IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 67 of 2014

BETWEEN : **WALI MOHAMMED** of 120 Sukanaivalu Road, Lautoka, Painter with Lateef & Company, Ravouvou Street.

PLAINTIFF

A N D : **MOHAMMED SHAMSHER AZAAD KHAN** of 82 Rossli Drive, Hinchinbrook 2168 NSW Australia through his lawful Attorney, Mohammed Yas of 32 Capricorn Boulevande Green Valley 2168 NSW, Australia, Property Owner.

DEFENDANT

(Ms) Jyoti Sangeeta Singh Naidu for the Plaintiff
Mr Varunendra Prasad for the Defendant

Date of Hearing :- **30th March 2015**
Date of Ruling :- **05th June 2015**

RULING

(A) INTRODUCTION

(1) Before me is the Defendant's Summons pursuant to Order 18, rule 18 (1) (a) & (d) of the High Court Rules and the inherent jurisdiction of the court seeking the grant of the following orders;

1. *An order that the Plaintiff's Statement of Claim dated the 1st day of May 2014 be struck out under the High Court Rules, 1988 and under the inherent jurisdiction on the ground that –*

   (i) it discloses no reasonable cause of action against the Defendant upon Section 12 of the Native/iTaukei Land Trust Act [Cap 134]; and

   (ii) it is abuse of the process of the court;

   and that the Plaintiff's action against the Defendant be dismissed;

2. *An Order the Plaintiff pays the costs of an incidental to this application.*

(2) The application is strongly resisted by the Plaintiff

(B) THE LAW

(1) Provisions relating to striking out are contained in Order 18, rule 18 of the High Court Rules. Order 18, rule 18 of the High Court Rule reads;

18. – (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement of any writ in the action, or anything in any pleading or in the endorsement, on the ground that –

(a) it discloses no reasonable cause of action or defence, as the case may be; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court;

And may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) *No evidence shall be admissible on an application under paragraph (1) (a).*

Footnote 18/19/3 of the 1988 Supreme Court Practice reads;

"It is only plain and obvious cases that recourse should be had to the summary process under this rule, per Lindley MR. in Hubbuck v Wilkinson(1899) 1 Q.B. 86, p91 Mayor, etc., of the City of London v Homer (1914) 111 L.T, 512, CA). See also Kemsley v Foot and Qrs (1952) 2KB. 34; (1951) 1 ALL ER, 331, CA. affirmed (195), AC. 345, H.L .The summary procedure under this rule can only be adopted when it can be clearly seen that a claim or answer is on the face of it obviously unsustainable " (Att – Gen of Duchy of Lancaster v L. & N.W. Ry Co (1892)3 Ch 274, CA). The summary remedy under this rule is only to be applied in plain and obvious cases when the action is one which cannot succeed or is in some way an abuse of the process or the case unarguable (see per Danckwerts and Salmon L.JJ in Nagle v Feliden (1966) 2. Q.B 633, pp 648, 651, applied in Drummond Jackson v British Medical Association (1970)1 WLR 688 (1970) 1 ALL ER 1094, (CA) .

Footnote 18/19/4 of the 1988 Supreme Court Practice reads;

"On an application to strike out the statement of claim and to dismiss the action, it is not permissible to try the action on affidavits when the facts and issues are in dispute (Wenlock v Moloney) [1965] 1. WLR 1238; [1965] 2 ALL ER 87, CA).

It has been said that the Court will not permit a plaintiff to be "driven from the judgment seat" except where the cause of action is obviously bad and almost incontestably bad (per Fletcher Moulton L.J. in Dyson v Att. – Gen [1911] 1 KB 410 p. 419)."

(3) In the case of ***Electricity Corporation Ltd v Geotherm Energy Ltd [1992] 2 NZLR 641***, it was held;

"The jurisdiction to strike out a pleading for failure to disclose a cause of action is to be sparingly exercised and only in a clear case where the Court is satisfied that it has ***all the requisite material to reach a definite and certain conclusion****; the Plaintiff's case must be so clearly untenable that it could not possibly success and the Court would approach the application, assuming that all the allegations in the statement of claim were factually correct"*

(4) In the case of **National MBF Finance (Fiji) Ltd v Buli [2000] FJCA 28; ABU0057U.98S (6 JULY 2000),** it was held;

