

**IN THE HIGH COURT OF FIJI**  
**WESTERN DIVISION**  
**AT LAUTOKA**

**CIVIL JURISDICTION**

**Civil Action No. HBC 199 of 2013**

**BETWEEN** : **VISHWA NAND GOUNDER** of Tavua, Fiji.

**PLAINTIFF**

**AND** : **ITAUKEI LAND TRUST BOARD** a statutory body duly incorporated under Section 3 of the Native Land Trust Act Cap 134 Laws of Fiji.

**DEFENDANT**

**Counsel** : Mr. Niven Padarath for the plaintiff  
Mr. Tomasi Duanasali for the defendant

**Dates of trial** : Tuesday, 25<sup>th</sup> September and Monday, 01<sup>st</sup> October, 2018  
**Date of judgment:** Thursday, 18<sup>th</sup> April, 2019

**J U D G M E N T**

**(A) INTRODUCTION**

- (1) By a writ issued on 31<sup>st</sup> October 2013, the plaintiff, Vishwa Nand Gounder, brought an action against the defendant, iTLTB, claiming (i) judgment for damages in the sum of \$403,380.00 being for loss of cane proceeds (ii) judgment for refund of all extra rental paid in the sum of \$1,400.00 (iii) in the alternative, an order requiring the defendant to take steps and to complete the cancellation of the lease issued to Muttamma.

(B) FACTUAL BACKGROUND

The statement of claim which is as follows sets out sufficiently the facts surrounding this claim from the plaintiff's point of view as well as the prayers sought by the plaintiff.

1. *The Plaintiff is a Sugar Cane Farmer cultivating sugar cane in area of Tagitagi.*
2. *The Defendant is a body corporate duly constituted and established by Section 3(6) of the Native Land Trust Act Cap 134 Laws of Fiji.*

THE LAND

3. *The Defendant was at all material times the head lessor of land described as Nakavika S/D lot 8 on RR 915 in the Tikina of Tavua, in the Province of Ba containing an area of 27 acres, 1 rood and 9 perches (referred to as "Land" in this claim).*
4. *The Plaintiff was, on or about the 19<sup>th</sup> April 2000 registered as the lessee of Native Lease No. 12122 which was a lease over land.*
5. *Prior to that, Pushpa Kant was then registered proprietor of a Native lease number 12122 as the executor and trustee of the Estate of Narayan Sami.*
6. *On or about 23<sup>rd</sup> October 2003, the Agricultural Tribunal at Lautoka, declared a tenancy over 8 acres of land from Native Lease No. 12122 in favour of Muttamma daughter of Ram Sami Gounder of Tagitagi, Tavua, Domestic Duties as the Trustee of the Estate of Arjun Gounder (referred to as "Muttamma" in this Claim).*
7. *The decision expressly provided that the 8 acres of tenancy was to expire when the tenancy issued to the Estate of Arjun Gounder would have expired. In addition, there was no declaration of tenancy made against Plaintiff.*
8. *On or about the 18<sup>th</sup> May 2010, Native Lease No. 12122 expired and upon expiry of the lease the interest of Muttamma would have expired.*
9. *Muttamma no longer resides in Fiji and has migrated overseas.*

### THE NEW LEASE OVER THE LAND

10. *The Plaintiff made an application for a new lease in his personal capacity and on or about the 2<sup>nd</sup> of July, 2008, the Defendant offered a 30 year lease to the Plaintiff subject to certain terms and conditions.*
11. *On or about 29<sup>th</sup> August 2008, the Plaintiff and the Defendant executed Native Lease Number 28684 which leased the land to the Plaintiff (referred to as "New Lease").*
12. *The lease was executed for a period of 30 years commencing on 1<sup>st</sup> July 2008.*
13. *Subsequently, the Defendant refused and/or neglected to release the original executed lease to the Plaintiff.*
14. *On or about the 22<sup>nd</sup> of October 2009, the Plaintiff through his solicitors wrote to the Defendant enquiring about the refusal to issue and/or release the executed copy of New Lease.*
15. *On or about 27<sup>th</sup> October 2009, the Defendant wrote to the Plaintiff saying that the lease was issued for the incorrect area of land and that they had not taken into account the decision of the Agricultural Tribunal.*
16. *The Plaintiff disputed this.*

