

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

**Civil Action No. HBC 96 of 2019**

**BETWEEN**

**AZMAT HUSSAIN** and **SHAINAAZ BI** both formally of Nawaka,  
Nadi but currently residing in Christchurch, New Zealand,  
Welder and Domestic Duty respectively.

**PLAINTIFFS**

**ABDUL HUSSAIN** of Nawaka, Nadi.

**FIRST DEFENDANT**

**AND**

**iTAUKEI LANT TRUST BOARD** a body corporate incorporated under the  
iTaukei Land Trust Act with its registered office at  
431 Victoria Parade, Suva, Fiji.

**SECOND DEFENDANT**

Counsel : Mr. Charan R. for the Plaintiffs  
Ms. Swamy A. for the 1<sup>st</sup> Defendant  
Mr. Ratule K. for the 2<sup>nd</sup> Defendant

Date of Hearing : 23<sup>rd</sup> October 2023

Date of Judgment : 05<sup>th</sup> December 2023

## JUDGMENT

[1] The plaintiffs instituted this action seeking the following orders and declarations against the 1<sup>st</sup> and 2<sup>nd</sup> defendants:

- a. An injunction to restrain the 1<sup>st</sup> defendant whether by themselves or by their servants or agents or otherwise howsoever from selling and/or transferring and/or further encumbering iTaukei Lease No. 33765 land known as Nacaracara No. 3 (Part of) Lot 1 on SO 7693 in the Tikina of Nawaka in the Province of Ba containing an area of 1000 meter squares.
- b. An injunction to restrain the 1<sup>st</sup> defendant whether by themselves or by their servants or agents or otherwise howsoever from carrying out any development including but not limited to construction or demolition of any building over land comprised under iTaukei Lease No. 33765 land known as Nacaracara No. 3 (Part of) Lot 1 on SO 7693 in the Tikina of Nawaka in the Province of Ba containing an area of 1000 meter squares.

- c. A declaration that the agreement for lease being TLTB lease reference No. 4/10/40016 entered into between the 1<sup>st</sup> and 2<sup>nd</sup> defendants was null and void.
- d. A declaration that the Registered Lease being iTaukei Lease No. 33765 over land known as Nacaracara No. 3 (Part of) Lot 1 on SO 7693 in the Tikina of Nawaka in the Province of Ba containing an area of 1000 meter squares issued to the 1<sup>st</sup> defendant is null and void.
- e. Special damages in the sum of \$80,000.00.
- f. General damages for pain, suffering and loss of housing.
- g. Pre-judgment interest of 10% per annum from 14<sup>th</sup> September 2018 to the date of judgment pursuant to section 3 of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act.
- h. Post-judgment interest of 4% per annum from the date of judgment pursuant to the date of full payment pursuant to section 4 of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act as amended by section 2 of the Law Reform (Miscellaneous Provisions) (Death and Interest) (Amendment Decree) 2011.
- i. Indemnity cost.

[2] The two plaintiffs are legally married husband and wife and the 1<sup>st</sup> defendant is a cousin of the 2<sup>nd</sup> named defendant. The plaintiff had entered into an agreement with one Marica Qalothe Mataqali of Nawaka to purchase a piece of land known as Nakoliafor residential purpose.

[3] The 1<sup>st</sup> defendant who is a cousin of the 2<sup>nd</sup> named plaintiff also entered into an agreement with the same Mataqali to purchase the land adjacent to the plaintiffs' land.

[4] In the first agreement the plaintiffs paid \$500.00 as goodwill and agreed to pay \$20.00 a month until the lease is issued to them. The plaintiffs on 28<sup>th</sup> January 2006 entered into another agreement and agreed to pay \$30.00 a month until the lease is issued. When the plaintiff approached the 2<sup>nd</sup>

defendant for an application for an agreement for lease they were informed that an agreement for lease over the same portion of land had already been issued to the 1<sup>st</sup> defendant.

