

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No.: HBC 345 of 2018

BETWEEN : SAKIUSA BOLADAI WAQA

PLAINTIFF

AND : BASIC INDUSTRIES LIMITED

DEFENDANT

Counsel : Plaintiff: Mr. S.Valenitabua

Defendant: Ms. S.Devan

Date of Hearing : 6th December, 2018

Date of Judgment : 14th January, 2019

JUDGEMENT

INTRODUCTION

1. The Plaintiff who is the Head of *Mataqali Ulugai* had filed this action by way of originating summons claiming rights of the land as customary owners. The Defendant was issued with a gravel extract licence in Wailiko River. The Plaintiff is claiming that the gravel licence issued to the Defendants does not provide for access rights across Native Reserve Lands of *Mataqali Ulugai*, but the Defendant was constructing a road on such land. The Defendant had started construction of an access road for the purpose of extraction of gravel. The Plaintiff is seeking permanent injunction restraining construction and or using road over Native Reserve Land. The Plaintiff is also claiming environmental damage due to the said construction of access road to Wailiko River over Native Reserve. The Plaintiff also states that without dereservation of the said land, no right of way could be granted in law.

FACTS

2. The Plaintiff filed the Originating Summons against the Defendant, which had obtained licence for extraction of gravel for a period of 12 months that will be renewed annually.
3. In the Originating Summons the Plaintiff is seeking determination of following questions;
 - i. Whether the Defendant by itself, its servants and/or agents and/or subsidiaries, holds a valid gravel licence to extract and/or quarry gravel from Wailiko River in Sawakasa.
 - ii. Whether the Defendant by itself, its servants and/or agents and/or subsidiaries, is required to seek, and did sought and obtained the written consent of the registered members of Mataqali Ulugai and/or the iTaukei Lands and Fisheries Commission ("TLFC") and/or the Roads Authority of Fiji and/or the Department of Environment, severally and/or collectively, to:-
 - (a) De-reserve itaukei lands referred to by the TLFC as NLC 500 an area of 694.0358 hectares belonging to Mataqali Ulugai ("the said land");
 - (b) Lease the said land or the piece of the said land upon which the Defendant now constructs its access road to Wailiko River;
 - (c) Construct an access road across the said land; and
 - (d) Be issues a Gravel Licence by the Taukei Land Trust Board ("TLTB") commencing from 01/01/18 to 31/12/18 to extract gravels from Wailiko River situated within the said land."
 - iii. Whether the Defendant should be enjoined or ordered by itself, its principal, their respective servants and/or agents to refrain and be restrained from carrying out any field work, earthworks, earthmoving and/or construction of an access road across the said land on the grounds that:-
 - (a) The Defendant has failed and/or willfully refused to obtain the written consent of the Plaintiff as Head of Mataqali Ulugai and majority of members of Mataqali Ulugai to de-reserve that piece of the said land upon which the Defendant now constructs its access road to Wailiko River on reserve itaukei land;
 - (b) The Defendant has failed and/or willfully refused to obtain the written consent of the Plaintiff as Head of Mataqali Ulugai and majority of members of Mataqali Ulugai to lease that piece of the said land upon which the Defendant now constructs its access road to Wailiko River on reserve itaukei land;

