

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

**CIVIL APPEAL NO. HBA 6 OF 2015**

**IN THE MATTER** of an Appeal from  
the Decision of the Tavua  
Magistrate's Court, in Civil Action  
No. 43 of 2014.

**BETWEEN** : **RICHARD BLASÉ aka RICHU** of Yasiyasi, Tavua,  
Self-Employed

**APPELLANT (ORIGINAL DEFENDANT)**

**A N D** : **INDRA WATI** as administrator of the estate of the  
late Babu Ram of Vuniboboga Yasiyasi, Tavua, Self-  
Employed

**RESPONDENT (ORIGINAL PLAINTIFF)**

**Counsel** : Mr N S Khan for appellant  
Mr N Nawaikula for respondent

**Date of Hearing** : 27 January 2016

**Date of Judgment** : 22 March 2016

## **J U D G M E N T**

### **Introduction**

[01] This is an appeal against a judgment of the Magistrate's Court of Tavua delivered in its civil jurisdiction.

[02] On 4 September 2015 the court granted a stay pending determination of this appeal on execution of the judgment that is challenged in this appeal.

[03] At the hearing, both parties orally argued the appeal and they also tendered comprehensive written submissions. I am grateful for both counsel for their effort in compiling handy submissions.

### **Grounds of Appeal**

[04] The appellant preferred to appeal to this court on the following grounds:

**Ground 1-***The learned Magistrate erred in law in Hearing the matter in the Magistrate's Court and in not striking the matter out for want of Jurisdiction as a Magistrate's Court had no Jurisdiction to hear the matter as the Defendant had challenged the title of the Plaintiff's land over which the Defendant resides and/or his right to occupy the land on the basis that it was not the Plaintiff's land he was residing on but State Land thus the Judgment ought to be set aside.*

*The Appellant relied on Section 16(2) of the Magistrates Court Act (Amendment) Promulgation 2007 that says that – a Magistrate court shall not exercise jurisdiction **“in suites wherein the title to any right or office is in question”***

**Ground 2-***The Learned Magistrate erred in Law and in Fact in not considering and/or properly considering and/or properly directing its mind to all the documents tendered by the Defendant to the Honourable Court in his Defence and relied upon by the Defendant and none of those had even been referred to as Exhibits which out to have been.*

**Ground 3-***That the Learned Magistrate erred in Law and in Fact in not considering and/or properly considering and/or properly directing its mind to all the documents tendered by the Defendant at the hearing of the matter as that would have established that the Defendant is not residing on the Plaintiff's land.*

**Ground 4-***That the Learned Magistrate erred in Law and in Fact in not being vigilant and/or providing sufficient guidance and/or assistance and/or directions to the Defendant during the Hearing of the matter when the Defendant was unrepresented.*

**Ground 5-***That the Learned Magistrate erred in Law and in Fact by coming to Judgment without and/or properly, scrutinising or examining all the documents tendered by the Defendant in determining the validity of the Defendants Defence in the matter which have also not been marked as Exhibits.*

**Ground 6-***That the failure by the Learned Magistrate in not considering and/or properly considering scrutinizing or examining and/or properly directing its mind to all the documents tendered by the Defendant at the Hearing of the matter was unfair and/or unjust and against the interest of Justice.*

**Ground 7-***That the Learned Magistrate was biased in not considering and/or properly scrutinizing or examining and/or properly directing its mind to all the documents tendered by the Defendant at the Hearing of the matter.*

**Ground 8-***That the Learned Magistrate erred in Law and in Fact in holding that there was no evidence tendered by the Defendant to show that the land he was occupying did not belong to the Plaintiff but the State when the Defendant did produce such documents showing that.*

**Ground 9-***That the judgment of the Learned Magistrate in all the circumstances of the case was unfair and/or unjust and/or biased and against the interest of Justice.*

**Ground 10-***That the Learned Magistrate erred in Law and in Fact when he held that the ownership of the land could be attributed to the Plaintiff merely because the Defendant had been paying rent to the Plaintiff's husband.*

