

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

CIVIL CASE NO.: HBC 166 OF 2018

BETWEEN : JAMES ROBERT CARNEY of 2360 Keneke St, Kilauea, Hawaii, Retired
Person, currently residing at Momi, Nadi, Fiji.
[Plaintiff]

AND : PETER CHARLES THAYER and SAMSHUN NISHA THAYER both of
6/7/46 Pasadena, California, United State of America, Carpenter and Domestic
Duties respectively, currently the Second Named Plaintiff residing at Momi
Bay, Nadi, Fiji.
[Defendants]

Before : A.M. Mohamed Mackie- J.
Counsel : Mr. K. Sivan for Plaintiff
: Ms. A. Swamy for Defendants
Written Initial Written Submissions by both parties on 4th February 2019.
Submissions : Reply Written Submissions by both parties on 22nd February 2019.
Date of Ruling : 21st March 2019.

R U L I N G

A. Introduction:

1. This ruling pertains to the hearing disposed before me by way of written submissions, in order to decide on the issue as to whether the Interim Injunction, which is presently in operation, should be extended until the final determination of this action.
2. This Court on 6th August 2018, after hearing the learned counsel for the plaintiff on the Ex-parte Notice of Motion and considering the contents of the supporting affidavit and that of the documents annexed thereto, made orders, *inter-alia*,

granting temporary injunction orders in favor of the Plaintiff to the following effect.

1. *THAT an INJUNCTION restraining the Defendants whether by themselves or by their servants and or agents or by whosoever from selling, partitioning, disposing, assigning, mortgaging, charging or in any way dealing with all that piece and parcel of land comprised in Certificate of Title No. 17666 being Lot 13 on DP 2051, "Gusunugaga" (part of) in the Island of Viti Levu, in the District of Nadroga, having an area of 6 acre, 1 root, 9 perches until final determination of the proceedings herein.*
2. *That an INJUNCTION restraining the Defendants whether by themselves, their agents, servants or otherwise howsoever from interfering with the plaintiff, his agent's care taker's right of use and enjoyment of the plaintiff's portion of all that piece and parcel of land comprised in Certificate of Title No. 17666 being Lot 13 on DP 2051, "Gusunugaga"(part of) in the Island of Viti Levu, in the District of Nadroga, having an area of 6 acre , 1 root, 9 perches*

B. Background:

3. The plaintiff in his pleadings avows, inter-alia, **that**:
 - a. In the year 1977, the first named defendant together with 6 other partners invested FJD 5,500.00 each for the purchase of the subject matter Land from the Momi Co-operative, which land was without Title till 18th December 2017.
 - b. The plaintiff knew the first named defendant for over 15 years and he convinced the plaintiff to purchase a lot from one of the original buyers, who had initially pooled money to buy the land.
 - c. As per the suggestion made by the first named defendant , the plaintiff purchased the share held by one Mr. **Vicky Yarberry** for a sum of USD 20,000.00 (FJD \$ 40,000.00) on the "Quit Claim Deed" marked as "JRC-2" executed in Hawaii on 20th August 2010.
 - d. Only after the execution of the said Deed, the plaintiff became aware that the subject property was without Title. Thereafter he came to Fiji, visited the Land with the first named defendant and on his verbal confirmation erected a large Shed and built a House thereafter in the portion allocated to him and resided therein whenever he came to Fiji.

- e. After various follow ups, the defendant advised him that the Title still had not come in the name of the first named defendant and had promised that once he gets the title, the plaintiff will get it from him.
 - f. On 18th day of December, the defendants received the Title under their name, however, upon the request made by the plaintiff, the defendants denied the plaintiff owning or having any rights over the subject property, especially in his lot.
 - g. Whilst he was in Hawaii, he received an e-mail dated 27th June 2018 from the Second named defendant, giving him 30 days' Notice to vacate the property alleging that he had been staying illegally .
 - h. Recently, Second named defendant had blocked the access to the plaintiff from entering into his House in the Land and even lodged a complaint to the police alleging trespass against the plaintiff as a result of which he was held in the police custody for questioning unreasonably.
 - i. He is at a losing end of his investment of USD 20,000.00 for his lot, where had constructed a house and in occupation from 2010.
4. Accordingly, the plaintiff moved for, *inter-alia*, two injunctive orders, which this Court issued as aforesaid.
 5. In the Statement of Claim, the plaintiff pleads for equitable relief, alleging that the Second named defendant's unlawful act has led the plaintiff to suffer loss and damages.

C. The law

6. The law that is applicable to an application for interim injunction is found in Order 29 of the HCR of 1988.
7. In *American Cyanamid v. Ethicon Limited* [1975] UKHL 1; [1975] 1 All ER 504, Lord Diplock stated, "The grant of an interlocutory injunction is a remedy that is both temporary and discretionary."
 - 7.1 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.

