

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBC 54 of 2013

BETWEEN : **MANJIT KAUR** of Votua, Ba, Domestic Duties.

PLAINTIFF

AND : **SARJEET SINGH** of Lot 18, Votua, Ba.

DEFENDANT

R U L I N G

(Ruling date amended pursuant to the Slip Rule under Order 20 Rule 10 of HCR 1980).

BACKGROUND

1. Before me is an application for stay pending appeal.
2. The relevant principles of stay were set out by the Fiji Court of Appeal in **Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd** Civil Appeal ABU0011.04S, 18th March 2005. They are:
 - (a) whether, if no stay is granted, the applicant's right of appeal will be rendered nugatory (this is not determinative). See Philip Morris (NZ) Ltd v Liggett & Myers Tobacco Co (NZ) Ltd [1977] 2 NZLR 41 (CA).
 - (b) whether the successful party will be injuriously affected by the stay.
 - (c) the bona fides of the applicants as to the prosecution of the appeal.
 - (d) the effect on third parties.
 - (e) the novelty and importance of questions involved.
 - (f) the public interest in the proceeding.
 - (g) the overall balance of convenience and the status quo."
3. In this case, the intended appellant was the defendant facing eviction in the section 169 Land Transfer Act first instance proceedings. Given that the plaintiff is the last registered proprietor of the land which the defendant is occupying, the onus was on the defendant to show cause why an eviction order should not be granted.
4. I reproduce below the reasoning of my brother judge Mohammed Ajmeer.
 - (i) Ajmeer J first noted that the plaintiff is the last registered proprietor of the land in question and as such, had locus to apply for a section 169 show cause Order.

- (ii) he then looked at the provisions of sections 169 to 172 of the Land Transfer Act.
- (iii) he observed that in showing cause, the defendant had deposed in his affidavit that:

The Director of lands has represented that a lease is being processed in his name. He applied for this lease for the place he is occupying.

The Director of lands may have been negligent in the issuance of the lease in the name of the plaintiff because the lease may cover the portion he applied for and was in occupation of. This issue is the subject of separate proceedings.

The plaintiff obtained the lease by fraud and misrepresentation and this also is the subject of another proceeding where oral evidence will be heard and the Director of lands is a party."

He does not agree that his house falls within the lease of the plaintiff.

- (iv) the onus was on the defendant to show that he had a right of possession.
- (v) the Crown Lease executed on 12 April 2012 and registered on 20 April 2012 under Crown Lease No. 18854 shows the plaintiff is the registered proprietor of the land. This lease is a protected lease under the State Lands Act. The Director of Lands has given his consent to initiate eviction proceedings against the defendant.
- (vi) the defendant had argued inter alia that the plaintiff's registered proprietorship is being challenged in a separate civil action No. 158 of 2015, where the defendant alleges that the plaintiff obtained the lease (CL 18854) by fraud in that she misrepresented to the Director of Lands (the head lessor) that the land upon which she was applying for a lease was vacant when she knew that the defendant was in occupation of it.
- (vii) Ajmeer J then cited various case authorities for the proposition that a pending separate action between the parties in respect of the land will not prevent the court from proceeding with a section 169 application in respect of the same land. However, where there is an allegation of fraud, and there is some evidence in support of the allegation indicating the need for a fuller investigation, then the section 169 summary procedure would be inappropriate. In such circumstances, the section 169 application should be dismissed without prejudice to the

respondent's right to institute proceedings by writ. A bare allegation of fraud would, by itself, not be sufficient to dismiss the application.

- (viii) Ajmeer J then noted that, although the defendant alleges fraud, he gave no particulars of fraud.
- (ix) The defendant in his affidavit states that the plaintiff knew the extent of the interest of the defendant and knowing that interest the plaintiff misrepresented to the Director of Lands that the land was vacant.
- (x) in **Prasad v Hamid** [2004] FJCA 10; ABU0059.2003 (19 March 2004), dealing with the issue of fraud, knowledge of adverse interest and discretion of the Director of Lands, Fiji Court of Appeal observed:

"Whether this case is disposed of in a summary way as his Lordship thought it should be or whether it goes to trial and is fully heard, that seems to be the ultimate question which will need to be answered. The matter needs to be decided with it in mind that section 40 of the Act provides that knowledge that any such unregistered interest is in existence shall not of itself be imputed as fraud. That puts it rather more positively than does the evidence in this case because it is apparently not fraud even if there is knowledge of an unregistered interest. Objectively speaking we know from the evidence that there was no unregistered interest. The Appellant may have had some right arising from his payment of rent until 1973 to occupy the land. He certainly had the permission of the relevant authorities to build the house which is in question but that cannot be determinative of the outcome of the case. If one were to accept Hamid's evidence about his conversations with officers of the Department of Lands many years ago about there actually being a lease which he could pick up but which was never available, one might take the view that he had had a raw deal from the Department of Lands. We could not make that finding in this summary proceeding.

