

IN THE HIGH COURT OF FIJI

WESTERN DIVISION AT LAUTOKA

DISTRICT REGISTRY

HBC NO: 93 OF 2014

BETWEEN : **NASRA BEGUM** as executrix and trustee of the estate of
Mohammed Sadiq, Businesswoman of Lautoka.

PLAINTIFF

A N D : **ITAUKEI LAND TRUST BOARD** having its registered office
at 431 Victoria Parade, Suva.

DEFENDANT

Appearances: Mrs Natasha Khan for plaintiff

Mr P. Nayare for defendant

Date of Hearing: 04 October 2016

Date of Judgment: 28 February 2017

J U D G M E N T

Introduction

[01] The plaintiff brings this action against the defendant praying for the following orders:

- a) A declaration that the Defendant could not have issued the deceased with the re-entry notice in the said circumstance.
- b) Compensation at the current market value of the real estate subject to the Agreement to Lease between the deceased and the Defendant.

- c) Damages (Special, General, Exemplary and Punitive) together with interest.
- d) Rental costs incurred by the Plaintiff from 25th January 2002 till date of the judgement.
- e) Interest on the rental costs.
- f) \$40,000 for reinstatement of building costs together with interest from 25th January, 2002.
- g) **Alternatively**, Current reinstatement value of the deceased's vuda property.
- h) Such further or other relief as seems just.
- i) Cost on solicitor – client indemnity basis

[02] The Master by order dated 15 June 2016 struck out the statement of defence filed on behalf of the defendant, which led the plaintiff to make an application to set a Formal Proof date. Pursuant to the plaintiff's application via summons filed on 28 July 2016, the court set down the matter for Formal Proof hearing on 4 October 2016.

[03] At the formal proof hearing, Ms Nasra Begum, the plaintiff gave evidence and exhibited some 15 documents. In addition, the plaintiff also filed written submissions.

The Background

- [04] The plaintiff's position on the pleadings is as follows: -
- [05] Nasra Begum, the Plaintiff is the sole executrix and trustee of the estate of Mohammed Sadiq ('the *deceased*'), who died on 13 October, 2007.
- [06] iTaukei Land Trust Board ('TLTB'), the Defendant is the custodian of all iTaukei lands by virtue of powers vested in it pursuant to iTaukei Trust Act, Cap. 134 and iTaukei Lands Act, Cap 133.
- [07] The deceased, had an iTaukei lease which expired on 31 December 1999, a further grace period of one year was given to him. In the interim, he negotiated a new lease from the Defendant and paid the appropriate fee for the same piece of land. However, despite the grace period and acceptance of the new lease fee, the Defendant issued new lease for the same real estate being Native Lease number 25400, Lot 1 on ND 3296 in the Tikina of Vuda in the Province of Ba having an area of 11 acres 2 roods and 16 perches to a third party.
- [08] The Defendant thereafter offered to lease the deceased a piece of real estate in its proposed Waiyavi Subdivision together with \$40,000 to build a house and back pay of rent that the deceased would have incurred till such time as his new house in the said proposed subdivision would be completed. That offer was accepted by the deceased.
- [09] The deceased on 17 April 2002 paid new lease application for Lots 1 & 2 on ND 4426 being the Defendant's proposed Waiyavi Subdivision ('the *property*').
- [10] The Defendant collected rent for the years 2002 till 2007 for the property from the deceased.
- [11] The deceased and the Defendant entered into an Agreement to Lease on 6 October, 2004 wherein the property is described as Waiyavi S/D STG 1

Lot 2 in the Tikina of Vitogo in the province of Ba having an area of 1100 square meters. Some conditions of the agreement to lease are:

- i) The said lease was for a period of 50 years with effect from 1st January, 2002;*
- ii) The yearly rental payable on the said lease was \$200.00 due payable on the execution of the said lease;*
- iii) All development in relation to the land had to have the prior consent of the Defendant in writing;*
- iv) Within 2 years from 1st January, 2002, the deceased had to erect a building for residential purpose on the land with the prior written consent of the Defendant and in compliance with the provisions of the Public Health Regulations and the Town Planning Regulations;*
- v) The Defendant will allow the deceased quite enjoyment of the land provided that the deceased complies with the conditions of the lease;*
- vi) The Defendant has the right to terminate the lease with the provisions of iTaukei Land Trust (Lease and Licenses) Regulations; and*
- vii) The deceased within 3 months of receiving a written notice from the Defendant had to engage the services of a registered surveyor and provide evidence to the Defendant that such a surveyor had been so appointed. The deceased was to also execute a lease in conformity with the agreement to lease. Failure to comply with these conditions would mean that the agreement to lease would cease to have effect.*

[12] The Agreement to Lease was thereafter duly stamped and stamp duty paid thereon.

[13] On 13 September, 2007, the Defendant issued the deceased a re-entry notice. The said notice although dated 13 September, 2007 was posted on 15 October, 2007.

