

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

HBC NO. 159 OF 2013

BETWEEN : **SETOKI TUYAWA** of Navatulevu, Narewa Road, Nadi.
PLAINTIFF

AND : **THE COMMISSIONER OF FIJI POLICE FORCE**, Ratu
Sukuna House, McArthur Street, Suva
1ST DEFENDANT

AND : **THE ATTORNEY GENERAL OF FIJI**
2ND DEFENDANT

Counsel : Mr. Eparama Sailo for the Plaintiff
: Ms. M. Faktaufon for the Defendants

Ruling made on : 29th September, 2017

R U L I N G

[A] **INTRODUCTION**

1. This ruling pertains to an objection taken up by the learned Counsel for the Defendants when the trial was in progress before my predecessor Judge on 15th June, 2016.
2. When the Senior Court Officer of the Magistrate's Court of Nadi, being the Plaintiff's 2nd witness (PW-2), was under examination in chief, the learned Counsel for the Plaintiff had asked the witness to disclose a Court Record that was not a part of either party's Affidavit Verifying List of Documents (AVLD), for which the Defence Counsel objected. Having heard both the Counsels my learned predecessor had adjourned the trial directing written submissions to be filed on the issue.
3. Consequently, when the matter came up before me on 02nd August, 2017, to fix for further trial, both the Counsels having drawn my attention to the above

insisted that a ruling be made before proceeding to fix for further trial. Both Counsels have filed respective written submissions.

[B] **BACKGROUND**

4. The Plaintiff, namely, SETOKI TUYAWA, on 6th September, 2013, filed this action against the Defendants claiming damages for the alleged wrongful arrest of him by the Police Officers attached to the Nadi Police Station on 11th January, 2011, and the subsequent detention in remand through the Magistrate's Court of Nadi till 25th January, 2011.
5. The Plaintiff alleges that he was wrongly identified as one 'SETOKI CEINATURAGA', who also shared the same first name and had a Bench Warrant issued against him by the Magistrate's Court of Nadi for his arrest in relation to Criminal Action No:- 902/09.
6. The Defendants in paragraph 4 of their statement of defence, while admitting that the Plaintiff was arrested on the day in question as averred in paragraph 4 of the statement of claim, have taken up the position that the Plaintiff was in fact arrested pursuant to Bench warrant No. 446/10, issued on 28th May, 2010, by the Nadi Magistrate's Court in Plaintiff's name 'SETOKI TUYAWA' in Criminal Action Nos. 880/09 and 903/09.

[C] **DISCUSSION**

7. The learned Counsel for the Plaintiff in his written submissions mainly, discusses about the types of Subpoena and the purposes for which they are issued, by quoting the relevant rules and drawing the attention to the specimen of subpoena shown in the High Court Rules. It is further submitted that the law permits the witness to produce the relevant case record from his possession to assist the Court and he can ask question as to why the Plaintiff was arrested when there was no bench warrant issued against him.
8. The learned Counsel for the Defendants in his written submissions, while drawing my attention to the governing rules of evidence, the relevancy and the admissibility, has clearly explained as to why this particular case record cannot be led in evidence and marked.
9. The disputed Case record that was sought to be disclosed through PW-2, even without being pleaded and/or listed in the AVLD bears case No. 903/11. It is said that this record too relates to the said accused 'SETOKI CEINATURAGA', and, admittedly, has nothing to do with the Plaintiff in this case before me.
10. The Plaintiff in this action, SETOKI TUYAWA, also has had two Criminal cases, bearing Nos. 880/09 and 903/2009, against him before the same Magistrate's

Court, for which too a Bench Warrant had been issued, and thereafter appears to have been cancelled/recalled on his appearance on the subsequent dates. However, I shall, for the time being, not delve into it to find out as to whether that warrant was in force at the time of his arrest and leave it to be considered in the final judgment in this action.

