

IN THE HIGH COURT OF FIJI
AT LAUTOKA
WESTERN DIVISION

CIVIL JURISDICTION

Civil Action No: HBC 98 of 2018

BETWEEN : **KAREN ANDREWS** of 77 Oramzi Rd, Girraween NSW 2145,
Retired.

PLAINTIFF

AND : **ABINESH VIKASH PRASAD** of Maro, Sigatoka.

1ST DEFENDANT

AND : **RAMENDRA PRASAD** and **JALENDRA PRASAD** both of Maro,
Sigatoka as the administrator of the Estate of Hari Prasad.

2ND DEFENDANT

AND : **DIRECTOR OF LANDS**

NOMINAL 3RD DEFENDANT

Appearances : Mr Eroni Maopa for the plaintiff
: (Ms) Jyoti Naidu for the 1st defendant
: No appearance for the 2nd defendant
: Mr Josefa Mainavolau J. for the nominal 3rd defendant

Hearing : Thursday, 04th July, 2019

Ruling : Friday, 20th September, 2019

RULING

[A]. INTRODUCTION

- (i) By an Amended Inter-Parte Notice of Motion filed on 04-02-2019, together with the Amended Writ of Summons and Amended Statement of Claim, the plaintiff seeks the following orders;

1. *An injunction against the 1st and 2nd defendants, their servants and or agents or whosoever restraining, preventing and or stopping them from dealing, selling, assigning and or transfer the new concrete dwelling house built on Lot 3 State Lease No. 20866 Malomalo, Nadroga, Sigatoka occupied by the 1st defendant and his family at Maro, Sigatoka until the determination of this action.*
2. *An injunction against the 1st defendant, his servants, agents and whosoever restraining, preventing and or stopping them from selling, assigning and or transfer the vehicle registration number IY 193 until the determination of this action.*
3. *An order that the 1st and 2nd defendants are to preserve and maintain in good conditions the said new concrete dwelling house built on Lot 3 State Lease No. 20866 at Malomalo, Nadroga, Sigatoka and the said vehicle registration number IY 193 until the determination of this action.*
4. *An order that the 1st defendant, his servants and or agents or whosoever forthwith release, give and or return all personal belongings in his or their possessions owned by the plaintiff as per schedule marked in annexure KA 6 in the affidavit in support of Karen Andrews. And or in the alternative the Bailiff and or the police stationed at Vatudradra Police Post enter, if refuse by the defendant his agents or servants, use appropriate and reasonable force to enforce the order of the court to remove, gather and collect the personal belongings of the plaintiff as mentioned above.*
5. *Alternatively, interim orders be granted as in 1 to 4 above pending the determination of this application.*
6. *That the police officers at Vatudradra Police Post are to assist the plaintiff and or the bailiff from executing order 4 above for the return of the plaintiff's personal belonging.*
7. *That cause of this application be borne by the 1st and 2nd defendants.*

(ii) The application is made pursuant to Order 29, rule 1 and rule 2(1) & (2) of the High Court Rules, 1988 and under the inherent jurisdiction of the Court.

[B]. BACKGROUND

(1) The plaintiff's affidavit in support which is as follows sets out sufficiently the facts surrounding this claim from the plaintiff's point of view as well as the orders sought by the plaintiff.

- [1] *I am the plaintiff/applicant named herein. I depose this affidavit to the best of my knowledge, information and belief.*
- [2] *I have known Abinesh Vikash Prasad aka Avi and his wife, Ranjileen aka Ranju both of Maro Sigatoka for approximately 5 years having met them when holidaying in Fiji in 2013. Since meeting them, we became close friends of and I spent a lot of time with them and their family during my regular trips to Fiji.*
- [3] *Since February 2016, I visited the defendant on 6 separate occasions, staying with him and his family for a total period of 12 weeks. Over that time, I came to consider the defendant and his wife to be my family – they called me mum and their children called me grandma.*
- [4] *I became aware that the defendant was involved in a court case regarding a sizeable are of land (approximately 22 acres) on which the house in which he was living was located.*
- [5] *I was informed by Avi that the Department of Lands had advised him that he needed to make use of the land (that is, grow crops) or he could be asked to leave the land.*
- [6] *It was agreed between the defendant and that I would provide the fund money to the defendant to enable him to start a farm, plough the land and buy cassava stems. That once the crop is harvested I would be repaid the money that I had loaned him to start the farm. Any money remaining and any future revenue obtained from the farm would be for the defendant to supplement his income and improve the family's quality of life.*
- [7] *During my visit in July 2016, I told the defendant and his wife that I had future plans of building a house as I was travelling frequently in and out of Fiji so I can have somewhere to be accommodated. I was informed by the defendant that he had some family land that would make an ideal site for the house. He offered that piece of land to me to build my house on it.*
- [8] *It was mutually agreed between the defendant and I that I built the house on the land for me and for my husband to live in whenever we visited Fiji while the defendant was to look after it between visit as caretaker.*
- [9] *During the 2nd half year of 2016 and 2017 the house was constructed and the defendant would advise me of the completion of various stages of construction so I sent/transfer the money to him for payment. The total amount of money sent by way of transfer amounts to F\$192,556.61. The sum excludes moneys paid by cash to the defendant when I was in Fiji. I annex herein spread sheet with the amount of money transferred for the construction of the house, the purchase of a car with insurance, divorce settlement and the farm marked as annexure KA1.*

