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

HBC NO. 27 OF 2016

In the Matter of an Appeal against the Ruling dated 18th November 2016 made by the Learned Master of the High Court of Lautoka

BETWEEN	:	**KENTO (FIJI) LIMITED** PLAINTIFF/APPELLANT
AND	:	**NAOBEKA INVESTMENT LIMITED** 1ST DEFENDANT/RESPONDENT
AND	:	**SOUTH SEA CRUISES LIMITED** 2ND DEFENDANT/RESPONDENT
AND	:	**ITAUKEI LAND TRUST BOARD** 3RD DEFENDANT/RESPONDENT
AND	:	**MATAQALI NAOBEKA** 4TH DEFENDANTS/RESPONDENTS
Counsel	:	Mr. S. Inoke for the Plaintiff/Appellant.
	:	Mr. K. Vuataki with Mr. Tikoca for the 1st and 4th Defendants - Respondents.
	:	Ms. T. Seru for the 2nd Defendant- Respondent.
	:	Mr. J. Cati for the 3rd Defendant- Respondent.
Written Submissions by	:	On 24 May 2018 by the Plaintiff- Appellant & on 3 August 2018 by the 1st and 4th Defendant-Respondents.
Date of Hearing	:	3 August 2018
Date of Judgment	:	23 October 2018
Ruling by	:	Mr. Mohamed Mackie- J.

JUDGMENT

A. INTRODUCTION:

1. This is an Appeal, with the leave to appeal and the extension of time for same being granted by my Ruling dated 23 February 2018, against the Ruling dated 18th November 2016 delivered by the learned predecessor Master (the Master) of this Court.

2. By the impugned Ruling the Master struck out the action of the Plaintiff-Appellant (the plaintiff), after considering the two separate Applications preferred by the 1st and 4th Defendant- Respondents (the 1st and 4th defendants) to that effect. It was also ordered for the plaintiff to pay unto the 1st and 4th defendants a sum of $ 500.00 being the summarily assessed costs.

B. BACKGROUND FACTS IN BRIEF:

3. The statement of claim (SOC), filed by the plaintiff in this action number HBC 27 of 2016, on 16th February 2016, among other things, states that;

   a. On 22nd August 2007, the 1st defendant (as lessee) and 3rd defendant (as lessor) signed an agreement for the lease of Malamala Island for a term of 99 years commencing from 1st day of July 2007 (hereinafter referred to as the **"head lease").**

   b. In about August, 2007 the 1st defendant (as sub lessor) and the plaintiff (as sub lessee) signed an agreement for the sublease of Malamala Island for a term of 25 years commencing from 1st day of August 2007 (hereinafter referred to as the **"sublease"** or the **"plaintiff's sublease"**.

   c. The plaintiff paid for and otherwise assisted the 1st and 4th defendants in obtaining the issue of the head and the subleases and it began the operations in the land in question on 3rd August 2007.

   d. On various dates in 2011 and 2012, the 1st defendant purported to terminate the plaintiff's sublease for alleged breaches of it and despite the unlawfulness of the purported termination and filing of a Civil

action bearing number HBC-100 of 2012 by the plaintiff, the 1st defendant purported to issue another sublease to the 2nd defendant in the year 2015 for the same land.

4. Accordingly, the plaintiff prayed, inter-alia, for a declaration that the purported termination of the sublease is unlawful with no effect, for injunctive reliefs against the 1st, 3rd & 4th defendants restraining them from issuing a new sublease to the 2nd defendant plus an injunction against the 2nd defendant restraining it from entering the land in question and for special, general and aggravated damages.

5. The 2nd and 3rd defendants filed their respective statements of defence, while the 1st defendant filed its striking out application on 21st March 2016 under Order 18 rule 18, without referring to any specific sub rule, and the 4th defendants filed their striking out application on 22nd April 2016 under Order18 rule 18 (a) ,(b) & (d) , Order 15 Rule 6(2)(a) and Order 15 Rule 14(1) of the High Court Rules, which resulted in the impugned ruling being made by the Master on 18th November, 2016.