**Ground 11-***That the Learned Magistrate erred in Law and in relying on certain High Court decisions tendered by the Plaintiff as Exhibits when the facts of those cases were totally different from the present case.*

**Ground 12-***That the Defendant reserves his right to add further Grounds of Appeal and/or amend the present Grounds of Appeal upon receipt of the Court record.*

### **Facts**

[05] As the executrix Indra Wati, the respondent (original plaintiff) launched an action in the Magistrate's Court at Tavua against RICHARD BLASE aka RICHU, the appellant (original defendant) and sought vacant possession of the property. The appellant is in occupation of the property. The respondent states that the appellant came into occupation as a tenant. In her statement of claim she averred that her husband is the last proprietor of the land by virtue of an Agricultural Lease being instrument of tenancy NLTB No: 4/4/279. She was represented by a lawyer throughout the proceedings at Magistrate's Court.

[06] The appellant appeared in person in the Magistrate's Court. He filed his statement of defence and counterclaim by himself.

[07] In the statement of defence the appellant stated *inter alia* that, *the defendant denies paragraph 1 of the plaintiff's claim (paragraph 1 of the claim, claims that plaintiff's husband is the last proprietor of the property) and has issues against it. And further submits that the land with title NLTB no 4/4/279 as stated by the plaintiff not the subjected land in which the defendant and his family resides in.* The appellant counterclaimed the sum of \$40,000.00 as compensation for all suffering and costs of various claims filed against him.

[08] The respondent in the reply to defence and counterclaim stated some new facts which he failed to state in the statement of claim. The new facts raised in the reply to defence and counterclaim were that, *the defendant was their labourer and cane cutter and used to work on our cane farm. Later he became fisherman and started to pay rent for the house at \$140.00 per month. The defendant stopped paying rent when my late husband died 3 years ago.*

[09] At the trial in the Magistrate's Court, the respondent gave evidence through her attorney (Ashwin Pratap) and the appellant also gave evidence. In evidence the appellant stated that, the plaintiff is giving false statement and the house belongs to him (respondent) and the land does not belong to the plaintiff as it is government land. The learned Magistrate gave judgment for the respondent and ordered that the appellant should give up vacant possession of the said land within 21 days. He also ordered summarily assessed costs of \$350.00. The appellant appeals the judgment.

#### **The issue at Appeal**

[10] The appeal concentrated on the question of the jurisdiction of the Magistrate's Court to grant vacant possession of the land to the respondent in an action wherein the right of title was an issue. The

appeal also concentrated on the question that whether the Learned Magistrate was correct in giving judgment for the respondent considering the evidence that were placed before him.

### **The Law**

[11] The jurisdiction of the Magistrate's Court to hear and determine civil suits derives from s.16 of the Magistrates' Court Act (Cap 14), as amended ('MCA'). This jurisdiction needs to be exercised subject to the limitation enunciated in subsection 2 of that section (as amended by s. 2 of the Magistrates' Courts Act (Amendment) Promulgation 2007 (PROMULGATION No. 34) which so far as relevant spells out that:

*'16.-(2) - A Magistrate's Court shall not exercise the following jurisdiction-*

*(a) in suits wherein the title to any right, duty or office is in question. (Emphasis provided)*

*(b) .....*

*(c) .....*

*(d) .....*

*(e) .....*

### **The Decision**

[12] Let me consider the issue of the jurisdiction of the Magistrate's Court to grant vacant possession in the proceedings wherein title of the land was in issue.

### **Want of Jurisdiction**

[13] Mr Nazim Khan, counsel appearing for the appellant submits that, the Learned Magistrate upon considering the Claim, Statement of Defence and the Affidavit on pages 35 and 36 of the Court Record ought to have been vigilant enough to make a decision that in the circumstances and in view of Section 16 (2) of the Magistrate's Court Act he had no jurisdiction to resolve the dispute before his Court which he failed to do. The essence of the appellant submission is that the Learned

Magistrate had acted without jurisdiction in deciding the matter which involved the right of title to the land.

