

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

**HBC NO. 141 OF 2013**

**BETWEEN** : **SURESH CHANDRA** of Rarawai, Ba, Fiji, Cultivator.

**Plaintiff**

**AND** : **JAGDISH CHAND**, Panel Beater and **ANISH CHAND**,  
Panel Beater and **AKLESH CHAND**, Storeman, all of  
Rarawai, Ba.

**Defendants**

**Counsel** : Ms. Jyoti o/i Messrs. Jyoti Legal for the Plaintiff.

: Defendants absent & unrepresented.

**Date of Hearing** : 18<sup>th</sup> August, 2017.

**Written Submissions due  
on 8<sup>th</sup> September, 2017** : Not filed

**Date of Judgment** : 23<sup>rd</sup> October, 2017

**Judgment by** : Justice Mr. Mohamed Mackie

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**J U D G M E N T**

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**Background**

1. The Plaintiff by way of Writ of Summons, along with his Statement of Claim dated 5<sup>th</sup> August, 2013, filed the above styled action against the Defendants praying for the following reliefs jointly and / or severally.
  - a) Judgment that the Defendants and / or their servants and/or their agents do give the Plaintiff vacant possession of the land and premises in the State Lease No. 18246 and of the approximately ¼ acre share of State Crown Lease No. 15491 both occupied by them;
  - b) An injunction restraining the Defendant's and/or their servants and/or their agents from interfering with the plaintiff's and his family's possession and occupation of the State Lease No. 18246 and in anyway interfering with his cane farm whether

by damaging the access way or by dumping rubbish and debris on the same or otherwise;

- c) Damages for loss of rental and / or mesne profit and production at \$500.00 per month for six years for the premises on the land amounting to \$36,000.00.
- d) Damages for trespass at the rate of \$20.00 per day amounting to \$43,800.00 for six years;
- e) General damages, f) Interest & g) Cost

**Chronology of events:**

- 2. The Defendants had not filed the acknowledgement of service and/or the intention to file Defence, though the Summons were, reportedly, served as per the affidavit of service dated 21st August, 2013, filed on 23rd August, 2013.
- 3. Thereafter, the plaintiff filed Summons dated 27<sup>th</sup> September, 2013, under Order 19, Rule 07, for final judgment against the Defendants due to their default in filing the Statement of Defence and this, reportedly, being served as per the affidavit of service dated and filed on 3<sup>rd</sup> October, 2013, the Defendants, appeared in person on 04<sup>th</sup> October, 2013. They were given time to file reply affidavit and same was filed on 25<sup>th</sup> October, 2013. This Summons had included prayers for certain injunction reliefs as well.
- 4. Subsequently, at the hearing held on 14.11.2013, then sitting Judge, while issuing interlocutory injunction as prayed for in prayers ( C ) and( D )to the said Summons, directed the Defendants to file their Statement of Defence on 20.01.2014. This order was served on the defendants on 27<sup>th</sup> November, 2013, as per the affidavit dated 2<sup>nd</sup> December, 2013. Record indicates that on this day Mr. Lee has appeared on behalf of the Defendants, purportedly, on the instruction of Mr. Nawaikula.
- 5. Thereafter, on 20.01.2014, Defendants have appeared in person and on application further time being granted, the Statement of Defence together with a Counter Claim dated 28<sup>th</sup> January, 2014, was filed by **Nawaikula Esquire** on 31<sup>st</sup> January, 2014. The Defendants also made an alternative claim of \$100,000.00 each as special damages. The Statement of Defence has been served on the Plaintiff's Solicitors as per the affidavit of Service dated 2<sup>nd</sup> June, 2014, filed of record.
- 6. Since no Defence to counter claim was filed by the Plaintiff, a Default judgment has been entered on 4<sup>th</sup> July, 2014, against the Plaintiff. The record does not contain an affidavit or any other proof of service of this Default judgment on the Plaintiff or his Solicitors. However, this is not a matter under scrutiny now.
- 7. Further, it is on record that on 3<sup>rd</sup> March, 2015, Plaintiff's Statement of Claim was struck out, as the Cost of 300 \$ ordered on 14.May,2014, on account of Plaintiff's

failure to file reply affidavit to 1<sup>st</sup> Defendant's affidavit dated 25<sup>th</sup> October, 2013 was not paid.

