

IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 0089 OF 2020
[Lautoka High Court HBC 63 of 2019]

BETWEEN : 1. ABHINESH SINGH
2. JYOTI SINGH

Appellants

AND : 1. RAJESH SINGH
2. THE DIRECTOR OF LANDS
3. THE REGISTRAR OF TITLES
4. THE ATTORNEY GENERAL'S OFFICE

Respondents

Coram : Dr. Almeida Guneratne, P
Jitoko, VP
Dayaratne, JA

Counsel : Mr R. Charan and Ms J. Bhavna for the Appellants
Mr R. P. Singh for the 1st Respondent
Mr J. Mainavolau for the 2nd, 3rd and 4th Respondents

Date of Hearing : 3rd July, 2023

Date of Judgment : 28th July, 2023

JUDGMENT

Almeida Guneratne, P

Prefatory Statement and Preliminary Reflections on the Background History to this Appeal

- [1] The plaintiff-appellant (hereinafter referred to as the plaintiff) initiated action against the defendants by writ of summons seeking principally an order for specific performance against the 1st defendant-respondent abovenamed (hereinafter referred to as the 1st Defendant) to convey a parcel of land comprised in a Crown Lease on the basis of an alleged Sale-Purchase Agreement (SPA) (vide: the Statement of Claim at pages 34 – 42 of the Copy Record (CR), supported by affidavit (pages 49 – 53 of the CR) with supporting documents annexed thereto) and an Affidavit of Service (page 44 of the CR). In addition to the said summons the plaintiff sought certain injunctive orders against the defendants by Notice of Motion.
- [2] The defendants did not file Statements of Defence to the plaintiff's initial summons but in affidavits (at pages 108 – 110 and 244 – 246 of the CR) the 1st Defendant opposed the plaintiff's action.
- [3] In the said affidavits taken cumulatively, the main thrust of the 1st defendant's opposition was that;
- (a) for the alleged Sale-Purchase Agreement (SPA), the Director of Lands (The 2nd defendant-respondent) had never given his consent;
 - (b) at all material times the person who initially entered into the alleged SPA being a foreigner prior consent had not been obtained from the Ministry of Lands; and
 - (c) the plaintiff had entered the land in question prior to the (i) consent of the 2nd Defendant (the Director of Lands) and (ii) prior to sub-division approvals of

the larger land. (vide: paragraph 11 of the 1st defendant's affidavit at page 246 of the CR).

[4] It is in that background that, on the 10th June, 2020 the matter had been taken for hearing by the learned High Court Judge.

The proceedings of 10th June, 2020

[5] The proceedings of that date (at pages 306 – 322 of the CR) reveal the following matters (issues) impacting on the determination I propose to make in this appeal.

[6] It stands revealed from the said proceedings that:-

- (a) the 1st defendant had not filed a Statement of Defence but was seeking to strike off the plaintiff's action on the basis that, there was no prior consent by the 2nd Defendant (Director of Lands) for the alleged SPA and the sub-division of the larger land on the basis of which the plaintiff claimed to have entered into possession of the resulting parcel of land;
- (b) in response to the query raised by Court, counsel for the 1st defendant had submitted that he was opting to proceed with the striking off application and should it were to succeed the need to go into his application to seek enlargement of time to file a Statement of Defence would then not arise;
- (c) in as much as, the plaintiff's Statement of Claim does not reveal a "*reasonable cause of action*" (vide: counsel's submission at page 307 of the CR), the 1st defendant's counsel moved that the plaintiff's action be struck off.

[7] Consequently, having proceeded with the matter where counsel made oral submissions followed by written submissions, the learned Judge having reserved his judgment eventually delivered the same striking off the plaintiff's action.

The Impugned Judgment dated 21st August, 2020 (at pages 6 – 31 of the CR)

- [8] I shall begin by tracing the salient features of the judgment and make my reflections and draw my conclusions thereon.

On the 1st defendant's striking out application

- [9] The basis on which a striking out application could be entertained is spelt out in Order 18 Rule 18 of the High Court Act, which is, basically "*if no reasonable cause of action*" is disclosed.
- [10] The learned Judge in an extensive exercise by citing precedents concluded that the plaintiff had failed to disclose "*a reasonable cause of action.*" (at page 30 of the CR and paragraph [54] of the impugned judgment.

