

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

CIVIL ACTION NO: HBC 268 of 2012

BETWEEN : Frank Ram

PLAINTIFF

AND : Raja Ram

1ST DEFENDANT

AND : Raja's Farm

2ND DEFENDANT

AND : Donald Ram, Ronal Ram and Sonald Ram

3RD DEFENDANT

AND : I Taukei Land Trust Board

4TH DEFENDANT
(Nominal Defendant)

COUNSEL : Mr. T Bukarau for the Plaintiff
Ms. M Vasiti for the 1st, 2nd and 3rd Defendants
Ms. L. Komaitai for the 4th Defendant

Date of Judgment : 8 August 2013

INTERLOCUTORY JUDGMENT

1. The Plaintiff filed an inter partes Notice of Motion dated 26 September 2012 seeking following injunctive orders:

- i. *That an interim injunction against the 1st and 2nd and or 3rd Defendants, their agents and/or any person expressly or impliedly authorized by them restraining him/them from interfering with the Plaintiff's quiet enjoyment of the property currently occupied by the Plaintiff and/or the Chicken shed on the subject property.*
 - ii. *That an interim injunction against the 1st and 2nd and or 3rd Defendants, their agents/or any person expressly or impressly or impliedly authorized by them restraining him/her/them to 100m from the property occupied by the Plaintiff and/or the Chicken shed on the subject property.*
 - iii. *That an interim injunction against the 1st and 2nd or 3rd Defendants, their agents and/or any person expressly or implied authorized by them restraining him/her/them to 100m from the Plaintiff.*
 - iv. *That an interim injunction against the Defendants, their agents and/or any person expressly or impliedly authorized by them restraining him/her/them from dealing with the properties in the lease over the subject lands such that it may impair the interests of the Plaintiff the subject of these proceedings.*
 - v. *That the interim injunction shall be extant until determination of the proceedings before this Honorable Court.*
 - vi. *Any other order that that Court deems just.*
2. The Plaintiff also instituted proceeding against the defendants via a Writ of Summons dated 26 September 2012 seeking a declaration and further orders that 1st to 3rd Defendant pay to the Plaintiff for all funds expended by him for the Developments and improvements of the property in issue, compensation for all sums paid to them to finance development of the farm, compensation for all

paid to them for the Defendants personal benefit and alternatively an order to divide the property in the event if the Defendants are unable to pay the funds expended by the Plaintiff.

3. The inter partes Notice of Motion was supported by the affidavit of Frank Ram sworn on 18 September 2012.
4. Raja Ram, the 1st Defendant, in the notice of motion, on behalf of 1st to 3rd Defendants filed an affidavit in opposition, on 9 November 2012.
5. Frank Ram the Plaintiff filed an affidavit in reply to the affidavit in opposition of Raja Ram dated 9 November 2012, on 13 February 2013, sworn on the same day.
6.
 - (i) The Plaintiff in his affidavit, deposed inter alia that around July 2009, Plaintiff arrived in Fiji on invitation of the 1st Defendants to develop what was earlier their family farm but now in the name of the 1st Defendant over land known as Naicele now comprised in Instrument of Tenancy No. 10448 vide TLTB No. 4/03/5003813. The development was to involve:
 - (a) Landscaping
 - (b) Building chicken shed
 - (c) Start a poultry business and
 - (d) Renovating the old family farm house.
 - (ii) Prior to embarking on these developments, the farmland had been uncultivated and abandoned for 4 years; and the old farmhouse situated at the Naicele lease was dilapidated and abandoned also.
 - (iii) The Plaintiff acting on the reassurance of the Defendants poured in finances calculated in the Plaintiff's estimate to around \$FJD270,000.00. Landscaping was completed, chicken shed has been built, poultry business started and farmhouse renovated. Midway through the

farmhouse renovations, Defendants sought to evict the Plaintiff from the property, unilaterally stopped the poultry business, received all income from poultry business for themselves (approx \$6082.39) depriving the Plaintiff thereof.

- (iv) The Plaintiff has suffered immense losses at the actions of the Defendants and seeks to recoup his losses as a result of the proceedings now afoot in this Court.

7. The 1st Defendant in his affidavit deposed inter-alia that:

- He is the lessee in the instrument of tenancy for a period of 30 years commencing from 1 January 2007, issued by I Taukei Land and Trust Board.
- Denied the receipt of funds as stated by the Plaintiff in the affidavit.
- Denied entering into a partnership with the Plaintiff for poultry business.
- Business registration name is only in the name of the 1st Defendant and not in partnership with the Plaintiff.
- That all actions and monies that the Plaintiff asserts that he has used he has done so of his own accord.
- That any decision made by the Plaintiff was not made in conjunction with and or after discussions with Defendants and Defendants ought not be punished for Plaintiff's abuse of his savings which has dwindled due Plaintiff's excessive unnecessary spending
- That 1st Defendant should not be deprived from accessing the land that is the source of livelihood.

Law and Analysis

8. The inter-partes hearing was on 23 May 2013, and on that day both counsel moved seven days time to file Written Submissions and reserved the interlocutory judgment to be delivered on notice.