### THE AGREEMENT

17. *On or about the 21<sup>st</sup> of September 2011, the Plaintiff and the Defendant agreed to resolve their dispute on the grounds that the Plaintiff will allow Muttamma the residential site only over the new lease.*
18. *The Plaintiff further agreed with the Defendant to surrender the new lease in return for an issuance of a fresh lease being residential site for Muttamma and the balance of the lease to be granted to the Plaintiff.*

### BREACH

19. *In breach of this agreement, the Defendant issued lease over 8 acres of land from the new lease to Muttamma.*

20. *Subsequently, the Defendant, in further breach, issued an instrument of tenancy registered with the Registrar of Deeds for the balance of the land to the Plaintiff. The Defendant misrepresented to the Plaintiff that the instrument of tenancy was being issued as per the agreement reached.*
21. *In further breach, the defendant has levied and deducted from the Plaintiff's cane proceeds rental of the lease for the entire lease covered under the new lease rather than the balance taken after 8 acres was granted to Muttamma.*

#### LOSS AND DAMAGES

22. *As a result of the breaches, the Plaintiff has suffered loss and damages.*

#### Particulars

- (a) *Loss of income from 180 tons of Sugar Cane on the 8 acres of land at the rate of \$83.00 per ton under native Lease number 28684 since the surrender of the lease on or about the 14<sup>th</sup> December 2011 to the date of expiry of new lease being the 1<sup>st</sup> of July 2038.*
- (b) *Extra rental deducted from the new lease from the Plaintiffs cane proceeds after the surrender of the lease and issuance of 8 acres to Muttamma.*

### **(C) THE DEFENCE**

The defendant in its statement of defence pleaded, inter alia;

1. **THAT** *as to paragraph 1 of the said claim, the Defendant can neither admit nor deny the same as it has no knowledge of the same and therefore puts the Plaintiff to strict proof of each and every allegation contained therein.*
2. **THAT** *the contents of paragraph 2 of the said claim is admitted.*
3. **THAT** *the contents of paragraph 3 of the said claim is admitted.*

4. THAT the contents of paragraph 4 of the said claim is admitted.
5. THAT the contents of paragraph 5 of the said claim is admitted.
6. THAT the contents of paragraph 6 of the said claim is admitted.
7. THAT save as to admit that the said decision of the Agricultural Tribunal dated 23<sup>rd</sup> October, 2003 stated that the tenancy of 8 acres by Muttamma as the Trustee of the Estate of Arjun Gounder was to expire when the tenancy issued to the Estate of Arjun Gounder would have expired, the rest and remainder of the allegations contained in paragraph 7 of the said claim are denied as the parties in this action were bound by the said decision to recognize the Muttamma's tenancy over part of the land in question.
8. THAT save as to admit that the said Native Lease No. 12122 expired on the 18<sup>th</sup> day of May, 2010, the rest and remainder of the allegations contained in the paragraph 8 of the said affidavit are denied as Muttamma had a right to the issuance of new lease to the 8 acres of the land in question that she occupied pursuant to the averred order of the Agricultural Tribunal and her substantial improvements on the same.
9. THAT as to paragraph 10 of the said claim, the Defendant can neither admit nor deny the same as it has no knowledge of the same and therefore puts the Plaintiff to strict proof of each and every allegation contained therein.
10. THAT in response to the contents of paragraph 10 of the said claim, the Defendant states that the said new lease should not have been issued to the Plaintiff considering Muttamma's interest over part of the said land as averred to in paragraph 8 herein-above.
11. THAT in response to the contents of paragraph 11 of the said claim, the Defendant refers to and repeats what is averred to herein-above.
12. THAT as to the contents of paragraph 13 of the said claim, the Defendant refused to release the said lease to the Plaintiff when it became aware of Muttamma's subsisting legal interest over part of the land in question.