"The law with regard to striking out pleadings is not in dispute. Apart from truly exceptional cases the approach to such applications is to assume that the factual basis on which the allegations contained in the pleadings are raised will be proved. If a legal issue can be raised on the facts as pleaded then the courts will not strike out a pleading and will certainly not do so on a contention that the facts cannot be proved unless the situation is so strong that judicial notice can be taken of the falsity of a factual contention. It follows that an application of this kind must be determined on the pleadings as they appear before the Court"

(5) In **Tawake v Barton Ltd** [2010] FJHC 14; HBC 231 of 2008 (28 January 2010), Master Tuilevuka (as he was then) summarised the law in this area as follows;

"The jurisdiction to strike out proceedings under Order 18 Rule 18 is guardedly exercised in exceptional cases only where, on the pleaded facts, the plaintiff could not succeed as a matter of law. It is not exercised where legal questions of importance are raised and where the cause of action must be so clearly untenable that they cannot possibly succeed (see Attorney General –v- Shiu Prasad Halka 18 FLR 210 at 215, as

per Justice Gould VP; see also New Zealand Court of Appeal decision in Attorney –v- Prince Gardner [1998] 1 NZLR 262 at 267."

(6) His Lordship Mr Justice Kirby in **Len Lindon –v- The Commonwealth of Australia (No. 2) S. 96/005** summarised the applicable principles as follows:-

a) *It is a serious matter to deprive a person of access to the courts of law for it is there that the rule of law is upheld, including against Government and other powerful interests. This is why relief, whether under O 26 r 18 or in the inherent jurisdiction of the court, is rarely and sparingly provided.*

b) *To secure such relief, the party seeking it must show that it is clear, on the face of the opponent's documents, that the opponent lacks a reasonable cause of action ... or is advancing a claim that is clearly frivolous or vexatious...*

c) *An opinion of the Court that a case appears weak and such that is unlikely to succeed is not, alone, sufficient to warrant summary termination... even a weak case is entitled to the time of a court. Experience teaches that the concentration of attention, elaborated evidence and arguments and extended time for reflection will sometimes turn an apparently unpromising cause into a successful judgment.*

d) *Summary relief of the kind provided for by O.26 r 18, for absence of a reasonable cause of action, is not a substitute for proceeding by way of demurrer.... If there is a serious legal question to be determined, it should ordinarily be determined at a trial for the proof of facts may sometimes assist the judicial mind to understand and apply the law that is invoked and to do in circumstances more conducive to deciding a real case involving actual litigants rather than one determined on imagined or assumed facts.*

e) *If, notwithstanding the defects of pleadings, it appears that a party may have a reasonable cause of action which it has failed to put in proper form, a Court will ordinarily allow that party to reframe its pleading.*

f) *The guiding principle is, as stated in O 26 r 18(2), doing what is just. If it is clear that proceedings within the concept of the pleading under scrutiny are doomed to fail, the Court should dismiss the action to protect the defendant from being further troubled, to save the plaintiff from further costs and disappointment and to relieve the Court of the burden of further wasted time which could be devoted to the determination of claims which have legal merit.*

(7) In **Paulo Malo Radrodro vs Sione Hatu Tiakia & others, HBS 204 of 2005,** the Court stated that:

"The principles applicable to applications of this type have been considered by the Court on many occasions. Those principles include:

a) A reasonable cause of action means a cause of action with some chance of success when only the allegations and pleadings are considered – Lord Pearson in Drummond Jackson v British Medical Association [1970] WLR 688.

b) Frivolous and vexation is said to mean cases which are obviously frivolous or vexations or obviously unsustainable – Lindley Li in Attorney General of Duchy of Lancaster v L.N.W Ry [1892] 3 Ch 274 at 277.

c) It is only in plain and obvious cases that recourse would be had to the summary process under this rule – Lindley MR in Hubbuck v Wilkinson [1899] Q.B 86.

d) The purpose of the Courts jurisdiction to strike out pleading is twofold. Firstly is to protect its own processes and scarce resources from being abused by hopeless cases. Second and equally importantly, it is to ensure that it is a matter of justice; defendants are permitted to defend the claim fairly and not subjected to the expense inconvenience in defending an unclear or hopeless case.

