

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

CIVIL ACTION NO. HBC NO 207 OF 2010

BETWEEN : **ARJUN** of Dugapatu, Rakiraki, Fiji, Machine Operator.

PLAINTIFF

AND : **DIRECTOR OF LANDS**

DEFENDANT

Counsel : Ms Natasha Khan for the Plaintiff
Mr. Jeremaia Lewaravu for the Defendant

R U L I N G

BACKGROUND

- [1]. On 12 February 1996, the plaintiff, Arjun, became the sole executor/trustee of the estate of his late father, Padma Nathan who had died on 16 November 1995. Nathan had been the lessee over a piece of state agricultural land comprised in Lease Number 6939 (Lot 3 on RR 1252, Tuvavatu formerly CT 8888 (Farm 11107) on the island of Viti Levu in the province of Ba. The said land has a total acreage of 7.1228 hectares. Being an agricultural lease, it was subject to the Agricultural Landlord & Tenant Act (Cap 270). The lease expired on 31 December 2006, that is, some 10 years or so after Nathan died. It would appear that, in February 2007, after the lease had expired, Arjun, applied to the Director of Lands for “Renewal of Lease” over Lot 3 CL 6939 4/13/552¹. Whether this was the same as an application for an extension or whether it was an application for renewal of the lease over part of the land only, is an issue between the parties. And whether or not Arjun did so apply in his capacity as executor-trustee of the Nathan estate, is also at issue. Arjun appears

¹ As per document “JR 3” annexed to the affidavit of Jarus Reuben sworn on 26 June 2013.

to treat the application as one for a 20-year extension pursuant to section 13 of the Agricultural Landlord & Tenants Act (Cap 270).

- [2]. Those issues prompted Arjun to file in October 2010 an Originating Summons in the High Court seeking (i) a declaratory order that he is entitled to an extension of Crown Lease No. 6939 for 20 years in terms of the Agricultural Landlord & Tenant Act and (ii) an injunction to restrain the Director of Lands from issuing a lease over the same land to any other person until the determination of this case.
- [3]. However, in 2011, Arjun's originating summons was dismissed by Madam Justice Wickramasinghe, with costs, to the Director of Lands, on the application of the Office of the Attorney-General on the ground that, Arjun, being an Australian citizen and a non-resident, and the land in question being well over one acre in acreage, cannot be granted an extension without the prior consent of the Minister of Lands by operation of section 6 of the Land Sales Act (Cap 137). On appeal, the Fiji Court of Appeal, in November 2012, did set aside the Orders of Wickramasinge J.
- [4]. In a nutshell, the Fiji Court of Appeal ruled that it was wrong of Wickramasinghe J to have determined the matter on the preliminary point raised i.e. whether Arjun, an Australian citizen, requires the consent of the Minister for Lands under section 6(1) of the Land Sales Act to take on a Crown Lease?
- [5]. The Fiji Court of Appeal then referred the matter back to the High Court with the directions which I paraphrase below:
1. the Orders of Wikramasinghe J dismissing Arjun's Originating Summons and also awarding costs to the Director of Lands are set aside.
 2. the preliminary issue raised by the Director of Lands' by her Amended Summons dated 11th May 2011 (i.e. whether Arjun, an Australian citizen, requires the consent of the Minister for Lands under section 6(1) of the Land Sales Act to take on a Crown Lease?) should be considered and determined together with the matters raised in the originating summons.
 3. the High Court is directed to take up the matter afresh.

- [6]. However, some four months after the Fiji Court of Appeal's directions to High Court, Arjun would receive a letter (dated 15 March, 2013) from the Registrar of the Sugar Industry Tribunal. The said letter, which I reproduce in full below, advised that the lease over Arjun's agricultural land had been issued to Savita Devi².

I have been advised by Savita Devi that the land covered by Registration No. 411/1107 has been issued to her. I have also received a copy of the Agricultural Tribunal Lease which indicated that the lease is under her name.

In the circumstances, as you no longer have the legal right to be registered as a cane grower, would you please show cause within 14 days why your registration should not be cancelled.

Sgd. WT Brown (Registrar of the Tribunal)

- [7]. This prompted Arjun to file the application which is now before me.

