IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 107 of 2018

BETWEEN: **BELLA O'CONNOR MUIR** formerly of Brisbane, Australia but now of Bau Road, Nausori, Businesswoman.

FIRST PLAINTIFF

AND: **ROSANA TURAGA OÇONNOR** of Ucuna, Lagalevu, Kadavu, Domestic Duties.

SECOND PLAINTIFF

AND **FIJI PUBLIC TRUSTEE CORPORATION LIMITED**

DEFENDENT

BEFORE: Hon. Acting Chief Justice Kamal Kumar

COUNSEL: Mr J. Lannyon for the Plaintiffs
Mr G. O'Driscoll for the Defendant

DATE OF RULING: 28 May 2020

RULING
(Application for Interlocutory Injunction)

1.0 INTRODUCTION

1.1 On 23 May 2018, Plaintiffs filed Ex-parte Summons (converted to Inter-parte) seeking following Orders:-

"1) That the Plaintiffs be allowed to harvest the mahogany trees they had planted at Lagalevu Estate, Kadavu.

2) That other occupants of Lagalevu Estate, Kadavu be restrained from interfering with the Plaintiffs or their agents in the process of harvesting and/or transporting the mahogany trees they had planted in Lagalevu Estate, Kadavu.

3) That the Defendant be ordered to issue a Notice to all descendants of Ned O'Connor that the Will dated 11th January 1899 is valid and binding and that the ownership principle ("owning what you plant") is binding and valid to date.

4) That any other orders that the court may deem just and equitable in the circumstances."

(**"the Application"**)

1.2 On 25 May 2018, being returnable date of the Application this Court granted interim injunction in respect to prayer 2 of the Application, directed parties to file Affidavits and adjourned the Application to 10 July 2018, for mention.

1.3 On 4 July 2018, Application was adjourned to 3 August 2018, for Plaintiffs to decide next line of action.

1.4 The Application was next called on 9 August 2018, when it was adjourned to 14 August 2018, due to non-appearance of Counsel for Defendant.

1.5 On 14 August 2018, the Application was heard and adjourned for Ruling on Notice.

1.6 Following Affidavits were filed on behalf of the Parties:-

For Applicant

Affidavit in Support of Bella O'Connor Muir sworn and filed on 23 May 2018 (hereinafter referred as **"Muir's 1st Affidavit"**);

For Defendant

Affidavit in Response of Marcus Pene sworn on 13 June 2018, and filed on 15 June 2018 (hereinafter referred to as **"Pene's Affidavit"**);

2.0 APPLICATION FOR INTERLOCUTORY INJUNCTION

2.1 Lord Diplock in **American Cyanamid Co. *v.* Ethicon Ltd** [1975] AC 396 stated the principle for interlocutory injunction as follows:-

(i) Whether there is a serious question to be tried;

(ii) Whether damages would be adequate remedy; and

(iii) Whether balance of convenience favors granting or refusing Interlocutory Injunction.

2.2 It is well established that the jurisdiction to either grant or refuse interlocutory injunctions is discretionary.

2.3 Lord Diplock in **American Cyanamid *v.* Ethicon Ltd** [1975] AC 396 stated as follows:-

> ***"My Lords, when an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff's legal right is made upon contested facts, the decision whether or not to grant an interlocutory injunction has to be taken at a time when ex-hypothesi the existence of the right or the violation of it, or both, is uncertain and will remain uncertain until final judgment is given in the action. It was to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved that the practice arose of granting him relief by way of interlocutory injunction; but since the middle of the 19th century this has been made subject to his undertaking to pay damages to the defendant for any loss sustained by reason of the injunction if it should be held at the trial that the plaintiff had not been entitled to restrain the defendant from doing what he was***

threatening to do. The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages of the uncertainty were resolved in the defendant's favour at the trial. The court must weigh one need against another and determine where "the balance of convenience" lies."

2.4 In **Series 5 Software *v.* Clarke** [1996] 1 All E.R. 853 Justice Laddie stated that the proper approach in dealing with Application for Interlocutory Injunction:

"(1) The grant of an interim injunction is a matter of discretion and depends on all the facts of the case. (2) There are no fixed rules as to when an injunction should or should not be granted. The relief must be kept flexible. (3) Because of the practice adopted on the hearing of applications for interim relief, the court should rarely attempt to resolve complex issues of fact or law. (4) Major factors the court can bear in mind are (a) the extent to which damages are likely to be an adequate remedy for each party and the ability of the other party to pay, (b) the balance of convenience, (c) the maintenance of the status quo, and (d) any clear view the court may reach as to the relative strength of the parties' cases."

