IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 241 of 2024

BETWEEN : **KHALID HUSSAIN**
Plaintiff

AND : **FOJINA BI SHAINAZ**
Defendant

Counsel : **Mr R Baadsha for the Plaintiff/Respondent**
Ms S Prasad for the Defendant/Applicant

Hearing : **30 June 2025**
Judgment : **2 July 2025**

EXTEMPORE JUDGMENT

(on an application for leave to appeal and a stay)

[1] The Applicant (Defendant) seeks leave to appeal from a decision of the learned Master dated 8 May 2025, declining to strike out the Respondent's (Plaintiff's) claim.

[2] The Applicant also seeks a stay of the proceeding whilst the proposed appeal is pending.

Background

[3] The Applicant is the registered proprietor of the property that is the subject of dispute in this proceeding. According to the Certificate of title, she became the registered owner of the property on 19 May 2016. The Respondent claims that the Applicant holds the property in trust for him. He allegedly contributed about $280,000 toward the purchase of the property. To reflect this arrangement between the parties, the Respondent alleges that the Applicant made the Respondent the sole beneficiary of her will.

[4] In 2024, the Applicant denied the Respondent access to the property. Hence, the Respondent brought these proceedings claiming a constructive trust.

[5] In October 2024, the Respondent filed an application to strike out the claim. The Applicant claimed indefeasibility of title, contending that the Respondent has not pleaded fraud against her, and thus he cannot succeed with his claim. Moreover, the Applicant argued that a constructive trust cannot exist in law unless recorded in a written instrument whereas the Respondent relies on an oral arrangement.

[6] The learned Master issued a Ruling on 8 May 2025. Having set out the Applicant's case for a strike out the learned Master proceeded to determine:

> *8. In the current proceeding, the Plaintiff claims to have invested into the property by paying for the purchase, price, and construction of the house. The Defendant has denied this. Hence it is a matter for trial to make findings what arrangement was made between the parties; if it was oral or evidence in writing, and what contribution the plaintiff had made to have beneficial interest, if any, in the property.*
>
> *9. I do not agree with the Defendant that the claim ought to be struck out under Order 18, Rule 18(1) of the High Court Rules.*

10. The Defendant's application, dated 11 October 2024, is dismissed with costs summarily assessed at $1,000 to be paid by the Defendant by 12 noon on 16 May 2025.

Appeal

[7] The Applicant filed a summons for leave to appeal the Master's decision on 20 May with a supporting affidavit. The Applicant deposes that the Respondent's claim as pleaded is hopeless, with no prospect of succeeding. She claims that allowing the claim to continue will cause her unnecessary cost and prejudice.

[8] The proposed grounds of appeal, some seven of them, take issue with the Respondent's pleadings and rely on provisions in the Land Transfer Act and the Indemnity Guarantee and Bailment Act.

Decision

[9] Pursuant to Order 59, rule 8(2) of the High Court Rules 1988, the Applicant requires leave to appeal from an interlocutory order or judgment of the Master. In *Devi v Shah* [2024] FJHC 316, Mackie J set out the test for the grant of leave to appeal as follows:

10. In Prasad v Republic of Fiji & Attorney General (No 3) [2000] FJHC 265; [2000] 2FLR 81 Justice Gates (as his Lordship then was) dealing with an application for leave to appeal to set aside interlocutory order stated:

"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] NTCA 124; [1993] 88 NTR 1 at 5-33; Niemann v. Electronic Industries*

Ltd. [1978] VR 451; Nationwide News Pty. Ltd. (t/a Centralian Advocate) v. Bradshaw (1986) 41 NTR 1.