[14] Conversely, Mr Nawaikula counsel appearing for the appellant submits that, the issue in the Magistrate's Court was not about 'the title to any right' but purely on trespass. The appellant is alleging that he challenged the Respondent's title. But that does not appear at all or raised in the Defence and therefore it is novel and now appearing for the first time as an issue in this appeal. He did not even raise it as an issue during proceedings in the Magistrate Court. He relies on the case authority of **Surjiv v Native Land Trust Board** (1997) FIHC 75. Précis of his contention was that the appellant cannot raise the issue of jurisdiction for the first time on appeal.

[15] The respondent brought action in the Magistrate's Court seeking vacant possession of the land (portion of the land). He claimed that that he is the last proprietor of the land and the appellant no longer have any approval or license to occupy and he is trespassing.

[16] In the statement of claim the respondent states:

***"THAT the plaintiff's husband is the last proprietor of an Agricultural lease being an instrument of tenant NLTB No: 4/4/279, Vuniboboga, Tavua containing an area of 15 acres on rods [sic] 2 perches". (Emphasis mine).[See para 1 of the statement of claim at page 9 of Copy Record].***

[17] The appellant appearing in person replied and stated in the statement of defence and counterclaim that:

***"THAT the defendant denies paragraph 1 of the plaintiffs claim and has legal issues against it. And further submits that the land with title NLTB no 4/4/279 as stated by the Plaintiff not subjected land in which the Defendant and his family resides in."*** (Emphasis provided). (See para 1 of the statement of defence and counterclaim at page 15 of Copy Record.)

[18] It will be noted that the respondent initiated the proceedings in the Magistrate's Court on the basis that he is the last proprietor of the

land and the defendant is occupying a portion of it without license. The appellant challenged that the respondent is the owner of the land in question and stated that land he occupy belongs to the government.

[19] Two issues would emerge from the pleadings before the Magistrate's Court. Firstly, whether the respondent is the last proprietor of the land which the appellant reside in? Secondly, if so, whether the appellant occupation is without license?

[20] The respondent claimed that he is the owner or last proprietor of the subject land. The appellant disputed this claim and took position that somebody else is the owner of the land in which he occupies. The respondent sought possession on the basis that he is the owner of the land. Basically, the respondent had launched a possessory action in the Magistrate's Court. Clearly, the issue in the Magistrate's Court was about title to any right. S.16 (2), MCA specifically prohibits a Magistrate's Court exercising jurisdiction in suits wherein title to any right is question.

[21] Counsel for the respondent argued that the action in the Magistrate's Court was based on trespassing. The respondent in evidence had admitted that the appellant has been on the land for thirty (30) years. A person who occupies a land for more than 30 years cannot be considered a trespasser. I would therefore reject the argument advanced by Mr Nawaikula counsel for the respondent that the action in the Magistrate's Court was based on trespassing.

[22] The title to the land was in question in the suit before the Learned Magistrate. He had no jurisdiction to grant possessory order in a matter where title to the land was in issue. Indeed in deciding the matter in which title to the land was in question the Learned Magistrate had acted without jurisdiction. The appeal should be allowed on this ground alone.

[23] In ***Sukhia v Pratap*** [1967] Fiji Law Rp 38; [1967] 13 FLR 19 (20 February 1967) Knox-Mawer J., in a similar case, stated:

*'It is common ground that in so far as it may be said that the title to any land is disputed or the question of ownership thereof arises the parties to this action have consented to the adjudication thereon by the Magistrate's Court. Be that as it may it is in my view that by reason of the provisions of Section 17 (similar to new s.16 (2)) cited above the Court below had no jurisdiction to resolve this dispute. In the outcome, this Court is compelled to set aside judgment in this case and also order for costs.'*

### **Submission to Jurisdiction**

[24] The matter does not end there. There is another consequential issue to be decided. That is whether the appellant had waived his right to object to jurisdiction.

