

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

**Civil Action No. HBC 27 of 2014**

**BETWEEN : KESHMIN PRASAD**

**Plaintiff**

**AND : KATRINA VAKAVERE and RITESH KRISHNA**

**Defendants**

**Appearances : Mr Vuataki for the Plaintiff**

**: Mr Sharma for the Defendants**

**Date of Hearing : 10<sup>th</sup> March 2014**

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**JUDGEMENT**

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**Introduction**

1. This Inter-Parte Notice of Motion supported by the affidavit of the plaintiff namely Keshmin Prasad was filed on 3<sup>rd</sup> March 2014 seeking the following orders
  - a) That the Defendants be ordered by injunction to obtain consent from iTLTB for tenancy and clear ground rent arrears on Native Lease No. 21261 being (part of) Lot 1 Plan SO 1570.
  - b) That there be an injunction requiring the defendants to return the shop keys to the Plaintiff or whosoever may hold such keys until further Orders.
  - c) That the Defendants their servants or agents be restrained by injunction from preventing the Plaintiff and the Plaintiffs staff from

entering the shop and operating the bowser or harassing the Plaintiffs staff until further Orders.

- d) General Damages for breach of promise.
  - e) Any order that the Honourable Court deems just and fair.
  - f) Costs for this application on an indemnity basis.
2. The defendants affidavit in reply filed on 10<sup>th</sup> March 2014 sworn by Katirina Vakavore aka Bakavere Marellsoni on 8<sup>th</sup> March 2014
  3. The Plaintiffs affidavit in reply to the defendants affidavit filed on 10<sup>th</sup> March 2014.
  4. When the matter came up before the Court on 10<sup>th</sup> March 2014 Counsels for both parties made oral submissions and the Counsel for the defendants supplemented his submission by tendering a written submission to Court.
  5. The Counsel for the plaintiff informed the court that he is not pursuing the order for general damages for breach of promise at this stage.

#### **The Facts**

6. In his Affidavit in support of the ex parte notice of motion the plaintiff states inter alia:
  - a) That he is the tenant of native Lease No 21261 of land known as part of Vitogo, Lot 1 on Plan No S01570 bearing NLTB Reference No 4/7/4543 situated on the Province of Ba and District of Vuda on the island of Viti Levu containing an area of 2013 square meters.
  - b) That the defendants and the plaintiff entered into a Tenancy Agreement whereby it was agreed that the plaintiff would occupy the said property containing the shop and the Bowser on a monthly rental of \$1,400.00 for seven years from 1<sup>st</sup> March 2011 to 28<sup>th</sup> February 2018.
  - c) That part of the agreement was to obtain the consent from the iTaukei Land Trust Board and that ground rent rental arrears would be cleared by the defendant which stood at \$3365.31 as at 26<sup>th</sup> February 2014.
  - d) That on or about 10<sup>th</sup> July 2012 the plaintiff was asked by the defendant to pay out their ground rent the sum of \$4,435.00 being

the defendants personal property, TLTB reference no 7/6361 which was paid by the plaintiff on the understanding that monthly rentals would be deducted from the said sum of \$4,435.00.

- e) That in reliance of the promise by the defendants to obtain TLTB consent and clear of the ground rent the plaintiff obtained a \$12000.00 loan advance for the purpose of the shop stock and the said loan was for the development of the plaintiffs business in the hope the contract will be renewed as per the terms acknowledged in the Memorandum of Agreement after the expiration of the current agreement terms.
  - f) That on or about 8<sup>th</sup> January 2014 the defendants issued the plaintiff with the Notice to Vacate requiring the plaintiff to vacate the said property and clear the outstanding electricity and water bills without causing any damages to the said property within 28 days.
  - g) That upon receipt of the said notice the plaintiff replied to Qoro Legal by a letter dated 31<sup>st</sup> January 2014 informing them of the reconciliation done and other matters addressing the defendants allegation of rental arrears.
  - h) That the plaintiff has fully complied with all provisions of the Memorandum of Agreement together with the rental agreement.
  - i) that the plaintiff then went to the Lautoka Police Station to report the matter and sought assistance of Senior Police Officer Mr All who then went to speak with the defendants but however advised me to seek redress from the Honourable Court of Law.
  - j) That from then the plaintiffs shop and Bowser is no longer in operation as the defendants have locked the door to the shop without any reasonable grounds.
  - k) That with every single day the shop is closed the plaintiff is losing out upto \$1,000 per day plus profits.
  - f) That therefore the plaintiff is praying for orders in terms of the inter-parte summonses filed herein.
7. The defendants in their affidavit in reply states inter alia;
- a) That the Estate of Bala Krishna aka Bala Krishna aka Bal Krishna aka Balkrishnan is the owner of Native lease No 21261.
  - b) That the defendants had agreed to lease a shop and petrol Bowser to the plaintiff at a monthly rental of \$1,400.00 as a monthly tenant for 3

