

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU 7 OF 2014
(High Court No. HBC 94 of 2006)

BETWEEN : **HABIB BANK LIMITED**

Appellant

AND : **1. ALI'S CIVIL ENGINEERING**
2. VITIANA TIMBERS (FIJI) LTD
3. CHALLENGE ENGINEERING LTD
4. NATIONAL BANK OF FIJI
5. DIRECTOR OF LANDS & SURVEYOR GENERAL
6. REGISTRAR OF TITLES
7. ATTORNEY-GENERAL

Respondents

Coram : **Basnayake, JA**
Almeida Guneratne, JA
Jameel, JA

Counsel : **Ms S. Devan for Appellant**
Mr V. Prasad for 1st and 2nd Respondents
Mr D. Sharma for 3rd and 4th Respondents
Ms M. Motofaga for 5th, 6th and 7th Respondents

Date of Hearing : **10 September, 2018**

Date of Judgment : **5 October, 2018**

J U D G M E N T

Basnayake, JA

- [1] I agree with the reasons and conclusions arrived at by Almeida Guneratne, JA.

Almeida Guneratne, JA

Introduction

- [2] This is an appeal against a ‘Judgment on Admissions’ dated 11th March, 2013 of the High Court of Fiji at Suva. The matter involved the conduct of the parties *inter se* in relation to two mortgage registrations namely an initial one bearing No. 6993 and a subsequent one bearing no. 8465.

- [3] After examining the relative pleadings of the parties (at pages 466-541 of Volume 2 of the Record of the High Court – RHC), material on the application for judgment on admissions (pp. 34 – 372) of Volume 1 of the RHC) and submissions made by respective Counsel (pp. 373 – 446 of Volume 1 of the RHC), the learned High Court Judge, having made reference to several statutory provisions (in particular to Order 27 of the High Court Rules – the White Book), the Crown Lands Act (in particular to Section 13 of the said Act (Cap 132) and certain case law authorities (pp. 18-25 of the RHC), made his final Orders:

- “a. Judgment is entered for a declaration (that) the Mortgage registered as No. 8465 is *ab initio*, null and void.
- b. Judgment is entered for declaration that the purported Mortgage sale under the said Mortgage no. 8465 is void
...”

(at p.33 of the RHC)

- [4] I did not think it necessary to refer to the pleadings and the material on the application for “judgment on admissions” at this juncture in detail for the reason that the same shall be traversed when I deal with the learned Judge’s treatment and

analysis of the same and the said final Orders made by him, in the light of the grounds of appeal (at pp.1-4 of Volume 1 of the RHC) urged by the Appellant. Central to the said grounds (although there are as many as 18 grounds) was the Appellant's principal contention that, the 1st Respondent's (Original First plaintiff) claim against it (Original First defendant) was based on fraud. The learned Judge held that "*The act of fraud in this case cannot be determined by the facts admitted.*" (p.33 of the RHC).

- [5] At the hearing before this Court I posed the question to the 1st and 2nd Respondent's Counsel as well as to the Appellant's Counsel as to whether, assuming there were some admitted facts, whether those admitted facts *per se* could have grounded a '*judgment on admissions*' and if not, on the basis of Section 13 of the Crown Lands Act whether the learned Judge could have made the impugned final Orders, while not hesitating to add that in my view the other matters the learned Judge took into consideration in making those final orders were irrelevant.
- [6] I shall make reference to the responses of Counsel to that question in the ensuing determination of this appeal.

Determination of the Appeal

- [7] I shall begin by referring to the doctrine of 'Judgment on Admissions' which finds statutory expression in Order 27 of the High Court Rules 1988;

"27: Admission of fact. Such admission may be expressed or implied but they must be clear..."

- [8] As noted earlier, the matter involved two Mortgage registration deeds, initial one No. 6993 and a subsequent one No. 8465. In the background of the circumstances that the two came to be effected, the learned Judge first looked at the first Respondent's

Amended Statement of Claim and then looked at the Appellant's response thereto in its Statement of Defence. (vide: pages 12-18 of the RHC) to extract the admissions. These may be summarised with necessary modifications as follows:

re : Paragraph 14 of the Amended Statement of Claim

1. The initial Mortgage deed (No. 6993) was in the custody of the Appellant and the Registrar of Deeds.

re : Paragraph 28 of the Amended Statement of Claim

2. The lawyers who had lodged the said Mortgage on behalf of the Appellant had ceased to act for it at some later point of time.

re : Paragraph 29, 30 and 31 of the Amended Statement of Claim

3. These paragraphs are the ones that contained allegations of fraud (and/or forgery) against the Appellant and/or its agents (including its solicitors). While totally denying the allegations of fraud the Appellant in its response to the averments in the Amended Statement of Claim made the following admissions – viz:

(a) That, an addition was made to the description of the land in question as regards the estimated area (originally 2, 229 hectares).