2.5 Another factor which Courts now take into consideration in addition to the above is **"overall justice"** as stated by His Honour Justice Cook in **Klissers Farmhouse Bakeries Ltd *v.* Harvest Bakeries Ltd** [1985] 2 NZLR 129 at 142 (paragraphs 20-30):-

"Whether there is a serious question to be tried and the balance of convenience are two broad questions providing an accepted framework for approaching these applications ... the balance of convenience can have a very wide ambit. In any event the two heads are not exhaustive. Marshalling considerations under them is an aid to determining, as regards the grant or refusal of an interim injunction, where the overall justice lies. In every case the judge has finally to stand back and ask himself that question. At this final stage, if he has found the balance of convenience overwhelmingly all very clearly one way ... it will usually be right to be guided accordingly. But if on the other hand several considerations are still fairly evenly posed, regard to the relative strengths of the cases of the parties will usually be appropriate. We use the word "usually" deliberately and do not attempt any more precise formula: an interlocutory decision of this kind is essentially discretionary and its solution cannot be governed and is not much simplified by generalities."

Serious Question To Be Tried

2.6 The Application for Interlocutory Injunction must establish that there is a serious question to be tried.

2.7 It is well established that the test for serious question to be taken is that the evidence produced to Court must show that Applicant's claim is not frivolous, vexatious or hopeless.

2.8 In **American Cyanamid** Lord Diplock stated as follows:-

"In those cases where the legal rights of the parties depend upon facts that are in dispute between them, the evidence available to the court at the hearing of an application for an interlocutory injunction is incomplete. It is given on affidavit and has not been tested by oral examination." (p 406)

"It is not part of the court's function at this stage of the litigation to try to resolve conflicts of evidence in affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial." (p 407)

2.9 His Lordship further stated as follows:-

"In view of the fact that there are serious questions to be tried upon which the available evidence is incomplete, conflicting and untested, to express an opinion now as to the prospects of success of either party would only be embarrassing to the judge who will have eventually to try the case."

2.10 Plaintiffs seek declaration:-

(i) stipulated in late Charles O'Connor I's Will whoever planted coconuts in the Lagalevu Estate, Kadavu, owned the coconuts so planted by him;

(iii) Plaintiffs are the owners of the mahogany plantation at Lagalevu Estate, Kadavu by virtue of the fact they planted it.

2.11 Plaintiffs also seek Order that the Defendant as Administrator of the Estate of Charles O'Connor make known to beneficiaries of Estate of Charles O'Connor about the planting of coconuts and not to interfere with Plaintiff's harvesting of the mahogany.

2.12 At paragraph 12 of Pene's Affidavit he states as follows:-

"12. In 2011, various meetings had been held wherein some beneficiaries had objected to the Plaintiffs and their family members from harvesting the mahogany."

2.13 From the Affidavit filed on behalf of Plaintiffs this Court makes following finding:-

(i) Pursuant to late Charles O'Connor I's Will he bequeathed Lagalevu Estate as follows:-

(1) 50 acres of land to his son Ned O'Connor

(2) 50 acres of land to his nephew Phillip (Vilivi) O'Connor

(3) 50 acres of land to his nephew William (Vili) O'Connor

(4) 50 acres of land to his grandchildren, children of his son Albert (Alovete) O'Connor, as gift to be redeemed before 1919, failure of which, the same reverts to the family as a whole

(5) 50 acres of land to his wife Litia as a gift for her sole use

(6) 50 acres of land tohis daughter Keleni O'Connor

(7) 50 acres of land to his daughter Keresi O'Connor

(8) 130 acres to his daughter Maraia and her husband Samuel Berwick in equal shares.

(ii) First Plaintiff is the daughter of Second Plaintiff and Aporosa Nacolaivalu Turaga O'Connor (**"Turaga"**);

(iii) Turaga was the son of late Litia Vunicau O'Connor;

(iv) Late Litia Vunicau O'Connor was the daughter of late Ned O'Connor.

(v) Late Ned O'Connor was the son of Charles O'Connor 1 and named beneficiary in late O'Connor's subject Will.

2.14 Plaintiffs also assert at paragraph 20 and 21 of Muir's 1st Affidavit that in late 1950's her late father and Plaintiff and First Plaintiff's siblings planted mahogany seedlings at Naibili on Lagalevu Estate and continued to so throughout 1970's.

2.15 Pene at paragraph 16 of his Affidavit states that he makes no admission what is stated in paragraph 20 to 24 of Muir's 1st Affidavit but at paragraph 17 of his Affidavit states as follows:-

"17. That I agree to paragraph 28 of the said Affidavit and re-iterate paragraphs 12, 13 and 14 of this Affidavit."

2.16 It is certain that there is dispute amongst the beneficiaries of the Estate of Charles O'Connor I, in particular between the Plaintiffs and those residing at

Lagalevu Estate as to the ownership of coconuts and mahogany planted on the Estate land.

