

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

CIVIL ACTION NO. HBC 96 OF 2019

BETWEEN : **AZMAT HUSSAIN** and **SHAINAAZ BI** both formerly of Nawaka, Nadi but currently residing in Christchurch, New Zealand, Welder and Domestic Duty respectively.

PLAINTIFFS

AND : **ABDUL AIYUB HUSSAIN** of Nawaka, Nadi.

FIRST DEFENDANT

AND : **ITAUKEI LAND TRUST BOARD** a body corporate incorporated under the iTaukei Land Trust Act, Cap 134 with its registered office at 431 Victoria Parade, Suva, Fiji.

SECOND DEFENDANT

Appearances : Mr R. Charan for the plaintiffs
Mr R. Singh for the first defendant
Date of Hearing : 17 June 2019
Date of Oral Ruling : 17 June 2019
Date of Written Ruling : 24 June 2019

R U L I N G

[on interim injunction]

Introduction

[01] At the end of the hearing, I said I would refuse to issue interim injunction and my written reasons would follow. Today's ruling provides those reasons.

[02] This is an application by the plaintiffs supported with an affidavit (*'the application'*). The application seeks injunctive orders restraining the first

defendant from dealing with and/or charging or encumbering or transferring the property in dispute.

[03] The injunctive relief is sought only against the first defendant.

[04] Having heard the application *ex parte* on 16 April 2019, I made an interim injunction as sought to be valid until the application heard *inter partes* on 3 May 2019.

[05] On 3 May 2019, the first defendant appeared by his solicitor and sought time to respond. This application was not objected to by the plaintiffs subject to the injunction is extended. I accordingly granted 14 days to the first defendant to file and serve his affidavit in response and 14 days thereafter to the plaintiffs to file and serve their affidavit in reply, while extending the injunction until the determination of the *inter partes* hearing.

[06] The first defendant filed his affidavit in response but the plaintiffs did not file any affidavit in reply.

[07] At the *inter partes* hearing, both parties orally argued the matter and only the first defendant tendered written submission.

Background

[08] The plaintiffs bring this action and seek among other things a declaration that the agreement for lease (TLTB lease reference No. 4/10/40016) entered into between the first and the second defendant is null and void and a further declaration that the registered lease (iTaukei Lease No. 33765) over the disputed land issued to the first defendant is null and void.

[09] The plaintiffs' claim arises out of a tenancy agreement they entered with the land owner, Marica Qalo of Nawaka, Nadi (Mataqali of Nawaka) in respect of Native Land known as "Nakolia" situated at Bulu Bulu Road, Nawaka, measuring 22 yards, on 30 April 2001.

[10] According to the plaintiffs, they are entitled to a portion over the first defendant's lease. They allege fraud on the part of the first defendant. In the meantime, the plaintiffs apply for interim injunction against the first defendant as described above.

Legal framework

[11] An application for the grant of an interim injunction may be made by any party to an action before or after the trial of the action, whether or not a claim for injunction was included in that party's writ, originating summons, counterclaim or third party notice, as the case may be (see HCR, O 29, R 1(1)).

The governing principles

[12] The governing principles to be applied in an application for interim injunction as explained in *American Cyanamid v Ethicon Ltd* [1975] 1 All ER are as follows:

- (a) Serious issues to be tried,
- (b) Are damages an adequate remedy in lieu of the interim relief and
- (c) Where does the balance of convince lie.

The evidence

[13] The plaintiffs have filed an affidavit of Azmat Hussain, the first named plaintiff while the first defendant his affidavit in opposition.

[14] It will be noted that the plaintiffs did not file an affidavit in reply to the affidavit in opposition filed by the first defendant.

Discussion

[15] After filing their writ of summons, which included a claim for injunction, the plaintiffs have applied for interim injunction against the first defendant.

