

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

HBC NO. 147 OF 2015

BETWEEN : **UMESH PRASAD** of Legalega West Road, Nadi, Farmer.
Plaintiff

AND : **RAMESH PRASAD**, of Legalega West Road, Nadi, Farmer.
First Defendant

AND : **ITaukei Land Trust Board**, a statutory body having its registered
Office at 431 – Victoria Parade, Suva.
Second Defendant

Counsel : Mr. Raratabu for the Plaintiff
: Mr. S. Nacolawa for the 1st Defendant
: Ms. Suveinakama for the 2nd Defendant

Date of Hearing : 8th February 2018

Date of Ruling : 12th June 2018

Ruling by : Justice Mr. Mohamed Mackie

RULING

A. INTRODUCTION:

1. This ruling is made to decide whether the injunction, issued by my learned predecessor judge on 4th Day of September 2015, should be allowed to remain in force or vacated.
2. My learned predecessor Judge, after considering the Notice of Ex-parte Motion and the accompanying affidavit of the plaintiff, namely, **MR. UMESH PRASAD**, filed on 2nd September 2015, had made the impugned injunction order as per paragraphs 1 and 2 bellow.

IT IS HEREBY ORDERED THAT:

1. ***THAT*** an injunction restraining the 1st Defendant and 2nd Defendant from engaging in any sort of transaction on Native Lease Agreement for Lease NLTB Ref No. 4/10/7209

until the final determination of this action.

2. **THAT** an injunction restraining the 1st Defendant from bulldozing or cultivating or disposing off Native Lease Agreement for Lease NLTB Ref No. 4/10/7209.

3. **THAT** this matter is adjourned to the 8th day of October

3. Simultaneously, the plaintiff had also filed his writ of summons and the Statement of Claim against both the Defendants claiming certain declaratory reliefs, general; damages and other ancillary reliefs.
4. The 1st Defendant, namely, MR. RAMESH PRASAD, having filed his acknowledgment of service on 23rd September 2015, filed his Statement of Defence in person on 28th September 2015, which was subsequently amended and filed by his Solicitors on 24th March 2016. The 1st Defendant also filed his affidavit in opposition to the injunction on 24th March 2016, for which the Plaintiff duly filed his reply affidavit on 15th June 2016.
5. The 2nd Defendant filed its acknowledgment of service on 18th September 2015, but failed to file the statement of Defence or the affidavit in opposition and my predecessor on 13th February 2017 ordered the matter to proceed in the absence of the 2nd Defendant.
6. However, summons for directions being filed before me, prior to further proceedings, the 2nd Defendant, with the leave of this Court, filed its statement of Defence and the Affidavit in opposition on 7th of November 2017.
7. On 08th February 2018, when the matter was taken up for hearing before me, the learned counsel for all the parties made respective oral submissions and though, parties were directed to file written submissions, only the learned Counsel for the 1st Defendant filed his written submissions on 22nd February 2018.

B. FACTUAL MATRIX:

8. The facts of the case are, in summary terms, described below.
 - a. The Plaintiff and the 1st Defendant are brothers, born to Mr. Kamta Prasad and Mrs. Ram Dulari. The lessee for the subject matter land was originally their father Mr. Kamta Prasad and while he was living said to have transferred the lease to his wife Mrs. Ram Dulari. Mr. Kamta Prasad died in 1994.
 - b. Plaintiff is living at the House situated in the land in question and his mother Ram Dulari also was with him, while the 1st Defendant was staying at and farming another land at Nadele, Sabeto, in Native Lease No: 15139. In the year 2003, the 1st Defendant, along

with his family, moved to the land in question in order to help the farming activities and to maintain the lease.