e) "The first object of pleadings is to define and clarify with position the issues and questions which are in dispute between the parties and for determination by the Court. Fair and proper notice of the case an opponent is required to meet must be properly stated in the pleadings so that the opposing parties can bring evidence on the issues disclosed – ESSO Petroleum Company Limited v Southport Corporation [1956] A.C at 238" – James M Ah Koy v Native Land Trust Board & Others – Civil Action No. HBC 0546 of 2004.

f) A dismissal of proceedings "often be required by the very essence of justice to be done"..... – Lord Blackburn in Metropolitan – Pooley [1885] 10 OPP Case 210 at 221- so as to prevent parties being harassed and put to expense by frivolous, vexations or hopeless allegation – Lorton LJ in Riches v Director of Public Prosecutions (1973) 1 WLR 1019 at 1027"

(8) **In Halsbury's Laws of England Vol 37 page 322** the phrase "abuse of process" is described as follows:

"An abuse of 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. In such a case, even if the pleading or endorsement does not offend any of the other specified grounds for striking out, the facts may show it constitutes an abuse of the process of the court, and on this ground the court may be justified in striking out the whole pleading or

endorsement or any offending part of it. Even where a party strictly complies with the literal terms of the rules of court, yet if he acts with an ulterior motive to the prejudice of the opposite party, he may be guilty of an abuse of process, and where subsequent events render what was originally a maintainable action one which becomes inevitably doomed to failure, the action may be dismissed as an abuse of the process of the court."

(9) The phrase "abuse of process" is summarized in ***Walton v Gardiner (1993) 177 CLR 378*** as follows:

"Abuse of process includes instituting or maintaining proceedings that will clearly fail proceedings unjustifiably oppressive or vexatious in relation to the defendant, and generally any process that gives rise to unfairness"

(10) In **Stephenson –v- Garret [1898] 1 Q.B. 677** it was held:

"It is an abuse of process of law for a suitor to litigate again over an identical question which has already been decided against him even though the matter is not strictly res judicata.

Domer –v- Gulg Oil (Great Britain) (1975) 119 S.J 392

"Where proceedings which were viable when instituted have by reason of subsequent events become inescapably doomed to failure, they may be dismissed as being an abuse of the process of the court"

Steamship Mutual Association Ltd –v- Trollope and Colls (city) Ltd (1986) 33 Build L.R 77, C.A

"The issue of a writ making a claim which is groundless and unfounded in the sense that the plaintiff does not know of any facts to support it is an abuse of process of the Court and will be struck out"

(C) THE FACTUAL BACKGROUND AND ANALYSIS

(1) The Plaintiff's causes of action against the Defendant are two fold, namely

- ❖ Fraudulent Misrepresentation.
- ❖ Unjust Enrichment.

(2) It is convenient at this stage to set out the Plaintiff's Statement of Claim which it is submitted discloses the above causes of action. The Plaintiff in his Statement of Claim pleads *inter alia* that,

(1) At all material times, the Defendant is the registered owner of all that piece of land known as Lot 11 Waiyavi Subdivision Stage 2 Plan 2 and containing an area of 21.3 perches under I Taukei Lease No. 15007 (the property)

(2) ***On 22nd March 1988, the Defendant agreed to sell the property to the Plaintiff for certain considerations.***

Particulars of Consideration

The Plaintiff was to give the Defendant the following consideration:

(a) Transfer ownership of two vehicles registration no BC 363 and BF 777 valued at $15,000

(b) Paid off the Defendant's loan in the sum of $30,000 with HFC

(c) Pay lease rentals to I Taukei Land Trust Board (TLTB)

(3) On or about 22nd March 1988, the Plaintiff transferred ownership of the two vehicles registration number BC 363 and BF 777 valued at $15,000 to the Defendant and later paid off Defendant's loan in the sum of $30,000 with HFC on or about 18th October 2010.

(4) Further, with the knowledge and implied consent of TLTB the Plaintiff paid lease rental from 22nd March 1988 to 16th July 2012 when the Defendant without the knowledge of the Plaintiff paid the lease rental with TLTB.

(5) In order to induce the Plaintiff to enter into the agreement, the Defendant made false representation.

Particulars of false misrepresentation

The defendant misrepresented that he would:

(a) Transfer the said TLTB lease number 15007 to the Plaintiff upon transfer of the two vehicles number BC 363 and BF 777 and upon full payment of Defendant HFC loan of $30,000.

(6) The said representations were false in that the Defendant did not transfer the said TLTB Lease No. 15007 to the Plaintiff upon transfer of the said two vehicles and full payment of the said loan on or about 18th October 2010.

