

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

**CIVIL ACTION NO. HBC 61 OF 2023**

**BETWEEN** : **SAIYAD MUNAF** of Lot 3, Votualevu, Nadi, Fiji Businessman  
**PLAINTIFF**

**AND** : **GURMIT SINGH** of Votualevu, Nadi, Fiji.  
**1<sup>ST</sup> DEFENDANT**

**AND** : **ITAUKEI LAND TRUST BOARD**  
**2<sup>ND</sup> DEFENDANT**

**AND** : **DIRECTOR OF TOWN AND COUNTRY PLANNING**  
**3<sup>RD</sup> DEFENDANT**

**AND** : **THE ATTORNEY GENERAL OF FIJI**  
**4<sup>TH</sup> DEFENDANT**

**BEFORE** : Hon. Mr. Justice Mohamed Mackie

**APPEARANCES** : Mr. S. Lutumailagi, for the Plaintiff  
Ms. A. Sharma, for the 1<sup>st</sup> Defendant.  
Mr. M. Rasiga, for the 2<sup>nd</sup> Defendant.  
Mr. S. Kant for the 3<sup>rd</sup> & 4<sup>th</sup> Defendants.

**HEARING** : 1<sup>st</sup> November, 2023.

**WRITTEN SUBMISSIONS:** Filed by the Plaintiff on 8<sup>th</sup> November 2023.  
Filed by the 1<sup>st</sup> Defendant on 29<sup>th</sup> November 2023.  
Filed by the 2<sup>nd</sup> Defendant on 10<sup>th</sup> November 2023.  
Filed by the 3<sup>rd</sup> & 4<sup>th</sup> Defendants on 1<sup>st</sup> November 2023.

**DATE OF RULING** : 14<sup>th</sup> February, 2024

**RULING**

**A. INTRODUCTION:**

1. This Ruling pertains to the hearing held before me on the 1<sup>st</sup> of November 2023 in relation to the inter parte NOTICE OF MOTION preferred by the Plaintiff , supported by an Affidavit sworn by him on 16<sup>th</sup> March 2023 and filed on 17<sup>th</sup> March 2023, together with exhibits marked from “A” to “J” seeking , inter alia, the following orders:

1. *THAT the Defendants and/or its agents be restrained from interfering, dealing with, Leasing, transferring, selling, alienating, amending or otherwise disposing of land comprised in Nakula 2 (part of) Lot 3 on SO 6270 Itaukei Lease Number 29681;*
  2. *That the Defendants and/or its agents be restrained from modifying, amending, altering the Approved SO Plan 6270 and registering the same at the Registrar of Titles Officer;*
  3. *That the 1st Defendant be ordered to remove the illegal fence line constructed on the Service Lane to allow the Plaintiff access to the Service;*
  4. *That the Defendants be restrained from modifying, altering or decreasing the approved 9.0 meter Service Lane as per the Approved SO Plan 6270;*
  5. *That an order be made for Fiji Police Force to remove the illegal fence to allow the Plaintiff access to the Service Lane;*
  6. *That an order be made on immediate removal of the illegal access road made by the 1<sup>st</sup> Defendant along the Service Lane;*
2. The Application is made pursuant to Order 29, Rule (1) and (2) of the High Court Rules 1988 and under the inherent jurisdiction of the court.
  3. The following Affidavits have been filed;
    - i. The Affidavit of SAIYAD MUNAF, the Plaintiff, sworn on 16<sup>th</sup> March 2023 (**the Affidavit in support**),
    - ii. The Affidavit of VINEND NAIDU sworn on 17<sup>th</sup> April 2023 and filed along with annexures “VN-1” to “VN-4” (**the Affidavit in opposition on behalf of 3<sup>rd</sup> & 4<sup>th</sup> Defendants**),
    - iii. The Affidavit of SAIYAD MUNAF sworn on 1<sup>st</sup> June 2023 and filed with an annexure marked as “A” (**the Affidavit of Reply to the Affidavit of VINEND NAIDU**),
    - iv. The Affidavit of MIKAELE KOROIVULAONO sworn on 6<sup>th</sup> June 2023 (**the Affidavit in Response on behalf of the 2<sup>nd</sup> Defendant**),
    - v. The Affidavit sworn on 24<sup>th</sup> July 2023 by MIKAELE KOROIVULAONO filed with annexure “MK-1” (**the Supplementary Affidavit on behalf of 2<sup>nd</sup> Defendant**)
    - vi. The Affidavit of GURUMIT SINGH, the 1<sup>st</sup> Defendant sworn on 12<sup>th</sup> October 2023 and filed with annexures marked as “A” & “B”. (**The Affidavit in opposition**)