The Action No: HBC-100 of 2012.

6. A brief mention about the action number **HBC 100 of 2012** is very much pertinent for the easy comprehension of the pivotal issue that led the parties to the Court in both these actions and since a new issue of multiplicity of action has been raised at the hearing by the learned counsel for the 1st and 4th defendants.

   a. The action number HBC 100 of 2012 was filed by the plaintiff in the year 2012, only against the 1st, 3rd and 4th defendants in the present action HBC 27 of 2016, without the 2nd defendant hereof being made a party. In the statement of claim (SOC) in the action number HBC-100 of 2012 , it is averred that the first defendant, namely, NAOBEKA INVESTMENT LIMITED had issued notices on the plaintiff to rescind or cancel the sublease agreement that had been , admittedly, entered into by and between the plaintiff and the 1st defendant in August 2007, citing multiple reasons such as **(a)** that the plaintiff has failed to carry out the survey under clause 5 (a) of the third schedule to the sublease within six months of the sublease, **(b)** the sublease signed by one

director under common seal of the plaintiff is no longer acceptable to the first defendant and **(c)** the plaintiff do not have proper approval by the Foreign Trade and Investment Board and now known as Investment Fiji.

b. It can be further observed through the pleadings, that it is on the aforesaid alleged breaches of the said sublease agreement by the plaintiff, the 1st defendant, purportedly, threatened to cancel the sublease agreement, which prompted the plaintiff to file the action number HBC-100 in 2012 and it was after the purported cancellation of the said sublease and issuing another sublease to the 2nd defendant hereof, the plaintiff filed this action number HBC-27 of 2016 on 16th February 2016. It is on the said sublease agreement, which is said to have been cancelled by the 1st defendant as aforesaid, the plaintiff bases its claim in both these actions. Thus, it plays the vital role in both these actions. Further reference to this HBC 100 of 2012 will be made, if needed, during the analysis bellow.

C. GROUNDS OF APPEAL:

7. Altogether, 5 grounds of appeal have been advanced by the learned counsel for the plaintiff , which read as follows;

1. The Learned Master was wrong in law and in fact by hearing and determining the First and Fourth Defendants' strike out application when the issue on which that application was based, namely, the issue of Foreign Investment Certificate pursuant to the Foreign Investment Act 1999, was dealt with and determined in the related civil action HBC 100 of 2012 and therefore res judicata, contrary to the findings of the said civil action.

2. The Learned Master failed to consider and address his mind at all or sufficiently to the fact the same issue had been dealt with and determined by this Honourable Court in civil action HBC 100 of 2012 despite the issue being drawn to his attention in the Appellant's supporting affidavit and submissions.

3. The Learned Master was wrong in law and in fact in holding (at page 25 of the Ruling) that it was "illegal for the Plaintiff to take an island in Fiji on sublease to carry on business in an activity, unless and until the Chief Executive of Investment Fiji issues the Plaintiff a Foreign Investment Certificate, which satisfies the terms of Section 8 of the Foreign Investment Act, No. 1 of 1999", for the following reasons:

   a. Res judicata as in paragraph 1 above;

   b. It was not open to the Learned Master to make such a determination in a strike out application because such a determination could only be made after a full and proper trial as it required consideration of complex matters of law, such as the intention of the Parliament in enacting the said Act, its purpose and intent. It also required full and proper evidence obtained at trial after cross examination of witnesses, for example, of the executive and officers of the relevant authority, for such a determination to be made.

4. The Learned Master was wrong in law and in fact for finding (at page 33) that the Appellant's action was founded upon an agreement prohibited by Section 4 of the Foreign Investment Act and that the action arose "ex turpi causa" for the reason given above.

5. The Learned Master was wrong in law and in fact by summarily dismissing the Appellant's action contrary to principle for the reasons given above.

