

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 29 of 2020

BETWEEN : **JONE TUKUNA** of Navakai, Nadi.
1st Plaintiff

AND : **SAKIUSA SIRINATURAGA MASIWINI, ELIZEBETH WYE, TEVITA DAKUNA, ASENA BULOUNICEVA SAQASERA** all of Navakai, Nadi.
2nd Plaintiffs

AND : **TOMASI TUSAI, PENAI A DRIU, VIJAY SINGH** all of Navakai, Nadi.
3rd Plaintiffs

AND : **RONALD RITESH KUMAR**, of Navakai, Nadi.
1st Defendant

AND : **DIRECTOR OF LANDS**
2nd Defendant

Before : Master U.L. Mohamed Azhar

Counsels : Mr. E. Moapa for the plaintiffs
Mr. E. Sailo for the first defendant
Mr. J. Mainavolau for the second defendant

Date of Ruling : 17.06.2022

RULING

01. This is the Notice of Motion filed by the plaintiffs pursuant to Order 4 of the High Court Rules seeking consolidation of this matter with other three matters, namely, HBC 276 of 2019, HBC 277 of 2019 and HBC 278 of 2019. All are pending in this court. The Motion is supported by an affidavit sworn by the first named second plaintiff. The first defendant opposed the summons and filed his affidavit. At hearing of the summons both counsels made oral submission and later filed their respective written submission.

02. The courts have broad discretion to order a joint hearing or trial of all matters at issue in actions involving common questions of law or fact. This discretion includes order for consolidation of the actions. Consolidation may take several forms and it can be made for discovery only, or for trial only, or for all purposes. Courts usually consolidate cases to speed up the trial process and to eliminate duplicative trials involving the same parties, issues, and evidence. The courts, in general, when exercising this discretion look with favour of motion to consolidate that promotes judicial economy without causing prejudice the parties. The rules of the courts provide for the matter to be considered and the orders that may be made by the courts. This court recently had an opportunity in Dean v Jan [2021] FJHC 164; HBC133.2018 decided on 12 March 2021 to discuss the law on consolidation of matters. The Order 4 rule 2 of the High Court Rules provides for the law to consolidate matters pending in the High Court. It reads that:

Consolidation of Proceedings (O.4, r.2)

2. Where two or more causes or matters are pending, then, if it appears to the Court-

- (a) that some common question of law or fact arises in both or all of them, or
- (b) that the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions, or
- (c) that for some other reason it is desirable to make an order under this rule,

the Court may order those causes or matters to be consolidated on such terms as it thinks just or may order them to be tried at the same time or one immediately after another or may order any of them to be stayed until after the determination of any other of them.

03. The effect of the above rule in its unambiguous language is that, firstly, it is a wide discretion that is given to the court. Secondly, there must be two or more matters or causes pending in the court. Thirdly, it must appear to the court that one of the three

subparagraphs of the rule is satisfied. Finally and more importantly the orders the court may make under this rule. The court may make three orders under this rule. They are (a) order those causes or matters to be consolidated on such terms as it thinks just, or (b) may order them to be tried at the same time or one immediately after another, or (c) may order any of them to be stayed until after the determination of any other of them. The order (a) for consolidation is different from other two orders (b) and (c), even though it has been used in a looser sense to include other two orders.

04. Austin J in **A Goninan & Co Ltd v. Atlas Steels (Australia) Pty Ltd** [2003] NSWSC 956 lengthily discussed the genesis and the development of the law and the current practice in common law in relation to consolidation of related matters and stated at paragraph 28 that:

The third limitation arising of the wording of the rule is that the order authorized by the rule is (relevantly) an order that the proceedings be "consolidated". An order for the consolidation of proceedings is, by the terms of the rule, different from an order that proceedings be tried at the same time or immediately after one another, or that one be stayed until determination of another. Sometimes, in the past, the word "consolidation" has been used in a looser sense to encompass these other kinds of orders: *Lee v Arthur*, at 62 per Moulton LJ. But in its "proper sense", an order for consolidation is an order "combining actions so that they thereafter proceed as one": *Cameron v McBain*, at 246 per Herring CJ; see also *Thomas & Morgan (United Kingdom) Ltd v Erica Vale Australia Pty Ltd* (1995) 31 IPR 335.

05. In that case, Austin J made an order consolidating five separate proceedings involving seven different parties into one proceeding, where all the proceedings raised the commons issue. The significance of the order was that, the five proceedings became one single proceeding, with one of the parties as plaintiff and two of the others as defendants. Each of the original parties was able pursue its claim against the others by way of cross-claim, resulting in only one set of pleadings of lesser volume.
06. On the other hand, there are circumstances which militate against the order for consolidation of related matters. For examples, two causes cannot be consolidated even though the parties are same, unless one action can be ordered to stand as counter-claim or third party proceedings in the other action. Likewise, it is generally impossible to order consolidation of matters where there are several lawyers have been instructed (see: **White Book 1999**, Vol I para 4/9/2 at page 30). These limitations, however, apply only in relation to order (a) mentioned in paragraph 3 above. However, the power to order

consolidation is discretionary and will not be exercised if a party can show a real possibility of prejudice.