The Grounds of Appeal urged (pages 1 – 6 of the Copy Record) and the written submissions filed by the 1st Defendant (respondent) on 28th June, 2023 and the Appellant on 30th June, 2023 respectively.

- [11] Having given my mind to the above in addition to the oral submissions made before this Court at the hearing on 3rd July, 2023, I proceed to discuss and move on to the ensuing determination and the proposed orders I intend to make as follows.

Discussion and Determination

- [12] The plaintiff's Statement of Claim I have recounted at paragraph [1] in this judgment.
- [13] I have no hesitation in saying that the said statement satisfies the pre-requisites of a claim initiating an action by summons with sufficient particulars as pleaded (paragraphs 1 to 19 thereof).

[14] For the reason I have stated in paragraph [13] above, the 1st defendant, without filing a Statement of Defence was not entitled to strike off the plaintiff's Statement of Claim.

[15] In my mind, a contesting party (the 1st defendant in the instant case) could not have done so on the very propositions which the learned Judge in his decision relied on which I reproduce below viz: - That,

“ a case must be very clear indeed to justify summary intervention of the Court. It is a jurisdiction which ought to be very sparingly exercised and only in very exceptional circumstances ” (paragraph 53 of the impugned judgment).

The factors that weighed with me in that regard

Was there an intention in the parties to create legal obligations (as between the plaintiff and the 1st defendant?)

[16] The intended (SPA) was annexed to the plaintiff's Statement of Claim (supported by affidavit as recounted in paragraph [1] above in this judgment).

[17] The 1st defendant's affidavit contained at pages 244 to 246 in paragraph 9 thereof states that *“the full consideration has not been paid by the plaintiff.”* (see at page 246 of the CR).

[18] Thus, an essential pre-requisite of creating legal obligations in a contract stood established, whether or not the full consideration had been paid or not being matters to be determined at a regular trial. (see: in this regard Cheshire & Fifoot, Law of Contract, 12th Australian Edition, Chapter 5, pp. 230 – 231).

The requirement of consent by the Director of Lands (2nd defendant) to enforce the alleged SPA

[19] That was the next hurdle the plaintiff was required to clear.

[20] In that regard while the plaintiff in his Statement of Claim pleaded that the said consent had been obtained both in regard to the dictates of Section 13 of the Crown Lands Act and Section 4 of the sub-division of Lands Act, which averments remained to date not denied by a Statement of Defence by the 1st defendant, who sought to intervene, having the effect of obviating a regular trial by filing a striking off application.

[21] Needless to say, that issue of “*consent*” by the Director of Lands (2nd defendant) was pivotal to the whole matter.

Hamlet without the Prince of Denmark

[22] If I may be excused for drawing an extended analogy with that Shakespearean classic, I could not resist in doing so for the reason that, the Director of Lands (2nd defendant) not being called to give evidence as to whether he had “*consented to the SPA in question,*” (being the pivotal/decisive criterion) the mater in dispute could not have been resolved and determined other than at a regular trial.

[23] With all respect, the learned High Court Judge failed to approach the matter from that perspective in consequence of which I say the judgment of the High Court cannot be allowed to stand and must be set aside and in its wake directing the High Court to set a date for a regular trial requiring the parties to lead evidence in regard to whether there was “*consent by the 2nd defendant*” (Director of Lands) for the alleged SPA.

[24] Although as the Copy Record may reveal there were certain adjunct issues, I did not think it necessary to delve into them in as much as the plaintiff’s case stood to stand or fall on what I have articulated in paragraph [23] above.

On the provisions of the sub-division of Land Act and their impact

[25] This was the other issue that needed to be addressed.

[26] That, a sub-division of the larger land had been carried out is not disputed. It stood as a *fait accompli*. Whether the preceding surveys that presumably would have been carried out were not in issue. The legality of such preceding surveys were not canvassed in contrast with a situation where a survey being done in breach of the Surveyors Regulations of 1980 (see in that regard this Court's judgment in **Mahendra Sharma & Another –v- NLTB**, ABU 0053 of 2018, 26th May, 2023.

[27] In the given background where the plaintiff averred in his pleadings that such consent was obtained, the 1st defendant denying it, in the absence of a Statement of Defence, it was incumbent on the Court to proceed to a regular trial on oral evidence without deciding and determining the matter on affidavits filed.

The Proceedings in Appeal

[28] Mr Singh in the interpretation he sought to put on Order 18 Rule 18 and in submitting that, on the competing tests to determine whether an order was final or interlocutory, the order that resulted was interlocutory which required "*the appellant*" to seek leave to appeal the said order.

