

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No.: HBC 70 of 2018

BETWEEN : **LAIJA RATUVA, KURUILEA KADAVU and WAME TOKAVOU,**
Turaga ni Mataqali Naicokocokobalavu, Nasalia and Yavusatu respectively for
an on behalf of themselves and on behalf of the members of Mataqalis
Naicokocokobalavu, Naslia and Yavusatu, who have duly authorized them to
bring this action, all of Taunovo Village, Vatulele Island, Villagers.

PLAINTIFFS

AND : **ITAUKEI LAND TRUST BOARD** established under the Itaukei Land Trust
Board Act (as amended) whose registered office is at Victoria Parade, Suva.

1st DEFENDANT

AND : **TRIVEST INTERNATIONAL LIMITED** a company duly incorporated in
Fiji and having its registered office at suites 16 & 17, Town Council Arcade,
Nadi in the Republic of Fiji.

2nd DEFENDANT

Counsel : Plaintiffs: Mr. N. Nawaikula
: 1st Defendant: Ms. Q. Vokanavanua
: 2nd Defendant: Ms. R.Lal
Date of Hearing : 20th February, 2019
Date of Judgment : 22nd February, 2019

JUDGMENT

INTRODUCTION

1. The Plaintiff who are representatives of 3 Mataqalis out of 6 Mataqalis that are beneficiaries of two leases issues by 1st Defendant to 2nd Defendant. The action was filed against Defendants for unlawful dealings and breach of duties. Admittedly, the 1st Defendant had issued Re Entry Notices (REN) to the 2nd Defendant, but had not

proceeded to cancel the two leases issued, in terms of Section 57 of Land Transport Act, 1971. This action was filed on 19.3.2018. The Defendants have filed statements of defense. The two leases are mortgaged to a financier which is a commercial bank, which is not a party to this action and or to this application for injunction. Due to default of mortgage, they are in the process of mortgagee sale of the properties which comprised of a resort, an airstrip and beachfront. The Plaintiffs, on 28.12.2018 filed an application for injunction seeking 1st Defendant from restraining consent to transfer of the mortgage over two leases until final hearing of this action. They state that once REN is issued to 2nd Defendant, the two leases issued to 2nd Defendant must be cancelled. Plaintiff state that no mortgagee sale can proceed. RENs are issued in terms of Section 105 of Property Act, and cancellation of title is contained in Section 57 of Land Transfer Act,1971 . Both provisions do not state that once RENs are issued that it is mandatory to proceed with cancellation of title. Plaintiffs do not have legal right to compel 1st Defendant to cancel the titles.

FACTS

2. The Plaintiffs had instituted this action for damages against the Defendants for unlawful dealings and breach of duties prior to 19.3.2018. The Plaintiff is seeking a Declaration and termination of two leases issued to the 2nd Defendant.
3. 2nd Defendant in the statement of defence had denied that Plaintiffs have a legal right to institute this action under their name. It further stated;
 - a. It purchased Vatulele Island Resort on mortgagee sale in 2012 and since that engaged in major works and renovation to the property. The delay in the major works with the said property is partly a result of the interference of Plaintiffs and other land owners.
 - b. Plaintiffs and landowners sabotaged the sale of Vatulele Island Resort between 2nd Defendant and an investor and this resulted the 2nd Defendant to seek additional loan from financier.
 - c. Counter claimed against the Plaintiff for their actions of interference with the property located in the two leases and also claimed against 1st Defendant for failure to secure quiet enjoyment of the two leases and also failure to grant consent for the sale to an investor.
4. 1st Defendant had filed a defence to the statement of claim and counterclaim of the 2nd Defendant and further stated