8. Immediately, the Plaintiff filed an inter-parte notice of Motion dated 3<sup>rd</sup> March, 2015, together with an affidavit of one SWASTIKA LATA seeking, among other reliefs, to have the Order granted on 3<sup>rd</sup> March, 2015, striking out the Plaintiff's Statement of Claim, revoked and/or set aside.
9. The above notice of motion being supported on 12.03.2015, the Court, having granted certain interim Orders on the same day, thereafter on 17<sup>th</sup> April, 2015, by its further Order wholly revoked the Order for striking out made on 3<sup>rd</sup> March, 2015, including the summarily assessed cost of \$ 1000.00.
10. Thereafter, subsequent to several mention dates, Summons for directions being filed on 14<sup>th</sup> March, 2016, Orders were accordingly made on 18<sup>th</sup> March, 2016. Then, the Plaintiff filed his Affidavit verifying list of documents (AVLD) on 25<sup>th</sup> May, 2016. But, it is observed that there was no any proof of service of the Order concerned and/or the Plaintiff's AVLD on the Defendants or on their Solicitor.
11. The record shows that on 07.10.2016, the Defendants were represented on the instruction of Mr. Nawaikula and though, time was given by Justice S. Sharma for the Defendant's Solicitor to file AVLD, they have, thereafter, neither appeared in Court nor filed their AVLD. Accordingly, having observed the subsequent absence of the Defendants, their Solicitors and non-filing of their AVLD, Justice Sharma on 13th December, 2016, had fixed the matter, presumably, for ex-parte hearing on 31<sup>st</sup> May, 2017 (formal proof).
12. Thereafter, with the changes occurred on the Bench, the matter being mentioned before me, for the 1<sup>st</sup> time on 31<sup>st</sup> May, 2017, since the Defendants were absent and unrepresented, I directed the Counsel for the Plaintiff to serve and file the proof of service of Plaintiff's AVLD and the Notice of change of Solicitors of the Plaintiff, on the Defendant's Solicitors. The Registry also was directed to issue NOAH on the Defendant's Solicitors and adjourned for 15<sup>th</sup> June, 2017, to fix a date for hearing. The NOAH on the Defendant's Solicitors Mr. Nawaikula for the above date has been acknowledged according to the record.
13. However, when the matter came up before me on 15<sup>th</sup> June, 2017, the Defendants and their Solicitor were absent despite the NOAH being, reportedly, served. Further, in compliance with the Court's direction, Counsel for the Plaintiff filed two affidavits in proof of the service of Plaintiff's AVLD and the notice of the change of Solicitors on the Defendant's Solicitors. Accordingly, the matter was fixed for formal proof by me on 11<sup>th</sup> August, 2017.
14. When the matter came up for formal proof before me on 11<sup>th</sup> August, 2017, the Court without proceeding to take evidence, once again issued notice on the Defendant's Solicitors in order to give the Defendants an opportunity to take part in the

proceedings. This notice was, reportedly, given to Mr. Nawaikula's office in addition to leaving the NOAH in the folder of Mr. Nawaikula.

15. Finally, when the matter came up before me on 18<sup>th</sup> August, 2017, as the Defendants were still absent and unrepresented; the Court proceeded with formal proof hearing.

**Statement of Claim:**

16. The Plaintiff claims that he is the registered proprietor and owner of State/ Crown Lease No. 18246 LD 4/1/2761, being lot 1 in Plan No. SO 6087 containing an area of 824 square meters, on a 99 years lease commencing from 1<sup>st</sup> January, 2010.
17. The 1<sup>st</sup> Defendant is said to be the Plaintiff's own Brother, while the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are said to be the Sons of the 1<sup>st</sup> Defendant. Plaintiff alleges that the Defendants are interfering with plaintiff's entitlement and peaceable occupation of land in State/Crown lease No: - 18246, on which a substantial concrete building is said to be situated. Moreover, it is alleged that the Defendants are also interfering with the possession and entitlements of ¼ acre out of his adjoining farm land, which is in State Lease No: 15491, for a number of years without paying any rental despite request and demands being made by the Plaintiff.
18. It is further averred that the Defendants have made additions and improvements without the consent of the plaintiff and that of the Local Authority. The Plaintiff claim to have inherited the lands in question from his late mother Ms. Sumari and though, the 1<sup>st</sup> Defendant had lodged a Caveat against the grant of probate to the Plaintiff , same was removed by way of Court Order and the Estate has now been distributed accordingly after grant of probate.
19. The Plaintiff claims to have sent the Defendants written notice dated 6<sup>th</sup> March, 2012, asking them to vacate. He moves for reliefs as prayed for in his statement of claim.

