

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

**CIVIL ACTION NO. HBC 227 OF 2019**

**BETWEEN** : **LATEVITI TUIROTUMA SAUKURU** of Natalau Village, Nadi,  
Private Consultant.

**APPLICANT/PLAINTIFF**

**AND** : **MOHAMMED YAKUB KHAN** of Sonabua, Natalau, Farmer.

**RESPONDENT/FIRST DEFENDANT**

**AND** : **ITAUKEI LAND TRUST BOARD**, a statutory body duly established  
under the iTaukei Lands Act and having its registered office at 431  
Victoria Parade, Suva.

**SECOND DEFENDANT**

**Appearances** : Mr N. Vakacakau for the plaintiff  
Ms R. Chand with Mr F. S. Koya for the first defendant  
Mr J. Cati for the second defendant

**Date of Hearing** : 15 June 2020

**Date of Ruling** : 13 July 2020

# **R U L I N G**

*[on interim injunction]*

## **Introduction**

[01] This is an application by the plaintiff/applicant for an interim injunction against the first defendant until the trial of the substantive action.

[02] By an *ex parte* summons filed on 14 November 2019, the applicant sought that:

- a) *AN ORDER that the first defendant by himself, his agents and/or servants shall keep the obstructing gate on the access road open without restriction by whatsoever means pending completion of the plaintiff's civil action herein or until further orders of the Court.*
- b) *AN INJUNCTION restraining the first defendant by himself, his agents and/or his servants from interfering with the plaintiff or any other party/parties from interfering with the plaintiff or any other party/parties for that matter from using the access road required for the plaintiff to freely access his dwelling house/space at Mare, Natalau.*
- c) *AN INJUNCTION restraining the first defendant by himself, his agents and/or servants from harassing the plaintiff by any means whatsoever relating to his usage of the subject access road pending completion of the plaintiff's civil action herein or until further orders of the Court.*
- d) *ANY further orders that the Court deems just and necessary.*

[03] The application is made under O 29 of the High Court Rules 1988 as amended ("*HCR*") and the inherent jurisdiction of the court.

[04] In support of the application, the applicant relies on his affidavit in support filed on 14 November 2019.

[05] The first defendant/respondent is resisting the application, and he has filed an affidavit in opposition sworn on 18 December 2019.

[06] Initially, the court granted the injunction on *ex parte* basis to be valid until the application is heard *inter partes* on 28 January 2020.

[07] After a few adjournments, the application was heard *inter partes* on 15 June 2020. At the hearing, both counsel made oral submissions and they have also filed their respective written submissions in addition.

### **Background facts**

[08] The background facts as alleged by the applicant are as follows.

- [09] Lateviti Tuirotuma, the plaintiff/applicant (*"the applicant"*) is a member of the landowning unit whom Mohammed Yakub Khan, the first defendant/respondent (*"the respondent"*) has leased the material premises from.
- [10] The respondent owns an Agricultural Instrument of Tenancy Number 12907 known as Sonabua containing an area of 24.2538 hectares located along the side and foothills of the Sabeto mountain ranges (*"the plaintiff's premises"*).
- [11] The applicant lives with his family on a piece of reserved land landlocked between the vast area of the respondent's lease and the Sabeto mountain ranges.
- [12] The way up to the applicant's place of residence is through a long existing road which diverts from the main road and through the respondent's premises. This road is often used by the applicant, members of the applicant's mataqali, the public, Energy Fiji Limited, Telecom Fiji Limited to access towers along the mountain ranges.
- [13] The only other way, which the applicant was forced to use was from the Lautoka side of the Sabeto mountain ranges, known as Natabua, park his vehicle close to the foot of the mountain range and trek through the mountain by foot for up to 2 hours before reaching his home.
- [14] The applicant lives with his elderly mother, his wife and his children.
- [15] After acquiring the lease, the respondent widened the long existing road.
- [16] The respondent recently placed a gate over the entry to the long existing road thereby blocking any entry whatsoever for the applicant and anyone else who wishes to access the mountainous area.
- [17] Consequently, a dispute developed between the applicant and the respondent and at times the respondent would have the police from the Sabeto Police Post lurking around the applicant's compound and threatening the applicant not to use the public access through the respondent's lease.
- [18] The applicant, his wife, his young children and elderly sick mother had been forced to use an alternative access from the Lautoka side of the mountain to access their home. This meant that they parked their vehicle somewhere close to

the foot of the mountain and trekked through the mountain for up to 2 hours before they could reach their home.

- [19] The applicant brings this action so that he as well as his family may be allowed to continue using the long existing access road up to the mountains which the first defendant has unlawfully blocked off.
- [20] The applicant alleges that despite numerous correspondences both written and verbal, the second defendant has failed in its duty by refusing to address issues raised by the applicant.
- [21] The applicant seeks an interim injunction to restrain the respondent from blocking the access road.

### **Legal framework**

- [22] The HCR, O 29, R 1 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, counterclaim or third party notice, as the case may be.*

*(2) Where the applicant is the plaintiff and the case is one of urgency and the delay caused by proceeding in the ordinary way would entail irreparable or serious mischief such application may be made ex parte on 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 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.”*

## The governing principles

- [23] The governing principles to be applied in an application for interim injunction as explained in *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER are as follows:
- (a) Is there a serious question to be tried?
  - (b) Are damages an adequate remedy?
  - (c) Where does the balance of convenience lie?
  - (d) Are there any special factors?