13. **THAT** the Defendant admits the contents of paragraph 15 of the said claim.
14. **THAT** as to the contents of paragraph 17 of the said claim, the Defendant states that it is concerned about Mutamma's subsisting legal interests not only to her residence erected on the land in question but also to the eight (8) acres for which she was entitled a tenancy pursuant to the orders of the Agricultural Tribunal averred to herein-above from 23<sup>rd</sup> October, 2003 to 18<sup>th</sup> May, 2010 and a new lease altogether for the said area thereafter.
15. **THAT** the Defendant denies that the surrender of the said lease was requested to facilitate the issuance of a new lease over residential area only to Mutamma because the intention was to issue to Mutamma what she was rightly entitled to pursuant to the averred orders of the Agricultural Tribunal and right thereafter.
16. **THAT** as to the contents of paragraph 19 of the said affidavit, the Defendant states that the lease over the said 8 acres of land were issued to Mutamma as she had a legal right and legitimate expectation that upon expiry of the tenancy granted under the averred orders of the Agricultural Tribunal, a new lease over the said part of the land in question would be issued to her as of right.
17. **THAT** save as to admit that the Defendant issued an instrument of tenancy for the balance of the land to the Plaintiff, the rest and remainder of the allegations contained in paragraph 20 of the said claim and the Plaintiff is put to strict proof of the same.
18. **THAT** the Defendant denies the allegations contained in paragraph 21 of the said claim and puts the Defendant to strict proof of the said allegations.
19. **THAT** as to the contents of paragraph 22 of the said claim and the particulars thereof, the Defendant categorically denies each of the said allegations and further states that as a matter of the operation of law by virtue of the averred orders of the Agricultural Tribunal, the Plaintiff is not entitled to further expect a tenancy over the whole of the land in question in view of Mutamma's legal interest to the said 8 acres of the same.

(D) PRE-TRIAL CONFERENCE

The minutes of the pre-trial conference record, inter-alia, the following:

Admitted Facts

1. *The Defendant is a body corporate duly constituted and established by Section 3(6) of the Native Land Trust Act Cap 134 Laws of Fiji.*
2. *The Defendant was at all material times the head lessor of land described as Nakavika S/D Lot 8 on RR 915 in the Tikina of Tavua, in the Province of Ba containing an area of 27 acres, 1 rood and 9 perches (referred to as "Land") in this claim).*
3. *The Plaintiff was, on or about the 19<sup>th</sup> April, 2000 registered as the lessee of Native Lease No. 12122 which was a lease over land.*
4. *Prior to that, Pushpa Kant was then registered proprietor of a Native lease number 12122 as the executor and trustee of the Estate of Narayan Sami.*
5. *On or about 23<sup>rd</sup> October, 2003 the Agricultural Tribunal at Lautoka, declared a tenancy over 8 acres of land from Native Lease No. 12122 in favour of Mutamma daughter of Ram Sami Gounder of Tagitagi, Tavua, Domestic Duties as the Trustee of the Estate of Arjun Gounder.*
6. *The decision expressly provided that the 8 acres of tenancy was to expire when the tenancy issued to the Estate of Arjun Goundar would have expired. In addition, there was no declaration of tenancy made against Plaintiff.*
7. *On or about the 18<sup>th</sup> May 2010 Native Lease No. 12122 expired.*
8. *Mutamma no longer resides in Fiji and has migrated overseas.*
9. *On or about 29<sup>th</sup> August, 2008, the Plaintiff and the Defendant executed Native Lease Number 28684 which leased the land to the Plaintiff (Referred to as "New Lease").*
10. *The lease was executed for a period of 30 years commencing on 1<sup>st</sup> July 2008.*

11. *Subsequently, the Defendant refused and/or neglected to release the original executed lease to the Plaintiff.*
12. *On or about the 22<sup>nd</sup> of October 2009 the Plaintiff through his solicitors wrote to the Defendant enquiring about the refusal to issue and/or release the executed copy of New Lease.*
13. *On or about 27<sup>th</sup> October 2009, the Defendant wrote to the Plaintiff saying that the lease was issued for the incorrect area of land and that they had not taken into account the decision of the Agricultural Tribunal. The Plaintiff disputed this.*

