

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

CIVIL NO. HBC 301 of 2012

BETWEEN : Total (Fiji) Limited

PLAINTIFF

AND : ITaukei Land Trust Board

DEFENDANT

COUNSEL : Ms. Rakai M for the Plaintiff
Mr. Lutumailagi I for the Defendant

Date of Judgment : 26 November 2013

INTERLOCUTORY JUDGMENT

1. There are two applications before this court for determination. The first application is the Plaintiff's summons dated 27 December 2012 wherein the Plaintiff is seeking an order that the Defendant's eviction proceedings in Lautoka High Court being Civil Action No. 184 of 2012 be stayed. The application is supported by the affidavit of Bernardo Zseo sworn of 27 December 2012.
2. The second application before this court is the Defendant's notice of motion dated 13 February 2013 wherein the Defendant is seeking an order that the present action be transferred to Lautoka High Court and consolidated with the Defendant's action being 184 of 2012. The application is supported by an

affidavit of Soloveni Masi sworn on 13 February 2013. The Plaintiff opposed this application and filed an affidavit in opposition on 8 March 2013.

3. The Defendant seeks following reliefs from its motion:

- “(a) An order or a declaration that the Plaintiff has a renewed term of lease over Lease No. 78720 for a further period of 25 years from 1 December 2011.*
- “(b) An order that the Defendant’s eviction proceedings in High Court Lautoka being High Court Action No. 184 of 2012 be stayed.*
- “(c) Alternatively, Plaintiff seeks relief against forfeiture.*
- “(d) Such further or other relief as to his Honourable Court seems just.*
- “(e) Costs on an indemnity basis.*

Facts Briefly

- 4. On 16 March 1970, the lease number 78720 was transferred to Shell Company (Pacific Islands) Limited. On 28 January 1985, the said lease was transferred to Shell (Fiji) Limited. The said lease was thereafter extended for further 25 years effective from 1 December 1986 with the increase of rental to \$4,500.00 per annum.
- 5. The Plaintiff states that the Defendant by its letter had made enquiries whether the Plaintiff wanted to remain on the said land and wanted an extension. The Plaintiff by its letter dated 15 September 2011 had informed that they would require the said land for a further period of 25 years. The Plaintiff is of a view that its communication to the Defendant informing its willingness to stay for a

further period of time amounts to an agreement between parties for further period of 25 years.

6. The Defendant in its affidavit deposed that there was no valid agreement between parties and the enquiry made by the board is only an invitation to treat and letter of the Plaintiff is informing their willingness to remain in the said land only amounts to an offer.
7. Mr Soloveni Masi, the Board's Regional Manager of its North Western Regional office in Lautoka deposed the following facts in his affidavit filed in support of the present application:

*“(a) **Paragraph 3***

“That I am advised by legal counsel that on or about the 20 day of August, 2012, the Defendant filed an application before the Lautoka High Court by way of “Summons for Ejectment” dated same day for the Plaintiff to give up vacant possession of the piece and parcel of itaukei land known and referred to as “C.G 1486, Tavua Old Market Site” in the District of Tavua in the Province of Ba – which is Lautoka High Court Civil Action No. HBC 184/12.

Annexed to the said affidavit is the said summons application which is marked “Exhibit A”.

*“(b) **Paragraph 4***

“That I am also advised by legal counsel that the reason that the Defendant has made the said application in HBC 184/12 is that the Plaintiff's lease over the said land has expired and will not be renewed and this is disputed by the Plaintiff who is the Defendant is the said matter.”

(c) **Paragraph 5**

“That I am further advised by legal counsel that the Plaintiff filed the present action on or about the 31 day of October 2012, in which it is seeking the declaratory orders as endorsed on the said claim.

A copy of the said claim is annexed to the said affidavit and marked as “Exhibit B.”

(d) **Paragraph 6**

“That I am advised by legal counsel the said HBC 184/12 and HBC 301/12 relate to the same subject matter being the said land, the Plaintiff’s expired lease to the same and the Defendant’s refusal to renew the Plaintiff’s lease to the same.”

(e) **Paragraph 7**

“That I am also advised by legal counsel that on or about the 28 day of December 2012, the Plaintiff further filed an application by way of Summons for Stay dated 27 December, 2012 in the present matter, in which they are seeking a stay of the Defendant’s application in HBC 184/12.”

