

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action no.: HBC No. 303 of 2012

BETWEEN: **NASINU LAND PURCHASE AND HOUSING CO-OPERATIVE SOCIETY LIMITED** a co-operative society duly incorporated pursuant to the Co-operative Societies Ordinance Cap 219 and having its principal place of business at 68 Suva Street, Suva.

PLAINTIFF

AND: **SHYAM NARAYAN** of Certificate of Title No. 3213 being Lot 1 on Deposit Plan No. 3130 Stage 9, Phase 1.

FIRST DEFENDANT

TEVITA RAKITU TURAGA of Certificate of Title No. 3213 being Lot 1 on Deposit Plan No. 3130 Stage 9, Phase 1.

SECOND DEFENDANT

SUKULU SENIROSI of Certificate of Title No. 3213 being Lot 1 on Deposit Plan No. 3130 Stage 9, Phase 1.

THIRD DEFENDANT

KOROVOU VAKALOLOMA of Certificate of Title No. 3213 being Lot 1 on Deposit Plan No. 3130 Stage 9, Phase 1.

FOURTH DEFENDANT

ULAISI ULUITAVUKI of Certificate of Title No. 3213 being Lot 1 on Deposit Plan No. 3130 Stage 9, Phase 1.

FIFTH DEFENDANT

NOA VAKAMOCE of Certificate of Title No. 3213 being Lot 1 on Deposit Plan No. 3130 Stage 9, Phase 1.

SIXTH DEFENDANT

ISOA VUKI of Certificate of Title No. 3213 being Lot 1 on Deposit Plan No. 3130 Stage 9, Phase 1.

SEVENTH DEFENDANT

SEREMAIA BALEI of Certificate of Title No. 3213 being Lot 1 on Deposit Plan No. 3130 Stage 9, Phase 1.

EIGHTH DEFENDANT

NAIBUKA RAQILAI SO of Certificate of Title No. 3213 being Lot 1 on Deposit Plan No. 3130 Stage 9, Phase 1.

NINTH DEFENDANT

RINADINA TAUKEI of Certificate of Title No. 3213 being Lot 1 on Deposit Plan No. 3130 Stage 9, Phase 1.

TENTH DEFENDANT

JOSEFA MOCEITAI of Certificate of Title No. 3213 being Lot 1 on Deposit Plan No. 3130 Stage 9, Phase 1.

ELEVENTH DEFENDANT

SAINIVALATI NABOGIKOLO of Certificate of Title No. 3213 being Lot 1 on Deposit Plan No. 3130 Stage 9, Phase 1.

TWELFTH DEFENDANT

NAIVITALAI RIDOI of Certificate of Title No. 3213 being Lot 1 on Deposit Plan No. 3130 Stage 9, Phase 1.

THIRTEENTH DEFENDANT

TOMASI WITI of Certificate of Title No. 3213 being Lot 1 on Deposit Plan No. 3130 Stage 9, Phase 1.

FOURTEENTH DEFENDANT

ILIAKIMI TABUA of Certificate of Title No. 3213 being Lot 1 on Deposit Plan No. 3130 Stage 9, Phase 1.

FIFTEENTH DEFENDANT

MELAYA BOLATOLU of Certificate of Title No. 3213 being Lot 1 on Deposit Plan No. 3130 Stage 9, Phase 1.

SIXTEENTH DEFENDANT

MEREANI VULIMAIVAVALAGI of Certificate of Title No. 3213 being Lot 1 on Deposit Plan No. 3130 Stage 9, Phase 1.

SEVENTEENTH DEFENDANT

TIKOYALI SUVA of Certificate of Title No. 3213 being Lot 1 on Deposit Plan No. 3130 Stage 9, Phase 1.

EIGHTEENTH DEFENDANT

JOELI QALOBULA of Certificate of Title No. 3213 being Lot 1 on Deposit Plan No. 3130 Stage 9, Phase 1.

