

IN THE HIGH COURT of FIJI
CIVIL JURISDICTION
AT LABASA

Civil Action No: 1of 2008

BETWEEN : MOHAMMED HANIF salesman PARMA NAND
plumber, SHIU PRASAD driver, RAM BAHADUR
taxi driver and VINOD KUMAR joiner all of Naveria
settlement Savusavu.

PLAINTIFFS

AND : HOUSING AUTHORITY a body corporate duly
constituted under the provisions of the Housing
Authority Act and having its head office at Valelevu
Suva.

1st DEFENDANTS

AND : DIRECTOR of LANDS & SURVEY

2nd DEFENDANT

AND : THE ATTORNEY GENERAL of FIJI

3rd DEFENDANT

Appearances: Mr. Sen for the Plaintiffs for Samad Law
Mr. Padiyachi of Gibson & Co for the 1st defendant
Mr. Mainavolau of AG's office for the 2nd & 3rd Defendants

R U L I N G

Introduction

This is an application by the 1st Defendant under Order 18 rule 18 of the High Court Rules to strike out the action against it in that it discloses no reasonable cause of action.

The matter was first heard before the Master of the High Court on the 6 November 2008 but no ruling was delivered. The matter was activated in December last year when the file was located. The parties wish to proceed with the hearing of this

summons by totally relying on their submissions before the prior Master. This is the ruling on the application.

Background

The Plaintiffs are currently residing at a portion of land described as Lots 1 & 2 of Deposited Plan 4780 situated at Nasavusavu in Vanua Levu with an area of approximately twenty one (21) acres. The portion of land is commonly known as *Naveria* in Savusavu. The Plaintiffs claim that they have resided on this area for a long time that is, a period of at least twenty years. The 1st Defendant was the proprietor of the land at the time of their occupation. The Plaintiffs right to occupy the portion of land on which they resided was by a *Tenancy at Will* granted to them by the 1st Defendant. Thereafter they paid ground rental to the 1st Defendant as stated on the said tenancy agreement at the rate ranging from \$204:00 to \$268:40 per year.

The whole of the land on which the Plaintiffs resided was later transferred to the 2nd Defendant on the 14 January 2004, and in March and/or April of 2007 the Plaintiffs were given notices to vacate the land as they were now considered to be trespassers on what is now state land. They then took action against the Defendants to exert a right of occupation by declaratory orders from the Court. They further sought remedies for breach of contract and breach of legitimate expectation.

Order 18 rule 18

The 1st Defendant by summons dated 9 October sought an order to strike out the action against it under O18 r18 upon the ground that it discloses no reasonable cause of action against it. Order 18 rule 18 (1)(a) of the High Court Rules to which this application is made states:-

18.-(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that-

(a) it discloses no reasonable cause of action or defence, as the case may be;
or

(b)

(c)

(d)....;

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under paragraph (1)(a).

(3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading.

It is clear from the above rule that no evidence is admissible on an application to strike out an action based solely on the fact that a pleading does not disclose a reasonable cause of action. However it also appears that in other applications for striking out made under sub-rule (b) (c) & (d) the Court is entitled to look beyond the pleadings and affidavit evidence is admissible. This matter however deals only with sub-rule (a) where the pleading does not disclose any reasonable cause of action against the defendant.

It is clear from the authorities and some would say it is trite law that the Courts discretionary power to strike out an action on the grounds of no reasonable cause of action is to be used sparingly and only where a cause of action is obviously unsustainable. However this discretionary power should not be used in cases involving difficult and complicated questions of law, (*A-G v Shiu Prasad Halka 1972 18FLR 210; Bavadra –v- Attorney General (1987)3PLR95*). In the exercise of this discretionary power the Court must take into account the following guiding principles:-

