

ARJUN v DIRECTOR OF LANDS (ABU0048 of 2011)

COURT OF APPEAL — CIVIL JURISDICTION

5 CALANCHINI AP, CHITRASIRI and MUTUNAYAGAM JJA

9, 30 November 2012

10 **Real property — leases — long-term tenancy — extension — crown rights —**
Director of Lands — executive permission — probate — executors — citizenship —
appellant was son of holder of a lease over Crown land — holder of lease died and
lease passed to appellant in will — appellant sought to extend lease upon its
expiration — Director of Lands refused application on basis that he was an
Australian citizen — trial judge upheld Director's position — appeal brought by
15 **appellant — whether lease passed to appellant in will — whether Director could**
impose additional requirements to stop lease from passing — Agricultural Landlord
and Tenant Act ss 4(2), 13(1) — Crown Land Act s 6 — Land Sales Act s 6(1) —
Trustee Act s 32

20 In November 1974, a lease agreement was entered into between the Director of Lands
and Padma Nathan who was the father of the appellant. By the said lease agreement the
land in dispute had been given on a lease to Padma Nathan for a period of 33 years and
9 months. Accordingly, the lease had expired on the 1st January 2007. Before the
expiration of the lease, the lessee Padma Nathan had died on 16th November 1995.
Consequent upon the death of Padma Nathan, probate was duly granted in the name of the
25 appellant for the purpose of administering the Estate of Padma Nathan. Being the Executor
of the deceased Padma Nathan, the appellant had paid the renewal fees for the said crown
lease. However, by that time, the Director of Lands was contemplating the issue of a new
lease in respect of the land subjected to the lease 6939, to a person named Savita Devi. The
appellant therefore filed this action moving the High Court to have the lease 6939
30 extended for another period of 20 years in accordance with s 13 of the Agricultural
Landlord and Tenant Act. At first instance, the trial Judge dismissed the application on the
basis of a preliminary issue, namely, that the appellant was an Australian citizen and so
required the permission of the Director of Lands to take on a crown lease. The appellant
then appealed.

35 **Held —**

(1) The appellant, being the duly appointed executor of the deceased lessee, came into
the shoes of the said lessee and then he became a tenant in respect of the land in dispute
for the purposes of the Agricultural Landlord and Tenant Act. It did not matter that he was
an Australian citizen.

40 (2) In those circumstances, the Director of Lands was duty bound to grant an
extension to the lease 6939 for another period of twenty years upon establishing the facts
according to law. Unfortunately, the learned trial judge had not addressed her mind to this
aspect and so had erred.

(3) Against this background, learned High Court Judge should not have dismissed the
action on the preliminary issue. Instead, she should have taken up both the preliminary
45 issue and the matters referred to in the originating summons together and allowed the
parties to present their respective cases according to law.

(4) In the circumstances the orders made by the learned High Court Judge were
erroneous. As such, the learned High Court Judge was to take up all the matters contained
in the originating summons as well as in the amended summons together, since issues
50 involving two Enactments were before the Court simultaneously.

Appeal allowed.

Cases referred to

Gonzalez v Akhtar [Civil Appeal CBV0001 Of 2002]; *Hunter v Appgar* [1989] 35 FLR 180; *Ministry of Lands and Ministry of Lands and Mineral Resources v Rafigan Bi et al* Judicial Review No. HBJ 01 of 2007; *Narayan v Narayan* [Civil Appeal ABU 0037 Of 2010], cited.

5 *N. Khan* for the Appellant.

R. Green for the Respondent.

Calanchini AP. For the reasons given by Chitrasiri JA, I would allow the appeal and I agree with his proposed orders.

10 [1] **Chitrasiri JA.** The Appellant namely Arjun who is the Plaintiff in the original action bearing number HBC 207/2010, filed a notice of appeal in this matter containing nine grounds of appeal. In that notice of appeal, he sought to set aside the judgment dated 21st June 2011 delivered by the learned High Court Judge sitting at the Lautoka High Court.

