

**PIO NAKESU v WAISEA LAKOINIUSILADI and MELIKI CIBA
(HBC0113 of 2009S)**

HIGH COURT — CIVIL JURISDICTION

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CALANCHINI JA

27 January 2012

10 **Practice and procedure — judgments and orders — application for extension of time to appeal — ex-parte order — what is proper course of action — matter taken over by another judicial officer — High Court Rules O 1 r 2, O 32 r 6, O 59 rr 2(k), 2(l), 9, 10 — Land Transfer Act s 169.**

15 The defendants applied for an extension of time to appeal against an ex parte order made in their absence.

Held –

(1) Where an order is made by a Master against a party in his absence, the proper course of action is for that party to apply to have the order set aside. The application should be made to the Master. The appeal procedure is not appropriate in the case of orders made ex parte.

20 (2) The application by the defendants seeking an extension of time to appeal the Master’s order was misplaced.

(3) There are many circumstances (such as retirement, resignation, removal, recusal, illness or death) that might result in a part heard matter before a judicial officer being taken over by another judicial officer. There is no indication that any one of those circumstances existed in this case. The Master was properly seised of the proceedings and the matter was part heard. Counsel for the plaintiff should have indicated that this was the case.

25 Defendants’ application is dismissed.

D. Toganivalu for the Plaintiff.

30 *T. Rigsby* for the Defendants.

Calanchini JA. This is an application by summons filed on 12 August 2011 on behalf of the Defendants to enlarge the time period for filing and serving a notice of appeal pursuant to O 59 r 10 of the High Court Rules.

35 The Defendants seek to appeal the decision of Master Amaratunga dated 19 November 2010. Pursuant to O 59 r 9 an appeal from a final order of the Master is to be filed and served within 21 days from the date of the delivery of the order. The present application was made approximately 10 months after the date on which the Master made his final order.

40 The application was supported by an affidavit sworn by Meliki Ciba on 12 August 2011. Annexed to the affidavit and marked “MC2” is a copy of the sealed order of the Master made on 19 November 2010. The preamble to the Order states that there was no appearance by the Defendants on that day.

45 It appears from the file note made by the Master concerning the proceedings before him on that day that Counsel for the Plaintiff made oral submissions and had filed written submissions.

50 Furthermore, there is a file note to the effect that when the matter was called for mention before Master Amaratunga on 12 November 2010 there was, once again, no appearance by the Defendants. On that day the Plaintiff was directed to file a supplementary affidavit. There is nothing in the file to indicate that the Defendants were aware that the proceedings would be finally disposed of on 19 November 2010.

The Master's Order made on 19 November 2010 was made in the absence of the Defendants and was therefore an order made *ex parte*. Where an order is made by the Master against a party in his absence the proper course of action is for that party to apply to have the order set aside. The application should be made to the Master. The appeal procedure is not appropriate in the case of orders made *ex parte*.

The Plaintiff's claim in this action was for immediate vacant possession of land. The proceedings were commenced by way of summons under s 169 of the Land Transfer Act Cap 131. Such applications are made before a judge in chambers. Pursuant to O 59 r 2(k) and to a subsequent direction given by the Honourable Chief Justice under O 59 r 2 (l) the Master has jurisdiction in respect of contested applications under s 169 of the Land Transfer Act. Pursuant to O 32 r 6 the Court may set aside any order made *ex parte* in chambers. Order 1 r 2 defines the Court as meaning the High Court, the judges, the Masters and the Registrar.

As a result the application by the Defendants seeking an extension of time to appeal the Master's order dated 19 November 2010 is misplaced and is therefore dismissed. That would be sufficient to dispose of the application before me. However it is necessary to make some additional observations about this matter.

The proceedings commenced before Master Tuilevuka on 4 June 2010. The learned Master made orders on that day which resulted in the Plaintiff filing a fresh summons on 8 June 2010. An affidavit sworn by Pio Nakesu on 16 March 2009 supporting the application was refilled on 8 June 2009. An answering affidavit sworn by Meliki Ciba on 12 July 2010 opposing the application was filed on 19 July 2010.

The hearing of the s 169 application commenced before Master Tuilevuka on 9 September 2010. The Plaintiff was represented by Counsel and the Defendants appeared in person. It is clear that the Plaintiff's claim was opposed by the Defendants. The Master heard evidence and made some brief notes. The proceedings were adjourned part heard to 21 September 2010 for a site visit. Master Tuilevuka attended for the site visit on that day. Counsel for the Plaintiff was present however the Defendants were not present. On that day the Master adjourned part heard the proceedings to 12 November 2010 in Suva for mention only.

There is no indication on the file that the Defendants were made aware of the adjourned date.

More importantly and somewhat surprisingly there is no indication as to the reason why Master Amaratunga became seised of the proceedings which had hitherto been conducted before Master Tuilevuka. In the normal course of events, either Master Tuilevuka should have come to Suva on 12 November 2010 or the parties should have been directed to Lautoka to appear before the Master. In the event that Master Tuilevuka could not deal with the matter on 12 November 2010, the date should have been vacated and the matter refiled for mention before Master Tuilevuka on a date and at a venue suitable to the Master and the parties.

There are many circumstances (such as retirement, resignation, removal, recusal, illness or death) that may result in a part heard matter before a judicial officer being taken over by another judicial officer. There is no indication on the file that any one of those circumstances existed in this case. This was a matter in which Master Tuilevuka was properly seised of the proceedings and was part heard. When Counsel for the Plaintiff appeared before Master Amaratunga on 12

and 19 November 2010, in the absence of the Defendants, he should have indicated that this action was part heard before Master Tuilevuka. Unfortunately there is no indication on the file as to what oral submissions were made before the Master on those days.

- 5 For all of the above reasons, the Defendants' application is dismissed and there is no order as to costs.

Application dismissed.

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