

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 188 of 2010

**BETWEEN : COASTAL DEVELOPMENT LIMITED, a duly incorporated company
having its registered office at 18 Aurora Avenue, Makoi, Nasinu.**

PLAINTIFF

**AND : NATIVE LAND TRUST BOARD, a corporate body constituted under the
Native Land Trust Act, Cap 134.**

DEFENDANT

**AND : THE MINISTRY OF LOCAL GOVERNMENT, HOUSING, URBAN
DEVELOPMENT & ENVIRONMENT, a Government body.**

1ST THIRD PARTY

AND : ILIESA RAKASETA of Brunswick Land Development, Suva.

2ND THIRD PARTY

AND : FILIMONI LEDUA & OTHERS, all of Veikoba Settlement.

3RD THIRD PARTY

BEFORE : Acting Master Thushara Rajasinghe

**COUNSEL : Mr. O'Driscoll G. for the Plaintiff
Mr. Tuberi C. with Vukica S. for the Defendant
Ms. Ali S. for the 1st – 3rd Third Party**

Date of Hearing : 12th February, 2014

Date of Ruling : 28th March, 2014

RULING

A. INTRODUCTION

1. This is a notice of motion filed by the Defendant pursuant to Order 20 r 5 and 7 of the High Court Rules seeking following orders inter alia,

- i. That leave be granted for the Defendant to amend its statement of defence dated 7th of July 2010 filed on the same day,
 - ii. That the cost of this application be cost in the cause,
2. Both parties were given directions to file their respective affidavit of opposition and affidavit in reply to the opposition which they filed accordingly. Subsequently this motion was set down for the hearing on 12th of February 2014. Learned counsel for the Defendant and the Plaintiff made their oral arguments and submissions during the course of the hearing. Having carefully considered the notice of motion, respective affidavits and submissions of the parties, I now proceed to pronounce my ruling as follows.

B. BACKGROUND,

3. The chronological background of this matter goes back to 2010, where the Plaintiff instituted this action by way of a writ of summons seeking following orders inter alia,
 - i. *A declaration that the contract dated 2nd of August 2006 entered between the Plaintiff and the Defendant be terminated,*
 - ii. *Judgment in the sum of \$ 9,654,121.00,*
 - iii. *Special Damages for incurred expenses after 30th of April 2010 until assessment and payment (to be assessed),*
 - iv. *General Damages to be assessed ,*
 - v. *Cost of this action,*
 - vi. *Interest,*
 - vii. *Any further orders this honourable court deems just and equitable,*
4. Upon being served with the writ, the Defendant served his statement of defence on the 7th July 2010 and the Plaintiff served his reply to the defence on 16th of August 2010. Subsequent to the closing of the pleadings, the summons for direction was filed on 15th of October 2010, which was heard and orders were granted in terms of the summons on the 3rd of November 2010.

The Defendant's case,

5. The Defendant filed an affidavit of Semi Senikuraciri in support of this motion, where he deposed that a new legal manager was appointed to the Defendant board. The Deponant further stated that he was advised by the new legal manager that the Defendant need to amend its statement of defence so the defendant can properly and fairly defend itself in this case. He further deposed that this amendment is very important to the case of the defendant and a draft copy of the amended statement of defence was marked and tendered as annexure "A".

The Plaintiff's case,

6. The Plaintiff objected this application for amendment and filed an affidavit of Mohammed Safar Ali in opposition to this application. Mr. Ali deposed in his affidavit that the Defendant has set out no reason why as such a late stage in this proceedings and several years after it had filed its original defence it is so important to amend. He further deposed that this amendment will prejudice the plaintiff in this proceedings.

C. THE LAW.

7. Order 20 rule 5 of the High Court rules has given the court a discretionary power to allow the Plaintiff or any other party to the proceedings to amend their pleadings at any stage of proceedings on such terms as to cost or otherwise as may be just and in such manner as it may direct. Lord Keith of Kinkel in Ketteman and others v Hansel Properties Ltd (1988) 1 All ER 38 observed that

"the rule is that amendment should be allowed if necessary to enable the true issues in controversy between the parties to be resolved, and if allowance would not result in injustice to the other party not capable of being compensated by an award of costs".