8. **The Orders sought by the plaintiff (the appellant) are as follows:**

   1. That the Orders made by the Learned Master Nanayakkara in his Ruling of 18 November 2016 be set aside.

   2. That the Appellant's (plaintiff) action against the First, Second and Fourth Respondents in Civil Action HBC 27 of 2016 be re-instated.

   3. That the First, Second and Fourth Respondents pay the costs of this appeal and hearing below.

D. SUBMISSIONS:

9. The learned Counsel for the plaintiff and all the defendants made oral submissions at the hearing before me. Additionally, the learned Counsel for the plaintiff and the 1st & 4th defendants have filed extensive and enlightening written submissions, for which I am grateful to them. The learned Counsel for the 2nd and 3rd defendants, in addition to their short oral submissions, opted to rely on the oral submissions made, and the written submissions filed by the learned Counsel for the 1st and 4th defendants.

10. I have carefully gone through the contents of the pleadings, the impugned ruling, including the rulings made in HBC-100 of 2012 on two striking out applications and on the application for the amendment of summons made by the 1st defendant therein and the contents in the oral and written submissions.

E. DISCUSSION:-

11. On careful perusal of the impugned ruling made by the Master, it is obvious that the Master has chosen to strike out and dismiss the action against the 1st and 4th defendants, only on two grounds, namely;

    a. That the SOC discloses no reasonable cause of action against them, as adduced in paragraph (a) of the 1st defendant's motion and in paragraph (h) of the 4th defendant's motion to strike out.

    b. That the plaintiff's claim is based on a purported sublease entered into by it illegally contrary to its Foreign Investment Certificate, the claim is tainted by such illegality and the Court is not bound to assist the plaintiff in enforcing such illegal activity, as adduced in paragraph (b) of the 1st defendant's Motion and in paragraph (j) of the 4th defendant's Motion to strike out.

12. The other grounds adduced by both the defendants in their respective motions, have not attracted the attention of the Master in making this impugned ruling. When deciding the fate of the plaintiff's action on the aforesaid grounds (a) and (b) , the Master seems to have engaged in an

exercise of investigation to ascertain the propriety and/ or the legality of the sublease agreement entered into by and between the plaintiff and the 1st defendant in August 2007 , contents of which had been duly agreed and acted upon by both the parties, particularly , disregarding the fact that the 1st and 4th defendants had obtained benefits out of it for over a period of four and half years.

13. In the above exercise, which is generally performed by a judge by going through the trial, the Master has picked up the question of non-availability of the Foreign Investment Certificate for the proposed extended activities of the plaintiff, in order to arrive at his erroneous finding that the sublease agreement and the activities performed by the plaintiff on it are illegal and the Court cannot lend its hands to the plaintiff.

14. The very fact that there were two unchallenged former rulings in existence on the question of the Foreign Investment Certificate in the connected action number HBC 100 of 2012, by the time the 1st and 4th defendants lodged their respective striking out applications in this action, seems to have escaped the attention of the Master or it has been disregarded by him when he made the impugned ruling, though it had been brought to his attention in paragraphs 6 and 7 of the affidavit in opposition filed by the plaintiff to the striking out application and in paragraphs 6 and 7 of the written submissions dated 12th July 2016 filed by the learned Counsel for the plaintiff before the Master.

15. The first and second grounds of appeal are revolving around the above issue , which is a decided matter (res-judicata) as per the judgments in ***Kento (Fiji) v Naobeka Investment Ltd [2013] FJHC 540;HBC 100 .2012 (16 October 2013)*** and ***Kento Fiji Ltd v Naobeka Investment Ltd [2014] FJHC 92; HBC100 . 2012 (25 February 2014)*** and the learned Master could not have disregarded this when arriving at his impugned Ruling.