15 [2] Learned High Court Judge by her judgment dated 26.06.2011 dismissed the originating summons filed by the Appellant with costs amounting to \$775.00. This decision was made consequent upon an application made in the amended summons dated 11th May 2011 filed by the Respondent namely the Director of
20 Lands who is the Defendant in the original action.

[3] In the said amended summons, Respondent raised a preliminary issue and moved Court to determine whether the Plaintiff Arjun being an Australian citizen requires the consent of the Minister of Lands pursuant to s 6(1) of the Land Sales Act (Cap 137) for him to take on a Crown Lease. Having allowed the parties to
25 make submissions on the preliminary issue, learned High Court Judge decided the same in favour of the Respondent and made order dismissing the Plaintiff's originating summons.

[4] The issue raised in this appeal is whether it was lawful to dispose the matter finally on the preliminary issue. In other words the appellant's desire is to have
30 the matter looked into by the Court, after allowing the parties to present their respective cases. Then the issue before this Court is whether it is correct to conclude the substantive matter referred to in the originating summons filed by the appellant upon the determination of the preliminary issue.

[5] At this stage it is pertinent to refer to the grounds of appeal in order to
35 decide the aforesaid question of law. I reproduce herein below those grounds of appeal as drafted by the Counsel.

1. The Learned Judge erred in law and in fact in finding that the other beneficiaries of the estate of Padma Nathan sold their beneficial interest to the Appellant pursuant to sale and purchase agreement in 2002, in that: -

40 *(i) There is no sale and purchase agreement between the other beneficiaries of Estate of Padma Nathan and the Appellant;*

(ii) The Deed of Renunciation signed by the other beneficiaries in favour of the Appellant has not been consented to by the Director of Lands and is therefore void and unenforceable;

45 *(iii) The Deed of Renunciation has not been registered against the lease and cannot be so;*

(iv) The Court did not hear any evidence on the issue nor were parties asked to make any submissions on the issue; and registered till such time as the lease is extended;

(v) Therefore the status quo of the Estate of Padma Nathan remains;

50 *2. The Learned Judge erred in law and in fact in finding that the Appellant required Ministerial Consent under s 6(1) of the Land Sales Act for extension of Crown Lease number 6939, for reasons that;*

(i) *The Appellant has applied for an extension of crown lease number 6939 in his capacity as Administrator and trustee of the Estate of Padma Nathan and not in his own right; and*

(ii) *The provisions of s 6 of Crown Land Act applies to the purchaser; or the taking on of a lease and not to the extension of an existing lease.*

5 3. *The Learned Trial Judge erred in law and in fact in finding that Crown Lease number 6939 have reverted back to the state, the misapplying the case of Ministry of Lands and Ministry of Lands and Mineral Resources v Rafigan Bi et al Judicial Review No. HBJ 01 of 2007 wherein the Respondent were not entitled to any further Statutory extension of 20 years.*

10 4. *The Learned Judge erred in law and in fact in finding that an application for extension needs to be made prior to expiry of the lease.*

ALTERNATIVELY

The Respondent's by accepting fees for renewal of the Crown Lease have waived their right to insist that an application for renewal ought to be made prior to the expiry of the Lease.

15 5. *The Learned Judge erred in law and in fact in finding that the Appellant made the application for extension in his own capacity, in light of the evidence that the Estate has not been wound-up.*

6. *The Learned Judge failed to consider the duties under the Trustees Act which empowers the Appellant to apply for extension of the Crown Lease.*

20 7. *The Learned Judge erred in law and in fact in considering the substantive matter before her, for reasons that:*

(i) *The only application before her was a Summons under order 33 rule 3, for determination on a preliminary issue being s 6(1) of the Land Sales Act (Cap 137).*

25 (ii) *The submissions by Counsel for both parties were restricted to these issues. No submissions were made on the provisions of Crown Lands Act, Agricultural Landlord and Tenant act or the jurisdiction of the Court; and*

(iii) *A decision on the substantive matter could not have been made on the hearing of a preliminary issue.*

30 8. *The Learned Judge erred in law and in fact in finding that the High Court did not have jurisdiction to hear the matter.*

9. *The Appellant will seek leave to amend its Grounds of Appeal (if necessary) upon receipt of His Lordships written records.*

[6] In the appeal ground 7, it is stated that the preliminary issue is far distinct from the main issue raised in the originating summons. It is the main argument advanced by the appellant. The grounds 1 – 6 have been framed to support the contention put forward in the said ground 7. The appeal ground 8 had been advanced to establish whether or not the learned judge erred in law and in fact when she concluded that she did not have jurisdiction to hear the matters referred to in the originating summons, relying upon the decision made on the preliminary issue.