[25] The appellant did not raise the issue of jurisdiction in the Magistrate's Court. The appellant appeared in the Court below as an unrepresented litigant. His defence *inter alia* was that he has legal issue about the claim. He did not specifically state that he is objecting to the jurisdiction of the court to hear and resolve the claim.

[26] The issue of jurisdiction has been raised by the appellant on appeal for the first time. He is represented by a counsel in this appeal.

[27] The appellant cited a case authority of ***Surjiv v Native Land Trust Board*** (supra) where Scot J held:

*(i) that the Regulations governing the construction of the dwelling required it to be removable and therefore the tenant was not entitled to compensation for its loss and*

*(ii) that the suggestion that the Magistrate exceeded his jurisdiction in dealing with the claim at all should have been raised in the Magistrates' Court as a preliminary objection.*

[28] In *Surjiv* Scot J also observed:



*'So far as I can determine the Magistrates' Court (cap 14 as amended by Decree 35/88) does not directly answer the question but one general principle of practice becomes immediately apparent and can first be dealt with. It is this: alleged want of jurisdiction should always be raised at the commencement of the proceedings and while a total want of jurisdiction cannot be cured by consent of the parties (Jones v Owen (1849) 18 LJQB 8) a party who so conducts himself as to waive his rights cannot later rely on want of jurisdiction on appeal (see Windsor v Dunford (1848) 12 QB 603 and Pringle v Hales [1925] 1 KB 573). **In the present case want of jurisdiction was not raised in the Magistrates' Court at all and I have some doubt as to whether it could properly be raised on appeal.'** (My emphasis)*

[29] The Learned Magistrate should have been vigilant enough to identify the nature of the proceedings he was dealing with. He was dealing with a possessory action over which he had no jurisdiction. As an unrepresented litigant the appellant faced by a lawyer had stated that he has some legal issues about the claim. The Learned Magistrate should have asked the appellant whether he is challenging the jurisdiction of the court to resolve the matter as he had stated that he has some issues regarding the claim. A Magistrate cannot assume jurisdiction. His jurisdiction derives from s.16 of MCA. The very first question he must ask should be that whether he has jurisdiction to try the case. The Learned Magistrate failed to do so. I am therefore unable to hold that there was a submission to the jurisdiction by the appellant.

[30] Bell J of the Supreme Court of Victoria in ***Tomasevic v Travaglini Anor*** [2007] VSC 337 (13.9.07) [139]-[141], on exacting nature of the task imposed upon the judge in civil and criminal trial, said:

*"Every judge in every trial, be it criminal or civil, has an overriding duty to ensure the trial is fair. A fair trial is the only trial a judge can judicially conduct. The duty is inherent in the rule of law and the judicial process. Equality before the law and equal access to justice are fundamentals human rights specified in the ICCPR. The proper performance of the duty to ensure a fair trial would also ensure those rights are promoted and respected.*

*Most self-represented persons lack two qualities that competent lawyers possess – legal skill and ability, and objectivity. Self-represented litigants therefore usually stand in a position of great disadvantage in legal proceedings of all kinds. Consequently, a judge has a duty to ensure a fair trial by giving self-represented litigants due assistance. Doing so helps to ensure the litigant is treated equally before the law and has equal Justice.*

*The matters regarding which the judge must assist self-represented litigants are not limited.*

*The judge must give assistance as is necessary to ensure a fair trial. The proper scope of the assistance depends on the particular litigant and the nature of the case. The touchstone is fairness and balance. The assistance may extend to issues concerning substantive legal rights as well as to issues concerning the procedure that will be followed.”*

[31] In ***Australia v Peacekeeper International*** FZC UAE [2008] EWHC 1220 (QB); LTL 9/6/2008) it was decided that:

***‘Participation by a property holder as an applicant in interpleader proceedings does not ordinarily amount to a submission to the jurisdiction because the purpose to gain protection of the court from the competing claimants.’***

[32] As an unrepresented litigant the appellant wanted to gain protection of the court from ejection of the land that he has been occupying for more than 30 years. He did not concentrate on the jurisdiction issue. He was concentrating on the protection of his possession of the land on which his dwelling is built. Under the circumstances his participation in the proceedings does not amount to a submission to the jurisdiction and therefore he could rely on want of jurisdiction on appeal.

