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

HBC NO. 87 OF 2013

BETWEEN : **RASUAKI SALABABA RALULU** and **JOKAVETI DOLANAISORO** both of Varadoli, Ba, Police Officers.

PLAINTIFFS

A N D : **PREM CHAND, SUSHIL CHAND** and **VINOD CHAND** formerly of Nadari, Ba, but now residing in Canada.

1st DEFENDANTS

AND : **MOHAMMED HAROON** trading as **HAROON'S HARDWARE**, a Hardware and a Construction business, having its registered office in Rakiraki, Ra.

2nd DEFENDANT

Before : A.M. Mohamed Mackie- J

Appearance : Ms. Jyoti N. for the Plaintiffs

1st Defendants absent and unrepresented

2nd Defendant absent and unrepresented

Date of Hearing : 18th September 2018

Date of Judgment : 13th November 2018

JUDGMENT

A. Introduction

1. The plaintiffs (Husband & Wife respectively) commenced this action on 20th August 2013, against the 1st and 2nd defendants, by way of Writ of Summons filed along with the Statement of Claim dated 17th May 2013, which now stands amended by the Amended Statement of Claim (ASC) dated 21st January 2014.

2. The claim against the 1st defendants was on the basis of the alleged unjust enrichment and failure to pay compensation, while the claim against the 2nd defendant was on the alleged negligence and breach of agreement.

3. The Plaintiffs prayed for following reliefs:

   i. *A declaration that the defendants are unjustly enriched by the said property.*
   ii. *Compensation for house and Improvements effected on the 1st defendant's property by the plaintiff.*
   iii. *Damages against the 2nd defendant for negligent and breach of contract.*
   iv. *General damages against the defendants.*
   v. *Indemnity cost, interest and other reliefs the court deem just.*

B. <u>Background as per the SOC</u>

<u>Claim against the 1st defendants.</u>

4. The plaintiffs were and are the registered owners or proprietors of all that piece of Land depicted in plan known as Vatuvaka (part of) containing an extent of 32 perches and around 2/10th of a perch being Lot 9 on deposited Plan No; 3500 and situated in the District of Rakiraki in the island of Viti Levu on certificate of Title No: 18172 (the plaintiff's property).

5. At all times material the 1st defendants were and are the registered proprietors all that piece of Land depicted in Plan hereon known as Vatuvaka (part of) containing an extent 33 perches and around 1/10 of a perch being lot No.09 on deposited plan No .4991 and situated in the District of Rakiraki in the Island of Viti Levu on Certificate of Title No.20298.

6. On or about 3rd March 2006, the plaintiffs by a mistake and in error, constructed their residential dwelling valued at $ 80,000.00 on the 1st defendant's property mentioned in paragraph 5 above.

7. According to the statement of claim ,the total value of the construction amounting to $80,000.00 was funded partly through a Mortgage Loan for a sum of $50,800,00 from Colonial Bank of Fiji (Now known as BSP) and the balance $29,200.00 through Fiji National Provident Fund (FNFP) . Both the Mortgage No: 573958 and the FNFP charge on it were registered on 26th September 2005.

8. The Plaintiffs did not know about the said mistake and error mentioned above until they

received a letter dated 19th May 2007 from M/s. Shahu Khan & Shahu Khan advising the plaintiffs about such mistake.

9. The defendants, through one Nirmala who was the Administratrix of the Estate of Sunil Chand under probate No. 32602 and Urmila Devi aka Sashi as the lawful Attorney of Vinod Chand (3rd named 1st defendant) under power of Attorney No. 34902 dated 20th August 1999, knew of the Plaintiff's mistake and error and had the opportunity to stop the plaintiffs, though Nirmala and Urmila Devi stood by and said nothing.

10. The defendants , on or about 16th November 2007 , obtained an Order against the plaintiffs for vacant possession under section 169 of the Land Transfer act from the Lautoka High Court in Civil Action No. 312 of 2007.

11. The defendants, having obtained the possession of the house, have rented out it to one Akesa Cavalevu for a monthly rental of $400.00.

12. The defendants have benefited, accepted and acquired the house built by the plaintiffs by accession knowing that they were not built gratuitously.

13. The said house built by the plaintiffs through the 2nd defendant was acquired by the 1st defendants by virtue of accession conferred incontrovertible benefit on the defendants and it would be unconscionable for the defendants to keep the benefit and to unjustly enrich out of it, without paying a reasonable sum in return for the enhanced value of the defendant's property.