07. The ultimate purpose of the orders made under this rule is to serve costs and time. No order will be made under this rule unless there is some common question law or fact. **The White Book 1999**, in Vol I para 4/9/2 states at page 30 that:

The main purpose of consolidation to save costs and time, and therefore it will not usually be ordered unless there is “some common question of law or fact bearing sufficient importance in proportion to the rest” of the subject-matter of the actions “to render it desirable that the whole should be disposed of at the same time” (*Payne v. British Time Recorder Co.* [1921] 2 K.B. 1 at 16; *Horwood v. British Statesman Publishing Co. Ltd* [1929] W.N. 38; *Daws v. Daily Sketch* [1960] 1W.L.R 126; [1960] 1 All E.R. 397, CA). Where this is the case, actions may be consolidated where the plaintiffs are the same and the defendants are the same, or where the plaintiff or defendants or all are difference (*Horwood v. British Statesman Publishing Co. Ltd* (1929) *per* Sankey L.J. at 59). The circumstances in which actions may be consolidated are therefore generally similar to those in which parties may be joined in one action under O, 15, r, 4.

08. Accordingly, if there are two or more related cases pending in the same court, that court should first consider whether (a) some common question of law or fact arises in both matters or all of them, or (b) the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions, or (c) some other reason makes it desirable to make an order under this rule. If the court is satisfied any of the above factors, then the court, considering the circumstances of the cases, may make any of the three orders mentioned in the rules, and they are (a) order that, those causes or matters to be consolidated on such terms as it thinks just or (b) order that, them to be tried at the same time or one immediately after another or (c) order any of them to be stayed until after the determination of any other of them. If the court makes an order for consolidation of several matter as per (a) above, it should then specify as to who will be the plaintiff/s, who will be the defendant/s, who will be cross-defendant/s and which pleading should be the claim and cross-claim etc. This is what that is meant by the phrase “on such terms as it thinks just” in the rule.

09. All plaintiffs in this case are the defendants in three separate matters commenced by the first defendant. The first defendant is the registered proprietor of land comprised in three separate State Leases bearing numbers 22447, 22448 and 22449 for Lots 2, 3 and 4 on SO 7592 being LD 4/10/6346, LD 4/10/6347 and LD 4/10/6348 respectively and situated

at Navakai, Nadi. He summoned all three plaintiffs by way of Originating Summons (Expedited Form) pursuant to Order 113 of the High Court Rules and sought orders on all plaintiffs to deliver vacant possession of respective lands to him together with an order for cost on indemnity basis. Only the first plaintiffs filed their affidavit in opposition in the Case No.277 of 2019 and the first defendant filed his affidavit in reply. The second and third plaintiffs did not file the affidavits in other two matters, but all the plaintiffs filed the current motion to consolidate this matter with other three matters filed by the first defendant.

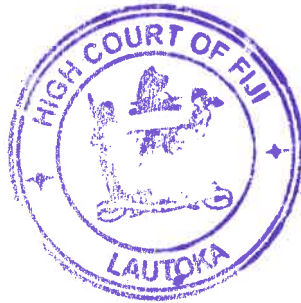
10. The plaintiffs claim that, the first defendant was the lease holder of all three lots described above and they entered and continued to remain as the tenants of the first defendant in all three Lots until expiry of his (first defendant's) leases. Upon realizing the expiry of all three leases of the first defendant, the plaintiffs approached the relevant authorities to get the leases issued to them over the lots they were occupying. However, the leases of the first defendant were renewed by the second defendant. The plaintiffs alleged that, the second defendant fraudulently renewed the leases for the first defendant without sub-dividing lots and granting separate leases to the plaintiffs, who were the tenants of the first defendant. The plaintiffs therefore seek the following reliefs from the court in this matter.
 - (i) A Declaration that the plaintiffs have equitable interest in the State Leases Nos. 22447 (Lot 2), 22448 (Lot 3), and 22449 (Lot 4) situated at Navakai, Nadi and formerly known as Lot 16 Crown Lease No. 18606 and they are entitled to reside on the property.
 - (ii) An order that the 1st defendant paid compensation to the plaintiffs for the period of tenancy from 2001 to 20140.
 - (iii) An Order that State Leases Nos. 22447 (Lot 2), 22448 (Lot 3) and 22449 (Lot 4) registered under the 1st defendant are cancelled forthwith and or in the Alternative an Order that such leases are subdivided by the defendants for the plaintiffs to have their own respective lots.
 - (iv) An injunction against the defendants restraining and stopping them from any dealing whatsoever of State leases Nos; 22447 (Lot2), 22448 (Lot 3), and 22449 (Lot 4) situated at Navakai, Nadi and formerly known as Lot 16 Crown Lease No. 18606 until the consent by the 2nd defendant is granted for subdivision of lots to the respective plaintiff.
 - (v) Cost on indemnity basis.