### **Does evidence support the judgment?**

[33] I will now turn to the question that whether the Learned Magistrate was correct in giving judgment for the respondent considering the evidence that were placed before him. This issue will include appeal grounds 2 to 11. For the sake of completeness I will consider this issue assuming

that the Learned Magistrate had jurisdiction to resolve the dispute that was before him.

[34] The Learned Magistrate fairly summarises the evidence given by the parties. Both parties produced their respective exhibits in support of their claim. The appellant's exhibits appear at pages 32 to 69 while defendant's at pages 70 to 96 of the Copy Record.

[35] After summarising the evidence the Learned Magistrate identifies the issue to be resolved. He identifies one issue namely:

***'The issue to be resolved is whether the defendant had [has] been occupying plaintiff's land without plaintiff's permission and whether he should be ordered to vacate the said land? (See para 10 of the judgment at page 30 of Copy Record)'*** (Emphasis provided)

[36] Unfortunately, the Learned Magistrate fails to identify the important issues that should be asked in a possessory action like the one that was before him. The appellant stated in his statement of defence that he has some legal issue about the claim and in evidence that the said land which he occupies does not fall within the land area owned by the plaintiff and that it is owned by government.

[37] The Learned Magistrate should have identified two key issues considering the pleadings and the evidence adduced by the parties. Such as,

(i) Whether the plaintiff is the owner of or has title to the land covered in Agricultural Lease being instrument of tenancy NLTB No: 4/4/279, Vuniboboga, Tavua containing an area of 15 acres no rood 2 perches.? If so,

(ii) Whether the defendant has been occupying a particular portion of the said land?

[38] Without identifying the key issues in the proceedings the Learned Magistrate proceeded to deliver the judgment. In his analysis the Learned Magistrate states:

...

- 15) *The defendant agreed that he had been paying rent to the plaintiff for the land. Although there is no evidence to show what the nature of this rent agreement was, apparently the defendant cannot be paying rent to the plaintiff for nothing unless he was in occupation or use of a particular portion of plaintiff's land. In this case however the evidence was that the defendant had been occupying a portion of plaintiff's land, thus I accept that defendant was living on the said land and for that reason he was paying rent.*
- 16) *According to the plaintiff from 2011 the defendant had continued to live on their land without payment of rent and without their permission. The plaintiff had also taken out eviction against other people in the High Court, who were living on their land without their permission and the application was granted for the said people to vacate their land.*
- 17) *I further note that defendant had raised that the portion of land he currently occupies is government land and doesn't fall under the said land belong to the plaintiff. Aside what has been asserted, none of the documents tendered by the defendant clearly supports the assertion mentioned that the subject land that he occupies is government land or that it belongs to someone else let alone himself and not the plaintiff.*
- 18) *In my opinion the defendant couldn't have been paying rent to the plaintiff unless he had been occupying a portion of plaintiff's land.*
- 19) *As to the defendant's counter claim I find that he has failed to establish his counter claim by way of evidence.*

...'

[33] The Learned Magistrate then concludes:

*'The Court is satisfied on the balance of probability that the defendant had been occupying a portion of plaintiff's land lease no. 4/4/279, Vuniboboga, Tavua containing an area of 15 acres no rood 2 perches.*

The defendant should therefore be ordered to vacate the plaintiff's land.

The defendants counterclaim is dismissed. (See para 20 to 22 of the judgment at page 31 of Copy Record)

[34] It is noteworthy that the Learned Magistrate has heavily relied on the Google map produced by the respondent and payment of rent by the appellant's father to respondent's father in the years 2009, 2008, 2007 and 2006 and 2010 by the appellant. (See pages 78 to 84 of Copy Record).