NINTEENTH DEFENDANT

IRIVI TALEBULA of Certificate of Title No. 3213 being Lot 1 on Deposit Plan No. 3130 Stage 9, Phase 1.

TWENTIETH DEFENDANT

JOELI KETE of Certificate of Title No. 3213 being Lot 1 on Deposit Plan No. 3130 Stage 9, Phase 1.

TWENTY FIRST DEFENDANT

BITOKA VULI of Certificate of Title No. 3213 being Lot 1 on Deposit Plan No. 3130 Stage 9, Phase 1.

TWENTY SECOND DEFENDANT

TEMO BOLATOLU of Certificate of Title No. 3213 being Lot 1 on Deposit Plan No. 3130 Stage 9, Phase 1.

TWENTY THIRD DEFENDANT

VILIAME UMA of Certificate of Title No. 3213 being Lot 1 on Deposit Plan No. 3130 Stage 9, Phase 1.

TWENTY FOURTH DEFENDANT

JOPE MOCEVAKACA of Certificate of Title No. 3213 being Lot 1 on Deposit Plan No. 3130 Stage 9, Phase 1.

TWENTY FIFTH DEFENDANT

VERENIKU BIU of Certificate of Title No. 3213 being Lot 1 on Deposit Plan No. 3130 Stage 9, Phase 1.

TWENTY SIXTH DEFENDANT

NASONI TAMANI of Certificate of Title No. 3213 being Lot 1 on Deposit Plan No. 3130 Stage 9, Phase 1.

TWENTY SEVENTH DEFENDANT

JONE KOMETE of Certificate of Title No. 3213 being Lot 1 on Deposit Plan No. 3130 Stage 9, Phase 1.

TWENTY EIGHTH DEFENDANT

JEREMAIA BALELALA of Certificate of Title No. 3213 being Lot 1 on Deposit Plan No. 3130 Stage 9, Phase 1.

TWENTY NINTH DEFENDANT

JONE WANISI of Certificate of Title No. 3213 being Lot 1 on Deposit Plan No. 3130 Stage 9, Phase 1.

THIRTIETH DEFENDANT

SAMUELA KOROI of Certificate of Title No. 3213 being Lot 1 on Deposit Plan No. 3130 Stage 9, Phase 1.

THIRTY FRIST DEFENDANT

YAUBALE KOROI of Certificate of Title No. 3213 being Lot 1 on Deposit Plan No. 3130 Stage 9, Phase 1.

THIRTY SECOND DEFENDANT

TEMO KOTOBALAVU of Certificate of Title No. 3213 being Lot 1 on Deposit Plan No. 3130 Stage 9, Phase 1.

THIRTY THIRD DEFENDANT

JONE NAIVOLASIGA of Certificate of Title No. 3213 being Lot 1 on Deposit Plan No. 3130 Stage 9, Phase 1.

THIRTY FOURTH DEFENDANT

ILISEVANI MEI of Certificate of Title No. 3213 being Lot 1 on Deposit Plan No. 3130 Stage 9, Phase 1.

THIRTY FIFTH DEFENDANT

IMERI SERU of Certificate of Title No. 3213 being Lot 1 on Deposit Plan No. 3130 Stage 9, Phase 1.

THIRTY SIXTH DEFENDANT

MERE KOROI of Certificate of Title No. 3213 being Lot 1 on Deposit Plan No. 3130 Stage 9, Phase 1.

THIRTY SEVENTH DEFENDANT

LEBA TURAGA of Certificate of Title No. 3213 being Lot 1 on Deposit Plan No. 3130 Stage 9, Phase 1.

THIRTY EIGHTH DEFENDANT

AMELIA TUISALA of Certificate of Title No. 3213 being Lot 1 on Deposit Plan No. 3130 Stage 9, Phase 1.

THIRTY NINTH DEFENDANT

ELENOA VATUNALIWALI of Certificate of Title No. 3213 being Lot 1 on Deposit Plan No. 3130 Stage 9, Phase 1.