[29] Mr Singh relied on the oft cited decisions in **Gounder v Minister of Health**, ABU0074/2006S and the English case of **White v Brunton** [1984] Q.B. 570, time and again finding reference in the judicial jurisprudence in Fiji.

Intervention by this Court (as per Justice Jitoko, V.P)

[30] In the very said Order and Rule relied on by Mr Singh, two situations are envisaged namely, where "*an application*" is made by 'A' (*supra* Order 18 Rule 18) and to strike off an action filed by 'B' and where "*an Amendment*" is sought by 'B' to the initial action filed by him.

[31] Indeed, while in that second situation, had there ensued “*an order*” that would have been “*interlocutory*” in nature for which leave to appeal would have been a condition precedent to appeal but here was a case on “*A’s application*” to strike off ‘B’s action which was upheld and therefore “*brought the suit to an end*” as pointed out by His Lordship Justice Dayaratne who was associated with me on the Bench.

[32] In the result on my part, penning the principal judgment, there being no room to regard the case as “*a split trial*,” whether on the “*application or the Order test*,” the suit having coming to an end with “*the order*” striking off the appellant’s action, the Appellant was not required to seek leave to appeal the impugned order of the High Court and was entitled to file a direct appeal to this Court.

The other two issues which were canvassed by Counsel on behalf of the 1st Defendant (Respondent)

[33] 1st Issue – whether “*the consent requirement*” as envisaged in Section 13 of the Crown (State) Lands Act necessarily needed to be “*prior consent*.”

[34] In that regard our attention was drawn to the decision in **Reddy v Devi** [2016] FJCA 17. In that case His Lordship Justice Calanchini responded to the issue under consideration thus:

“[25]....Section 13 requires the consent of the Director to be first obtained in respect of any alienation or dealing by way of sale, transfer or sub lease of a state lease. In the absence of such prior consent then that alienation or dealing is null and void. It is also apparent from the wording of **section 13** **that the party responsible for obtaining that consent is the lessee** of the State lease since under section 13(3) any lessee aggrieved by the refusal of the Director to give the required consent may appeal to the Minister.

[26] **However the point that needs to be emphasized is that the consent is not required for the entering into of a contract for the alienation or the dealing. The contract does not constitute the act of alienation or dealing.** The consent

is required prior to the alienation or the dealing being effected. In other words prior to the sale, transfer or sub lease being effected.....”

[35] I did not need any persuasion in agreeing totally with that thinking and reasoning which I adopt in this appeal for the full court.

[36] Accordingly, I decline to agree with the contention advanced by the 1st defendant’s (respondent’s) counsel on the said issue.

[37] 2nd Issue – Whether (as alleged by the 1st defendant (respondent), the initial transferee being a foreigner, in the absence of “prior consent by the Minister of Lands” for such transfer, subsequent “dealings” could have been regarded as being legal.

[38] In **Reddy v Devi** (supra), Justice Calanchini is seen addressing that issue as well when His Lordship drawing a distinction between a Section 13 situation and the present issue under consideration expressed the view that:

“The position is different under Section 6 of the Land Sales Act (Cap 137) where the responsible Minister’s consent is required prior to a non-resident purchaser entering into a contract to purchase land.” (at paragraph [26] of His Lordship’s decision).

[39] If I were to pause at this point, should that allegation stood to be established, perhaps, the claim of the plaintiff might have been liable to be rejected as being *void ab initio*.

[40] However, the plaintiff’s case was on the basis of a Crown Land lessee, the initial transfer to an alleged foreigner having become a part of history, given the additional fact that the plaintiff has been in occupation of the land in question for several years. What action had the Director of Lands taken during that time?

Three fundamental matters that arose for consideration by this Court in that background scenario

[41] The first – (the factual content)

- (i) was the initial transferee a foreigner for which the Minister's "*prior consent*" had not been obtained?
- (ii) How then and in what circumstances had such a transfer had come to be done?
- (iii) Particularly where the plaintiff claimed that there was an agreement nominating the plaintiff as transferee by the said foreigner to which agreement the 1st defendant was a party. (*vide*: page 75 of the Copy Record)

[42] The second – (the impacting factual mixed with legal content)

That is, in that period of time could the plaintiff have been regarded as having been in illegal possession/occupation of the land in question?