### **Issues for trial**

1. *Whether the Plaintiff is a sugar cane farmer cultivating land in Tagitagi, Tavua?*
2. *What rights were given to the parties, Mutamma and the Estate of Arjun Gounder by the Decision of the Agricultural Tribunal dated 23<sup>rd</sup> October 2003 in relation to the land in question and its effect on the decision made by the Defendant?*
3. *Whether the Plaintiff made an application for a new lease in his personal capacity and or about the 2<sup>nd</sup> of July 2008, the Defendant offered a 30 year lease to the Plaintiff subject to certain terms and conditions?*
4. *Whether on or about the 21<sup>st</sup> of September 2011, the Plaintiff and the Defendant agreed to resolve their dispute on the grounds that the Plaintiff will allow Mutamma the residential site only over the new lease?*
5. *Whether the Plaintiff further agreed with the Defendant to surrender the new lease in return for an issuance of a fresh lease being residential site for Mutamma and the balance of the lease to be granted to the Plaintiff?*
6. *Whether the Defendant breached its agreement with the Plaintiff?*
7. *Whether subsequently, the Defendant, in further breach, issued an instrument of tenancy registered with the Registrar of Deeds for the balance of the land to the Plaintiff?*



8. *Whether in further breach, the defendant has levied and deducted from the Plaintiff's cane proceeds rental of the lease for the entire lease covered under the new lease rather than the balance taken after 8 acres was granted to Mutamma?*
9. *Whether as a result of the breaches, the Plaintiff has suffered loss and damages?*

#### Particulars

- 9.1 *Loss of income from 180 tons of Sugar Cane on the 8 acres of land at the rate of \$83.00 per tonne under Native Lease number 28684 since the surrender of the lease on or about the 14<sup>th</sup> December 2011 to the date of expiry of new lease being the 1<sup>st</sup> of July 2018.*
- 9.2 *Extra rental deducted from the new lease from the Plaintiffs cane proceeds after the surrender of the lease and issuance of 8 acres to Mutamma.*
10. *Whether Mutamma had a right to the issuance of a new lease over 8 acres of land which she occupied and whether the Agricultural Tribunal had permitted this?*
11. *Whether Mutamma has a legal right and legitimate expectation that upon the expiry of the tenancy granted a new lease will be issued to her?*
12. *Whether Native Lease No. 12122 was renewed or;*
13. *Whether a fresh lease was issued over the land covered under Native Lease No. 12122?*
14. *Whether by letter dated on or about 27<sup>th</sup> October, 2009, the Defendant advised the Plaintiff that his lease area was incorrect as the Defendant had not taken into account the decision of the Agricultural Tribunal?*
15. *Whether the Defendant is concerned about Mutamma's subsisting legal interests to her residence erected on the land in question as well as the 8 acres for which she was entitled a tenancy pursuant to the averred Agricultural Tribunal Orders from 23<sup>rd</sup> October, 2003 to 18<sup>th</sup> May , 2010 and a new lease altogether for the said area thereafter?*

16. *Whether Defendant subsequently refused and/or neglected to release the original executed lease to the Plaintiff when it realized Mutamma's subsisting legal interests over the land in question?*

**(E) ORAL EVIDENCE**

The plaintiff's case ---- \* The plaintiff  
\*Kavitesh Gounder

The defendant's case --- \*Savenaca Bola  
Estate Officer  
iTLTB

**(F) DOCUMENTARY EVIDENCE**

**List of Exhibits**

<b>Exhibit No.</b>	<b>Description of Exhibits</b>	<b>Tendered by:</b>
1	Copy of a lease No. 28684	Plaintiff
2	Lease Offer	"
3	Mishra Prakash & Associates – Letter dated 31/05/2011	"
4	Surrender of iTaukei Lease-28684	"
5	Mishra Prakash & Associates – Letter dated 21/09/2011	"
6	FSC Growers Statement	"
6 (a)	Letter dated 03/08/2017.- 5 year production history.	"
7	Instrument of Tenancy -11941	"
8	Native Land Trust Board Application to Lease – Agricultural	"

