

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

HBC NO. 62 OF 2015

BETWEEN : SHEIK SHAFIYUL HAQUE of Meigunyah, Nadi, Self-Employed.

Plaintiff

AND : ABID HUSSAIN of Meigunyah, Nadi, Bussinessman.

Defendant

Before : A.M. Mohamed Mackie- J

Appearance : Mr. A. Ravindra Singh, for the Plaintiff

Mr. V. Sharma with Mr. W. Mucunabitu, for the Defendant

Date of Trial : 10<sup>th</sup> September 2018

Written Submission: For the Plaintiff not filed

For the Defendant filed on 12<sup>th</sup> November 2018

Date of Judgment : 15<sup>th</sup> February 2019

J U D G M E N T

A. INTRODUCTION

1. This is an action commenced by the plaintiff, by way of writ of summons and the statement of claim (SOC), dated 14<sup>th</sup> of April 2015 and filed on 16<sup>th</sup> of April 2015, moving for the following reliefs against the defendant, as per the prayers to the SOC.

- i) Judgment in the sum of \$ 51,253.39 as mentioned in paragraph 30 of the SOC;
- ii) General damages;
- iii) Interest on judgment sum;
- iv) Costs of this action on a solicitor /client indemnity basis; and

- v) Any further relief that this Honorable Court may deems fit.
2. The defendant by his Amended Statement of Defence(SOD) and counter claim filed on 16<sup>th</sup> February 2017, while refuting the majority of the averments in the SOC, moved for that;
- a. The plaintiff's action against the defendant be struck out,
  - b. An order for the plaintiff to pay a sum of \$42,767.00 , being the loss and damages as particularized in paragraph 38 of the SOD
  - c. General damages,
  - d. Special damages,
  - e. Costs and such other and further reliefs.

**A. HISTORY:**

3. In view of the contents of the Agreed Facts, found in the PTC minutes dated and filed on 10<sup>th</sup> September 2018, it is needless to narrate the history behind this case, since a quick glance through those agreed facts, which I shall reproduce bellow, will give a fair outline of the matter before this court.

**B. AGREED FACTS & ISSUES:**

4. Following facts, which were formulated after filing of the amended SOD with a counter claim, were agreed upon between the parties on the date of trial.

**AGREED FACTS:**

1. *The Defendant is a businessman and is originally from Labasa.*
2. *The Defendant was aware that the farm house on the said land was empty.*
3. *The Plaintiff rented the farm house to the Defendant on the Defendant's request.*
4. *The Defendant in or about January 2009 to in or about December 2010 carried out work for the Plaintiff and his uncle in exchange for payment of rental.*

5. *The Plaintiff and the Defendant agreed that the Defendant would purchase the said property in 2010.*
6. *The Plaintiff would sell the said land and improvements thereon to the Defendant for a total consideration sum of \$50,000.00.*
7. *The Defendant would pay the total consideration sum of \$50,000.00 to Plaintiff's uncle one Mr. Rashid for and on behalf of the Plaintiff.*
8. *The Defendant would pay \$1,500.00 per month until the entire payment was made in full.*
9. *The Defendant would not pay any rent from January 2010 since he was purchasing the same.*
10. *The Plaintiff instituted civil action against the Defendant in Nadi Magistrates Court being Civil Action No. 122 of 2012 by on or about 15th May 2012.*
11. *The Court granted an order dated 21st May 2012 wherein the Defendant was stopped from excavating soil from the said land.*
12. *That on or about 10th September 2014, the Plaintiff filed a summary proceeding in High Court at Lautoka pursuant to Order 113 of the High Court Rules.*
13. *That on 22nd January 2014 the then Master of the High Court of Lautoka granted vacant possession and ordered the Defendant to deliver vacant possession forthwith.*
14. *The Defendant filed an application for setting aside the Order however the same was dismissed and struck out with costs of \$300.00 in favour of the Plaintiff.*
15. *The Defendant's application for declaration of Tenancy at the Agricultural Tribunal was also struck out on grounds of abuse of the process.*
16. *The Defendant then filed an appeal on the decision of the Master and the same was dismissed with costs in favour of the Plaintiff.*

5. As far as the Agreed Issues are concerned; parties have raised 35 issues, including the issues on counter claim, most of which, in my view, are found to be redundant and/or stand answered through one or more of the aforesaid agreed facts and/ or do not warrant consideration in the adjudication of the actual dispute brought out by the parties through their respective pleadings. Hence, I shall not reproduce all those issues, except for highlighting few vital issues, during my analysis, which would, probably, determine the propriety of the plaintiff's action and dispose it fully and finally.