[43] The third – (the legal questions)

Taking a combination of the aforesaid two matters resulting as it were in their wake, was not the court obliged to address such issues as "*estoppel and acquiescence*?"

[44] All those matters could have been gone into and determined at a regular trial and not decided and concluded by affidavits.

Some final comments

[45] Before I part with this judgment I would like to make some final comments.

Should a party defendant be allowed to intervene in an application to strike off a claim (originating in summons) without filing a Statement of Defence within time as requisite in law?

- [46] My unreserved view writing for this court is that it should not be allowed for the simple reason that, a defaulting defendant's such conduct amounts to an attempt to do indirectly to do he/she is not entitled to do directly.
- [47] In such situations a court (in this instance, the High Court) should not permit such an exercise, if not for anything else, for regular procedure laid down by the legislature as per the High Court Act, would be rendered otherwise although I am mindful of Order 18 Rule 18 (1)(a) as being an exception to that regular procedure.
- [48] That provision in Order 18 Rule 18(1)(a) is applicable to a situation where an "*Amendment is sought*" to pleadings and an order ensues thereon which would therefore make such ensuing order "*interlocutory*" in contrast to a situation as in the present case where the High Court "*struck off*" (and therefore "*dismissed*" the plaintiff's action) bringing the suit to an end, leaving no room for "*any application*" for the court to consider thereafter.
- [49] Before I proceed to my conclusion I wish to make some further remarks.
- [50] I begin by looking at and making observations on the finding arrived at by the learned Judge that, the appellant (plaintiff) had not shown "*a cause of action*" in support of which the learned judge relied on a plethora of precedents.
- [51] While appreciating the judicial industry evidenced in that finding with due respect I was unable to agree with that finding.

What is "a cause of action?"

- the essential two elements

- [52] The first is "*a right*" claimed by a party and the second is the "*the denial of that alleged right.*"

- [53] Even a cursory look at the appellant's (plaintiff's) Statement of Claim shows that those elements stood clearly pleaded with "*particulars*."
- [54] The 1st respondent (defendant) did not file a Statement of Defence but sought to "*strike off*" the plaintiff's action on the basis of affidavits filed.
- [55] Here is a case where the plaintiff filed a Statement of Claim and pleaded a cause of action with particulars in regard to his alleged seminal of a right. That first step the plaintiff satisfied. The second step was to establish his claim by calling witnesses subject no doubt to cross-examination given the substantive content of the claim.
- [56] That regular procedure should not have been allowed (permitted) to be short-circuited in entertaining "*a striking off application*" I go further in expressing the view that, a court should not encourage such a course of action.
- [57] Consequentially, I agree with the submissions of the appellant's counsel's that, the learned Judge erred in "*striking off*" the plaintiff's action on affidavits filed by parties without proceeding to a regular trial.

On the respondent's argument that, the impugned order of the High Court was interlocutory and therefore appellant was required to first seek leave to appeal.

- [58] This issue I have already addressed earlier.
- [59] On the basis of the foregoing reasons the judgment of the High Court cannot be allowed to stand and accordingly I proceed to make my Orders.

Jitoko, VP

- [60] I have had the advantage of reading in draft the judgment of learned Hon. Guneratne P. I agree with him and for the reasons which he gives I too would allow this appeal.

Dayaratne, JA

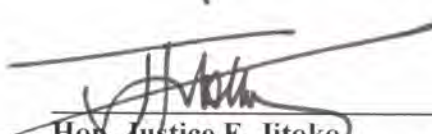
[61] I agree with the reasoning and conclusions arrived at by Dr. Almeida Guneratne, P.

Orders:

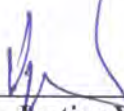
- 1) *The appeal is allowed and the judgment of the High Court dated 22nd August, 2020 is set aside.*
- 2) *The case is remitted to the High Court to make a determination at a regular trial on evidence to be led.*
- 3) *The 1st defendant (1st respondent) shall pay as costs of this appeal a sum of \$5,000.00 to the appellant.*



Hon. Justice Almeida Guneratne
PRESIDENT, COURT OF APPEAL



Hon. Justice F. Jitoko
VICE PRESIDENT, COURT OF APPEAL



Hon. Justice V. Dayaratne
JUSTICE OF APPEAL

Solicitors:

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Patel & Sharma (Nadi) for the 1st Respondent
Office of the Attorney-General for the 2nd, 3rd and 4th Respondents