

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

**[CIVIL JURISDICTION]**

**Civil Action No: HBC 42 OF 2014L**

**BETWEEN:**            **RAJESH KUMAR** of Saweni, Lautoka, Retired Labourer  
*Plaintiff*

**AND:**                 **NAWIN PRASAD SHARMA** of Vuda, Lautoka, Unemployed.  
*1<sup>st</sup> Defendant*

**AND:**                 **ITAUKEI LAND TRUST BOARD** a body corporate duly  
constituted under the Itaukei Land Trust Cap 134.  
*2<sup>nd</sup> Defendant*

Before            :     Hon. Mr. Justice R.S.S. Sapuvida

Counsel         :     Ms V. Patel for the Plaintiff  
                       Ms U. Baleilevuka for the 1<sup>st</sup> Defendant

Date of Ruling:     6 March 2017

**INTERLOCUTORY JUDGMENT**  
(Interim Injunction)

**The Plaintiff's Case**

[1] This is an Inter-Partes Notice of Motion by the Plaintiff against the 1<sup>st</sup> Defendant seeking the following Orders:

- (I) *That the Plaintiff be allowed access onto the property comprised in Native Lease No. 29367 Known as Naweiyanitu (pt of) being Lot 1 on SO 6127 in order to dismantle and remove the plaintiff's 5 bedroom iron-timber house situated thereon.*
- (II) *Alternatively that the 1<sup>st</sup> Defendant whether by himself or his agents or servants or any of them or otherwise be restrained by injunction until the hearing and determination of this action or further order from doing the following acts or any*

*of them that is to say from renting out the Plaintiff's 5 bedroom iron and timber building and/or collecting rental proceeds from the Plaintiff's said house that is erected on all that piece of and parcel of land comprised in Native Land Lease No. 29363 known as Naweiyanitu (pt of) being Lot 1 on SO 6127 and/or from damaging and/or interfering with and/or entering the said property.*

*(III) That the 1<sup>st</sup> Defendant be restrained from by himself or whosoever from entering or having unrestricted access to the Plaintiff's said house until the hearing and final determination of this action.*

*(IV) And the costs of this application be costs in the cause.*

- [2]. The type of the main Order the Plaintiff has pursued in this application *inter alia* is ideally in the nature of a Mandatory Injunction than preventing the 1st Defendant's unlawful actions (if any) attached to the land in dispute and maintaining the peaceful possession until the Court determines the rights of the parties at the end of the hearing of this action.
- [3]. The Plaintiff in his Affidavit in Support for interlocutory injunction states that his father Mr. Bansraj was the registered lessee of all the native land comprised in Native Lease No. 17059 known as "Naweiyanitu" in the Tikina of Vuda in the province of Ba and having an area of 12 acres 2 rods and 32 perches.
- [4]. The Plaintiff's another claim is that the 1<sup>st</sup> Defendant (who is the Plaintiff's nephew being the son of the Plaintiff's late brother) has fraudulently obtained a Native Lease over the whole of the house site belonging to and occupied by the Plaintiff and the 1<sup>st</sup> Defendant's late father. The Plaintiff further claims that the 1<sup>st</sup> Defendant is holding the Plaintiff's one-half interest in the house site under a constructive trust and that the 1<sup>st</sup> Defendant execute a surrender over this one-half interest and give him possession of the said property.
- [5]. The Plaintiff in his affidavit in support of his interlocutory application for injunction (paragraphs 9 to 12 of his affidavit) deposes that the 1<sup>st</sup> Defendant after obtaining a lease over the whole of the said house site (including the Plaintiff's house site) evicted the Plaintiff from the said property within 5 days of obtaining the Order (not explained) and did not allow him to dismantle and remove his said iron and timber house.
- [6]. According to the facts revealed from his affidavit, the Plaintiff has written to the 1<sup>st</sup> Defendant's then Solicitors to be allowed him on to the property to enable him to dismantle and remove the said house which consists of a 5 bedroom iron and timber building and fencing but the 1<sup>st</sup> Defendant refused to allow the Plaintiff to do this process.