[7] The substantive issue raised in the originating summons filed by the Appellant is to have an extension of the Crown Lease bearing number 6939. The said lease agreement was entered into on 12th November 1974 between the Director of Lands and Padma Nathan who was the father of the Appellant. By the said lease agreement the land in dispute had been given on a lease to Padma Nathan for a period of 33 years and 9months. Accordingly, the lease had expired on the 1st January 2007. Before the expiration of the lease, the lessee Padma Nathan had died on 16th November 1995. Consequent upon the death of Padma Nathan, Probate was duly granted in the name of the Appellant for the purpose of administering the Estate of Padma Nathan. Being the Executor of the deceased Padma Nathan, Appellant had even paid the renewal fees for the said crown lease.

[8] However, according to the averments in the affidavit filed in support of the originating summons, it is stated that the Lands Department is contemplating to issue a new lease in respect of the land subjected to the lease 6939, to a person named Savita Devi. Therefore, the Appellant had filed this action moving the High Court to have the lease 6939 extended for another period of 20 years in accordance with s 13 of the Agricultural Landlord and Tenant Act [Cap. 270]

[9] The said s 13 (1) of the Agricultural Landlord and Tenant Act reads thus:

10 *“13 (1) Subject to the provisions of this Act relating to the termination of a contract of tenancy, a tenant holding under a contract of tenancy created before or extended pursuant to the provisions of this Act in force before the commencement of the Agricultural Landlord and Tenant (Amendment) Act, 1976, shall be entitled to be granted a single extension (or a further extension, as the case may be) of his contract of tenancy for a period of twenty years, unless –*

15 *(a) During the term of such contract the tenant has failed to cultivate the land in a manner consistent with the practice of good husbandry; or*

(b) The contract of tenancy was created before the commencement of this Act and has at the commencement of the Agricultural Landlord and Tenant (Amendment) Act, 1976 an unexpired term of more than thirty years:

20 *Provided that, notwithstanding the provisions of s 14, a premium equivalent to one year’s rent shall be payable in full in advance on the first day of the first year and of the eleventh year of such extension (Substituted by 35 of 1976, s.8)”*

[10] In terms of the above s 13(1) of the Agricultural Landlord and Tenant Act, a tenant to an existing tenancy is entitled to have an extension of the contract of tenancy for another period of twenty years provided the matters referred to in subsections (a) and (b) in that section do not exist. The definition given in the Act to the word “tenant” is that;

30 *“a person lawfully holding land under a contract of tenancy and includes the personal representatives, executors, administrators, permitted assigns, committee in lunacy or trustee in bankruptcy of a tenant or any other person deriving title from or through a tenant”.*

The word “tenancy” found in the Agricultural Landlord and Tenant Act includes a “lease”.

35 Therefore, a “tenant” would mean an executor of a “lessee” as well, as far as the Agricultural Landlord and Tenant Act is concerned. In the circumstances, plain reading of the section indicate that the appellant being the executor of the deceased Padma Nathan is entitled to have the benefits of a tenant referred to in s 13(1) of the Agricultural Landlord and Tenant Act.

[11] Accordingly, the Appellant being the duly appointed executor of the deceased lessee comes into the shoes of the said lessee and then he becomes a tenant in respect of the land in dispute for the purposes of Agricultural Landlord and Tenant Act. In the circumstances, the Respondent namely the Director of Lands is duty bound to grant an extension to the lease 6939 for another period of twenty years upon establishing the facts according to law. Unfortunately, the learned trial judge has not addressed her mind to this aspect.