- (c) The Defendant has failed and/or willfully refused to apply for de-reservation and issuance of itaukei lease by TLTB over the said land;
 - (d) The Defendant has failed and/or willfully refused to obtain the written consent of the Plaintiff as Head of Mtaqali Ulugai and majority of members of Mtaqali Ulugai to construct its access road to Wailiko River on reserve itaukei land;
 - (e) The Defendant has failed and/or willfully refused to negotiate with and pay consideration to the Plaintiff as Head of Mtaqali Ulugai and majority members of Mtaqali Ulugai for the construction of its access road on Mtaqali Ulugai reserve itaukei land to access Wailiko River; and
 - (f) The Defendant has failed and/or willfully refused to do Environment Impact Assessment ("EIA"), Traffic Impact Assessment ("TIA") and obtain all necessary approvals to construct its access road from the Plaintiff as Head of Mtaqali Ulugai and majority members of Mtaqali Ulugai, Lands Department, Ministry of Environment, TLTB, Roads Authority of Fiji and TLFC, in order to access Wailiko River."
4. In support of the Originating Summons the Plaintiff had sworn an affidavit and he stated that Defendant had attempted to construct a road through the Native Reserve belonging to his *Mtaqali* without dereservation and also without obtaining their consent for such dereservation and or for lease.
 5. The Plaintiff is also alleging that Defendant had not obtained Environmental Impact Assessment (EIA), Traffic Impact Assessment (TIA) and permission from other relevant government authorities, for the construction of road access for movement of heavy vehicles and transportation of gravel.
 6. The Plaintiff sought, following restraining order
 - "An interim injunction prohibiting the Defendant from continuing, carrying on and/or completing all access road works and construction currently being undertaken by the Defendant by itself, its servants and/or agents and/or independent contractors within Mtaqali Ulugai's itaukei reserve lands at Sawakasa, Tailevu until further order of the Court.
 7. The initial application for interim relief was made *ex parte* and since there was a need for translation of a document it was ordered. This translation was submitted and *ex parte* summons was converted to *inter partes* summons.
 8. When this matter was first called before me the counsel for the Defendant did not admit that they are constructing a road and stated that it may be RDA or any other government body.

9. On 28.11.2018 an interim injunction was granted restraining the Defendant from constructing the access road and if it had completed using the said road till hearing of the *inter partes* summons.
10. The Defendant had filed affidavit in reply to the *inter partes* summons for injunction.
11. In the affidavit in reply the Defendant is stating inter alia,
 - i. The Plaintiff is representing only a minority of Mataqali Ulugai.
 - ii. Defendant had followed due process in obtaining gravel extraction licence.
 - iii. It had obtained EIA according to the TOR issued by Ministry of Environment.
 - iv. An offer was made for access road for gravel extraction from ITLTB, who is authorized to do so.
 - v. The Defendant had paid sum of \$8,244.50 for road access.
 - vi. The Defendant was granted approval for road access and had constructed a road of approximately 2-4 km on existing old logging road from the last house at the settlement to the Wailiko creek.
 - vii. The access road is almost complete and expects to start extraction of gravel within a week.
 - viii. If an injunction is granted gravel extraction operation will be seriously affected.
 - ix. The current proceeding are being filed merely to frustrate and delay the Defendant's operation.
12. The Plaintiff did not file affidavit in reply to the Defendant's affidavit in opposition.
13. The Defendant had also filed written submission and Plaintiff did not file submissions.

ANALYSIS

14. The Plaintiff is seeking interim injunction restraining the Defendant from constructing and or using access road to the gravel extraction site.
15. Though initially declined to accept the Defendant was constructing an access road, in the affidavit in opposition Defendant had admitted that fact. (See paragraph 13 of the affidavit of the Defendant).
16. It had stated that the road construction work had almost completed and extraction of the gravel was about to start.
17. The Plaintiff is the head of Mataqali Ulugai and state that access road that Defendant is going to use, form a part of Native Reserve.

18. If so such land it needs to be dereserved before granting of consent to use it as an access road. No documentary evidence produced by the Plaintiff that the said land where the road work had commenced form part of Native Reserve.
19. The Defendant had not denied that fact, too. So at interim injunction state I consider the fact that the road construction by the Defendant was on Native Reserve.
20. The Plaintiff is also complaining about destruction of fauna and flora and environmental destruction, in Native Reserve Land, which is irreparable harm to all the species including Plaintiff.
21. In *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504 at 510 held.
So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.
22. The Plaintiff had filed originating summons seeking determination of the issues raised in the said summons which I quoted previously. These issues cannot be considered frivolous.
23. So, there is a serious question to be determined in this Originating Summons regarding the construction and or usage of access road to the gravel extraction site licenced to the Defendant in terms of the relevant statutory provisions.
24. The Defendant in the written submission stated that road access was granted in the Licence for grave extraction marked 'MV1' in their affidavit in reply. (see paragraph 24 of the submissions). This cannot be accepted as quoted clause 6 of the conditions of Licence does not grant any road access, but only grants permission to enter adjoining land for the purpose of extraction. This is only to extract entire area of the land leased equipment may need to move to adjoining land for 'access and egress.'
25. Native Reserve cannot be leased as an access road unless it is dereserved and there is no evidence of such dereservation. The Defendant had not denied that, access road being part of Native Reserve.
26. In the Terms of Reference (TOR) for the EIA there is no indication for a requirement to consider the closest access road to the extraction site and the environmental impact of such access road being constructed and being used for heavy earth moving vehicles regularly during the construction phase and also after operation of the extraction, transportation of gravel till extraction of gravel is discontinued.
27. The Defendant had produced an offer for an access road for gravel extraction. This is annexed as 'MV8'.