APPLICATION NOW BEFORE ME

- [8]. The application now before me was filed on 20 June 2013 by Arjun as an *ex-parte* Notice of Motion. However, it was dealt with *inter-partes*. The said Notice of Motion seeks the following Orders:

- (i) that the Director of Lands do forthwith recall Crown Lease No. 19020 issued in favour of Savita Devi, covered by land under Crown Lease No. 6939 and have the same cancelled by the Registrar of Titles.
- (ii) that the Director of Lands do forthwith inform the Sugar Industry Tribunal and Sugar Cane Growers Council that Crown Lease No. 19020 issued in favour of Savita Devi, covered by land under Crown Lease No. 6939 is cancelled.
- (iii) that the Director of Lands pay Arjun costs of this Motion on a solicitor – client indemnity basis.
- (iv) that there be abridgment of service of this motion.
- (v) such further or other Orders as may deem just and expedient.

² copy of the said letter is annexed and marked "AA2" to his affidavit.

ARJUN'S AFFIDAVIT IN SUPPORT

- [9]. Arjun's affidavit in support deposes *inter-alia* the following:
- (i) it revisits and discusses the decision of the Fiji Court of Appeal.
 - (ii) that Savita Devi was in fact removed from the land in question pursuant to a High Court Order (of Mr. Justice Sosefo Inoke) dated 23 February, 2010³. (the said decision of Inoke J is reported in paclii, **Arjun v Devi** [2010] FJHC 38; HBC113.2009 (9 February 2010)).
 - (iii) on 14 June 2013, he came to know through his brother in law, namely Vishwa Goundar, who holds his power of attorney, that the Sugar Cane Growers Council had cancelled his contract and had issued a new one to Savita Devi. The cane contract to Savita Devi was applicable over the same lease which he held and over which same land another lease had been issued to Savita Devi.
 - (iv) on 01 January 2013, he did receive a statement from the Lands Department⁴. He says that up to 01 January 2013, he had been paying rent⁵. He annexes two of his statements from 2012. The statements relate to his account. He highlights that that account bears the same number as the account that now stands in Devi's name. He also points out that the farm number which corresponds to his account is the same as the farm number which is now allocated to Devi.
 - (v) it was upon receiving this statement from the Lands Department and upon noting the above numbering, that he came to learn of the new lease that

³ the same is annexed hereto and marked "AA3".

⁴ copy of the said statement is annexed to his affidavit and marked "AA6".

⁵ He deposes as follows:

THAT I have since received a statement from Lands Department addressed to Savita Devi, however posted to me. The said statement is dated 1st January, 2013. Up until then I was paying rental and annex hereto and mark "AA7 (i) and AA7 (ii) my two statements from 2012.

I would like to draw the following to this Honorable:-

- i) The account numbers on both statements are the same;
- ii) The farm number is the same;
- iii) My credit balance has been forwarded to Savita Devi's statement; and
- iv) Savita Devi's account is being further credited with my monies from FSC.

had been issued to Savita Devi. A certified true copy of the said lease is annexed to his affidavit.

[10]. Arjun further deposes that he:

- (i) at no time, ever surrendered the balance of Crown Lease No. 6939, which is the same land over which a lease has been issued in favour of Savita Devi.
- (ii) had duly paid the renewal fees for his lease on 14 February, 2007.
- (iii) had been paying and the defendant has been accepting lease rental from him.
- (iv) is entitled to an automatic renewal of his Crown Lease under ALTA.
- (v) he had been duly cultivating the said farm.

[11]. Arjun further deposes that he is rather shocked as to the manner in which the Director of Lands had granted a lease to Savita Devi, when the determination of his application was still pending.

[12]. He adds that the Court of Appeal had clearly observed that the lease ought to be renewed in his name.

[13]. Arjun says that the actions of the Director of Lands are contemptuous in light of the Court of Appeal decision and also considering that the matter is still pending before this Court for decision.

[14]. He says that Crown Lease No. 19020 could only have been granted to Devi in error as the lease was never ever formally surrendered by him, nor was it ever cancelled by the Director of Lands.

[15]. He adds that he has standing cane on the land which needs to be crushed.

DIRECTOR OF LANDS' POSITION

[16]. In opposition, the Office of the Attorney-General has filed an affidavit of one Jarus Reuben. Reuben is a Clerical Officer in the Department of Lands at Lautoka.

