IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 254 of 2013

BETWEEN : **iTAUKEI LAND TRUST BOARD**, a body corporate duly constituted under the iTaukei Land Trust Act, [Cap 134].

PLAINTIFF

AND : **MUKESH CHAND** of Vunidogo, Naitasiri.

1ST DEFENDANT

AND : **ARUN CHAND** of Vunidogo, Naitasiri.

2ND DEFENDANT

AND : **ELENI ROKOVU** of Vunidogo, Naitasiri.

3RD DEFENDANT

BEFORE : **Acting Master Thushara Rajasinghe**

COUNSEL : **Mr. Vere N.** for the Plaintiff
Mr. Vijay Maharaj for the Defendants

Date of Hearing : 30th January, 2014
Date of Ruling : 7th March, 2014

RULING

A. INTRODUCTION

1. The Plaintiff filed this Originating Summons pursuant to Order 113 of the High Court Rules (H.C.R) seeking an order to recover possession of the land that the Plaintiff is entitled to possession. The first Defendant (hereinafter referred as the Defendant) upon being served with this Summons, filed his affidavit in opposition. The second and the third Defendants did not file any affidavit in opposition. The Plaintiff then filed his

affidavit in reply together with a supplementary affidavit of Mr. Jimilai Waqabaca. Subsequent to filing of respective affidavits, this Summons was set down for hearing on the 30th of January 2014.

2. At the beginning of the hearing, learned counsel for the Defendant raised a preliminary issue that the Plaintiff has abused the process of the court by instituting this action. Learned counsel stated that the Plaintiff has already instituted an action against the first Defendant in the Nasinu Magistrate court bearing action No 11 of 2013 on identically the same cause of action and seeking identically same orders as in this action. The first Defendant has filed his statement of defense with his counter claim and added two persons as third party to the said proceedings in the Magistrate court. Learned counsel further submitted that the learned Magistrate has granted an injunction order against the Plaintiff restraining them to interfere with the possession of the first Defendant. Having outlined his preliminary issue, learned counsel for the Defendant sought an order to dismiss this Originating Summons on the ground of the abuse of the process of the court.

3. Having considered the preliminary issue raised by learned counsel for the first Defendant, I invited both counsel to make their submissions on this issue prior to the substantive matter, which they submitted accordingly. Learned counsel for the Plaintiff submitted his written submissions which was followed by the submissions of the Defendant. The Plaintiff then filed his reply submissions.

4. Having considered the respective affidavits and submissions of the Plaintiff and the Defendant, I now proceed to pronounce my ruling on this preliminary issue as follows.

B. BACKGROUND.

The Defendant's Submissions,

5. Learned counsel for the first Defendant submitted that the Plaintiff instituted this action without disclosing the existence of the pending action No 11/2013 in the Magistrate Court which amount to an abuse of the process of the court. Learned counsel further

submitted that the Magistrate Court is a court with competent jurisdiction to hear and determine this dispute and the matter will be called in 11th of March 2014 to fix a hearing date. The Defendant has already filed his statement of defence with the counter claim and obtained an injunction order against the Plaintiff in the Magistrate court action No 11 /2013. Apart from that the Defendant added two parties as third party to the said proceedings. Learned counsel while disagreeing with the contentions of counsel of the Plaintiff stated that there is no requirement to file a formal Summons to dismiss these proceedings on this preliminary issues.

The Plaintiff's Submissions.

6. Learned counsel of the Plaintiff admitted the existence of the pending action in the Nasinu Magistrate court. Learned counsel further admitted in his written submission that if there are two courts faced with substantially the same question or issue that question or issue should be determined in only one of those courts. While admitting such, the Plaintiff contended that the High Court has a supervisory power over the Magistrate Court, wherefore the High Court could proceed with this action while the Magistrate Court action is pending. The Plaintiff deposed in his affidavit in reply that they instituted this action in accordance with the rules of the High Court and not intended to mislead court. Furthermore, the Plaintiff stated that the injunction was granted on an ex parte application of the Defendant in the Magistrate Court.

C. THE LAW.

7. I have considered the contention of learned counsel of the Plaintiff that there is no formal Summons filed by the Defendant seeking an order to strike out this action on the ground of the abuse of the process of the court. However, the Defendant raised this preliminary issue and alleged abuse of the process of the court by the Plaintiff in his affidavit in opposition. The Plaintiff admitted the existence of the action No 11 /2013 in the Magistrate Court based on the same questions and issues as of this action though they denied the allegation of abuse of the process of the court. Having considered the nature of

this preliminary issue, I find that this preliminary issue of the abuse of the process of the court does not fall under Order 18 rule 18 of H.C.R. The allegation of the abuse of the process of the court is not founded on the pleadings. It is founded on the institution of this action while an action in the Magistrate Court is pending based on identically the same issue.