[16] The first defendant opposes the application on the ground that:

- (a) The validity of the agreement the plaintiffs rely is questionable as the authority of the person who witnessed that agreement is not known.
- (b) The agreement refers to a land known as "*Nakolia*" situated at Bulu Bulu road, Nawaka, which is not the land in dispute.
- (c) The agreement dated 19 February 2006, for increase of rent from \$10.00 per month to \$30.00 per month is suspicious for the following reasons:
 - (i) The agreement does not indicate which property is subject to the rental increase.
 - (ii) The document also does not annex any previous agreement wherein \$10.00 rental a month was agreed upon.
 - (iii) The signatures on the document have not been witnessed by an independent person and as such the validity of the signatures and the document as a whole is questionable.
 - (iv) The first defendant's signature on the document is forged.
 - (v) The Court cannot grant any injunctive orders in respect of the subject property as there is a vacant possession order for the subject property which has not been set aside.

[17] The first defendant's affidavit evidence remains unchallenged in the absence of affidavit in reply by the plaintiffs. The plaintiffs had opted to not to file a replying affidavit to the first defendant's affidavit in opposition.

Serious issue

- [18] Both parties allege fraud against each other.
- [19] The document relied by the plaintiffs is a rental agreement between the plaintiffs and the land owner entered into in April 2001. The first defendant alleges that the signatures on the document has not been verified by an independent person and his signature (signature 4) on the document is forged.
- [20] Mr Singh of counsel appearing for the first defendant contented that the rental agreement is null and void as the consent of the TLTB was not obtained as required by Section 12 of the iTaukei Land Trust Act.
- [21] Mr Charan of counsel appearing for the plaintiffs on the other hand submits that the consent would not be required because the agreement was between the plaintiffs and the iTaukei Land owner.
- [22] It is thus seen that there is a serious question to be tried at trial as to the validity of the agreement the plaintiffs rely.

Adequacy of damages

- [23] The plaintiffs also claim damages as relief.
- [24] The Court will not grant interim injunction if damages would be an adequate remedy in lieu of interim relief.
- [25] The first defendant submits that the plaintiffs claim cannot be sustained due to illegality and that if there is a claim for damages, it will be against the second defendant.
- [26] The plaintiffs do not seek interim relief against the second defendant.

[27] In my view, the remedy for the plaintiffs, if any, would be damages. The plaintiffs would be adequately compensated if they were successful in their claim at the trial.

Balance of convenience

[28] It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises (see *American Cyanamid at 408E*).

[29] Although I have decided that the remedy in damages is available to the plaintiffs, I consider the balance of convenience for the sake of convenience.

[30] The first defendant is the registered proprietor of the property in question. As the proprietor of the property, the first defendant is entitled to deal with the property especially to take legal action for the recovery of possession of the property from persons unlawfully occupying it.

[31] The plaintiffs have brought the current proceedings against the first defendant following an order he obtained against the plaintiffs in an action brought under s. 169 of the Land Transfer Act 1971.

[32] The plaintiffs had failed to assert their right to possession of the property in the eviction proceedings brought by the first defendant. Further, the plaintiffs did not even appeal the eviction order made against them.

[33] If an injunction is granted, that would effectively restrain the first defendant from further proceeding with the eviction order and/or enforcing that order.

[34] The Court will not grant an equitable remedy against a party preventing him or her from exercising a legal right.

[35] In the circumstances of the case, the balance of convenience is against the granting of the interim injunction.

Conclusion

[36] For the reasons set out above, I would conclude that the plaintiffs have failed to make out a case for interim relief. I would, therefore, refuse to grant interim injunction. In all circumstances, I would make no order as to costs.

The result

1. Interim injunction refused.
2. The first defendant will file and serve his statement of defence within 14 days. Thereafter, matter will take its normal cause.
3. No order as to costs.

M.H. Mohamed Ajmeer
24/6/19

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M.H. Mohamed Ajmeer

JUDGE



At Lautoka

24 June 2019

Solicitors:

For the plaintiffs: Ravneet Charan Lawyers, Barristers & Solicitors

For the first defendant: Patel & Sharma, Barristers & Solicitors