

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 133 of 2017

BETWEEN: **MOHAMMED FAROOQ AKA MOHAMMED FAROOD** of 31 Greenmeadows
Ave Manurewa, Auckland, New Zealand, Taxi Proprietor.

PLAINTIFF

AND: **MAIMUN NISHA AKA MEHMUN NISHA** of 21 Nasilivata Road, Nadera,
Domestic Duties.

DEFENDANT

BEFORE : **Hon. Justice Vishwa Datt Sharma**

COUNSEL : **Mr. Kumar V.** for the Plaintiff/Applicant
 Ms. Singh V. for the Defendant/Applicant

DATE OF JUDGMENT: **13th February, 2024**

JUDGMENT

*[Setting aside Judgment by Consent and Stay and Enforcement of orders
and committal proceedings]*

On the outset, the Substantive Action by Originating Summons was filed on 12th May 2017. Orders for Vacant Possession was made. Subsequent interlocutory application for orders were made. Hence, the current two interlocutory applications are filed by both parties for Court's Determination.

A. INTRODUCTION

(1) The Applicant/Defendant, Maimun Nisha, coupled with an affidavit in Support filed an Inter-Parte Notice of Motion on 18th July 2023 and sought for the following Orders:

1. That the Judgment by Consent entered on the 19th day of October, 2022 be wholly set aside unconditionally.
2. That an interim stay be granted on the execution of the order of Writ of Vacant Possession dated the 21st of February 2023
3. That the Civil Action No. HBC 133 of 2017 be relisted back in the cause list and an order be granted that the matter proceeds to hearing.
4. That the costs of this application be costs in cause.

(2) Subsequently, the Plaintiff, Mohammed Farooq also filed an Inter-Parte Summons coupled with an affidavit in support on 20th July 2023 and sought for the following orders:

1. That the Honorable Court give further directions in relation to the enforcement of the eviction proceedings in the within action.
2. That the consent orders of 26 October, 2020 are to be read together and/or in conjunction with the Consent Orders of 19th October, 2022.
3. That all the tenants and/or occupants and/or family members bought in by the Defendant, Maimun Nisha aka Mehmun Nisha be declared illegal occupants il-line with the Consent Orders of 26th October, 2020 which constituted a subletting and dealing if the said property which was prohibited.

4. That the High Court Sheriff officer be directed to evict the declared illegal occupants together with the Defendant, Maimun Nisha aka Mehmun Nisha.
 5. Alternatively, leave be granted to issue an Order of Committal for Contempt of Court Order against the Defendant, Maimun Nisha aka Mehmun Nisha of 21 Nasilivata Road, Nadera, domestic Duties for failure to comply with the Consent Orders of 26th October, 2020 and Consent Orders of 19th October, 2022 be issued by the Court against the Defendant.
 6. That any irregularity and non-compliance arising from this application be cured by Order 2 Rule 1 and Order 2 Rule 2 of the High Court Rules 1988.
 7. That the Plaintiff requests this Honorable Court to allow the Fiji Police and Military to assist in the execution of Consent Orders of 26th October, 2020 and Consent Orders of 19th October, 2022
 8. Any other Order this Honourable Court deem just and equitable.
 9. Cost of this application be cost in cause.
- (3) Both applications were heard together on 05th December, 2023.
- (4) Written Submissions was only filed by the Applicant/Defendant, Maimun Nisha.

B. BACKGROUND

- (5) The Plaintiff, Mohammed Farooq, filed an application for Vacant Possession pursuant to Section 169 of the Land Transfer Act for an order that the Defendant delivers Vacant Possession of the property in Certificate of Title No. 17598 being Lot 21 on the Deposited Plan No. 4257. The Plaintiff and the Defendant are siblings. He said property was bequeathed to the Plaintiff by his late father, Mohammed Hanif vide his will and testament of 10th August, 1998. The Plaintiff was appointed the sole Executor/Trustee. The Plaintiff obtained a Probate Grant on 05th November, 2017. On 24th May 2014, the property was transferred to the Plaintiff by way

