

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Case No.: HBC 43 of 2017

BETWEEN : **B. D. LAKSHMAN & SONS PROPERTIES LIMITED** a limited liability company having its registered office at Deuba, Fiji

PLAINTIFF/RESPONDENT

AND : **ABRAHAM MORELL** of Navua

DEFENDANT/APPELLANT

Counsel : **Ms. Chou N. for the Plaintiff/Respondent**
Mr. Chambers K. for the Defendant/Appellant
Date of Hearing : **5th February, 2018**
Date of Judgment : **29th March, 2018**

JUDGMENT

INTRODUCTION

1. This is an application inter alia for extension of time to appeal against the Master's order of 19th July, 2018. The action is filed by the Respondent-Plaintiff (the Plaintiff) seeking eviction of the Applicant-Defendant (Defendant) in terms of Section 169 of the Land Transfer Act 1971. The land against which eviction order was sought is described in CI 2495, in terms of Originating Summons filed by the Plaintiff on 16th February, 2017. The Defendant appeared upon the receipt of the summons through his solicitor on 30th March, 2017 and without filing any affidavit in opposition on 19th July, 2017 entered in to a consent judgment. Having consented for eviction the same solicitor had file present application on 4th September, 2017 seeking extension of time to appeal against the said consent orders of the Master made on 19th July, 2017. There is no allegation of mistake, duress, misrepresentation, fraud or illegality alleged in affidavit in support of the summons.

ANALYSIS

2. The consent orders of the Master delivered on 19th July, 2017 state as follow;

'Upon hearing Mr. Devnesh Sharma Counsel for the Plaintiff and Mr. Tevita Bukarau of Counsel for the Defendant

It is this day ordered by consent as follows that

1. *The Defendant deliver immediate vacant possession of that part of the Plaintiff's property currently occupied him and his family as being part of the land comprised and described in Certificate of Title Register Volume 25, Folio 2495 known as "Lageri (part of) and "Navakarako" situated at Waiyanitu Road in Waiyanitu in the District of Navua and having an area of one hundred and twenty one acres.*
2. *An injunction order granted restraining the Defendant/or their servant and /or agents from taking or removing any soil or gravel from and /or over the said property.*

3. The above order was sealed on 24th July, 2017.

4. The solicitor who appeared for the Defendant on 19th July, 2017 and had consented to the orders filed the *inter partes* summons seeking following orders on 4th September, 2017

1. *An order to enlarge the time to appeal of the Master's Orders made on 19th July 2017 and sealed before this Honourable Court on 26 July, 2017.*
2. *An order to grant a stay and or halt the continuance of execution to the present proceedings by the Plaintiff and or their agents pending the hearing of this appeal.*
4. *An order that the proceedings as filed and carried on is an abuse of this Court's process.*
5. *An order that the s169 proceedings in HBC 43.44 and 45 of 2017 be consolidated with the writ in Tomu Mari v BD Lakshman & Sons Ltd Civil Action HBC 219 of 2017.*

The present application is for extension of time for appeal against the orders of the Master made on 19th July, 2017.

6. The above summon was purportedly made in terms of Order 59 rule 10(1) and (2) and Order 59 rule 16(1) and Order 4 rule 2 of the High Court Rules of 1988.
7. I said, that the summons was purportedly made, as there is no provision in the High Court Rules of 1988 that can support the orders sought by the Defendant in this action.
8. This matter had concluded with the consent orders entered by the Master and it cannot be reopened in the same action, by way of an appeal.
9. Both parties filed written submissions, but none had addressed the vital issue whether a party can appeal against a consent order made by the Master.
10. At the hearing none of the parties submitted any provision of law or case law against or in support of the said vital issue.
11. In the written submission filed by the Defendant as well as at the oral hearing the counsel referred to Court of Appeal decision of McGoon v Ali [2015] FJCA 31; ABU16.2007 (27 February 2015) (unreported)(Per Calanchini P). This was not an appeal against a consent order, but an appeal against a separate action filed by the claimant regarding an agreement entered with the assistance of the solicitors that resulted a consent orders. So this action has no application to the present summons, seeking enlargement of time for appeal
12. Orders 3 and 4 of the summons can be struck off in limine as there are no provisions in law to grant such relief after conclusion of an action by consent orders. Such orders cannot be granted even on an appeal.
13. Order 1 and 2 of the Summons filed on 4th September, 2007 depend on whether a party to a consent judgment can appeal against the same. So I will deal with that issue first.
14. I have not been pointed any High Court Rule that allows a party to a consent judgment to appeal against the same in the same action.

15. **Ram v Martinez** [2004] FJHC 388; HBC0168.2000L (11 March 2004) it was held,
“These proceedings were at an end when the terms of settlement were executed and filed. That no order had been made by the court is of no effect. In Green v Rozen & Ors [1955] 2 All ER p.797 and at page 801, Slade J. said and I quote.

“I arrive at the conclusion that in these circumstances the new agreement between the parties to the action supersedes the original cause of action altogether, that the court has no further jurisdiction in respect of the original cause of action which has been superseded by the new agreement, and that, if the terms of the new agreement are not complied with, then the injured party must seek his remedy on the new agreement.”

The court therefore had no jurisdiction to grant the orders that it did on 1 October 2003.

The only available action for the plaintiff is to bring a fresh action. In **Mohammed Rasul v Hazara Singh** 8 FLR 140 at p. 144, Hammett P.J. said and I quote:-

“In my opinion, once the parties to a dispute have joined issue in litigation and have later compromised their action and filed in court the terms upon which the action has been settled and the plaintiff has discontinued the action as was done in this case, the same issue cannot be made the subject of a fresh action until the compromise in the previous action has been set aside in an action brought for that express purpose based upon grounds of some considerable merit. To hold otherwise would, in my view, be to deprive the parties to a compromise of that sense of finality upon which both the parties to any compromise are entitled to rely and base their future conduct.”

Counsel for the plaintiff/respondent submitted as there were alleged breaches of the Legal Practitioners Act the terms of settlement are void and of no effect.

I do not accept this submission. Any alleged breach of the Legal Practitioners Act is a separate and independent matter which does not effect this action which had come to an end when the terms of settlement were executed.”

16. **ROFA Sport Management AG and another v DHL International (UK) Ltd and another** [1989] 2 All ER 743 applied **Green v Rozen** [1955] 2 All ER 797. [1955] 1 WLR 741.

17. In the light of the said authorities there is no right of appeal against a consent order entered by the Master on 18th July, 2017. (See Anisworth v Wilding [1896] 1 Ch 673 Dietz v Lenning Chemicals [1969] 1 AC 170, Harris v Caladine (1991) 172 CL.R 84; [1991] HCA9 Per Brennan J).
18. When there is no appeal against an order, there cannot be extension of time for appeal. So the Order 1 of the Summons filed by the Defendant needs to be struck off in limine.
19. Order 2 of the Summons depend on Order 1 and since order 1 is struck off the order 2 cannot stand on its own and needs to be struck off.

FINAL ORDER

- a. The summons filed by the Defendant on 4.9.2017 is struck off.
- b. No costs.

Dated at Suva this 29th day of March, 2018



[Signature]
Justice Deepthi Amaratunga
High Court, Suva