

IN THE HIGH COURT OF FIJI AT LABASA  
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 17 OF 2014

BETWEEN : NAUSHAD HUSSAIN

Plaintiff

AND : HIRA LAL

1<sup>st</sup> Defendant

AND : I TAUKEI LAND TRUST BOARD

2<sup>nd</sup> Defendant

AND : THE ATTORNEY GENERAL OF FIJI

3<sup>rd</sup> Defendant

Counsel : Mr. P. Lomaloma for the Plaintiff  
Mr. Fesaitu for the 3<sup>rd</sup> Defendant

Date of Hearing : 18<sup>th</sup> November, 2014

Date of Judgment : 26<sup>th</sup> February, 2015

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**INTERLOCUTORY JUDGMENT**

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[1] The plaintiff has filed this action seeking reliefs under two causes of action. Under the first cause of action against the first and second defendants the following reliefs are prayed : -

- f) *Specific performance of the agreement dated the 25<sup>th</sup> of July, 2009;*
- g) *A declaration that the alleged surrender and purported registration thereof is a nullity, void and of no effect;*
- h) *An order that the Third Defendant cancels the said registration of the surrender;*
- i) *An order that the Second Defendant restores the whole of the lease in the name of the Plaintiff;*
- j) *An order that the Second Defendant processes all documents necessary to effect the transfer of the lease to the Plaintiff;*
- k) *An order that the Registry of the High Court signs all necessary documents to effect the transfer if the First Defendant fails to do so;*
- l) *An order that all cane proceeds held up at the FSC for the last cane payment of the 2012 season and thereafter be paid to the Plaintiff;*
- m) *Special Damages;*
- n) *General Damages;*
- o) *Exemplary or Punitive damages;*
- p) *Interest pursuant to the Miscellaneous Provision (Interest and Death) Act;*
- q) *Indemnity costs;*
- r) *Such further and or other relief as this Court in the circumstances deems just.*

Under the second cause of action the following reliefs against the first defendant are prayed : -

- a) *The sum of \$47,766.00 (Forty seven thousand seven hundred and sixty six dollars) in specific damages for losses suffered till the time of filing;*
- b) *General damages in an amount to be determined at trial;*
- c) *Exemplary or Punitive damages;*
- d) *Indemnity Costs;*
- e) *Interest pursuant to the Miscellaneous Provisions (Interest and Death) Act;*

*f) Such further relief that this Honourable Court determined necessary and appropriate.*

[2] As the first defendant is residing out of jurisdiction the plaintiff had obtained permission of Court to serve the summons out of jurisdiction.

[3] The second and third defendants have filed their statements of defence.

[4] One Apisalome Yabakidua has filed an affidavit of service and stated that all documents have been served on the first defendant in New Zealand. The said affidavit of service was filed on 1.8.14.

[5] On 29.9.14 a motion has been filed to enter default judgment against the first defendant. The said Motion stated:

*“The plaintiff will rely on the affidavit of Apisalome Yabakidua sworn on the 30<sup>th</sup> day of September 2014 filed herein. This motion is filed pursuant to Order 19 Rule 7 of the High Court Rules and the inherent jurisdiction of the High Court.”*

[6] The Learned Master had given a Ruling on 8.10.14 and has fixed the case for formal proof before a Judge.

[7] The case was taken before me for formal proof. The plaintiff’s counsel informed that he is confining his application to obtain default judgment only pertaining to relief “f” of his Statement of Claim, under the first cause of action, only against the first defendant.

[8] Relief “f” reads as follow *“specific performance of this agreement dated 25.7.2009”*.

### **Background**

[9] The first defendant was the owner of a lease issued by the second defendant.

- [10] The plaintiff had entered into a partly oral and partly written agreement with the first defendant for the sale of the lease held by the first defendant.
- [11] As per the terms of the agreement the plaintiff had to comply with certain terms and the first defendant was to complete the sale subject to the consent of TLTB and FSC.
- [12] The parties had entered into a sale and purchase agreement and a power of attorney had been given by the first defendant to the plaintiff to manage the land.
- [13] The plaintiff alleges that although he had complied with the conditions the first defendant had gone back and now has surrendered the lease to the TLTB.
- [14] In the statement of claim the plaintiff has aver that the first and second defendants have acted fraudulently and among other reliefs had sought for specific performance of the agreement.
- [15] In the second cause of action the plaintiff has claimed for damages against the first defendant for breach of contract.