(7) At the time he made the two misrepresentations, the defendant knew but for his reckless indifference, ought to have known that it was false.

Second Cause of Action – Unjust Enrichment

(8) *Further or in the alternative, the Plaintiff has constructed extension and made improvements and maintenance to the property since 22nd March 1988.*

(9) *Such construction and improvements were made without the written consent of TLTB. The Defendant by himself and through his Lawful Attorney, Mohammed Yas knew of the Plaintiff's mistake and error and illegality and had the opportunity to stop the Plaintiffs but the Defendant y himself and through his lawful attorney Mohammed Yas stood by and did nothing.*

(10) *The Defendant benefitted, accepted and acquired the improvements made by the Plaintiff by accession knowing that they were not built gratuitously but for the Plaintiff's own.*

(11) *The said improvements by the Plaintiffs and acquired by the Defendant by virtue of accession conferred incontrovertible benefit on the defendant and it would be unconscionable for the Defendant to keep the benefit and unjustly enriched hereof, without paying a reasonable sum in return for the enhanced value of the Defendant's property.*

(12) *Accordingly, the property was worth more than its valuation in 1988 and so the plaintiff has lost the benefit of the both moneys he paid to the Defendant through loan repayment, lease payment and improvements on the property pursuant to the agreement.*

(13) *In consequence, the Plaintiff has loss and damages of $190,000 for the value of the property.*

(3) In his Statement of Claim the Plaintiff seeks the following reliefs;

1. *A Declaration that the Defendant hold the Property on constructive trust for the Plaintiff*

2. *A Declaration that the Defendant hold the deposit of $15,000 and $30,000 paid by the Plaintiff for the Defendant in HFC loan account and improvements thereof in proportionate to the value of the Property in resulting trust to the Plaintiff.*

3. *An Order that the Defendant do transfer the property to the Plaintiff forthwith.*

4. *Alternatively, that the Deputy Registrar do sign and execute all necessary legal documents pertaining the said transfer Property in lieu of the Defendant.*

5. *General damages*

6. *Costs on Indemnity Basis.*

7. *Pre and Post Trial Interests*

8. *Any other Orders this Honourable Court deem just.*

(4) The Defendant's argument runs, essentially as follows;
(Counsel in his submission writes;)

(a) *As is self-evident from the reliefs sought numbered 1 to 4 (as above), the Plaintiff upon his claim is seeking that the Defendant's property be transferred to him pursuant to a purported agreement upon which the Defendant* ***agreed to sell*** *the property to the Plaintiff for 'certain consideration'.*

No agreement in writing for the sale of land

(b) With respect, we respectfully submit that for the Plaintiff to be entitled to bring an action against the Defendant and to seek the reliefs that he has sought in respect of the said property, an action can only be so brought if there is an agreement in writing in existence in respect of the agreement for the purported sale of land.

(c) The Plaintiff in paragraph 2 of his claim has pleaded that the Defendant ***'agreed to sell'*** *the property being iTaukei/Native Lease No. 15007. Since there is no other allegation of any other nature or manner apart from "agreed to sell", upon Section 59 (d) of the Indemnity, Guarantee and Bailment Act (Cap 232), it is incumbent upon the Plaintiff to plead with clarity and without any ambiguity the purported Agreement in writing upon which he makes such allegation in order for him to be entitled to bring an action against the Defendant.*

(d) We respectfully submit that the Plaintiff is unable to plead an agreement in writing due to the fact that there is none between the Plaintiff and the Defendant for the sale of the land/the property being iTaukei/Native Lease No. 15007.

(e) The Plaintiff filed the present case after his action Lautoka High Court Civil Action No. 39 of 2013 against the present Defendant was struck out, and has done so without seeking to set aside the Ruling of the Court or appealing the Honourable Court's finding of facts as above. Accordingly we respectfully submit that the Plaintiff has proceeded with the current proceeding in abuse of the process of the Court.

(f) Section 12 (1) of the iTaukei/Native Land Trust Act (Cap 134) specifically states that consent must be obtained for ***any sale*** *and such consent must be first had obtained. This is followed by the words – transfer, sublease or any other manner whatsoever. Therefore Section 12 (1)* ***distinctly requires consent for any sale.***

(g) The Plaintiff has not anywhere in his pleading averred that the purported agreement (as pleaded by him without any reference to any agreement in writing) for the purported sale of the iTaukei/Native Lease is valid and lawful

with the requisite consent duly obtained. The Plaintiff being fully aware of this requirement of law has in various parts of his claim made various allegations pertaining to the alleged existence of the TLTB consent for various matters however noticeably makes no reference to the existence of any TLTB consent for the purported sale of the land.