(G) **THE CONSIDERATION AND THE DETERMINATION**

- (1) The plaintiff is a sugar cane farmer. The defendant, iTLTB, is the lessor of the subject land, Native Lease No. 12122 described as 'Nakavika' S/D lot-8 on RR 915 in the Tikina of Tavua, in the province of Ba containing an area of 27 acres, 1 rood 8 perches. The land was leased by the iTLTB to Mr Narayan Samy, the father of the plaintiff, who in a deed executed on 06<sup>th</sup> December, 1980 granted licences to his brothers, Arjun Gounder and Sagedewan Gounder over certain portions of the land. Under the deed, Arjun Gounder was permitted to occupy and cultivate eight acres of Native lease 12122. The recitals of the deed show that three brothers, namely Narayan Samy, Arjun Gounder and Sagedewan Gounder all contributed to the deposit price of the lease which was registered in the name of Narayan Samy. Narayan Samy granted irrevocable licences to his two brothers and their respective families, executors or administrators to occupy and cultivate the land in question. The land was divided into three parts in the deed and each brother worked in his own portion and contributed towards paying off the lease and the annual rentals. Narayan Samy passed away and Pushpa Kant became the registered proprietor of Native Lease 12122 as the Executor and Trustee of the Estate of Narayan Samy. The plaintiff was registered as the lessee of Native Lease No. 12122 on 19<sup>th</sup> April, 2000.
- (2) Arjun Gounder died on 24<sup>th</sup> April, 1997. On or about 23<sup>rd</sup> October, 2003, the Agricultural Tribunal at Lautoka declared a tenancy over 08 acres of land from Native Lease 12122 in favour of 'Mutamma' as the Trustee of the Estate of Arjun Gounder. **The decision expressly provided that *'the new tenancy will expire when the tenancy issued to Arjun Gounder would have expired under the provisions of iTLTB'*.** On or about 18<sup>th</sup> May 2010 the native Lease 12122 expired.
- (3) The plaintiff on or about 2<sup>nd</sup> July, 2008 made an application for a new lease since the Native Lease 12122 was due to expire on 18<sup>th</sup> May, 2010. On or about 29<sup>th</sup> August, 2008, the plaintiff and the defendant executed Native Lease Number 28684 which leased the land to the plaintiff. The lease was executed for a period of 20 years commencing on 01<sup>st</sup> July, 2008. On or about 22<sup>nd</sup> October, 2009, the plaintiff through his previous solicitors wrote to the defendant enquiring about the refusal to issue the executed copy of the new lease. On 27<sup>th</sup> October, 2009 the defendant wrote to the plaintiff saying that the lease was issued for the incorrect area of the land and that they had not taken into account the decision of the Agricultural Tribunal.

- (4) The defendant says that the new lease should not have been issued to the plaintiff considering 'Mutamma's' interest over part of the said land. The defendant further says that it refused to release the said lease to the plaintiff when it became aware of 'Mutamma's' subsisting legal interest over the part of the land in question.
- (5) The essence of the plaintiff's claim is that: (reference is made to paragraph 17 to 21 of the statement of claim).

17. *On or about the 21<sup>st</sup> of September 2011, the Plaintiff and the Defendant agreed to resolve their dispute on the grounds that the Plaintiff will allow Muttamma the residential site only over the new lease.*
18. *The Plaintiff further agreed with the Defendant to surrender the new lease in return for an issuance of a fresh lease being residential site for Muttamma and the balance of the lease to be granted to the Plaintiff.*

BREACH

19. *In breach of this agreement, the Defendant issued lease over 8 acres of land from the new lease to Muttamma.*
20. *Subsequently, the Defendant, in further breach, issued an instrument of tenancy registered with the Registrar of Deeds for the balance of the land to the Plaintiff. The Defendant misrepresented to the Plaintiff that the instrument of tenancy was being issued as per the agreement reached.*
21. *In further breach, the defendant has levied and deducted from the Plaintiff's cane proceeds rental of the lease for the entire lease covered under the new lease rather than the balance taken after 8 acres was granted to Muttamma.*

(Emphasis added)

- (6) The defendant in its statement of defence says; (reference is made to paragraph 14, 15, and 16 of the statement of defence).

14. ***THAT** as to the contents of paragraph 17 of the said claim, the Defendant states that it is concerned about Mutamma's subsisting legal interests not only to her residence erected on the land in question but also to the eight*

(8) acres for which she was entitled a tenancy pursuant to the orders of the Agricultural Tribunal averred to herein-above from 23<sup>rd</sup> October, 2003 to 18<sup>th</sup> May, 2010 and a new lease altogether for the said area thereafter.

