

IN THE HIGH COURT OF FIJI
AT LAUTOKA
WESTERN DIVISION

CIVIL JURISDICTION

Civil Action No. HBC 161 of 2018

BETWEEN : **NIHAL WANIGASEKERA** of 21 Rubicon Crescent, Kuraby 4112,
Brisbane, Australia.

PLAINTIFF

AND : **ANEESH SHARMA AND ASHEEKA DEVI** both of Teidamu,
Lautoka.

DEFENDANTS

Appearances : **(Ms) Jyoti Sangeeta Naidu for plaintiff**
The defendants in person

Hearing : **Friday, 24th May, 2019**
Ruling : **Thursday, 01st August, 2019**

R U L I N G

(A) INTRODUCTION

[01] By an ex-parte Notice of Motion filed on 30th July, 2018 together with the Statement of Claim attached to the Writ of Summons, the plaintiff seeks the following orders;

- (1) *An interim injunction be granted against the Defendants, their servants and/or agents or whosoever restraining, preventing and or stopping them from dealing, selling, assigning and/or transfer the TLTB Agreement for lease 4/7/39616 known as Weira (Part of) Subdivision Lot 6 in the Tikina of Vitogo in the province of Ba containing an area of 1098 square meters until the determination of the application herein.*
- (2) *An interim injunction be granted against the Defendant their servants, agents and whosoever restraining, preventing and or stopping from selling, assigning and/or*

transfer of the vehicle registration number JL 158 until the determination of the application herein.

- (3) *An injunction be granted against the Defendants, their servants and/or agents or whosoever restraining, preventing and or stopping them from dealing, selling, assigning and/or transfer the TLTB Agreement for lease 4/7/39616 known as Weira (Part of) Subdivision Lot 6 in the Tikina of Vitogo in the province Ba containing an area of 1098 square meters until the determination of this action.*
- (4) *An injunction be granted against the Defendant, their servants, agents and whosoever restraining, preventing and or stopping from selling, assigning and/or transfer of the vehicle registration number JL 158 until the determination of this action.*
- (5) *An order be granted that the Defendants are to preserve and maintain in good conditions the said piece of land TLTB Agreement for lease 4/7/39616 known as Weira (Part of) Subdivision Lot 6 in the Tikina of Vitogo in the province of Ba containing an area of 1098 square meters and the said vehicle registration number JL 158 until the determination of this action.*

[02] The application is supported by an affidavit sworn by the plaintiff on 20th July, 2018. The application is made pursuant to Order 29, rule 1, 2(1) and (2) of the High Court Rules, 1988 and the inherent jurisdiction of the Court.

[03] Initially, the plaintiff made this application ex-parte. However, after having considered the nature of the reliefs the plaintiff seeks, the Court ordered the plaintiff to convert the application to inter-parte and directed the plaintiff to serve the documents on the defendants. The plaintiff duly served the documents on the defendants as directed by the Court.

(B) BACKGROUND

[01] In the supporting affidavit sworn on 20th July, 2018, the plaintiff deposed;

- (1) *I am the Plaintiff and the matters deposed to are within my own knowledge except where indicated otherwise.*
- (2) *This is my affidavit in support of my application by way of Motion seeking interim injunction against the Defendant from transferring and/or altering the subject properties.*
- (3) *I have known both the Defendants for a long time as the second named Defendant, Ms. Asheeka Devi is a relative of my wife and whenever we came to Fiji we would visit them.*