[17]. According to Reuben:

- (a) Crown Lease No. 6939 was issued to Padma Nathan for a term of 33 years, 9 months with effect from the 1st of April, 1973. Crown Lease No. 6939 expired on 31st December, 2006.
- (b) in 1989, Nathan lodged an application for subdivision. However, that application was declined.
- (c) upon Nathan's death, the plaintiff became the sole executor and trustee of the estate. Acting in that capacity, he then lodged an application for partial transfer of Lot 1 and Lot 3 of SO 4621. The Director of Lands did grant consent to partial transfer on 28 April, 2003⁶. The plaintiff was then issued with a new Crown Lease No. 15403. This new Crown Lease was registered on 11 June, 2004. Crown Lease No. 15403 consist of the land area covered in Lot 1 of Crown Lease No. 6939⁷.
- (d) after the partial transfer, the remainder of Crown Lease No. 6939 was limited to Lot 2 and Lot 3 on Plan SO 4621. These two Lots remained on Crown Lease No. 6939 at the time of expiry dated 31st December, 2006.
- (e) during the currency of Crown Lease No. 6939, the plaintiff as executor of the Estate of Padma Nathan, did not and /or failed to apply for an extension of the Lease. The application he lodged on 14 February, 2007 was not for an extension of Crown Lease No. 6939 as it was limited to the renewal of the lease of the land contained in Lot 3 only⁸. Crown Lease No. 6939 ceased to exist after 31 December, 2006. The plaintiff does not have any locus standi to bring this claim against the defendant. He has also breached section 13 of the Crown Lands Act in having failed to seek let alone obtain the prior consent of the Director of Lands to institute this proceedings against the same.

⁶ Refer to annexure 'W14' in the Affidavit of Walmik dated 20th January, 2011.

⁷ Annexed as annexure 'JR 2' is copy of Crown Lease No. 15403.

⁸ Annexed as annexure 'JR 3' is a copy of the application lodged by the Plaintiff with the Defendant.

- (f) Reuben deposes that the plaintiff did not file an application for stay at the Lautoka High Court after his Originating Summons was dismissed on 21 June, 2011.
- (g) Reuben agrees that the Fiji Court of Appeal did direct the High Court **“to take up the matter afresh”**. He adds that since the Fiji Court of Appeal has referred the matter back to the High Court, **“the Defendantis not bound by the same as the High Court has been directed to take up the matter afresh”**.
- (h) Reuben insists that Savita Devi is the registered lessee of Crown Lease No. 19020 and that the plaintiff had failed to seek the consent of the Director of Lands to institute legal proceedings in HBC 113 of 2009. He also failed to inform the Court that Crown Lease No. 6939 had expired when he instituted legal proceedings in HBC 113 of 2009 and that the Director of Lands was not a party in HBC 113 of 2009.
- (i) Reuben further deposes that the Office of the Director of Lands is yet to update the Crown Lease System. That means that the system will still automatically show rent and interest paid on all expired leases. In reality, the Department no longer accepts rent from expired leases. In cases, where it still accepts rent, the Department will refund rent for expired leases and carry forward in cases of renewed leases. The Department is currently working on updating and upgrading the Crown Lease System.
- (j) Reuben further says as follows:
 - (a) the Land area in Lease No. 19020 is not the same as the land area in Lease No. 6939.
 - (b) the renewal fee was in regards to the extension of the lease in Lot 3 only. Further, the payment of renewal fee does not guarantee that the lease will be extended.
 - (c) acceptance of lease rental does not create a tenancy. The Department does not accept rent from expired leases and will refund rental collected from expired leases.
 - (d) the plaintiff was not entitled to automatic renewal as he had breached section 13 (1),(a) for non cultivation and being an absentee tenant who resides overseas.

- (k) there was no application to extend the Lease prior to expiration on 31 December, 2006. In any event, the application for renewal by the plaintiff dated 14 February, 2007 is limited to the land area in Lot 3 only.
- (l) the plaintiff has not cultivated any sugar cane on his Crown Lease No. 15403. Furthermore, a cane contract will only be issued to a bona fide farmer if he is able to harvest 250 tonnes of sugar cane and owns at least 7 acres of sugar cane farming land. The plaintiff has not fulfilled the two conditions for a cane contract.

[18]. When the matter was first called before me on 24 June 2013, I ordered that Savita Devi be joined as defendant pursuant to Order 15 Rule 6 (2) of the High Court Rules 1988.