Claim against the 2nd Defendant:

14. The claim against the 2nd defendant, who constructed the house as a contractor for the plaintiffs on the defendant's land as aforesaid, was on the basis of the alleged negligence and breach of contract on his part. Though, the 2nd defendant had filed the statement of defence and was ready for the trial, the claim against him was dismissed on same being withdrawn by the plaintiffs on 2nd September 2016 before Ajmeer –J. Subsequently, the 1st prayer in the statement of claim for a declaration against the first defendants was also withdrawn on 5th September 2016. Therefore, no necessity arises for this court to discuss about the case against the 2nd defendant in this judgment.

C. Service of writ & SOC on the 1st Defendants

15. Since the 1st defendants were said to be residing in Canada, the service of the writ and the Statement of claim had not been effected on them personally in Fiji.

16. On 28th January 2014, the plaintiff being directed by the court to show cause as to why the SOC should not be struck out for want of prosecution under Order 25 rule 9 and the affidavit being filed in that regard by the plaintiffs, the then learned Master by his ruling dated 12th May 2014, permitted the plaintiffs to proceed with the action and directed the plaintiff to apply for an order of court granting permission to serve the writ on the 1st defendants out of the jurisdiction.

17. Subsequently, an Ex-parte Notice of Motion being filed on 9th June 2014 for an Order for the service of writ and SOC on the 1st defendants, who were said to be living in Canada, the learned then Master on 11th June 2014 allowed the application to have the writ and the SOC served by way of publishing an advertisement in one of the Newspaper in Canada. In addition to the above, on a further application made on 9th October 2014 for the substitute service, the learned Master on 27th November 2014 allowed to serve the writ by way of registered post at the address of the 1st defendants in Canada. The Master also had on 14th November 2014, extended the period of validity of the writ for further 6 months as per the Ex-parte summons filed on 13th November 2014.

18. On 2nd March 2015, plaintiffs filed the affidavit of service of writ and the SOC on the 1st defendants, along with the proof of newspaper advertisement published in Canada.

19. The plaintiff's Solicitors having done a search on 11th June 2015 and since no Notice of Intention to Defend or the statement of defence had been filed by or on behalf of the 1st defendants, on 17th June 2015 filed an interlocutory judgment against the 1st defendants and same was sealed on 24th June 2015.

20. Thereafter, on 10th November 2016, the plaintiff filed an Ex-parte Notice of Motion seeking permission from the court to have the interlocutory judgment and the Notice of the assessment of damages served on the 1st defendants in Canada, by way of publishing an advertisement in the newspaper and orders in terms of summons granting permission were made 25th November 2016. This being not effected , the plaintiffs filed another ex-parte Notice of Motion on 6th February 2017 and order was granted on 13th February 2017 by the learned subsequent Master to serve the interlocutory judgment and the Notice of the assessment of damages on the 1st defendants by way registered post.

21. Accordingly, having reportedly served the aforesaid papers by registered post, the plaintiffs filed the affidavit of service on 20th February 2017 together with the registered postal article.

22. As there was no response from the 1st defendants, when the matter came up for hearing on 2nd November 2017, the learned Master, having decided that the plaintiff's claim should fall under Order 19 Rule 7 of the HCR, proceeded to set aside the interlocutory

judgment on the basis that it had been entered irregularly and directed the plaintiff's Solicitor to file the summons under Order 19 Rule 7 (2). (vide Master's note dated 2nd November 2017)

23. Accordingly, plaintiff's Solicitors on 20th April 2018 filed Ex-parte Notice of Motion under Order 19 Rule 07 seeking, among other reliefs, leave of the court for the plaintiffs to formally prove their claim against the 1st defendant and the hearing on same was taken up before me on 18th September 2018.

D. Formal Proof Hearing

24. At the formal proof hearing held before this court on 18th September 2018, the 2nd named plaintiff (PW-1), one **Mr. Mohamed Haroon** (PW-2), who had been named as the 2nd defendant, being the contractor and had constructed the plaintiff's house in the 1st defendant's land instead of constructing in plaintiff's land, **Mrs. Akesa A. Cavalevu** (PW-3), who prepared and submitted two separate valuation reports on both the properties and **Ms. Ronica Prakash** (PW-4), the Bank Officer gave evidence. Documents from P-1 to P-14 were also marked at the hearing through the 2nd plaintiff PW-1 and the contents of same were substantiated by the respective witnesses called by the plaintiffs. In addition to above an affidavit evidence has been tendered sworn by the present tenant of the house in question.