- c. Plaintiff states that after few months, the 1st Defendant becoming aware that the lease is expiring and the mother had consented to renew it in the plaintiff's name, tried to convince the mother to have the lease in his name and after much discussion, it was agreed for both of them to apply for renewal in both of their names after it expires and it was further agreed that the 1st Defendant will apply for new lease in the name of both.
- d. The Plaintiff, who was under the impression that the new lease will be obtained by the 1st Defendant in both of their names, when on suspicion checked with the 2nd Defendant board in the year 2004, found to his shock and dismay that the 2nd Defendant had issued a new lease under NLTB Ref No: 4/10/7209 only in the name of the 1st Defendant.
- e. The Plaintiff alleges fraud and misrepresentation on the part of the 1st Defendant, while making allegation of negligence against the 2nd Defendant for failing to consider the Plaintiff's request, to conduct proper investigation, to carry out physical inspection, to interview the Plaintiff and to act with due care and/or diligence, despite advising the Plaintiff by the 2nd Defendant Board's letter dated 4th May 2015 that they will not entertain any further dealing with the land in question and particularly, after informing the 1st Defendant by letter dated 16th December 2005, with copy to the Plaintiff, that the Board has terminated the lease to the 1st Defendant.
- f. The 1st Defendant admits that he disconnected the Power and Water supply to the Plaintiff's House. It is also in admission that the 1st Defendant started felling the trees and clearing the Land using the Bulldozer. The Plaintiff alleges that the 1st defendant started dismantling Plaintiff's House as well causing severe hardships to Plaintiff's family life.
- g. It is said, according to the last Will of Mr. Kamta Prasad dated 16th November 1993, both brothers (the plaintiff and the defendant) are entitled to equal share of the property.

C. LEGAL PRINCIPLES:-

9. An interlocutory injunction is a remedy that is both temporary and discretionary in nature. (**American Cyanamid v. Ethicon Limited**[1975] UKHL 1; [1975] 1 All ER 504 per Lord Diplock) As a temporary remedy, it is obtained before the final determination of the parties' rights in an action and so it is framed in such a way as to show it is to last only until the determination of the matter concerned.

10. The principles on the grant of interim injunctions and whether to dissolve such an injunction pending determination of the matter are settled. As stated by Lord Diplock in *Cyanamid*(supra), they are:
- (i) Whether there is a serious question to be tried;
 - (ii) Whether damages be an adequate remedy, and;
 - (iii) The balance of convenience.
11. Where an interim injunction has been granted ex parte, the Plaintiff bears the onus of satisfying the Court that the injunction ought to continue. (*Westpac Banking Corporation v. Adi Mahesh Prasad Civ App ABU 27 of 1997S (FCA Reps 99/1)*)
12. In *Digicel (Fiji) Ltd v Fiji Rugby Union [2016] FJSC 40; CBV0004.2015 (26 August 2016)*, Hon. Marsoof J stated:
- According to the procedure adopted by our courts, which are called upon to decide any application for interlocutory injunction, the evidence consists entirely of admissions on record by way of pleadings and the content of affidavits that are filed by the parties.

D. ANALYSIS:

Whether there is a serious question to be tried?

13. The first issue for determination is whether there is a serious question to be tried. This is the threshold test or question. In *Digicel (Fiji) Ltd v Fiji Rugby Union [2016] FJSC 40; CBV0004.2015 (26 August 2016)*, Keith J, referring to the principles set out by Lord Diplock in *Cyanamid* (supra), stated:

The court first considers whether there is a serious issue to be tried. That does not mean that the court must be satisfied that there is a strong case for granting an injunction at the trial of the action. If an interlocutory injunction is to be granted, the court only has to be satisfied that the claim is neither frivolous nor vexatious. (Emphasis mine)

In *Cyanamid* (supra) at 406, Lord Diplock stated:

“My Lords, when an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff’s legal right is made upon contested facts, the decision whether or not to grant an interlocutory injunction has to be taken at a time when ex-hypothesis the existence of the right or the violation of it, or both, is uncertain and will remain uncertain until final judgment is given in the action. It was to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be

resolved that the practice arose of granting him relief by way of interlocutory injunction ; but since the middle of the 19th century this has been made subject to his undertaking to pay damages to the defendant for any loss sustained by reason of the injunction if it should be held at the trial that the plaintiff had not been entitled to restrain the defendant from doing what he was threatening to do. The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial. The court must weigh one need against another and determine where "the balance of convenience" lies.