C. THE TRIAL:

Witnesses:

6. At the one day trial held before me, the plaintiff , namely, **Mr. Sheik Shafiyul Haque (PW-1)** , **Mr. Hamsath Ali (PW-2)** who, purportedly, offered certain services to the plaintiff and to his uncle, and finally **Mr. Imtaz Ali (PW-3)**, Senior Valuer from the Lands Department gave evidence for and on behalf of the plaintiff ,while the defendant alone gave evidence on his behalf.

Documents:

7. Following documents were marked on behalf of the plaintiff and the defendant from their respective bundles of documents.

Plaintiff's Documents:

- a. **PE-1.** Crown Lease number 9749 transferred in favour of the plaintiff on 20<sup>th</sup> October 2005.
- b. **PE-2.** Letter dated 7<sup>th</sup> May 2012 from the Divisional Surveyor – Western, granting consent for the eviction.
- c. **PE-3.** Notice of re-entry dated 16<sup>th</sup> May 2011 and addressed to the plaintiff sent by the Divisional Surveyor –Western.
- d. **PE-4.** A quotation received by the plaintiff from Aussie Spares & Earth Movers.
- e. **PE-5.** A "To whom it may concern" letter dated 19<sup>th</sup> November 2010 written by the defendant.

- f. PE-6. Letter dated 6<sup>th</sup> March 2012 sent by the plaintiff to the Divisional Surveyor – Western.
- g. PE-7. Letter dated 4<sup>th</sup> May 2012 sent by the plaintiff to the Divisional Surveyor – Western.
- h. PE-8. A Valuation Report.
- i. PE-9. Receipt dated 25<sup>th</sup> July 2015 for a sum of \$ 2,000.00.
- j. PE-10. Receipt dated 24<sup>th</sup> February 2015 for \$1,500.00

**Defendant's Documents:**

- a. DE-1. Power of Attorney dated 10<sup>th</sup> December 2010 given by the plaintiff unto his Uncle Haroon Rasheed.
- b. DE-2. Three different receipts dated 27<sup>th</sup> July 2010 for \$ 5,000.00, 6<sup>th</sup> December 2010 for \$5,000.00 and 16<sup>th</sup> March 2011 for \$4,000.00 respectively.
- c. DE-3. Sale and Purchase Agreement dated 14<sup>th</sup> October 2010.

**D. THE ANALYSIS:**

- 8. The issue whether the plaintiff was the registered lessee of the land in question does not warrant consideration, in view of the agreed facts numbers 3, 5, 6, 12 and 13, wherein the title of the plaintiff, as the lessee for the land in question, has been tacitly admitted by the defendant.
- 9. The fact that the defendant came into the land in dispute as a tenant in or about February 2006 is not in dispute. However, parties are at variance on the agreed amount of monthly rental, which according to the plaintiff, was \$300, 00 from the inception, while the defendant says that it was at the rate of \$250.00 from February 2006 till August 2006 and was subsequently increased to \$300.00 from September 2006.
- 10. Admittedly, there has been a sale and purchase agreement (SPA) entered into between the parties on the 14th October 2010 for the defendant to buy the land for a sum of \$50,000.00 according to which the said consideration was to be paid to the plaintiff's Uncle, namely, Mr. Haroon Rashid, who held a Power of Attorney from the plaintiff, which was marked as DE-1. The SPA was marked as DE-3.