1. Every person has a right of access to the Courts of law for it is there that the rule of law is upheld, including against Government or other powerful interests therefore it is considered a serious matter to deprive a person this right of access.
2. To strike out an action a party seeking it must show that it is clear on the face of the pleadings that it lacks a reasonable cause of action (*Munnings –v- Australian Government Solicitor (1994) 68 ALJR 169 at 171* or that it is clearly frivolous or vexatious; *Dey-v-Victorian Railways Commissioners (1994) HCA 1;(1949) 78 CLR 62 at 91*).
3. Experience teaches us that what may appear to be an unpromising cause can turn into a successful judgment therefore a Court's opinion that a case appears weak and unlikely to succeed is not alone sufficient to warrant a striking out; (*Coe –v- The Commonwealth (1979)53 ALJR 403*).
4. That even if there is a defect on the pleadings and it appears that a party has a reasonable cause of action a Court will ordinarily allow an amendment to the pleadings; *Church of Scientology –v- Woodward (1982) HCA 78*.
5. The overriding principle is to do what is right hence of it is clear that the proceedings within the concept of pleadings is doomed to fail the Court

should dismiss the claim to protect the Defendant from being further troubled and save the plaintiff from further costs.

The Application and Determination

The 1st defendant in its application to strike out submits the following as the basis of the striking out. The first is that the Plaintiffs have failed to state the cause of action against the 1st Defendant except as to the reference that the 1st Defendant legalised their occupation by the payment of rental. The second is that the Plaintiff has acknowledged in its claim that the portion of land they are occupying was transferred from the 1st Defendant in January 2004 and that their occupation was by a tenancy at the will of the landlord. The third is that the reliefs sought in the prayers cannot be enforced against the 1st Defendant. The first relief in particular cannot be enforced against it in that the 1st Defendant with the knowledge of the Plaintiffs had transferred the land four years before the writ was issued and even if it was it is still statute barred. The second and third relief could not be sought against it because there was no particulars of any breaches provided in the writ simply because the Plaintiffs could not prove that there was a contract from which the breach occurred. The fourth point raised by the 1st Defendant is that section 59(d) of the *Guarantee, Indemnity and Bailment Act* prevents an action being brought against a person in respect of an interest in land arising from a contract or sale of land unless it is in writing and signed by the parties. And as far as the 1st defendant is aware there is no contract except a tenancy at will.

In support of the submissions the 1st Defendant referred to Master Udit's ruling in the case of *Mohan Prasad vs. Rup Investment & SCC, High Court Civil Action No. 182 of 2006*, in which he quoted the words of Scott's LJ in *Bruce v Odhams Press Ltd [1936] 1 KB 697 at 712-713*, in which His Lordship stated that the :-

“The cardinal provision in rule 4 is that the statement of claim must state the material facts. The word “material” means necessary for the purpose of formulating a complete cause of action; and if one material fact is omitted, the statement of claim is bad, it is ‘demurrable’ in the old phraseology, and in the new is liable to be ‘struck out’ under Order XXV, rule 4; See Philipps v Philipps 4 QBD 127; or a further and better statement of claim may be ordered under Order XIX, r7”

And finally as far as the 1st Defendant is concerned the Plaintiff has failed to identify the particulars of the breaches if any and has not stated specifically the reliefs they are seeking from the 1st Defendants and even if it was stated could not be enforced against it and therefore their claim against the 1st Defendant should be struck out with costs.

The Plaintiff in its submission states that the purpose of the action is to legitimise their claim to a piece of land in which the 1st Defendant was the proprietor. Further since the power to strike out is discretionary the Court in exercising this power is to act with great circumspection and only where it is clear that the plea cannot succeed should it strike out a matter. In this regard and for this purpose the Court is entitled to inquire into all the circumstances of the case and therefore affidavit evidence is admissible. There was no affidavit evidence ordered for this purpose by the Court perhaps because this is not an exceptional case requiring it to look beyond the pleadings.

The statement of claim consists of nineteen (19) paragraphs and only paragraphs (1) and (9) relate to the 1st Defendant. Paragraphs 1 and 9 states:-

1. *THAT the First Defendant **is and was** all material times was the registered proprietor of all those property described as Lots 1 and 2 on DP No. 4780 Part of Niveria and more properly described in Certificate of Title No. 18551 situated in the district of Nasavusavu and containing an area of 21 Acres 2 roods and 16 perches (herein after referred to as the property)(emphasis added)*

(9). That the property was on the 14th day of January 2004 transferred to the second Defendant.