- [10] Later in 2016, I loaned to the defendant the total sum of F\$16,565.30 to purchase a car [Refer to KA1 above.] We agreed that the defendant would repay the loan at the rate of \$200.00 per month commencing from the date of the purchase. An additional \$6,000 was transferred to the defendant at the time he advised me he purchased the car on 21 March 2017 and a further amount of \$600 was transferred on 7 April 2017 for insurance. The defendant is driving the car registration no. IY 193.
- [11] Following my stay with the family in November/December 2016, my relationship with the defendant's wife Ranju deteriorated because of accusations that the defendant and I were having a relationship during his visit to Australia.
- [12] At the end of the December that year I was informed by the defendant that he was going to divorce Ranju. I advised the defendant that seeking a divorce was a big decision and was he certain that he wanted to make that decision. After confirming that he knew what he wanted to do, he asked me for assistance to pay his legal fees and, on 20 December, I transferred FJ\$4,082.74 to him.
- I transferred a further sum of F\$10,000 to the defendant for the legal fees on 3rd April 2017. I was informed by the defendant that fees would be to finalise the divorce settlement with his wife.
- [13] Further I was informed by the defendant that his wife (and her lawyer) was demanding F\$50,000 as full and final settlement for divorce. I told the defendant that I do not have that amount but I would loan him F\$30,000. I advised him that some of the money (AU\$10,000) was borrowed from my mother that I would need to repay her. My mother had withdrawn the AU\$10,000.00 from her account on the 10th of April, 2017. I annex herein my mother's bank statement where AU\$10,000 was withdrawn marked as KA 2.
- [14] The defendant agreed to repay the F\$30,000 to me once the court case regarding his farmland was finalised, at which time he would sell some of his land, with the proceed to make repayment. I sent/transfer the money on 10th and on 17 April 2017 the defendant advised me that his wife had signed the document that she received the full settlement amount and that no further claim against him was envisaged.
- [15] I told the defendant that it was best that he sold the house that was constructed as it would be meaningless because he divorced his wife and it was impossible for me come over for my visits and stay there. Also I asked, could I have the money spent on the construction of the house given back.

- [16] *Thereafter the defendant's behaviour and tone of voice during our conversation started to change and deteriorated. I started to suspect that he was dishonest and lying to me when I crossed check information, regarding the divorce, his involvement with a car accident, and the land with his friends. I told him that I no longer trust him. He then ceased communications with me, and changed his contact details preventing me from contacting him. I no longer have any relationship whatsoever with the defendant and his family.*
- [17] *By letter dated 21 September 2017, through my lawyer, demanding the repayment/return of money to me was served to the defendant but he denied my claim via letter dated 13 October 2017. I annex herein copies of the letter marked respectively as annexure KA 3 & KA 4.*
- [18] *On 10 March 2018, I came to Fiji and accompanied by a friend to visit the house on Maro Road. I took some photographs of the house but the defendant came claiming that the house was his private property and he went to report at Vatudradra Police Post. I annex herein photographs of the house marked as annexure KA 5.*
- [19] *Following the interview with WPC Lanieta and I returned to the compound at Maro. I was invited to enter the compound by the defendant after a brief conversation with WPC Lanieta.*
- [20] *We had discussion with the defendant and WPC Lanieta where the defendant admitted that I had paid for the house. He also admitted that the money I had given him for the divorce and for the purchase of car had been spent on the house. The defendant and his wife are still living together as husband and wife.*
- [21] *I verily believed that I was being used by the defendant, in a fraudulent and deceptive way, to send him money to fulfil his evil and greedy behaviour. That the defendant has been dishonest with me and not worthy of being trusted. He made representations to me which I believe were false to the extent benefitted him illegally. The promises to repay me the money never eventuated.*
- [22] *That I need all the monies that the defendant loaned from me specifically for the construction of the house, money for his alleged divorce and the money used to buy the car and start the farm. Also I have some personal belongings left in the defendant's house when I last visited them that need to be returned. I annex herein list of my belongings marked as annexure KA 6.*
- [23] *I also urge the court to grant injunctions against the defendant restraining him from selling, assigning, alienating or dealing with the house at Maro, Sigatoka. That the house and the car are preserved and not to be sold until the determination of my claim.*

[24] *That I give usual undertaking as to damages should the court finds against me. I am retired and received monthly benefits in the sum of AU\$2,350.83. I have cash at bank balance in the sum of AU\$37,412.29 and the value of my property is worth AU\$649,000 as at 1/7/2016. I annex herein copies of the above marked as annexure KA 7, KA 8 & KA 9.*

(2) The amended Notice of Motion is filed by the plaintiff against first and second defendants. The plaintiff duly served documents on all the defendants. The second defendant did not enter an appearance. The third defendant is not concerned with the notice of motion.

(3) The application for interim injunction is vigorously opposed by the first defendant. The first defendant filed an affidavit in opposition. The first defendant deposed;

1. *THAT I am the Defendant/Respondent herein.*
2. *THAT I depose this Affidavit from facts well known to me and which I believe to be true.*
3. *THAT this is my affidavit in opposition to the Affidavit of Karen Andrew (hereinafter referred to as the said Affidavit) filed on 18th May, 2018.*
4. *THAT I take note of paragraph 1 of the said Affidavit.*
5. *THAT I admit paragraphs 2 to 4 of the said Affidavit and further state that the first few years the Plaintiff would come reside in the resort and would only come to visit us however thereafter each time the Plaintiff came she was residing with us and we provided her with our hospitality. This way our friendship with her became stronger.*
6. *THAT I do not admit the contents of paragraph 5. Further I state that at no stage I mentioned to the Plaintiff I need to plant due to Department of Lands. I did grow crops on the Land for my own subsistent use and at times sold to the hotels(s) and in my neighbourhood if in access.*
7. *THAT I deny paragraph 6 and further state that each time the Plaintiff came to Fiji and stayed with us she saw the uncultivated land and offered to help me with the seedlings to start cultivation. She herself mentioned that this is her help to our family which is likes her too and that we did not need to repay her. Thus the money given by her was to help me which I appreciated and not under any form of agreement made with her.*
8. *THAT I deny paragraph 7 of the said Affidavit. Sometimes in January, 2016 my wife and I had already started planning, grading and levelling a piece of my family's land to build our house. When the Plaintiff came in*

July, 2016 she saw our future planning and offered to help us build. When we objected then she stated that we did not consider her as our family. Thus we let her help us acquire our house with the belief that what the Plaintiff is offering is help towards our family. At no point it was discussed that this was her property or the money lent were loan.