11. Moreover, it is also an agreed fact that from January 2009 till December 2010 the defendant carried out certain works for the plaintiff and his said uncle in exchange of payments of rentals (Vide agreed fact 4).
12. Additionally, the parties have agreed that arrangement between them for the waiver of the monthly rental from January 2010, was also due to the fact that the defendant was to purchase the property in question as per the said Agreement marked as "DE-3" (Vide agreed fact 9).
13. Thus, in view of the above agreed facts, it appears that the defendant had been substantially absolved from the liability of paying monthly rental until sometime after the signing of the Agreement to sell on 14<sup>th</sup> October 2010. The plaintiff has not given the exact number of months for which the waiver was granted. However, the plaintiff in paragraph 30 of the SOC pleads for \$15,000.00 being the mense profit at the rate of \$300.00 from **January 2010** till **February 2015**, which is a substantial relief as per the prayer to the SOC.
14. Thereafter, the impugned Agreement to sell has been frustrated in the early part of 2012 as evidenced by the PE-6 letter dated 6<sup>th</sup> March 2012 sent by the plaintiff addressed to the Divisional Surveyor informing about the cancellation of the Agreement to sell , and the Consent letter dated 7<sup>th</sup> May 2012 marked as "PE2" received by the plaintiff from the Divisional Surveyor to commence proceedings in order to evict the defendant, according to which the initial action in the Magistrate's court of Nadi was filed on 15<sup>th</sup> May 2012.
15. Before addressing the issues that have been formulated purely revolving around the facts, it is prudent to primarily consider the following issues, which are mixed with law and, in my view, would probably dispose the matter fully and finally, without having to take a deep dive into the lengthy evidence on facts adduced by and on behalf of the parties. It doesn't mean that I am not going to consider the evidence led at all.
  - a. *Whether the plaintiff has obtained the consent of the Director of Lands to institute these proceedings for the recovery of damages for the Land?*
  - b. *Whether the plaintiff has any legal right sub-let the property without the consent of the Director of Land?*

16. If the answers to the above pivotal issues are negative, the plaintiff's action will undoubtedly fail *ab-initio*. In the event the above two issues attract favorable answers to the plaintiff, he is still under duty to prove that; **(1)** The defendant was in arrears of rental from January 2010 till February 2015, **(2)** Damages were caused to the land by excavation of soil by the defendant, and **(3)** the plaintiff had to incur various other expenses due to the acts of the defendant, as averred in paragraph 30 of the SOC. If he fails to prove the above on balance of probability, his claim will have to be rejected.
17. Conversely, if the defendant **fails** to prove that the alleged payment of \$14,000.00 by him unto the plaintiff's Uncle Mr. Haroon Rashid (Power of Attorney Holder), was made **not for anything other than being the part payment of the agreed purchase price**, as averred in the SOD , his counter claim will warrant nothing but dismissal.
18. The sub-lease held by the plaintiff in this case is a **"Protected Lease"** and there is no dispute on this point. My attention is drawn to the section 13 of the Crown Lands Act.

*Section-13-(1) whenever in any lease under this Act there has been inserted the following clause:-*

*"This lease is a protected lease under the provisions of the Crown Lands Act"*

*(hereinafter called a protected lease) it shall not be lawful for the lessee thereof to alienate or deal with the land comprised in the lease of any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever, nor to mortgage, charge or pledge the same, without the written consent of the Director of Lands first had and obtained, nor, except at the suit or with the written consent of the Director of Lands, shall any such lease be dealt with by any court of law or under the process of any court of law, nor, without such consent as aforesaid, shall the Registrar of Titles register any caveat affecting such lease.*

*Any sale, transfer, sublease, assignment, mortgage or other alienation or dealing effected without such consent shall be null and void.*

19. Admittedly, the plaintiff obtained the consent of the Director of Land by letter dated 07<sup>th</sup> May 2012 (**PE-2**) to evict the defendant and accordingly, he initiated proceedings under action no. 122 of 2012 in the Magistrate's Court of Nadi on 15<sup>th</sup> May 2012.

20. However, since the learned Magistrate had refused to grant an injunction order, as moved by the plaintiff, which had the effect of eviction, the plaintiff on 10<sup>th</sup> September 2013 initiated summary proceedings under Order 113 of the High Court rule in the High Court and finally succeeded in evicting the defendant from this land in the year 2015.
21. It is after the said eviction, the plaintiff has instituted this action for the recovery of purported arrears of mense profit, damages and other expenses, however with no fresh consent being obtained from the Director of Land for this purpose. The plaintiff has not adduced any evidence to show that he in fact even applied for the consent of the Director of Land to institute this action. The plaintiff is not the absolute owner of the land. Instead, he is only a lessee under the Director of Land.
22. These proceedings for the recovery of alleged damages cannot take place behind the back of the Director of Lands and his consent should have been obtained in the first hand, if any damages had been caused to the land.
23. The Plaintiff not only failed to obtain the consent to file this action, but also had handed over the possession of the land in question to the defendant on the mere execution of the Agreement to sell, before the due execution of the transfer, after obtaining the consent. This takes us to the second issue above as well, which revolves around the plaintiff's failure to obtain the consent before actually dealing with the Land by handing over the possession thereof for the defendant to engage in his activities.
24. Although, the clause 8 of the impugned Agreement to sell stipulates that the possession shall be given only after the settlement, the clause 11.1(b) of the same Agreement clearly shows that the clause 8 above has been observed in breach by the parties. Clause 11.1(b) speaks about the re-entry right of the plaintiff if the defendant as the purchaser makes any default.
25. The plaintiff cannot make use of the lease title according to his whims and fancies for the recovery of damages, allegedly, caused to the land, without obtaining the consent of the Director of Lands as prescribed by the section 13 of the Act.



