IN THE HIGH COURT OF THE REPUBLIC OF FIJI

AT LAUTOKA

Civil Action No. 79 of 2013

IN THE MATTER of Section 169 of the Land Transfer Act (Cap. 131)

BETWEEN: **CROWN INVESTMENTS LIMITED** a limited liability company having its registered office at Lautoka.

PLAINTIFF

A N D: **MAHABUB MASHUK ALI** trading as Tourist Information Centre of Nadi.

DEFENDANT

Before: Master M H Mohamed Ajmeer

Counsel:

Ms M Latianara for the plaintiff
Ms U Baleilevuka for the defendant

Date of Hearing : 23 May 2014
Date of Ruling : 21 July 2014

RULING
[on preliminary issue]

Introduction

[1] This ruling relates to a preliminary issue raised by defendant.

[2] The Defendant in this matter has raised a preliminary issue in that he says that the issue before the court was litigated in the matter 192 of 2011 before a Judge. The Honourable Judge made an oral ruling for the respondent to pay rental arrears at a certain rate into the trust account of Champa Punja and the respondent has abided by the decision as he claims. The defendant also seeks to strike out the matter as abuse of process.

[3] It seems that the defendant has raised plea of *res judicata.*

[4] The plaintiff opposes the issue raised by the defendant. According to the plaintiff, this matter is not an abuse of process as the merit of this matter was not litigated nor was the aspect of the prayer sought decided on, as the civil action no. 192 of 2011 was struck out by consent as a result of technical issues raised by the then defendant.

[5] Both parties have filed their respective written submissions.

Background

[6] The plaintiff issued summons for vacant possession by way of summary procedure under section 169 of the Land Transfer Act of the shop premises known as shop 9 in Crown Investment Building situated at Nadi Town.

[7] Previously, the plaintiff had brought a similar action-192 of 2011 under section 169 of the Land Transfer Act to recover possession of the same premises against two defendants, one of whom was the defendant in this action (prior action). That prior action was withdrawn by the plaintiff to bring proceeding afresh and accordingly that action was terminated. However, subject to cost of $ 300.00 to the defendant.

Preliminary Issue

[8] The preliminary issue that was raised by the defendant is as follows:

> "The issue before the court was litigated in the matter 192 of 2011 before the Honourable Judge."

Defendant's argument

[9] Ms Baleilevuka on behalf of the defendant argued that the finality of the litigation is of paramount importance, to avoid any further actions, dealing with the same issues in future. The plaintiff who is seeking access to court process must and should always adhere to the rules of the court. It is important that we avoid numerous actions on the same issues be brought forth to court by the same party. She finally submitted that the plaintiff has wrongly filed the same action

with the tenancy issue in this new action. This is an abuse of court process and therefore this action be struck out.

Plaintiff's argument

[10] Ms Latianara for the plaintiff contended that this matter is not an abuse of process as the merit of this matter was not litigated nor was the aspect of the prayer sought decided on, as the Civil Action no. 192 of 2011 was struck out by consent as a result of technical issues raised by the then defendants and she submitted that the application for striking out be dismissed with costs and that the substantive matter herein be set for hearing.

The law on res judicata and abuse of process

[11] It seems that the defendant is relying on res judicata principles and abuse of process. Therefore it is pertinent to set out the law relation to res judicata.

[12] The requirements of cause of action estoppel the summary from Spencer Bower and Handley Res Judicata (4th edn, 2009) cited with approval by Lord Clarke (with whom Lord Phillips P, Lord Rodger, Lord Collins and Lord Dyson agreed) in the recent case of *R (on the application of Coke-Wallis) v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1 at [34], [2011] 2 All ER 1 at [34], [2011] 2 AC 146:

> 'In para 1.02 *Spencer Bower and Handley* makes it clear that there are a number of constituent elements in a case based on cause of action estoppel. They are that: "(i) the **decision,** whether domestic or foreign, was judicial in the relevant sense; (ii) it was in fact **pronounced**; (iii) the tribunal had **jurisdiction over the parties and the subject matter**; (iv) the decision was—(a) **final; (b) on the merits**; (v) **it determined a question raised in the later litigation**; and (vi) **the parties are the same** or their privies, or the earlier decision was *in rem.*" ' (Emphasis provided).

