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

CIVIL ACTION NO. HBC 220 OF 2017

BETWEEN : **ASESELA SADOLE** formerly of Rakuibalenasiga, Lot 1, Nailaga, Ba, but now residing at Vunakece Road, Namadi Heights, Tamavua, Suva, Fiji Islands, Retired.

PLAINTIFF/APPELLANT

A N D : **MAKITALENA VADRASOLA** of Nailaga, Ba, Fiji Islands, Domestic Duties.

DEFENDANT/RESPONDENT

Appearances : Mr A. Dayal for the plaintiff/appellant
Mr K. Tunidau for the defendant/respondent
Date of Hearing : 17 September 2019
Date of Judgment : 05 November 2019

JUDGMENT

Introduction

[01] This is an appeal against the order dated 4 June 2019 of the Learned Master (*'the Master'*) by which he dismissed the appellant's summary application for vacant possession of the land made under section 169 of the Land Transfer Act (*'LTA'*).

[02] The main question which arises in this appeal is: did the Master erred in law and/or in fact in upholding the doctrine of promissory estoppel against a protected lease and dismissing the application for possession of the property despite the fact that the respondent has failed to show cause to remain on the property.

[03] At the hearing before me, oral submissions were made on behalf of the appellant by Mr Dayal and on behalf of the respondent by Mr Tunidau. I also had the advantage of reading written submissions (in the case of the respondent, Mr

Tunidau who also acted for the defendant in the Master's Court relied on his submission filed in the proceedings before the Master). I am grateful to both counsel for their submissions.

Factual background

[04] Mr Asesela Sadole, the plaintiff (*'the appellant'* in these proceedings) is the last registered proprietor of Native Lease No. 26793, Lot 1 on Ba 1889 Land known as Rukuibalenasiga in the Tikina of Nailaga in the Province of Ba and containing an area of 13 acres, Two Roods and Zero Perches (13A.2R.00P) (*'the property'*).

[05] Ms Makitalena Vadrasola, the defendant (*'the respondent'* in these proceedings) occupies the property.

[06] The appellant wanted possession of the property. He issued a notice to quit through his solicitor. The respondent failed to vacate the property.

[07] As a result, the appellant initiated summary proceedings for recovery of possession of the property under s. 169 of the LTA on the basis that the respondent had trespassed on the property and continuing to do so despite demand for possession.

[08] The respondent appeared in court and filed her show-cause affidavit and stated that: the appellant brought her husband and her to the land with the promise that he will after sometime transfer the lease to her and her husband. The respondent and her husband sold their *yaqona* planation in their village and resettled on the appellant's land. Until the last 2 years, she and her husband had worked on the sugarcane farm and cane proceeds had gone directly to the appellant's bank. The appellant verbally promised to transfer the land to her and her husband.

[09] The appellant filed a replying affidavit (he says it is an affidavit in support) to the respondent's affidavit and stated that: the respondent's husband, Malelili Nakulanikoro Nasau (who is the appellant's nephew) moved out of the residence

he was occupying with the respondent in 2015. The respondent's husband moved to the property to work on the property. There was never a promise at any time to transfer the property or any part thereof to the respondent or her husband within the first 10 years of their taking residence and their work on the property. In January 2016, the respondent's husband resigned and moved out of the property which was informed to the respondent.

[10] The Master, who heard the application filed by the appellant for possession of the property, dismissed the appellant's application. The appellant appeals to this Court.

The Master's reasoning for his decision

[11] The Master summarises the respondent's position stated in the show-cause affidavit as follows (at para 19 of his judgment):

> *"**19.** The duty on the defendant is, now, not to produce any final or incontestable proof of her right to remain in the property, but to adduce some tangible evidence establishing a right or supporting an arguable case for her right to remain in possession of the land in dispute. The defendant in her affidavit, especially in paragraph 5 to 23 has averred her right to possess. Briefly, the defendant is from Nagelewai village, Wainimala, Naitasiri and was married to Malelili Nakulanikoro Nasau, who is the nephew of the plaintiff. They were separated almost a year before this application was filed in this court and the defendant has been living in the farm house situated in the disputed land with her seven children. The defendant further states that, about 14 years ago, the plaintiff approached her and her husband to occupy the disputed farm and he (plaintiff) further promised to transfer the lease to the defendant and her husband so that, the money generated from the farm could be used for the education of their children. As a result of the said promise by the plaintiff, the defendant says that she sold her yaqona plantation in her village of Nagelewai, Wainimala, Naitasiri and re-settled on the plaintiff's land described in the summons for ejectment. It is clear from the averments of the defendant that, she claims her right to stay on the land based on the promise made by the plaintiff..."*