26. The Act clearly stipulates that the consent of the Director of Lands is a pre-requirement for filing the action. However, there are decided authorities permitting the consent to be obtained and submitted to the court before the judgment and/or the court actually deals with the land in terms of its judgment. The plaintiff has not taken step to obtain the consent even at this belated stage before the pronouncement of judgment for the court to deal with the land in the event he succeeds in his claim.
27. In any event, if the answers to the aforesaid 2<sup>nd</sup> issue and other issues of facts related to plaintiff's claim happens to be negative, even if the consent of the Director of Lands to institute the action is produced at this stage, it will not assist the plaintiff.
28. As observed above, the next main issue (issue (b) above) is whether the plaintiff had obtained the consent to deal with the land. It is an admitted fact that the plaintiff, even before the signing the Agreement to sell, handed over the possession of the Land and had started receiving rent and other services from the defendant. However, the Act does not prohibit entering into an Agreement to sell or lease with a third party without the consent of the Director of land. What the Act requires is the consent to be obtained before the execution of the relevant Transfer, Lease or Mortgage and/or actually deal with the land, which can include the handing over the possession and the new party engaging in the intended activities therein as well.
29. The plaintiff, after signing of the Agreement to sell, has deliberately proceeded to hand over the vacant position of the land in question unto the defendant before the execution of the transfer documents. This is against the section 13 of the crown Lands Act. The plaintiff in his evidence and the documents has unreservedly admitted that he did not obtain the consent either for the institution of this action or handing over the possession as aforesaid , which is a dealing affecting the land in question.
30. The plaintiff does not have any right to claim for or receive any rental or damages through the sub leasing of the land as he did or otherwise without the consent of the Director of Lands first had and obtained and to do so is illegal.

31. The plaintiff, who failed to follow the prescribed provisions of the law and acted illegally, cannot seek remedy. Hence, this court cannot lend its hand to the plaintiff. Accordingly, I decide that the issue number 2 above should also attract negative answer leading the plaintiff's action to be dismissed.

### Issues on Facts

32. Without prejudice to the above findings, for the sake of completeness, let me consider few issues on facts, to decide whether the plaintiff could succeed in his claim.

33. As far as the claim for mense profit (Rental arrears) is concerned, the plaintiff does not give the exact period of time for which the rent fell arrears. There is a clear admission that the defendant offered certain services to the plaintiff and his uncle in lieu of monthly rental. The value of such service and for how long such services were rendered by the defendant have not been unambiguously pleaded or brought out through the evidence.

34. Further, the plaintiff is asking for rental from January 2010. But the admission number 9 says that the defendant would not pay any rent from January 2010. This arrangement, undoubtedly, would have continued even after signing the Agreement in October 2010. During his cross examination in page 45 of the copy record, the plaintiff admits the Monthly receipt of \$300.00. No evidence to show the number of months the rent has fallen arrears. The pleadings and the evidence on the question of the alleged arrears of rental are not convincing and the purported claim should fail accordingly.

35. The next question is on the damages allegedly caused by the defendant. He claims \$10,000.00 as damages. There is no any tangible evidence in this regard. The PE-8 valuation report does not speak about any damages caused to the land. It merely says about the market value of the land.

36. The Valuation Officer called by the plaintiff as PW-3 from the Land Department was not privy to this report as it had not been done by his department. This report had been obtained by the plaintiff from a private Valuer in order to buttress his claim, but it did not favour the plaintiff. The

plaintiff did not give any specific evidence with facts and figures on the alleged damages caused by the defendant.

