

IN THE HIGH COURT OF THE REPUBLIC OF FIJI

WESTERN DIVISION

AT LAUTOKA

CIVIL JURISDICTION

Civil Action No. HBC 166 of 2013

BETWEEN : **SHEIK SHAFIYUL HAGUE** of Meigunyan, Nadi in the Republic of
Fiji.

Plaintiff

AND : **ABID HUSSIAN** of Meigunyah, Nadi in the Republic of Fiji,
Businessman.

Defendant

Appearances:

Ms Laisani Tabuakuro for the Plaintiff

Ms Barbara Doton for the Defendant

Date of Hearing: 17 June 2014

Date of Ruling: 11th August 2014

R U L I N G

[On Setting Aside]

Introduction

1. This is an application filed by defendant to set aside the order granting immediate vacant possession to the plaintiff of the land contained in the Crown Lease No. 9749 being Lot 2 on plan SO 0641A situated at Meigunyan, back road, Nadi, which is an agricultural land.

2. By way of an ex-parte notice of motion (application) dated 10 February 2014 the defendant seeks the following orders:
 - i) *An ORDER that the order made by the Court against the defendant on 27th [22nd] day of January 2014 be set aside and/or dissolved and/or discharged.*
 - ii) *An ORDER that the execution of the said order made by the Honourable Court on 27th [22nd] day of January 2014 be stayed.*
 - iii) *An ORDER that the plaintiff pay for the cost of this application.*
3. The defendant filed two affidavits in connection with this application, one is affidavit in support and another affidavit in response of Abid Hussein (defendant) sworn on 8 February 2014 and on 4 March 2014 respectively.
4. Plaintiff opposed the application to set aside and he filed an affidavit sworn on 20 February 2014 in opposition.
5. In addition both parties have filed useful written submission on the matter.
6. The application to set aside is made pursuant to Order 113 rule 8 of the High Court Rules 1988 (HCR) and the inherent jurisdiction of the court.

Background

7. By way of an originating summons [Expedited Form] the plaintiff sought immediate vacant possession of the land comprised in the Crown Lease No. 9749 (the property) on the basis that the defendant is occupying the property without consent or licence of his or his predecessors in title. The property involved in this action is a state land. The defendant filed affidavit in response and deposed that he has entered into a Sale and Purchase agreement for the sale of the property for the consideration sum of \$50,000.00, paid the sum of \$14,000.00 to a Mr Rashid, not the Plaintiff, and that the Plaintiff has executed the transfer documents and applied for the consent of the Director of Lands which is still pending. On 17 October 2013 counsel for the plaintiff sought 7 days to file

and serve an affidavit in reply and at the same time made application to set down the matter for hearing. To which, counsel for the defendant agreed. Thereupon the matter was set down for hearing at 11.00am on 22 January 2014.

8. On 22 January 2014 when the matter came up for hearing, Mrs Naidu who appeared on behalf of the defendant for the limited purpose made an application for adjournment. Her application to adjourn the hearing to another date was strenuously objected to by the plaintiff. She withdrew her appearance later when the Court refused her application to adjourn the hearing. Her application was refused as she failed to adduce sufficient ground for an adjournment of the hearing. As a result, the matter proceeded to hearing without the defendant being present at hearing. Having considered the affidavit in support, affidavit in response and the submission advanced by the plaintiff's counsel the court on 22 January 2014 made order granting immediate vacant possession to the plaintiff. This is the order that the defendant seeks to set aside in the current application.

Defendant's argument

9. Ms Barbra, on behalf of the defendant, argued that the defendant is not a trespasser as he is occupying the land with the leave and licence of the plaintiff and has a Sale and Purchase Agreement with the plaintiff. She further contended that the defendant has a right to possession i.e. the defendant has a good defence on merits, and she accordingly submits that the order granting vacant possession to the plaintiff on 22 January 2014 should be set aside.

Plaintiff's contra argument

10. Ms Tabuakuro argued that the Defendant is occupying the land illegally and/or without leave and licence of the plaintiff who is legally entitled to the state land as registered lessee. She further contended that the Plaintiff had an agreement with the Defendant to transfer the land to him and that agreement has become null and void in the absence of consent of the Director of Lands. She also submitted that the Plaintiff has obtained the necessary consent to file this action to recover possession of the land from the Defendant.

In essence, her argument was that the defendant cannot claim right to possession based on an illegal contract.