14. There is no dispute that the Plaintiff has been living in the premises in suit with his family since the year 1984. Plaintiff says that the Defendant, after coming into the premises with his family in the year 2003 to live therein, becoming aware that lease is expiring and there was an arrangement to have it renewed in Plaintiff's name, the Defendant tried to convince the Mother to have it issued in his name and finally agreed to have it in both of their names and accordingly, the Defendant was entrusted to apply for the new lease in the name of both.
15. Though, the Defendant has taken up a position that he obtained the lease in his sole name as the plaintiff had indicated that he had no interest in obtaining a lease in his name and he would go for a rented House, subsequently, the Defendant, having changed his mind, agreed to surrender the lease in order to have a separate lease issued to the Plaintiff for a portion of the land. It is alleged that the Plaintiff refused to take that offer and removed the pegs planted to demarcate the boundary. Plaintiff says that he did not agree with the manner in which the sub-division was done as the House he was living fell out of that boundary and the land allocated for him was insufficient.
16. However, the Plaintiff is making a serious allegation of fraud and misrepresentation committed on the part of the 1st Defendant. Plaintiff alleges that the 1st Defendant instead of applying to have it in both of their names, surreptitiously by misrepresenting and hiding the factual situation from the 2nd Defendant, obtained the new lease only in his name. The 1st Defendant calls the Plaintiff as a trespasser. The Plaintiff, who is living in the premises for nearly 35 years (since his birth) cannot be simply treated or called as a trespasser.
17. The 2nd Defendant in its affidavit in opposition, among other things, admits that the Plaintiff is living in the land throughout his life, the 1st Defendant was living in a separate lease hold, and the new lease was issued to the 1st Defendant on the sole representation made by him, without verifying and inspecting the land. The 2nd Defendant, particularly, admits the sending of letter dated 4th May 2005 stating that no further dealing with the land in question

will be done and another letter dated 16th December 2005 cancelling the lease issued to the 1st defendant.

18. The 2nd defendant also admits that no investigations or inspections were done before issuing the lease to the 1st Defendant. The question arises as to how the 2nd defendant proceeded to issue a new lease in favor of the 1st Defendant without proper verification and investigation as to who was in actual occupation of the land in question. It is admitted that the 1st Defendant made the lease application without informing that the Plaintiff is living there and nor he provided father's will and probate
19. The 2nd Defendant states that the original lease was in Mr. Kamta Prasad's name and the arrangements were underway to issue the lease to Mrs. Ram Dulari, the wife of Mr. Kamta Prasad. However, ultimately issued it in the name of the 1st Defendant. Having done this the 2nd Defendant gives an assurance to the plaintiff by letter dated 4th May 2005, that no further dealings will be done in respect of the land in question. Subsequently, the 2nd Defendant sent another letter dated 16th December 2016 to the 1st Defendant, with copy to the plaintiff, stating that the lease has been cancelled.
20. The above revelations requires the Court to go into the matter to examine the propriety of the role played by the 2nd defendant and that of the 1st Defendant, which is possible only at the trial and it is unsafe to completely rely on conflicting affidavits filed, particularly, in a matter of this nature, where the Plaintiff is in the verge of being evicted by the 1st Defendant's purported cleaning activities, which goes to the extent of Bulldozing the House, where the Plaintiff is, admittedly, living with his family.
21. The Plaintiff supports the extension of an injunction pending the determination of this matter. Indeed, his position is that the 1st Defendant, fraudulently and by surreptitiously misrepresenting the facts to the 2nd Defendant got the lease issued in his name. The Plaintiff may have had a legitimate expectation in terms of the will of his late father and on the subsequent mutual agreement that he would have his share of the lease land covering the House, where he lives.
22. There is an admission on the part of the 2nd Defendant that the 1st Defendant misrepresented the facts and they too did not conduct any investigation or inspection as to the veracity of the facts presented by the 1st Defendant. The 1st Defendant's purported registered title should withstand the allegation of fraud. Proper stage of testing is the substantial trial in the action, where the allegation of fraud could be properly adjudicated.
23. I do not think the Plaintiff's action is frivolous or vexatious. Rather, I am convinced of the existence of serious issues to be tried.

Adequacy of damages & Balance of Convenience.

24. In **Cyanamid (supra) at 408**, Lord Diplock explained the principles relevant to a decision on where the balance of convenience lay, as follows:

...the governing principle is that the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage.

25. In Fiji, the Court of Appeal has dealt with the principles pertinent to the balance of convenience and it is, I think, apt to refer to some of these decisions.