16. The 1st and 4th defendants, who opted not to appeal against the above Rulings in that action number HBC 100 of 2012 delivered by two former Masters (Mr Rajasinghe and Mr Ajmeer-who are presently sitting as Hon. Judges), once again lodged another striking out application on 13th June 2017 before the subsequent Master Mr Mohamed Azhar (present Acting Master) and the Ruling by him dated 12th September 2017 came out to be the

same, falling in line with the findings of the former Master Mr. Rajasinghe in the first striking out application. Vide. ***Kento (Fiji) v Naobeka Investment Ltd [2017] FJHC 671; HBC 100 .2012 (12 September 2017).*** Paragraphs 25 and 26 of Acting Master Azhar's ruling crystalizes the whole issue here and gives ample reasons as to why the plaintiff's that claim should have remained intact.

17. Number of case law authorities on the question of res- judicata has been extensively discussed by the Acting Master Mr Mohammed Azhar in his Ruling and this Ruling too stands intact by a higher forum. It is a well-recognised principle in our law that once a matter has been adjudicated by a competent court, it may not be pursued further by the same parties before the same forum, unless it is subjected to scrutiny by a higher forum and set aside or altered.

18. In his submissions addressing on res Judicata and Issue of Estoppel, on which the 1st and 2nd grounds of appeal are based, the learned Counsel for the 1st and 4th defendants is seems to be in an attempt to justify the impugned ruling, by arguing that the plaintiff in this action had failed to confirm that necessary approval has been granted under the Foreign Investment Act, though 3 years and 4 months had lapsed since the ruling in the action No. HBC 100 of 2012 was delivered on 16th October 2013 and the refusal to strike out in the former action was on the basis that, inter alia, the plaintiff had represented to the court that it had already applied for approvals and extensions from the Investment Fiji.

19. I beg to disagree with the learned Counsel for the 1st and 4th defendants on this point for the simple reason that the answers for the questions, such as whether the plaintiff had in fact applied for the FIC? Whether it had duly complied with all the requirements for it? Whether the plaintiff had violated any rules and regulations in respect of the existing Certificate? And why the new Certificate for the extended activity had not been issued? Were to be correctly ascertained only after a proper trial before a judge. The Master should not have proceeded to decide the above questions summarily in the absence of any acceptable and cogent evidence before him.

20. Further, the plaintiff in fact had a FIC for its initial activities, and it is evidenced by the favourably responded letter dated 11th January 2013 received by the plaintiff from the Investment FIJI which is marked as "A" that the plaintiff had made an application for the extension of the activities, though it had not made use of a formal application form for that purpose. The Master need not have, expected or called for a new FIC, which is generally not supposed to be issued over the counter or in a couple of days or weeks, in order to decide the legality or validity of the duly entered sublease agreement and that of the limited activities carried on by the plaintiff for a period well over four and half years, without any complaint being made to the relevant authorities with regard to any violations or illegal activities.

21. Even if a new FIC had not been issued or denied for some reason, it appears that the plaintiff has had all good reasons to carry on with its initial activities in terms of the original FIC issued to it, on which plaintiff could have operated for nearly another 20 years, unless there was cogent evidence to the effect that the plaintiff had violated any specific conditions in the FIC or in the sublease agreement or engaged in illegal activities. The task of full and final adjudication on it should be left for a judge at a proper trial, unless the law and facts before the Master were so strong and clear to warrant his intervention to deal with it summarily and strike out the action.

22. The argument advanced for and on behalf of the 1st and 4th defendants, that the rules of res judicata do not apply as the circumstances under which the rulings in the former and the present actions were made differs will not hold water. The absence of the FIC for the extended activities of the plaintiff need not have necessarily vitiated the sublease agreement or made the initial activities carried out by the plaintiff on it as illegal. The circumstances prevailed at the time of making the ruling in HBC 100 of 2012 by then Master Mr Rajasinghe continued to prevail when the present ruling in appeal was made and the Master could not have picked up the absence of the new FIC as a tool to decide the validity of the whole activities carried out by the plaintiff from the very first day and to declare that the sublease was an illegal document , without allowing the due process to take its turn in the ascertainment of the whole facts before a trial court.