15. **THAT** the Defendant denies that the surrender of the said lease was requested to facilitate the issuance of a new lease over residential area only to Muttamma because the intention was to issue to Muttamma what she was rightly entitled to pursuant to the averred orders of the Agricultural Tribunal and right thereafter.
16. **THAT** as to the contents of paragraph 19 of the said affidavit, the Defendant states that the lease over the said 8 acres of land were issued to Muttamma as she had a legal right and legitimate expectation that upon expiry of the tenancy granted under the averred orders of the Agricultural Tribunal, a new lease over the said part of the land in question would be issued to her as of right.

(7) Therefore, the essence of the matter for determination by this court is; (reference is made to agreed issues 4 to 8 on pre-trial minutes).

4. Whether on or about the 21<sup>st</sup> of September 2011, the Plaintiff and the Defendant agreed to resolve their dispute on the grounds that the Plaintiff will allow Mutamma the residential site only over the new lease?
5. Whether the Plaintiff further agreed with the Defendant to surrender the new lease in return for an issuance of a fresh lease being residential site for Mutamma and the balance of the lease to be granted to the Plaintiff?
6. Whether the Defendant breached its agreement with the Plaintiff?
7. Whether subsequently, the Defendant, in further breach, issued an instrument of tenancy registered with the Registrar of Deeds for the balance of the land to the Plaintiff?
8. Whether in further breach, the defendant has levied and deducted from the Plaintiff's cane proceeds rental of the lease for the entire lease covered under the new lease rather than the balance taken after 8 acres was granted to Mutamma?

## ORAL AGREEMENT

- (8) By its defence the defendant pleaded that no oral agreement subsisted between the plaintiff and itself to give away only residential site from the land to Mutamma. The defendant denied the plaintiff's claim *in toto*. The defendant's entire case is that there was no such oral agreement. The defendant's version in the matter is that "*as a matter of the operation of law by virtue of the averred orders of the Agricultural Tribunal, the plaintiff is not entitled to further expect a tenancy over the whole of the land in question in view of Mutamma's legal interest to the said 8 acres of the same*" and it resisted the plaintiff's claim to enforce the alleged verbal agreement. The defendant says that the Agricultural Tribunal decision is binding on the parties and therefore, Mutamma is entitled to 8 acres of land from Native Lease 12122. On the other hand the plaintiff contends that on 18<sup>th</sup> May 2010 the Native Lease expired and upon expiry of the lease the interest of Mutamma in the lease ceased to be effective.

## PROVING THE EXISTENCE OF AN ORAL AGREEMENT

- (9) The Plaintiff is suing on an oral agreement. He is seeking to enforce an oral agreement. If an oral agreement becomes the subject of legal proceedings a court is unlikely to uphold that agreement if the essential elements of a contract are not satisfied. The real problem is overcoming the burden of proof. Where a person alleges the existence of an oral contract, that party has the burden of proving the assertion to the satisfaction of the court. The onus is upon the plaintiff to prove the existence of the essential elements of a contract. When considering whether an oral contract has been formed, it is important to determine whether or not the fundamental elements of a contract have been satisfied. If the elements are satisfied, a disputing party will have a difficult task in trying to disprove the existence of a contractual relationship. First and foremost, the plaintiff has to prove the alleged oral agreement.

## ESSENTIAL ELEMENTS OF A CONTRACT

- (10) The creation of a binding contract requires the contracting parties to meet a number of requirements that are prescribed by common law. These requirements are referred to as the elements of a valid contract and consist of the following:
- \* Offer
  - \* Acceptance
  - \* Consideration

- \* Intention to create legal relations
- \* Capacity to contract.