[13] In ***Westminster City Council v Haywood*** *(No 2)* [2000] 2 All ER 634. Lightman J applied the following definition of res judicata and held (at 645–646):

'A modern and authoritative statement of the doctrine of res judicata is to be found in the speech of Lord Bridge of Harwich in ***Thrasyvoulou v Secretary of State for the Environment, Oliver v Secretary of State for the Environment*** *[1990] 1 All ER 65 at 70–71, [1990] 2 AC 273 at 289: "The doctrine of res judicata rests on the twin principles which cannot be better expressed than in the terms of the two Latin maxims 'interest reipublicae ut sit finis litium' and 'nemo debet bis vexari pro una et eadem causa'. These principles are of such fundamental importance that they cannot be confined in their application to litigation in the private law field. They certainly have their place in criminal law. In principle they must apply equally to adjudications in the field of public law. In relation to adjudications subject to a comprehensive self-contained statutory code, the presumption, in my opinion, must be that, where the statute has created a specific jurisdiction for the determination of any issue which establishes the existence of a legal right, the principle of res judicata applies to give finality to that determination unless an intention to exclude that principle can properly be inferred as a matter of construction of the relevant statutory provisions." '*

'As a matter of principle and common sense, the doctrine of res judicata should apply equally to determinations and directions of the ombudsman (and judgments on appeal from him) as to other judgments and determinations, and res judicata should as much be a bar to a complaint before the ombudsman as it is a bar to the commencement of legal proceedings to which (in cases where the acts of maladministration complained of consist of interference with private law rights or breaches of private law duties) it is an alternative.'

[14] In the case of **Vivrass Development Ltd v Fiji National Provident Fund Board [2003]** Fiji High Court Action No. HBC312 of 2002s, Pathic JA (as he then was) stated as follows:

"According to Halsbury Vol. 16 4th Ed. para 1527 the doctrine of res judicata 'is a fundamental doctrine of all Courts that there must be an end to litigation'; it is a branch of the law of estoppel'.

In this case I find that the essentials of res judicata have been fulfilled as Halsbury (ibid) at para 1528 said:

In order that a defence of res judicata may succeed it is necessary to show not only that the cause of action was the same but also that the plaintiff has had an opportunity of recovering, and but for his own fault might have recovered in the first action that which he seeks to recover in the second. A plea of res judicata must show either an actual merger, or that the same point has been actually decided between the same parties". (Emphasis provided).

[15] Kumar, J in the case of **Andrew Skeriec & Ors v Union Manufacturing and Marketing Company Limited** [2014] Fiji High Court Civil Action No. 111 of 2008 at para 3.19 quotes:

"It is an abuse of the process of the court and contrary to justice and public policy for a party to re-litigate the issue of fraud after the self-same issue has been tried and decided by the Irish Court (House of Spring Gardens Ltd v Waite [1990] 2 ER 990, C.A)" (Emphasis provided).

Determination

[16] For my part, in this ruling I am to determine that whether the principles of res judicata and abuse of process will apply to the matter that is before me. I will endeavour to apply to the present case the six

requirements enunciated in Spencer Bower and Handley Res Judicata (4th edn, 2009) (ibid). The issue before me here is whether the cause of action raised in the current action was decided in prior action No. HBC 192 of 2011. If I answer the question negatively then the preliminary issue raised by the defendant must be rejected.

[17] Ms Baleilevuka submits that the issue before the court was litigated in the matter 192 of 2011 before the judge and the judge made an oral ruling for the respondent (the defendant herein) to pay rental arrears at a certain rate into the trust account of Champa Punja. The respondent has abided by the decision. The important point is the judge ruled that he would give a written ruling in the matter and this ruling has not been made.

[18] Ms Latianara submits the following regarding the prior action:

i. The plaintiff was Crown Investment Limited and the defendants included Victory Tours Limited and Mashuk Ali;

ii. This matter was instituted by way of an Originating Summons on 25th November, 2011, wherein the Plaintiff sought that the defendants show cause why they should not give up vacant possession;

iii. The matter was called before the Master Tuilevuka (as he then was) on 4 occasions;

iv. On the last occasion wherein the matter had been called before the Master Tuilevuka (as he then was), being the 26th of April, 2012, then Solicitors of the Plaintiff had conceded to withdraw the application and file fresh application, due to some technical issues raised after talks with the defendant;

v. The Orders made by the Honourable Master Tuilevuka (as he then was) were as follows:

I) $300.00 costs to the Defendant
II) Matter struck out by consent

[19] The submission advanced by the defendant's counsel regarding prior action (192 of 2011] that the judge that heard the action made an oral ruling and that would give a written ruling later on, is not correct and not borne out by the case record. I say this after perusing the case record of 192 of 2011. In the first place, the prior action was not heard and decided by a judge as the defendant alleged. That action was heard by Master Tuilevuka (as then he was). The plaintiff's submission in this regard is correct on the whole.