OBSERVATIONS

[19]. Firstly, I disagree with Ms Khan's submission that the Fiji Court of Appeal had made findings that the lease ought to be renewed in Arjun's (or the estate's) name. On my reading of the FCA's decision, the FCA was merely making obita observations to emphasise the complexity of the issues involved in this case and, in that regard, to accentuate the error of Wickramasinghe J in having dismissed the Originating Summons on a preliminary point.

[20]. Secondly, both counsel went to great lengths in their submissions about various aspects of the law which intertwine rather complexly in the facts of this case, as if they were arguing the main substantive issue. However, overlooked the basic fact that, Devi is now registered proprietor of the lease in question and as such, she has the full protection of the law as to the indefeasibility of her title.

[21]. Having said that, and taking that as my starting point, it is hard for me at this time to make an Order to direct the Director of Lands to recall the lease issued to Devi. To make such an Order at this juncture would presuppose that – Devi has committed some fraudulent action such as to defeat the indefeasibility of her title (see Fels v. Knowles (1906) 26 NZLR 608 at page 620). In that regard, I caution myself, and I say this to highlight the heavy burden that befalls Arjun if he were to attempt to defeat Devi’s title, that under section 40 of Fiji’s Land Transfer Act (Cap 131), it is not necessarily fraud to purchase and register an interest knowing of unregistered interests that will thereby be defeated.

Purchaser not affected by notice

40. Except in the case of fraud, no person contracting or dealing with or taking or proposing to take a transfer from the proprietor of any estate or interest in land subject to the provisions of this Act shall be required or in any manner concerned to inquire or ascertain the circumstances in or the consideration for which such proprietor or in any previous proprietor of such estate or interest is or was registered, onto see to the application of the purchase money or any part thereof, or shall be affected by notice, direct or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding, and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.

[22]. Even if the Director of Lands had been wrong in issuing the lease to Devi, Devi’s title will remain indefeasible in the absence of proof of fraud on her part.

[23]. The onus is clearly on Arjun to establish some right in equity based on some legal or equitable cause of action, which can defeat Devi’s indefeasibility. This, I cannot determine summarily.

[24]. And even if I were to presume that Arjun had a legal or equitable cause of action, it would be wrong in principle for this court to use that mere presumption to

undermine the principle of indefeasibility which already exists (until proven otherwise by Arjun) in favour of Devi.

[25]. Having said that, I must reiterate that the onus is now on Arjun, firstly, to establish a legal or equitable cause of action and, secondly, to establish that whatever interest he has is strong enough against the whole world including Devi.

[26]. I acknowledge that the Fiji Court of Appeal had made some observations, for example, that the estate may be entitled to a grant of a 20-year extension – but only “upon establishing the facts according to law”.

[27]. The onus of establishing the facts according to law rests with Arjun. This is a matter I reserve for trial.

[10] In terms of the above Section 13(1) of the Agricultural Landlord and Tenant Act, a tenant to an existing tenancy is entitled to have an extension of the contract of tenancy for another period of twenty years provided the matters referred to in sub sections (a) and (b) in that section do not exist. The definition given in the Act to the word *“tenant”* is that;

*“a person lawfully holding land under a contract of tenancy and includes the personal representatives, **executors**, administrators, permitted assigns, committee in lunacy or trustee in bankruptcy of a tenant or any other person deriving title from or through a tenant”*.

The word *“tenancy”* found in the Agricultural Landlord and Tenant Act includes a *“lease”*.

Therefore, a *“tenant”* would mean an executor of a *“lessee”* as well, as far as the Agricultural Landlord and Tenant Act is concerned. In the circumstances, plain reading of the section indicate that the appellant being the executor of the deceased Padma Nathan is entitled to have the benefits of a tenant referred to in Section 13(1) of the Agricultural Landlord and Tenant Act.

[11] Accordingly, the Appellant being the duly appointed executor of the deceased lessee comes into the shoes of the said lessee and then he becomes a tenant in respect of the land in dispute for the purposes of Agricultural Landlord and Tenant Act. In the circumstances, the Respondent namely the Director of Lands is duty bound to grant an extension to the lease 6939 for another period of twenty years upon establishing the facts according to law. Unfortunately, the learned trial judge has not addressed her mind to this aspect.

