs.

DEFENDANTS

Counsel : Mr. Dass E. for the Plaiintiffs

Mr. Bukarayo V. for the Defendants

Date of Hearing : 27th November 2023

Date of Ruling : 16th January 2024

RULING

(On Leave to Appeal)

[1] The plaintiff instituted this action seeking to have the defendant evicted from the subject land.

[2] The defendants, on 11th September 2018 filed summons pursuant to Order 18 rule 18 of the High Court Rules 1988 to have the matter struck out.

[3] The application for striking out was heard on 07th August 2020 and the learned Master of the High Court by his ruling delivered on 08th July 2022 struck out the matter.

[4] On 15th July 2020 the plaintiffs filed summons seeking leave to appeal the decision of the learned Master and for an order staying the decision of the learned Master pending the appeal.

[5] The grounds of appeal relied on the plaintiffs are as follows:

1. That the learned Master erred in fact and in law by holding that the plaintiffs' action for vacant possession is unsustainable based on the decision of Mr. Justice Ajmeer whereby His Lordship nullified the agreement to Lease 6/77/40841 in Judicial Review No. HBJ 01 of 2017 when in fact the substantive appeal was listed for hearing on 09th September 2022.
2. That the Learned Master erred in fact by holding that the iTaukei Land Trust Board only filed an application seeking leave to appeal the decision of Mr Justice Ajmeer but did not proceed to obtain leave nor did it take any step in that matter when in fact the iTaukei Land Trust Board obtained leave to appeal out of time.

3. That the learned Master misdirected himself by holding that the allegations of fraud made by the plaintiffs were baseless when in fact the officer representing the appellant in Judicial Review No. HBJ 01 of 2017 had consented for judgment in favour of the applicant in that matter.

4. That the learned Master erred in law in striking out the plaintiffs' action and not considering that the iTaukei Land Trust Board had appealed the decision of Mr. Justice Ajmeer that had nullified the agreement to lease in Judicial Review No. HBJ 01 of 2017.

5. That the learned Master erred in fact and in law when he held that the order obtained by Mohammed Ashik was not fraudulent when in fact the order was obtained with the following defects:

   I. The legal officer consenting to a judgment in favour of the respondent in violation of section 12 of the iTaukei Land Trust Act.

   II. The affected party in Judicial Review No. HBJ 01 of 2017 being the appellants herein not being added as a party to that action when the lease was issued in favour of the appellants herein amounts to significant miscarriage of justice.

[6] The law relating to granting leave to appeal interlocutory orders have been discussed at length in the following decisions:

In **Niemann v. Electronic Industries Ltd.** [1978] V.R. 431 at page 441 where Supreme Court of Victoria (Full Court) held as follows:

> ".....leave should only be granted to appeal from an interlocutory judgment or order, in cases where substantial injustice is done by the judgment or order itself. If the order was correct then it follows that substantial injustice could not follow. If the order is seen to be clearly wrong, this is not alone sufficient. It must be shown, in addition, to affect a substantial injustice by its operation.

> It appears to me that greater emphasis is therefore must be on the issue of substantial injustice directly consequent on the order. Accordingly if the effect of the order is to change substantive rights, or finally to put an end to the action, so as to effect a substantial injustice if the order was wrong, it may be more easily seen that leave to appeal should be given.

In the case of **Khan v Suva City Council** [2011] FJHC 272; HBC406.2008 (13th May 2011) the following observations were made in regard to applications for leave to appeal;

> It is trite law that leave will not generally be granted from an interlocutory order unless the Court sees that substantial injustice will be done to the applicant.
>
> Further in an application for leave to appeal, it is incumbent on the applicant to show that the intended appeal will have some realistic prospect of succeeding.

In **Kelton Investment Ltd & Tapoo Ltd v Civil Aviation Authority of Fiji and Motibhai & Company Limited** Civil Appeal No. ABU 0034 of 1995 the Court of Appeal observed as follows;

> The Courts have thrown their weight against appeals from interlocutory orders or decisions for very good reasons and hence leave to appeal are not readily given. Having read the affidavits filed and considered the submissions made I am not persuaded that this application should be treated as an exception. In my view the intended appeal would have minimal or no prospect of success if leave were granted. I am also of the view that the Applicants will not suffer an irreparable harm if stay is not granted.

In the case of **Ex parte Bucknell** (56 CLR 221 at page 224) it was held:

> At the same time it must be remembered that the prima facie presumption is against appeals from interlocutory orders, and, therefore,

an application for leave to appeal under section 35(1)(a) should not be granted as of course without consideration of the nature and circumstances of the particular case. It would be unwise to attempt an exhaustive statement of the considerations which should be regarded as a justification for granting leave to appeal in the case of an interlocutory order, but it is desirable that, without doing this, an indication should be given of the matters which the court regards as relevant upon an application for leave to appeal from an interlocutory judgment.

In **Dunstan v Simmie & Co Pty Ltd** 1978 VR 649 at 670 it was held:

"....although the discretion to grant leave cannot be fettered, leave is only likely to be given in a case where the determination of the primary issue puts an end to the action or at least to a clearly defined issue or where, to use the language of the Full Court in Darrel Lea (Vic.) Pty Ltd v Union Assurance Society of Australia Ltd., (1969) V.R. 401, substantial injustice would result from allowing the order, which it is sought to impugn, to stand."

[7] In this matter the learned Master's decision is based on the decision in Mohammed **Ashik Ali v iTaukei Land Trust Board** HBJ 01 of 2017. Justice Ajmeer in this judgment has made the following observations:

That the respondent granted the agreement for Lease No. 6/77/40841, dated 1 January 2016, in the name of Narend Kumar and Jasmawati, in error and by mistake in that the respondent had granted that lease by error mistakenly believing there was in existence a court order that compelled it to do so.

[8] The respondent appealed the above decision to the Court of Appeal and the Court of Appeal by its judgment delivered on 30th September 2022 set aside the said judgment of Justice Ajmeer.

[9] Since the learned Master decided to strike out the plaintiffs' action if leave to appeal is not granted it would cause substantial injustice to the plaintiffs.

[10] In fairness to the learned Master I must say that the plaintiffs should have informed the learned Master about the appeal pending before the Court of Appeal. If it was brought to the notice of the court the learned Master would not have based his decision on the said judgment.

[11] For these reasons the court makes the following orders.

ORDERS

1. Leave is granted to appeal the ruling of the learned Master dated 08th July 2022.
2. The said ruling is stayed until the appeal is finally determined.
3. There will be no order for costs.

Lyone Seneviratne

HIGH COURT OF FIJI LAUTOKA

JUDGE

16th January 2024