7.2 The principles on the grant of interim injunctions and whether to dissolve such an injunction pending the determination of the matter are settled, and were stated by Lord Diplock in *Cyanamid*(supra)as being:

- i. Whether there is a serious question to be tried;
- ii. Whether damages be an adequate remedy, and;
- iii. The balance of convenience

7.3 Where an interim injunction has been granted ex parte, the Plaintiff bears the onus of satisfying the Court that the injunction ought to continue. (See *Westpac Banking Corporation v. Adi Mahesh Prasad*Civ App ABU 27 of 1997S (FCA Repts 99/1)

7.4 In *Digicel (Fiji) Ltd v Fiji Rugby Union* [2016] FJSC 40; CBV0004.2015 (26 August 2016), 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. The Analysis:

Whether there is a Serious Question to be tried?

8. 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”.

9. In deciding the issue, I have considered the materials before me, namely, the contents of the affidavits and that of the annexed documents and written sub-

missions tendered by both the parties.

10. An injunction is an order of the Court restraining the commission or the continuance of some wrongful act, or the continuance of some omission.
11. The temporary injunctive relief obtained by the plaintiff as per paragraph (1) above is to restrain both the defendants from selling, mortgaging or disposing or dealing with the Land till the final determination of the matter. The next injunctive relief as per paragraph (2) is to restrain the defendants, their agents and servants from interfering with occupation and possession of the Land in question by the plaintiff or his agents and/or caretaker.
12. The claim of the plaintiff that he is in possession of a part of the land from the year 2010 is not disputed. The e-mail dated 27th June 2018 from the Second named defendant addressing the plaintiff asking to vacate the Land and the subsequent involvement of the police allegedly to have the plaintiff ousted from the Land on the purported charge of trespass confirms the claim of the plaintiff that he is in occupation /possession of the disputed portion of the land.
13. However, the claim of the plaintiff that he became the owner of the land from Mr. Vicky Yarberry, by virtue of the document marked JRC-2, which is termed as "Quit Claim Deed" cannot, be accepted for any favorable consideration. It is a document, purportedly, executed to renounce said Vicky Yarberry's so called title or interest, which has no link to any previously registered title.
14. The plaintiff, subsequently, has admitted in his affidavit that he paid money to a person, who had no title. For a person to transfer or renounce, the ownership or any interest in a land he /she should have the title in the first hand. The plaintiff does not possess any acceptable instrument to claim ownership, title or interest in the land in dispute. The impugned document marked "JRC -2" named as "Quit Claim Deed "does not worth even the paper on which it is written.
15. The person, namely, Mr. Vicky Yarberry, from whom the plaintiff claims to have purchased by paying USD 20,000.00 is not a party to this action. Though, the plaintiff claims that he purchased from said person on the representation made

by the 1st defendant, the plaintiff was under duty to ascertain the fact whether the seller had the title to pass.

16. The plaintiff in his affidavit in support or in the statement of claim does not allege any **misrepresentation or fraud** on the part of the defendants, except for merely saying that he proceeded to purchase from Vicky Yarberry on the "representation" made by the first defendant. The defendant's Title as it stands now is indefeasible.
17. There cannot exist a serious issue to be tried or a *prima- facie* case for the plaintiff as far as the title of the land in question is concerned. The first principle, in deciding the propriety of the injunction order obtained as per paragraph 1 above, does not warrant consideration in favour of the plaintiff.
18. Obviously and admittedly, the defendants have the good title for the entire land, out of which the plaintiff claims a portion on equity. There is no tangible evidence that the defendants misrepresented or defrauded the plaintiff. The plaintiff grossly failed to verify from the defendants before he parted with his money on execution of the impugned "quit claim deed" whether Mr. Victor Yarberry had title to pass.
19. The plaintiff is under duty to adduce sufficient reason as to why the existing interim injunction as per paragraph (1) restraining the defendants from selling, mortgaging or disposing the land should remain intact.
20. There is no any conceivable or justifiable ground under which the plaintiff could possibly challenge the title of the defendants for him to have a declaration by this court at the end of the trial to the effect that he is entitled to a portion of the subject matter land.
21. The defendants being the owners of the land, should be at liberty to deal with the land and the plaintiff, who has, admittedly, no title or acceptable ground to challenge the title of the defendants, cannot stand on the way if and when the defendants wants to exercise their right by selling, mortgaging or disposing the land.

22. The relief, if any, for the plaintiff obviously lies against the very person to whom he paid money in exchange of the, purported, Quit Claim Deed, which carried nothing in turn to the plaintiff. There is no sufficient evidence that the defendants were instrumental or played a substantial role in the transaction between the plaintiff and Mr. Vicky Yarberry.
23. Even if it is found, at the end of the trial, that the plaintiff has a claim against the defendants, such claim can bring nothing more than damages in monetary form.
24. Injunctions are only remedies, which can usually be granted if the applicant has a substantive cause of action. As stated by Lord Diplock in *The Tikina* [1979] AC 210:

"A right to obtain an [interim] injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out an invasion, actual or threatened by him, of a legal or equitable right of the [claimant] for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an [interim] injunction is merely ancillary and incidental to the pre-existing cause of action."

