

**IN THE HIGH COURT OF FIJI**  
**WESTERN DIVISION**  
**AT LAUTOKA**

CIVIL ACTION NO. HBC 198 OF 2011/L

**BETWEEN: BIMAL VIMLESH NARAYAN** of Meigunyah, Nadi, Clerk

**PLAINTIFF**

**AND : REENA KUMARI BRAY** of Lami, Central Division,  
Fiji, Domestic Duties

**DEFENDANT**

**Appearances :** Mr Anil J Singh for the Plaintiff  
Mr D. Naidu for the Defendants

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**Ruling**

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**Introduction**

**Application of the Defendant**

1. The Defendant filed summons dated 17<sup>th</sup> May 2013 seeking the following orders:
  - a) To consolidate Civil Action HBC 78 of 2013 with this action.
  - b) To stay all proceedings in this action for vacant possession sought by the Plaintiff against the Defendant until determination of Civil Action of No. HBC 78 of 2013.
2. In the affidavit in support of the summons sworn by the Defendants lawful Attorney it is stated inter alia that:
  - i) The Defendant has filed Writ of Summons with statement of Claim in HBC 78 of 2013 against the Plaintiff in this matter to set aside /nullify/interpret the consent orders made on 4<sup>th</sup> October 2011.
  - ii) The Defendant request HBC 78 of 2013 be consolidated with this action in which the Defendant is the Plaintiff.

- iii) In order to determine the intention of the parties at the time of compromise and/or consent orders were entered into it is necessary to consolidate this action with civil action number 78 of 2013 as both arise out of the same transaction.
- iv) It is also necessary to preserve the status quo until determination of the issues raised in Civil action no 78 of 2013 by the Court.
- v) In allowing the Plaintiff (Appellants) appeal in Civil Appeal No. ABU 0063 of 2011 Justice Basnayaka in paragraph (16) stated the Defendant would need to file a fresh action for determination of the parties intentions.

### **Affidavit in Response**

3. The Plaintiff's Attorney filed an affidavit opposing the application to consolidate action HBC 78 of 2013 with this action. It is stated in the said affidavit:
- (i) That the Civil Action HBC 198 of 2012 deals with Order 113 of the High Court Rules where the Plaintiff is seeking order for vacant Possession on the ground that the Defendant is illegally occupying the subject property and without paying any rent to the Plaintiff.
  - (ii) That the new action HBC 78 of 2013 deals with the interpretation of the terms of settlement that was entered in Civil Action No. 81 of 2006.
  - (iii) That the Defendant is illegally occupying and staying free on the subject property as his occupation is without the consent of the Director of Lands and is now estopped from raising any issues pursuant to the sale and purchase agreement dated 11<sup>th</sup> October 2005.
  - iv) Should the Defendant want to settle the transaction pursuant to the sale and purchase agreement dated 11<sup>th</sup> October 2005 than he should move out of the subject property and/or alternatively pay rental to the Plaintiff at the rate of \$1200.00 from 1<sup>st</sup> January 2006 which amounts to \$108,000.00.
  - v) That the Defendant came into possession of the subject property prior to the consent of the Director of Lands and as such the sale and purchase agreement dated 11<sup>th</sup> October 2005 is null and void.

### **Hearing**

4. When the matter came up for hearing on 3<sup>rd</sup> September 2014 the learned counsel for both parties made oral submissions and tendered written submissions with leave of the court. The Plaintiff in his written submissions states that he adopts the submissions filed on 6<sup>th</sup> December 2013 and further submissions filed on 2<sup>nd</sup> May 2014.