[20] As the plaintiff's counsel submits, the prior action was withdrawn by the plaintiff to bring proceeding afresh. As such the matter was struck out by consent with $300.00 cost to the defendant. In those circumstances, is it possible to argue that the cause of action raised in this action was determined and adjudicated upon in the prior action?

[21] The plaintiff in this action and in the prior action is the same. The defendant in this action was the second defendant in the prior action. The prior action as well as this action had been brought under section 169 of the Land Transfer Act to recover immediate vacant possession of the same property. To succeed in res judicata plea, the extensive requirements of res judicata (see [12], above) must be met. There is no dispute as to any of those requirements except requirement (iv) that the **decision was final and that was taken on the merits** and the requirement (v) that **it determined a question raised in the later litigation.**

[22] The previous matter was dismissed with $300.00 cost to be paid to the defendant upon withdrawal by the plaintiff with the consent of the defendant. That dismissal order may be considered a final order. Can one say that dismissal order was not taken on the merits? I would say it was not, for the case record of the prior action clearly shows that action was dismissed upon the plaintiff's withdrawal to bring a fresh action. According to the plaintiff, the withdrawal was necessitated due to a technical objection raised by the defendant. Obviously, there was no chance or necessity for the court to take a

final decision on the merits in the prior action. The plaintiff therefore fails to meet the requirement (iv), 4th requirement of res judicata, that the final decision was taken on the merits in the previous action.

[23] The 5th requirement of res judicata plea is that it determined a question raised in the later litigation. The issue in this action is that whether the plaintiff as the registered proprietor of the property is entitled to recover possession of the property which the defendant occupies. This was the issue that was to be determined in the prior action as well. The defendant argues that the issue before the court was litigated in the matter 192 of 2011. In contrast, the plaintiff's contention is that from the court records in Action no. 192 of 2011, the merits of the case, which is for the Defendant to show cause why they should not give up vacant possession, was never decided on, as the matter had been struck out as a result of technical issue raised.

[24] In the case of **Christou and another v Haringey London Borough Council** [2014] 1 All ER 135 (CA), Elias LJ (with him Laws and McCombe LJJ agreeing) noted:

> *'[39] The doctrine of res judicata provides that where a decision is pronounced by a judicial or other tribunal with jurisdiction over a particular matter, that same matter cannot be re-opened by parties bound by the decision, save on appeal. A party can set up an estoppel against his opponent to prevent him from seeking to re-open what has already been determined. This is a rigorous rule with few exceptions (fraud is one).*
>
> *[40] The twin principles underlying this doctrine have been often espoused: they are the need for finality in litigation and that a party should not be vexed by being twice subjected to the same litigation. Lord Maugham LC described them in these terms in New Brunswick Rly Co v British and French Trust Corp Ltd* [1938] 4 All ER 747 at 754, [1939] AC 1 at 19–20*:*
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> *'The doctrine of estoppel is one founded on considerations of justice and good sense. If an issue has been distinctly raised and decided in an action in which the parties are represented, it is unjust and unreasonable to permit the same issue to be litigated afresh between the same parties, or persons claiming under them.'*

[25] Returning back to the matter at hand, in the prior matter the dismissal order was never made after considering the merits of the case. In any event the current application is made, in my opinion, on a different cause of action, i.e. arrears accumulated from February 2010 till September 2013. Arrears of rent may be considered a continuing process and would give rise to continuing cause of action. Furthermore, the current action is brought following a fresh notice to quit (dated 16 November 2012) whereby any permission or licence given to the defendant to occupy the property has been cancelled and/or revoked. In the circumstances one cannot say the defendant is vexed by being twice subjected to the same litigation.

[26] The doctrine of estoppel which is founded on considerations of justice and good sense has no application to the current action. The issue which is raised in the current action was never decided in the previous action between the parties. The plaintiff therefore cannot set up an estoppel against the plaintiff to prevent him from seeking to bring the current action as the issue raised herein has not already been determined.