9. *THAT I deny paragraph 8 of the said Affidavit and further state that ever since we got to know the Plaintiff and from her coming to stay with us she has never come with her husband for a holiday to Fiji nor brought him home. There was no agreement that I would be staying on the property as caretaker. The property is built on my family's land for my own use not for the Plaintiff.*
10. *THAT in response to paragraph 9 I state that the Plaintiff started showing interest in my property when I mentioned to her that she can always come and stay with us as she can have a room at our place for herself. That is when the Plaintiff started sending money to us so that the property could be built in prompt time. There had been no form of any agreement between the Plaintiff and I that the money was a loan or to be reimbursed. That is why such a substantial amount given had no written contract between us.*
11. *Further, the Plaintiff started to develop passionate feelings for me and then she started insisting that I stay on resorts away from my wife. She also sent money for this purpose.*
12. *THAT I deny paragraph 10 of the said Affidavit and further state that due to the developing feelings of the Plaintiff towards me she started to gift me more things. She continues to send money and then insisted to purchase a car which we can go for rides when she was here in Fiji. She also started sending money for me to divorce my wife and to pay her a sum for settlement which I kept objecting.*
13. *THAT in response to paragraph 11 I state that both the Plaintiff and I were in an affair. Sometimes in February, 2017 the Plaintiff visited us in Fiji and insisted that we go for holiday in Labasa as my birthday treat. With the company of my wife and the Plaintiff we all went to Labasa. During our holiday one of the days my wife stayed in Labasa while the Plaintiff and I travelled to Savusavu where we stayed for a night at a hotel. On our return to Labasa the next day my wife confronted us and I then had confessed everything to her about my extra marital affair with the Plaintiff.*
14. *THAT I deny paragraph 12 and 13 of the said Affidavit and state that after my wife had found out about my affairs with the Plaintiff I tried to stop seeing the Plaintiff in order to save my marriage. The Plaintiff on the*

other hand kept sending money and forcing me to get divorce from my wife which for us to stay in Australia.

15. *Further when I told the Plaintiff I will not divorce my wife and would continue with the affair with her she was very frustrated and threaten me that she would spoil my name with my family members and in my community.*
16. *Moreover, I had not known the Plaintiff's mother and I never obtained any financial contribution from her.*
17. *THAT I deny paragraph 14 and further state there was/is no agreement as the Plaintiff claims. The money was sent by the Plaintiff so I continue been in relationship with her.*

Furthermore, I do not own any land to make such decision of selling it. The Plaintiff is only doing all this to spoil my reputation in my community and with my family.
18. *THAT I deny paragraph 15 and further state that the Plaintiff contributed in the property so she could stay with us each time she came to Fiji. However, after my wife's confront, the Plaintiff kept forcing me to divorce my wife and to send her away from this property so she can come and stay with me. When I had denied this, the Plaintiff then started asking everything back. Whatever the Plaintiff had spent and gave us was a form of help and gift during our affair, the Plaintiff had never loaned me this money.*
19. *THAT I deny paragraph 16 and in response further state that the Plaintiff started harassing me to leave my wife and stay with her. She also started giving suicide threats and that is when I stopped contacting her thinking it may go out control if I keep talking to her. I have stopped been in relationship with the Plaintiff however she still wish to continue to be in relationship with me. When we had met in March, 2018 the Plaintiff once again tried to be with me when we met at Tokatoka Hotel.*
20. *THAT I agree with paragraph 17 and further state when I met the Plaintiff in March, 2018 she informed that she is doing all this because she is really angry with me and if I decide to stay with her then she would withdraw her notice. When I told her I am not leaving my wife I believe then she had proceeded to file her claim.*
21. *THAT I agree with paragraph 18 and 19 and in response I did report this to Vatudradra Police Post since the Plaintiff had already served me the Notice and I did not want to involve in further dispute with the Plaintiff so upon the request of WPC Lanietia I had a conversation with the Plaintiff and she was still insisting me to divorce my wife.*

22. *THAT in response to paragraph 20 I state that I with my wife had taken Bank loan to finance the house. The dwelling house is built on my Family property and not on the land bought by the Plaintiff. The Plaintiff's contribution towards the property had been a gift and/or help and not as a loan. I do not intend to divorce my wife and neither be in a relationship with the Plaintiff.*
23. *THAT I deny paragraph 21 and further state that I had not misrepresented to the Plaintiff in any way. The Plaintiff all along knew we were building the house and she voluntarily gave her assistance with the thought that she can stay with us any time she likes. Everything was in good relationship when we were having an affair but when I stopped seeing her that is when the Plaintiff got really frustrated and is now doing all this to spoil my name.*
24. *THAT none of her belongings are in my house. She had never come to my place with any children or any of children's belongings. She has in fact gifted some of the stuff which she only wants to claim back in revenge and to spoil my name.*
25. *In response to paragraph 22 I state that the money was never loaned from her to me. It is to my knowledge that the Plaintiff wished to assist us in building our house so whenever the Plaintiff came to Fiji she would have a place to stay like it has been happening previously.*

If it was an agreement to return the money to her then I would not have received it in the first place as I know I would not be able to give that money to her.
26. *THAT I object to paragraph 23 of the said Affidavit and further state that the house is built on my family's land and if any injunction is placed on the property then the owners of the land will be deprived of their use of land. I am only using a part of the land which my family had allowed me to use.*
27. *THAT I take note of paragraph 24 of the said Affidavit.*
28. *THAT for the above reasons I humbly seek the application herein be struck out with cost.*

(4) In the affidavit in reply, the plaintiff deposed;

1. *That I am the Plaintiff named herein and I depose this Affidavit to the best of my knowledge, information and belief.*

2. *That I have read the Affidavit in Reply of Abinesh Vikash Prasad (hereinafter referred to as the said Affidavit) filed on 20 June 2018 and I wish to respond to the same.*
3. *In response to paragraph 6 of the said Affidavit, on 5 July 2016 at 8.00 am Sydney time, the defendant's wife (Ranjileen aka Ranju) told me in a Facebook chat message that she and the defendant had visitors from the Department of Lands regarding their land. She said that the defendant needed to plant vegetables on the land which was lying idle or the Department of Lands may ask them to leave. I told her that I had already spoken to the defendant about it the day before and told him that I would help. I annex herein a copy of the Facebook chat messages as annexure KA1.*
4. *I deny paragraph 7 of the said Affidavit and further state that, it was only after my telephone conversation with the defendant on 4 July 2016 regarding the visit from the Department of Lands that I offered to assist by loaning him the money required to start a farm – to clear the land, plough the land and buy and plant cassava stems. Prior to that time, the land was uncultivated and lying idle. The defendant and I made a verbal agreement that, when the first crop of cassava was harvested, I would be repaid the money I had loaned him.*
5. *Further, on 6 July 2016, in a Facebook chat commencing at 6.24 am Sydney time, the defendant's wife told me that Abinesh had spoken to the contractor about the ploughing of the land and that the contractor required a deposit to be paid by that afternoon. The amount of money that was required for the deposit was also mentioned. I annex herein a copy of the Facebook chat messages as annexure KA2. An amount of FJS\$1,700.00 was transferred to the defendant's wife later that morning at 10.19am via Western Union. I annex herein a copy of the record of transfer as annexure KA3.*
6. *Further, the defendant and I kept a record of the money I loaned to him for the farm and the total expenditure in order to enable the defendant to determine the total amount to be repaid upon harvest of the first crop, as per our agreement. This record was annotated with both our initials indicating mutual acknowledgement of the amount of money loaned and the amount to be repaid. I annex herein a copy of this record as annexure KA4.*
7. *Further, a Facebook chat between the defendant and me on 12 July 2016 commencing at 6.04am indicates the nature of the agreement between us regarding the farm. The defendant referred to the farm as "our farm" and referred to me as "the boss". I annex herein a copy of the Facebook chat messages as annexure KA5.*