(b) That, the said addition / variation was made to the clear copies held by the Appellant as the said Mortgage 6993 was not registered yet in terms of the Land Transfer Act and given a new registration no. 8465.

[9] I pause at this point to make some brief reflections – viz:

- (1) As noted earlier the learned Judge himself was not prepared to uphold the allegations based on fraud which spares me the task of going into that aspect.
- (2) The express admissions made by the Appellant as recounted above do not by any stretch of imagination amount to admissions that could have founded a

basis for judgment to be given in as much as if at all, the Appellant's averments are express denials of the averments contained in the Amended Statement of Claim. It would amount to doing violence to language if an express denial is to be construed as an admission.

- (3) However, if one were to look for implied admissions for the same is envisaged in Order 27 of the High Court Rules, such can be discerned within the four corners of the Amended Statement of Claim and the Statement of Defence and that is that, the alleged alteration referred to in regard to the description of the initial Mortgage 6993 was unilaterally made by the Appellant.
- (4) Nevertheless, the Appellant offered an explanation for this in averring that,
 - (a) the 1st Respondent (1st Plaintiff) defaulted in its payment under its Mortgage to it (vide: paragraph 29(a) of the Appellant's Statement of Defence).
 - (b) Consequently, to protect its Mortgage security as the 1st Respondent was not only avoiding payment of 'the debt' but also tried to restrain it from proceeding with the Mortgage Sale (Appellant having sold the property to the 3rd Respondent) and further trying to alter the position regarding the Mortgage Security by applying to the Director of Lands (the 5th Respondent/Original 4th Respondent) to separate the amalgamated land. (vide: paragraph 31 of the Statement of Defence).
 - (c) Therefore, the Appellant averred that, it was far from expecting such Mortgagor/debtor to consent to any variation of the Mortgage.

[10] Viewing the matter in the perspective of what I have recounted above, I cannot see how the learned Judge could have given a 'judgment on admissions' (express or implied) on the proceedings. Given the demonstrable areas at which the parties are

seen to have been at variance the case had to be necessarily decided on a *viva voce* trial.

[11] Order 27 of the High Court Rules does contemplate the High Court to decree a 'Judgment on admissions' either by pleadings or otherwise.

[12] It would appear that, the learned Judge had had regard to this alternative when he addressed his mind to Section 13(1) of the Crown Lands Act. That is, in relation to the Appellant having not sought from the Director of Lands (5th Respondent) approval prior to making the alterations it made to the initial Mortgage document 6993.

[13] But, that otherwise provision is well defined in Order 18 Rule 13 of the High Court Rules – viz:

"Such admissions may be made expressly in a defence to a counter-claim, or they may be admission by virtue of the rules, as where a defendant fails to traverse an allegation of fact, in a statement of claim or there is default of adherence or defence is struck out and accordingly the allegation of fact in the statement of claim is deemed to be admitted."

[14] The Amended statement of claim nowhere had pleaded anything traversing Section 13(1) of the Crown Lands Act for the Appellant to have responded to if that issue in any event was to be brought within the said otherwise provision.

[15] Consequently, I agree with the Appellant's submission that, the learned Judge in his reference to the provisions of the Crown Lands Act had exceeded his jurisdiction in that, his jurisdiction was confined to making a determination on whether there were admissions on which a judgment could have been decreed as prayed for by the 1st Respondent.

[16] While I could rest my final decision on what I have articulated above, I cannot resist the following observations.