(h) The Plaintiff's allegations and relief for declaratory orders is also disingenuous and hopeless attempt in purport an existence of a lawful right/claim when there is none.

(5) In *adverso*, the Plaintiff forcefully submits that; (Counsel in his submission writes)

(a) The Plaintiff was also paying the lease rental for the said land to TLTB from 22nd March 1988 to 16th July 2012. The TLTB knew about this arrangement but accepted the rental anyway.

(b) As such, we submit that consent of TLTB was granted to the Plaintiff by implication (implied) and that no issue of illegality arises.

(c) This however we submit raises a serious question to be tried.

(d) The Defendant had benefited from the improvements done on the property as well as payments by the Plaintiff to clear the Defendant's loan of $30,000 secured on the property by HFC. The value of the property has increased by those improvements. It would be unjust for the Defendant to retain those benefits without restitution. The Plaintiff is therefore entitled to restitution.

(e) In that regard, we submit that the Defendants holds the said property on trust for the plaintiff. It would be unconscionable for the Defendant to hold the benefit at the expense of the Plaintiff as it was the common intention of both parties that the said property be transferred to the Plaintiff after transferring of his said two vehicles and payment of the Defendant's loan amount of $30,000. This should result back to the Plaintiff.

(6) (a) Being acutely aware that;

(i) Fundamentally, courts are required to determine cases on merits rather than dismissing them summarily on procedural grounds,

and

(ii) It is a fundamental principle of any civilised legal system that all parties in a case are entitled to the opportunity to have their case dealt with at a hearing at which they or their representative are present and heard,

I approach the pleadings with these principles uppermost in my mind.

(b) Moreover, I bear in mind the "**caution approach**" that the court is required to exercise when considering an application of this type.

I remind myself of the principles stated clearly in the following decisions.

In Dev. v. Victorian Railways Commissioners [1949] HCA 1; (1949) 78 CLR 62, 91 Dixon J said:

> *"A case must be very clear indeed to justify the summary intervention of the court ... once it appears that there is areal question to be determined whether of fact or of law and that the rights of the parties depend upon it, then it is not competent for the court to dismiss the action as frivolous and vexatious and an abuse of process."*

In Agar v. Hyde (2000) 201 CLR 552 at 575 the High Court of Australia observed that:

> *"It is of course well accepted that a court ... should not decide the issues raised in those proceedings in a summary way except in the clearest of cases. Ordinarily, a party is not to be denied the opportunity to place his or her case before the court in the ordinary way and after taking advantage of the usual interlocutory processes."*

Fiji Court of Appeal in **A.G. v. Shiu Prasad Halka** (1972) 18 F.L.R. 2010 said:

> *"The power to strike out a Statement of Claim given under Order 18 r.18 is one which is to be sparingly used and is not appropriate to cases involving difficult and complicated questions of law."*

(7) (a) It is not in dispute that the land in question in this case is Native Land within the meaning of Native Land Trust Act.

(b) When one looks at the Statement of Claim, it is apparent that the Plaintiff's causes of action stems from the purported **agreement** upon which the Defendant **agreed to sell** the land comprised in iTaukei Lease No. 15007 for consideration that the Plaintiff transferred his two vehicles BC 363 and BF 777 and pay off his loan of $30,000 with HFC.

(c) It was not disputed that TLTB has not given prior consent to alienation or dealing of the property of which the Defendant is the registered lessee. In general terms, any dealing in land by a lessee in respect of a Native lease requires the prior consent of the TLTB. Without that prior consent any such

dealing by the lessee is both unlawful and is expressly stated in Section 12 (1) of Native Land Trust Act to be Null and Void.

For the sake of completeness, Section 12 (1) of the Act is reproduced below.

Section 12 (1) states;

> *12.-(1) 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.*

There is no dispute that the leased property is the subject of a Native Lease. There is no doubt that section 12 (1) of the Native Land Trust Act applies to the leased property. It is not disputed that TLTB has not given prior consent to alienation or dealing of the property of which the Defendant is the registered lessee.