8. *I deny paragraph 8 of the said Affidavit. Planning for the house commenced in July 2016 after I had told the defendant and his wife of my wish to build a house of my own in Fiji. I searched the internet and selected a plan for my house. I sent a copy of the house plan to the defendant's wife in a Facebook chat message on 15 August 2016 at 10.27am. I annex herein a copy of the Facebook chat message as annexure KA6.*
9. *Further, a copy of the house plan was emailed on 17 August 2016 at 6.42pm to a friend of the defendant who was requested to print out a copy and give it to the defendant as a copy of the plan was required to enable the architect to draft full architectural plans. I annex herein a copy of the email and the attached house plan as annexure KA7 and KA8.*
10. *Further, the architect's plans should include the date they were drafted and also the date the plans were approved by the Public Health Officer at Sigatoka Hospital.*
11. *Further, the land for the house was not cleared and levelled until 18 September 2016. As I was in Fiji at that time, I witnessed the land being cleared and took photographs as a record of the occasion as it marked the beginning of the project to build my house. I annex herein copies of two of the photographs with the date and time they were taken showing the clearing of the land and my presence at the event as annexure KA9.*
12. *Further, it was around this time that the defendant and I travelled to Lautoka to the Department of Lands office with the title deeds for the land to obtain the approval to build.*
13. *Further, the defendant's wife and I talked about the house in Facebook chats. I annex herein a copy of a Facebook chat message from the defendant's wife dated 5 September 2016 at 1.03pm in which she indicates that the house being built is my house as annexure KA10.*
14. *In response to paragraph 9 of the said Affidavit, I have never claimed that I have holidayed in Fiji with my husband nor have I ever claimed to have taken my husband to the defendant's home. However, this does not preclude me from wanting to build a home in Fiji for my husband and I to live in. My husband would prefer and feel more comfortable and able to relax in our own home than in a crowded resort.*
15. *In response to paragraph 10 of the said Affidavit, I have never been advised by the defendant that he had plans to build a house. However, I had been told by the defendant and his wife in Facebook chat messages that I would always be welcome to stay with them. I annex herein copies of Facebook chat messages dated 13 September 2015, 29 February 2016 and 7 July 2016 as annexure KA11, KA12 and KA13.*

16. *Further, I had already stayed with the family in the house in which they were at that time living for three separate periods of time (February, April and July 2016) before we had any discussion about building a house. I had never been aware of the existence of the family land until I expressed my wish to build a house. It was then that the defendant showed the land to me and said it would be an ideal site to build a house.*
17. *Further, there was no written contract between the defendant and myself because it was not a business agreement. It was a verbal agreement between the defendant and I who, at that time, considered each other to be close family members. As I was paying the cost of construction, the house would be mine, for my use (and my husband's if he accompanied me) whenever I travelled to Fiji. At other times, in acknowledgement of the fact that the house was built on a small area of the defendant's family land, the defendant and his family would have the benefit of living in a new house substantially bigger, more solidly constructed and with better amenities than the house in which they were at that time living with the responsibility for looking after the house (as caretakers) in my absence. This arrangement was with the full knowledge that, because of our relationship as family, if and when I was no longer able to travel to Fiji and make use of the use of the house, it would become theirs to use entirely as they wish.*
18. *Further, there was no written contract between us because the money was not given as a loan. It was never intended that the money would be repaid by the defendant as it was given solely for the purpose of covering the costs of construction, as advised to me by the defendant, of my house, for my use. I did not and would not, under any circumstances, give the defendant (or anyone else) such a substantial sum of money as a gift. Furthermore, money was withdrawn from a joint bank account I hold with my husband who was aware of the intended purpose for the money and the agreement that was made between the defendant and me. My husband did not and would not, under any circumstances, agree to money being withdrawn from our joint bank account being given to the defendant (or anyone else) as a gift, especially as my husband had not yet met the defendant.*
19. *I deny paragraph 11 of the said Affidavit. I did not develop passionate feelings for the defendant. My relationship with the defendant and his family was a close family relationship. My husband and I have no children of our own and I came to consider the defendant and his family to be my Fijian family. The defendant and his wife called me mum and their children called me grandma. Furthermore, apart from the substantial age difference between the defendant and me, I have been married to my husband for almost 30 years and have known him for over 44 years. We are happy in our retirement together and have not experienced any*

significant marital problems that would prompt me to seek out a relationship with another man.

20. *Further, I did not insist that the defendant stay on resorts away from his wife nor did I send money for this purpose. In fact, there would have been no reason to send money for this purpose when I was if I was still in Australia.*
21. *Further, at no time during any of my trips to Fiji or my stays with the defendant's family id the defendant and I stay together at a resort or hotel away from his wife or family. In any case, it would not have been possible for us to do so without their knowledge.*
22. *In response to paragraph 12, I did not insist that the defendant purchase a car for which he and I could go for drives when I was in Fiji. There would have been no benefit to me in giving him money for this purpose as I was already hiring a car on those occasions when I was staying with the defendant's family. The hired car was used for driving to and from the local shop, the defendant's wife and I to drive to Sigatoka to do grocery shopping, visiting friends and family and driving the defendant and his wife to and from their place of employment. However, I did loan the defendant money to purchase a car which was for his and his family's benefit. As I was already paying for the construction of the house, I was not in the position to give him the money. Rather, it was a loan that the defendant and I agreed would be repaid at a rate of FJ\$200.00 a month.*
23. *Further, the fact that the defendant did not purchase the car until after the final time I stayed with his family and after the breakdown in my relationship with him and his family, indicates that the money was not given for the purpose claimed by the defendant.*
24. *Further, the amount of FJ\$16,565.30 which was transferred to the defendant on 1 November 2016 for the purpose of purchasing a car was withdrawn from the joint bank account I hold with my husband who was aware of the intended purpose for the money and the agreement that was made between the defendant and me. My husband did not and would not, under any circumstances, agree to money being withdrawn from our joint bank account being given to the defendant as a gist to purchase a car.*

Further, at no time did I request that the defendant divorce his wife. I had no reason to make such a request.

