

IN THE HIGH COURT OF FIJI

WESTERN DIVISION AT LAUTOKA

Civil Action No. HBC 99 of 2013L

BETWEEN : **MILIANA NEIVALU** of Moala Village, Nadi, Domestic Duties for and on behalf of herself and the members of the Rororo Family.

PLAINTIFF

A N D : **ILAMI LUTUMAILAGI and JOELI LUMUNI** all of Moala Village, Nadi, driver and Farmer respectively as Trustees of Mataqali Nalubati

FIRST DEFENDANT

A N D : **KENI VARO** of Maola Village, Nadi, Hotel Worker

SECOND DEFENDANT

Appearance : Mr K. Vuataki for Plaintiff
Ms L. Tabuakuru for Defendant

Date of Hearing : 16.08.2016

Date of Ruling : 01.09.2016

R U L I N G

Introduction

1. This is an application to dissolve an injunction order granted in favour of plaintiff.
2. By Notice of Motion filed on 6 July 2016 Defendants seek the orders that:

1. *That the order made on 28th November, 2013 in the action herein be dissolved forthwith.*
 2. *That the plaintiff and/or agents and/or servants be restrained from excavating soil gravel and sand from Nukuvatu Island in the District of Sikituru forthwith until further order of this Honourable Court.*
 3. *That the Plaintiff and/or agents and/or her servants to remove all excavating machines and trucks from the said Nukuvatu Island in the District of Sikituru forthwith until further order of this Honourable Court.*
 4. *That the Police officers from Nadi Police station to assist the Defendants and their bailiff to enforce any order if granted.*
 5. *That the Plaintiff provide full accounts and details for all sands, gravel and/or soil removed from the said Nukuvatu Island in the District of Sikituru forthwith and deposit 10% of the proceeds as per paragraph (d) of the order made on 28th November, 2013 into the judicial trust account of this Honourable Court.*
3. The application is supported by an affidavit of Ilami Lutumailagi the first named 1st defendant (the applicant) sworn on 1/7/2016.
 4. The application is made under Order 29, rule 1 of the High Court Rules (as amended) 1988 (“HCR”).
 5. The plaintiff/respondent (“the respondent”) filed two affidavits in opposition.

Background

6. In June 2013 the plaintiff brought this action against the defendants and claims amongst other things a declaration that the plaintiffs are entitled to use Nukuvatu Island as their danudanu and eating place. At the same time the plaintiffs also filed an application seeking injunction to restrain the defendants from interfering and harassing. Upon hearing the application, the court (Weeratne J as he was then) granted orders on follows:

- a) *That the defendants, their servants, agents, or howsoever be restrained by injunction from stopping, interfering, hindering or barring plaintiff, any member of the Rororo Family and their children and/or authorised agents, contractor and workmen in clearing and removing sand and gravel from Nikuvatu Island in the District of Sikituru until further order;*
- b) *That the defendants, their servants, agents, or howsoever be restrained by injunction from harassing or speaking harshly to plaintiff, any member of the Rororo Family and their children and/or authorised agent, contractor and workmen until further order;*
- c) *That Police at Nadi Police Station assist plaintiff and/or her authorised contractor and employees for the carrying out of the above orders until further order;*
- d) *Above orders (a), (b) and (c) are granted subject to the plaintiff depositing 10% of sales proceeds in court, on an ongoing basis weekly on every Friday of the week, whilst the extraction work is been carried out by the plaintiff.*
- e) *No orders as to costs.*

Discussions

7. This is an application by the defendants to discharge the injunctive orders granted in favour of the plaintiff. The ground relied upon is that the plaintiff had failed to comply with the undertakings incorporated into the order.
8. When granting the injunction, the court ordered that the plaintiff must deposit 10% of sales proceeds in court, on an ongoing basis weekly every Friday of the week, whilst the extraction work is being carried by the plaintiff.

9. Mr Vuataki, counsel for the plaintiff submits that the plaintiff had not wilfully disobeyed the order of the court. She remembers being told by her lawyer that she had to pay 10% into court and thought she could let the 10% add up until she could pay in a lump sum. She now understands the order and can object the strict compliance.
10. Conversely, Ms Tabuakuru counsel for the defendants contends that there has been systematic non-compliance of the condition of the injunction. They are trying to patch up their failure by depositing a small sum into the court after seeing the application to discharge.
11. Undoubtedly, the court granted the injunctive orders on the condition that the plaintiff deposits 10% of sales proceedings into court on weekly basis. The orders were granted on 28 November 2013. The plaintiffs did not deposit as ordered until the defendants file their application to vacate the orders. However, the plaintiff had made a few payments after the defendant's application.
12. Interestingly, the deposit of sale proceeds was ordered in view of undertaking as to damages. The plaintiff gave undertaking as to damages out of the sale of sand and fine gravel to be excavated from danudanu (the subject land).
13. There was no proper undertaking by the plaintiff when obtaining the injunctive orders against the defendants. The plaintiff had just relied on the sale proceeds of the sand and gravel from the subject land. Let it as it is. The plaintiff had breached the condition of the injunction upon which it was granted by failing to deposit weekly 10% of the sale proceeds of the sand and gravel extracted from the land. This failure cannot be rectified by the plaintiff by depositing a small sum in court after the application for dissolutions of the orders was filed.

14. I would therefore discharge forthwith the injunctive orders granted in favour of the plaintiff on 28 November 2013. I would also order the plaintiff to pay summarily assessed costs of \$200.00 to the defendant.

15. The plaintiff along with the application has also filed an application seeking cross injunctions against the plaintiffs restraining them from excavating soil, gravel and sand from the subject land. However, the plaintiff did not seriously push for such an order. The defendant's primary concern was to discharge the injunction. I therefore refrain from making any orders on the cross application for injunction. The defendant might apply to court for such orders if need be.

The Result

1. The injunctive orders of 28 November 2013 discharged.

2. The plaintiff will pay summarily assessed costs of \$200.00 to the defendant.

M H Mohamed Ajmeer 1/9/16

M H Mohamed Ajmeer

JUDGE

At Lautoka

1 September 2016