37. The next witness for the plaintiff, PW-2, spoke about certain constructions and leveling of the land. He did not speak about specific damages caused by the defendant to the land, except for about some holes on the land. Though, he stated that the total cost was \$38,000.00, he did not produce any document in proof of carrying out the work, details of the work and payments made to him. According to him this purported works have involved mainly construction and leveling of land and does not say the leveling was needed as a result of any damages caused by the defendant.
38. Although the evidence shows the soil extraction, Plaintiff has not proved that the defendant took it out and made use of it for his own benefit.
39. No acceptable evidence was placed by the plaintiff to prove the so called damages. Thus, this claim too should necessarily fail. The contents of the documents marked as PE-9 and PE-10 marked through the plaintiff to prove certain works, purportedly, done in the land, have not been substantiated by calling the relevant witnesses. These unsubstantiated documents and the plaintiff's evidence on them cannot be accepted and acted upon. Rest of the, purported expenses also have not been proved. Accordingly, plaintiff's claim for various expenses cannot be allowed and should be dismissed.

**E. COUNTER CLAIM BY THE DEFENDANT:**

40. The defendant, by way of counter claim, moves for the repayment of \$14,000.00, allegedly paid by him to the plaintiff's Uncle (Power of Attorney holder Mr. Haroon Rashid), being the part payment of the purchase price, in the following manner on the receipts marked as "DE-2".
  - a. A sum of \$5,000.00 on 21st July 2010 by receipt number 107780.
  - b. A sum of \$4,000.00 on 6<sup>th</sup> December 2010 by receipt number 107781.
  - c. A sum of \$5,000.00 on 16<sup>th</sup> March 2011 by receipt number 107782.
41. It is to be noted that as per the paragraph 2 under the title "PRICE & PAYMENTS" in page 2 of the impugned Agreement to sell entered into on 14<sup>th</sup> October 2010, what has been agreed between the parties is for the entire

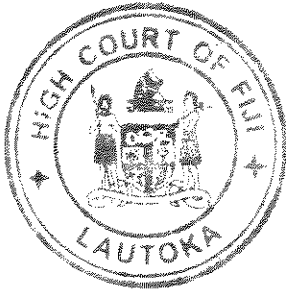
purchase price of \$50,000.00 to be paid by monthly installment of \$1,500.00 (One Thousand Five Hundred Dollars) with effective from 31<sup>st</sup> January 2011.


42. According to the aforesaid 1<sup>st</sup> receipt bearing No.107780, it is observed that the alleged 1<sup>st</sup> payment in a sum of \$5,000.00 has been paid on 21<sup>st</sup> July 2010, around 2 months and 3 weeks beforehand the Agreement was signed on 14<sup>th</sup> October 2010 and around 6 months in advance to the date on which the 1<sup>st</sup> installment of \$1,500.00 was to fall due, which was 31<sup>st</sup> January 2011 as per the Agreement.
43. It is also to be noted that even the alleged 2<sup>nd</sup> payment of \$4,000.00, as per the aforesaid 2<sup>nd</sup> receipt bearing No. 107781, has been made on 6<sup>th</sup> December 2010, while the 1<sup>st</sup> installment of \$1,500.00 as per the Agreement was to be due only on 31<sup>st</sup> January 2011.
44. Had the defendant in fact paid the said sums on account of very same land, undoubtedly, the 1<sup>st</sup> payment of \$5,000.00 made on 21<sup>st</sup> July 2010 should have been reflected and given credit against the total purchase price of \$50,000.00 in the Agreement.
45. Number of questions arises, as to why the defendant offered to pay such colossal amounts, firstly before the agreement was signed, secondly, before the due date of payment and more importantly while the consent for the transfer had not been obtained.
46. Although, the defendant was rightly confronted on this issue during his cross examination by the learned counsel for the plaintiff, the learned defense counsel did not opt to re-examine the defendant at all and left this question unclarified. The defendant, through his examination in chief, under cross examination or re-examination, should have given plausible explanation as to why he made such payments, while he was supposed to pay in the installment of \$1,500.00 from 31<sup>st</sup> January 2011.
47. In view of the above, I am not fully convinced that the defendant in fact paid the said sum of \$14,000.00 unto the plaintiff's Power of Attorney holder Mr. Haroon Rashid, as the part payment for the purchasing of the very same land in terms of the impugned Agreement to sell.

48. Accordingly, it is my considered finding that the defendant's counter claim does not warrant favorable consideration and it has to be dismissed.

F. FINAL ORDERS:

1. The plaintiff's action fails and same is hereby dismissed.
2. The defendant's counter claim dismissed.
3. There shall be no costs ordered against or in favor any party and they shall bare their own costs.



  
A. M. Mohammed Mackie  
Judge

At Lautoka  
15<sup>th</sup> February, 2019