FORTIETH DEFENDANT

TALEBULA DILAI of Certificate of Title No. 3213 being Lot 1 on Deposit Plan No. 3130 Stage 9, Phase 1.

FORTY FIRST DEFENDANT

SEREANA VUKIA of Certificate of Title No. 3213 being Lot 1 on Deposit Plan No. 3130 Stage 9, Phase 1.

FORTY SECOND DEFENDANT

VOSABECI KUKILI of Certificate of Title No. 3213 being Lot 1 on Deposit Plan No. 3130 Stage 9, Phase 1.

FORTY THIRD DEFENDANT

JULIE SENIROSI of Certificate of Title No. 3213 being Lot 1 on Deposit Plan No. 3130 Stage 9, Phase 1.

FORTY FOURTH DEFENDANT

SENIBUA SAUSAUWAI of Certificate of Title No. 3213 being Lot 1 on Deposit Plan No. 3130 Stage 9, Phase 1.

FORTY FIFTH DEFENDANT

LOSALINI RAIWALUI of Certificate of Title No. 3213 being Lot 1 on Deposit Plan No. 3130 Stage 9, Phase 1.

FORTY SIXTH DEFENDANT

ANA KUMETE of Certificate of Title No. 3213 being Lot 1 on Deposit Plan No. 3130 Stage 9, Phase 1.

FORTY SEVENTH DEFENDANT

KELERA KOROVAKI of Certificate of Title No. 3213 being Lot 1 on Deposit Plan No. 3130 Stage 9, Phase 1.

FORTY EIGHTH DEFENDANT

SEINI MELISA of Certificate of Title No. 3213 being Lot 1 on Deposit Plan No. 3130 Stage 9, Phase 1.

FORTY NINTH DEFENDANT

SAVU TAWAKE of Certificate of Title No. 3213 being Lot 1 on Deposit Plan No. 3130 Stage 9, Phase 1.

FIFTIETH DEFENDANT

AND: **THE OCCUPIERS** of Certificate of Title No. 3213 being Lot 1 on Deposit Plan No. 3130 Stage 9, Phase 1.

DEFENDANTS

Before: Hon. Mr. Justice Deepthi Amaratunga

Counsel: Ms. S. Devan for the Plaintiff
Ms. Raikaci N. for the Defendant

Date of Hearing: 19.03.2024

Date of Judgment: 25.03.2024

JUDGMENT

INTRODUCTION

- [1] This is a leave to appeal against Master’s interlocutory decision that dismissed the application for strike out of Plaintiffs action for eviction of Defendants. This action stated in 2012 by way of originating summons in terms of Order 113 of High Court Rules 1988. Defendants were not named and it was against ‘occupiers’ of the premises described in CT 3213 being Lot 1 on DP 3130 containing 326 acres and two Roods. After hearing of originating summons in terms of Order 113 of High Court Rules 1988 (HCR), Master had converted the action to a writ of summon. When such conversion happened the Defendants remained on record as “occupiers” without naming including the parties who had already filed affidavits in opposition.
- [2] Later writ of summons filed with named fifty Defendants and it is not clear as how this fifty Defendants were earmarked for eviction, from an area of 326 acres and two roods.
- [3] It is also noted some of them were already before the court when the originating summons was converted to writ of summons, but on 10.9.2020 present solicitors had filed Notice of Appointment for all the Defendants. Originating summons was filed for eviction from an area of 326 acres and two Roods, but by the time of institution of the action Plaintiff had made numerous partial transfers of CT 3213.