2.17 This Court has not given any weight to letter dated 18 August 2017 addressed to the Defendant (Annexure "K" of Muir's Affidavit). The authors of that letter should have signed Affidavits for Court to consider their evidence.

2.18 This Court also takes note of the following:-

(i) First Plaintiff has filed this proceeding in her personal capacity and not as Administrator of her late father's Estate.

(ii) Plaintiff has failed to join the beneficiaries of the Estate of Charles O'Connor 1.

(iii) Plaintiffs should have joined beneficiaries known to them or atleast those residing at Lagalevu Estate or those who allegedly stopped their people from harvesting the mahogany plants or Masi O'Connor who allegedly gave instruction to his family to cut the mahogany trees.

2.19 Having heard that there is serious question to be tried as to ownership of coconut plants and mahogany trees on Lagalevu Estate this Court will assess balance of convenience.

Balance of Convenience

2.20 Court takes note of the following:-

(i) Plaintiffs being daughter and wife of late Turaga and are beneficiaries in the Estate of Charles O'Connor I.

(ii) Plaintiffs may or may not have any interest in the mahogany trees planted at Lagalevu Estate.

(iii) Defendant as Administrator of Estate has not taken any positive step to complete the Administration of the Estate or sort out any differences beneficiaries may have.

(iv) Plaintiffs have emotional ties to the land subject to Lagalevu Estate and if they did plant mahogany trees then they will have such ties to those trees as well.

(v) In view of what is stated at paragraph 2.20 (iii) this Court finds damages would not be adequate remedy if late Turaga and his family had in fact planted the mahogany trees as alleged.

(vi) Undertaking as to damages given by Plaintiff is not sufficient or satisfactory for the reason, if Court finds that Plaintiffs had no interest in the mahogany trees then Plaintiffs will not be in position to pay any damages awarded against them from sale of those trees. In other words, Plaintiffs when giving undertaking as to damages should not rely on assets or property when their ownership is in dispute and/or subject to litigation.

2.21 In view of what is stated at paragraph 2.20 (iii) and (iv) of this Ruling, interest of justice dictates that until the issue as to ownership of mahogany trees is sorted out or determined by Court the status quo should remain.

3.0 Costs

3.1 Since Defendant as Administrator of the Estate is having its own difficulty and is no way responsible for permitting anyone from harvesting or cutting down mahogany trees no costs should be awarded.

4.0 Miscellaneous

4.1 Before I conclude, I wish to make certain observations and suggestions.

4.2 In view of what is state at paragraph 2.18 of this Ruling, Plaintiffs should seriously consider seeking legal advice and amending the pleadings for Court to consider and determine the matter.

4.3 Defendant subject to its own decision or legal advice should take following steps to resolve the dispute and/or administration of the Estate of Charles O'Connor I at least prior to expiry of another decade:-

(i) Conduct search at Registrar General's Office to determine who are children or descendants of Ned O'Connor, Philip (Vilivi) O'Connor, William (Vili) O'Connor; grandchildren/children of Albert (Alvete) O'Connor, Keleni O'Connor, Keresi O'Connor, Maraia Berwick and Samuel Berwick.

(ii) Defendant can also obtain that information from Plaintiffs and late Charles O'Connor I's descendants living at Lagalevu Estate;

(iii) Call a meeting of all the beneficiaries at a convenience place and time by placing advertisements in the dailies;

(iv) At the meeting, inform the beneficiaries about the Will of late Charles O'Connor I and reach a resolution as to how his Estate is to be distributed and the ownership of coconut plants and mahogany trees.

(v) If mahogany trees are matured and needs to be harvested, then Defendant as Administrator may if it wishes to do, have the trees harvested and hold the net sale proceeds in trust until the ownership issue is resolved by this Court or the beneficiaries themselves.

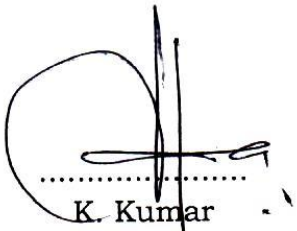
4.4 It is to be noted that what is stated at paragraph 5.3 of this Ruling is only a suggestion and as such it is entirely up to Defendant how the Estate is to be administered for the benefit of the Estate.

5.0 **Orders**

5.1 I make following Orders:-

(i) That the occupants of Lagalevu Estate, Kadavu, descendants of late Charles O'Connor I, descendants of William (Vili) O'Connor and the Plaintiffs whether by themselves, their agents, servants or whosoever is restrained from harvesting and/or transporting the mahogany trees planted in Lagalevu Estate, Kadavu until further Orders of this Court.

(ii) Each party bear its own cost for the Application.



K. Kumar
ACTING CHIEF JUSTICE

At Suva
28 May 2020

Law Solutions for the Plaintiffs

Legal Department of Fiji Public Trustee Corporate Ltd. for the Defendant