

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 109 OF 2017

BETWEEN : **MOHAMMED SHAMEEM** of Northern Press Road, Martintar,
Nadi, Businessman.

PLAINTIFF

AND : **AJAY KUMAR** of Wailoaloa, Nadi, Businessman.

DEFENDANT

Appearances : Plaintiff appearing in-person
Mr A. J. Singh for the defendant

Date of Hearing : 29 March 2018

Date of Judgment : 29 March 2018

J U D G M E N T

Introduction

[01] The plaintiff brought this claim against the defendant by way of originating summons (expedited form) in conjunction with an affidavit sworn by the plaintiff and seeks among other things an order that the defendant to enter into a sale and purchase agreement pursuant to clause 6 of the Memorandum of Understanding entered into between the defendant and the plaintiff on 26 May 2014

[02] The claim is founded on a memorandum of understanding (*MoU*) allegedly entered into between the parties on 26 May 2014.

[03] The defendant filed an affidavit in response and stated among other things that this matter is not appropriate to be dealt with by an originating summons. He asked the court to dismiss the claim as it is defective.

[04] At the trial, both parties confined their evidence to that of their respective affidavits filed in court. Each party confirmed their affidavits and closed their

case. I have had the benefit of the written submissions filed by the parties in addition to their evidence.

Background

[05] The background facts of the case are as follows:

- i. Ajay Kumar, the defendant was and is the registered lessee of land comprised of Crown Lease being LD Reference No.4/10/1492, Lot 2 on ND 5122 having an area of 8 acres (the land).
- ii. The defendant wanted to sell 3.5 acres of the land to Mohammed Shameem, the plaintiff.
- iii. They entered into an MoU on 26 May 2014. The MoU incorporated the following clauses:
 1. *That the Vendor is desirous to sell 3.5 acres from the Property to the Purchaser and the Purchaser is desirous to purchase 3.5 acres from the Property.*
 2. *The Purchaser would pay a sum of \$300,000.00 plus Capital Gains Tax (if any) to the Vendor for the 3.5 acres from the property.*
 3. *The Vendor and the Purchaser hereby agree to carry out survey of the Property and all other necessary works to sub-divide 3.5 acres from the property.*
 4. *The Vendor agrees to make all necessary applications and obtain all relevant consents and approvals from all relevant authorities for the sub-division of 3.5 acres from the Property.*
 5. *The Purchaser hereby agrees to pay for all the costs for the subdivision of the 3.5 acres from the Property.*
 6. *That the Vendor and the Purchaser hereby agree that upon completion of the subdivision and issuance of the new lease, the vendor and the Purchaser would enter into a formal Sale and Purchase Agreement to facilitate the sale of the 3.5 acres from the Property to the Purchasers.*
 7. *The Vendors hereby state that the Vendors have sought independent legal advice in this matter and have agreed to the above terms on their own will and not under any undue influence.*
 8. *The Purchaser hereby states that the Purchaser has sought independent legal advice in this matter and has agreed to the above terms on his own will and not under any undue influence*
- iv. The plaintiff seeks specific performance of the MoU.

The Law

[06] Order 28, rule 9 of the High Court Rules 1988 (*the HCR*) says:

“Continuation of proceedings as if cause or matter begun by writ (O.28, r.9)

9.-(1) Where, in the case of a cause or matter begun by originating summons, it appears to the Court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause or matter had been begun by writ, it may order the proceedings to continue as if the cause or matter had been so begun and may, in particular, order that any affidavits shall stand as pleadings, with or without liberty to any of the parties to add thereto or to apply for particulars thereof.

(2) Where the Court decides to make such an order, Order 25, rules 2 to 7, shall, with the omission of so much of rule 7(1) as requires parties to serve a notice specifying the orders and directions which they require and with any other necessary modifications, apply as if there had been a summons for directions in the proceedings and that order were one of the orders to be made thereon.

(3) This Rule applies notwithstanding that the cause or matter in question could not have been begun by writ.

(4) Every reference in these Rules to an action begun by writ shall, unless the context otherwise requires, be construed as including a reference to a cause or matter proceedings in which are ordered under this Rule to continue as if the cause or matter had been so begun”.

Discussion

[07] The plaintiff has commenced this proceeding by way of originating summons. The plaintiff had used originating summons (expedited form-Form 4 in Appendix 1 to the HCR) when originating the proceedings. He should have used the general (Form 3) originating summons in the first place.

[08] Fatiaki J in *Citizens Constitutional Forum & Ors v President & Attorney General* [2001] 2 FLR 127 (Ruling 23 May 2001 at 64) held that: the process of filing and serving affidavit evidence can take anything up to 2 months to complete under the normal maximum time frame the plaintiff may apply to the Court for a hearing date to be fixed for a general (Form 3) originating summons and must be complied with. Unless authorised or required under the Rules, no party to civil proceedings may use the expedited originating summons.

- [09] The defendant has filed responding affidavit in which he states that: the MoU has been forged. The plaintiff's action hinges on the MoU signed by the parties in respect of a piece of land. The land in respect of the MoU has been entered into is a state land.
- [10] Mr Singh counsel for the defendant submits that no consent of the Director of Lands was obtained to execute a document in respect of the state land and to institute proceedings affecting the state land.
- [11] Through his originating summons, the plaintiff seeks specific performance of the MoU in that he seeks an order that the defendant enters into a sale and purchase agreement pursuant to Clause 6 of the MoU. Clause 6 provides:
- "That the vendor and the Purchaser hereby agree that upon completion of the subdivision and issuance of the new lease, the vendor and the Purchaser would enter into a formal Sale and Purchase Agreement to facilitate the sale of the 3.5 acres from the Property to the Purchasers."* (Emphasis provided)
- [12] Significantly, the MoU has been entered into conditionally. That means the parties will enter into a formal sale and purchase agreement upon completion of the subdivision and issuance of the new lease. Although the subdivision of the land is complete, the new lease has not been issued to the defendant.
- [13] The lease in respect of the MoU was entered into had been expired. It expired in 2016 and the defendant is waiting for the new lease.
- [14] A cause of action from the MoU, if any, would arise only after the new lease is issued to the defendant. That did not happen. The plaintiff admits this but states that a new lease would be issued to the defendant.
- [15] The defendant had raised a number of contested factual issues including fraud.
- [16] For these reasons, I think I should convert the proceeding initiated by expedited originating summons into a writ action. O.28, r.9 empowers the court, where it appears to the court at any stage of the proceedings, to allow an action begun by originating summons to continue as if the action begun by writ. Therefore, I, acting under O.28, r.9, allow the plaintiff to continue the proceedings as if he has begun the proceedings by writ. The affidavits filed by the parties will stand as

pleadings with liberty to both parties to add further particulars thereto or they are at liberty to file fresh pleadings if they so wish. In all the circumstances, I would make no order as to costs.

The Final Outcome

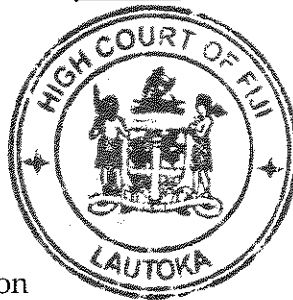
1. The action is to continue as if begun by writ.
2. The affidavits filed by the parties will stand as pleadings with liberty to add further particulars thereto or the parties may file fresh pleadings if they so wish.
3. No order as to costs.

M.H. Mohamed Ajmeer
29/3/18

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M.H. Mohamed Ajmeer

JUDGE

At Lautoka
29 March 2018



Solicitors:

For the plaintiff: appearing in person

For the defendant: Messrs Anil J Singh Lawyers, Barristers & Solicitors