## **Chronology of Events**

5. In civil action no. 81 of 2006 the Plaintiff sought the following orders from Court.
  - (a) A declaration that the said agreement has been duly rescinded, or alternatively rescission of the said agreement.
  - (b) A declaration that the said deposit is forfeited as liquidated damages.
  - (c) Vacant possession of the Property;
  - (d) Special damages for Loss of rental income from the Property;
  - (e) General damages for loss of opportunity to sell the Property to a third party
  - (f) Costs on solicitor client indemnity basis
  
6. It is stated in the statement of Claim of the Plaintiff in Action No. 81 of 2006 that the Plaintiff entered into a written agreement with the Defendant to sell the property contained in Crown Lease No 15354 for the total sum of \$100,000.00. Furthermore, the following facts are stated in his statement of claim
  - i) That the Defendant prior to execution of the Agreement paid \$50,000.00 to the Plaintiff and the total sale price was \$150,000.00.
  - ii) The settlement date of the sale and purchase of the property was 31<sup>st</sup> December 2005.
  - iii) Vacant possession was to be provided to the Defendant upon and on settlement.
  - iv) That sometime in early January 2006 the Plaintiff through his lawful Attorney allowed the Defendant to store some of her belongings at the property pending settlement and in breach of clause 10 of the agreement Defendant took full possession sometimes in January 2006.
  - v) The Plaintiff through his attorney extended the date of settlement until 3pm on 15<sup>th</sup> February 2006 because the Defendant was unable and/or unwilling to settle agreement.
  - vi) That in spite of the Extension the Defendant continues to be unable and/or unwilling to settle the agreement and that the Plaintiff through his Attorney gave notice to the Defendant to give vacant possession of the property.

7. The Defendant filed a statement of Defence praying inter alia;
  - a) That the Plaintiff's claim be dismissed.
  - b) That there be order for specific performance for the transfer of crown lease no. 15354 to the Defendants name.
  - c) Declaration that the Plaintiff complete all works on the said dwelling house including permanent electrical connection prior to release of the balance purchase price of \$50,000.00 to the Plaintiff.
  - d) Damages.
8. When this matter was taken up for hearing on 4<sup>th</sup> October 2011, Parties entered terms of settlement signed by the Plaintiff, the Defendant and the respective Counsels.
9. Once the settlement was entered the Defendant filed a motion on 4<sup>th</sup> November 2011 seeking a clarification on the payment to be made to the Plaintiff and also to stay of the consent order until further Order of Court.
10. The learned Judge after inquiry made order dated 16<sup>th</sup> November 2011 not to release the deposit of \$50,000.00 to the Plaintiff varying the terms entered in the settlement and if the amount is already paid the Plaintiff was ordered to return the same.
11. The Plaintiff then appealed to Court of Appeal being Action No. ABU 0063 of 2011 against the variation by Judge to the terms of settlement and the Court of Appeal allowed the appeal setting aside the order dated 16<sup>th</sup> November 2011.
12. In the Judgement of the Court of Appeal His Lordship Banayaka J (paragraph 16) stated as follows

***".....This is not a case involving an arithmetical error or where the judge says that is not what he intended. In order to ascertain the intentions of the parties evidence will have to be led. For this purpose the Defendant will have to file a fresh action"***
13. Pursuant to the said judgement the Defendant (as Plaintiff) commenced action no. 78 of 2013 on 13<sup>th</sup> May 2013 and sought the following reliefs:
  - i) That the terms of settlement dated 4/10/2011 be declared a nullity and as being tainted with fraud and therefore set aside.

Alternatively

- a) That the Court interpret and give effect to the Terms of Settlement dated 04/10/2011 after pursuing both the hand written and typed version to give effect to the same.