- [7]. It is further revealed from the Plaintiff's affidavit that, in the meantime the Plaintiff was informed by some neighbors that the 1<sup>st</sup> Defendant is renting the Plaintiff's house and collecting the proceeds. The 1<sup>st</sup> Defendant has deposed in his affidavit in response that ;“( his) ....son together with my carpenter who is building my house are currently occupying the house.”
- [8]. Plaintiff in his affidavit claims that this single story wooden structure on the said land belongs to the Plaintiff. He was paid \$15,000 by the Government in 1995 – 1996 to relocate this house to its current position when the Vuda bypass was being made. The Agreement (Exhibit RK-3) is between the Plaintiff and the Director of Lands.
- [9]. The Plaintiff relying on the forgoing background facts submits that he clearly has a substantive cause of action against the 1<sup>st</sup> Defendant.
- [10]. Plaintiff's writ of summons was filed on 26<sup>th</sup> March, 2014, and the present application for injunction is made under Order 29 rule 1(1) and rule 2(1) of the High Court Rules and under the inherent jurisdiction of this Court.
- [11]. The Plaintiff reads and relies on:
- (a) The Notice of Motion for Interlocutory Injunction dated 20<sup>th</sup> January, 2015;
  - (b) The Affidavit of Rajesh Kumar (the plaintiff) in support of the Notice of Motion for Interlocutory Injunction and the exhibits therein; and
  - (c) The pleadings filed in this action.

### **The 1<sup>st</sup> Defendant's Stand**

- [12]. The 1<sup>st</sup> Defendant in his Affidavit in Opposition states that:
- The said land in dispute was a former Native Lease which expired on 31<sup>st</sup> December, 2004.
  - The Defendant applied for renewal of lease to the 2<sup>nd</sup> Defendant's office and in 2005 he was granted a new lease. This new lease was a residential lease and contained 5884m<sup>2</sup>.
  - That the Plaintiff failed to apply for a new lease because he was facing financial constraints at that time, thus the 1<sup>st</sup> Defendant opted to apply for it and he got it after paying close to \$2,500.00.

- The 1<sup>st</sup> Defendant applied for a new lease for the whole portion of 12 acres but he was only given 5884m<sup>2</sup> by the 2<sup>nd</sup> Defendant. The rest of the portion of the land was remitted to the 2<sup>nd</sup> Defendant.
- The said house was built by the Plaintiff's father and when his father passed away he was the one who was occupying the said house.
- That sometimes in or about 1995-1996 when the Vuda bypass was being made the Government had to relocate the house in which the Plaintiff was residing in and a sum of \$15,000.00 was compensated to the Plaintiff and which none of the said monies was given to the 1<sup>st</sup> Defendant's father.
- That on 12<sup>th</sup> March, 2013 the 1<sup>st</sup> Defendant issued a Demand Notice to the Plaintiff for vacant possession in Lautoka High Court Civil Action No. 68 of 2013 and on 9<sup>th</sup> October, 2013 an order for vacant possession was obtained in favour of the 1<sup>st</sup> Defendant.
- That on 17<sup>th</sup> October, 2013 the Plaintiff's family was removed from the property by the bailiff. In addition, the Plaintiff appealed the judgment of the Learned Master and on 13<sup>th</sup> of August, 2014 the appeal was dismissed.
- That on 20<sup>th</sup> January, 2015 the Plaintiff filed a motion for interlocutory injunction.
- That sometimes in March, 2015 this matter was set for Hearing before Justice Ajmeer; however the Plaintiff's Solicitor requested for an adjournment on the grounds that a new judge to be allocated to hear and determine this matter on basis that Justice Ajmeer was then the Learned Master who had presided over the section 169 application.

[13]. The 1<sup>st</sup> Defendant thereby urges that the action of the Plaintiff should be dismissed on the operation of the principle of *res judicata*.

#### **The Law relating to Injunctions**

[14]. The Plaintiff, relying on the leading authority on the subject of injunction and in particular when it comes to the issue of whether or not an interlocutory injunction should be granted, submits the decision of the House of Lords in **American Cyanamid Co vs Ethicon Ltd** [1975] AC396, [1975]1 ALL ER 504. The Counsel for the Plaintiff highlights the following portion from the judgment:

*"It is no part of the Court's function at this stage of the litigation to try to resolve conflicts of evidence in affidavits as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law*

*which call for detailed argument and mature considerations. These are matters to be dealt with at the trial."*

- per Lord Diplock in American Cyanamid at p.407.

[15]. The guidelines laid down by Lord Diplock are regarded as the leading source of law on the subject and as the Court of Appeal pointed out in Cayne v Global Natural Resources PLC [1984] 1 ALL ER 225, as they are based on the proposition that there will be a trial on the merits at a later stage when the rights of the parties will be determined.