25. *In response to paragraph 13 of the said Affidavit, I deny that the defendant and I were in an affair. I deny that the defendant and I travelled to Savusavu while the defendant's wife stayed in Labasa. The defendant, his wife and I, as well as his wife's sister, did travel to Labasa on 17 February 2017 as a birthday treat for the defendant. The first night of our stay was*

spent with the defendant's cousin and family. The following day, 18 February 2017, the defendant, his wife, his wife's sister, his cousin, his cousin's wife and I travelled to Savusavu. The defendant, his wife, his wife's sister and I stayed at the Savusavu Hot Springs Hotel and his cousin's wife stayed with family nearby. The defendant's wife put several posts on Facebook of photographs of herself, the defendant and me together at the Hotel, Savusavu Wharf and other places in around Savusavu. I annex herein copies of two of the Facebook posts as annexure KA14 and KA15.

26. *Further, given that the defendant and I did not travel to Savusavu alone together, I deny that the defendant's wife confronted us upon our return to Labasa and deny that the defendant confessed to her about an extra marital affair with me.*
27. *I deny paragraph 14 of the said Affidavit. Following my trip to Fiji and my stay with the defendant's family in February 2017, I had made no plans to return to Fiji in the foreseeable future and therefore, there was no requirement for the defendant to try to stop seeing me. However, he did continue to contact me via mobile phone in order to advise me of money required for the continued construction of my house and I continued to transfer the requested money, to both the defendant and his wife.*
28. *Further, I deny forcing the defendant to divorce his wife. In fact, I do not know how it would be possible to compel him to do so unless he so wished. I did not ever suggest to the defendant that we would stay in Australia after he divorced his wife. It would have been extremely difficult, if not possible, for the defendant to obtain a visa in order to travel to Australia for the purpose of an extended stay. Furthermore, neither at that time, not now did I nor do I have any wish to leave my marital home for the purpose of residing with another man.*
29. *I deny paragraph 15 of the said Affidavit. I deny having an affair with the defendant. In any case, it would not have been possible to continue with an affair as, at that time, I was no longer travelling to Fiji nor had I made any plans to do so.*
30. *Further, I at no time threatened to spoil his name with his family members or his community and have not done so. In fact, I was reluctant to speak to anyone, except my husband, about what the defendant had said about me and the defendant's later actions. It is the defendant who has spoilt my name.*
31. *Further, I had no communication nor did I seek to have any communication with any of the defendant's family members following my visit to Fiji in February 2017 until I travelled to Fiji in March 2018. My communication with the defendant ceased on 27 April 2017 for a period of*

- time until the defendant against contacted me via mobile phone on 22 June 2017. My communication with the defendant again ceased on the 18 July 2017 and we had no further contact until my trip to Fiji in March 2018.*
32. *I deny paragraph 16 of the said Affidavit. The defendant met my mother during his trip to Australia in December 2016 and stayed with my mother at her home for the duration of his stay. I annex herein photographs of the defendant with my mother as annexure KA16.*
33. *In response to paragraph 17 of the said Affidavit, I had advised the defendant that I had borrowed money from my mother to loan to him. The amount of AU\$10,000 was withdrawn from my mother's bank account on 10 April 2017. This money (together with some additional funds that she provided) was transferred to the defendant via MoneyGram on 10 April 2017 (an amount of FJ\$9,900.00) and 11 April 2017 (an amount of FJ\$7601.00). I annex herein a copy of my mother's bank account and copies of the records of transfer as annexure KA17, KA18 and KA19.*
34. *Further, I would not have borrowed money from my mother nor would my mother have agreed to provide the money in order for me to continue in a relationship with the defendant.*
35. *Further, the defendant agreed to repay the money by selling a parcel of land following the finalisation of the court case in which in he was then involved regarding the house he was living in and the surrounding farmland. It was on an area of this land that the farm referred to above was located.*
36. *Further, although the defendant has stated that he does not own any land, he claimed at that time that he was certain to win his court case regarding the aforementioned land. On the 10 March 2018, in the presence of WPC Lanieta from Vatudradra Community Post, the defendant claimed that he had won his court case and that, when the case was finalised, he would be able to repay me the money "in one shot". He repeated his claim later that evening in the presence of my witness.*
37. *Further, since then, I have learned that his claim to me in the presence of WPC Lanieta and another witness that he had won his court case was unfounded and so, it may be the case that the defendant does not currently have ownership of any land.*
38. *Further, I deny that I am seeking repayment of money loaned to him for the farm, purchase of a car and other purposes and given to him for the construction of my house in order to spoil his reputation in his community and with his family.*
39. *I deny paragraph 18 of the said Affidavit. I deny that there was a confrontation with the defendant's wife, as stated previously. I deny that I*

kept forcing the defendant to send his wife. As previously stated, I do not know how it would be possibly to do so.

40. *Further, given that I had no contact with the defendant since before he and his wife commenced residing in the property. I deny forcing the defendant to send his wife away from the property so that I could stay with him there.*
41. *Further, I deny the affairs and that the money was given to him as a gift during an affair.*
42. *Further, I agree that the money I loaned to him was a form of help. The money I loaned to the defendant for the farm, helped him and his family because the Department of Lands had told the defendant that he and his family were at risk of being asked to leave if the land remained uncultivated. Furthermore, any money remaining from the sale of the first harvest after I had been repaid the money I had loaned the defendant and any future revenue obtained from the farm was for the defendant to supplement his income and improve his family's quality of life. However, I restate that the money was a loan.*
43. *Further, the loan of the money for the purchase of a car helped the defendant and his family by providing ready and reliable transport which he and the family would otherwise not have had as the defendant was not able, at that time, to obtain a bank loan for the purpose. However, I restate that the money was a loan.*
44. *Further, the construction of the house I was building for myself (and my husband) helped the defendant and his family because they were going to have the benefit of living in a new house that is substantially bigger, more solidly constructed and with better amenities than the house in which they were at that time living, as stated previously.*
45. *Further, I am seeking repayment of the money for the construction of the house because the defendant's actions have denied me any opportunity of accessing and using the house that I paid for and built for myself and my husband and our use.*
46. *I deny paragraph 19 of the said Affidavit. I at no time harassed the defendant to leave his wife and stay with me. As stated previously, I deny an affair with the defendant and therefore had no reasons to harass him in that way. Furthermore, an examination of the call log on my phone will demonstrate that the defendant initiated the majority of calls between him and me. I made no further attempt to contact him after our last mobile phone conversation on 22 June 2017.*