### OFFER

- (11) An offer is an expression of readiness to contract on the terms specified by the offeror which, if accepted by the offeree, will give rise to a binding contract. It is by acceptance that an offer becomes a contract.
- (12) The plaintiff at the trial relied on a correspondence dated 21<sup>st</sup> September, 2011, written by the plaintiff's previous solicitor, Mr Vipul Mishra to the defendant. The correspondence is in these terms; (PE-5)

OUR Ref: MKY

21<sup>st</sup> September, 2011

*The Manager- North Western Region  
iTaukei Land Trust Board  
P O Box 73  
LAUTOKA, FIJI.*

### WITHOUT PREJUDICE OTHER THAN AS TO COSTS

*Dear Sir,*

*FARM NO. 221/02936 – AGRICULTURAL TRIBUNAL ORDER REF NO.  
WD : 25 OF 1993 – NLTB NO. 4/4/50039794 – VISHWA NANDAN  
GOUNDER F/N NARAIN SAMI*

*We refer to the discussions held by your Legal Officer, Ms. Nellie with our Mr Vipul Mishra in order to resolve this matter quickly. The proposal of the legal officer was put to our client. Our client has agreed that the house site area be subdivided and given to the Estate of Arjun Gounder. The Estate of Arjun Gounder is to bear all costs of subdivision, payment of partial surrender fees and any other premiums to be paid to either iTaukei Land Trust Board or to the Registrar of Titles Office.*

All documents to be signed by our client is to be forwarded to us for perusal and confirmation before execution. Our client has said that our costs will also have to be paid by the Estate of Arjun Gounder which we will keep on the lower side.

The effort taken by the Board to resolve this matter satisfactorily is appreciated by this Office.

Yours faithfully,

**MISHSRA PRAKASH & ASSOCIATES**

Per: (Signed)

For Vipul M Mishra

- (13) The correspondence relied on by the plaintiff contain the written acceptance of the alleged oral offer. **The defendant has not replied to the correspondence relating to the communication of acceptance.**

The crucial paragraph in the correspondence is;

*"We refer to the discussions held by your Legal Officer, Ms. Nellie with our Mr Vipul Mishra in order to resolve this matter quickly. The proposal of the legal officer was put to our client. Our client has agreed that the house site area be subdivided and given to the Estate of Arjun Gounder."*

**The defendant stoutly denied there was any such proposal or offer.** To form a contract there must be an offer by one party. The onus is upon the plaintiff to prove the offer. Mr. Mishra plays an important role in proving the version of the plaintiff. He seems to be in a position to cast light on how, when and where offer was made and what the terms were. The absence of Mr. Mishra, (the person to whom the alleged offer is made) from the witness box to give oral evidence of what transpired and what are the terms of the offer (if any) leads to an inference that the evidence of the absent witness, if called, would not have assisted the plaintiff and leads me to a finding that the plaintiff has not discharged the civil burden of proof on the factual issue of offer. **If the story about the offer is true, the plaintiff should have examined Mr. Mishra. I am unable to see how any finding can be reasonably made about how, when and where offer was made and what the terms were in the absence of Mr. Mishra from the witness box.** There is no evidence of an offer made by or on behalf of the defendant to give away residential site from the land to Mutamma. The whole edifice of (the plaintiff's



case) collapses in the absence of Mr.Mishra from the witness box. I reject out of hand the claim by the plaintiff that **there was an oral contract for the "surrender of the new lease in return for an issuance of a fresh lease being residential site for Mutamma and the balance of the lease to be granted to the plaintiff"**. That is the end of the matter. There has been a suggestion by counsel for the plaintiff that "since the defendant took the position that there was no agreement it was important for the defendant to call the witness Ms. Nellie." What is the evidentiary consequence of the failure of the defendant to call (Ms) Nellie off iTLTB? Of course, the fact that the defendant has not called (Ms) Nellie to give evidence does not entitle the plaintiff to an automatic finding in his favour on the factual issue of offer. The plaintiff had the onus of proof and the fact that the defendant does not call oral evidence of (Ms) Nellie does not absolve the plaintiff from proving his case. The onus is upon the plaintiff to prove the alleged oral offer. Her evidence would not help the plaintiff's case. She is a witness to rebut the evidence of Mr Mishra, the person to whom the alleged offer is made. Reliance was placed by counsel for the plaintiff on the decision of "Gaskell v Denkas Building Services Pty Limited 2008 NSWCA 35". As regards counsel for the plaintiff's submission, he, counsel, did not refer to any passage in the judgment in that case which supports his contention and I see none on referring to it.