On the material reflected in the Record and re : Submissions of Counsel

- (a) The 5th Respondent's (Director of Lands) initial approval had not been obtained for the alteration of Mortgage document 6993, it had been obtained subsequently.
- (b) Then, was the initial alteration without the 5th Respondent's approval an act that rendered Mortgage 6993 void *ab initio* rendering the Mortgage document 8465 void as well? or was it only voidable?
- (c) Could the 1st Respondent have sought relief to have the said Mortgage No. 8465 declared as being void *ab initio* in the absence of a prayer seeking a declaration that, Mortgage 6993 was void?
- (d) The Appellant's contention that, as urged by the 1st Respondent, factually, if Mortgage 6993 was executed on 3 December, 1988 then how could it have granted a Mortgage over an Approved lease which had come into being on 1st August, 1989?
- (e) Consequently, parties being at variance on that factual aspect, if the initial Mortgage 6993 was invalid, would it not be incumbent upon Court to investigate at a trial *viva voce* as to when the said initial Mortgage 6993 was executed when the Statement of Defence (supported by affidavit) did not contain an admission that the said Mortgage was executed on 3 August 1999?"
- (f) While I did see some merit in the submissions of the 1st and 2nd Respondent's Counsel that, the otherwise provision in Order 18 Rule 13 of the High Court Rules, could be taken into the fold of admissions, *viz*: not only pleadings but also documents that are permitted to be relied upon in that regard, however, my poser to the 1st and 2nd Respondent's Counsel was whether, although, the same may well pave the way for a Judgment on admissions if only the parties had agreed to abide by a Judgment on that basis; but in its absence, whether the impugned final orders could have been made by the learned Judge on the basis of the admissions. *per se*.

(g) In response to my poser, the case of Wallersteiner v. Moir [1974] 3 All ER 217, was relied upon by Counsel for the 1st and 2nd Respondents. In my view, that case did not appear to assist him with Counsel for the Appellant making submissions thereon with which I agree and which I shall refer to in the ensuing pages.

(h) Then, there was Counsel for the 3rd and 4th Respondents who submitted (a) that his clients had been adversely affected by the impugned judgment in that substantial injustice has been caused to them. They have paid for the property but have been deprived of its usage and possession since February, 2006 while the 1st Respondent has continued to occupy the said land whilst not having to pay any mortgage debt.

[17] Mr. Sharma stressed on the following points:

(i) Summons for ‘Judgment on admissions’ (pages 34-35 of the RHC) being for a declaration that the varied relevant mortgage registered as no. 8465 with the Registrar of Deeds is fraudulent, null and void, it was not open to the learned Judge to deviate from the Summons and in the absence of an amendment thereto to make a finding that the said mortgage was null and void.

(ii) Both Ms. Devan who appeared for the Appellant and Mr Sharma for the 3rd and 4th Respondents submitted that the learned Judge had made a fundamental error of fact in regard to the date of execution of Mortgage 6993 when he held that it was August, 1999 when in fact the 1st Respondent’s own pleadings (in the original Statement of Claim) at paragraph 6 confirmed that it was executed in December, 1998.

- (iii) The 1st Respondent itself had consented to the sale to the 3rd Respondent as reflected in an earlier case between the same parties and in respect of the said land. (Civil Action 94/2006; High Court, Suva; Judgment dated 29th March, 2007 per Justice Pathik – vide: annexed to the 3rd and 4th Respondents written submissions).

Reliance on authorities by the parties re the Grant of the Declaration

- [18] Although many authorities had been referred to in the written submissions of parties they placed reliance on the English Court of Appeal decision in **Wallersteiner v. Moir** [1974] 3 All ER 991. While the 1st and 2nd Respondent principally employed the said decision to support its contention that, justice of the matter warranted the grant of the declaration, the underlying basis of Order 27 Rule 3 being that, “*Where appropriate a judgment or Order would be made pursuant to the rule ‘so as to save time and costs,’*” the Appellant and the 3rd and 4th Respondents contended that, ‘In general declaratory relief is granted only after trial.’”
- [19] If I understood the 1st and 2nd Respondent’s Counsel’s submission correctly, he appeared to contend that, the ends of justice were met by the learned judge when he declined to make a finding on fraud and left it for that matter to be resolved. But, to have it resolved where and when? The final Order was to declare the Mortgage 8465 null and void *ab initio*. Thereafter, there was nothing left in the suit. Apart from that, on what basis could the Judge have given that declaration in the absence of a finding on fraud, when as noted earlier, the summons in question had not been even amended to bring in Section 13(1) of the Crown Lands Act? Where in the amended Statement of Claim was an averment in regard to such non-compliance with the said Section 13(1) for the Appellant even to have responded to in its Statement of Defence by an averment to extract an admission whether expressly or even impliedly to ground a ‘Judgment on such admissions?’
- [20] Accordingly, I have no hesitation in agreeing with the contentions made by Counsel for the Appellant and the 3rd and 4th Respondents that, the learned Judge made