[16]. The principles to be applied in making the decision in a case of this nature as the Counsel for Plaintiff emphasizes are as follows:

- (a) The Plaintiff must establish that he has a good arguable claim to the right he seeks to protect;
- (b) The Court must not attempt to decide this claim on the affidavits; it is enough if the Plaintiff shows that there is a serious question to be tried;
- (c) If the Plaintiff satisfies these tests, the grant or refusal of an injunction is a matter for the exercise of the Court's discretion on the balance of convenience. [*The Supreme Court Practice 1995 Volume 1 at p. 514 29/1/2*]

[17]. The Plaintiff's Counsel also submitted these references in support of the Plaintiff's application for injunction:

- Chung Exports Ltd v Food Processors (Fiji) Ltd Civil Appeal No. 12 of 2003 delivered on 26 August 2003.
- Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) - Ltd Civil Appeal No. 11 and 11A of 2004 delivered on 26 November 2004.
- Professional West Realty (Fiji) Ltd v Professionals Ltd [2010] Civil Appeal No. ABU 0072 of 2008 delivered on 21 October 2010.

[18]. The Plaintiff's Counsel submits that the threshold question in each case must be whether there is a serious question to be tried and from the Plaintiff's Statement of Claim in the case in hand it is clear that there are serious questions to be tried by this Court.

[19]. The Counsel for Plaintiff in her submissions points out that the subject in respect of which these injunctive orders are being sought is the Plaintiff's residential building and he has been left without a roof over his head.

[20]. It is revealed from the 1<sup>st</sup> Defendant's affidavit that there had been an action instituted by the 1<sup>st</sup> Defendant being the Plaintiff in Lautoka High Court Case

No. 68 of 2013 against the Plaintiff in this case in which the judgment has been entered in favour of the 1<sup>st</sup> Defendant (Plaintiff in that action).

- [21]. The Plaintiff in the case in hand had been the Defendant in the said case, but he has suppressed the details and the outcome of the said litigation which is a serious question when it comes to the issue of *bona fide* of the Plaintiff.
- [22]. Even though the Plaintiff very lightly states about an Order in his affidavit, he has been very cautious to conceal the real facts of the previous litigation he had with the 1<sup>st</sup> Defendant where he was evicted from the disputed land.
- [23]. It is a widely accepted principle in any given legal system that he who comes to court must come with clean hands, and that principle plays a prime role as far as an application of injunction is concerned.
- [24]. The 1<sup>st</sup> Defendant in his affidavit in opposition has annexed the Ruling made in Lautoka Civil Action No. 68 of 2013. [NS2]
- [25]. The Learned Acting Master of the Lautoka High Court on 09 October 2013 has ruled against the Defendant (the Plaintiff of the case in hand) and given the vacant possession of the land to the Plaintiff (the 1<sup>st</sup> Defendant in this case) covered by the Native Lease No. 29367 stating that the Native Lease No. 170501 expired in 20004.
- [26]. The Learned Master has also held that the Plaintiff in the present case had not taken any step to renew the lease and cannot now claim to be one of the trustees of the property after the lease had expired. The Plaintiff has not replied to these points and evidence brought by the 1<sup>st</sup> Defendant in the present injunction inquiry at least to show Court that the Civil Action No. 68 of 2013 has no connection to the present issue between the parties.
- [27]. Therefore, the Plaintiff's immediate step ought to have been an appeal against the said decision to the higher forum, and yet the Plaintiff has not brought any evidence to that effect.
- [28]. However, the 1<sup>st</sup> Defendant asserts that the Plaintiff's further efforts in pursuing the matter before the higher forum were also rejected by the High Court.
- [29]. Hence, from the facts revealed by the 1<sup>st</sup> Defendant in connection to the aforesaid previous litigation, this Court finds enough facts to decide that the previous litigation between the same parties was on the same subject matter on which the Court had already decided its merits.