8. Buckley J in **Thames Launches Ltd v Corporation of the Trinity House of Deptford Strond** (1961) All E.R. 26) provided an elaborative description on this legal issue, where he held that

"*I understand the principle to be that if there are two courts which are faced with substantially the same question, it is desirable to be sure that that question is debated in only one of those two courts, if by that means justice can be done. It does not appear to me with all respect to Jessei M.R. that it would make any difference whether the problem which confronted one court were of a wider and more general nature than the problem which confronted the other court. I can see that there would be a fair matter of argument if there were two proceedings going on in court "A" and court "B", the proceedings in court "A" relating to a number of questions, only one of which was raised in the proceedings in court "B" and was the only question raised in that court. That would be a very strong argument for saying that the convenient course would be to allow that question to be dealt with in the proceedings in court "A' which would dispose of the matter raised in the proceedings in court "B", whereas if the reverse course were taken the same would not apply. The problem whether a particular question which is raised in substantially identical terms in court "A" and court "B", should be allowed or should not be allowed to proceed in both courts, is one which ought to admit of a solution which prevents the matter being pursued in two separate proceedings; notwithstanding that the question raised in one court or the other many involve problems of a wider character*". (Empahsis added)

9. Having observed the legal principle on the issue of when two courts are faced with substantially the same question, Buckley J further held in **Thames Launches Ltd v Corporation of the Trinity House of Deptford Strond** (supra) that

"Counsel for the Defendant says that the principle is that a man should not pursue a remedy in respect of the same matter in more than one court. In my judgment, the principle is rather wider than that. It is that no man should be allowed to institute proceedings in any court if the circumstances are such that to do so would really be vexatious. In my judgment it is vexatious if somebody institutes proceedings to obtain relief in respect of a particular subject matter where exactly the same issue is raised by his opponent in proceedings already instituted in another court in which he is not the Plaintiff but the Defendant". (Empahsis added)

10. In **NBF Asset Management Bank v Tuimasl Lutu** (Civil Action HBC0146 of 2002) Justice Fathik held that

"by brining this action for the dealings between the parties, gives the impression that there is multiplicity of action which should be avoided. All the relevant issues between the parties ought be decided in one and the same action"

11. Justice Winter in **Niko Jhon Wilson v Housing Authority and others** (Civil Action No HBC0412 of 2004) held that

"I reviewed that law in a decision between Mr. Timoci Naco and Mr. Masirewa v Colonial Mutual Life Insurance Society, Civil Action No HBC0413 of 2003. In that decision I referred to Reid v New Zealand Trotting Conference (1984) I NZLR at page 9 where Richardson J explained abuse of process principles. In that decision the court observed that the court system exists to resolve disputes in a just manner but that filing new proceedings and asking the court again to resolve disputes also under adjudication, rules as no longer capable of being decided or decided in part albeit in a separate but related forum must be an abuse of the process of the court".

12. In view of the judicial precedents discussed above, a person is not allowed to institute proceedings in two courts on substantially the same issue and if he has done so, it is considered as vexatious and an abuse of the process of the court. I am mindful of the fact that the case authorities mentioned above have dealt with different circumstances than in these proceedings. However, the facts in those cases have no binding authority as no case

of exactly the same nature could be found. It is only to ascertain the principles upon which the court has decided those facts and applying them to see whether the circumstances in this case will come within the ambit of those principles. I am satisfied that the principles enunciated in these judicial precedents have effective application to the circumstances under review in this action and certainly assist me in this ruling.

D. ANALYSIS.

13. In view of the respective affidavits filed by the parties, there is no dispute of the existence of the pending Magistrate Court action No 11/2013 based on identically the same issue as in this case, apart from the contrasting claim of the counsel about the status of the proceedings. Learned counsel for the Plaintiff contended that the learned Magistrate was informed about these proceedings and that the matter was adjourned for a longer date pending the outcome of this action. However, learned counsel for the Defendant having tendered a certified sealed copy of the Magistrate court order dated 18th of November 2013 stated that there was no such an adjournment and the learned Magistrate granted time for the parties to file their respective pleadings and the matter will be called on 11th of March 2014 to fix a hearing date. Having perused the sealed copy of the learned Magistrate's said order, I accept the submission of the learned counsel of the Defendant, though the present procedural status of that action carries less material importance to this ruling.

14. The main contention of the Plaintiff is that the High Court has a supervisory jurisdiction over the Magistrate's Court and therefore this matter can proceed while the action in the Magistrate's Court is pending. In response, learned counsel for the Defendant submitted that the Magistrate Court is a court of competent jurisdiction to hear the issue raised in the action No 11/2013, and therefore, the institution of these proceedings is an abuse of the process of the court.