Abuse of Process

[27] Mr Singh also argued on the issue of abuse of process. He cited the case of Taniela Bolea v Fiji Daily Post Company Limited (HBC 0058 of 2003), where Justice Pathik referring to Halsbury's Laws of England and stated:

> *'An abuse of the process of the court arises where its process is used, not in good faith and for proper purposes, but as a means of vexation or oppression or for ulterior purposes, or, more simply, where the process is misused.'*

[28] It seems to me that the defendant submits that even if the doctrine of res judicata is not directly applicable, the related doctrine of abuse of process operates. The particular kind of abuse of process is that first

identified by Sir James Wigram V-C in **Henderson v Henderson** (1843) 3 Hare 100 at 114–115, (1843) 67 ER 313 at 319:

> *'... I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.'*

[29] The scope of this doctrine, and its relationship to, and point of departure from, the doctrine of res judicata, was set out succinctly and with clarity by Lord Millet **in Johnson v Gore Wood & Co** (a firm) [2001] 1 All ER 481 at 525–526, [2002] 2 AC 1 at 58–59:

> *'Sir James Wigram V C did not consider that he was laying down a new principle, but rather that he was explaining the true extent of the existing plea of res judicata ... Later decisions have doubted the correctness of treating the principle as an application of the doctrine of res judicata, while describing it as an extension of the doctrine or analogous to it. In Barrow v Bankside Members Agency Ltd [1996] 1 All ER 981, [1996] 1 WLR 257, Sir Thomas Bingham MR explained that it is not based on the doctrine in a narrow sense, nor on the strict doctrines of issue or cause of action estoppel. As May LJ observed in Manson v Vooght [1999] BPIR 376 at 387, it is not concerned with cases where a court has decided the matter, but rather cases where the court has not decided the matter. But these various defences are all designed to serve the same purpose: to bring finality to litigation and avoid the oppression of subjecting a defendant unnecessarily to successive actions ... the difference to which I have drawn attention is of critical importance. It is one thing to refuse to allow a party to relitigate a question which has already been decided; it is quite another to deny him the opportunity of litigating for the first time a question which has not previously been adjudicated upon. This latter (though not the former) is prima facie a denial of the citizen's right of access to the court conferred by the common law and guaranteed by art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969). While, therefore, the*

doctrine of res judicata in all its branches may properly be regarded as a rule of substantive law, applicable in all save exceptional circumstances, the doctrine now under consideration can be no more than a procedural rule based on the need to protect the process of the court from abuse and the defendant from oppression. In Brisbane City Council v A G for Queensland [1978] 3 All ER 30 at 36, [1979] AC 411 at 425 Lord Wilberforce, giving the advice of the Judicial Committee of the Privy Council, explained that the true basis of the rule in Henderson v Henderson is abuse of process and observed that it—

"ought only to be applied when the facts are such as to amount to an abuse, otherwise there is a danger of a party being shut out from bringing forward a genuine subject of litigation." '

'In so far as the so called rule in Henderson v Henderson suggests that there is a presumption against the bringing of successive actions, I consider that it is a distortion of the true position. The burden should always rest upon the defendant to establish that it is oppressive or an abuse of process for him to be subjected to the second action.'

[30] As stated in Henderson's case (supra), the plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation. In the previous action brought by the plaintiff the court did not form an opinion and pronounce a judgment on the issue raised.

[31] The res judicata related abuse of process does not provide an automatic bar to a successive action provided that it would not be abusive or oppressive to take that cause of action. Moreover, the burden is on the party asserting abuse of process to establish it. As I already noted that the principles of res judicata will not apply to the current action brought by the plaintiff. It would not be abusive or oppressive to bring this successive action against the defendant on an issue which was not already decided by the court.

Conclusion

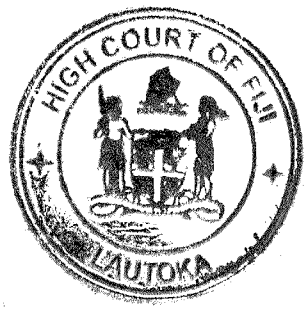
[32] The question raised in this current action was not already decided on by the court in the prior action. As such the principles of doctrine of res judicata did not apply to the current action. The burden of

establishing abuse of process was no the defendant. The defendant failed to discharge this duty. The plaintiff is entitled to bring the current action as there was no res judicata. Therefore there is no abuse of process.

[33] For all these reasons, I reject and overrule the preliminary objection raised by the defendant that the plaintiff has wrongly filed the same action with the tenancy issue in this action and that this is an abuse of process, with cost of $200.00 which is summarily assessed.

Final Orders

[34] The preliminary objection raised by the defendant is rejected and overruled. The defendant is to pay summarily assessed cost of $200.00 to the plaintiff in 21 days. The matter is now adjourned to 13 August 2014 for mention only to fix hearing the substantive matter. Order accordingly.



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M H Mohamed Ajmeer

Master of the High Court

At Lautoka

For plaintiff: Messrs Young & Associates, Barristers & Solicitors

For defendant: Messrs Anil J Singh Lawyers, Barristers & Solicitors