"But that does not appear to us to be a reason why we should find that the learned judge fell into error. As was said Prasad may, in the 1994 proceedings, have cause for complaint against the Department of Lands.

"We make no comment about this because we have not the material before us which would enable us to do so. No more can be said then that about the case which Prasad proposes to make. The important point though is that the matter is between Prasad and the Department of Lands: it cannot concern Hamid. That is a point which the judge himself made very strongly.

"More importantly for present purposes, Hamid has not demonstrated that he has any interest in the land or reasonably arguable case that he has an interest in the land. The evidence points to he having never had any more than a periodic tenancy. The Department of Land's refusal of rent after 1973 suggests that it no longer recognized him as its tenant. Hamid brought the 1994 proceedings but he failed to provide satisfactory particulars of fraud. He has never done so. In short Hamid has not discharged the onus which rests on him under s.172 of the Act.

"It is a hard thing to contemplate a situation in which somebody who has occupied land for so many years, has built a house upon that land and, at least at one stage appears to have had some sort of tenancy, now to be faced with the prospect of having a significant part of his home demolished by the actions of

Hamid. But Hamid has his rights. They are clear. The legislation is clear and the authorities under the legislation are also clear. In our opinion the Judge made no error in this case. It was one appropriate for summary dismissal."

- (xi) Ajmeer J noted that the land in dispute is a state land governed by the State Lands Act. He observed that the defendant did not possess any document to show that he has been in occupation with the consent of the Director of Lands.
 - (xii) in **Hamid**, Fiji Court of Appeal said that the court will not interfere with the Director of Lands' discretion as to whom he grants the lease of the land and that the Director of Lands is entitled to grant to whoever is most entitled or qualified.
 - (xiii) Ajmeer J then noted that the defendant only asserts that the plaintiff misrepresented to the Director of Lands that the land in question was vacant knowing very well that the defendant was in possession of the land.
 - (xiv) he then observed that under section 40 of the Land Transfer Act, the knowledge of the existence of any trust or unregistered interest shall not of itself be imputed as fraud.
 - (xv) Ajmeer J noted that the defendant in his affidavit states that the land belonged to Votua Womens Club and that the Tagi Tagi Gurudwara Committee had handed over the land to his father to look after and that the defendant was seeking to prove that his interest derives from the right of his father.
 - (xvi) Ajmeer J then noted that there was no tangible evidence before him to prove that the defendant's father was ever issued a lease over the land, either.
 - (xvii) Ajmeer J then concluded that he was not satisfied that the defendant has a right to remain in possession or that the defendant had a reasonably arguable case for such a right. He then ordered that the defendant is to deliver up possession of the land comprised in Crown Lease No. 18854 to the plaintiff forthwith.
5. The intended appellant has raised the same arguments before me.
6. Mr. Padarath had raised the following arguments in Court:

- (i) that his client acquired an equitable proprietary interest over the land in question considering (a) that he had been in possession of the land and (b) that he had lodged an application for a lease with the Director of Lands and had been assured that the application was being processed.

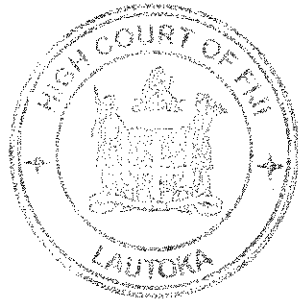
I am appalled at the submission that one could acquire an equitable proprietary interest over a crown land from the moment that one lodges an application for a lease. As for his prior occupation, I reiterate the point made by Ajmeer J that that occupation was made pursuant to a dealing that was not consented to by the Director of Lands. It was accordingly an illegal occupation which cannot in the least be a valid basis to assert an equitable proprietary interest.

- (ii) that the respondent had obtained the leasehold in question by fraud, the fraud being that, he had represented to the Director of Lands in his application for a lease that the land in question had been vacant when in fact it was occupied by the defendant all along.

It is hard to see how that conduct of the respondent could ever amount to fraud. To constitute fraud, the intended appellant must establish first and foremost that he had an existing proprietary interest which the respondent had undermined and defeated. Having established that, then he would have to face the hurdle of section 40 of the Land Transfer Act which provides that knowledge of the existence of any trust or unregistered interest shall not of itself be imputed as fraud.

- 7. It is hard for me to fault the reasoning of Ajmeer J and I fully support it. In saying that, I am also saying that I do not see any real prospect of success (if at all there is some) in the defendant's appeal. I consider that against the rights of the respondent as the registered proprietor of the land in question. Accordingly, I am of the view that the balance of convenience favours a refusal of stay. In the unlikely event that the defendant should succeed in his appeal, he could still, of course still seek to recover in damages against the Director of Lands and the respondent.

8. Application for stay dismissed. Costs to the respondent which I summarily assess at \$800-00 (eight hundred dollars only).



A handwritten signature in black ink, appearing to be "Anare Tuilevuka".

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Anare Tuilevuka
JUDGE
Lautoka.

22 September 2017