- a. Plaintiff has no locus to bring an action to seek termination of leases issued by them.
 - b. Even though 1st Defendant is obliged to administer land for the benefit of land owners, they are also considering plight of the lessees before termination or lease.
 - c. All the arrears of lease rentals and fines etc are settled and these money had already been distributed to land owners.
 - d. Apart from that \$ one million is paid to Investment Fund and in addition, education and training funds were also paid. There were additional payments for village infrastructure more than 300,000.
 - e. Since 2012, though the resort was not functioning over 4 million was paid as benefits to the land owners.
5. The Plaintiff on 28.12.2018 filed an ex parte motion seeking a restraining order against 1st Defendant granting consent to transfer two leases (i.e. NL 28084 and NL 28085). This was converted in to *inter partes* motion due to obvious reasons.
6. In the affidavit in support Plaintiff stated inter alia,
- a. Soon after 1st Defendant leased the land comprised in two leases to 2nd Defendant landowners began facing difficulties as the Resort that was situated on the property stopped operating and members of Matalqalis lost their employment in the said resort. The air strip and the roads were also neglected since then.
 - b. **The Plaintiff seeks termination of leases in order for another investor to take over the resort and make it operational.** (See paragraph 8 of affidavit in support of the injunction).
 - c. On or about 26.8.2018 1st Defendant informed Plaintiffs that they would be re-entering two leases (RENs are annexed as LR 2 to the affidavit in support of the injunction).
 - d. After service of RENs, the 2nd defendant was evicted and Plaintiffs took possession of the property which was mortgaged to the financier.

7. The RENs were issued for the benefit of financier and mortgagee and 1st Defendant had informed the solicitor for the Plaintiffs that they would only register the REN if financier failed to secure a buyer quickly. 1st Defendant had also informed that the possession of landowners is illegal as re entry was not registered and formalized.
8. The Plaintiffs contend that moment the RENs are issued it became formalized and 1st Defendant is legally obliged to cancel the two leases issued.

ANALYSIS

9. The Plaintiffs are members of 3 of the Mataqalis who are beneficiaries of the land comprised in two leases leased to the 2nd Defendant by 1st Defendant as the trustee of the said land in terms of law.
10. The two leases were issued in 2006 for 99 years and there is a resort, airstrip and beach front and the resort had operated from 1987 to 2012 and it is admitted that members of 6 Mataqalis were also employed in the resort. So, non operation of the resort since 2012 had affected some members of Mataqali through loss of income from employment.
11. 2nd Defendant who is the owner of the properties comprised in the two leases had stated that renovations of the resort were disrupted through the interference of the members of Mataqalis.
12. At the moment even 6 years after initial closure in 2012, the resort is not operational and 2nd Defendant had not defaulted the mortgage payments to the mortgagee and they had exercised their rights through a mortgagee sale, to secure their debt. This will also provide a window of hope to villages that resort will operate under new investor.
13. **Though the resort was not operational, the arrears of lease rentals as well as educational and training fund totalling to 843,502.50 settled by the mortgagee and all the member of Mataqalis were paid their dues up to the end of year 2018. This is not disputed by Plaintiffs.**
14. Having received all their dues from present financier and mortgagee of the project a section of 3 Mataqalis out of 6 are now seeking cancellation of the two leases. The Plaintiffs contend that once the two leases are cancelled the mortgagee sale will also be void. Plaintiffs state that they have a legal right to compell cancellation of leases.
15. 1st Defendant had issued REN to 2nd Defendant regarding the two leases (see annexed LR3 to the affidavit in support of the interim injunction)

16. 2nd Defendant had in terms of the said REN vacated the premises, but their title is not cancelled. Perusal of title indicates that there are other charges registered on the title.
17. If the title is cancelled these parties who had registered charges on the property as well as mortgagee will get affected and due process needs to be followed before their rights are affected. So it is clear that issuance of REN and or obtaining possession of the land is not the end of the process of cancellation of title to the properties. It is only the first step and there is nothing in the law to make it irreversible or make it mandatory to proceed to next level to cancel the title.
18. REN are issued in terms of Section 105 of Property Act which states,

"Restrictions on and relief against forfeiture of leases

105. - (1) 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, in the lease shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice -

- a) specifying the particular breach complained of; and*
- b) if the breach is capable of remedy, requiring the lessee to remedy the breach; and*
- c) in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach.*

(2) Where a lessor is proceeding, by action or otherwise, to enforce a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the court for relief; and the court may grant or refuse relief, as the court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty or otherwise, including the granting of an injunction to restrain any like breach in the future, as the court, in the circumstances of each case, thinks fit.

(3) A lessor shall be entitled to recover as a debt due to him from a lessee, and in addition to damages, if any, all reasonable costs and expenses properly incurred by the lessor in the employment of a barrister and solicitor or a surveyor or valuer, or otherwise, in reference to any breach giving rise to a right of re-entry

valuer, or otherwise, in reference to any breach giving rise to a right of re-entry or forfeiture which, at the request of the lessee, is waived by the lessor, or from which the lessee is relieved, under the provisions of this section.