(d) **In the present case, there is no giving and taking of possession. Moreover, there is no sale, transfer or sublease. The possession is not parted with to the Plaintiff. No mutual rights and liabilities are created in relation to possession.** Therefore, the purported "agreement for the sale" cannot be considered an "alienation". It does not amount to a "dealing" in land within the meaning of Section 12. It does not amount to a formal sublease of the land or to a formal transfer of the lessee's interest of the land comprised in the lease. **Therefore, the purported agreement for the sale has not created an immediate interest in land.** In these circumstances, I have no hesitation in holding that the purported "**agreement for sale**" does not constitute a dealing with the Native Land so as to come within the provisions of Section 12 (1) of the Native Land Trust Act. **Therefore, no issue of illegality arises**. The view that I have expressed is in accordance with the sentiments expressed in the following Court of Appeal decision.

HENRY J.P. in PHALAD s/o Shiu Prasad and SUKH RAJ s/o Dhani *(Civ. App. No. 43 of 1978 F.C.A.) said;*

> ***"The cases already cited show that the Courts have held that the mere making of a contract is not necessarily prohibited by section 12. It is the effect of the contract which must be examined to see whether there has been a breach of section 12.*** *The question then is whether, upon*

the true construction of the said agreement ***the subsequent acts of appellant, done in pursuance of the agreement, "alienate or deal with the land, whether by sale, transfer or sublease or in any other manner whatsoever"*** *without the prior consent of the Board had or obtained. The use of the term "in any other manner whatsoever" gives a wide meaning to the prohibited acts. For myself I have no doubt but that the true construction of the said agreement and the substantial implementation of such an agreement for sale and purchase, under which possession is* ***completely parted with to the purchaser and immediate mutual rights and liabilities are created in respect of such*** *exclusive possession, is a breach of section 12 if done before the consent is obtained."*

(Emphasis Added)

(e) Be that as it may, it is of interest to note that on 22nd March 1988, the Defendant agreed to sell the property to the Plaintiff for certain considerations and the TLTB has accepted rental for the said land from the |Plaintiff from 22nd March 1988 to 16th July 2012. **As a result, the inescapable conclusion is that the TLTB has played an active part in the "agreement for sale". I say no more on this!. I hold that the Defendant or TLTB cannot plead illegality under Section 12 (1) of the Act, when things go wrong. It would not be fair to plead illegality when things go wrong.**

The view that I have expressed is in accordance with the sentiments expressed in the Court of Appeal decision, in **"Native Land Trust Board v Subramani"**, [(2010) FJCA 9, ABU 0076, 2006, 25.02.2010.]

It is our respectful opinion that the decision in Chalmers v Pardoe protects the interests of the landowners because tenants who fail to notify the NLTB of dealings in the land under lease will get no assistance from the Court.

However, if the NLTB or the landowners themselves directly involve themselves in such dealings, as was in this case, then as a matter of general equitable principle, it would be quite unconscionable, in our respectful view, for them to be able to escape the consequences of their actions when things go wrong by pleading illegality under the Act.

(Emphasis Added)

(8) (a) **Nevertheless**, there is a fatal flaw in the two causes of action. Section 59 (d) of the indemnity, Guarantee and bailment Act (Cap 232) states that no action shall be brought upon any contract or sale of lands or any interest in them unless the agreement upon which such action is brought or a memorandum thereof is in writing. Quite plainly this provision is designed to prevent fraud.

No such writing is in evidence in the present case. There is no shred of evidence tending to establish such writing. Accordingly, the oral contract pleaded by the Plaintiff is invalid and unenforceable.

For the sake of completeness, section 59 (d) of the act is reproduced below.

59. ***No action shall be brought-***

(a) ……
(b) ……
(c) ……

(d) ***upon any contract or sale of lands,*** *tenements or hereditaments or any interest in or concerning them; or*

(e) ……

Unless the agreement upon which such action is to be brought or some memorandum or note thereof is in writing and signed by the party to be charged there or some other person thereunto by him lawfully authorised.

(Emphasis added)

(b) Reading the Plaintiff's Statement of Claim is as favourable a light as possible, in my considered view that the two causes of action cannot possibly raise or support because none of the requirements in Section 59 (d) of the Indemnity, Guarantee and Bailment Act are fulfilled in the Plaintiff's case. The two causes of action are clearly untenable and they cannot possibly succeed in view of non compliance of the mandatory requirement of Section 59 (d) of the Indemnity, Guarantee and Bailment Act.