28. This letter was issued on 23.08.2018 and had not annexed any sketch or plan of access road though the area of the access road is mentioned as 1.1035 ha. It need not state that total area of a road cannot be considered as definite road access, without a sketch or plan.
29. The offer for the said access road needs to be accepted by the Defendant and there is no evidence produced indicating acceptance of the offer or any communication to that effect.
30. Even acceptance of the offer, will not grant Defendant road access through a defined access road.
31. Though it is not suitable to test the evidence produced through affidavit at injunction, if such communication was presented it would have indicated the location of the access road.
32. So, simply the Defendant had not produced any evidence for them to construct a road access to the licenced gravel pit.
33. In *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504 at 509 held,
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.
34. The Plaintiff is alleging that Defendant is constructing a road in the Native Reserve . If so, it is not only illegal but also damage to the environment will be irreversible and irreparable harm will happen to the environment.
35. The continuation of usage of such a road will be a continuing infringement of rights of the Native Land Owners. It will also be continuance of illegal activity, if it is so.
36. No amount of damage can compensate such an activity. The Defendant is also alleging that through this injunction they will also suffer damages. The Defendant is alleging that Plaintiff is not in a position to pay such damage if they are successful at the end.
37. Neither party is able to compensate the other through payment of money in this instance, and balance of convenience needs to be considered.
38. The Defendant had not commenced its gravel extraction. The issue is not the extraction of gravel but access road to the extraction site. The Plaintiff and the owners of the said land will be irreparably affected if their Native Reserve is exploited for commercial

purpose without following due process, and there is not even a plan or sketch as to the location of the road. This indicate Defendant had no authority to construct a road from undefined access road which was offered to them. The Defendant state that they have paid for such access, but without a defined road there cannot be legally enforceable right to access.

39. So, how can Defendant start constructing a road access to their site of extraction? This is not explained in the affidavit in reply.
40. If the injunction is not granted the Defendant may construct any road from any place including and not limiting Native Reserve ignoring all other legal requirements. This is not acceptable and needs to be restrained.
41. The Defendant is yet to obtain lease for the said access though due process after fulfillment of EIA and other requirements under the law. The TOR of the Ministry of Environment has not included impact of the access road. If a Native Reserve is used for access that will not be illegal but also pollute and destruct the environment irreparably.
42. Defendant is a commercial entity and road access to the site needs to be first demarcated in a plan or sketch and without that, they have started construction of the road. Before obtaining a contract for use of such land as road access, after proper concurrence of the relevant ministries, no road can be constructed and or used for heavy each moving vehicles for extraction and transportation of gravel.
43. So the balance of convenience favours the Plaintiff to maintain the status quo through restraining construction of access road and or using such road by the Defendant for the purpose of gravel extraction and or transportation of gravel.
44. The interim order granted on 28th November, 2018 is hereby extended till final determination of this Originating Summons. The cost of this application is cost in the cause.

FINAL ORDERS

- a. The interim order granted in this matter on 28th November, 2018 and sealed on the same day is extended till final determination of this Originating Summons.
- b. The cost of this application is cost in the cause.

Dated at Suva this 14th day of January, 2019.




Justice Deepthi Amaratunga
High Court, Suva