## The evidence

- [24] The applicant has filed his affidavit in support of the application while the respondent his affidavit in opposition.

## Discussion

- [25] After filing a writ of summons with statement of claim attached, the applicant filed an application for an interim injunction against the respondent restraining from obstructing the road access, which the applicant had been using to access his home.
- [26] Initially, the court granted a limited interim injunction as sought on *ex parte* basis considering urgency of the matter. Thereafter, the matter was heard *inter partes*.
- [27] I had the benefit of clear and helpful written and oral submissions from counsel on both sides, Mr Vakacakau (of Falcon Chambers) for the applicant, and Ms Chand (of Siddiq Koya Lawyers) for the respondent.
- [28] iTaukei Land Trust Board, the second defendant did not contest these interlocutory proceedings.
- [29] The respondent opposes the application on the ground that:
- (a) The road was constructed by the respondent's son. This was after instrument of tenancy No. 13493 was given. This road was made to access the livestock and also to access the respondent's house.
  - (b) Telecommunications Fiji Limited (TFL), Department of Roads and Digicel Fiji Limited (DFL) did not use the road on instrument of

tenancy No. 13493 at any time. They access their towers which are located on the property of Mohammed Shorab Khan from Queens Highway which has two public access roads.

- (c) Energy Fiji Limited (EFL) did use road on Instrument of Tenancy No. 13493 to access our house for metre readings only. The general public did not at any time use this road either as it is not a public road.

[30] The applicant on affidavit states that since he lives in the hilly or mountainous terrain I usually use a long existing access road which connects from the main Queens Highway, through the cane areas of Sabeto and branches off through the respondent's sugar cane lease and up through the mountainous terrain to where I live and even beyond that area to other inland locations, and that the connecting (the one in dispute) has long existed well before the respondent's tenure of his lease as it is regularly used by EFL, TFL, Department of Roads, DFL and other such bodies and also the general public.

*Whether there is serious issue to be tried*

[31] The applicant says that he had been using the road in dispute even before he became lessee of the sugar cane lease. The respondent denies this. He says that the applicant has an alternative road from Lautoka end.

[32] At this stage of the litigation, it is not part of court's function to try to resolve conflicts of evidence on affidavits as to facts on which the claims of either party may ultimately depend nor decide difficult question of law which calls for detailed argument and mature consideration (see 407H, *American Cyanamid*).

[33] Primary issue involved in this action is the applicant's right of way. For the present purpose, I am satisfied that there is a serious question to be tried at trial as to the plaintiff's right of way. On the incomplete untested evidence I evaluate the chances of the respondent's ultimate success at more than 50 per cent.

*Adequacy of damages*

[34] The Court will not grant an interim injunction if damages would be an adequate remedy in lieu of interim relief. The ultimate issue to be decided at the trial would be the applicant's right of way over the disputed road.

[35] The applicant does not seek any interim relief against the second defendant.

[36] In my view, if the applicant were to succeed at the trial in establishing his right of way he would not be adequately compensated by an award of damages for the loss of his right as a result to the respondent's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. The dispute relates to the road access.

*Balance of convenience*

[37] It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises (see *American Cyanamid at 408E*).

[38] In this matter, it is doubtful that damages would be an adequate remedy to the applicant as his right of access is involved. The applicant complains that the respondent had blocked the road access-the applicant's right of way which he has been using for a long time. In my opinion, balance of convenience favours the applicant. The granting of the interim injunction would simply maintain the status quo until the trial of the matter, and serious mischief will not be caused to the respondent by the grant of the interim injunction allowing the applicant to continue to use the long existing access road as he was using. In the circumstances of the case, the balance of convenience is in favour of the granting of the interim injunction.

*Special factors*

[39] Ms Chand submits that there had been non-disclosure on the part of the applicant in that the applicant had failed to disclose to the court that he not only uses the respondent's property to get to his dwelling but also uses the road from the junction of Natabua (Lautoka) and that the respondent has livestock on his farm.

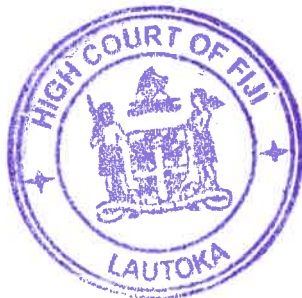
[40] The issue at this stage is whether the applicant is entitled to right of way over the respondent's property. The usage of alternative road is not material, and the applicant need not plead that the respondent has livestock. In any event, I do not find any material non-disclosure on the part of the applicant.

## Conclusion

[41] For the reasons which I have given and in the exercise of my discretion, in accordance with the principles laid down by *American Cyanamid*, I have decided that I should grant an interim injunction. I accordingly grant an interim injunction against the respondent/first defendant as sought. I would also make an order that the respondent/first defendant must pay costs of \$650.00, which is summarily assessed to the applicant.

### The result

1. Interim injunction granted.
2. The respondent/first defendant shall pay summarily assessed costs of \$650.00 to the applicant/plaintiff.
3. The substantive matter is returned to the registry for taking its normal course.



*M.H. Mohamed Ajmeer*  
13/7/20

.....  
M.H. Mohamed Ajmeer

JUDGE

At Lautoka

13 July 2020

Solicitors:

For the plaintiff/applicant: Falcon Chambers Lawyers, Barristers & Solicitors

For the first defendant/respondent: Siddiq Koya Lawyers, Barrister & Solicitor