Regrettably, the counsel for the Plaintiff did not respond to this issue. This was quite unsatisfactorily.

In view of the mandatory requirement of Section 59 (d) of the Indemnity, Guarantee and Bailment Act and the legal consequences that flow from non compliance, I have reached the irresistible conclusion that the Plaintiff's Statement of Claim discloses no reasonable cause of action against the Defendant.

At this stage, I remind myself the words of *Lord Pearson in* ***Drummond Jackson v British Medical Association [1970] WLR 688.***

"A reasonable cause of action means a cause of action with some chance of success when only the allegations and pleadings are considered".

Given the above, I certainly agree with the sentiments which are expressed inferentially in the Defendant's submissions.

(9) Finally, the counsel for the Defendant raised the issue of "Abuse of Process". The Defendant's argument runs essentially as follows. (Counsel in his submissions writes…)

> "(1) *It is self –evident that there is no purported agreement in writing between the Plaintiff and Defendant for the sale of the land (iTaukei/Native Lease) being the* ***same subject matter*** *as the present action. Justice…… in the said Ruling specifically states that the* ***Court provided ample opportunity to the Plaintiff to being forward his entire case however the Plaintiff failed to do so.***
>
> *(2) The Plaintiff filed the present case after his action Lautoka High Court* ***Civil Action No. 39 of 2013*** *against the present Defendant was struck out, and has done so without seeking to set aside the Ruling of the Court or appealing the Honourable Court's findings of facts as above. Accordingly we respectfully submit that the Plaintiff has proceeded with the current proceeding in abuse of the process of the Court.*
>
> *(Emphasis added)*

Regrettably, the counsel for the Plaintiff did not respond to this issue. This was quite unsatisfactory.

Nevertheless, I must confess that I remain utterly unimpressed by the effort of the Counsel for the Defendant.

The Plaintiff's application in the previous Action No. 39 of 2013 is made pursuant to section 110 (3) of the Land Transfer Act (LTA) for an Order to extend the caveat lodged against the subject lease. It is not right and proper for the Defendant to argue that the issues now Plaintiff has sought to be raised in the present action could have and should have been litigated in the earlier proceeding for extension of caveat under Section 110 (3) of LTA by bringing a concurrent Writ of Summons and Statement of Claim. Reading as best, I can between the sections of Land Transfer Act, It seems to me that there is no such requirement. For the sake of completeness, section 110 of the Land Transfer Act, is reproduced full in below;

> *110.-(1) Except in the case of a caveat lodged by the Registrar the caveatee or his agent may make application in writing to the Registrar to remove the caveat, and thereupon the Registrar shall give twenty-one day's notice in writing to the caveator requiring that the caveat be withdrawn and, after the lapse of twenty-one days from the date of the service of such notice at the address mentioned in the caveat, the Registrar shall remove the caveat from the register by entering a memorandum that the same is discharged unless he has been previously served with an order of the court extending the time as herein provided.*
>
> *(2) Every such application shall contain an address in Fiji at which notices and proceedings may be served.*

(3) The caveator may either before or after receiving notice from the Registrar apply by summons to the court for an order to extend the time beyond the twenty-one days mentioned in such notice, and the summons may be served at the address given in the application caveatee, and the court, upon proof that the caveatee has been dully served and upon such evidence as the court may require may make such order in the premises either ex parte or otherwise as the court thinks fit.

On the strength of this I conclude that the Plaintiff's present action is not tantamount to abuse of process.

Therefore, the argument advanced by the Counsel for the Defendant is devoid of any merits as such is rejected.

(D) CONCLUSION

Having had the benefit of written submissions for which I am most grateful and after having perused the pleadings of the Plaintiff, doing my best on the material before me, this court concludes that the Plaintiff's Statement of Claim discloses no reasonable cause of action against the Defendant.

(E) FINAL ORDERS

(1) The Plaintiff's Writ of Summons and the Statement of Claim against the Defendant is struck out.

(2) The Plaintiff is ordered to pay costs of $1000.00 (summarily assessed) to the Defendant which is to be paid within 14 days from the date hereof.

HIGH COURT OF FIJI
LAUTOKA

05/06/2015

Jude Nanayakkara
Acting Master of the High Court

At Lautoka
5th June 2015