- [30]. The Plaintiff begs in his written submissions that the 1<sup>st</sup> Defendant's conduct has been reprehensible in evicting the Plaintiff within 5 days of obtaining an order after a summary hearing and in not allowing him to dismantle his house and to remove the same.
- [31]. Even from the above line of submissions it is convinced that the Plaintiff's motive is to recover his materials from the disputed land, viz. to dismantle his house and to remove it from the land in dispute. In another meaning, the Plaintiff is indirectly seeking a Mandatory Injunction even though it is not specifically pleaded in his Notice of Motion.
- [32]. Unfortunately, the Plaintiff cannot now bring the facts of a decided case to invoke the sympathy of this Court to obtain the injunctive reliefs against the Defendant.
- [33]. Having said that, I invite my attention to the Pre-Trial Conference Minutes and a closer look at the admission numbers 11 & 12 where it has been admitted by the Plaintiff that the 1<sup>st</sup> Defendant on 9<sup>th</sup> October 2013 obtained an order for vacant possession against the Plaintiff under section 169 of the Land Transfer Act in proceedings in Lautoka High Court being Action No. 68 of 2013, and by that proceedings the Plaintiff has been evicted from the said property.
- [34]. Then it is so clear that the Plaintiff is no more in possession of the property in dispute.
- [35]. The eviction was also done by a proper legal process of Court.
- [36]. The Plaintiff's effort now in the present case in hand as I observe is to find some loophole to enter into the said property by obtaining an interim order from this Court.
- [37]. As I have earlier stated in this Ruling, the Plaintiff by his main prayer in the application for Interim Orders, is seeking a Mandatory Injunction, the effect of which is to require the performance of several specific acts, viz. his access to the property comprised in Native Lease No. 29367 Known as Naweiyantu (pt of) being Lot 1 on SO 6127, the dismantling and removal of his 5 bedroom iron & timber house situated thereon.
- [38]. However, the Plaintiff neither by his affidavit in support of the application for Injunction nor by his written submissions filed in support of the same is able to discuss and convince this Court on the above.
- [39]. "A Mandatory injunction can only be granted where the plaintiff shows a very strong probability on the facts that grave damage will accrue to him in the future. It is a jurisdiction to be exercised sparingly and with caution but, in the

proper case, unhesitatingly." - Lord Upjohn in: Redlands Bricks, Ltd. V Morris and Another. [1969] 2 ALL E.R. 579, that

[40]. Furthermore, in addition to the Mandatory nature of those Orders sought by the Plaintiff, the Orders are sought directly against a previous decision of the same Court in the guise of an Injunction, viz. against the Judgment of the Learned Master of the High Court Lautoka delivered on 9 October, 2013.

[41]. Therefore, unfortunately the decision of the American Cynamid and as well as the written submissions of the Plaintiff's Counsel do not give any weight to support the Plaintiff's present application before me.

### The Issue of Res Judicata

[42]. It is worthwhile to look into the issue of res judicata raised by the 1<sup>st</sup> Defendant as it directly affects the Plaintiff's claim, viz. that he has a prima facie case against the Defendants.

[43]. The Supreme Court Practice 1979 Volume 1 on paragraphs 18/19/10B at page 320 states:-

"so if a party seeks to raise anew a question which has already been decided between the same parties by a Court of competent jurisdiction, this fact may be brought before the Court by affidavit, and the statement of claim, though good on the face of it, may be struck out, and the action dismissed; even though a plea of *res judicata* might not strictly be an answer to the action; it is enough if substantially the same point has been decided in a prior proceeding (*MacDougall v Knight*, 25 Q.B.D. 1; *Reichel v Magrath*, 14 App.Cas. 665 at p. 667; *Humpries v H*, [1910] 2.K.B. 531, CA; *Cooke v Rickman* [1911] 2. K.B. 1125; *Greenhalg v Mallard* [1947] 2 ALL E.R. 255, C.A.; cf. *Conquer v Boot* [1928] 2 K.B. 336; *Green v Weatherhill* [1929] 2 Ch.213.

### The Decision of the Court

[44]. Finally, there are more than sufficient reasons before me to decide the present case of the Plaintiff against the 1<sup>st</sup> Defendant is also a matter of *res judicata* and that the Plaintiff is even nowhere near the success in this injunction application.

[45]. Hence, for all the above reasons I cannot accept the submissions of the Plaintiff that he has an arguable case on the face of it against the 1<sup>st</sup> Defendant to be tried in this cause. The Learned Master of the High Court has once decided the legality of the Native Lease which is now a decided matter. The Plaintiff failed

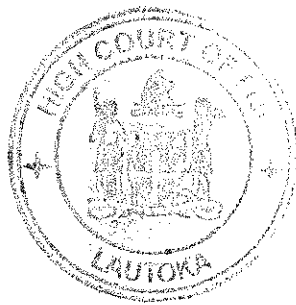


to satisfy the required tests as his Counsel points out which I have repeated in paragraph 16 of this judgment.

[46]. Therefore, I conclude that the Plaintiff has failed to satisfy this Court that this is a fit case for him to seek injunctive relief against the 1<sup>st</sup> Defendant.

[47]. Hence, I dismiss the Plaintiff's Inter-Partes Notice of Motion for interim injunction.

[48]. The costs shall be in the cause.



A handwritten signature in black ink, appearing to read "R.S.S. Sapuvida", written over a set of horizontal lines.

**R.S.S.Sapuvida  
[Judge]**

**At Lautoka.  
06 March, 2017**