- (4) *I started to have close relation with the Defendants and I spent a lot of time with them and their family during my regular trips to Fiji.*
- (5) *Sometimes in June, 2016 when I visited the Defendants they showed me the TLTB Agreement for lease 4/7/39616 known as Weira (Part of) Subdivision Lot 6 in the Tikina of Vitogo in the province of Ba containing an area of 1098 square meters under Aneesh's name and requested me if I could lent them money to build their house which they would pay me back upon Mr Aneesh Sharma's insurance been matured in 2018.*
- (6) *That since they are my family and I was close to them I did decide to help them by loaning the money. It was agreed between the Defendants that I would provide the fund to the Defendants to enable them to build the house and repay the money once the insurance matured. In September 2016 when I visited Fiji, I loaned the Defendants first \$20,000.00.*
- (7) *In January, 2017 I came back to Fiji and gave \$45,000.00 and in May, 2017 a further \$50,000.00 was given to the Defendants for building their house.*
- (8) *In October, 2017 I visited again and I gave another \$50,000.00 to the Defendants upon their request.*
- (9) *Out of kindness I had also bought household material worth of \$12,000.00 which I gifted it to the Defendants to finish the house.*
- (10) *That all the money given to the Defendants was from my savings I had loaned this to them on trust and with the belief they will repay me by January, 2018. Copies of my Bank Statements is annexed herein and marked as "NW 1" and copies of my Passport page with Fiji Immigration entry stamp is also annexed herein and marked as "NW 2".*
- (11) *I have asked the Defendants to return my money without interest in January, 2018 instead told me they needed more time and gave their declaration that they owe money to me and will pay me back. A copy of the declaration is annexed herein and marked as "NW 3".*
- (12) *Moreover, in March, 2018 when I came to visit Fiji I decided to purchase a vehicle for myself but because I did not have enough time to look for a suitable vehicle I left \$30,000.00 with the Defendants for safe keeping until my return to purchase a vehicle under my name however upon enquiry the Defendants has advised me they have already purchased a vehicle registration number JL 158 without my knowledge which is under Asheeka Devi's name. A copy of the vehicle search annexed herein and marked as "NW 4".*
- (13) *That I have demanded numerous times to return the money I have given to the Defendants which they are neglecting/or refusing to do so.*

- (14) *Through my Solicitors I have also sent a demand notice demanding my money which again the Defendants did not respond to and also neglected and /or refused to return my money. A copy of the demand notice is annexed herein and marked as "NW 5".*
- (15) *That I need all the monies that the Defendants loaned from me especially for the construction of the house and the money used to buy the car as this was my retirement saving with interest.*
- (16) *I humbly urge the Court to grant injunction against the Defendants restraining them from selling, assigning, alienating or dealing with the house at Lot 6 Weira Subdivision, Teidamu, Lautoka on the TLTB Agreement for lease 4/7/39616. That the house and the car are ought to be preserved and not to be sold until the determination of my claim.*
- (17) *There is urgency in this matter as I do not know how the Defendants are going to return my money and the subject property and the vehicle registration number JL 158 are the only way to recover my money.*
- (18) *I give my usual undertaking as to damages should the Court finds against me. I have cash at bank balance in the sum of AU\$10,000 and I also own a car in Fiji by registration number FZ 307. A copy of my current bank statement is annexed herein and marked as "NW 6".*
- (19) *Therefore for the reasons above I humbly seek for order in terms of my application herein.*

[02] The application for interim injunction is vigorously opposed by the defendants. The defendants filed an affidavit in opposition. The defendants deposed;

- (1) *That we are the 1st and 2nd Defendants in the matter.*
- (2) *That the Plaintiff misleads this honorable Court by presenting documents acquired by misleading us.*
- (3) *That the Plaintiff at any point in time before the 2nd Defendant declined the marriage offer, mention that the monies he gave us for the building of our home was a loan rather mentioned it as help.*
- (4) *That the Plaintiff instructed us to receive money on his behalf from unknown persons.*
- (5) *That the Plaintiff has not displayed or provided evidence that the amount mentioned in the Statement of Claim is in fact a loan.*

- (6) *That the Plaintiff does not provide Certainty that the amount claimed is provided for in a legal agreement.*
- (7) *That the Plaintiff fails to satisfy all the elements in proving a genuine and enforceable contract.*
- (8) *That the Plaintiff demands payment based on the 1st Defendant's Insurance Policy which does not mature till the year 2033.*
- (9) *That the Plaintiff did not show an intention that the amount claimed is a loan rather reiterated that the same was mere help.*
- (10) *That the Plaintiff acquired the Statutory Declaration by ill means through the 1st and 2nd Defendants.*

[03] The plaintiff did not file an affidavit in reply.