### **Determination**

- [16] At the formal proof hearing the plaintiff confined his claims only for specific performance of the agreement against the first defendant.
- [17] The Native Land Trust Board has issued an instrument of tenancy to the first defendant for a period of 31 years commencing from 1.7.05. On 25.7.09 the first defendant had entered into a sale and purchase agreement P2 with the plaintiff.
- [18] The plaintiff in his evidence stated he had paid \$15,000 to the first defendant and for the balance \$15,000 the parties had entered into agreement P2.

## Sales and Purchase Agreement

[19] The agreement was marked as P2. The said agreement is subject to two conditions namely :-

- a). *Consent from NLTB.*
- b). *Consent from FSC.*

[20] Also among other things Clause 3 states that the parties to execute an application to assign and transfer of NLTB NO. 50018258 and of the Sugar Cane Contract No. 312/4013 and the whole of the same should be submitted for the consent of Native Land Trust Board and FSC.

[21] The plaintiff submitted that his obligations were stipulated under Clause 1, 1 (a), 3, 4(b), 4(d), 18, 23. It was also tendered in evidence that settlement was to be effected within two months of obtaining consents stated in Clause 2.

[22] It was also submitted that Clause 16 of P2 dealt with situations of default by the vendor. It is pertinent to note Clause 16 which reads as follows:

*“If the vendor shall make default in the performance or observance of any stipulation or agreement on the Vendor’s part herein contained and if such default shall continue for the space of fourteen (14) days from the due date then and in any such case the Purchaser without prejudice to other remedies available to him may at his option exercise any of the following remedies namely:*

- a) *May sue for specific performance of this agreement.*
- b) *May claim damages in addition to seeking specific performance of this agreement.*

Accordingly, if the vendor default to perform an obligation stipulated in the clause for 14 days from the due date then the plaintiff was entitled to sue for specific performance or claim for damages.

- [23] The first defendant has signed a power of attorney in favour of the plaintiff on 25.7.09 (P 12) which allowed the plaintiff to enter the land and cultivate. Subsequently the plaintiff has entered the land and cultivated. The power of attorney has been given for the purpose of looking after, maintaining, cultivating and managing farm number 4013. The plaintiff tendered P3 the receipts issued by the first defendant for the payment of money pursuant to the oral agreement. P6 as receipt for purchasing fertilizer.
- [24] The plaintiff submits P8, P 9 and P10 the statements for cane cultivation for the years 2010, 2011 and 2012 the first defendant had received a net profit of \$20,108.28. It's pertinent to note that as per P2 clause 4(d) the purchaser was entitled for the sugar cane proceeds for 2010.
- [25] The plaintiff in his evidence submitted that the agreed sum to be paid was \$37, 117.86. He has paid a total of \$45,593.14. It is alleged that the first defendant has failed to transfer the land in favour of the plaintiff as per P2.
- [26] The plaintiff had instituted an action in the Magistrate Court against the first defendant who is alleged to be residing in New Zealand. Subsequently the first defendant has surrendered the lease back to the second defendant.
- [27] PW 2 the Law Clerk gave evidence pertaining to correspondence between the plaintiff's solicitor and the second defendant.
- [28] It was submitted that the first defendant had surrendered his lease to the second defendant and the same has been registered on 18.1.13 by the Registrar of Deeds.

- [29] The plaintiff conceded that he had to prove fraud in order to qualify to obtain the relief (f) he has sought.
- [30] However it's pertinent to note that the plaintiff's closing written submission is contrary to the relief he sought at the formal proof. In fact without leading evidence the plaintiff has addressed court on his damages claim. It is also pertinent to note that at the formal proof, counsel conceded that he was entitled only either to damage or for specific performance and at this stage he was only going to pursue the remedy of specific performance.
- [31] For the plaintiff to obtain the relief (f) of prayer under the first cause of action the way it is constituted it's incumbent on the plaintiff to establish fraud. When the plaintiff entered into P2 he was aware that P2 was subject to the consent of second defendant and that the entire agreement was subject to Clause 2 and 3 of the agreement. To comply with clause 2 parties had to comply with Clause 3 of P2. The parties had entered into P2 in 2009. The plaintiff has filed this case in 2014. However the court finds that the plaintiff has failed to establish that the plaintiff has complied with Clause 3 of the agreement with independent corroborative evidence or documentary evidence. For the sale and purchase agreement to take effect it was imperative that Clause 2 is fulfilled. For Clause 2 to be complied with both parties had to act under Clause 3. As I have stated earlier the plaintiff has failed to satisfy court that the plaintiff has complied with his obligation under Clause 3 and that the first defendant with intention to defraud the plaintiff was not complying with the said clause.
- [32] As per the agreement clause 2 and 3 becomes a "condition precedent". When a condition precedent is imposed the plaintiff has to satisfy court that it has been fulfilled. It is stated *"where certain conditions precedent must be satisfied by the plaintiff before performance can be exacted from the defendant, such conditions must be performed by the plaintiff before he claims specific performance"*. [C.G.Weeramantry; The Law of Contracts. Vol II 969].