(f) **Paragraph 8**

“That I am further advised by legal counsel that these two matters, HBC 184/12 and HBC 12 have the same common question of law or fact and relate to claims to right or relief that arise in respect of the same transaction or series of transactions relating to itaukei land in the District of Tavua in the Province of Ba.”

(g) **Paragraph 8**(supposed to be 9)

“That in the circumstances, the Lautoka High Court registry is the registry located in the division in which the present cause of action arises.”

(h) **Paragraph 9** (supposed to be 10)

“That as such, I am advised by legal counsel that the present action should be transferred to the Lautoka High Court and be consolidated with HBC 184/12 for hearing and determination by the said court.”

8. The affidavit in opposition to the application of the Board, deposed as follows:

*“(a) **Paragraph 4:***

“As to paragraph 3, I admit that the Board has filed an action to Lautoka HBC 184/12 wherein it is seeking an order pursuant to section 169 of the Land Transfer Act for the Plaintiff to show cause why it should not be give up vacant possession of Native Leas. No. 78720. The said application is being opposed by the Plaintiff and the Plaintiff has filed an affidavit in response on 12 October, 2012.

I am advised by the Plaintiff’s solicitors and verily believe that the Board wrongly filed the said action in Lautoka High Court because this matter between and the Plaintiff and the Board cannot be decided in a summary manner under Section 169 of the Land Transfer Act.”

*(b) **Paragraph 5:***

“As to paragraph 4, I say that by letter dated 24 August, 2011, the Defendant made an offer and requested the Plaintiff to advise them by 4 October, 2011 if the Plaintiff wished to renew the lease and remain on the land. The Plaintiff accepted the offer to renew the lease by letter dated 15 September, 2011 and therefore there was a binding contract between the Plaintiff and the Defendant for the renewed term of the lease. Based on that, the Board duly accepted the rental payment from the Plaintiff up to November, 2012.

(c) **Paragraph 6**

“I admit paragraph 5 and 7, but say that the Plaintiff is seeking an order or a declaration that it has a renewed term of lease over Lease No. 78720 for a further 25 years from 1 December, 2011.

(d) **Paragraph 7**

“In reply to paragraphs 6 and 8, I say as follows:

(i) *The Board in Lautoka HBC 184 of 2012 is asking the Plaintiff to show cause why it should not give up vacant possession of the said land, where in the present action by writ of summons, the Plaintiff is seeking an order and or declaration that it has a renewed term of lease over the land in question and or relief against forfeiture.*

(ii) *Therefore, the dispute between the parties cannot be decided in a summary fashion. I am advised by my solicitors that the relief sought by the Plaintiff needs to be tried in an open court trial where the Plaintiff will have an opportunity to adduce oral testimony in support of the reliefs sought in its statement of claim.*

(iii) *I am further advised by our solicitors and verily believe that there is no need to consolidate the two actions as the dispute between the Plaintiff and the Board can be decided in this action and the Lautoka HBC 184 of 2012 be stayed.”*

(e) **Paragraph 8**

“In reply to paragraph 9, 10 and 11 of the said affidavit, I say as follows:

(i) *The property in question is in Tavua and not in Lautoka.*

(ii) *The Plaintiff’s HO is based in Suva and all its documents and witness are in Suva and the Plaintiff will suffer serious prejudice if*

their actions is transferred to Lautoka as the Plaintiff will incur unnecessary legal costs and travelling expenses.

(iii) The Board's head office and its legal services department are also based in Suva and it would be appropriate for the parties that the action be tried in this Court rather than being transferred to Lautoka High Court.

(iv) In Lautoka High Court, I am advised that there are only two judges whereas in Suva High Court, there are several judges."

*(f) **Paragraph 9***

I pray to this Honourable Court that the best interest of the parties is that the action be tried in Suva High Court and Defendant's application for transfer of this proceedings to Lautoka High Court and consolidation of the proceedings be dismissed with costs."

The Law and Analysis

9. The Supreme Court practice 1997 (White Bank) at page 23, set out the provisions in relation to transfer of actions as follows:

"Discretion of the court – It is within the discretion of the Court whether to order the transfer to another division,....