(C) **LEGAL PRINCIPLES**

- (1) Against this factual background, it is necessary to turn to the applicable law and the judicial thinking in relation to the principles governing "Interlocutory Injunction".
- (2) The Plaintiff's application is made pursuant to Order 29, rule 1 of the High Court Rules, 1988 which provides;

Application for injunction (O.29, r.1)

1.- "(1) *An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in that party's writ, originating summons, counter claim or third party notice, as the case may be.*

(2) *Where the applicant is the Plaintiff and the case is one of the urgency and the delay caused by proceeding in the ordinary way would entail irreparable or serious mischief such application may be made ex parte in affidavit but except as aforesaid such application must be made by Notice of Motion or Summons.*

(3) *The plaintiff may not make such an application before the issue of the writ or originating summons by which the cause or matter is not be begun except where the case is one of urgency, and in that case the injunction applied for may be granted on terms providing for the issue of the writ or summons and such other terms, if any, as the Court thinks fit."*

- (3) The governing principles applicable when considering an application for interim injunction were laid down in the leading case of "**American Cyanamid Co v Ethicon Ltd**" (1975) (1) ALL.E.R 504 as follows;

(A) **Whether there is a serious question to be tried?**

- (B) Whether damages would be adequate remedy?
- (C) Whether balance of convenience favour granting or refusing Interlocutory injunction?

In that case **Lord Diplock** stated the object of the interlocutory injunction as follows at p. 509 ;

“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 favor 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 favor at the trial. The court must weigh one need against another and determine where the balance of convenience lies.”

In **Hubbard & Another v. Vosper & Another [1972] EWCA Civ 9; (1972) 2 WLR389** Lord Denning gave some important guidelines on the principles for granting an injunction where his Lordship said:

*“In considering whether to grant an interlocutory injunction, the right course for a judge is to look at the whole case. He must have regard not only to the strength of the claim but also to the strength of the defence, and then, decide what is best to be done. Sometimes it is best to grant an injunction so as to maintain the status quo until the trial. At other times, it is best not to impose a restraint upon the defendant, but leave him free to go ahead. For instance, in *Fraser v Evans (1969) 1 GB 349*, although the Plaintiff owned the copyright, we did not grant an injunction, because the Defendant might have a defence of fair dealing. The remedy by interlocutory injunction is so useful that it should be kept flexible and discretionary. It must not be made the subject of strict rules.”*

(D) DISCUSSION

- [1] The guiding principle in granting an interlocutory injunction is the balance of convenience; there is no requirement that before an ‘interlocutory injunction’ is granted the plaintiff should satisfy the Court that there is a ‘probability’, a ‘prima facie case’ or a ‘strong prima facie case’ that if the action goes to trial he will succeed; but before any question of balance of convenience can arise the party seeking the injunction must satisfy the Court that his claim is neither frivolous nor vexatious; in other words that the evidence before the Court discloses that there is a serious question to be tried.
- [2] The plaintiff in the instant case must first satisfy the Court that on the evidence presented to it, his claim to an interest in the property does raise a serious question to be tried; and,

having done so, he must go on to show that on the balance of convenience it would be better to maintain the status quo until the trial of the action.

[3] The plaintiff deposed;