- (vi) Further or other relief the Court deems just and equitable.
11. Whilst the three Originating Summons filed by the first defendant seek the orders on the plaintiffs to vacate all the leaseholds occupied by them, the plaintiffs seek a declaration of equitable interest over those State Leases. The question is whether those Originating Summonses commenced pursuant to Order 113 of the High Court Rules and this proceeding begun by way of Writ can be consolidated exercising the discretion conferred on the court by Order 4 rule 2 of the High Court Rules.
 12. The procedure under Order 113 of the High Court Rules is to recover the possession of a land occupied by a trespasser or a squatter. It is simple and speedy machinery that is intended to operate with minimum delay, expense and technicality as opposed to plenary trial involving oral examination of witnesses (**The Supreme Court Practice 1988 (White Book)** paragraph 113/1-8/1 at page 1470). This procedure is not only applies where the occupier has entered into occupation without licence or consent, but also applies to a case where the occupier entered into possession of land with a licence but continues to remain in occupation without a licence or even after the licence or consent ceased to exist (**Bristol Corporation v. Persons Unknown** [1974] 1 W.L.R. 365; [1974] 1 All E.R. 593). Furthermore, the court in **Department of the Environment v. James and Others** [1972] 3 All E.R. 629 held that, if a plaintiff, in an action for ejectment, proves his legal title in possession, he is, as of right, entitled to an immediate judgment for possession. The common law courts under common law rules have no discretion to delay him. The only defence any defendant has is to show consent either from the plaintiff or his predecessor in title. Alternatively, the defendant can show a title superior to that of the plaintiff in order to get the application dismissed. Accordingly, the procedure under Order 113 is a summary procedure which is dealt with by way of affidavit of the parties with minimum delay, expenses and technicalities. Therefore, three originating summonses filed by the first defendant against all the plaintiffs should be dealt with as soon as possible to give effect to the intention and purpose of the relevant rule.
 13. On the other hand, this action which commenced by way of writ should go through the lengthy procedure of pre-trial steps. The pleadings just completed. The plaintiffs alleged that, the renewal of the State Leases in favour of the first defendant was fraudulent. Examination and cross examination of witnesses and scrutiny of documents are vital in this matter as opposed to the Originating Summonses filed by the first defendant. It cannot be said that, consolidation of all matters will save costs and time, because the Originating Summonses filed by the first defendant to be summarily decided on affidavits only. The first defendant also filed the Expedited Form of Summons in all those proceedings. Whether it is an Expedited Form or not, the very purpose of the Order 113

of the High Court Rules is to grant quick relief. If all these matters are consolidated, the Originating Summonses filed by the first defendant have to wait until the plaintiffs' this action is taken for trial. This will unnecessarily cause delay and in return will cause great prejudice to the first defendant who invoked the jurisdiction of this court under Order 113 of the High Court Rules.

14. The plaintiffs filed this action only after they were served with the Originating Summons of the first defendant. Filing an action or pendency of action cannot be a bar to bring Originating Summons for vacant possession. Neither it can be a defence, nor can it delay the pending Originating Summons. If filing a writ action is accepted as a bar or defence, all the defendants in summons for eviction will commence the writ action for the sake of doing and move for consolidation. It will set a bad precedent to blatantly abuse the process of the court.
15. On the other hand, no harm or prejudice will be caused to the plaintiffs if the Originating Summons filed by the first defendant are heard and decided. The reason is that, firstly, there is no guarantee that the decision would be in favour of the first defendant as the matter has not been heard. Secondly, even the plaintiffs are ordered to vacate the respective properties, it won't affect this matter, because, the plaintiffs' possession, in all these State Leases, is not necessary for determination of either the declaration sought by them or the fraud they alleged. All the claims of the plaintiffs can be decided even though they are out of possession of all State Leases.
16. In summary, consolidation of this matter with other three Originating Summonses will cause great prejudice to the first defendant; it will not save cost and time as the witnesses are not called to determine the Originating Summonses which are summarily decided on affidavits; and more importantly, it will set a bad precedent for abuse the process of the court by the would-be defendants in applications under Order 113 of the High Court Rules. For these reasons, I decide that, it is not desirable to make an order under Order 4 rule 2 of the High Court Rules.
17. In result, I make the following orders:
 - a. The Notice of Motion filed by the plaintiffs is dismissed,
 - b. The parties to complete all pre-trial steps in this matter,
 - c. The parties who have not filed their respective affidavits in other three matters to file and serve the same to fix them for hearing, and

- d. Each plaintiff in this matter should pay a summarily assessed cost of \$ 1000.00 to the first defendant within a month from today. To avoid the doubt, the total cost payable by the plaintiffs is \$ 3,000.00.



U.L.

U.L.Mohamed Azhar
Master of the High Court

At Lautoka
17.06.2022