9. It is noted that counsel for the Defendants undertook not the transfer, or alienate or encumber the property until the final determination of the injunction orders prayed for in the notice of motion.
10. The application by the Plaintiff is made pursuant to order 29 Rule of the High Court Rules which states as follows:
- 1.(1) An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in that party's writ, originating summons, counterclaim or third party notice, as the case may be.*
- (2) Where the application is the plaintiff and the case is one of urgency such application may be made ex parte on affidavit but, except as aforesaid, such application must be made by motion or summons.*
- (3) The Plaintiff may not, make such an application before the issue of the writ or originating summons by which the cause or matter is to be begun except where the case is one of urgency, and in that case the injunction applied for may be granted on terms providing for the issue of the writ or summons and such other terms, if any, as the Court think fit.*
11. Both counsel in their Written Submissions relied on the principles laid down in **American Cynamid Co v Ethicon (1975)** AC 396 to substantiate their respective positions.
12. The court in determining whether to exercise its discretion to grant an injunction or not guided by the following principles as:
- i. Is the serious question to be tried?
 - ii. Are damages an adequate remedy?

iii. Where does the balance of convenience lie?

Is there a serious question to be tried?

13. Plaintiff in his affidavit deposed that he spent monies to be around \$FJD270,000.00 for earth moving to landscape chicken shed site, payment of assistance to Defendant family and payment of renovating old family house. He further deposed that Defendant's were benefited from the improvements and development on the lease.
14. The Plaintiff further takes up the position that the Defendants have sought to evict him after acquiring the benefits as a constructive trustee for the Plaintiff. The Defendant having denied the receipt of any money from the Plaintiff submits that the purported claim filed by the Plaintiff is merely for the repayment of a debt. He further deposed that Plaintiff has failed or neglected to annex any evidentiary proof of such payment to the Defendants. The position of the Plaintiff in answer to the above assertion was that the Plaintiff was not in habit of keeping receipts and infact the transfer was between the family members.
15. However, Defendants contend that this is not possible as immigration laws do not allow travelers coming in to Fiji to carry more than \$10,000.00 in cash without declaring to the immigration authorities and investment of a total of \$AU 264,615.00 in Defendant's poultry business also require prior approval of Reserve Bank of Fiji to transfer and invest such a large sums of money. Having considered the affidavit evidence placed before the court by the Plaintiff and the Defendant for the purpose of establishing whether there is a serious question to be retried, court is of the view that mere assertion in the affidavit and filing a claim by way of writ alone would not be sufficient to satisfy the court to meet the threshold without any acceptable evidence to support his position. Court is mindful of the fact that financial transactions between

brothers may not always be evidenced in writing. However, if the Plaintiff has transferred such a large sum of money from Australia to Fiji would necessary have documentary proof which Plaintiff has failed to annex to the affidavit to support his assertion.

Whether damages are an adequate remedy?

16. The House of Lords in **American Cyanamid** case stated as follows in determination of whether damages would be an adequate remedy or not?

“If damages in the measure recoverable at common law would be adequate remedy and the Defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the Plaintiff claim appeared to be”

17. Plaintiff deposed in this regard that the farmers earning can never be an adequate remedy for the improvements done on the subject property and it would be difficult to recover the interest from the Defendants. Defendants contended that damages in this case would be an adequate remedy for Plaintiff as the claim filed is for repayment of a debt.
18. Court also has to consider whether the Plaintiff who is seeking an injunction has given adequate undertaking as to damages.
19. In the case of **Air Pacific Ltd v Air Fiji Limited** case court stated that there must be an adequate information to allow assessment of the undertaking.
20. The Defendants contends that the undertaking as to damages is inadequate on the following grounds:
- i. *That the third party insurance policy is not adequate indicator as to the value of the said motor vehicle;*

ii. *That there is no documentation to support the undertaking of the vehicle at sub clause (2); and*

iii. *That the said vehicles at sub clauses 1 & 2 are subject to depreciation therefore the Court is unable to ascertain the exact value and thus whether the said undertaking is adequate.*

21. The court having considered the undertaking of the Plaintiff is of the view that Plaintiff's affidavit does not confirm sufficient information of the financial position of the Plaintiff for an assessment of the value of the undertaking.

Balance of Convenience

22. The onus lies on the Plaintiff to establish that on balance the harm that if it likely to suffer if the injunction is not granted outweighs any detriment to the Defendant in the event that the injunction is granted.

23. In the case of **Professional West Realty (Fiji) Ltd v Professional Ltd [2010]** FJCA 50 the Court considered it appropriate to refer to the comments of **Lord Diplock in NW Ltd v Woods [1979]** 1WLR 1294 at page 1306.

“where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the Plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial, is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other.”

24. The 1st Defendant is registered lessee of the property and presently looks after the farm. He deposed that he needs to be able to access the farm and harvest

the crops. He further deposed that Plaintiff does not reside all the time in the farm and does not work in the farm.

25. The court having considered the evidence placed before the court in relation to the balance of convenience for the purpose of consideration of the injunctive relief against the Defendants, is of the view that 1st Defendant being the registered lessee of the property and should not be deprived of accessing the farm and cultivation and looking after the animals. An injunction would lead to the farm being idle as the Defendants are the people who are presently working in the farm. The balance of convenience in the given circumstances in my view is in favour of the Defendants.
26. In conclusion, the Plaintiff has thus failed to satisfy the principles laid down in the American Cyanamid case for injunctive relief as prayed for in the Notice of Motion.

Final Orders

27. The application for an injunction is refused.
28. The Plaintiff must pay the 1st to 3rd Defendants costs which summarily assess at \$1,000.00.
29. Orders accordingly.

Susantha N Balapatabendi
JUDGE