years, on the condition that the rental would be paid on time and that the plaintiff would prepare a proper agreement and seek consent from the ITaukei Land Trust Board and execute the agreement.

- c) That the defendant has not agreed to a seven years term as alleged and further the plaintiff took the 1<sup>st</sup> named defendant to a lawyer in Lautoka town and advised that she has to sign the agreement.
- d) That the 1<sup>st</sup> named defendant has not signed any documents on absence of her children, she was sick and unable to read or write English properly, she was 69 years old at the time. She did not sign a document which she was asked to sign. The who's document was not read and explained to her neither was a copy given to her before she was asked to sign. She was not given the opportunity to obtain independent legal advice on the document, the 2<sup>nd</sup> named defendant refused to and had never signed any agreement.
- e) That the TLTB rental is in arrears in the sum of \$3,365.31 because the plaintiff has failed to pay rental which is the only income of the defendant.
- f) That the plaintiff has paid ground rent arrears for the defendant land TLTB Reference no. 776351 and she has deducted that amount from the rental payable in July 2012 to April 2013.
- g) That the plaintiff has defaulted in her normal monthly rental payment from May 2013 to February 2014.
- h) That the plaintiff also paid \$1,200.00 for the month of August and September leaving a balance of \$800.00. She paid another \$1,000.00 in February 2014 and she is in default of \$6,660.00 in rental payment.
- i) That it is the plaintiffs responsibility to obtain necessary consent and to establish the business when the consent was granted by the TLTB.
- j) That the plaintiff never approached the defendants for a reconciliation of the rental and the Memorandum of Agreement is not duly consented by the ITaukei Land Trust Board.
- k) That the defendant did not allow the plaintiff access to the premises because she had defaulted on her rental payment in the sum of \$6,660.00. The premises was locked by the plaintiff and she holds the keys and the 1<sup>st</sup> named defendant notified the Vitogo Police post on 18<sup>th</sup> February 2014 before she stopped plaintiff from entering the premises on the next day.

8. The plaintiff in response to affidavit of the defendants states inter alia:
- a) That the tenancy agreement was for a period of 7 years and it was prepared by common solicitors, the contents of it was explained to both defendants.
  - b) That the consent from ETLB was to be obtained by the defendants being lessors of the said land and not by the plaintiff and the plaintiff was enticed into entering the agreement on the basis that the defendants would obtain consent from ETLB and clear arrears as part of their responsibility.
  - c) That the plaintiff had only been paying \$1,000.00 for the shop rent as the bowser space still contained the defendants items hence she could not operate the bowser.
  - d) That since the plaintiff had started renting the premises the defendants informed her for whatever groceries they take from the shop or cash advances would go towards the monthly rent and that annex KP 1 is the reconciliation document showing that shop rent of \$1,000.00 is updated as of the period of May 2013 to December 2013 by way of grocery taking from the shop.
  - e) That the plaintiff had only been paying shop rental and not the bowser rental of \$400.00 month.
  - f) That the plaintiff has no arrears with the defendants as proved by her reconciliation and she had paid shop rental for January 2013 of \$1,000.00.
  - g) That in May 2013 the 2<sup>nd</sup> defendant texted the plaintiff from New Zealand requesting that the plaintiff do a direct deposit into the 1<sup>st</sup> defendant's account as she was in New Zealand at that time. Since May 2013 the plaintiff has been doing direct cash deposits in the Westpac account of the 1<sup>st</sup> defendant.
  - h) That the defendants have refused the plaintiff entry into the main door of the shop which leads to the door of the shop she operates. Hence her staff and herself are unable to enter the shop.