Alternatively

- b) Vary the terms of settlement dated 04/10/2011 in its discretion to give effect to the intention of the parties.
  - c) Costs on indemnity basis.
14. However, prior to the Defendant filing above Action No. 78 of 2013 the Plaintiff filed this Action No 198 of 2011 by way of Originating summons on the basis that the vacant possession of the sub-lease which is crown land should be given to him as the Occupation of the Defendant is void ab.initio due to the lack of consent from the Director Lands.
15. In considering the pleadings and legal proceedings of Action No. 81 of 2006, 98 of 2011 and 78 of 2013, I note the following facts:
- i) That the plaintiff filed Action No. HBC 81 of 2006 on a Sale and Purchase agreement which he has entered into with the Defendant. He sought inter alia that the deposit made by the Defendant be forfeited as liquidated damages and also vacant possession. The Defendant filing a statement of defence sought inter alia Order for specific performance of the agreement.
  - ii) Matter was settled on 04 October 2011 and \$50,000.00 paid by the Defendant to the Plaintiff according to the terms of settlement.
  - iii) Dispute arose about the balance payment to be made by the Defendant to the Plaintiff on the terms of settlement and the learned Judge varied to terms of settlement by ordering that the \$50,000.00 paid by the Defendant to the Plaintiff to be refunded if all ready paid or not to be released to the plaintiff if its not paid.
  - iv) The Court of Appeal set aside the said order which amended the consent Judgement and stated that in order to ascertain the intention of the parties evidence have to be led and for this purpose the Defendant will have to file a fresh action.
  - v) The Plaintiff files action No. HBC 198 of 2011 on the basis that the land is a crown lease and the occupation of the Defendant is void ab.initio due to the lack of consent from the Director Lands.
  - vi) Defendant files Action No. 78 of 2013 seeking to set aside the settlement; alternatively interpret and give effect to the terms of settlement after pursuing both hand written and typed versions;

alternatively to vary the terms of settlement in its discretion to give effect to the intention of the parties.

### **Analysis and Determination**

16. The settlement entered between the parties in Action No. 81 of 2006 was not set aside by the Court of Appeal. What is set aside is the amendment to the settlement. As such I am of the view that the settlement reached in Action No. 81 of 2006 is still intact.
17. In the affidavit in reply sworn by Plaintiff's Lawful Attorney Remal Anjesh Narayan on 3<sup>rd</sup> February 2012 it is admitted that the terms of settlement and order entered on 04/10/2011 are intact and not set aside.

In paragraph 4 of the said affidavit (paragraph 4; 2<sup>nd</sup> sub paragraph) it is stated as follows

***"I have been further informed by my solicitors and verily believe that the terms of settlement and Orders entered on 04/10/2011, are intact and not set aside and therefore there is no merit in which the Defendant is now alleging"***

18. Furthermore, it is admitted by the parties that the Defendant has paid the Plaintiff \$50,000.00 before entering in to the sale and purchase agreement and made a further payment of \$50,000.00 in accordance with Clause 2 of the settlement.
19. The Plaintiff who accepted part payment on the settlement reached with the Defendant and who also admits by the affidavit in reply that the settlement is intact and not set aside by the Court of Appeal is now trying to get vacant possession of the land on the basis that the sale and purchase agreement reached between the parties is void ab.initio due to it being not consented to by the Director Lands.
20. If the Court takes up this case without considering the settlement reached between the same parties in HBC 81 of 2006 it will nullify the said settlement and thereby cause prejudice to the Defendant who has already paid \$100,000.00 for the property, out of which \$50,000.00 was paid in accordance with the terms of settlement. As a result the Plaintiff will be unjustly enriched with the money he has received from the Defendant.
21. The Defendant although late in filing Action No HBC 78 of 2013 has now sought that the settlement be set aside or corrected in order to give effect to the intention of parties.

If the Court allows the Plaintiff to proceed with this action in order to get vacant possession of the property it would nullify the settlement entered into

by the parties in Action No HBC 81 of 2006.

Therefore, it is my view that the Court should first decide whether the said settlement is to be set aside or not.

22. Consolidation of the two actions in my view will avoid multiplicity of suits and avoid prejudice to the Defendant as discussed above.
23. In considering all of the above, I hold that action No. HBC 78 of 2013 should be consolidated with this action and that proceedings in this action for vacant possession should be stayed until determination of Action No. HBC 78 of 2013.

**Final Orders**

24. (a) Civil Action HBC 78 of 2013 to be consolidated with this action.
- (b) Stay all proceedings in this action for vacant possession sought by the Plaintiff against Defendant until determination of Civil Action 78 of 2013.
- (c) Each party should bear their own costs.



**Lal S. Abeygunaratne**

**Judge**

**29/10/2014**