[5] The plaintiffs allege that the 1<sup>st</sup> defendant fraudulently misrepresented and induced the 2<sup>nd</sup> defendant to obtain the agreement for lease. The particulars of misrepresentation as averred in the statement of claim are as follows:

- a. While making an application for an agreement for lease, the 1<sup>st</sup> defendant caused land to be inspected by the 2<sup>nd</sup> defendant and/or their officers and/or agents and/or personal representatives.
- b. During the course of inspection, the 1<sup>st</sup> defendant caused the plaintiff's portion of land to be inspected, identified and marked as land occupied and owned by the 1<sup>st</sup> defendant.
- c. The information provided by the 1<sup>st</sup> defendant during the course of inspection was used to support the 1<sup>st</sup> defendant's application for an agreement for lease.

[10] Plaintiffs also allege that the 2<sup>nd</sup> defendant, while purporting to resolve the issues raised by the plaintiffs, breached its duty of care owed to the plaintiffs by issuing the 1<sup>st</sup> defendant with the registered lease. The particulars of breach as averred in the statement of claim are as follows:

- a. The 2<sup>nd</sup> defendant failed to adequately address the issues raised by the plaintiffs through the various letters written;
- b. The 2<sup>nd</sup> defendant failed to conduct proper investigations before issuing a registered lease under the 1<sup>st</sup> defendant's name;
- c. The 2<sup>nd</sup> defendant failed to provide the plaintiff with any substantial update or findings of the investigations;
- d. The 2<sup>nd</sup> defendant failed to properly carry out a physical inspection of the land over which the registered lease was granted prior to granting of the registered lease;

- e. The 2<sup>nd</sup> defendant failed to carry out any interviews with the plaintiffs prior to granting a registered lease over the land occupied by the plaintiffs;
- f. The 2<sup>nd</sup> defendant failed to act with due care and diligence while issuing the 1<sup>st</sup> defendant with a registered lease.

[11] The 1<sup>st</sup> defendant in his statement of defence while denying the above allegations states that the Mataqali has no right over the property and it is the 2<sup>nd</sup> defendant who is the lawful owner of the lease.

[12] The 2<sup>nd</sup> defendant while denying the allegations in the statement of claim states that;

- (a) under section 12 of the iTaukei Lands Trust Act 1940 it is not lawful for any iTaukei land to be alienate or dealt with by way of sale, lease or transfer or in any other manner whatsoever without the consent of the 2<sup>nd</sup> defendant being first had and obtained;
- (b) the purported agreement was implemented to the fullest by allowing the plaintiffs to occupy and take possession of the land upon payment of the \$500 goodwill and continued payment of rent to Marica Qalo;
- (c) performance of the obligations under the said agreement was without the 2<sup>nd</sup> defendant's prior written consent and therefore illegal as being contrary to section 12 of the iTaukei Land Trust Act 1940;
- (d) the plaintiff since 2001, took no steps to apply for a lease in order to regularize their occupation and possession of the subject land.

[13] The 2<sup>nd</sup> defendant states further that the construction by the plaintiffs of a concrete residential dwelling on the subject land was done so without the board's prior written consent and therefore illegal as being contrary to section 12 of the iTaukei Land Trust Act 1940 and any loss or damage arising out of

any damage to or loss of the said concrete residential dwelling ought to be borne by the plaintiffs themselves because of their illegal actions.

[14] The 2<sup>nd</sup> named plaintiff testified at the trial and said she entered into a tenancy agreement (P1) with one Marica Qalo and paid Goodwill of \$500.00 and also agreed to pay \$20.00 per month as rent. The agreement was tendered in evidence but it was objected to by the learned counsel for the 1<sup>st</sup> defendant on the ground that the 2<sup>nd</sup> named plaintiff is not a signatory to this document. However, the 2<sup>nd</sup> named plaintiff was a witness to this document and the agreement is between her husband who is the 1<sup>st</sup> named plaintiff in this action and Marica Qalo. The 2<sup>nd</sup> named plaintiff is therefore a competent witness to tender this agreement in evidence.

[15] The plaintiff's action depends on this agreement. The question here is whether the Marica Qalo who is supposed to be a member of the Land Owning Unit was entitled to enter into this agreement.