E. Discussion

25. The Plaintiffs have foregone the claim against the 2nd defendant on 2nd September 2016, who subsequently gave evidence for the plaintiff as PW-2. The plaintiffs on 5th September 2016 also foregone the declaratory relief claimed on the basis that the defendants had unjustly got enriched as prayed for in the first relief of the prayer to the statement of claim. Plaintiffs are seeking compensation for the house constructed and on the improvements done on the first defendant's land, general damages, indemnity cost and interest only from the First defendants.

26. The writ of summons was, reportedly, served on the First defendants by way of advertisement in a newspaper. However, the First defendants did not file notice of intention to defend, nor did they file statement of defence within the prescribed time. Therefore, the Plaintiffs on 17th June 2015 duly entered an interlocutory judgment against the 1st defendants and this interlocutory judgment and the notice of assessment of damages were also reportedly served on the 1st defendants in Canada by way of registered post as per the permission granted by the court.

27. There being no response from the 1st defendants for the said notice, when the matter

had come up on 2nd November 2017 for the assessment of damages hearing, the learned Master on his own moved to set aside the interlocutory judgment on the basis that the interlocutory judgment was irregular as the 1st defendants had failed to file the statement of defence, while in fact the 1st defendants had failed to give notice of intention to defend as well.

28. The plaintiff's claim against the 1st defendants, obviously, being for unliquidated damages and when the defendants failed to give **Notice of Intention to defend** the plaintiff was entitled to enter interlocutory judgment as per Order 13 Rule 2 of the High Court Rules 1988, which is an administrative act. It is to be noted that the plaintiffs had already withdrawn the declaratory relief against the 1st defendants. The only remaining claim was for an unliquidated sum of money. Thus, the applicable Order and Rule were Order 13 Rule (2).

29. The fact that the 1st defendants had failed to file the **Notice of Intention to Defend,** has escaped the attention of the learned Master, in which event the Rule (2) of Order 13 comes into play. The learned Master has chosen to set aside the interlocutory judgment entered under Order 13 Rule (2) on the basis that it was an irregularly entered judgment as the 1st defendant had failed to file the **Statement of defence.**

30. When the claim is for an unliquidated amount and the defendant fails to file the Notice of Intention to Defend, undoubtedly, it is Rule (2) of the Order 13 that comes into play and the plaintiff in this case has rightly obtained the interlocutory judgment under the above order and rule. It is when a defendant, having filed the Notice of Intention to Defend, fails to file the statement of defence only, the plaintiff can move for judgment under relevant rule of Order 19 of HCR.

31. In my view, that the learned Master has erred both in law and in fact when he decided to set aside the interlocutory judgment entered on 17th June 2015, on the basis that it had been irregularly entered and by ordering the plaintiff to file summons under Order 19 Rule (7).

32. However, on careful perusal of the record, it transpires that what has been set aside by the learned Master on 2nd November 2017 is the interlocutory judgment that had been entered against the 2nd Defendant on 5th February 2015 and not the interlocutory judgment entered against the 1st defendants on 17th June 2015. There was no an interlocutory judgment entered against the 1st defendants on 5th February 2015.

33. The interlocutory judgment against the 1st defendants has actually been entered only on 17th of June 2015, after carrying out a search on 11th June 2015, which has been sealed on 24th June 2015.This interlocutory judgment against the 1st defendants remain intact and

only the interlocutory judgment against the 2nd defendant has, purportedly, been set aside by the Master as aforesaid , which in fact had already been vacated of consent by payment of cost by the 2nd defendant unto the plaintiff before the predecessor Master on 29th June 2015.

34. This mean that the Master on 2nd November 2017 has, purportedly, set aside an interlocutory judgment, which had not been either entered against the 1st defendant or did not exist against the 2nd defendant since it had already been vacated as aforesaid.

35. Since there was an interlocutory judgment in record against the 1st defendants and they had not responded to the Notice of it and the Assessment of Damages, I am of the view that the learned Master could very well have proceeded with the hearing for the assessment of damages against the 1st defendants. The plaintiff need not have resorted to file summons under Order 19 Rule 7 to enter another judgment against the 1st defendants, while the interlocutory judgment already entered remained intact.