**B. FACTUAL BACKGROUND:**

4. Simultaneously, the Plaintiff also filed his writ of summons and the statement of claim (SOC) against the Defendants moving for the following reliefs;
  - a. *THAT the Defendants and/or its agents be restrained from interfering, dealing with, Leasing, transferring, selling, alienating, amending or otherwise disposing of land comprised in Nakula 2 (part of) Lot 3 on SO 6270 Itaukei Lease Number 29681;*
  - b. *That the Defendants and/or its agents be restrained from modifying, amending, altering the Approved SO Plan 6270 and registering the same at the Registrar of Titles Officer;*
  - c. *That the 1st Defendant be ordered to remove the illegal fence line constructed on the Service Lane to allow the Plaintiff access to the Service;*

- d. That the Defendants be restrained from modifying, altering or decreasing the approved 9.0 meter Service Lane as per the Approved Plan SO 6270;
- e. That an order be made for Fiji Police Force to remove the illegal fence to allow the Plaintiff access to the Service Lane;
- f. That an order be made on immediate removal of the illegal access road made by the 1st Defendant along the Service Lane;
- g. **That the 1<sup>st</sup> Defendant to pay damages in a sum of FJD 2, 60,000.00 (Two Hundred Sixty Thousand Dollars). (Emphasis mine)**
- h. Post judgment interest of 4% per annum from the date of final judgment till the satisfaction of it.
- i. Costs of this action on indemnity basis.

5. The Plaintiff in his SOC states, *inter alia*,; **THAT,**

1. In the year 2011 he acquired a piece of land known as Nakula 2 (part of) Lot 3 on Plan SO 6270 in Itaukei Lease No- 29681, situated in Votualevu, Nadi, Fiji.
2. The 1<sup>st</sup> Defendant is a resident on a land at a distance from the subject land.
3. He intended to develop his land (lot 3) in 2 stages, the first stage by building a commercial center for rental purpose and the second stage for the construction of a Car Park at the back of the building.
4. Prior to his purchasing the subject land, a sub division was done, and was approved by the 3<sup>rd</sup> Defendant on 26<sup>th</sup> July 2011 and the SO Plan No-6270 was approved by the 2<sup>nd</sup> Defendant on 20<sup>th</sup> October 2011. As per the Deposit Plan SO 6270, a 9.0 meter wide service lane was allocated for commercial use of it as access for the customers of the business and general public.
5. He was informed at the time of acquisition that the 1<sup>st</sup> Defendant had no any proper lease for the land he was residing on, and prior to 2015 he (the 1<sup>st</sup> Defendant) was using a temporary access road through the land of one Tour Manager. As the Tour Manager subsequently constructed a fence on their boundary, the 1st Defendant's access road was cut off and he made an illegal access from Service lane (lot 4 in SO 6270), which had been provided mainly for commercial lots and its customers.
6. In that process, the 1<sup>st</sup> Defendant damaged the concrete pavement and the "V" drainage, and despite numerous requests and demands were made to stop using the illegal access road as there was no provision made for any access road to be joined through the Service lane in SO 6270, he continued to do so. The Plaintiff states further, that the 1<sup>st</sup> Defendant also erected a fence along the access road created by him and thereby the Plaintiff's access to the service lane was fully prohibited, which resulted in halting of the construction of the commercial center.
7. He was under the belief and advised that the Service lane was mainly allocated for the commercial lots and its customers and as a result of the 1<sup>st</sup> Defendant's fence, the full access has been restricted, his construction works are not completed due to the illegal fence and he is unable to rent out and as a result he is incurring losses to potential rental income.
8. He sent numerous communications to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to have the dispute resolved as they are the relevant statutory bodies, which deal with the sub division and its occupation, but nothing materialized.
9. Plaintiff's right to access the Service Lane has been adversely affected and continue to be affected if the 1<sup>st</sup> Defendant's fence and the access road are not removed.
10. The scheme plan submitted by the 1<sup>st</sup> Defendant to 3<sup>rd</sup> Defendant involves amendment to SO 6270 as it provides for amending the pegs to allow the 1<sup>st</sup> Defendant to have an access road and this has had a huge impact on Plaintiff for his commercial buildings and would decrease the value of his property (Lot-3). The alterations to the Plan at this stage in time will adversely affect his lot 3 and incur him further unanticipated losses.