(4) Where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture under any covenant, proviso or stipulation in a lease, or for non-payment of rent, the court may, on application by any person claiming as sublessee any estate or interest in the property comprised in the lease or any part thereof, either in the lessor's action, if any, or in any action brought by such person for that purpose, make an order vesting, for the whole term of the lease or any less term, the property comprised in the lease or any part thereof in any person entitled as sublessee to any estate or interest in such property upon such conditions as to execution of any deed or other document, payment of rent, costs, expenses, damages, compensation, giving security or otherwise, as the court in the circumstances of each case may think fit, but in no case shall any such sublessee be entitled to require a lease to be granted to him for any longer term than he had under his original sublease.

(5) For the purposes of this section –

- a) "lease" includes an original or derivative sublease, also an agreement for a lease where the lessee has become entitled to have his lease granted;
- b) "lessee" includes an original or derivative sublessee, and the persons deriving title under a lessee; also a grantee under any such grant as aforesaid and the persons deriving title under him;
- c) "lessor" includes an original or derivative sublessor, and the persons deriving title under a lessor; also a person making such grant as aforesaid and the persons deriving title under him;
- d) "sublease" includes an agreement for a sublease where the sublessee has become entitled to have his sublease granted;
- e) "sublessee" includes any person deriving title under a sublessee.

(6) This section shall apply although the proviso or stipulation under which the right of re-entry or forfeiture accrues is inserted in the lease in pursuance of the directions of any Act.

(7) For the purposes of this section, a lease limited to continue as long only as the lessee abstains from committing a breach of covenant shall be and take effect as a lease to continue for any longer term for which it could subsist, but determinable by a proviso for re-entry on such a breach.

(8) The provisions of this section shall not extend –

- a) to a covenant or condition against assigning, subletting, parting with the possession or disposing of the land leased; or
- b) in the case of a mining lease, to a covenant or condition for allowing the lessor to have access to or inspect books, accounts, records, weighing machines or other things, or to enter or inspect the mine or the workings thereof; or
- c) to a condition for forfeiture on the bankruptcy of the lessee or on taking in execution of the lessee's interest; or
- d) to a condition for forfeiture for breach of any liquor or distillation laws; or
- e) to any contract of tenancy of agricultural land which is subject to the provisions of the Agricultural Landlord and Tenant Act. (Cap 270)

(9) *This section shall not, save as otherwise mentioned, affect the law relating to re-entry or forfeiture or relief in case of non-payment of rent.*

(10) *This section shall have effect notwithstanding any stipulation to the contrary*

19. The above provision cannot be interpreted so as to make service of REN as crossing the Rubicon. It is far from that, and in fact there are essential requirements that needs to be fulfilled before the right for re-entry is enforced in action or otherwise. Notice of REN is only first step in the process of cancellation of title and in no way compel the party to proceed to cancellation.
20. Once a lawful re-entry and possession of the property was obtained, the party that issued REN can seek cancellation of the titles in terms of Section 57 of Land Transfer Act, 1971. This is an option that is available and not mandatory. Even if that option is exercised, due process needs to be followed before cancellation. Section 57 of Land Transfer Act, 1971 states

"Cancellation by Registrar

57. The Registrar, upon proof to his satisfaction of lawful re-entry and recovery of possession by a lessor either by process of law or in conformity with the provisions for re-entry contained or implied in the lease, shall cancel the original of such lease and enter a memorial to that effect in the register, and the estate of the lessee in such land shall thereupon determine but without releasing the lessee from his liability in respect of the breach of any covenant in such lease expressed or implied, and the Registrar shall cancel the duplicate of such lease if delivered up to him for that purpose:

Provided that-

(a) where the right of re-entry is based upon the non-payment of rent only, the Registrar shall, where any person other than the lessee has a registered interest in the lease, give

notice to such other person at his address appearing in the register to pay the rent in arrear and, if the same is paid within one month from the date of the said notice, then the Registrar shall not cancel the original or duplicate of such lease; and

(b) unless the re-entry and recovery of possession have been by formal process of law, the Registrar shall require notice of application to register the same to be served on all persons interested under the lease, or, failing such notice, shall give at least one calendar month's notice of the application by publication in the Gazette and in one newspaper published and circulating in Fiji before making any entry in the register."