47. *Further, I at no time made suicide threats to the defendant or anyone else. I would never cause pain to my husband and my elderly mother by taking my own life.*
48. *Further, I deny that I still wish to have a relationship of any kind with the defendant, the defendant's wife or their children. I had no intention of seeing the defendant or his family again. However, I was advised by my then lawyer to go to the house that I had paid for in order to attempt to communicate with them and, if possible, to take photographs of the house. On 10 March 2018, accompanied by a friend as my witness. I visited the house which is situated on Maro Road, Maro, Sigatoka.*
49. *Further, I deny that the defendant and I met at the Tokatoka Hotel. However, the defendant and his driver, did drop me off at the Hotel following a meeting between the defendant and me at the Nadi Farmer's Club on 12 March 2018 during which we discussed how to try to resolve these matters. This meeting came about because the defendant had failed to honour his commitment to meet at his lawyer's rooms with me and WPC Lanieta from the Vatudradra Community Post, as had been agreed on 10 March 2018.*
50. *I deny paragraph 20 of the said Affidavit. When I met with the defendant during my trip to Fiji in March 2018, I had not yet filed any claim. I had consulted a lawyer in Fiji and met with her on 6 March 2018 to discuss my options in regards to recovering my money. However, at that time, I was not in a position to proceed with a civil claim in the High Court as I was not able to afford the cost as quoted to me by the lawyer. I told this to the defendant and his wife, in the presence of my witness, when I met with the both of them on 10 March 2018.*
51. *Further, I had not spoken to the police prior to my first visit to the house on 10 March 2018 as I was not aware that that was an option available to me.*
52. *Further, even after speaking to WPC Lanieta at the Vatudradra Community Post, who advised me to file a report with the police against the defendant, I told her I didn't want to take any action that might potentially result in the defendant going to prison. In any case, such action would not result in me recovering my money. I told this to the defendant and his wife, in the presence of my witness, when I met with the both of them on 10 March 2018.*
53. *Further, it was only after all attempts to resolve the matter with the defendant had failed, that I filed a report and made a statement at Sigatoka Police Station on 20 March 2018.*

54. *In response to paragraph 21 of the said Affidavit, when I first visited the house on 10 March 2018, the defendant accused me of trespassing on his property and went to the Vatudradra Community Post and returned with WPC Lanieta to the car park adjacent to Sharma's shop on the corner of Queens and Maro Road where I and my witness had gone after leaving the defendant's property.*
55. *Further, at her request, I accompanied WPC Lanieta to Vatudradra Community Post where I spoke with her at length about who I was, why I had visited the house and my previous relationship with the defendant and his family. She requested that I return, with her, to the property in order to talk to the defendant and I reluctantly agreed.*
56. *Further, I at no time during this conversation, which was witnessed by WPC Lanieta and was recorded, did I insist that the defendant divorce his wife.*
57. *I deny paragraph 22 of the said Affidavit. I have not bought any land in Fiji and have never claimed to have brought the land on which the house is built.*
58. *Further, I reiterate that, on the 10 March 2018, in the presence of WPC Lanieta, the defendant did acknowledge that I had provided money to him for the purpose of constructing the house. He also admitted that money I had loaned to him for other purposes had been spent on building the house. He admitted again, later that evening, in the presence of my witness, that the money I had loaned to him for the purpose of purchasing a car had been spent on building the house.*
59. *Further, on the 10 March 2018, in the presence of WPC Lanieta, the defendant admitted that he had made a mistake and had to pay the consequences.*
60. *Further, on the 10 March 2018, in the presence of WPC Lanieta, the defendant claimed that he had won his court case and that, when the case was finalised, he would be able to repay me the money "in one shot".*
61. *Further, later that evening on 10 March 2018, in the presence of my witness, the defendant repeated his claim that he had won his court case and that, when the case was finalised, he would be able to repay me the money "in one shot".*
62. *Further, in a telephone conversation with the defendant on 28 June 2017 commencing at 7.46am Sydney time, the defendant said to me "I just wanted to tell you that, not in June but in August I'll be sending all your money because my case will be over next month and last week was my*

case too ... so most probably I'll win the case. So I'll be organising your money and sending it to give it back."

63. *Further, although I deny having an affair with the defendant and had never asked him to divorce his wife, nevertheless, the defendant had told me of his plans to divorce his wife and I had loaned him money to assist him which was to be repaid following the finalisation and settlement of his court case, as stated previously. Furthermore, on 10 March 2018, in the presence of WPC Lanieta, the defendant admitted to spending the money loaned to him for that purpose on building the house.*
64. *Further, later that evening on 10 March 2018, the defendant admitted again, in the presence of my witness, that he and his wife had planned to divorce and had, for a period of time, been separated from each other. The defendant admitted that he had given the money I had loaned him to his wife as payment of the divorce settlement, but following their reconciliation, they had subsequently spent the money on building the house.*
65. *In response to paragraph 23 of the said Affidavit, I did not give the money to the defendant as a gift so that I could stay with them any time I liked. There was no need for me to do that as I had already stayed with the defendant and his family on several occasions and had been told by the defendant and his wife in Facebook chat messages that I would always be welcome to stay with them, as stated previously. I refer to annexure KA11, KA12 and KA13, annexed previously.*
66. *Further, as stated previously, I deny that I am seeking repayment of moneys loaned to him for the farm, purchase of a car and other purposes and given to him for the construction of my house in order to spoil his name.*
67. *I deny paragraph 24 of the said Affidavit. On the 10 March 2018, in the presence of WPC Lanieta, the defendant admitted that personal belongings of mine were currently stored in his previous place of residence.*
68. *Further, later that evening, in the presence of my witness, the defendant again said that personal belongings of mine were currently stored in his previous place of residence.*
69. *Further, later in March 2018, PC Kevueli Tunidau of Vatudradra Community Post rang the defendant, at my request, to arrange a time to meet with him at his previous place of residence in order to retrieve my belongings. The defendant advised PC Kevueli that he would bring my belongings with him to a meeting at my then lawyer's office which had*

been arranged for Monday 19 March 2018 at 11.00am. The defendant failed to attend the planned meeting.