**C. THE APPLICABLE PRINCIPLES:**

6. The applicable principles are now generally settled and well known. 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[1]**” as follows:

*(A) Whether there is a serious question to be tried?  
(B) Whether damages would be an adequate remedy?  
(C) Whether balance of convenience favor granting or refusing interlocutory injunction?*

7. 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 him 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.”*

8. In **Hubbard & Another v. Vosper & Another [2]** 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 defendant 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 copy right, 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. CONSIDERATION:**

9. The Plaintiff did not file any Reply Affidavit to the Affidavits in opposition filed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, except for to that of the 3<sup>rd</sup> and 4<sup>th</sup> Defendants. At the hearing, Counsel for the parties made oral submissions. Additionally, written submissions were tendered by the Plaintiff, the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants as aforesaid. I am grateful to counsel for those lucid and relevant submissions and the authorities cited and annexed thereto.

**Nature of the Order/s Sought:**

10. Careful perusal of the reliefs sought by the Plaintiff in his Notice of Motion shows that the Order 1, 2 and 4 therein are restraining orders, to prevent the Defendant/s from doing

certain act/s, while the Orders 3, 5 and 6 are Mandatory Orders or Positive Orders to direct the Defendant/s to do certain act/s. Remarkably, by the relief No-5, the Plaintiff moves the Court to Order the Fiji Police Force to remove the purported illegal fence, when the Fiji Police is not a party and have nothing to do with this Civil dispute.

11. Moreover, the injunctive relief prayed for as per paragraph 1 of the Notice of Motion, is in relation to Lot 3 on Plan SO 6270, for which the Plaintiff claims to have become the Lessee as per Lease No- 29681 marked as "A".
12. As per the Affidavits in opposition and the submissions made by all the Defence Counsel, the Plaintiff's ownership or his possession of Lot No-03 is not disputed at all, except for alleging, as per the letter dated 22<sup>nd</sup> October 2021 sent by the 2<sup>nd</sup> Defendant to the Plaintiff, that he (the Plaintiff) is blocking the Service lane (use of it by the 1<sup>st</sup> Defendant) and has failed to obtain consent for the development, which are breaches and liable for penalty as per the said letter dated 22<sup>nd</sup> October 2021 marked as "F" by the Plaintiff in his Affidavit in support.
13. This shows that there is no any threat or objection by any of the Defendants to the Plaintiff's Lease holding rights to his Lot 3 as long as he does not obstruct the Service lane, which is lot 4 in SO Plan 6270, and he obtains necessary approval/ consent for his development works.
14. The whole issue here revolves around the Plaintiff's objection for the creation of a roadway for the 1<sup>st</sup> Defendant to access his land from the service lane as per the amended scheme plan submitted by the 1<sup>st</sup> Defendant, which has been approved by the 3<sup>rd</sup> Defendant on or about 15<sup>th</sup> March 2021 . The 1<sup>st</sup> Defendant is now using the said road leading to the Service Lane from his house and has also erected a fence I along the Eastern boundary of the said road.
15. The Plaintiff in his Affidavit admits that the 1<sup>st</sup> Defendant prior to 2015 was using a temporary access through a land belonged to the Tour Manager and after the closure of it started to use an access through the Service lane from 2015. Now, the 1<sup>st</sup> Defendant's creation and usage of this access road through the Service lane has been regularized and approved by the 3<sup>rd</sup> Defendant and the Surveyor General in the year 2021.
16. The 2<sup>nd</sup> Defendant Board too has accepted this amended Scheme plan for them to consider issuing the Lease to the 1<sup>st</sup> Defendant and by their letter dated 22<sup>nd</sup> October 2021 have advised the Plaintiff not to obstruct the Service lane and usage of it by the 1<sup>st</sup> Defendant to access his land through the road that leads from Vatualevu main road through the Service lane. Vide paragraphs 2 to 5 in the letter dated 22<sup>nd</sup> October 2021.
17. It is to be borne in mind that the Plaintiff does not have an exclusive right to the Service lane situated on his Northern Boundary. He seems to be in an attempt to have the Northern Boundary of his lot 3 fully opened to the Service Lane for his exclusive use of the end part of the Service lane.
18. However, creation of the 1<sup>st</sup> Defendant's access road way, by erecting fence along the Eastern Boundary of it and the usage of the said access road are series of acts occurred in the year 2015 and the access road is now being used by the 1<sup>st</sup> defendant for several years.

The application for amendment of the SO Plan 6270 was made on 16<sup>th</sup> February 2021 and the amended Plan was approved by the 3<sup>rd</sup> Defendant on 15<sup>th</sup> March 2021 subject to conditions. Vide “VN-2”. Finally, the conditions being fulfilled, direct access to 1<sup>st</sup> Defendant’s land was approved on 31<sup>st</sup> March 2022 as per Plan Number SO 9425 marked as “VN-4” As per this Plan part of Service lane has been amalgamated with lot 1 on SO 9425.