Where by reason of its nature and subject matter, an action has been commenced and is proceeding in an inappropriate division or court, regard must be had to the applicable statutory provisions, rules or generally accepted practice... An application for such a transfer should be made unless a party considers he has a claim for special expedition in which event he should apply for an expedited hearing in the existing division or

court which he will then have to justify. The court will not normally allow the transfer of the action which is proceeding to the appropriate division or court merely on the ground that the action could be dealt with more expeditiously or efficiently elsewhere. If, however, the judge considers that a transfer of the action is the appropriate course, he may of his own motion after making enquiries of the head of the other division direct a transfer to that division with the consent of the head of his own division and that of the division to which the action is to be transferred.”

10. At page 28, states as follows:

“Two actions cannot be consolidated where the Plaintiff in one action is the same person as the Defendant in another action, unless one action can be ordered to stand as a counter-claim or their party proceedings in another action.....

Where consolidation must be refused for one reason or another an order will often be made that one action shall follow the other in the same list be heard before the same judge. In this way, the common witnesses are saved the expense of two attendances, and the judge will be in a position to try the actions in such order as may be convenient or even at the same time.”

11. The High Court Rules relevant for the present application states as follows:

*“(a) **Order 4 Rule 1 (1)***

“Proceedings must ordinarily be commenced in the High Court registry located in the Division in which the cause of action arises.

(b) **Order 4 Rule 1 (4)**

“Any action commenced in the High Court may be transferred by the Court from one High Court registry to another or to a Magistrate’s Court.”

(c) **Order 4 Rule 2**

“Where two or more causes or matters are pending, then, if it appears to the Court:

(i) That some common question of law or fact arises in both or all of them, or

(ii) That the rights to relief claimed therein are in respect or arise out of the same transaction or series of transactions, or

(iii) that for some other reason it is desirable to make an order under this rule, the Court may order those causes or matters to be consolidated on such terms as it thinks just or may order them to be tried at the same time or one immediate after another or may order any of them to be stayed until after the determination of any other of them.”

12. The Plaintiff’s opposition to the transfer of this action to Lautoka High Court is mainly on the premise that the property is in Tauva and not in Lautoka, the head offices of both the Plaintiff and the Defendant is based in Suva and there are only two judges in Lautoka whereas in Suva High Court there are several judges.

13. At the outset it should be noted that transfer of action is within the discretion of the court.

14. In exercising of the discretion on transfer, the court needs to be mindful of the fact that which court is the most suitable court to hear and determine bearing in mind the nature of the case, interest of all the parties, convenience of the parties and witnesses, expenses, the end of justice in the determination of the issues in view of most efficient administration of the court.
15. The court also needs to be mindful whether the proposed transfer would achieve the purpose of an expeditious conclusion of actions as well.
16. The present action is related to HBC/184/12 that both actions relate to land in question and serious of transactions relating to the previous lease over the same, that is Native lease 78720 which expired on 1 December 2011. The letter dated 24 August 2011 which the Plaintiff contends and the Defendant denies to be an offer of a new lease.
17. The cause of action arose in the District of Tavua, in the Province of Ba, in my view this action ought to have been, filed in Lautoka High Court.
18. This court is of the view that the application for consolidation should not be dealt with at this stage. The judge in Lautoka hearing the application of HBC 184/12, in my view should take the appropriate decision in this regard once the matter is transferred to the Lautoka High Court.
19. The White Book provides as stated in my earlier paragraphs that orders can be made instead for one action to stand as a counter claim or their party proceedings to the other action, or that one action to follow the other in the same list and be heard before the same judge, in such order as may be convenient or even at the same time, if the consolidations will be deemed to be not appropriate.
20. The High Court rules order 4 rule 2(iii) also provides similar provisions which enable to judge in Lautoka High Court to take the appropriation decision on causes or matters to be consolidated or not or order to try both matters at some

time or one immediately after another or may order any of them to be stayed until after the determination of any other of them.

21. That both parties are at liberty to proceed with their respective applications before the Judge in Lautoka High Court, hearing the Civil Action No. 184 of 2012.

Orders

1. The Plaintiff's action No. HBC 301 of 2012 is transferred to Lautoka High Court.
2. The Plaintiff's summons dated 27 December 2012 is transferred to Lautoka High Court.
3. The Defendant's motion dated 13 February 2012 for consolidation is transferred to Lautoka High Court.
4. Costs shall be in the cause.
5. Orders accordingly.

Susantha N. Balapatabendi

JUDGE