23. The next argument advanced by the learned defence Counsel, to meet the 1st and 2nd grounds of appeal, was the, alleged, multiplicity of proceedings. This was not an issue dealt by the Master in arriving at the impugned decision to strike out, though it may have been presented before the Master by the 1st and 4th defendants. This court cannot be called upon to go into this issue not considered and acted upon by the Master. It can be left for decision as an issue before the trial judge or a consolidation application, if allowed, would solve it.

The 3rd ground of Appeal

24. This ground, which deals with the alleged illegality, has already been sufficiently addressed in the foregoing paragraphs, when considering the 1st and 2nd grounds of appeal. The Master has decided that it was *"illegal for the plaintiff to take an Island in Fiji on sublease to carry on a business in an activity , unless and until the Chief Executive of Investment Fiji issues the plaintiff a Foreign Investment Certificate , which satisfies the terms of section 8 of the Foreign Investment Act, No 1 of 1999"*

25. The Master should not have arrived at such a decision when the question of res judicata was duly raised and since it was not open to the Master to arrive at such a determination in a strike out application and a finding of that nature could be arrived at only after a full-scale trial involving all the witnesses and the interpretation of the relevant Act, particularly, the conditions embodied in the sublease agreement, which was not before the Master for his perusal at least.

26. There was no evidence at all before the Master as to when the alleged breach was committed. No complaints made to the relevant authorities about the alleged breach or illegal activities.

27. I am guided by the judgment in *Kamandu v Weleilakeba [2013] FJHC 442 HBC 86.2011(2 September 2013)*, which dealt with a FTIB Certificate and highlighted the danger of summarily determining whether a Certificate existed or not. Hon. Justice. S. Balapatabendi in his judgment, among other things, stated as follows;

25. *Furthermore, as per the affidavits tendered to this court by the defendants and the documents annexed thereto, do not reveal that there was any complaint against the Plaintiffs to the relevant statutory body or authority to inquire into the allegation of violation of the terms and conditions of the certificate issued to the Plaintiff's company and the provisions of the Foreign Investment Act.*

26. *In the absence of proper complaint to the appropriate body, in my view, this court is unable to come in to a proper conclusion whether the Plaintiff have violated the law or not by entering in to the loan agreement. The only material available to this court is the mere assertion in the affidavit supported by reference to relevant legal provisions of the Act in Written Submissions. It seems that no statutory body authorized by law to issue Foreign Investment Certificate has not decided that the investor violated the conditions or the provisions of the law. It would not be appropriate for this court to come to a conclusion solely based on the Written Submissions without a due process of the law in relation to the alleged violation.*

28. I agree with the learned defence counsel's argument in paragraph 33 of his written submissions that the plaintiff did not have a Certificate for the extended activity. But, as I observed above, the absence of such a Certificate need not have been considered as a serious shortcoming or a disqualification for the plaintiff to engage in its activities permitted by the original FIC and for the Master to determine that the sublease agreement the plaintiff had in hand and the activities done on it were illegal.

29. The next pertinent question that arises is, how the defendants can claim that the plaintiff is asking the court to enforce an illegal activity, without proving as to from when this alleged illegal activity commenced, for how long it was in progress and what step the defendants took to stop it. More importantly, how the Master could have arrived at a finding that the plaintiff had the illegal intention when the sublease agreement was signed in 2007, without hearing the witnesses, scrutiny of facts and the law involved at a proper trial that should be held before a judge.

30. The Master could not have assumed or taken notice of such alleged, illegality in the operations of the plaintiff or about the presence of the intention, on the part of the plaintiff to violate and engage in illegal activity at the time of signing the sublease, merely relying on the affidavit evidence or submission made to that effect, unless it was proved by following the due process.

31. There was no tangible evidence before the Master on any illegal activity or unlawfulness on the part of the plaintiff, for the Master to desist from assisting the plaintiff or to arrive at a decision that the claim was frivolous as claimed by the learned defence counsel.

