

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 161 of 2013

BETWEEN : **ASHAD ALI and EMA BI** both of Tua Tua, Labasa, Fiji, Taxi Proprietor and Staff Nurse respectively.

PLAINTIFFS

AND : **IRSHAD NADEEM HUSSAIN** of Narere, Nasinu, Taxi Proprietor.

DEFENDANT

BEFORE : **Acting Master Thushara Rajasinghe**

COUNSEL : **Mr. Singh J. K.** for the Plaintiffs
Mr. Samad I. H. Q. for the Defendant

Date of Hearing : **21st November, 2013**

Date of Ruling : **12th December, 2013**

JUDGMENT

A. INTRODUCTION

1. The Plaintiff instituted this action by way of Originating Summons dated 4th of June 2013 seeking an order for vacant possession of the land together with premises thereon located on Native Lease No 22403 Tacirua Subdivision Stage 4 Lot 114 as shown Lot 3 on S.O. 1672.
2. The Defendant upon being served with the Summons filed his affidavit in opposition which was followed by the reply affidavit of the Plaintiff. Subsequently, the matter was set down for hearing on the 21st of November 2013. Both the learned counsel agreed to

conduct the hearing by way of written submissions which I allowed. Accordingly the counsel filed their respective written submissions.

3. Having considered the Summons, respective affidavits and written submissions of the parties, I now proceed to pronounce my judgment as follows.

B. BACKGROUND

Plaintiff's case,

4. The Plaintiff claims that he is the registered lessee of the property comprised in Native Lease No 22403 located at Tacirua Plains Subdivision stage 4 being on Lot 114 as shown Lot 3 on S.O 1672 in the Province of Naitasiri and in the Tikina of Naitasiri. Plaintiff marked a copy of said Native Land lease No 22403 as annexure "A" and tendered it for my perusal and consideration. He further deposed that he entered into an agreement with the Defendant to transfer the said Native Lease to the Defendant. All necessary documentation for the transfer were executed through Messrs Kohil & Singh Solicitors in Suva. He tendered a copy of the Transfer executed pursuant to section 44 (1) of the Land Transfer Act as annexure "B" for my perusal and consideration. Moreover, the Plaintiff confirmed that the consent of the Native Land Trust Board was obtained for this transfer in accordance with section 12 of the Native Land Trust Board Act. The consent document was marked and tendered as annexure "C".
5. The plaintiff further stated that subsequent to the execution of transfer documents, the Defendant refused to settle the debt of FNFP. This refusal of the Defendant frustrated the completion of this transfer. The transfer deed was not registered pursuant to the provisions in Land Transfer Act. The Plaintiff meantime allowed the Defendant to occupy the land pending the execution and completion of the transfer deal. The Plaintiff claims that the Defendant was given the possession of the land for a monthly rental of \$ 450 until the completion of the said transfer deal. However, the Defendant defaulted the payment of said rent and has now been illegally occupying the land.

Defendant's Case.

6. The Defendant did not dispute the execution of the transfer documents and the consent of the NLTB. He admits that he is presently occupying the land as it was transferred to him pursuant to the Transfer Deed executed on the 23rd of April 2011. He stated that he is still willing to settle the agreed amount to the transfer. He alleges that the Plaintiff failed to honor his obligations in the agreement, which was to settle the loan he had obtained from FNPF. He tendered the said Agreement of Sale & Purchase as annexure to his affidavit in response. He further claims that he had been paying a monthly installment of \$450 as the loan repayment on behalf of the Plaintiff. He tendered a bundle of receipts to confirm that he had spent a large amount of money to improve and develop the land. Having stated his contention, the Defendant urged that he has a right of possession to this land and refuse to vacate and give possession to the Plaintiff.

C. THE LAW

7. Sections 169 to 172 of the Land Transfer Act outline the procedure for the application in this nature. In view of the section 169 of the Act, the last registered proprietor of the land and/or a lessor with power to re-enter where the lessees or tenant is in arrear for such period and/or a lessor who has issued a legal notice to quit or the term of the lease has expired are allowed to institute proceedings under this section to evict the person who is in possession of the land without a right to the possession.

8. Section 171 states that

“On the day appointed for the hearing of the summons, if the person summoned does not appear, then upon proof to the satisfaction of the judge of the due service of such summons and upon proof of the title by the proprietor or lessor and, if any consent is necessary, by the production and proof of such consent, the judge may order immediate possession to be given to the plaintiff, which order shall have the effect of and may be enforced as a judgment in ejectment”.

9. Section 172 deals with the Defendant's burden of prove where it states that

“If the person summoned appears he may show cause why he refuses to give possession of such land and, if he proves to the satisfaction of the judge a right to the possession of the land, the judge shall dismiss the summons with costs against the proprietor, mortgagee or lessor or he may make any order and impose any terms he may think fit”.

10. In view of sections 171 and 172 of the Act, I find the purpose of this special proceedings under section 169 is to provide a summary procedure for the registered proprietor and/ or the lessor to eject the occupiers from the land who either occupy the same without any legal right to possession or breach of tenant or lease agreement.
11. Bearing in mind the laws applicable for the proceedings under section 169 of the Land Transfer Act, I now draw my attention to briefly summaries the submissions of the Plaintiff and the Defendant.