45 [12] Moreover, in the affidavit of the appellant filed in support of the originating summons, it is mentioned that he had paid the renewal fees in respect of the said Crown Lease 6939. The document marked A7, filed as part and parcel of the affidavit is the receipt to establish the payment of renewal fees. Effect of the law in such a situation is found in s 4 (2) of the Agricultural Landlord and Tenant Act. It reads thus:

“any payment in money to a landlord by a person occupying any of the land of such landlord is proved, such payment shall in the absence of proof to the contrary, be presumed to be rent”.

5 Therefore, it is clear that the Appellant being the executor of the deceased lessee has established that he has paid rent in respect of this land to cover a future period in the capacity of the lessee of the Crown Lease No. 6939.

[13] Acceptance of such a payment of rent by the Director of lands may amount to considering the appellant as the lessee. In that event, the respondent is estopped from refusing to grant the extension of the lease sought by the appellant. The decision to dismiss the action on the preliminary issue by the learned High Court Judge had prevented the appellant presenting this fact of payment of rent before the High Court.

[14] Furthermore, the law requires the executors to take all endeavours in the best interest of the beneficiaries in administering an Estate of a deceased person. Section 32 of the Trustee Act (Cap 65) imposes a duty on a trustee of any lease in respect of a leasehold land that is renewable, to obtain a renewed lease and to do such other acts, as required. Failure to do so may lead others to have recourse to the remedial measures stipulated in the said Trustee Act that may cause detriment to an executor. In this instance too, the Appellant being the executor of the estate of Padma Nathan becomes a trustee of the property belonging to the Estate of the deceased. In the circumstances, the Appellant may be subjected to the actions detrimental to him in the event he does not take every endeavour to obtain the lease 6939 extended. The Appellant had lost the opportunity of presenting this matter as well, before the High Court since the case was decided finally upon the determination of the preliminary issue.

[15] The discussion referred to above relates to the matters contained in the affidavit filed by the Appellant in support of the originating summons. Admittedly those had not been adverted to by the learned High Court Judge. Hence, it may amount to a violation of Natural Justice as well. Therefore, it is necessary for this Court to make an appropriate order in order to prevent any miscarriage of justice being caused to the appellant for not allowing him the opportunity of presenting his case before Court.

[16] Against this background, learned High Court Judge should not have dismissed the action on the preliminary issue. Instead, she should have taken up both the preliminary issue and the matters referred to in the originating summons together and allowed the parties to present their respective cases according to law. Therefore, as stated in the appeal ground 7, it is clear that the question raised by the preliminary issue is far distinct from the matters raised in the originating summons.

[17] Having considered the matters that the learned High Court Judge should have looked into, I will now consider the matters pertaining to the preliminary issue which led to the dismissal of the action. The said preliminary issue was raised by the amended summons dated 11th May 2011 filed by the Solicitor for the Respondent. However no affidavit had been filed in support of the said amended summons. It may be due to the fact that the preliminary issue raised is basically on a question of law. Be that as it may, the issue brought forward in the amended summons is whether the Appellant, being an Australian citizen obtained the consent of the Minister for Lands under s 6 (1) of the Land Sales Act (Cap137) in order to take on a Crown lease.

50 [18] The said s 6(1) of the Land Sales Act stipulates:

“No non-resident or any person acting as his agent shall without the prior consent in writing of the Minister responsible for land matters make any contract to purchase or to take on lease any land:

5 *Provided that nothing contained in this subsection shall operate to require such consent or prevent a non-resident from making any such contract if the land together with any other land in Fiji of such non-resident does not exceed in the aggregate an area of one acre”.*

Relying upon the above s 6(1), the learned High Court Judge has decided the issue in favour of the respondent and held that the appellant cannot obtain a lease as he is a non-resident of Fiji. This decision of the learned High Court Judge was on the basis that the renewal application by the Appellant to have the lease renewed was in his personal capacity and not as the executor of the Estate belonging to the deceased Padma Nathan. This is evident by paragraph [22] of the impugned judgment. Relevant sentence in the paragraph 22 of the judgment is reproduced herein below.