19. All those activities and steps are not acts currently being committed by any of the Defendants or in the verge of being committed by them in the immediate future for those to be stopped, restrained or enjoined by the Order No-2 and 4 sought by the Plaintiff. Thus, the Application for Order No-2 and 4 has to, necessarily, fail.
20. As far as Orders 3, 5 and 6 are concerned, they are Mandatory or positive Orders, which cannot be granted unless it is shown that grave damages and prejudice have resulted warranting the immediate intervention of the Court by granting such mandatory Orders. There is no such a state of affairs in this case for the Court to intervene by way of such Orders. Hon. Justice Amarathunga in ***Freedive (Fiji) Charters Ltd v Bule Water Craft Ltd – Civil Action No- HBC 153 of 2016 (29 August 2016)*** discussed the case of ***Redland Bricks Ltd v Morris and another [1969 ] 2 All ER 576*** by House of Lords with regard to the issue of Mandatory injunctions.

**No claim for permanent injunction and/or Substantial Reliefs:**

21. Careful perusal and comparison of the final reliefs claimed in the Statement of Claim, and the injunctive reliefs claimed in the Notice of Motion shows that the Plaintiff has not prayed for any permanent injunctive orders or any substantial reliefs such as a declaratory relief in his favor and against any of the Defendants.
22. All the reliefs claimed in the Statement of claim and in the Notice of Motion are only temporary reliefs, except for the final relief prayed for damages in a sum of \$260,000.00 (Two Hundred and Sixty Thousand Dollars) in the prayer to SOC. When the damages are quantified, no injunctive orders will be granted. The Plaintiff hereof has quantified and limited his damages to \$260,000.00 and in his Affidavit in support he does not aver a single word that irreparable damages would be caused if injunctive orders are not granted as prayed for. An injunctive order is generally issued only when the damages are irreparable and it cannot be compensated by an award of monetary damages.
23. On the other hand, no purpose will be served by issuing an injunctive Order when there is no any substantial claim or permanent injunctive reliefs prayed for in the Statement of claim. In ***Goundar v Fiesty Ltd [2014]FJCA 20 ABU 0001.2013 (5 March 2014)*** Amaratunga JA in the court of Appeal (with whom Chandra and Muthunayagam JJA concurred) held:

*“32. The application for injunction needs to be refused in limine, as there is no permanent injunctive relief sought in the claim. The only claim is for damages for trespass and negligence against the 1st and 2nd Defendants respectively. In American ***Cyanamid Co v Ethicon Ltd [1975] UKHL 1; [1975] 1 All ER 504 at 510 Lord Diplock*** held;*

*“...So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of*

*succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.*

*As to that, the governing principle is that the court should first consider whether if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial' (emphasis is mine).*

24. In the case in hand, the Plaintiff cannot seek any interlocutory injunctive relief or mandatory order without seeking a permanent injunction or a substantial relief. It is a fundamental issue that has been overlooked by the Counsel for the Plaintiff. This is pivotal in an Application for any injunctive relief and since there was no permanent injunction sought this application for interim injunction should be rejected.
25. In the words of Lord Diplock in **American Cyanamid (at p. 510)**, the plaintiff must have a **“real prospect of succeeding in his claim for a permanent injunction at the trial”** and here the plaintiff seeks no permanent injunction.
26. The injunction sought for in prayer (1) to (6) in the inter parte Notice of Motion filed on 17<sup>th</sup> March 2023 could never stand on its own without a final judgment for a permanent injunction and/ or any other substantial relief in relation to the subject matter. A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent on there being a pre-existing cause of action against the defendants arising out of an invasion, actual or threatened, by them of a legal or equitable right of the plaintiff for the enforcement of which the defendants are amenable to the jurisdiction of the court. The injunction sought in the summons must be part of the substantive relief to which the plaintiff's cause of action entitles it; and the thing that is sought to restrain the defendants from doing must amount to an invasion of some legal or equitable right belonging to the plaintiff and must be enforceable by the final judgment for an injunction . The Plaintiff does not have an exclusive right to the Service lane as alluded to above. Therefore, the application should be dismissed in limine as there are no permanent injunctions sought in the statement of claim in relation to prayer (1) to (6) of the Notice of Motion. This complication weighs, and in my judgment, weighs quite significantly, against the grant of the interlocutory relief that is sought.
27. In view of the above, this Court does not find any serious question to be tried at the substantial trial as to the plaintiff's entitlement for relief. The court must be satisfied that there is a “serious question to be tried”. In *American Cyanamid v Ethicon* (supra) Lord Diplock at page 510 said:

*“The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried. “*

28. Lord Diplock further held:

*“It is no part of the court’s function at this stage of litigation to try to resolve conflicts of evidence on affidavits 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 considerations. These are matters to be dealt with at the trial.”*

29. In **“Honeymoon Island (Fiji) Ltd v Follies International Ltd[5]”** Pathik JA, Powell JA and Bruce JA enunciated the following:

*“The grant of interlocutory injunction relief is discretionary. The court must be satisfied that there is a serious question to be tried, in other words, whether the application has any real prospect of succeeding in its claim for a permanent injunction at the trial.”*

30. I am mindful that the present application is an interim application that does not and cannot amount to a trial or quasi-trial of the issues that will ultimately be determined.
31. The plaintiff must demonstrate a prima facie case. This requirement is to be understood as being whether there is a serious question to be tried as to the plaintiff’s entitlement to relief, not whether it is more probable than not that the plaintiff will succeed at trial. The sense in which the test is understood is that the plaintiff must prove, prima facie, a sufficient likelihood of success to justify, in the circumstances, the preservation of the status quo pending trial. The plaintiff must show that it has a putative legal or equitable right in respect of which final relief is sought which will justify the temporary relief.

#### **No Undertaking as to damages**

32. Nowhere in his Affidavits, has the Plaintiff averred that irreparable damages would be caused to him, if the Defendants are not restrained from the acts that he complains of. Instead, he has quantified his would be damages in a sum of \$260,000.00. This itself deprives the Plaintiff of his purported right to obtain an injunctive relief. The third and fourth defendants have submitted that the plaintiff has failed to provide any undertaking as to damages, except for the usual undertaking. However, the Plaintiff is at liberty to substantiate damages, if any, at the trial. In the circumstances, the grant of an interlocutory injunctive or order is not warranted.
33. Calanchini J(as he then was) in **Nand v Prasad, [2011] FJHC 85; HBC277.2010 (21 February 2011)** stated:

*“The law is well settled in Fiji that an applicant for interim injunctive relief who offers an undertaking as to damages must also proffer sufficient evidence of his financial position: Honeymoon Islands (Fiji) Ltd —v- Follies international Limited (unreported Civil Appeal No. 63 of 2007 delivered on 4 July 2008). As a result the Plaintiff in the present application was required to proffer sufficient evidence of his financial position. The sufficiency of that evidence was a relevant consideration in determining the value of the undertaking as to damages which in turn was a matter to be taken into account by the Court in deciding whether to exercise its discretion in favour of the applicant...”*

34. In the case before me, the plaintiff has not shown that there is a serious issue to be tried, he has a real prospect of success and if injunction is not granted, he will suffer irremediable



loss. He has confined his remedy only to damages, which he has quantified. Therefore, I conclude that damages would be an adequate remedy for the plaintiff and that it is not unjust for him.


**The balance of convenience:**

35. The Plaintiff in his Affidavit has admitted that the 1<sup>st</sup> Defendant is using this disputed road through the Service Lane connecting the Vatualevu Road from the year 2015. Obviously, he has no an alternative road to access his house from the Vatualevu Road. If orders sought are granted, as prayed for, undoubtedly, the 1<sup>st</sup> Defendant will not have an access to his land and House, where he resides from his birth, and he will be land-locked.
36. The balance of convenience requires a consideration of matters favoring or militating against the granting of an injunction and will necessarily involve a consideration of the strength of the plaintiff's claim, assuming that a serious issue has been identified. I have already expressed my view that no serious issue exists to be tried. Therefore, it is not necessary to assess the relative strength of the parties' case.

**E. ORDERS**

1. The Plaintiff's application, for interlocutory restraining and mandatory orders, is refused.
2. The plaintiff is to pay costs summarily assessed in a total sum of \$1,500.00 within 14 days.
3. The said cost is to be paid \$500.00 each to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and the balance \$500.00 to be paid unto the 3<sup>rd</sup> and 4<sup>th</sup> Defendants.
4. The parties are directed to proceed with pre-trial steps before the Master of the High Court on the substantive matter.



  
A.M. Mohamed Mackie  
Judge

At the High Court of Lautoka on this 14<sup>th</sup> day of February, 2024.

**SOLICITORS:**

For the Plaintiff:                      Messrs Ace Legal, Barrister & Solicitor  
For the 1<sup>st</sup> Defendant:                Legal Aid Commission  
For the 2<sup>nd</sup> Defendant:                Legal Department, Itaukei Land Trust Board  
For the 3<sup>rd</sup> & 4<sup>th</sup> Defendant:        Attorney General's Chamber