4th and 5th grounds of Appeal:

32. The 4th ground of appeal has been covered in the foregoing paragraphs. The plaintiff seems to have had a valid sublease agreement for the activities covered by it on which the plaintiff in fact operated for nearly 5 years. It cannot become a prohibited agreement just because the plaintiff changed its plans and decided to expand the activities, for which the plaintiff was allegedly in the process of obtaining a new Certificate. Plaintiff's request has not yet been turned down by Fiji Investment. If not for the cancellation of the plaintiff's sublease and arrival of the 2nd defendant on a new sublease, the plaintiff would have, probably, proceeded in its plan for extended activities with the new FIC being obtained.

33. I need not take a deep delve into the 5th ground of appeal in view of the merits in the other grounds of appeal discussed above. From the line of authorities it is clear that only on rare instances the court would allow striking out applications.

F. CONCLUSION:

34. This Court has already granted leave to appeal the impugned ruling of the Master, on grounds of appeal well founded and meritorious. The plaintiff has satisfied this court that this is a fit and proper case that warrants the intervention of this Court to do away the prejudice caused to the plaintiff by the impugned ruling.

35. The Master has failed to consider the existence of two former rulings in the connected action on the question of FIC, which remained intact and when the defence of res judicata was favouring the plaintiff on it. Further, the Master's decision that the plaintiff's sublease agreement and the activities on it are illegal from the inception, in the absence of the new FIC, is

materially wrong and this question of new FIC should have been left for the decision after the trial.

36. If this impugned ruling is allowed to remain, it would undoubtedly cause substantial injustice to the plaintiff. Since the grounds of appeal are sound and meritorious this appeal should be allowed.

G. COSTS:

37. The plaintiff moves for costs in the appeal and the court bellow on indemnity basis. I have reserved the cost for leave to appeal and extension of time application against the 1st and 4th defendants. I ruled out costs against the 2nd and 3rd defendants as they did not actively take part in the striking out application. The impugned ruling by the Master has struck out the action only against the 1st and 4th defendants. The action against the 2nd and 3rd defendants still survives.

38. Learned counsel for the 1st and 4th defendants states that the notice of intention to seek indemnity costs is a must for invoking the court's discretion in awarding such costs and there must be reprehensible conduct on the part of the party against whom such costs are moved for. Learned counsel has cited few authorities to support his contention.

39. The learned Counsel for the plaintiff has drawn my attention to relevant principles/ guidelines that govern the ordering of indemnity costs. It is only by the Plaintiff's Counsel's written submissions before the Master; claim has been made for indemnity cost. However, the 1st and 4th defendants were aware or should have been advised and aware that they were engaging in an unproductive exercise in making strike out application, particularly, when the issue of FIC was res judicata.

40. The plaintiff, who claims to be a foreign investor, prima facie, has been rendered out of business due to the eviction caused by the unilateral cancellation of its sublease by the 1st defendant and granting of a new sublease to the 2nd defendant. It would have endured substantial amount as costs in order to bring back its action alive.

41. Considering all the circumstances, awarding of a sum of $ 4,500.00 as summarily assessed costs payable by the 1st and 4th defendant to the plaintiff, being the costs before the Master and on account of leave to appeal and the appeal before this court, and ordering same to be paid before the next date would do justice for the time being.

H. FINAL ORDERS:

a. The appeal is allowed.

b. The impugned ruling dated 18th November 2016 made by the learned Master of this court is hereby set aside.

c. The statement of claim against the 1st and 4th defendants stands reinstated.

d. There shall be summarily assessed costs in a sum of $ 4,500.00 payable by the 1st and 4th defendants jointly and severally unto the plaintiff within 21 days from today.

e. The 1st and 4th defendants shall file and serve the statement of defence within 21 days.

f. The action shall proceed against all 4 defendants.

g. The parties shall be at liberty for further directions.

h. The matter will take its normal course.

HIGH COURT OF FIJI LAUTOKA

A.M.Mohammed Mackie

Judge

At Lautoka

23rd October, 2018