- [4] On 26.01.2021 present solicitors for the Defendant had filed a summons to strike out the action on the basis of Order 18 rule 18 (1) (a), (b) and (d) of HCR.
- [5] Master delivered Ruling on this summons 8.2.2024 dismissing the said summons and also making unless orders against all Defendants except first and twenty seventh Defendant by 22.2.2024 as the time for statement of defence was not filed.
- [6] This peremptory order was compiled by remaining Defendants(i.e all Defendants except first, second twenty seventh and thirty eighth Defendants, who will be called only as Defendants here after), but the solicitor for Defendants filed summons seeking leave to appeal against the Master's decision on the same day.
- [7] Plaintiff's former name Nasinu Land Purchase and Housing Co-operative Limited was the owner of CT 3213 as stated by Master in paragraph 16 of the decision, initially for 326 and two Roods. There was a chase at name and Master accordingly corrected Plaintiff's name.
- [8] There were numerous partial transfers on the said title and most of them are illegible on the annexed certificate of title produced to the court. It is obvious that Plaintiff cannot seek eviction from 326 areas and two roods which is entire area of land on CT 3213, as Plaintiff had already transferred parts of it over a long period of time.
- [9] In this action Plaintiff is seeking eviction of Defendants from part of said land referred as Phase 1 Stage 9. This area is known as "Kilikali Settlement" and according to Plaintiff this is an area within CT 3213. This is stated in the affidavit in opposition, to summons for Strike Out, and not stated earlier.
- [10] Plaintiff had failed to demarcate the area from which they seek to eviction called as "Killikali Settlement" without that there is real likelihood of persons who are outside the area from being made party to this action due to failure on the part of Plaintiff to identify the Land in this action.

[11] As there were numerous partial transfers from CT 3213 Plaintiff cannot seek eviction from CT 3213. Nor can it seek eviction in this action from Phase 1 stage 9 an area of that land known as "Burekalout" was a subject matter of another action. So from which part Plaintiff is seeking eviction is not clear and without identifying the area properly Plaintiff cannot seek eviction of Defendants from an undefined area from CT3213 as part of it were transferred to others.

[12] Plaintiff had failed to demarcate the land from which they are seeking eviction and it was loosely named as Stage 9 Phase 1 which admittedly was also a subject matter of HBC 266 of 2012. Since both actions were instituted in 2012 there cannot be two evictions in terms of order 113 of HCR, for the land stated.

[13] Leave to appeal against Master's decision is granted as there is no proper identification of land area from which Plaintiff seeks eviction. Master had not identified the land as pleaded. Master had relied on affidavit in opposition to strike out to identify the land as alleged by Plaintiff, not considered pleadings.

[14] Leave to Appeal is granted against Master's decision of 8.2.2024.

History of the Proceedings

[15] The following represents a brief chronology of the legal action thus far:

- i. On 01.11.12, the Plaintiff filed an Originating Summons seeking Orders for vacant possession of part of its land legally described as Lot 1, Deposit Plan No.3130 on Certificate of Title No.3213, Phase 1, Stage 9.
- ii. The action filed was an "occupiers" action since the Plaintiff did not know the names of the persons residing on its land.
- iii. On 30 July 2018 after having heard the matter, the then Master of the High Court declined to grant the order sought by the Plaintiff, instead he converted the Originating Summons into a writ action and further ordered for the action to be entered to trial.

- iv. Pursuant to Master's Ruling, the Plaintiff filed an Order 34 Summons seeking an order for the action to be entered for trial.
- v. However pursuant to the directions of the Court, the Plaintiff named fifty Defendants and again "unnamed occupiers".
- vi. On 7 .6. 2020, the Plaintiff filed a Writ of Summons and Statement of Claim seeking orders for eviction against 50 named Defendants and "unnamed occupiers".
- vii. On 11 .9. 2020, present solicitors filed an Appointment of Solicitors on behalf of all the Defendants.
- viii. On 27 .1. 2021, an application filed on behalf of all the Defendants seeking an order that the Statement of Claim be struck out in terms of Order 18 rule 18 (1)(a),(b) and (d) of HCR.
- ix. Master on 8.2. 2024 dismissed the Defendants application and ordered as follow,
 - i. "Defendants (sic) application dated 26 January 2021 is dismissed with costs to be in cause.
 - ii. Henceforth, the Plaintiff is to be named as Nasinu Land Purchase Housing Co-operative Limited formerly known as Nasinu Land Purchase and Housing Co-operative Society Limited.
 - iii. The First Defendant Shyam Narayan is removed as party to the proceedings.
 - iv. The writ is deemed to have expired against the Twenty Seventh Defendant-Nasoni Tamai pursuant to Oder 6 Rule 6 of the Rules.
 - v. All remaining Defendants are directed to file and serve the statement of defence by 12 noon on 23 February 2024.
 - vi. Should their statement of defence not be filed as ordered, the Plaintiff will be entitled to default judgment pursuant to Order 19 Rule 5(1) of the High Court Rules against the defaulting defendants.
 - vii. If the defence is filed and served as directed Plaintiff is to file and serve its reply to the defence by 12 noon on 01 March 2023"
- x. On 19.2.2024 Defendants filed summons seeking leave to appeal against Master's interlocutory order handed down on 8.2.2024.
- xi. On 19 .2. 2024, Defendants filed and served a Statement of Defence.
- xii. The Plaintiff filed and served its Reply to the Statement of Defence on 1 .3. 2024.