[35] Google map cannot decide the fact that the respondent is the owner of the land and the appellant is in occupation of a particular portion of the land. It (Google map) is an unauthenticated document. In my opinion, the Learned Magistrate would not have relied on an unauthenticated document as it is not the proper document to determine ownership and occupation of the land without permission. The Learned Magistrate should have rejected that document.

[36] Will payments of rent by the appellant determine ownership or title of the land? The appellant disputed the title of the respondent to the land. There is nothing on the record to show that the appellant had admitted that the respondent is the last proprietor or owner of the land in question. Receipts produced by the respondent at the trial in proof of payment of rent by the appellant would not establish that the respondent is the proprietor of the land in the absence of any agreement between the appellant and the respondent. In his judgment the Learned Magistrate states that, although there is no evidence to show what the nature of this rent agreement was, apparently the defendant cannot be paying rent to the plaintiff for nothing unless he was in occupation or use of a particular portion of plaintiff's land.

[37] The receipts produced by the respondent do not state which property the rent being paid for. The receipt for payment of rent does not necessarily prove that the respondent is the last proprietor of the land. The appellant has stopped paying rent in 2011. The appellant might have paid rent to the respondent's father on the mistaken belief that he is owner of the land. The appellant has now found out that the respondent is not the owner of the land he is in occupation. The burden was always on the respondent to prove on the balance of probability that he is the owner of the land. The Learned Magistrate appears to have presumed that the respondent is the proprietor of the land. It is clear when he said in the judgment that the defendant could not have been paying rent to the plaintiff unless he had been occupying a portion of plaintiff's land.

[38] The Learned Magistrate has overlooked two vital documents the appellant produced at the trial namely (i) a report given by Tavua police to iTLTB and (ii) and a letter of 4 September 3013 written by iTLTB to Tavua Police Station. (See annexures marked 'C' & 'D' referred to in the affidavit of appellant in support of stay application). These documents state:

***'THAT a survey had been conducted by the ITLTB in year 2013 and which clearly states that this land is situated within government land and not on the PLAINTIFF'S land.'***

[39] There was sufficient evidence both oral and documentary establishing that the land which the appellant resides on does not fall into the plaintiff's land. The Learned Magistrate failed to give proper weight to the appellant's evidence. He has not given reason why he disregarded the appellant's evidence.

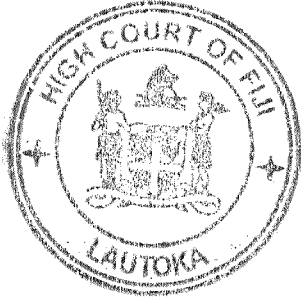
[40] Furthermore, The Learned Magistrate had also failed to consider FEA and WAF bills which are in the appellant's father's name and permission given by Tavua Rural Local Authority to construct a house on the land that the appellant has been in occupation. (See defendant's exhibits 'RB-3' & 'RB-4' at pages 47, 64 & 65 of Copy Record)

### **Conclusion**

[41] The Learned Magistrate had delivered the judgment in a suit where title to the land was in question contrary to s. 16 (2) of the Magistrate Court Act. He had acted without jurisdiction in deciding the matter. Even one assumed that he had jurisdiction, the Learned Magistrate had overlooked the vital documents tendered in evidence by the appellant. If he had considered the vital documents he would have reached a different decision. He should have struck out and dismissed the plaintiff's claim. In the circumstances I am compelled to allow the appeal and to set aside the judgment of 25th August 2015 delivered by the Magistrate Court. I would order the respondent to pay costs of this appeal which I summarily assess at \$850.00.

**Final Outcome of this Appeal:**

1. Appeal allowed.
2. Magistrate's judgment dated 25 August 2015 is set aside.
3. Respondent will pay summarily assessed cost of the appeal in the sum of \$850.00 to the appellant.



*M H Mohamed Ajmeer*  
22/3/16

**M H Mohamed Ajmeer**  
**JUDGE**

**At Lautoka**  
**22 March 2016**

Solicitors: Nazmeem Lawyers for the Appellant  
Niko Nawaikula for the Respondent