70. *Further, on 5 May 2018, I accompanied WPC Lanieta to visit the defendant in order to request the return of my belongings. The defendant advised WPC Lanieta that, if I wanted my belongings, to speak to the CID.*
71. *Further, on the 9 May 2018, I spoke to DC Gupta at Sigatoka Police Station, DC Gupta was the Investigating Officer for the report I had filed against the defendant on 20 March 2018. DC Gupta rang the defendant, on my behalf, to ask if he was going to return my personal belongings.*

The defendant advised DC Gupta that he was not permitted to enter the premises of his previous place of residence which was where my belongings were currently stored and that I would need to apply for a court order if I wished to retrieve my belongings.

72. *Further, I have never claimed to have gone to the defendant's home with any children. However, I have both taken items to Fiji as gifts for the defendant's children and I have freighted items to Fiji as gifts for the children. I acknowledge that these items (and others) were given as gifts and I have not and am not claiming them back.*
73. *I deny paragraph 25 of the said Affidavit. I did not give the defendant money to assist him and his wife to build their house because I was never advised by the defendant that he had plans to build a house nor was there any indication that he was planning to do so.*
74. *Further, I had no need to assist them so that I would have a place to stay because, as the defendant has stated himself, it had already been happening.*
75. *Further, although the defendant claims that he would not have received the money in the first place as he knew he would not be able to repay the money to me, he advised me that he expected to make more than enough money from the sale of his first cassava crop to repay the money I had loaned him to start the farm.*
76. *Further, when I loaned the defendant the money to purchase the car, we discussed the repayments and he advised me that he could afford to repay the loan at the rate of FJ\$200.00 a month which I believe is approximately half the rate of repayment of a comparable bank loan for the same purpose. I did not expect the defendant to repay the loan at a rate more than he could afford because this was an arrangement between family members, not a commercial agreement.*

77. *Further, in regards to the money given to the defendant for the construction of the house, as stated above, the money was not given as a loan. It was never intended that the money would be repaid by the defendant as it was given solely for the purpose of covering the costs of construction of my house, for my use. I am seeking repayment of the money for the construction of the house because the defendant's actions have denied me any opportunity of accessing and using the house that I paid for and built for myself and my husband and our use. I did not and would not, under any circumstances, give the defendant such a substantial sum of money as a gift.*
78. *Further, as stated previously, money was withdrawn from a joint bank account I hold with my husband who was aware of the intended purposes for the money and the agreements that were made between the defendant and me. My husband did not and would not, under any circumstances, agree to money being withdrawn from our joint bank account being given to the defendant (or anyone else) as a gift.*
79. *In response to paragraph 26 of the said Affidavit, I am seeking an injunction in regards to the new concrete dwelling house being the house that I paid for, not the land. The house occupies only a small portion of the total area of the defendant's family land and the granting of the injunction would not deprive the owners of their use of the land.*

[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 to 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

- (i) 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.
- (ii) The plaintiff in the instant case must first satisfy the Court that on the evidence presented to it, her claim to an interest in the property does raise a serious question to be tried; and, having done so, she 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.
- (iii) The plaintiff says;
- She visited Fiji sometime in July 2016 and decided to build a house to stay in whenever she comes to Fiji for visits.
 - The first defendant offered her a portion of family land to build there.
 - It was mutually agreed between the parties that;
 - (i) the plaintiff would build her house on that piece of land;
 - (ii) the plaintiff and her husband to stay there whenever they visit Fiji;
 - (iii) the first defendant and his family would be allowed to live in the house as the caretaker and;
 - (iv) to look after the house between visits.
 - That the plaintiff sent money to the first defendant via bank transfers, Money gram and Western Union in the total sum of FJD\$122,703.52 for the construction of a new concrete dwelling house. A concrete dwelling house was built on the land offered by the 1st defendant.
 - Moreover, in November 2016, the first defendant needed money to buy a car and loaned from the plaintiff the sum of FJ\$16,565.30. In March and April 2017 an additional FJ\$6,600.00 was loaned inclusive of the car insurance and the total amount of FJ\$23,165.30 to be repaid at the rate of \$200.00 per month. The first defendant bought a car registration No. IY 193 for a cheaper price.
 - On 10th March 2018 the plaintiff went to see the house in Maro, Sigatoka but the first defendant chased her out from the compound claiming the house belongs to him and reported the plaintiff to the police for trespass.

- The plaintiff lodged a report at Sigatoka Police Station against the first defendant for obtaining financial advantage and for fraud. (Sigatoka Report No. 339/03/18).
- That the plaintiff has personal belongings in the first defendant's previous dwelling (the farmhouse) but the defendant refused to return them to the plaintiff.

(iv) (A) In reply, the 1st defendant stoutly denies the plaintiff's assertion that;

- *The first defendant offered her a portion of family land to build there.*
- *It was mutually agreed between the parties that;*
 - (i) *the plaintiff would build her house on that piece of land;*
 - (ii) *the plaintiff and her husband to stay there whenever they visit Fiji;*
 - (iii) *the first defendant and his family would be allowed to live in the house as the caretaker and;*
 - (iv) *to look after the house between visits.*

(B) The 1st defendant acknowledged the receipt of moneys from the plaintiff and says that the plaintiff offered a 'financial help' to build a house for his family on the land and to buy a car for him. He says that the money was meant to be a "financial help" given to his family at no cost and do not have to be paid back. He says that he is legally not obliged to pay this money back to the plaintiff since it was given as a financial help.

(v) As I see it, there is a dispute whether parole contract has or has not been entered into and there is conflicting affidavit evidence as to facts on which the claim of the plaintiff and the 1st defendant depend. In this case, the legal rights of the parties depend upon facts that are in dispute between them. In this regard Lord Diplock said in American Cyanamid (supra) at page 510;

"It is no part of the Court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature consideration. These are matters to be dealt with at the trial".