[33] It is also pertinent to note that in the absence of fulfilling clause 2 and 3 of the agreement the agreement becomes unenforceable by statute.

[34] As per clause 3 both parties have agreed to execute an application to obtain the consent to assign and transfer of the lease and the contract. However no oral or documentary evidence was submitted to court by the plaintiff to satisfy, that the plaintiff had complied with his part under this clause. When the court questioned the plaintiff's solicitor as to compliance with clause 2 and 3 of the agreement the solicitor failed to answer.

[35] This court observes that for the settlement date to be effected the parties should have complied with Clause 2 & 3 of P2. The plaintiff to be entitled to invoke the jurisdiction under Clause 16 of P2 he has to establish before court that the parties had complied with clause 2 and 3 of the agreement and that the vendor has defaulted in performance and such default has continued for 14 days. The plaintiff has failed to produce before this court any documentary evidence to show that he had put the first defendant on notice and 14 days had passed without the first defendant complying with it. The plaintiff has failed to satisfy court that he has complied with the pre-requisite to invoke the jurisdiction of this court to obtain the relief of specific performance.

[36] It is also pertinent to note that the plaintiff is attempting to obtain specific performance by challenging the surrender of the lease by the first defendant. The basis for this challenge and the basis for seeking specific performance are in the first cause of action which is against the first and second defendants. The plaintiff has alleged fraud on the part of first and second defendants. Even though the plaintiff has filed this application under Order 19 Rule 7, the first cause of action pertaining to fraud is against first and second defendants and the way it is pleaded it is not separable. Strangely, the plaintiff decided not to proceed against the second defendant in seeking relief under the first cause of action. It should also be noted that the plaintiff has failed to adduce any evidence on the intention to fraud by the defendant.



- [37] It is also pertinent to note that the plaintiff is still the valid holder of the Power of Attorney of the first defendant, thus the Power of Attorney holder is suing the principle on fraud while still holding the Power of Attorney. No evidence of the revocation of the power of attorney has been submitted to court.
- [38] The plaintiff further submits that the first defendant has now surrendered the lease to the second defendant. Under the circumstances to obtain specific performance, the plaintiff has failed to satisfy court as to the existence of the corpus in the contract.
- [39] No evidence was led to show that the plaintiff had acted under clause 2 and 3 of P2 or at least attempted to act. There was no evidence placed as to whether the consent of NLTB and FSC were obtained. I find as per clause 2 and 3 of P2 this is a condition precedent as the validity of the entire agreement P2 is subject to the said clauses.
- [40] In the absence of regulatory approvals, for this court to grant orders for specific performance I will have to act on a assumption that the regulatory approval has been obtained. Without any evidence being led on the regulatory approval this court declines to act on such an assumption.
- [41] For the plaintiff to obtain a judgment for specific performance, the plaintiff has to prove the existence of a valid agreement. *"Specific performance presupposes of course the existence of a valid and enforceable contract and is awarded only in respect of executory as opposed to executed contract"*. (C. C. Weeramantry the Law of Contracts Vol II. 971).
- [42] In this instance for the plaintiff to obtain specific performance he has failed to satisfy court that he had complied with Clause 3 of P2 and that first defendant has not complied fraudulently.

**Conclusion**

- [43] In the closing submissions the plaintiff also submitted that he was unable to serve the writ of summons on the first defendant. It is sufficient to state that this statement of the plaintiff cuts across his entire application for formal proof as without proper proof of service the plaintiff will not be entitled to seek for formal proof.
- [44] I also hold that the cause of action against the first and second defendants are non separable as pleaded in the statement of claim. Accordingly, the plaintiff's application to obtain default judgment as prayed for in relief "f" under the first cause of the action against the first defendant cannot succeed.
- [45] For the above stated reasons in the judgment, the plaintiff has failed to satisfy court to obtain default judgment against the first defendant as pleaded in relief "f" under the first cause of action against the first and second defendants. Thus the motion to enter default judgment dated 29.9.14 stands dismissed.
- [46] I make no order as to cost.



*Mayadunne Corea*.....

Mayadunne Corea

**JUDGE**

26.02.2014