The statement of claim seeks the following reliefs:-

- (a). AN ORDER restraining the Defendants, whether by themselves, their servants, agents or legal representatives from evicting the Plaintiffs and to interfere with the peaceful occupation and usage of the said land until the hearing and determination of the within action;
- (b). FOR A DECLARATION that the Plaintiffs are entitled to the peace (*sic*) of land on which they respectfully reside until further order of the Court;
- (c). Judgement for the sum of \$172,170:00 as pleaded in paragraph 13 hereinabove;
- (d). DAMAGES for breach of contract;
- (e). DAMAGES for legitimate expectation;
- (f). COSTS of this action on an indemnity basis and
- (g). SUCH further and/or other relief as this Honourable Court may deem just.

The Plaintiff acknowledges that the 1st Defendant has transferred the property in question to the 2nd Defendant on 14 January 2004 (paragraph 9 of the statement of claim). The very fact that the 1st Defendant is no longer the proprietor of the subject land means that any declaration or order sought regarding the plaintiffs attempt to legitimise their right to the land is doomed to fail. Does the 1st Defendant have a legal obligation beyond the contract of the *tenancy at will*? I am of the view that it does not. The plaintiffs derived their right to possession of the land whilst the 1st Defendant was the proprietor by a “*tenancy at will*” agreement the terms of which are clear to them. The *Halsburys Laws of England (3rd Edition) Vol. 23 at 1150* defines a tenancy at will as:-

“...a tenancy under which the tenant is in possession, and which is determinable at the will of either the landlord or the tenant; and although upon its creation it is expressed to be at the will of the landlord only or at the will of the tenant only, yet the law implies that it be at the will of both parties. As in other tenancies, a tenancy at will arises by contract binding both landlord and tenant and the contract may be express or implied.”

If there was any right at all for the Plaintiffs to legitimise their right of possession against the 1st Defendant it arose from this relationship of tenancy and no other. This relationship in my view has ended under circumstances not pleaded in the claim and upon which no determination could be made but what is clear though is that the 1st Defendant is no longer the proprietor and therefore none of the reliefs sought can be enforced upon it. In respect of the declaratory relief sought the Courts power to grant a declaratory relief is discretional and where it could be concluded that the issue presented is too high a level of legal abstraction it will refuse the relief sought; (*Attorney General (Vic) –v- The Commonwealth (1962) 107 CLR 529*).

I agree with the 1st Defendant’s submission that the reliefs sought by the Plaintiff could not be enforced against it. The first relief sought was an order inter alia, restraining the Defendants from evicting the Plaintiffs from the land, this order cannot be enforced against the 1st Defendant neither can the second which is a declaration that the Plaintiffs are entitled to the piece of land on which they reside. The third relief sought could not also be enforced against the 1st Defendant in that the relationship between the Plaintiffs and the 1st Defendant arose from a tenancy at will and the particulars provided did not arise from any breaches under the tenancy at will. Further the nature of the claim cannot be enforced in this action but is cause for another claim in which the terms of the tenancy at will is to be pleaded and determined.

Conclusion

I am therefore of the view that it is clear on the face of the pleadings that the claim lacks a reasonable cause of action against the 1st Defendant. Notwithstanding that experience has taught us that what may appear to be an uncompromising cause can turn into a successful judgement the case is not only weak but is unlikely to succeed and further that it is clear that an amendment could not cure any defect that it may have. I therefore strike out the action against the 1st Defendant with costs.

Orders

The orders are therefore:-

1. The claim or cause of action against the 1st Defendant is struck out;
2. That there be cost in favour of the 1st Defendant which I summarily assess at \$500:00.
3. That the matter be put before me for further direction on 27 May 2013.

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H. ROBINSON
MASTER, HIGH COURT LABASA

17 May 2013.