In **Professional West Realty (Fiji) Ltd v Professionals Ltd, Civil Appeal No. ABU 0072 of 2008 (21 October 2010) at [37]**, the Court (per Byrne AP and Calanchini JA) stated:

"Having determined, correctly in our opinion, that the material did raise a serious question to be tried, the learned judge was required to consider the balance of convenience. In some decisions the balance of convenience test is considered under two separate heads and in others the approach is that there are a number of factors that need to be considered in determining the balance of convenience. However, regardless of the approach adopted, the learned judge was required to consider whether an award of damages would be an adequate remedy for the Respondent if successful on the question of liability at the trial of the action".

In **Honeymoon Island (Fiji) Ltd v Follies International Ltd, Civil Appeal No. ABU0063 of 2007S (4 July 2008) at [13]**, the Court of Appeal (per Pathik, Powell, and Bruce JJA) stated:

As a prelude to considering the balance of convenience the Court must consider whether or not the applicant will suffer irreparable loss, being loss for which an award of damages would not be an adequate remedy, either because of the nature of the threatened loss, or because the party sought to be restrained would not be in a position to satisfy an order for damages. "If damages...would be an adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted": American Cyanamid...

In **Chung Exports Ltd v Food Processors (Fiji) Ltd., Civil Appeal No. ABU0012 of 2003 (26 August 2003) at [13]**, the Court (per Eichelbaum, Tompkins, and Penlington JJA) stated:

The court will consider whether there is a serious question to be tried, and if so, where lies the balance of convenience. The latter will require consideration of

such factors as the relative strength of the plaintiff's claim, whether damages will be an adequate remedy, whether the defendant is in a position to pay damages, and any other relevant factors. If the factors are reasonably balanced, it may be appropriate to maintain the status quo. In the end, the court is required to determine where the overall justice lies.

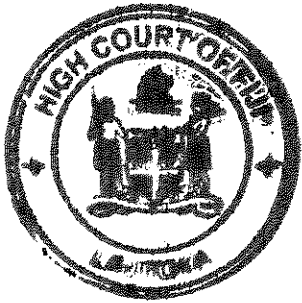
In *Professional West Realty (supra)* at 43, the Court had this to say:

“The balance of convenience is often approached by considering the harm to the Plaintiff that may result in the event that the injunction is not granted and the harm to the Defendant that may result in the event that the injunction is granted. The onus lies on the Plaintiff to establish that on balance the harm that it is likely to suffer if the injunction is not granted outweighs any detriment to the Defendant in the event that the injunction is granted”.

26. The Plaintiff's position in this case is that he will suffer irreparable damage for which it is more than likely to be unable to recover any damages if the Defendant is not restrained. It is in this land the Plaintiff is living. The Defendant neither refutes it nor says that the Plaintiff has an alternative place to live. He is all out to bulldoze the plaintiff's House stating that it does not worth even \$5,000.00.
27. Nowhere in his affidavit in opposition, the 1st Defendant speaks about any damages occurred or possibility of it to him on account of the injunction being in force and the plaintiff's occupation and possession. This injunction was obtained by the plaintiff on 4th September 2015. The 1st defendant was not serious about having it lifted at the earliest possible. The injunction prohibits him from cultivation too. It took more than 6 months for him to file the affidavit in opposition, although the injunction had been served on him on 8th September 2015. Then, he was not keen in having the hearing at the earliest possible. The hearing is after about 3 years.
28. I am satisfied that any damage that could befall on the 1st Defendant on account of extending the existing injunction is very minimal or none, when compared to the damages that could occur to the Plaintiff in the event the existing injunction is lifted.
29. I bear in mind that it is the Plaintiff who has the burden of satisfying the Court that the injunction ought to continue. I find that when granting the injunction, no order has been made to make provisions for any possible damages and the learned Counsel for the 1st Defendant has not taken it up as an issue. However, in fairness to the 1st Defendant, it can be rectified at this stage by requiring the Plaintiff to furnish some security for this purpose. I consider that the balance of convenience favour the continuation of the injunction granted ex-parte.

E. ORDERS:

- a. The ex-parte interim injunction granted on 4th September 2015 is to continue, pending the final determination of this action.
- b. The Plaintiff shall within 6 weeks from today furnish a security for the value of not less than \$10,000.00 to indemnify any possible damages to the 1st Defendant, failure of which injunction will expire.
- c. The parties shall bear their own cost in relation to this application.
- d. The matter will take normal course.



A handwritten signature in black ink, appearing to read "A.M. Mohammed Mackie", is written over a dotted line.

A.M.Mohammed Mackie

Judge

At Lautoka
12th June, 2018