15 *“I also determine that the application of the plaintiff for an extension was made in the personal capacity, for his own personal gain and not as the executor and the trustee.”*

However, the first paragraph of the affidavit dated 12th October 2010 deposed to by the appellant shows that he is making the application as the sole executor and trustee of the estate of his late father. Therefore it is incorrect to decide that the application of the Appellant was made in his personal capacity.

20 [19] There is one other matter which made the learned High Court Judge to arrive at the conclusion that the application was made in the personal capacity of the appellant. It is the execution of the documents annexed as part and parcel of the affidavit, filed in support of the originating summons. Those documents were marked as A4, A5 and A6. By executing those documents the other heirs of the deceased Padma Nathan had surrendered their rights in relation to the land in dispute in favour of the Appellant. This may have influenced the learned trial Judge to assume that the appellant has become the sole proprietor of the land concerned.

30 [20] When a transfer of title of a leasehold land is to be effected, it is necessary to have the consent of the Minister in charge of the subject obtained under s 6 (1) of the Land Sales Act (Cap137) before such a transaction is effected. No such consent had been obtained prior to the said documents A4-A6 were executed. Therefore, no right, title or interest would pass to the Appellant by the execution of those documents. Accordingly, it is incorrect to decide that the application of the appellant was in his personal capacity depending on the basis that the appellant has acquired all the rights to the land consequent upon the execution of the said documents marked A4, A5 and A6.

40 [21] In the circumstances, it is wrong on the part of the learned High Court Judge to have dismissed the action even on the preliminary issue. As I have mentioned herein before the application by the Appellant was under the Agricultural Landlord and Tenant Act. It was filed by the appellant in the capacity of the executor of the deceased Padma Nathan. Hence, s 6 (1) of the Land Sales Act with the relevant authorities such as *Hunter v Apgar* [1989] 35 FLR 180
45 *Gonzalez v Akhtar* [Civil Appeal CBV0001 Of 2002] *Narayan v Narayan* [Civil Appeal ABU 0037 Of 2010] should have been considered along with the provisions contained in the Agricultural Landlord and Tenant Act and it should not have been in isolation of each other. More importantly, it is the duty of the Court to look at the provisions of both the Enactments namely the Land Sales Act
50 and the Agricultural Landlord and Tenant Act in determining the issue of extending the lease particularly because the appellant is a non-resident of Fiji.

Therefore, it is incorrect to dismiss the action merely looking at the preliminary issue based on the Land Sales Act. In the circumstances the orders made by the learned High Court Judge are erroneous. Therefore I am of the view that the learned High Court Judge should take up all the matters contained in the

5 originating summons as well as in the amended summons together, since issues involving two Enactments are before Court simultaneously. Particularly, it is the duty of the Court to see whether the provisions contained in those two Enactments are over lapping with each other or whether those two stand on their own.

10 [22] I will now consider the awarding of costs of this appeal. It is correct that the matter came to an end due to the application made in the amended summons filed by the Respondent. Therefore, if not for this appeal filed by the appellant, his claim in the capacity of the executor would have come to an end due to the acts of the respondent.

15 [23] However, it must be noted that no relief had been sought by the Respondent in the amended summons. There was no affidavit filed in support of the amended summons in the relief sought by the respondent. In such a situation learned High Court Judge should have made an appropriate order without dismissing the action. She, without considering those matters had decided to

20 dismiss the action on the preliminary issue. Hence, the High Court also is to be blamed partly for dismissing the action preventing the appellant to present his case before the High Court. Having considered those matters, I do not wish to make an order as to the costs of this appeal.

25 **Mutunayagam JA.** I agree with the reasoning and the findings of Chitrasiri JA.

Orders of Court

1. *Both Orders 1 & 2 dated 21.6.2011 of the Learned High Court Judge are set aside.*
2. *The application made by the Respondent by the Amended summons dated 11th May 2011 should be considered together with the matters raised in the originating summons.*
3. *Learned High Court Judge is directed to take up the matter afresh.*
4. *There will be no costs for this Appeal.*

Appeal allowed.

Alex de Costa
Solicitor