**Statement of Defence:**

20. The Defendants by their joint Statement of Defence dated 28<sup>th</sup> January, 2014, having admitted the Plaintiff's title as averred in paragraphs 1 to 3 of the Statement of Claim, conversely, take up a position that the Plaintiff obtained that title in breach of his position as Trustee for the Defendants and the agreement entered on 15.04.1997 between them and the Plaintiff. Further, they claim that the concrete building with 6 rooms is their own allocation under the Estate, for which they allege that the Plaintiff has taken title illegally under his own name.
21. By way of further defence, the Defendants have denied the rest of the averments in the SOC, except for the averments in paragraph 5 thereof, which avers that the Defendants are living there for number of years without either buying the residential lot or paying any rent, though several request and demands were made to that effect. Defendants, while specifically admitting Plaintiff's title, state that they are living there throughout their life with the expectation that the Plaintiff as a Trustee under the

agreement would allocate to them the House with the Land and thus they are not bound to purchase or rent it from the Plaintiff.

22. The Defendants pray, among other things, for the dismissal of Plaintiff's action, for an Order to transfer the lot they are in occupation in their name and for specific performance. Alternatively, they move for an Order for the Plaintiff to pay them in a sum of \$100,000.00 each as special damages.

**Defence to Counter Claim:**

23. On careful perusal of the record, it is observed that subsequent to the filing of Statement Defence, the Counsel for the Defendants, having found that no Defence to the Counter claim was filed by the Plaintiff, entered a Default Judgment against the Plaintiff on 4<sup>th</sup> July, 2014, for the payment of \$ 100,000.00 each as alternative relief. It appears to be an unaccomplished mission on the part of the Defendant's Solicitor. However, I am of the view that it is not a matter that demands any scrutiny at this juncture.

**Evidence**

24. At the formal proof hearing held before me on 18<sup>th</sup> August, 2017, the Plaintiff **Suresh Chandra**, being the only witness, gave evidence and closed his case marking documents from "1a" to "7a".
25. In addition to the oral evidence of the Plaintiff, learned Counsel at the commencement of the formal proof hearing, moved the Court to consider the averments in the affidavit dated 25<sup>th</sup> September, 2013, sworn by the Plaintiff and filed along with his Summons dated 29<sup>th</sup> September, 2013. Now it is for the delivery of judgment on the evidence presented as above.

**Analysis**

26. It has to be stressed at the outset, that this Judgment hereby entered is **not** on the aforesaid Summons dated 29<sup>th</sup> September, 2013, filed under Order 19, on account of the alleged failure to file Statement of Defence. Statement of Defence dated 28<sup>th</sup> January, 2014, has, subsequently, been filed and same stands accepted as observed in chronology of events above.
27. This judgment is the outcome of the formal proof hearing, held before me after the Defendants and/or their Solicitors failed to be present in Court to have the matter fixed for trial and for them to defend the action, despite several notices being given and, reportedly, served.
28. A copy of the Plaintiff's AVLD, along with the notice of change of Solicitors and NOAH have been, reportedly, served on the Defendant's Solicitor, on the direction made prior to my fixing of the matter for formal proof. But they have failed to file their AVLD. I am convinced that this Court has taken all the possible steps to have

the Defendants and their Solicitors in Court for the trial, but they have failed to appear in Court.

29. On perusal of the case record, it is appears that the defendants and their Solicitors, from the inception, have been lackadaisical in appearing in Court and defending their action. Thus I am convinced in fixing the matter for formal proof and allowing the Plaintiff to lead his evidence in their absence is justifiable.

30. It is to be noted that there are two lands involved in this matter, one being residential land on State Lease No: 18246 and the other one being the ¼ acre share of a farm land on State Lease No.15491. The Plaintiff in the prayer to his Statement of Claim had moved for, among other reliefs, for an injunction to the following effect, which, however, was not moved for or issued at the inception.

b) *“An injunction restraining the Defendants and/or their servants and/or their agents from interfering with the plaintiff’s and family’s possession and occupation of the State Lease No.18246 , and in anyway interfering with his cane farm therein whether by damaging the access way or by dumping rubbish and debris on the same or otherwise”*

31. Subsequently, by his aforesaid Summons dated 29<sup>th</sup> September, 2013, in addition to his substantive and other ancillary reliefs, the Plaintiff had moved for 3 separate injunctions in respect of the lands in the said State Leases, as per paragraphs ( b),( c) and ( d) of the prayer thereof.

32. It is to be noted that the injunction sought under (b) above was, actually meant to restrain the Defendants from their possession and occupation of the Concrete House situated in the State Lease No. 18246 ,where the Defendants are ,admittedly, in occupation for number of years. In other word it appears to have been a sinister move by the Plaintiff to eject the Defendants, summarily, by way of an injunction. However, then presiding Justice. L. Abeygunaratne, in his wisdom, had not issued such an injunction.

33. However, it is on record that the injunction orders prayed under paragraph (c) and (d) of the Summons have been issued on 14<sup>th</sup> November, 2013, **with the consent of the Counsel for the Defendants (Mr. Lee)**, Accordingly, it appears that in terms of paragraph (C) the Defendants have been restrained, on their own volition, from using the **part of the said State Lease No. 18246 (Residential Land)** for commercial purposes, transport business or Mechanical repairs and from interfering with the peaceful enjoyment of the Plaintiff.