36. In view of the above, this Court need not proceed to enter another judgment against the 1st defendants on the evidence adduced before me at the formal proof hearing and there was no necessity to lead evidence when the court had acted administratively and entered an interlocutory judgment against the 1st defendants under Order 13 rule (2) High court Rules of 1988.

37. However, I can act on the evidence so led before me at the formal proof hearing for the purpose of the assessment of damages, for which there is no bar as the 1st defendants have not responded to the notice of interlocutory judgment and assessment of damages.

38. Thus, the only duty before this court is the assessment of compensation and damages due to the plaintiffs, on account of building their house on the land belonging to the 1st defendants, instead of building it on their own land purchased by them as per the Transfer No. 573957 registered on 26th September 2005 as evidenced by P-1 document (Certificate of Title).

39. The plaintiffs have proved that they obtained loan for a sum of $ 50,800.00 from the Colonial National Bank by mortgaging their land for the construction of the house and obtained a further sum of $7,750.00 from the same bank using their FNFP for the fencing and improvement of the property. The fact that the plaintiffs have constructed their house on the land belonging to the 1st defendants is not in issue. The liability on the part of the 1st defendants towards the plaintiff has already been decided by the interlocutory judgment and what remains is the assessment.

40. The PW-1, the 2nd named plaintiff has given clear and uncontested evidence marking 14

documents, with regard to obtaining financial facilities amounting to $ 58,550.00 by mortgaging their land in P-1 and on spending that loan money on the construction of the house, fencing and improvements of the property in question.

41. The 2nd named plaintiff has further stated that she and her husband being Police officers by profession, are still paying fortnightly a sum of $129.25 on account of the loan they obtained for the construction of the House, in which they were in possession only for a short period till they were ejected by the 1st defendants by way of Section 169 application made by the defendants.

42. As per the evidence, the defendants are said to be earning a monthly income of $250.00 by renting the house in question, while the plaintiffs are made to remain in the Police quarters, still paying the Mortgage loan obtained to construct the house.

43. PW-2, the contractor has given reliable and uncontested evidence that he only constructed the house and periodically got paid by the Bank as per the arrangement that was in place.

44. The PW-3, who carried on valuation of both the properties, gave evidence and substantiated the contents in both valuation reports marked P-8, which relates to the house constructed by the plaintiff on the defendant's land and P-9 regarding the value of the bare land owned by the plaintiffs respectively. According to the P-8 report, the improvements carried out by the plaintiffs have been estimated at $60,000.00, which I do not hesitate to accept.

45. The PW-4, Bank officer too has given evidence substantiating the plaintiff's evidence on the Mortgage loan of $58, 550.00 obtained by the plaintiffs, regular payments by them despite being ejected from the house and on the current outstanding loan to the Bank. The plaintiffs also have spent a substantial amount being the costs of the paper publication carried out in Canada for the substituted service of writ and SOC.

46. I am satisfied that the plaintiffs have to be adequately compensated for the expenses incurred by them for the construction of the house in the 1st defendant's land on a mistaken identity and the damages also should be reasonably assessed since the 1st defendants have taken the possession of the Land and the House without paying any compensation unto the plaintiffs. The plaintiffs have invested their hard-earned money on this and now have become homeless.

47. The 2nd Plaintiff's evidence on obtaining financial facilities and with regard to the expenses incurred on the construction of the house and other improvements remains unchallenged. Her evidence has been straightforward and remained substantiated by the

evidence of PW-2, Pw-3, Pw-4 and PW-5. She appeared to be a truthful witness. I find no reason to disregard her evidence on the expenses incurred by her and her husband, who is the 1st named plaintiff currently serving in a foreign soil as a peace keeping officer.

48. According to the interlocutory judgment, which stands intact, the plaintiffs are entitled for compensation for the house constructed by them and improvements carried on the land, general damages, indemnity cost and interest.

49. The second named plaintiff has given convincing evidence substantiated by documentary evidence and by other witnesses called on behalf of the plaintiffs and 2nd named plaintiff has proved substantial loss incurred by her and her husband the 1st named plaintiff.