### **Law and Analysis**

9. The Courts are guided by the guide lines provided in the case of **American Cyanamid Company Vs Ethicon Limited [1975] 1 ALL ER 504** in determining whether to exercise its discretion to grant an injunction or not.

The guidelines are as follows:

- i) Whether there is a serious question to be tried.
  - ii) Whether damages would be an adequate remedy.
  - ii) Where does the balance of convenience lie?
10. In the matter before me the plaintiff is relying on Agreement and/or contracted arrangement annexure marked "KPI". The plaintiff claims that she entered into the said tenancy agreement with the defendant whereby it was agreed that she will occupy the said property containing the shop and the bowser on a monthly rental of \$1,400.00
11. The plaintiff states further that part of the agreement was that consent would be obtained from the ITaukei Land Trust Board.
12. In clause 9 of the Agreement marked KPI it is stated that the agreement shall be subject to the consent of the Native Land Trust Board.
13. The Counsel for defendants asserted in the written and oral submissions that the agreement and/or contracted arrangements the plaintiff is seeking to rely on is an illegal Agreement as the consent and permission of the NLTB has not been obtained to execute it, and relied on **Chalmers V Pardoe** in support of the assertion.
14. Section 12 (1) of the Native Lands Trust Act provides:

*"Except as may be otherwise provided by regulations made hereunder, it shall not be lawful for any lessee under this Act to alienate or deal with the land comprised in his lease or any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever without the consent of the Board as lessor or head lessor first had and obtained. The granting or withholding of consent shall be in the absolute discretion of the Board, and any sale, transfer, sublease or other unlawful alienation or dealing effected without such consent shall be null and void."*

15. **In Nathaniel Stuart Chalmers vs Lawrence Pardoe [1963] 1WLR677**

it was held by the Privy Council;

i) *"That in the absence of some special circumstance which precluded it, equity would on the facts of this case intervene to prevent the respondent from going back on his word and taking the building for nothing."*

ii) *"That while an agreement for a lease or sublease in the appellant's favour could reasonably be inferred from the respondent's evidence, even treating the matter simply as one where a licence to occupy coupled with possession was given for a purpose of erecting a dwelling house and accessory buildings, a "dealing" with the landlord had taken place, and since prior consent of the board was not obtained the dealing under Section 12 of the Ordinance was unlawful, and equity could not lend its aid to the appellant."*

16. As per the decision of **Chalmers vs Pardoe** oral consent of a head lessee to erection of dwelling house on part of the lease land was considered as a "dealing" with the land which required the consent of the Native Land Trust Board and therefore it was held to be an unlawful dealing within the meaning of Section 12 of the Native Land Trust Act in which case the Court of equity will not assist the sub-tenant.

17. Similarly in this matter the plaintiff entering into the Memorandum of Agreement with the defendant and occupying part of the lease land is a "dealing" with the land which requires the prior consent of the board under section 12 (1) of the Native Land Trust Act.

18. In view of the fact that no such consent was obtained before the execution of the Memorandum of Agreement it becomes a null and void document as per section 12(1) of the Native Land Trust Act.

19. As such I am of the view that the plaintiff cannot rely on a illegal agreement and seek the assistance of Court to enforce it by violating the law.

20. The Learned Counsel for the plaintiff submitted to Court that the principles of equitable estoppel applies in this matter as the plaintiff went into occupation of the premises on the invitation of the defendants and on an assumption that the defendants will not withdraw their consent.

21. He cited **Ramlu V NLTB (2008) FJHC 145 HBC 297/1993 L and NLTB V Subramani (2010) FJCA 9, ABU 0076 2006 (25 Feb 2010)** in support of his submission.