[12] Having analysed the law pertaining the s.169 application and the body of case laws determining such application and promissory estoppel, the Master sets out his reasoning for the dismissal of the appellant's application for summary judgment for possession of the land [at paragraph 29 of his judgment]:

> *"29. ... the registered proprietor of the land in dispute and he has complied with the procedural requirements under the section 170 of the Land Transfer Act. What is required from the defendant as per decision of the Supreme Court in* ***Morris Hedstrom Limited –v- Liaquat Ali*** *(supra) is that* ***some tangible evidence establishing a right*** *or* ***supporting an arguable case for such a right.*** *The defendant through her contention in her affidavit has shown an arguable case based on the principle of promissory estoppel which requires an open court hearing. This conclusion requires the summons to be dismissed under section 172 of the Land Transfer Act (Cap 131) as this is the fit order this court can make in this case considering all the evidence adduced before this court through the affidavits on the parties."*

Grounds of appeal

[13] The appellant appeals the Master's judgment on the following grounds:

1. *That the Learned Master erred in law and/or in fact finding that defendant had rights over the land on the grounds of promissory estoppel where the appellant's lease was a protected lease under section 12 and 13 of iTaukei Land Trust Board.*

2. *That the Learned Master erred in law and/or in fact finding that there was a promise for sale of land to the defendant 14 years ago which has been denied by the appellant.*

3. *That the Learned Master erred in law and/or in fact finding by not taking into consideration that the respondent does not have license or consent to occupy the property from the appellant or the iTaukei Land Trust Board.*

4. *That the Learned Master erred in law and/or in fact by not taking into consideration that there was no promise made for sale of property to the respondent at any time by the appellant.*

5. *That the Learned Master erred in law and/or in fact in upholding the doctrine of promissory estoppel against a protected lease.*

6. *That the Learned Master erred in law and/or in fact by dismissing the summons despite the respondent's not showing evidence to remain onto the property.*

Legislative framework

[14] Dealing with the summary proceedings for recovery of land, the Land Transfer Act (*'LTA'*) ss. 169 – 172 provides:

> ***[LT 169] Ejectors***
>
> ***169*** *The following persons may summon any person in possession of land to appear before a Judge in chambers to show cause why the person summoned should not give up possession to the applicant-*
>
> *(a)* ***the last registered proprietor of the land;***
> *(b) a lessor with power to re-enter where the lessee or tenant is in arrear for such period as may be provided in the lease and, in the absence of any such provision therein, when the lessee or tenant is in arrear for one month, whether there be or be not sufficient distress found on the premises to countervail such rent and whether or not any previous demand has been made for the rent;*
> *(c) a lessor against a lessee or tenant where a legal notice to quit has been given or the term of the lease has expired.* [Emphasis added]
>
> ***[LT 170] Particulars to be stated in summons***
>
> ***170*** *The summons shall contain a description of the land and shall require the person summoned to appear at the court on a day not earlier than 16 days after the service of the summons.*

[LT 171] Order for possession

171 *On the day appointed for the hearing of the summons, if the person summoned does not appear, then upon proof to the satisfaction of the Judge of the due service of such summons and upon proof of the title by the proprietor or lessor and, if any consent is necessary, by the production and proof of such consent, the Judge may order immediate possession to be given to the plaintiff, which order shall have the effect of and may be enforced as a judgment in ejectment.*

[LT 172] Dismissal of summons

172 *If the person summoned appears he or she may show cause why he or she refuses to give possession of such land and, if he or she proves to the satisfaction of the judge a right to the possession of the land, the Judge shall dismiss the summons with costs against the proprietor, mortgagee or lessor or he or she may make any order and impose any terms he or she may think fit, provided that* ***the dismissal of the summons shall not prejudice the right of the plaintiff to take any other proceedings against the person summoned to which he or she may be otherwise entitled,*** *provided also that in the case of a lessor against a lessee, if the lessee, before the hearing, pay or tender all rent due and all costs incurred by the lessor, the Judge shall dismiss the summons.*

The issue on appeal

[15] The central issue on appeal was whether the Master erred in law and/or in fact in dismissing the s. 169 summons filed by the appellant for delivering up possession of the subject land to the appellant on the ground that the respondent has the right to possess the land sought to be delivered and such right arises out of the promissory estoppel.