- * *I have known both the Defendants for a long time as the second named Defendant, Ms. Asheeka Devi is a relative of my wife and whenever we came to Fiji we would visit them.*
- * *I started to have close relation with the Defendants and I spent a lot of time with them and their family during my regular trips to Fiji.*
- * *Sometimes in June, 2016 when I visited the Defendants they showed me the TLTB Agreement for lease 4/7/39616 known as Weira (Part of) Subdivision Lot 6 in the Tikina of Vitogo in the province of Ba containing an area of 1098 square meters under Aneesh's name and requested me if I could lent them money to build their house which they would pay me back upon Mr Aneesh Sharma's insurance been matured in 2018.*
- * *That since they are my family and I was close to them I did decide to help them by loaning the money. It was agreed between the Defendants that I would provide the fund to the Defendants to enable them to build the house and repay the money once the insurance matured. In September 2016 when I visited Fiji, I loaned the Defendants first \$20,000.00.*
- * *In January, 2017 I came back to Fiji and gave \$45,000.00 and in May, 2017 a further \$50,000.00 was given to the Defendants for building their house.*
- * *In October, 2017 I visited again and I gave another \$50,000.00 to the Defendants upon their request.*
- * *Out of kindness I had also bought household material worth of \$12,000.00 which I gifted it to the Defendants to finish the house.*
- * *That all the money given to the Defendants was from my savings I had loaned this to them on trust and with the belief they will repay me by January, 2018. Copies of my Bank Statements is annexed herein and marked as "NW 1" and copies of my Passport page with Fiji Immigration entry stamp is also annexed herein and marked as "NW 2".*
- * *I have asked the Defendants to return my money without interest in January, 2018 instead told me they needed more time and gave their declaration that they owe money to me and will pay me back. A copy of the declaration is annexed herein and marked as "NW 3".*

- * *Moreover, in March, 2018 when I came to visit Fiji I decided to purchase a vehicle for myself but because I did not have enough time to look for a suitable vehicle I left \$30,000.00 with the Defendants for safe keeping until my return to purchase a vehicle under my name however upon enquiry the Defendants has advised me they have already purchased a vehicle registration number JL 158 without my knowledge which is under Asheeka Devi's name. A copy of the vehicle search annexed herein and marked as "NW 4".*
- * *That I have demanded numerous times to return the money I have given to the Defendants which they are neglecting/or refusing to do so.*

[4] In reply, the defendants deposed;

- * *That the Plaintiff misleads this honorable Court by presenting documents acquired by misleading us.*
- * *That the Plaintiff at any point in time before the 2nd Defendant declined the marriage offer, mention that the monies he gave us for the building of our home was a loan rather mentioned it as help.*
- * *That the Plaintiff instructed us to receive money on his behalf from unknown persons.*
- * *That the Plaintiff has not displayed or provided evidence that the amount mentioned in the Statement of Claim is in fact a loan.*
- * *That the Plaintiff does not provide Certainty that the amount claimed is provided for in a legal agreement.*
- * *That the Plaintiff fails to satisfy all the elements in proving a genuine and enforceable contract.*
- * *That the Plaintiff demands payment based on the 1st Defendant's Insurance Policy which does not mature till the year 2033.*
- * *That the Plaintiff did not show an intention that the amount claimed is a loan rather reiterated that the same was mere help.*
- * *That the Plaintiff acquired the Statutory Declaration by ill means through the 1st and 2nd Defendants.*

[5] In the Statutory Declaration (Plaintiff's annexure marked NW-3) the defendants have declared that;

"We, Mr Aneesh Kumar Sharma and Mrs Asheeka Devi of Teidamu, Lautoka solemnly and sincerely declare that we borrowed one hundred sixty five thousand

dollars (\$165,000.00) from Mr Nihal Wanigasekera of 21 Rubicon Crescent, Kuraby 4112, Brisbane, Australia to build our house at Teidamu, Lautoka.

The money we have borrowed will be paid back to him in installment on availability without any interest.

- [6] **In their submissions before this Court the defendants frankly admitted that they did take money from the plaintiff to build their house.** (Reference is made to page (08) and (10) of the Transcript of the hearing.)

“Judge: Did you obtain a loan from this?”

Defendants: No my Lord. It was a help.

Judge: But you obtained money from him, right?”

Defendants: Yes.

Judge: Yes. Now, you received money from him thereafter, after you received that money you constructed a house on that property?”

Defendants: Yes my Lord.

Judge: So, you using his money, you constructed a house on the property?”

Defendants: I didn't ask for that money but he forcefully gave the money for me to build a house.

Judge: You accepted that money and by using that money you constructed a house?”

Defendants: Yes my Lord.”