22. **Ramlu V NLTB** was a case where it was decided that the NLTB was estopped from refusing to renew a native lease in favour of Mr Ramlu, alternatively the NLTB has waived the requirement upon Mr Ramlu Regulation 18 of the Native Land Trust (Leases and Licences) Regulation.
23. It is my view that **Ramlu case** has no relevance to the matter before me as it was a case where the NLTB was estopped from refusing to renew a lease due to the contractual relationship between Mr Ramlu and the NLTB. It was an action brought by a lessee against the NLTB in which the provisions of Section 12(1) of the Native Land Trust act was not an issue.
24. **In NLTB V Subramani** it was held as the NLTB and the land owners knew and actively encouraged the plaintiff to renovate the buildings on the land with the promise that the lease would be extended the general equitable principals, affirmed by the Privy Council in **Charmers V Pardoe** (supra) must apply. The NLTB and the land owner cannot deny that the plaintiff has an equity in the land for which he is entitled to compensation if they were unable or unwilling to re-convey the land to him.
25. Paragraph 47 and 48 of **NLTB v Subramani** the Court of Appeal sets out the circumstances under which the equitable principle is applied.
26. Paragraph 47 and 48 states as follows
- [47] *"It's our respectful opinion that the decision in **Chalmers V Pardoe** protects the interests of the landowners because tenants who fail to notify the NLTB of dealings in the land under lease will get no assistance from the Court."*
- [48] *"However, if the NLTB or the landowners themselves directly involve themselves in such dealings, as was in this case, then as a matter of general equitable principle, it would be quite unconscionable, in our respectful view, for them to be able to consequences of their actions when things go wrong by pleading illegality under the Act."*
27. It is clear from the said judgement that the general equitable principle will apply if the NLTB or landowners themselves directly involve themselves in such dealings as was in that case.
28. However, in this case NLTB or the land owners are not directly or indirectly involved in the execution of the Agreement. It's a dealing between the registered proprietor of a Native lease and a tenant for which consent of the Board has not been obtained under section 12 (1) of the Native Land Trust Act.



29. Therefore It is my view that the decision in **NLTB V Subramani** has no relevance to this case and as such the Court cannot give any assistance to a tenant who has failed to notify the NLTB of a dealing in the land under lease.
30. Furthermore, I draw my attention to the nature of the injunction sought by the plaintiff. It is to compel the defendants to obtain consent from NLTB for the tenancy on native lease no 21261.
31. As the defendants cannot require the NLTB to grant consent and the granting consent is at the sole discretion of the NLTB injunction sought is not capable of being performed. In other words the Court cannot grant an injunction which indirectly compels the NLTB to give their consent for a Tenancy Agreement executed contrary to Section 12 (1) of the Native Land Trust Act.

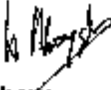
**Conclusion**

32. Considering all of the above facts, I am of the view that the plaintiff has failed to establish that there is a serious question to be tried in this action.
33. Furthermore the plaintiff has not given an undertaking as to damages on her application for injunctive relief. It is a serious omission as per the decision of **Natural Waters of Viti Ltd – V- Crystal Clear Mind Mineral Water (Fiji) Limited**, Civil Appeal No. ABU 0011 of 2004, Court of Appeal of Fiji. Where the court held:
 

*"Applicant for interim injunctions who offer an undertaking as to damages should always proffer sufficient evidence of their financial position. The court needs this information in order to assess the balance of convenience and whether damages would be an adequate remedy."*
34. In considering the balance of convenience I determine that it lies in favour of refusing to grant an injunction for the reasons set out in the above paragraphs.
35. In applying the principles laid down in the **American Cyanamid** case court is of the view that the plaintiff has failed to establish any of that in favour of her as discussed herein before.

36. Accordingly, I make the following orders:

- a) Inter-Parte Notice of Motion dated 27<sup>th</sup> February 2014 filed by the plaintiff be dismissed.
- b) The Plaintiff shall pay costs summarily assessed in the sum of \$1,000.00 to the defendants.

  
L.S. Abeygunaratne

Judge

18.03.2014