The submissions of the parties

[16] Mr Dayal on behalf of the appellant contends that: the Master had erred in law and in fact in deciding that the respondent had the rights over the land on the grounds of promissory estoppel. The Master failed to appreciate that the lease was a protected leave. As such, the respondent could not rely on promissory estoppel because:

1. The dealing with the respondent was an illegal dealing, not approved by iTaukei Land Trust Board (*'ITLB'*);
2. The equity principle *"he who comes to equity must come with clean hands"* applies in the present case;
3. The respondent did not give any particulars of the agreement to substantiate the terms of agreement;
4. The respondent was a trespasser to the land.

[17] On the other hand, Mr Tunidau counsel for the respondent in his submission filed in the Court below (even for the purpose of appeal, he confined his argument to that of the written submission filed in the Court below) submits that: the facts deposed by the defendant (*respondent*) in her affidavit in opposition were not replied or rebutted by the plaintiff (*appellant*). The facts adduced by affidavit of the defendant contain tangible evidence supporting an arguable case for to have the right not be evicted. The tangible evidence is reflected in the defendant's affidavit. The defendant has shown cause not to be evicted and the summons by the plaintiff ought to be dismissed.

Discussion

[18] The appeal arises out of the Master's dismissal of the appellant's summary application for the possession of the land made under section 169 of the LTA.

[19] The appellant made the application on the basis that he is the last registered proprietor of the land. In terms of section 169, the last registered proprietor may summons any person in possession of land to appear before a judge in chambers to show cause why the person summoned should not give up possession to the applicant. In this instance, the appellant, the last registered proprietor of the land summoned the respondent who is in possession of the land in dispute to appear in court and show cause why she should not give up possession to the appellant.

[20] It was not in dispute that the appellant is the last registered proprietor of the land by virtue of a native lease.

[21] The s. 169 application must contain a description of the land and must require the person summoned to appear at the court on a day not earlier than 16 days after the service of the application (see: s.170 LTA). The respondent did not raise any issue of description of the land in the application.It can be said the appellant had complied with the s.170 requirement.

[22] The application was served on the respondent on 24 October 2017, and she filed her show-cause affidavit on 20 December 2017. The hearing of the matter before the Master was concluded on 22 October 2018. The Master then announced to the parties that the ruling will be pronounced on notice. The Master pronounced his ruling on 4 June 2019..

[23] It is noteworthy that the appellant initiated summary proceedings against the respondent for possession of the land on the basis that she (appellant) is a trespasser and the appellant did not even disclose the fact that the respondent is the wife of his (appellant's) nephew in his affidavit in support.

[24] The respondent in her show-cause affidavit states that she has been occupying the land for more than 14 years. She further states that the appellant came to her village in Suva and asked her and her husband to come and work at the appellant's farm and promised that he will transfer the lease to them (her husband and her).

[25] The appellant had brought a lot of new things in his affidavit in reply (he called it *'affidavit in support'*). In his affidavit in reply, the appellant states that the respondent came with her husband to occupy the property and her husband was employed by the appellant to work on the sugar-cane farm, and the respondent's husband left the farm and informed his wife (the respondent) that he had resigned from his employment with the appellant in 2016.

[26] The appellant did not deny that the respondent has been occupying the property for more than 14 years. However, he denied giving any promise to transfer the lease to her husband and to her.

[27] The respondent came to the property with her husband on the invitation of the appellant and she has been occupying the property for more than 14 years. In the circumstances, she cannot be regarded as a trespasser. Her entry to the land was lawful.

Dismissal of summons

[28] If the person summoned appears he or she may show cause why he or she refuses to give possession of such land and, if he or she proves to the satisfaction of the Judge a right to the possession of the land, the Judge shall dismiss the summons with costs against the proprietor, etc. (see: s.172 LTA).

[29] The respondent appeared before the Master and on her show-cause affidavit stated that she has a right to stay on the property because of the promise given by the appellant that he will transfer the property to the respondent and her husband after sometime.

[30] The Master satisfied himself that the respondent had proved a right to the possession of the land. Accordingly, he dismissed the appellant's summons without cost acting under s. 172. In conclusion (at para 29), The Master said: "... *The defendant ... has shown an arguable case based on the principle of promissory estoppel which requires an open court hearing.*" He has relied on the decision of the Supreme Court (then Supreme Court which had jurisdiction equivalent to the jurisdiction of the present High Court) case of *Morris Hedstrom Limited v Liaquat Ali* (CA No: 153/87), where the court held:

> *"... The defendants must show on affidavit evidence some right to possession which would preclude the granting of an order for possession under section 169 procedure. That is not to say that final or incontrovertible proof of a right to remain in possession must be adduced. What is required is that some tangible evidence establishing a right or supporting an arguable case for such a right, must be adduced."*

[31] What the respondent was required to show on her show-cause affidavit was that some tangible evidence establishing a right or supporting an arguable case for such right.