The affidavit evidence shows that there are serious questions to be tried. Was there a verbal agreement between the parties to have a house built on the land for the plaintiff? Did the plaintiff pay for a house to be built on the land? Was there fraud by false representations? Did the first defendant offer a portion of his family land to the plaintiff to have a house built on the land for 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 alleged verbal agreement? Where does the plaintiff stand legally? Did the first defendant fail to disclose to the plaintiff that the property belongs to a third party? Did the first defendant fail to inform the plaintiff that there was no proper lease on the property? Did the first defendant fail to inform the plaintiff that the land in question is crown land belongs to a third party? Did the first defendant fail to disclose information to the plaintiff when he was under a legal duty to disclose that information dishonestly intending, by that failure, to make a gain or cause a loss? Was there fraud by failure to disclose information? Is it legal to build a house on a third party's property? Where does the plaintiff legally stand? Did the first defendant make a representation to the plaintiff that the land where the house sits is his family land? Did the first defendant make a false representation dishonestly knowing that the representation was untrue with intent to make a gain for him?

All these are serious questions to be tried in this case and I reserve these questions for trial?

It must also be considered on what basis the first defendant will defend this action.

The first defendant says that the alleged parole contract would be unenforceable since it fails to comply with Section 59 of the Indemnity, Guarantee and Bailment Act, Cap 232.

It is, first, necessary to observe what the statute says. Section 59 of the **Indemnity, Guarantee and Bailment Act, Cap 232** is in these terms so far as relevant;

Section 59 relevantly provides:

"59. No action shall be brought....."

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

*.....
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."*

The bank spread sheet indicating the amount of money transferred and the purpose of transfer (annexure marked KA-1 and referred to in the affidavit of the plaintiff sworn on 04/05/2011) may sometimes constitute note or memorandum in writing of the parole contract to satisfy Section 59 of the Indemnity, Guarantee and Bailment Act. The annexure marked KA-1 is open to the construction and the Court needs to consider what weight should be attached to it. That it is a spread sheet, does not mean that it might not be also be a memorandum or note of a parole contract. I do not want to lay down any final conclusion as regards the question whether the spread sheet in question does satisfy the requirements of the Indemnity, Guarantee and Bailment Act. This point the plaintiff

is entitled to have tried in open Court. So without travelling further into the details, I should confine myself to saying that the determination of the question involves an examination of a greater number of judicial decisions in the subject of the sufficiency or insufficiency of the memorandum or note. This is a matter to be dealt with at the trial. It is a difficult question of law which calls for detailed argument and mature consideration.

- (vi) His Lordship Hon. Justice Ajmeer in **Deo v Hans [2018] FJHC 1113; HBC 121.2018 (21 November 2018)** correctly said;

31] *When considering an application for interim injunction, the Court only needs to be satisfied that there is a serious question to be tried on the merits. A cause of action that can be described as hopeless will not satisfy the test (National Commercial Bank Jamaica Ltd v Olint Corporation Ltd [2009] UKPC 16, [2009] 1 WLR 1405, at [11]- [12]. The result is that the Court is required to investigate the merits to a limited extent only. All that needs to be shown is that the claimant's cause of action has substance and reality. Beyond that, it does not matter if the claimant's chance of success is 90 per cent or 20 per cent (Mothercare Ltd v Robson Books Ltd [1979] FSR 466 per Megarry V-C at p.474, Alfred Dunhill Ltd v Sunoptic SA [1979 FSR 337 per Megaw LJ at p.373).*

- (vii) In equity, the plaintiff, arguably, might retain some beneficial interest in the property, in which case, it is arguable that the defendants would be holding the property on trust for the plaintiff.

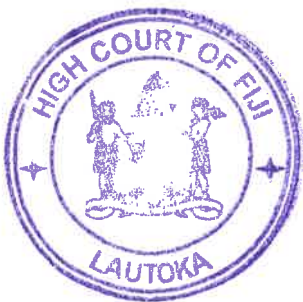
I am also of the view that the balance of convenience favors the granting of the injunctions sought. The plaintiff says that the defendants might sell the property. I am of the view that damages would not be an adequate remedy in the particular circumstances of the case. I say that because, if the injunctions 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, would lose the property forever. I doubt from where I sit if the defendants who are struggling farmers would be in a position to even pay the damages. The extent to which the disadvantages to each party would be incapable of being compensated in damages in the event of his succeeding at the trial is always a significant factor in assessing where the balance of convenience lies. The plaintiff says in paragraph (24) of his affidavit in support sworn on 14/05/2018, that she has a bank balance in the sum of AUS \$37,412.29 and the value of her property is worth AUS \$649,000.00 as at 01/07/2016. If an interlocutory injunction is granted and the defendants succeed at the trial, the plaintiff would be in a financial position to pay them such damages as are attributable to the injunction.


- (viii) Finally, the plaintiff seeks her personal belongings (annexure KA-6) left in the 1st defendant's house when she last visited them.

In response, the 1st defendant says that he is not aware any of the plaintiff's belongings left in the farm house. But he does not dispute about ownership of goods listed in annexure KA-6.

ORDERS

- [i] An interim injunction is granted against the 1st and 2nd defendants, their servants and or agents or whosoever restraining, preventing and or stopping them from dealing, selling, assigning and or transferring the concrete dwelling house built on Lot 3 State Lease No. 20866 Malomalo, Nadroga, Sigatoka occupied by the 1st defendant and his family at Maro, Sigatoka until the determination of this action.
- [ii] An interim injunction is granted against the 1st defendant, his servants, agents and whosoever restraining, preventing and or stopping them from selling, assigning and or transferring the vehicle registration number IY 193 until the determination of this action.
- [iii] The 1st and 2nd defendants are to preserve and maintain in good condition the said concrete dwelling house built on Lot 3 State Lease No. 20866 at Malomalo, Nadroga, Sigatoka and the said vehicle registration number IY 193 until the determination of this action.
- [iv]. The plaintiff is given access to the farm house and the concrete dwelling house on Lot 3, State Lease No- 20866 at Malomalo, Nadroga, Sigatoka, on 27-09-2019 between 9.00 am to 12.00p.m to pick up personal belongings listed in the schedule marked as annexure KA-6 in the affidavit in support of the plaintiff, sworn on 14-05-2018. The police stationed at Vatudradra Police Post should accompany the plaintiff when entering the house on 27-09-2019 between 9.00am to 12.00pm.
- [v] The costs of the application are costs in the cause.




..... 20/09/2019
Jude Nanayakkara
[Judge]

At Lautoka
Friday, 20th September, 2019