The Law & Analysis

11. The plaintiff initiated proceedings under Ord. 113 of the High Court Rules to recovery of possession of the property. Pursuant to that Order, proceedings may be brought by originating summons where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his.
12. The plaintiff is the registered lessee of the property and the defendant is occupying the same. The plaintiff is therefore entitled to commence the action under Ord. 113 for the recovery of the property.
13. The Defendant did not participate in the hearing of the Plaintiff's application, albeit he filed an affidavit in response. The Defendant in his affidavit in response stated that he is occupying the land with the consent of the plaintiff but no documents were provided by the Defendant to the Court to establish that assertion. Supposedly, even if the defendant occupied the property with the consent of the plaintiff, that consent may be deemed to have withdrawn when the plaintiff served notice to vacate. Where the defendant is an invitee to occupy land, it is not necessary there should be two stages to eviction-service of revocation and then notice to quit. It would be sufficient if both were given together, see **Prasad v Chand** (infra).
14. The Plaintiff claims possession of the state land from the Defendant. The Defendant deposes that he has entered into an agreement for the sale of the property for the consideration sum of \$50,000.00, paid the sum of \$14,000.00 to a Mr Rashid, not the Plaintiff, and that the Plaintiff has executed the transfer documents and applied for the consent of the Director of Lands which is still pending.

15. Section 13.-(1) of the State Lands Act, Cap 132 prohibits the lessee from alienating or dealing with the land comprised in the lease or any part thereof without the written consent of the Director of Lands first had and obtained.

16. Section 13.-(1) of the State Lands Act provides:-

“13.-(1) Whenever in any lease under this Act there has been inserted the following clause:-

*“**This lease is a protected lease under the provisions of the Crown Lands Act**”*

(hereinafter called a protected lease) it shall not be lawful for the lessee thereof to alienate or deal with the land comprised in the lease or any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever, nor to mortgage, charge or pledge the same, without the written consent of the Director of Lands first had and obtained, nor, except at the suit or with the written consent of the Director of Lands, shall any such lease be dealt with by any court of law or under the process of any court of law, nor, without such consent as aforesaid, shall the Registrar of Titles register any caveat affecting such lease.

Any sale, transfer, sublease, assignment, mortgage or other alienation or dealing effected without such consent shall be null and void” (Emphasis added).

17. In this case the Plaintiff seeking possession as the lessee of the state land (lessee in protected lease). According to the Defendant, he had entered into an agreement for the sale of the property and the Plaintiff executed the transfer documents, but application for consent is still pending.

18. In **Prasad v Chand** (2001) 1FLR 161, Justice Gates J (as then he was) states:-

“Section 13 of the State Land Act prohibits any dealing in the land which is comprised in a State Lease, without the Director of Land’s consent. Whatever the nature of the permission granted to the defendant to occupy

the relevant State Land, it was clearly unlawful because it lacked the Director's consent. The Defendant would have committed the offence of criminal trespass on State Land under section 32 and 40 of the Act. Unlawful occupation of Native land is similarly an offence under section 27 of the Native Lands Trust Act Cap.134 and other breaches of that Act are caught by section 26. Section 12 of NLTA is couched in similar language to that of section 13 of the State Lands Act.

"If I were to accept all of the Defendant's evidence unchallenged by the Plaintiff, the Defendant fails to satisfy me that he has a right to possession. Apart from the paucity of evidence on the agreement with the Plaintiffs' deceased father, the agreement itself falls foul of the statutory prohibition on the dealing with the State leases. The Defendant has gone into possession and built a house without the consent of the Director of the Lands. The Director had no prior opportunity to evaluate the Defendant as a suitable tenant of the State, the very purpose for the consent provision. Any gift or promise to subdivide and to grant part of the State Lease to the Defendant would be null and void in these circumstances. It would also be in breach of section 4(b) of the Subdivision of Land Act Cap. 140 and therefore an offence under section 15 of that Act."

19. The Defendant says that he is not in illegal occupation of the property by reason of the agreement for the sale of the property for the consideration of \$50,000.00. The land in question is a state land and the Plaintiff is holding a protected lease as contemplated under section 13 of the State Land Act. Obviously, the alleged agreement concerning the land comprised in the protected lease has been dealt with, without prior consent of the Director of Lands as required by section 13 of the State Lands Act. In terms of section 13 and in the light of the decision of **Prasad v Chand** (supra) the agreement the Defendant relies on is illegal and null and void. As a result he cannot claim right to possession based on the illegal agreement. Therefore the Defendant has failed to establish that he is

occupying the land legally and/or with the consent of the Plaintiff or that of any predecessor in title of his.

20. On 22 January 2014 I granted vacant possession of the property to the plaintiff having considered the affidavit in support, the affidavit in response and submission made by counsel for the plaintiff. Of course, that order was made without participation of the defendant. He failed to appear in court on the hearing date.

21. The defendant has made the current application to set aside the order granting vacant possession to the plaintiff on the ground that that order was made ex-parte. The application to set aside is made pursuant to Ord. 113, r. 8 of the High Court Rules, which provides:

*'The judge may, on such terms as he thinks just, **set aside or vary any order made in proceedings under this Order**'*
(Emphasis added).