of administration and Instrument of Transfer on 24th May 2014, pursuant to Probate No. 54583 Granted to the Plaintiff. The Defendant did reside on the property when the Plaintiff's late father was alive. However, when he took demise, his last will and testament of 10th August 1998, he bequeathed his entire estate to the Plaintiff. The Defendant in his affidavit in opposition 'alleges that the Plaintiff's and Defendant's late father had left a Will and Testament dated 17th April 2012 wherein he had bequeathed the property to her that she was not aware of the Will of 17th April 2012 until the Defendant was made aware of the same by her father's lawyer late lawyer, Mr. Sheik Shah. The Defendant's contention is that she is entitled to reside on the said property because she and her husband had expended monies on the maintenance work and extension of the property. The Defendant further alleges that the Plaintiff never indicated that their late father had left a Will of 10th August 1998 - that the Plaintiff will inherit the property.'

- (6) The Learned Master heard the case and converted the Substantive Originating Summons of the Plaintiff into a Writ action and ordered the Defendant to file/Serve a Statement of Defence.
- (7) The Action from the Learned Master was subsequently upon the completion of the cause was allocated to a Judge of the High Court for hearing and determination.
- (8) The substantive action was scheduled for hearing and determination before me on 19th October 2022 at 9.30am.
- (9) He Plaintiff was represented by Mr. Kumar S from Sunil Kumar Esquire whilst the Defendant was represented by Ms. Ali S with Ms. Singh S from Legal Aid Commission.
- (10) On the scheduled date of hearing of this Action Mr. Kumar S. sought for Consent Orders to be made for Vacant Possession pursuant to section 169 of the Land Transfer Act. Further, execution to be suspended for 45 days on or before 05th December 2022 at 4pm. Each party to bear their own costs.
- (11) Ms. Ali S with Ms. Singh confirmed to the above orders to be made and sought for the orders.
- (12) The Court accordingly acceded to both counsels request and granted the Consent Order as follows:

By Consent:

- (i) Orders in terms of the prayers at no. 1 in the originating Summons filed on 18th December 2017:
 - (ii) That the Defendant [Maimun Nisha] aka Mehmun Nisha to deliver Vacant Possession of the land comprised and described in the Certificate of Title No. 17598 being Lot 21 on the Deposited Plan No. 4257 situated in the District of Naitasiri on the Island of Viti Levu upon which is erected a Residential dwelling situated at 27 Nasilivata Road, Nadera.
 - (iii) Each party to bear their own costs."
- (13) Subsequently, on 21st February, 2023, this Court granted the order sought for the Writ of Possession against the Defendant.
- (14) The Defendant, Maimun Nisha on 09th March 2023 and 04th April 2023, filed an Originating Summons and Notice of Motion sought for Leave to Appeal and stay of execution of Writ of Possession.
- (15) The application was heard and a decision delivered on 20th June 2023 as follows:
- (i) The Applicant/Defendant's application for leave to appeal and stay of execution is dismissed.
 - (ii) The Applicant/Defendant to pay a sum of \$1,000 as summarily assessed costs.
- (16) Now, in the current for determination of the two (2) impending applications filed by one party, each seeking for the **setting aside of the Consent Order and enforcement of orders together with Committal proceedings.**

C. DETERMINATION

- (i) **Setting Aside of Consent Order.**
- (17) I have perused the affidavit of the Applicant/ Defendant, Maimun Nisha filed on 18th July 2023.

(18) The Applicant/ Defendant's complaint is:

"At paragraph 14-21 inclusive of her affidavit: 'that communicating with these lawyers [Ms. Neetu Prakash and Ms. Ali] at Legal Aid Commission was rather very difficult and not of assistance and I was often intimidated and pressured to settle. Had a meeting with Ms. Ali together with my husband on 16th October 2022, and understood that she was withdrawing as my lawyer. However, discovering that my lawyer had withdrawn my representatives from this matter, and allowed a **Consent Order to be granted**, left me in shock and dismay! I **fervently disputed the Consent Order as I genuinely believe I have** a legitimate legal arguments that could have influenced the outcome of this case.'" The entire process transpired in such a haste and with such limited notice that I was unable to adequately prepare, nor truly comprehend the gravity of the actions taken on my behalf.' **That it was then ordered by the Court on 19th October 2022 that I must evict the premises by the 05th December 2022.**"

(19) In short, the Applicant/Defendants complaints is against her Legal Aid Counsel, Ms. Ali, who appeared in the High Court and agreed to the Consent Order on the ground, inter-alia, that she acted without instruction [withdrawn as Counsel] for her to Consent to an order for Vacant Possession for which the Applicant/Defendant, Maimun Nisha is not happy about.