[32] In my opinion, the respondent had adduced some evidence establishing a right or at least an arguable case for such a right based on proprietary estoppel.

Proprietary estoppel

[33] I think I should say a little about proprietary estoppel.

> *"The doctrine of proprietary estoppel is thought to provide protection from fraud. It applies, in particular, where one party has been encouraged by another to believe that they will be granted an interest in the property in question, and has acted to their detriment in reliance on that belief. The doctrine affords such a party a new cause of action to protect their interest, which might go as far as the court ordering the property to be conveyed to that party. However, it is not expressly provided for in that statute, so that its application may risk being excluded as contrary to the Parliamentary intent (see, e.g., McCausland v Duncan Lawrie Ltd [1997] 1 WLR 38 and United Bank of Kuwait plc v Sahib [1997] Ch 107) and it is clear that the mere fact of an invalid agreement cannot found an estoppel as this would defeat the policy of the 1989 Act (Attorney-General for Hong Kong v Humphreys Estate (Queen's Gardens) Ltd [1987] AC 114). Nevertheless, in Kinane v Mackie-Conteh [2005] EWCA Civ 45, [2005] WTLR 345, Arden LJ said (at [29]) that it did not follow the existence of a failed agreement prevented reliance on an estoppel since it was necessary to consider whether the claimant was relying on the invalid agreement or the unconscionable conduct of the defendant in encouraging the claimant to believe that the agreement was valid. Dixon ('Proprietary Estoppel and Formalities in Land Law and the Land Registration Act 2002: A Theory of Unconscionability 'in Cooke (ed.), Modern Studies in Property Law, Vol. 3, Hart Publishing, 2003) refers to this as the 'double assurance theory' of estoppel in that the defendant represents (a) the right over his land and (b) that this right will exist despite a failure to comply with statutory formalities. Thus, the estoppel operates to remedy the unconscionability, i.e., to provide a remedy due to the failure of the assurances rather than on the basis of permitting an invalid agreement to be enforced (see: Contract Law by Jill Poole at pg. 181)."*

[34] In *Cobbe v Yeoman's Row Management Ltd* [2006] EWCA Civ 1139, [2006] 1 WLR 2964, where C had orally agreed in principle with Y that C would obtain planning permission for the redevelopment of land owned by Y and that, subject to it being obtained, Y would sell the land to C for redevelopment with the profit over a certain level being split equally between C and Y. The claimant went to considerable expense and effort to obtain planning consent. Having done so, however, Y refused to enter into the contract of sale. Since the *'agreement'* was unenforceable for lack of writing. C sought to rely on proprietary estoppel, the Court of Appeal held that:

> *"Proprietary estoppel operated because Y had acted unconscionably in leading C to believe that a contract would result. This estoppel did not undermine s. 2 because it was based on the unconscionable conduct of Y rather than the enforcement of an invalid contract. Since remedying unconscionability is the purpose of the estoppel, it follows that the assurance given does not need to satisfy the test of contractual certainty as long as it is not too vague or uncertain to give rise to an expectation."*

[35] As was held in *Cobbe* (above) proprietary estoppel, if any, would operate against the appellant because he appears to have acted unconscionably in leading the respondent to believe that an interest in the land would be transferred to her (and to her husband). The estoppel would not undermine the s. 12 (of the iTaukei Land Trust Act) requirement as the assurance given does not need to satisfy the test of contractual certainty including the consent. The consent issue will arise when the transfer of the property is taking place.

Temporary nature of the order

[36] The dismissal of the summons summarily under s. 172 appears to be temporary in nature because proviso to that section states that the dismissal of the summons shall not prejudice the right of the plaintiff to take any other proceedings against the person summoned to which he or she may be otherwise entitled. It follows that the dismissal of the appellant's summons for summary recovery of possession of the land under section 172 will not prejudice the appellant's right to take any other proceedings against the respondent to which he may be otherwise entitled.

Conclusion

[37] For the reasons set out above, I think I should dismiss the appeal as the Master was entitled to reach the decision he made in the circumstances of the case. Accordingly, I dismiss the appeal with costs. The appellant must pay summarily assessed costs of $500.00 to the respondent.

The result

1. Appeal dismissed.
2. Appellant shall pay the summarily assessed costs of $500.00 to the respondent.

5/11/19

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M.H. Mohamed Ajmeer

JUDGE

HIGH COURT OF FIJI LAUTOKA

At Lautoka

05 November 2019

Solicitors:
For the appellant: Aman Dayal Lawyers, Barristers & Solicitors
For the respondent: Kevueli Tunidau Lawyers, Barristers & Solicitors