[28]. I also acknowledge that the Fiji Court of Appeal has observed that the Nathan estate/Arjun has paid rent to the State in respect of the said land which the Director of Lands has been accepting.

[29]. However, the FCA leaves it to the High Court to determine whether or not the acceptance of the rent in the circumstances of this case amounts to an acceptance on the part of the Director of Lands of Arjun/estate as lessee – and if so – whether the Director of Lands is then estopped from refusing to grant the extension, sought by Arjun.

[12] Moreover, in the affidavit of the appellant filed in support of the originating summons, it is mentioned that he had paid the renewal fees in respect of the said Crown Lease 6939. The document marked A7, filed as part and parcel of the affidavit is the receipt to establish the payment of renewal fees. Effect of the law in such a situation is found in Section 4 (2) of the Agricultural Landlord and Tenant Act. It reads thus:

"any payment in money to a landlord by a person occupying any of the land of such landlord is proved, such payment shall in the absence of proof to the contrary, be presumed to be rent".

Therefore, it is clear that the Appellant being the executor of the deceased lessee has established that he has paid rent in respect of this land to cover a future period in the capacity of the lessee of the Crown Lease No. 6939.

[13] Acceptance of such a payment of rent by the Director of lands may amount to considering the appellant as the lessee. In that event, the respondent is estopped from refusing to grant the extension of the lease sought by the appellant. The decision to dismiss the action on the preliminary issue by the learned High Court Judge had prevented the appellant presenting this fact of payment of rent before the High Court.

[14] Furthermore, the law requires the executors to take all endeavours in the best interest of the beneficiaries in administering an Estate of a deceased person. Section 32 of the Trustee Act (Cap 65) imposes a duty on a trustee of any lease in respect of a leasehold land that is renewable, to obtain a renewed lease and to do such other acts, as required. Failure to do so may lead others to have recourse to the remedial measures stipulated in the said Trustee Act that may cause detriment to an executor. In this

instance too, the Appellant being the executor of the estate of Padma Nathan becomes a trustee of the property belonging to the Estate of the deceased. In the circumstances, the Appellant may be subjected to the actions detrimental to him in the event he does not take every endeavour to obtain the lease 6939 extended. The Appellant had lost the opportunity of presenting this matter as well, before the High Court since the case was decided finally upon the determination of the preliminary issue.

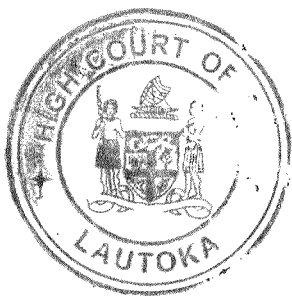
[15] The discussion referred to above relates to the matters contained in the affidavit filed by the Appellant in support of the originating summons. Admittedly those had not been adverted to by the learned High Court Judge. Hence, it may amount to a violation of Natural Justice as well. Therefore, it is necessary for this Court to make an appropriate order in order to prevent any miscarriage of justice being caused to the appellant for not allowing him the opportunity of presenting his case before Court.

- [30]. To reiterate, on my reading, the purpose behind the above comments of the Fiji Court of Appeal was to highlight the complexity of the issues involved and to accentuate the error committed by Wickramasinghe J in summarily dismissing Arjun's originating summons, lightly, on the preliminary point raised. In that regard, I agree with the submissions of Mr. Lewaravu.
- [31]. Since the granting of the lease to Devi, the issues now involved have taken a whole new turn.
- [32]. Assuming that Arjun will establish eventually in the trial of this action that the estate is entitled to a 20 – year extension and that the acceptance by the Director of Lands of rent paid by the estate, to use the words of FCA – “amount(s) to considering the appellant (Arjun) as the lessee” – what sort of interest over the lease does that give the estate and, flowing from that, is that interest strong enough to defeat the registered interest of a bona fide purchaser for value (assuming Devi is such)?

CONCLUSION

[33]. For the above reasons, I dismiss the application. This matter is adjourned to **Wednesday 03 June 2015 at 10.30 a.m.** for pre-trial directions and to set a trial date as parties complete all pre-trial processes.

[34]. Costs to the Director of Lands which I summarily assess at \$850-00 (eight hundred and fifty dollars) only.



A handwritten signature in black ink, appearing to be "Anare Tuilevuka", written over a horizontal dotted line.

Anare Tuilevuka
(Ruling as Master)
28 May 2015