ANALYSIS

- [16] Leave to Appeal against Master's decision was made in terms of Order 59 Rule 8(2) of HCR, leave is required against an interlocutory decision. There is no dispute as to the decision of Master was interlocutory in terms of Court of Appeal decision of **Goundar –v- Minister for Health** (unrep ABU 75 of 2006; 9 July 2008)
- [17] In terms of Order 59 rule 11 of the HCR such application needs to be filed and served within 14 days. There is no issue as to filing of the application within the time period
- [18] In this action Defendants had complied with the orders of the Master as they were guillotine orders and due to difficulty in obtaining a stay of such orders instantly.
- [19] This application seeking leave to appeal was listed before me on 4.3.2024 and directions were given for parties to file affidavits and listed for hearing on 19.3.2024 considering the nature of the application and also that this action is already twelve years old.
- [20] It is rare and indeed exceptional to grant leave to appeal from an interlocutory decision of Master in an action that had delayed like this action. Yet the delay itself should not deny the proper exercise of discretion in leave to appeal from Master's interlocutory decision.
- [21] In **Niemann v. Electronic Industries Ltd** [1978] VicRp 44; [1978] V.R. 431 at page 441 where Supreme Court of Victoria (Full Court) held as follows:
".....leave should only be granted to appeal from an interlocutory judgment or order, in cases where substantial injustice is done by the judgment or order itself. If the order was correct then it follows that substantial injustice could not follow. If the order is seen to be clearly wrong, this is not alone sufficient. It must be shown, in addition, to affect a substantial injustice by its operation."

[22] So substantial injustice is required to grant leave. In this case substantial injustice will occur if Defendants are evicted from an area other than what Plaintiff is entitled to evict. For that what is the area Plaintiff seeks to evict should be clear to court at this juncture.

[23] The law on leave to appeal an interlocutory order was set out in **Bank of Hawaii v Reynolds** [1998] FJHC 226 by Pathik, J (as he was then). Referring to the case of **Ex Parte Bucknell** [1936] his lordship stated in the judgment that;

“At the same time, it must be remembered that the prima facie presumption is against appeals from interlocutory orders, and, therefore, an application for Leave to Appeal under s5 (1) (a) should not be granted as of course without consideration of the nature and its circumstances of the particular case. It would be unwise to attempt an exhaustive statement of the considerations which should be regarded as a jurisdiction for granting Leave to Appeal in the case of an interlocutory order, but it is desirable that, without doing this, an indication should be given of the matters which the court regards as relevant upon an application for leave to appeal from an interlocutory judgment”.

[24] Court of Appeal in **Shankar –v- FNPF Investments Ltd and Anr** [2017] FJCA 26; ABU 32 of 2016, 24 February 2017 at paragraph 16:

“The principles to be applied for granting leave to appeal an interlocutory decision have been considered by the Courts on numerous occasions. There is a general presumption against granting leave to appeal an interlocutory decision and that presumption is strengthened when the judgment or order does not either directly or indirectly finally determine any substantive right of either party. The interlocutory decision must not only be shown to be wrong it must also be shown that an injustice would flow if the impugned decision was allowed to stand. **(Nieman –v- Electronic Industries Ltd** [1978] VicRp 44; [1978] V.R. 431 and **Hussein –v- National Bank of Fiji** (1995) 41 Fiji L.R. 130.”