34. In addition to above, with their consent, the Defendants have also been restrained from interfering with the Plaintiff’s possession, cultivation and occupation of the part of the **State Lease No. 15491 (farm Land)** and from dumping rubbish and debris therein. Further, the Plaintiff in his evidence has categorically stated that he does not move for any damages and forego same against the Defendants.

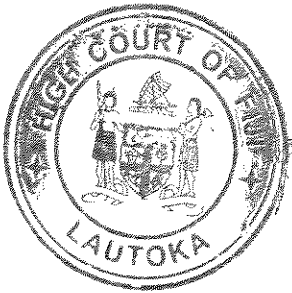
35. Therefore, the task before this Court has been made somewhat easy by the clear admission made in the Statement of Defence with regard to the Plaintiff's title and by consenting to grant the above interlocutory injunctions against them.
36. Thus, the only issue that begs adjudication is whether the Defendants and/or their servants, agents should give up the vacant possession of the land and premises in State Lease No. 18246 (residential) and part of the State Lease No.15491 (Farm Land) as prayed for in paragraphs (a) of the prayer to the Statement of Claim.
37. The Plaintiff through his evidence has marked 7 exhibits, out of which the documents marked as "1-a" and "2-a" are pivotal, being the State Lease bearing No. 18246 for Residential land and State Lease No. 15491 for the Farm land , which prove his lease title to the subject matter of this action.
38. The plaintiff claims inheritance for the lands, admittedly, being the Estate of his late Mother Ms. Sumari, on the probate issued to him. The Defendants in paragraphs 1 to 3 of their joint Statement of Defence have clearly admitted the title of the plaintiff as averred in paragraphs 1 to 3 of the Statement of Claim.
39. Plaintiff by his evidence has satisfied the Court that he became the Lease Holder of these State Leases in the year 2010, after obtaining the Probate in his Mother's Testamentary proceedings. Though, the 1<sup>st</sup> Defendant along with two others had filed Caveats in the said Testamentary Action, Plaintiff states that it was removed by a Court Order.
40. The Defendants have not challenged the above fact in the Statement of Defence, and the evidence of the Plaintiff on it, instead admitted same including the title of the Plaintiff. Because of this direct and tacit admissions on the part of the Defendants, I observe, that the Plaintiff was not under a heavy burden of proving his title as far as both the State Leases are concerned.
41. Having admitted the title of the Plaintiff, the stance taken by the Defendants in their Statement of Defence was that the plaintiff is holding the Leases in question as a trust for the benefit of them and there is an agreement between them for the Plaintiff to transfer the Residential Land along with the Concrete House therein unto them and he has not discharged his such obligations. This position of the Defendants has not been substantiated before this Court.
42. Apart from marking his lease documents as "1a" and "2a", which demonstrate and prove his title to both the lands in question, he has marked documents "4a" to "7a" to show how he exercised his lease rights over the said lands. Document marked "7a" is the Notice to Quit Plaintiff claims to have sent to the Defendants 6<sup>th</sup> March, 2012, prior to filing of this action. This has not been replied by the Defendants.
43. The plaintiff gave clear and unchallenged evidence at the formal proof hearing. He also produced the relevant documents in support of his claim. I accept his oral,

affidavit and documentary evidence tendered in court. I see no reason to disbelieve his evidence.

44. On the unchallenged oral and documentary evidence adduced before this Court, I would answer the only issues raised by me in paragraphs 36 above affirmatively. Accordingly, the plaintiff is entitled to judgment in his favour as follows. No damages awarded as the Plaintiff has withdrawn his claim for same.
45. I shall not make any order with regard to the Counter Claim of the Defendants, since it stands, seemingly, adjudicated summarily as stated above and the propriety of which, need not be subjected to scrutiny through this judgment.
46. Since, I observe that the substantial relief granted under prayer (a) to the Statement of Claim is now covering the reliefs granted by way of interlocutory injunction; no necessity will arise for any permanent injunctions to be issued.

**Orders**

- a. A judgment is hereby entered in favour of the Plaintiff as per paragraph (a) of the prayer to the Statement of Claim, against the all 3 Defendants, their servants/agents and all those holding under them.
- b. There shall be no damages as the Plaintiff has relinquished same.
- c. Defendants shall pay unto the Plaintiff summarily assessed Cost of \$1000.00.



A handwritten signature in black ink, appearing to read "A.M. Mohammed Mackie", is written over a horizontal dotted line.

A.M.Mohammed Mackie

**Judge**

At Lautoka  
23<sup>rd</sup> October, 2017