8. The main issues to be considered in application for amendment of pleadings had discussed in **Reddy Construction Company Ltd v Pacific Gas Company Ltd** (1980) FJCA 9; (1980) 26 FLR 121(27 June 1980), where it was held that

“the primary rule is that leave may be granted at any time to amend on terms if it can be done without injustice to the other side. The general practice to be gleaned from reported cases is to allow an amendment so that the real issue may be tried, no matter that the initial steps may have failed to delineate matters. Litigation should not only be conclusive once commenced, but it should deal with the whole contest between the parties, even if it takes some time and some amendment for the crux of the matter to be distilled. The proviso, however that amendment will not be allowed which will work an injustice is also always looked at with care. So in many reported cases we see refusal to amend at a late stage particularly where a defence has been developed and it would be unfair to allow a ground to be changed”.

9. Justice Pathik while determining an application made under order 20 r 7 for amendment of other documents, which is also founded on the same legal principles as of this application held in **Fiji Electrical Authority v Suva City Council** (1994) FJHC2; Hbc0901d.84s (5 August 1994) that

“the guiding principle of cardinal importance, namely, that all such amendment ought to be made for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings”.

10. In summation from the aforementioned judicial precedence, a wider objective approach of allowing the parties to present their real issues in dispute is the founding principle in order to determine an application in this nature. However, this primary consideration should be subjected to the issue of prejudice cause to the other party.

D. ANALYSIS

11. Despite of stating that the new legal manager wants to amend the statement of defence in order to properly and fairly defend the Defendant in the proceedings, the Defendant failed

to elaborate how these propose amendment could assist them to defend them properly and fairly. It would have been more appropriated, if the Defendant had specifically introduced proposed amendment rather than of merely tendering a copy of the proposed draft amended statement of defence.

12. Upon careful comparison and understanding of the pleading and the proposed amended statement of defence, I find that the defendant has introduced following issues as amendments, that;

i. The plaintiff failed to advice the Defendant about the frustration of the contract, wherefore, the Plaintiff is estopped from claiming any damages against the Defendant,

ii. No reason for an order for a declaration to terminated the contract as the Plaintiff could have terminated the contract on the ground of frustration,

iii. The Plaintiff is not entitled to claim any damages as they failed to terminate the contract on the ground of frustration,

13. Once again, the Defendant failed to elaborate how these proposed amendments assist the court to determine the real issue in dispute with finality. In the absence of such, forced me to carefully consider the nature of the Plaintiff's claim and the defence of the Defendant. The Plaintiff's claim is founded on the contract entered between the parties to develop Veikoba residential sub division on the 2nd of August 2006. The Plaintiff alleged that the destruction caused by the squatters on the site hindered the work progress with the engineering work. The proposed amendments are also mainly focused on the issue of contract and the issue of frustration caused by the squatters on the site. In view of these reasons, I am of the opinion that these proposed amendments will assist the court to determine the real dispute between the parties.

14. I now turn to the issue of prejudice to the other party, in this case, the Plaintiff.

15. In pursuant of Order 20 r 5, the court could exercise its discretionary power to allow the amendments of pleading at any stage of the proceedings. In this instance case, the pleadings have been closed and parties have reached to the stage of pre trial conference. The statement of defence was filed on 7th of July 2010. The Defendant stated that the new legal manager after reviewing the defence which is already filed wanted to seek permission of the court for these proposed amendments. Meantime, the learned counsel for the Plaintiff submitted that if this amendment is allowed, the Plaintiff will incur substantive cost in order to prepare their reply which involves with great amount of documentations. Having weighted the contrasting submissions of the parties, I am of the opinion that the granting of this amendment does not cause undue injustice to the Plaintiff and the order of cost could be enough to compensate any delay caused by this amendment.

16. In view of the foregoing reasons, I am satisfied that these proposed amendment will assist the court to determine the real issues in dispute between the parties with finality. I accordingly make following orders,

- i. The leave is granted for the Defendant to amend the statement of defence filed on 7th of July 2010,
- ii. The Defendant is granted 14 days to file and serve their amended statement of Defence,
- iii. The Plaintiff is awarded a cost of \$2500, assessed summarily,

Dated at **Suva** this **28th day** of **March, 2014**.

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R.D.R. Thushara Rajasinghe
Acting Master of High Court, Suva