Plaintiff's Submissions,

12. The learned Counsel for the Plaintiff contended that the Defendant's occupation on this land is illegal and the transaction is not valid as the consent of the NLTB has lapsed pursuant to section 12 of the NLTB Act. He submitted that the only remedy available for the Defendant if he has any claims, in the form of damages in another proceedings. The Defendant has no equitable remedy as no consent is in force now. The learned counsel for the Plaintiff further submitted that the Defendant is now occupying the land as a tenant and since he has been defaulting the rent, he has no right of possession pursuant to section 172 of the Land Transfer Act.

Defendant's Submissions,

13. The Defendant always maintains that he is willing to proceed with the transfer transaction and fulfilled his obligations under the agreement. He contended that Plaintiff's willful refusal to settle the FNFP loan prevents him to complete the transfer transaction.

D. ANALYSIS,

14. In view of the evidence presented in the respective affidavits and in written submissions, the dispute between the Plaintiff and the Defendant is that who is responsible for the breach of the Agreement of Sale and Purchase. The Defendant is not disputing the registered proprietorship of the Plaintiff. However, he contended that he has a right of possession as the lease has already being transferred to him pursuant to the execution of the transfer deed. He further claims proprietary estoppels to the land in dispute. Conversely, the Plaintiff claims that the transfer was not valid as the consent of the NLTB has expired. In light of these findings, the burden is on the Defendant to satisfy the court that he has a right to possession the land.
15. In *Morris Hedstrom Limited-v- Liaquat Ali* CA No: 153/87 held that

"Under Section 172 the person summonsed may show cause why he refused to give possession of the land and if he proves to the satisfaction of the Judge a right to possession or can establish an arguable defence the application will be dismissed with costs in his favour. The Defendants must show on affidavit evidence some right to possession which would preclude the granting of an order for possession under Section 169 procedure. That is not to say that final or incontrovertible proof of a right to remain in possession must be adduced. What is required is that some tangible evidence establishing a right or supporting an arguable case for such a right, must be adduced."
16. *Morris Hedstrom Limited v Liaquat Ali* (Supra) outlined the degree of the Defendant's burden under section 172 of the Land Transfer Act, where the defendant is only required to adduce some tangible evidence to establish a right of possession or an arguable case against the Plaintiff's claim.
17. The Plaintiff merely stated that the Defendant refused to perform his obligation under the agreement. In contrast, the Defendant tendered a copy of the Agreement of Sale and Purchases which states otherwise. This document confirmed that the payment of \$ 450

was not for the rent but was for the repayment of the Plaintiff's loan. According to the said agreement, the Plaintiff has undertaken to settle his FNPF loan. This actually prevent the proper registration of the transfer deed executed between the parties, and invalidated the consent given by the NLTB.

18. Under such circumstances, could the Plaintiff plead refuge in section 12 of the NLTB Act to deny the Defendant's right to the land. The learned counsel for the Plaintiff extensively submitted that in line with the *Charmers v Pardoe* (1963) 1 WLR 677) the sales agreement between the parties is invalid as the consent of the NLTB has expired.

19. Section 12 of the Native Land Trust Board Act states that

“Except as may be otherwise provided by regulations made hereunder, it shall not be lawful for any lessee under this Act to alienate or deal with the land comprised in his lease or any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever without the consent of the Board as lessor or head lessor first had and obtained. The granting or withholding of consent shall be in the absolute discretion of the Board, and any sale, transfer, sublease or other unlawful alienation or dealing effected without such consent shall be null and void:

Provided that nothing in this section shall make it unlawful for the lessee of a residential or commercial lease granted before 29 September 1948 to mortgage such lease. (Substituted by Ordinance 30 of 1945, s. 8; amended by 29 of 1948, s. 3.)”

20. **Sir Terence Donovan** held in *Chalmers v Pardoe* (*supra*) that;

“Even treating the matter simply as one where a licence to occupy coupled with possession was given, all for the purpose, as Mr. Chalmers and Mr. Pardoe well knew, of erecting a dwelling house and accessory buildings, it seems to their lordships that ,when this purpose was carried into effect, a “dealing” with the land took place. On this point their lordships are in accord with the court of appeal; and since the prior consent of the board was not obtained it follows that under the terms of s 12 of the ordinance, this dealing with the land was unlawful. It is true that in “Hernam Singh and Backshish Singh

v Bawa Singh, the court of appeal said that it would be an absurdity to say that a mere agreement to deal with land would contravene s 12, for there must necessarily be some prior agreement in all such cases. Otherwise there would be nothing for which to seek board consent. In the present case, however there was not merely agreement, but on one side, full performance and the board found itself with six more buildings on the land without having the opportunity for considering beforehand whether this was desirable. It would seem to their lordships that this is one of the things that s12 was designed to prevent.their lordships after full and anxious consideration of the whole matter have reached the same conclusion as the court of appeal namely that a dealing in the land took place here without the prior consent of the board as required by s 12 of the ordinance; that the dealing was accordingly unlawful and that in these circumstances equity cannot lend its aid to Mr. Chalmers”.