25. In the light of the foregoing observations, I decide that there is no serious question to be tried as far as the title of the subject matter land is concerned and it is not justifiable to have the interim injunction, issued as per paragraph (1) above, in operation anymore. It warrants nothing but discontinuance of it forthwith.

Whether damages would be an adequate remedy

26. Firstly, the Plaintiff has not placed before the Court anything to indicate that damages would not be an adequate remedy. The Plaintiff carries the onus of satisfying the Court that the damages would not be sufficient and thus the interim injunction should continue.
27. Lord Diplock in *American Cyanamid* said:
'The court should go on to 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 trial. 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, however strong the plaintiff's claim appear to be at that stage' (at 408B-C).

28. If the damages would not adequately compensate the plaintiff and he is in a financial position to give a satisfactory undertaking to the defendant as to damages, and an award of damages pursuant to that undertaking would adequately compensate the defendant in the event of the defendant succeeding at trial, an interlocutory injunction may be granted. If the plaintiff is not in a position to honor his undertaking as to damages, and appreciable damage to the defendant is likely, an injunction will usually be refused: *Morning Star Co-operative Society Ltd v Express Newspapers Ltd* [1979] FSR 113.
29. In my opinion, as I observed under previous heading, damages would adequately compensate the plaintiff in the instant case in the event he succeeds against the defendants.
30. The plaintiff has not taken up a stance that the defendants are not in a financial position to pay damages. An award of damages pursuant to that undertaking would adequately compensate the plaintiff in the event of the plaintiff succeeding at the trial.

Balance of convenience

31. Lord Diplock in *American Cyanamid* highlighted that:

'It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises' (at 408E).
32. In the case in hand, there is no doubt as to the adequacy of damages, in the event of victory to either of the parties at the end of the trial.
33. However, the fact that the plaintiff is in possession of the disputed portion of the land from the year 2010, together with the structures put up by him with the knowledge and consent of the defendants, is not disputed by the defendants.

34. If the defendants are permitted to oust the plaintiff, by way of an extra-judicial process as alleged by the plaintiff, it would undoubtedly cause serious inconvenience to the plaintiff as against any inconvenience that would be caused to the defendants by tolerating the presence of the plaintiff in the land in question.
35. The absence of an injunction order as per paragraph (2) above would undoubtedly cause more inconvenience to the plaintiff. Therefore, the question of balance of convenience in respect of the injunction order in terms of paragraph (2) above should attract an answer in favour of the plaintiff.

Special factors:

36. There is a special factor to be considered by this court, which revolves around the injunction order granted in terms of paragraph 2 above. The section 39 of the Constitution of Fiji guarantees the right of every individual against the arbitrary eviction, without an order from a competent Court. Neither party addressed the Court on this point.
37. The plaintiff is in possession/occupation of the land in question from the year 2010. The defendants have not challenged this position. Instead of following the appropriate judicial mechanism, the defendants seem to have attempted to oust the plaintiff from the portion of the land with the assistance of the police on the pretext of trespass. There is no evidence of charging the plaintiff before a Magistrate for trespass.
38. In view of the above, I am inclined to hold that the injunction order granted in terms of paragraph (2) above should remain in force till the disposal of this action or until the defendants obtain an order for eviction by following the relevant procedures available to the defendants under our Laws.

E. Conclusion:

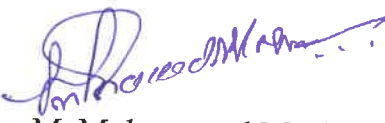
39. For the reasons set out above, I decide that the injunction order granted as per paragraph (1) of the Ex-parte Notice of Motion dated 6th August 2018 should be discontinued with. However, it is my considered view that the injunction order

granted in terms of paragraph (2) of the Ex-Parte Notice of Motion should continue to be in force, with a slight variation to the contents thereof, till the determination of this action or the defendants obtain an order for eviction from a competent Court.

F. The outcome

- a. Interim injunction order granted as sought in prayer (1) of the Ex-Parte Notice of Motion dated 6th August 2018 is hereby discontinued.
- b. Interim injunction order granted as sought in prayer (2) of the Ex-Parte Notice of Motion, shall continue to be in force with the substitution of the words "disputed portion" in place of the words "Plaintiff's portion" in line 3 thereof.
- c. Interim injunction referred to in (b) above shall remain in force till the determination of the substantial action hereof or an order for eviction is made by a competent Court on an application made by the defendants to that effect.
- d. This ruling shall not operate as a bar for the defendants to institute proceedings for recovery of possession.
- e. Order for costs reserved.




A. M. Mohammed Mackie
Judge

At Lautoka
21st March, 2019