22. Any order made in proceedings under Order 113 may be set aside or varied by the judge on such terms as he thinks just. In my opinion 'any order' envisaged in Ord. 113, r. 8 may also include a final order whether made on merits or otherwise. I have already delivered a separate ruling regarding a preliminary issue raised by the plaintiff that an order made considering merits of the case cannot be reviewed by the same court.

23. At this stage it would be useful to quote Supreme Court Rules 1999 (White Book) in relation to setting aside an order made in proceedings under Ord. 113. Supreme Court Rules 1999 (White Book) page 1799 (113/8/16) states as follows:

'Setting aside order – Any order, which presumably includes a final order for possession under this Order may be set aside or varied on such terms as may be just (see r.8) but this can only be done by a Master, who however need not be the Master who made the order though it should be relisted before the Master who made the order, if possible. The application to set aside or vary

the made by summons served on the opposite party and supported by affidavit, stating as fully as possible the grounds relied on for sitting aside or varying the order in question (Emphasis added).

24. It is seen any order made in proceedings under Ord. 113 may be set aside if the judge think just to do so. Ord. 113, r. 8 confers discretion on the judge to set aside or vary any order made in proceedings under Ord. 113 for a just cause to be shown by the party seeking to have that order set aside or varied.

25. In this case the defendant seeks to set aside the impugned order for the vacant possession on the following grounds:

- a) That the non-appearance of the Counsel for the Defendant on the 27th of January, 2014 was due to an oversight on their city agents by informing their office that the matter was for mention on the said date.*
- b) That the Defendant has paid \$14 000 to the Plaintiff as part payment pursuant to a Sale and Purchase agreement for the transfer of the Crown Lease No.9749 however there is no consent by the Director of Lands.*
- c) That there are pending cases before the Nadi Court and the Agricultural Tribunal as such the Court must delay the determination of this matter.*
- d) That the Defendant has undertaken improvements to the land and reconnected the water and electricity to the property*

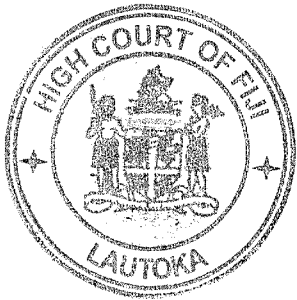
26. At hearing, a counsel who appeared on behalf of the defendant made an application to adjourn the hearing to another date saying that the counsel who had carriage of the matter is unable to appear in court to argue the matter. That application to adjournment was objected to by the plaintiff's counsel. The court refused the application to adjourn and decided to proceed with the hearing. The counsel who appeared for the defendant then voluntarily withdrew her appearance.

27. It is pertinent to note that when delivering the judgment in favour of the plaintiff on 22 January 2014, I considered all the affidavits and documents that were before the court including that of the defendant.
28. The defendant submits that there are pending cases before the Nadi Magistrate's Court and the Agricultural Tribunal and as such the Court must delay determination of this matter. The pending action filed by the defendant for the alleged breach of contract will not be a bar for this court to decide the summary application filed by the plaintiff under Ord.113 of the High Court Rules for vacant possession of the property. As to the matter pending before Agricultural Tribunal, the defendant must have made the application for a declaration of tenancy. Interestingly, the defendant in these proceedings does not state that he was cultivating the land in question. In these proceedings the defendant's defence is that he has a Sale and Purchase Agreement, paid the sum of \$14,000.00 to the plaintiff as part payment and has undertaken improvements to the land. The defendant did not place any evidence to establish that he was cultivating the land.
29. The plaintiff has commenced these proceedings before the defendant's application to the Agricultural Tribunal. It seems to me that the defendant has filed his application before the Agricultural Tribunal for convenience. Therefore, in my judgment, there is no need to stay these proceedings until final determination of the application filed by the Defendant before the Agricultural Tribunal.
30. In a summary proceeding for the recovery of vacant possession, the defendant must show that he has a right to possession of the property. The proprietorship of the plaintiff is not in dispute. The defendant says he has a right to possession pursuant to the Sale and Purchase Agreement. In my judgment delivered on 22 January 2014 I already have decided that the Sale & Purchase Agreement was null and void. And, I also have decided that the defendant cannot claim right to possession based on an illegal agreement. Since I have already decided all the points raised by the defendant, I cannot make a different decision in this setting aside application.

31. There is no new material adduced by the defendant to set aside the order made on 22 January 2014 granting immediate vacant possession to the plaintiff. I feel it would not be just to set aside the order in the absence of any new and compelling circumstances.

32. For all these reasons, I would dismiss and struck out the application filed by the defendant with costs summarily assessed in the sum of \$300.00 payable to the plaintiff by the defendant.

M H Mohamed Ajmeer



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M H Mohamed Ajmeer

Master of the High Court

11 August 2014

At Lautoka.

Solicitors:

Messrs Koyas, Solicitors & Barristers for the plaintiff

Messrs Rams Law, Solicitors & Barristers for the defendant