(20) In *Halsbury 4th Ed. Vol. 26 P.286*, it provides that:

'unless all the parties agree, a Consent Order, when entered; can only be set aside by a fresh action, an application cannot be made to the Court of first instance in the original action [HBC Civil Action no. 133 of 2017] to set aside the Judgment and/or order."

(21) The Applicant/ Defendant did not adhere to do as was required of him to do so procedurally as is also provided for hereinabove in *Halsbury 4th Ed. Vol.26 p.286* when he was suppose to file a fresh action accordingly.

(22) It is noted that a Consent Judgment/ Order is a final decision of the Court for all purposes. It can only be set aside on the ground of fraud and/or mistake. The Applicant/ Defendant has failed to show that there are elements of fraud or mistake involved that led to the grant of the Consent Order/Judgment on 19th October 2022.

(23) For the aforesaid rational, I proceed to dismiss the Applicant/Defendant's application seeking for the setting aside of the consent order entered into on 19th October 2022.

(ii) Stay

(24) The Court record shows that on 19th March 2023, the Applicant/ Defendant, Maimun Nisha filed an Originating Summons and sought for an order for stay of execution for the Writ of Possession.

(25) The application was already heard and determined by the Court on 20th June 2023 whereby this Court made an Order "that the stay of execution of the Writ of Possession" was dismissed.

(26) Yet again, the Applicant/Defendant comes to the Court with the second limb application seeking for stay of execution which cannot be re-litigated and allowed since the action has been concluded to its finality on Consent Orders in place.

(27) Accordingly, I proceed to dismiss the order sought for Interim Stay.

(iii) Enforcement of eviction proceedings

(28) This Court granted the Writ of possession to the Plaintiff against the Defendant, Maimun Nisha on 21st February 2023.

(29) This meant that the Court Sheriff was empowered by law to physically ensure that the Defendant, Maimun Nisha is evicted from the said premises as per the Consent Order of this Court of 19th October 2022.

(30) Accordingly, the Respondent/ Plaintiff's application seeking for enforcement of eviction proceedings is valid and may be enforced.

- (31) Tenants/occupants/ family members be declared illegal occupants.
- (32) This Court has dealt with the Plaintiff's substantive application and consent orders were accordingly made therein.
- (33) The application only sought for the Defendant Maimun Nisha to give Vacant Possession of the Certificate of Title No. 17598 and not the other occupiers.
- (34) That being the case, and the failure on the part of the Plaintiff for failing to file a proper application and seek orders prompts this Court to dismiss this order sought accordingly.
- (35) Deputy Sheriff to evict.
- (36) The Deputy Sheriff only to carry out Vacant Possession of the Defendant, Maimun Nisha and not other occupiers, in terms of the Court order made for Vacant Possession against her.

D. COSTS

- (37) Matter proceeded to full hearing and determination with parties to the proceedings furnishing Court with Written submissions and Counsels made oral submissions.
- (38) The Applicant/Defendant, Maimun Nisha to pay a summary assessed costs of the proceedings of \$1,000 within 14 days timeframe to Applicant/Plaintiff, Mohammed Farooq.

E. ORDERS

- (i) The Applicant/Defendant's application seeking setting aside of Consent Order of 19th October 2022 is dismissed.
- (ii) Interim Stay Order sought by the Applicant/Defendant is also not acceded to and Dismissed.

- (iii) Respondent/Plaintiff's application to enforcement of eviction proceeds to be executed by the Deputy Sheriff.
- (iv) Respondent/ Plaintiff's application seeking for an order for tenant/occupants/family members and other occupiers is also dismissed.
- (v) Applicant/Defendant to a pay a sum of \$1,000 as summary assessed costs with 14 days' timeframe to the Applicant/Plaintiff, Mohammed Farooq.
- (vi) File is now closed.

Dated at Suva this 13th day of February , 2024.



Vishwa Datt Sharma
JUDGE

CC: SUNIL KUMAR ESQUIRE, NAUSORI
MESSRS. NAMBIAR LAWYERS, SUVA