- (14) The plaintiff said in evidence that the officer of iTLTB (Ms) Nellie brought the documents to his farm to surrender his iTAUKEI Lease No. 28684. The plaintiff exhibited the document he signed as PE-4, the 'surrender of Lease No- 28684 '. The plaintiff also said in his evidence that he did not have an opportunity to read the document. He said he put his signature to the document on the understanding and belief that he was surrendering only the house site.

The plaintiff's exhibit PE-4, the surrender is in these terms;

### **SURRENDER**

*The following ITAUKEI LEASE No. 28684 dated 10<sup>th</sup> day of September, 2008 containing 27A. IR. 09P is hereby WHOLLY surrendered as from the 31<sup>st</sup> day of December, 2011.*

<i>Title</i>	<i>Number</i>	<i>Name of Land</i>	<i>Tikina</i>	<i>Province</i>	<i>Area</i>
<i>TL</i>	<i>28684</i>	<i>NAKAVIKA S/D LOT 8 ON RR 915</i>	<i>Tavua</i>	<i>Ba</i>	<i>27A.IR.09P</i>

(a) ..... (sgd)  
Signature of Lessee

*The Signature by mark of (a) V.N. Gounder was made in my presence and I verily believe that such signature is of the proper handwriting of the person described as VISHWA NADAN GOUNDER of Nakavika, Tavua, Farmer the lessee and I certify that I read over and explained the contents to the lessee in the English language and he appeared fully to understand the meaning and effect thereof.*

(b) .....(sgd)  
Witness

*In witness whereof the Seal of the Board is hereunto affixed this 28<sup>th</sup> day of February, 2012.*

The Common Seal of the iTaukei Land Trust Board  
was hereunto affixed in pursuance of a resolution of the Board  
by and in the presence of

..... (sgd)  
Member of the Board

The plaintiff contended that he was induced to sign the surrender (PE-4) by the misrepresentation that it was only a partial surrender and not a whole surrender of land.

The suggestion does not sound reasonable and proper.

**I need not pronounce a finding as to the alleged fraud or misrepresentation. Fraud or misrepresentation is not mentioned in the pleadings. I need not deal with the allegation of fraud or misrepresentation where fraud or misrepresentation is not expressly pleaded.** I cannot resist in saying that it is not the function of the trial judge in the context of an adversarial trial to assist a party to overcome the problems consequent to the position taken by that party in the pleadings. The function of pleadings is to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by them.

Two further matters may be added to the scales in the defendant's favour.

## SUBDIVISION OF LAND ACT (Cap 140)

- (15) If there was an oral agreement to give away residential site from the land to Mutamma it would be unenforceable at law. By virtue of section 4 of the Subdivision of Lands Act, no subdivision may take place without the prior approval of the Director of Town and Country Planning. The subdivision of the property here could not be made without such prior consent. It does not come within any of the exceptions. As such the alleged oral agreement, since it included such a term, was made in contravention of the Act, and was illegal. Application must be made in writing to the Director first, by the person seeking to subdivide the land. [Section 5].

The statutory provisions need not be pleaded for the court to consider them.

### NO MEMORANDUM

- (16) Besides, if there was an oral agreement to give away residential site from the land to Mutamma it would be unenforceable at law anyway since it fails to comply with Section 59 of the Indemnity, Guarantee and Bailment Act, Cap 232.

Section 59 relevantly provides;

#### *Promises or agreements by parol*

*\*59. No action shall be brought-*

*(a) whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or*

*(b) whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person; or*

*(c) to charge any person upon any agreement made upon consideration of marriage; or*

*(d) upon any contract or sale of lands, tenements or hereditaments or any interest in or concerning them; or*

*(e) upon any agreement that is not to be performed within the space of one year from the making thereof,*

*unless the agreement upon which such action is to be brought or some memorandum or note thereof is in writing and signed by the party to be charged there or some other person thereunto by him lawfully authorized.*


Clearly there is no note or memorandum of the alleged oral agreement within the terms of section 59 of the Act.

**(H) ORDER**

The plaintiff's claim is dismissed.

In the circumstances of the case, I make no order as to costs.



  
18/04/2019  
**Jude Nanayakkara**  
**[Judge]**

At Lautoka,  
Thursday, 18<sup>th</sup> April, 2019