21. The basis of the interim injunction is that once REN is issued 1st Defendant is obliged to cancel the two leases. This is a legal proposition, but unfortunately the Plaintiffs were unable to state any provision of law supporting that contention.
22. Neither Section 105 of Property Act, 1971 nor Section 57 of Land Transfer Act, 1971 cited by the counsel at the hearing of injunction makes issuance of REN as a point of no return for 1st Defendant for the cancellation of two leases relating to REN. As stated earlier it is far from that.
23. Contrary to Plaintiffs contention Section 57 of Land Transfer Act, 1971 makes it mandatory for the Registrar to issue notices to all persons interested under the leases before cancellation. Such notice can be through Gazette and one newspaper, and if so at least one month notice needs to be given.
24. Apart from the notice, if the cancellation of lease is due to non payment of rent only, the Registrar must also give notice to any person having registered interest over the property. So, other registered interested parties should also given an opportunity to rectify any default before cancellation.
25. So, it is clear though RENs issued, Plaintiffs cannot compel the 1st Defendant to cancel the titles, irrespective of any private communication that it had with any party including 2nd Defendant.
26. Registration is everything under Torrens system hence cancellation needs to be in terms of law. There is no provision in law that was pointed to me by counsel for the Plaintiff in support of their contention.
27. The Privy Council held the indefeasibility under Torrens System as follows in *British American Cattle Co v Caribe Farm Industries Ltd* [1998] 1 W.L.R. 152 held, (per Lord Browne-Wilkinson)

'Although the details of the Torrens system vary from jurisdiction to jurisdiction, it is the common aim of all systems to ensure that someone dealing with the registered proprietor of title to the land in good faith and for value will obtain an absolute and indefeasible title, whether or not the title of the registered proprietor from whom he acquires was liable to be defeated by title paramount or some other cause'

28. So, the cancellation of title needs to be in terms of law and Plaintiffs who had benefited from two leases from payments of the lease rentals cannot seek cancellation of the same though fraud on the title. They had relied on the title and they are estopped from denying title.
29. Once they have accepted the title and had also benefited from that, they are in no position to compel cancellation of title only because RENs were issued. Plaintiffs do not have legal right to stall the mortgagee sale. They are not in a position to jeopardise the rights of mortgagee through prevention of grant of consent by the 1st Defendant.
30. In *Chambers v Wakaya Limited* [2011] FJCA 25; ABU0040.10 (decided on 15 March 2011) Court of Appeal dealing with an appeal of grant of an injunction held,

*"Without any further development of the quia timet law situations the law and the extent of the Fiji High Courts jurisdiction is clear. If the Plaintiff does not have an action to prevent the Defendant infringing a proprietary or other established legal right of the Plaintiff, there is no jurisdiction to entertain an application or grant an interim interlocutory injunction on a quia timet or any other basis. In the mainstream common law jurisdictions there is no new law that Lord Diplock's advice can be used in other situations. There are cases, however, such as *Bryanston Finance v. de Vries* (No.2) [1976] Ch 63 where the Court of Appeal in England has emphasized that it is an egregious error to interpret *American Cyanamid* and "balance of convenience" and so forth in ways and into situations never intended or envisaged by Lord Diplock.(emphasis added).*
31. It is admitted fact that the financier and mortgagee had exercised its right as mortgagee sale and is on the verge of sale to a new investor. The injunction is *quia timet* in nature. 1st Defendant had not granted consent but was about to grant it.
32. So the first point that the Plaintiffs need to satisfy is whether they can in an action prevent the 1st Defendant's legal right to grant consent to mortgagee sale of two leases on the basis of issuance of REN. This is the serious question that Plaintiffs are relying on to obtain the injunction. There is no serious question on the said issue as it is clear there is no legal obligation after REN to proceed to cancellation of title.

CONCLUSION


33. The contention of the Plaintiff is once REN are issued leases ought to be cancelled cannot hold water. So, there is no locus standi for the Plaintiffs to seek an injunction based on REN. The motion seeking interim injunction filed on 28.12.2018 is struck off. The cost is summarily assessed at \$1,000 for each Defendant.

FINAL ORDER

- a. The motion seeking injunction filed on 28.12.2018 is struck off.
- b. The Plaintiffs are ordered to pay a cost of \$1,000 assessed summarily to each of the Defendants (Total 2,000) within 21 days.

Dated at Suva this 22nd day of February, 2019.




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Justice Dcepthi Amaratunga
High Court, Suva