15. Fletcher Moulton L.J held in ***In re*** **Connolly Brothers Limited, Wood v Connolly Brothers, Limited** (1911) 1 ch 731) that

"a man has a right to bring an action in a court of inferior jurisdiction when the circumstances of the case entitle him to do, and if he within his rights he is neither more nor less liable to be restrained from proceeding with an action in a court of co-ordinate jurisdiction than he is from proceeding with an action in a court of interior jurisdiction. The question of jurisdiction to grant this injunction has nothing to do with the statues of the court. It has to do with the circumstances of the case as bearing in on the conduct of the party enjoined. …….. the existence of this jurisdiction does not warrant the court in exercising it on occasions when its exercise is not fully justified by the facts of the case. To restrain a man from proceeding with an action which prima facie he has a right to bring and to prosecute is a very serious thing. But when once we are satisfied that the jurisdiction exists we can consider the circumstances of the particular case. ……..it is quite clear that the court has felt justified in exercising this jurisdiction where it is satisfied that it would be vexatious to let the other action to proceed".

16. According to ***In re*** **Connolly Brothers Limited, Wood v Connolly Brothers, Limited (supra)**, the court is not required to consider the status of the court and only need to consider the circumstances of the case in order to exercise its jurisdiction in a situation as of this instance case. The Magistrate's Court is a court with competent jurisdiction to hear this dispute pursuant to section 16 (1) (b) (i) and (ii) of the Magistrate's Court Act, which is not disputed by the parties. Under such circumstances, no party should be allowed to invoke the jurisdiction of two courts with competent jurisdiction based on identically the same issue or question. Such act certainly affects the judicial reciprocity, which I name as *"domestic judicial comity"* within the court system.

17. I reproduce the observation of Buckley J in **Thames Launches Ltd v Corporation of the Trinity House of Deptford Strond** (supra) which I mentioned above, where he held that

"Counsel for the Defendant says that the principle is that a man should not pursue a remedy in respect of the same matter in more than one court. In my judgment, the principle is rather wider than that. It is that no man should be allowed to institute proceedings in any court if the circumstances are such that to do so would really be

vexatious. In my judgment it is vexatious if somebody institutes proceedings to obtain relief in respect of a particular subject matter where exactly the same issue is raised by his opponent in proceedings already instituted in another court in which he is not the Plaintiff but the Defendant".

18. It is apparent that the Plaintiff has invoked the jurisdiction of this court and the Magistrate's Court on identically the same question. The Plaintiff first instituted the proceedings in the Magistrate's Court by way of a writ of summons. The Defendant having being served with the summons, filed his statement of defence with his counter claim. He further added two other parties to the proceedings as third party. Moreover, the Defendant has successfully obtained an injunction against the Plaintiff in the Magistrate's Court proceedings. The Plaintiff then filed this action which is also founded on identically the same issue but added two other parties as defendants. The Plaintiff only instituted this action after the Defendant filed his counter claim against the Plaintiff and obtained an injunction against them. The circumstances under which the Plaintiff instituted this action are undoubtedly similar to the circumstances outlined by Buckley J in Thames Launches Ltd (Supra) as vexatious litigation.

19. The Plaintiff instituted this action knowing the existence of a counter claim against them in the Magistrate's Court proceeding and did not disclose it in their affidavit in support. The issue of the existence of Magistrate's Court action No 11/2013 was brought to the court's attention by the Defendant's affidavit in opposition. The Plaintiff responded only then in his affidavit in reply and sought an order from this court to revoke the injunction granted in the Magistrate's Court action No 11/2013. I am mindful of the contention of the Plaintiff that the proceedings under Order 113 of H.C.R is more expedient considering the urgency and monetary importance of this matter to the Plaintiff. However, such urgencies and convenience should be considered together with the other relevant circumstances of this case. The Plaintiff chose to institute the action in the Magistrate's Court. They then invoked the Jurisdiction of this court once the Defendant filed his counter claim and obtained an injunction against them in the Magistrate's Court proceedings.

20. The Plaintiff further contended that the parties in these proceedings are different to the action in the Magistrate's Court. Indeed the Plaintiff has instituted the action in Magistrate's Court only against the first Defendant of these proceedings. However, it is apparent that the disputed issue and the orders sought in both actions are identically founded on the same facts and issues. Hence, I disregard this contention of the Plaintiff.

21. Having considered the reasons setout above, I am satisfied that the institution of this proceeding is vexatious and abuse of the process of the court. I accordingly make the following orders, that;

i. The Originating Summons filed by the Plaintiff dated 27th of September 2013 is refused and dismissed accordingly.
ii. The first Defendant is granted a cost of $1000 assessed summarily.

Dated at **Suva** this **7th day** of **March, 2014**.

…….

R.D.R. Thushara Rajasinghe

Acting Master of High Court, Suva