11. The Senior Court Officer had in fact been subpoenaed to produce Case Records bearing Nos. 880/09 & 902/09 and to give evidence, which were, admittedly, in relation to the Plaintiff SETOKI TUYAWA. Though, the Case records bearing Nos. 880/09 was duly led in evidence and marked as "PE-3" the next record marked as "PE-4" was Case No. 903/09 and not the Case No. 902/09 as mentioned in the subpoena. However, this record 903/09 too reported to be in relation to the Plaintiff.
12. The witness PW-2 had testified that the above cases 880/09 & 903/09 are the two files, the Plaintiff was dealt with by Nadi Magistrate's Court and there were no other Criminal files pending against him.
13. Subsequently, the learned Counsel for the Plaintiff had gone ahead questioning the witness as to why the Plaintiff was arrested when there was no bench warrant issued against him by the Court, in response to which the witness has told the Court that he has in his possession a file of aforesaid SETOKI CEINATURAGA. This record bearing No. 903/11, was neither in the pleadings nor in the Affidavits verifying list of documents of both the parties.
14. It was at this juncture, the Counsel for the Defendants had objected for the production of the said case record No. 903/11 and for any questions being asked on it. The argument of the Plaintiff's Counsel in response was that since the witness had it in his possession/ custody though not listed, there cannot be any bar for production of it and leading of evidence on it.
15. As far as the Plaintiff's case is concerned, the onus shouldered on the Plaintiff is to prove that no Bench warrant had been issued for his arrest by the Magistrate Court of Nadi during the time material to his arrest on 11th January, 2017.
16. The witness (PW-2) namely, Senior Court Officer by marking case records bearing No. 880/09 and 903/09 as "PE-3" & "PE-4" respectively has stated that there was no Bench warrant issued against the Plaintiff in the above numbered cases during the time material to his arrest. Witness has also stated that there were not any other cases pending against the Plaintiff other than the aforesaid two cases.
17. Though, the above evidence had not been subjected to cross examination as the objection had cropped up, the Defendants, in terms of their pleadings, are not

seriously disputing the fact that there was no Bench warrant issued against the Plaintiff. The question whether the Bench warrant No. 446/10 that had been issued in respect of cases No. 880/09 and 903/09, for the arrest of the Plaintiff, were in fact operative at the time of the arrest has to be ascertained at further trial.

18. It is significant to note that the Defendants in paragraph 5 of their statement of defence have admitted that the Plaintiff, SETOKI TUYAWA, was arrested by the arresting officer on a mistaken identity. It means that the arrest of the Plaintiff was carried out on a Bench warrant issued to arrest another person, namely, SETOKI CEINATURAGA.
19. It appears to me that the very purpose behind the Plaintiff's Counsel's attempt in disclosing the unlisted Case Record bearing No:- 903/11 through PW-2, was nothing but to prove that there was in fact a Bench warrant issued against the said SETOKI CEINATURAGA on which the Plaintiff, SETOKI TUYAWA is alleged to have been arrested on mistaken identity.
20. When the Plaintiff's Counsel made the above aborted attempt to disclose the unlisted Case Record bearing No. 903/11, the fact that there was a tacit admission on the part of the Defendants to the effect that the arrest of the Plaintiff had in fact been carried out on a Bench warrant issued for the arrest of said SETOKI CEINATURAGA seems to have had escaped the attention of the Counsel for the Plaintiff.
21. It is my considered view in light of the above admission, that there was no need on the part of the Plaintiff's Counsel to disclose the disputed Case Record No. 903/11 or lead evidence on it to prove that a Bench warrant had been issued against SETOKI CEINATURANGA. In other words the issue of Bench warrant on the said person had not been disputed by the Defendants and no further evidence on it was a requirement.
22. It is also observed that the particular question put by the Plaintiff's Counsel to the witness Court Officer to the effect *Why the Plaintiff was arrested without a Bench Warrant?* was not a question answerable by this witness except for the Officer who did the act of arresting.
23. Apart from the above, I am certain that the Counsel for the Plaintiff was aware that the abrupt introduction of a document, which was not a part of the pleading or the AVLD, is obnoxious to the uninterrupted proceedings and bound to take the opposite party and the Court by surprise, ultimately causing serious prejudice.

24. All the documents listed in the agreed bundle of documents (ABD) are admissible at the trial unless the Court decides otherwise or if a party gives written notice objecting to the admission of a particular document on a valid and acceptable ground.
25. Similarly, there are infrequent instances where a document not included in the AVL D is allowed by the Court to be produced and led in evidence, using its discretionary power under special circumstances, if it appears to Court that the production of such a document will assist for the better understanding of the issue involved and to arrive at the most justifiable decision in the action.
26. In Blackstone's Civil Procedure 2008 (8th edition, P 603) 'Relevance, Admissibility and the Discretion to exclude' is discussed at length and two governing principles underlying the English law of evidence are;

"(a) evidence must be sufficiently relevant in order to be admissible, but (b) such evidence will only be admissible in so far as it is not excluded by the court either by virtue of a rule of law or in the exercise of its discretion".

27. For the aforementioned reasons this Court decides that the impugned Case Record bearing No:- 903/11 sought to be produced by the Plaintiff's Counsel, being an unlisted one in the AVL D , does not fall in to the category of documents that warrants the invocation of the Court's discretion for it to be produced and led in evidence at this trial .
28. (1) The objection raised by the Counsel for the Defendants at the trial before my predecessor Judge on 15th June, 2016, is hereby upheld.
- (2) Considering the circumstances no cost is ordered.
- (3) Matter will proceed for further trial.



29th September, 2017

A.M. Mohammed Mackie

 A.M.Mohammed Mackie
Judge

Copies to be served to

1. K. Law Chambers for the Plaintiff
2. Office of the Attorney General for the 1st & 2nd Defendants