Fiji's legislative policy against appeals from interlocutory orders appears to be similar inter alia to that of the State of Victoria, Perry v Smith [1901] ArgusLawRp 51; (1901) 27 VLR 66 at 68; and also with appeals to the High Court of Australia, see Ex parte Bucknell [1936] HCA 67; [1976] 56 CLR 221 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*** *(Niemann at 436).*

Leave could be given for an exceptional circumstance such as if the order has the effect of determining the rights of the parties *Bucknell (supra) at 225; Dunstan v Simmie & Co. Pty Ltd [1978] VicRp 62; [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," Dunstan (supra) at 670; Darrel lea (Vic.) Pty Ltd v Union Assurance Society of Austria Ltd [1969] VicRp 50; [1969] VR 401 at 408."*

11. *I am also guided by the decision in* ***Ali v. Radruita [2011] FJHC 302 (26 May 2011****. This was an application for leave to appeal an order made by the Master that the defendant should pay $10,000.00 as interim damages to the plaintiff within 28 days. Calanchini J (as His Lordship then was) said that "It is well settled that* ***only in exceptional circumstances will leave be***

granted to appeal an interlocutory order. *Leave will not normally be granted unless some injustice would be caused (page 4). Then at page 6 he said:*

> *"The exceptional circumstances that the Defendant is required to establish in the present application are that the* ***Master has acted upon a wrong principle, or has neglected to take into account something relevant, or has taken into account something irrelevant or that the amount awarded in so much out of all reasonable proportion to the facts proved in evidence****. In my judgment the Defendant must also establish that it is necessary in the interests of justice for the Master's award to be reviewed".*[1]

[10] Is the decision of the learned Master clearly wrong? Is there sufficient doubt with respect to the learned Master's decision and substantial injustice to the Applicant if leave is not granted, say, for example, where the Master has finally determined the applicant's substantive rights? The answer to these questions is no. Far from determining the substantive rights, the Master has determined, in my view correctly, that the factual issues must be determined at trial.

[11] The Applicant argues that her registered title defeats any claim the Respondent may have, and that the absence of a written instrument recording the constructive trust is fatal. The Applicant relies on the High Court decision of *Radrodro v Church of Jesus Christ of Latter Day Saints* [2005] FJHC 694 (11 November 2005), as well as on provisions in the Land Transfer Act and the Indemnity Guarantee and Bailment Act, to support the argument that any agreement concerning land must be in writing..

[1] My emphasis.

[12] The Applicant's registered title does not, of itself, defeat a claim for an equitable interest. There is also the question of unjust enrichment which is pleaded by the Respondent. These matters must be allowed to go to trial.

[13] As for the *Radrodro* decision, I do not see how it applies to the present case. That matter involved a ludicrous claim by the plaintiff in that proceeding for $3 billion, arising from alleged inventions that had not allegedly been valued or protected. The learned Judge's decision in that case to strike out the claim was straightforward. That case does not address the proposition that a constructive trust involving land must be in writing.

[14] The Respondent, on the other hand, relies on the High Court decision of *Nair v Raman* [2012] FJHC 1019 (13 April 2012) as authority for the argument that a constructive trust may be inferred from the conduct of the parties. That was certainly the determination of the learned Judge in that case, where there was no written instrument recording a constructive trust.

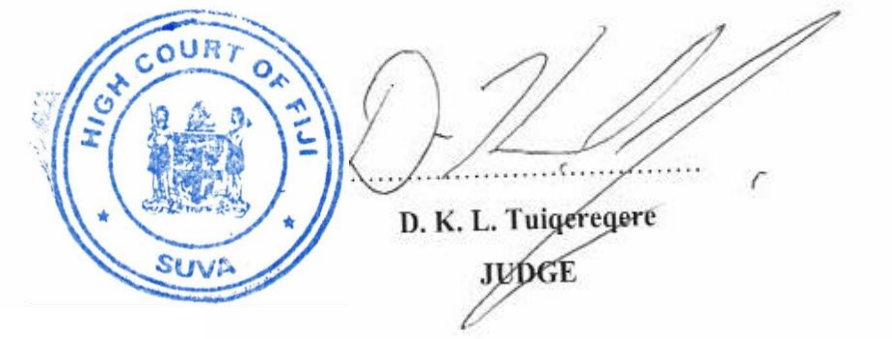
[15] The result is that the Applicant's application for leave to appeal fails. In light of this, there is no need to consider her application for a stay.

Orders

[16] My orders are as follows:

i. The Applicant's summons for leave to appeal dated 20 May 2025 is dismissed.

ii. The Respondent is entitled to costs summarily assessed in the amount of $750 to be paid by the Applicant within one month.



Solicitors:

Baadsha Law for the Plaintiff

M A Khan Esq. for the Defendant