50. The Plaintiffs built a three bedroom house on the 1st defendant's land, erected fence around it and further improved it spending over $58, 000.00. The contents of the valuation report marked as P-8, according to which the estimated present value is $60,000.00. This has been satisfactorily substantiated by the relevant valuer, who gave evidence as PW-3 on behalf of the plaintiffs.

51. Having spent such a large sum of Money, the plaintiffs had an expectation to live in their own house from which they were ejected without being compensated. They now live in the quarters provided by the Police Department on account of which they must be, undoubtedly, losing a considerable amount as housing rentals from their monthly salary. These are consequence of denial of their entitlement by the 1st defendants.

52. The plaintiffs are still paying the mortgage installment together with interest. They being not the owners of the house in question cannot expect to recover the full rental income earned by the 1st defendants as the lawful owners of the house. However, in addition to the compensation to be paid on account of the expenses for the construction and improvements, they deserve a reasonable damage, particularly, on account of what they lose from their monthly salary as housing rental levied by the Police department.

53. I, having taken all into account, assess the compensation to be paid by the 1st defendants unto the plaintiffs at **$60,000.00,** which would be reasonable in the circumstances of the case.

54. The plaintiffs were ejected in November 2007 and for last 11 years they are living in Police quarters. Having considered the above and the fact that the 1st defendants are now earning a monthly rental of $250, 00 by renting the premises in suit, I assess the general damages payable to the plaintiffs by the 1st defendants at the rate of **$125.00** per month for a period of 5 years and 6 months, commencing from 20th May 2013 (date of

filing the action) till the date of judgment, which would be $125.00 x 66 months =. **$8,250.00**

55. In addition to the above assessed compensation and damages, I assess a further sum of **$ 10,000.00** being damages for the disappointment and pain of mind suffered through the ejectment without any compensation.

56. The interlocutory judgment has also granted indemnity cost payable by the 1st defendants, unto the plaintiffs, which I summarily assess as **$7,500.00.**

57. The total amount payable shall be **$ 85,750.00.**

F. Conclusion

58. Since the claim of the plaintiff was only for an unliquidated amount and the 1st defendants had failed to file the Notice of Intention of defence and/or the statement of defence within the prescribed time period, the plaintiff had the right to enter interlocutory judgment under Order 13 Rule (2) of the High Court Rules 1988.

59. The interlocutory judgment entered against the 1st defendants under the above order and rule on 17th June 2015 still remains intact and there was no need to file fresh summons under Order 19 Rule (7) of the HCR as ordered by the learned Master on 2nd November 2017.

60. The learned Master on 2nd November 2017 erred by, purportedly, setting aside the interlocutory judgment that had been entered against the 1st defendants. However, what the learned master has in fact set aside on that date is the interlocutory judgment that had been entered against the 2nd defendant on 2nd May 2015 , which was not in existence as same had been vacated of consent and by payment of costs before the learned predecessor Master on 29th June 2015.

61. The learned Master's decision on 2nd November 2017 directing the plaintiff's Solicitors to file fresh summons under Order 19 Rule (7) cannot stand as a valid order and same should be set aside acting on the inherent jurisdiction of this Court.

62. The plaintiffs shall be entitled for a total sum of **$85,750.00** being the assessed compensation, damages and cost.

63. The plaintiffs shall also be entitled for interest on the aforesaid total sum at the rate of 3% per annum from the date of this judgment till the total amount is fully paid and settled.

G. Final outcome

a. The interlocutory judgment entered against the 1st defendants on 17th June 2015 and sealed on 24th June 2015 stand intact.

b. The , purported, setting aside decision made by the learned Master on 2nd November 2017 had no effect on the interlocutory judgment that had been entered against the 1st defendants on 17th June 2015.

c. The direction given by the learned Master on 2nd November 2017 to the plaintiff's Solicitors to file summons under Order 19 Rule 7 against the 1st defendants is hereby set aside.

d. A total sum of $ 85,750.00 is assessed being the compensation, damages and the cost to be paid by the 1st defendants unto the plaintiffs in terms of the interlocutory judgment entered on 17th June 2015.

e. The plaintiffs are entitled for interest on the above sum at the rate of 3% from the date of judgment till the said amount is fully paid.

f. A copy of this judgment shall be served on the 1st defendants, with the leave of the court being obtained, if they are still residing outside the jurisdiction of this court.

HIGH COURT OF FIJI
LAUTOKA

A.M.Mohammed Mackie
Judge

At Lautoka
13th November, 2018