[14] The deceased died on 13 October, 2007.

[15] The said purported notice of re-entry alleged as follows:-

- a) *the deceased was in breach of clause 2 (k) of the Agreement to lease:-*
 - i) *he failed to provide a plan of dwelling house in compliance with Town Planning Regulations to the Defendant for approval within two (2) years from 1st January, 2002;*
 - ii) *he failed to lodge his application together with plans of his proposed residence to Lautoka City Council to obtain building permit within 2 years from 1st January, 2002;*
 - iii) *he had failed to build a house on the land within the minimum external floor area of 74.32m² within 2 years from 1st January, 2002; and*
 - iv) *he had failed to engage the services of a surveyor and produce evidence to the Defendant that he had engaged the services of a surveyor and that he had not executed the lease in terms of the Agreement to Lease*

[16] The Defendant on 9 September, 2009 issued a lease being Native Lease Number 29095 over the entire proposed Waiyavi Subdivision to the Punja Charity Trust. The same being a lease for Religious purposes.

[17] Basically, the claim is based on breach of agreement to lease entered between the deceased and the iTLTB.

Evidence

[18] The plaintiff gave evidence in support of her claim. She confirmed everything she has stated on the statement of claim.

Discussion

[19] The plaintiff has brought this action in her capacity as the sole executrix and trustee of the estate of Mohammed Sadiq, the plaintiff's father ('the *deceased*'). The deceased died on 13 October, 2007. The plaintiff obtained the probate on 16 January 2008.

[20] The deceased had an iTauke lease, which expired in December 1999. After expiry of the lease, the deceased was granted grace period of one year. In the meantime, the defendant leased out the property to a third party. The plaintiff alleges that the defendant issued new lease for the same property that was given to the deceased on lease to a third party.

[21] Subsequently, on 6 October 2004 the deceased and iTLTB entered into an agreement to lease different land (P/Exhibit 10). By that agreement iTLTB agreed to grant a lease, a piece or parcel of land (Waiyavi S/D STG 1 Lot 2) containing an extent of 1100 square metres. The agreement was subject to certain conditions including iTLTB's right to terminate the lease with the provisions of iTaukei Land Trust (Lease and Licenses) Regulations. The core condition was the deceased within 2 years from 1 January, 2002 had to erect a building for residential purpose on the land.

[22] It appears that the deceased did not even provide a plan of dwelling house within two years from 1 January 2002. As such, iTLTB issued the deceased a re-entry notice pursuant to section 105 of the Property Law Act (Cap. 130). By virtue of that section the lessor has a right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any

covenant or condition, express or implied. By notice dated 13 September 2007, iTLTB required the deceased to remedy the breach of the conditions embedded in the notice. The deceased or the plaintiff did not act on the re-entry notice issued by the iTLTB. There is no evidence before me to show that the deceased or the plaintiff attempted to show, at least, that there was no breach of any condition in the agreement to lease or to remedy the breaches pointed out in the notice. The plaintiff takes stand that the re-entry notice dated 13 September 2007 was posted on 15 October 2007 after the deceased died on 13 October 2007. The date of the notice is immaterial. What is relevant the date on which the plaintiff received the notice. The plaintiff had a month after receipt of the notice to remedy the breaches indicated therein. The plaintiff's cause of action in fact arose out of the notice to re-enter. The plaintiff could have brought action and applied to the court for relief under section 105 (2) of the Property Law Act. In my opinion, the cause of action for the plaintiff to initiate legal proceedings based on the notice issued by iTLTB arose in October 2007. The plaintiff has wasted time on correspondences with iTLTB.

[23] The pertinent question is whether the disputed property forms part of the estate of the deceased. I would say it does not. This is because the lease of the deceased had expired in 1999. He was given a grace period of one year after the expiry. In October 2004, the deceased entered into an agreement to lease with iTLTB. Thereafter, in September 2007 iTLTB issued re-entry notice against the deceased and, in September 2009 iTLTB issued new lease for the same property to a third party. The deceased or the plaintiff did not take any action based on the re-entry notice issued by iTLTB. The agreement to lease the iTLTB had with the deceased was conditional. There is no evidence in court to establish that the deceased had complied with the conditions of the agreement. In the circumstances, it cannot be said that the deceased had any power of dispositions over the disputed property at the time of his death. Therefore, the property in question does

not form part of the estate of the deceased and accordingly the plaintiff claim is bound to fail.

[24] The without prejudice offer made by iTLTB in December 2010 to settle the issue out of the court (see P/Exhibit 12) cannot be held against it (iTLTB) as the same has been made without admission of any liability.

[25] For all these reasons, I would dismiss the plaintiff's claim, but without costs.

The Outcome

Action dismissed without cost.

M H Mohamed Ajmeer
28/2/17

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M H Mohamed Ajmeer

JUDGE

At Lautoka

28 February 2017