[16] Section 5 of the iTaukei Land Trust Act 1940 provides:

(1) iTaukei land shall not be alienated by iTaukei owners whether by sale, grant, transfer or exchange except to the State, and shall not be charged or encumbered by iTaukei owners, and any iTaukei to whom any land has been transferred heretofore by virtue of an iTaukei grant shall not transfer such land or any estate of interest therein or charge or encumber the same without the consent of the Board.

(2) All instruments purporting to transfer, charge or encumber any iTaukei land or any estate or interest therein to which the consent of the Board has not been first given shall be null and void.

[17] It is therefore clear that the agreement entered into between the 1<sup>st</sup> named plaintiff and Marica Qalo is not an agreement enforceable in law and it does not give any right to the plaintiffs over the property which is the subject matter of this action.

[18] The plaintiffs failed to adduce any evidence to show that they obtained permission to construct a dwelling house on the property. Since the construction of the dwelling house was illegal the plaintiffs are not entitled to any damages for the loss of the house.

[19] The evidence of the 2<sup>nd</sup> named plaintiff is that she liaised with iTLTB to obtain a lease and in support of that she tendered a letter dated 10<sup>th</sup> August 2017, written by iTLTB to the 1<sup>st</sup> defendant stating *inter alia*, that;

1. We process partial surrender of area occupied by Shainaaz Bi and Azmat Hussain.
2. We will recalculate the rent and premium charged in relation to the new area that will be retained.
3. We will refund any overpayment in regards to new area.

[20] However, on 08<sup>th</sup> October 2013 the iTLTB sent an offer letter to the 1<sup>st</sup> defendant offering a lease for the same property for \$6,544.00 which was accepted by the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant was then granted an agreement for lease effective from 01<sup>st</sup> July 2013 for a period of fifty years and on 15<sup>th</sup> December 2017 the 1<sup>st</sup> defendant was granted the iTaukei Lease No. 33765 (P3).

[21] The plaintiffs allege that the 1<sup>st</sup> defendant fraudulently misrepresented and induced the 2<sup>nd</sup> defendant to grant him the lease. The 2<sup>nd</sup> defendant's officers have inspected the land before granting the lease. The 1<sup>st</sup> defendant is not duty bound to tell the 2<sup>nd</sup> defendant about the plaintiffs' interest in the property. The plaintiffs should have liaised with the 2<sup>nd</sup> defendant. In fact they have liaised with the 2<sup>nd</sup> defendant but the 2<sup>nd</sup> defendant decided to grant the lease to the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant cannot be blamed for that. The 2<sup>nd</sup> defendant had granted the lease to the 1<sup>st</sup> defendant acting on the powers conferred upon it by the statute. There is no allegation that the 2<sup>nd</sup> defendant exceeded its powers in granting the lease to the 1<sup>st</sup> defendant.

[22] The witness for the plaintiff in his testimony stated that he received the notice to vacate the property (P7) but his sister, the 2<sup>nd</sup> named plaintiff and her husband were in New Zealand. There had been a separate action for eviction of the plaintiffs and whether they were properly served notice to vacate was an issue in that matter and the plaintiffs should have raised that issue in eviction proceedings.

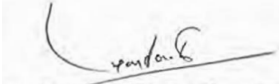
[23] The plaintiffs claim \$80,000.00 as damages caused to the house. It is a universally accepted principle of law that special damages must be pleaded and proved. In this matter in proof of the special damages claimed the plaintiffs tendered two documents marked as "P5" and "P6". These documents are not valuation reports but only quotations for the construction of a proposed residence. Therefore, these documents cannot be considered as evidence for the value of the house alleged to have been demolished by the 1<sup>st</sup> defendant.

[24] For the above reasons the court makes the following orders.

#### ORDERS

1. The plaintiffs' action is dismissed.
2. The plaintiffs are ordered to pay the 1<sup>st</sup> defendant \$3000.00 to the defendants (\$1,500.00 each) as costs of this action.



  
Lyone Seneviratne

**JUDGE**