[25] So the overriding consideration is the success of the Appeal against Master’s decision and whether there is substantial injustice done by the said order. Defendants were not named in this action initially, as it was filed in terms of Order 113 of HCR, but the originating summons required identification of the proper area. Plaintiff filed another action HBC 266 of 2012 for eviction from same area, and an order was obtained in that case for eviction.

- [26] Defendants filed their application to strike out this action inter alia for failure on the part of Plaintiff to properly identify the land. This application was filed on 27.1.2021 nearly three years ago.
- [27] In the statement of claim Plaintiff must identify the area on which it seeks to evict occupants. In the statement of claim the is described as follows;
- “The Plaintiff is the registered owner of all that land comprised in Certificate of Title No 3213 being Lot 1 on deposited plan no 3130 which contains 326 acres and two roads [the land] , situated at Ratu Dovi Road, Nasinu.
- The Plaintiff is in the process of subdividing , developing and selling part of the land (referred to as phase 1, stage 9) comprised in Certificate of Title No 3213 which the Defendants or ‘occupiers’ are presently illegally occupying.”
- [28] Plaintiff in the affidavit in reply to strike out at paragraph 13(iv) stated;
- “The legal action filed in HBC 266 of 2012 related to another part of the land also comprised in Certificate of Title No 3213 and it also related to that part of the land referred to as “Stage 9 Phase 1” development and are is known as “Burekalou”. A Copy of the scheme plan pertaining to this part of land is annexed hereto marked “SN-4”.
- [29] Master’s Ruling on 30.7.2018 stated;
- “The current originating summons is now converted to a writ action and entered for a trail”
- [30] In the Originating Summons which was converted to writ of summons Plaintiff is seeking eviction in terms of Order 113 of HCR from CT 3213 being Lot 1 on DP 3130, Stage 9 Phase 1 in Republic of Fiji having an area of 326 acres 2 Roods on the ground’
- [31] Plaintiff is admitting that State 9 Phase 1 of CT 3213 was subject matter of an action in HBC 266 of 2012 which was already granted in favour of Plaintiff. So there is an issue as to proper identification of the area as stated in the statement of claim, and also abuse of process for eviction.

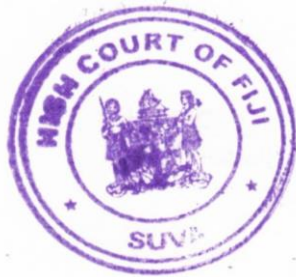
[32] From the above it is shown that Plaintiff who had sought eviction in terms of Order 113 sought eviction from 326 acres and 2 roods stated as stage 9 phase 1. Identification of area is fundamental as to the eviction in an action of this nature as Plaintiff had made numerous partial transfers of land, from CT 3213.

[33] In the circumstances Defendants cannot be located properly without identifying the area in the statement of claim. In the affidavit in support of the summons Defendants had stated this position and Master's decision had failed to identify the land described in statement of claim and or originating summons in terms of Order 113 of HCR which was converted to a writ of summons by Master on 30.7.2018.

[34] So leave is granted for Defendants in terms of order 59 rule 8 (2) of HCR. Defendants are required to file an appeal within seven days of granting leave to appeal in terms of order 59 rule g(b) of HCR.

FINAL ORDERS

- a. Leave granted for Defendant to appeal against Master's decision of 8.2.2024.
- b. No order as to costs considering circumstances of the case.




.....
Deepthi Amaratunga
Judge

At Suva this 25th day of March, 2024.

Solicitors:

Neel Shivam Lawyers
Ranovo and Raikaci Lawyers