21. However, the legal precedent enunciated in Chalmers (Supra) was further elaborated and distinguished in **Native Land Trust Board v Subramani** (2010) FJCA 9; ABU0076.2006 (25 February 2010) where the Fiji Court of Appeal held that;

*“In respect of Mr. Chalmers' claim for an equitable charge or lien over the land because of the substantial buildings he had erected on the land, the Privy Council in **Chalmers v Pardoe** (supra) said this*

“The claim is based on the general equitable principle that, on the facts of the case, it would be against conscience that Mr. Pardoe should retain the benefit of the buildings erected by Mr. Chalmers on Mr. Pardoe's land so as to become part of the land without repaying to Mr. Chalmers the sums expended by him in their erection...

*There can be no doubt on the authorities that where **an owner of land has invited or expressly encouraged another to expend money on part of his land on the faith of an assurance or promise that that part of the land will be made over to the person so expending his money** a court of equity will prima facie require the owner by appropriate conveyance to fulfil his obligation; and when, for example for reasons of title, no such conveyance can effectively be made, a court of equity may declare that*

the person who has expended the money is entitled to an equitable charge or lien for the amount so expended. (my emphasis)

*It is clear from the above passages from Chalmers v Pardoe (supra) that that case is authority for the proposition that an arrangement between the head lessee and his sub-tenant of native land, where the head lessee grants the sub-tenant a licence to occupy coupled with possession, is a "dealing" within the meaning of s. 12 of the **Native Land Trust Act** and is therefore null and void if the prior consent of the NLTB is not obtained. In such a case, as between the head lessee and the sub-tenant, the Court of Equity will not assist the sub-tenant"*

*Further, we think Chalmers v Pardoe (supra) is distinguishable from the present case because of the facts. In that case, in contrast to the present case, the NLTB and the landowners played no active part in the grant of the sublease. It is our respectful opinion that the principle in Chalmers v Pardoe (supra) is an exception to the general rule and is not a rule of general application to cases involving native land where s. 12(1) of the **Native Land Trust Act** is in issue. As we have said above, it is not true that in all cases where s. 12(1) is invoked, the Court will not assist the tenant or the subtenant".*

22. In view of the Subramani (Supra), the defendant is allowed to seek assistance of the court as he was invited and offered by the Plaintiff to occupy and purchase the land, under such understanding he has executed all necessary documentation for the proper transfer of the lease including the consent of the NLTB. The NLTB also actively took part in this instance case by issuing him consent under section 12 of the NLTB Act. Accordingly, I am satisfied that the Defendant has successfully established that he has an equitable interest in this land. Hence the issue of possession of this land is involved with an arguable case.

23. I now turn to the issue of Proprietary Estoppel. The learned counsel for the Defendant submitted that the Defendant claims proprietary estoppels on the basis of money being spent by the Defendant. He further submitted that this type of estoppels which operates to prevent the revocation of a right affecting land which one party has been led by other to be permanent.

24. Justice Amaratunga observed in *Vishwa Nand v Rajendra Kumar* (Civil Action HBC 271 of 2012) that

“The general rule, however, is that “liabilities are not to be forced upon people behind their backs” and four condition must be satisfied before proprietary estoppels applies. There must be an expenditure, a mistaken belief, conscious silence on the part of the owner of the land and no bar to the equity”.

25. Justice Wati in *Wilfred Thomas Peter v Hira Lal and Farasiko* (Labasa HBC 40 of 2009) held that

“I must analyse whether the four condition have been met for the defence of proprietary estoppel to apply. The conditions are

- i. An expenditure,*
- ii. A mistaken belief,*
- iii. Conscious silence on the part of the owner of the land,*
- iv. No bar to the equity,*

26. Moving back to this instance case, the Defendant has incurred substantial expenditure for repayment of the Plaintiff’s loan and other rates and taxes for the land. Apart from that, he has spent for the development of the land. The Plaintiff did not object for such expenditure and silently approved them. The Defendant incurred such expenditure under the belief of purchasing the land as he has already executed the transfer deed and was invited to occupy the land. As it was discussed above, the Defendant is entitled to invoke the court jurisdiction to seek equitable remedies. Under such circumstances, I am satisfied that the Defendant has established his claim of proprietary estopples to the land.

E. CONCLUSION,

27. Having considered the reasons discussed above, I am satisfied that the Defendant has successfully provided evidence to establish a right of possession of the land and the

existence of an arguable case against the Plaintiff's claim. I accordingly make following orders that;

- i. The Originating Summons filed by the Plaintiff on the 4th of June 2013 is refused and dismissed accordingly,
- ii. The Defendant is granted a cost of \$ 750 assessed summarily,

Dated at Suva this 12th day of December, 2013.

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R.D.R. Thushara Rajasinghe
Acting Master of High Court, Suva