- [7] The plaintiff says that the second named defendant, Asheeka Devi, is a relative of his wife and he had a close relationship with the defendants. The plaintiff further says that in June 2016, when he visited the defendants, they showed him the TLTB Agreement for Lease 4/7/39616 and requested for a private loan to build a house on the property. He says that he offered a private/personal loan for a specific purpose and there was a condition that the loan should be repaid by a specific date or event. The position

advanced by counsel for the plaintiff is that a sum of \$165,000.00 is owing under a verbal agreement for a personal loan made to the defendants by the plaintiff.

- [8] On the other hand, the defendants say that there was a relationship between the plaintiff and the second named defendant and the money was meant to be a financial help given to her at no cost and do not have to be paid back. She says that the relationship has turned sour and when they did split up the plaintiff started asking her to pay him back. She says that she is legally not obliged to pay this money back to the plaintiff since it was given as a financial help. The defendants took issue with the plaintiff's assertion that the amount is owing under a verbal agreement for a personal loan made to the defendants by the plaintiff.
- [9] The defendant's argument is two-fold; first, the money was meant to be a financial help and not a loan, therefore, do not have to be paid back. Secondly, they were forced to sign the Statutory Declaration and it is not truthful and accurate. On the other hand, the plaintiff contends that the payment was to be a "private loan" given for a specific purpose and needs to be "repaid or returned". Moreover, the plaintiff contends that the debt was acknowledged by the defendants by signing a Statutory Declaration pursuant to **Statutory Declarations Act (Cap 43)** declaring that the statements in it are true in the presence of Justice of Peace. Counsel for the plaintiff concludes by submitting that there is a legal document (Statutory Declaration) to show that it was a private loan.
- [10] As I see it, there is a disagreement about whether the money was meant to be a financial help or a private loan. A private loan is an agreement between the person lending the money and the person borrowing the money on the condition that the loan will be repaid by a specific date or event. A private loan agreement can be made in writing or verbally. Loans between family members are often informal, not recorded in writing, and are based on trust. Generally, in the law, a gift or financial help has several elements. First, the donor must perform some act constituting the actual or symbolic delivery of the gift. Second, the donor must possess the intent to give. Third, the donee must accept the gift. There is also an additional element, which is the relinquishment by the donor 'of ownership of the gift'. A loan, on the other hand, is generally defined as the giving or granting of something, particularly a sum of money, to another, with the expectation that it will be repaid or returned. The issues before this court are; **Is there an amount owing under a verbal agreement for a personal loan made to the defendants by the plaintiff? What is the character of the payment or the nature of the payment in the case before me? What was the intention of the plaintiff giving the money and whether it was meant to be a financial help or a personal loan? What weight should be given to the Statutory Declaration? All these are serious questions to be tried in this case and I reserve these questions for trial. In equity, the plaintiff, arguably, might retain some beneficial interest in the property if he can show that it was a private or personal loan, in which case, it is arguable that the defendants would be holding the property on trust for the plaintiff.**
- [11] I am also of the view that the balance of convenience favors the granting of the injunctions sought. The plaintiff says that the defendants intent to sell the property. I am

of the view that damages would not be an adequate compensation in the particular circumstances of the case. I say that because, if the injunctions were not granted now, and the defendants were to proceed to sell the property to a bona fide purchaser for value, there is potential that the plaintiff, who obviously has a stake in the property if the money in question was a private loan, would lose the property forever. I doubt from where I sit if the defendants would be in a position to even pay the damages.

(E) **ORDERS**

- (1) An interim injunction is granted against the defendants, their servants and/or agents or whosoever restraining, preventing and or stopping them from dealing, selling, assigning and/or transferring the land comprised in TLTB Agreement for Lease 4/7/39616 known as Weira (Part of) Subdivision Lot 6 in the Tikina of Vitogo in the province of Ba containing an area of 1098 square meters until the determination of the within proceedings.
- (2) An interim injunction is granted against the defendants, their servants and/or agents restraining, preventing and or stopping them from selling, assigning and/or transferring of the vehicle registration number JL 158 until the determination of the within proceedings.
- (3) The costs of the application are costs in the cause.



At Lautoka
Thursday, 01st August, 2019


01/08/2019
Jude Nanayakkara
[Judge]