findings on triable issues which went outside the pleadings, that is to say, going outside the Amended Statement of Claim and the Statement of Defence where the learned Judge could have extracted even an implied admission in decreeing the impugned Judgment as one falling within the framework of Order 27 of the High Court Rules and therefore a judgment given without and/or in excess, of jurisdiction.

- [21] Furthermore, a mere ocular perusal of the Appellant's response to Paragraph 31 of the Amended Statement of Claim shows that the Appellant had expressly denied the averments contained in the said paragraph. Without having to say more, it would amount to doing violence to language if an express denial was to be construed as an admission, an aspect I have already noted earlier.

Admissions of fact per se and Admissions that may ground a judgment as envisaged in Order 27 (High Court Rules)

- [22] In an earlier part of this Judgment I did note certain admissions made by the Appellant in its response in the Statement of Defence to the averments made by the 1st and 2nd Respondents in their Amended Statement of Claim. But the same could not have grounded a Judgment to be given thereon, al beit in the light of the express denials as well highlighted at paragraph [21] above.

Admissions and Confessions in the field of Criminal Law and an analogy that may be drawn in the context of Civil Law

- [23] I could not resist drawing an analogy as reflected by me on the aforesaid titular heading. In the criminal law field, there may be admissions but to ground a conviction they must constitute a confession (subject however to other applicable principles as to admissibility of a confession). Likewise, in a civil case, there may be certain admissions of fact but for them to ground a basis for judgment to be given, those admissions must be either express or implied.

- [24] In my view, that criterion has not been satisfied in the present case.

[25] It will be noted that, I have not taken the trouble to dwell on the respective status of the parties and their relations to each other *inter se*, because I felt it was not necessary in as much as, the matter to be determined appeared to me as being clear viz: - whether – in the context of Order 27 (High Court Rules), the learned High Court Judge’s judgment bears scrutiny.

[26] In summary, therefore, I hold that,

(a) On the basis of the Amended Statement of Claim and the Statement of Defence thereto, the learned Judge could not have extracted any admissions that could ground a judgment to be given on admissions as envisaged in Order 27 of the High Court Rules, (by way of express admissions).

(b) For the learned Judge to have proceeded on the basis of even implied admissions in the context of the said Order 27, the 1st and 2nd Respondent in their Amended Statement of Claim were obliged to aver non-compliance with Section 13(1) of the Crown Land Act by amending its summons in the very least, which the 1st and 2nd Respondent demonstrably did not do to have evoked a response from the Appellant.

Conclusion

[27] In conclusion, for the aforesaid reasons, I hold that, the judgment of the High Court dated 11th March, 2013 must be set aside and this appeal must be allowed for the reasons (a) to begin with, the said impugned ‘judgment on admissions’ could not have been made and (b) consequently the case being required to be fixed for trial to be determined on *viva voce* evidence (having regard also not only to the Appellant’s submissions in the context of the circumstances in which ‘judgment on admissions’ could have been in the context of the confines of Order 27 of the High Court Rules but also to the concerns expressed by the 3rd and 4th Respondents.

Jameel, JA

[28] I have read in draft the judgment of Almeida Guneratne, JA and agree with the reasons and orders proposed therein.

Orders of Court

1. *The Appeal is allowed and the Judgment of the High Court dated 13th March, 2013 is set aside.*
2. *The Registrar of this Court is directed to remit this case back to the High Court of Suva for trial on the substantive aspects of the rights of parties inter se, if necessary by raising fresh issues thereon.*
3. *On the principle that, award of costs follow the event, this Court orders that, the 1st and 2nd Respondent pay a sum of \$2,500 to the Appellant and a sum of \$2,500 to the 3rd and 4th Respondents as well within 21 days of this Judgment.*



Hon. Justice E. Basnayake
JUSTICE OF APPEAL



Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL



Hon. Madam Justice F. Jameel
JUSTICE OF APPEAL