

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

CIVIL ACTION NO. HBC 308 OF 2020

BETWEEN : **MOHAMMED SHAHEEM KHAIRATI** of Yalalevu, Ba and also of 181 Kaniere Road, Hoktika, Westcoast, 7811 south Island, New Zealand

PLAINTIFF

AND : **VILIAME** of Yalalevu, Ba

DEFENDANT

BEFORE : Hon. Mr. Justice Mohamed Mackie

APPEARANCES : Mr. Singh for the Plaintiff
Defendant appears in person only for a limited purpose.

HEARING : By way of written submissions filed on **30th August, 2022**

DATE OF JUDGMENT : 5th October 2022

JUDGMENT

A. **Introduction:**

1. Before me is a Summons for ASSESSMENT OF DAMAGES filed by the Plaintiff on 20th June, 2022 and dated 28th June, 2022, seeking following orders.

1. *That the Court do assess the amount of damages due to the Plaintiff by the Defendant.*
2. *The Defendant do pay the costs of this assessment.*

2. In addition to the above Summons, a Summons filed on 13th July, 2021 and dated 17th August, 2021 for FINAL JUDGMENT against the Defendant in default of filing acknowledgment of service and/or Statement of Defence, is also pending unadjudicated.

3. The said Summons for the ASSESSMENT OF DAMAGES was supported before me on 29th June, 2022 and the Defendant, by appearing in person, informed the Court that he had already vacated the land and premises in suit, which was confirmed by the Counsel for the Plaintiff. The Defendant also informed that he will be seeking Legal Aid for further proceedings.

4. Accordingly, the Court made the following ancillary Orders, *inter-alia*;

- a. *That prior to the assessment of damages there shall be a formal proof hearing in order to decide the entitlement of damages.*
 - b. *The Plaintiff's Solicitors shall decide whether they will be proceeding with the claim for vacant possession?*
5. Subsequently, when the matter came up again on 20th July, 2020 with the presence of the Defendant, the formal proof hearing and the hearing of assessment of damages, if need arises, were fixed to be disposed by way of Affidavit evidence by the Plaintiff. The Plaintiff's Solicitors were also given liberty to file written submissions on the question of assessment of damages.
6. Though, the Defendant appeared in Court on 20th July, 2022, as he had already defaulted in filing the acknowledgment of service and/or the Statement of defence within the prescribed period, he was not in a position to oppose the Summons for the Assessment of Damages or to take part in the formal proof hearing in order to decide the Plaintiff's entitlement for damages before the summons for assessment of damages is gone into.

B. Background History in Brief.

7. On 05th of August, 2019, the Plaintiff, became the registered proprietor and owner of all that Farm land and premises known as Certificate of Title No.7200 being Lot 2 on plan No. 1068 Valele (part of) in the District of Ba in the Island of Vitilevu, containing an area of **16 Acres, 03 Roods, 05 Perches**, by making a bid for it pursuant to a High Court Order.
8. The Defendant's Father one Mr. Billie, who had lived in the dwelling House/Store (Quarters) therein with the Defendant, as a laborer under the previous owner/ predecessor in title, had vacated the land and premises as the Plaintiff took the possession of the land by becoming the owner thereof as aforesaid. But the Defendant refused to vacate and interfered with the Plaintiff's attempt to clean the land and commence his sugar- cane and other cultivation activities.
9. The Plaintiff caused his Solicitors to send a notice dated 12th November, 20219 requiring the Defendant to desist from interfering with the Plaintiff's cultivation activities and to stop causing loss and damages by continuing to occupy the quarters therein.
10. As the Defendant continued to occupy and caused damages by becoming a trespasser, despite the receipt of the said notice, the Plaintiff filed this action against the Defendant on 21st December,2021, seeking reliefs, *inter-alia*;
 - a. *Injunctive reliefs in terms of paragraphs (a), (b) & (d) of the prayer to the Statement of claim.*
 - b. *Judgment for possession for the Plaintiff against the Defendant of the land in Certificate of Title No.7200 as per paragraph (C) to the prayer.*

- c. *Judgment for the Plaintiff against the Defendant in a sum of \$8,000.00 for the loss of one year's sugar cane crops.*
- d. *Judgment for the Plaintiff against the Defendant in a sum of \$1,500.00 for the loss of occupation of the quarters from 1st September, 2019 till the end of November, 2020 and thereafter at the rate of \$100.00 per month until his vacation.*

11. The Plaintiff had also simultaneously filed Summons for injunction on 21st December, 2020 seeking injunctive orders against the Defendant as per the paragraphs 1, 2, and 3 of the summons, which were similar to the reliefs prayed for in paragraphs (a), (b) & (d) of the prayer to the Statement of claim, but this was not immediately proceeded with, though Affidavit in opposition and reply thereto were filed, seemingly due to more attention being focused on the 169 Application bearing No. HBC 40 of 2020 that had already been filed by the Plaintiff before the Learned Master.
12. The Order for possession in the said 169 Application was made by the Master on 9th May, 2022, in compliance with the same the Defendant voluntarily but, belatedly vacated the land and premises as informed by the Defendant in Court before me on 29th June, 2022.
13. However, as the Defendant was alleged to be removing the Roof and the Doors of the Quarters, in the process of his vacation of it, an interim injunction Order was subsequently issued by this Court acting on the Application that had already been filed.
14. As Defendant had failed to file the acknowledgment of service and/ or the Statement of Defence, the Plaintiff's Solicitors on 13th September, 2021 had filed Summons for Final Judgment against the Defendant pursuant to Orders 13 Rules 4, 5 & 6 and Order 19 Rule 5 to 7 of the High Court Rules, as stated in paragraph 2 above.
15. Accordingly, the foremost task that lies before the Court now is to decide whether the Plaintiff is entitled for judgment as prayed for in the said Summons and in the prayer to the Statement of claim. In the even the Court finds that the Plaintiff is entitled for reliefs as prayed for, the next duty of the Court is to assess the damages.
16. As the Defendant has already vacated the land and premises in suit and the Plaintiff has gone into the possession thereof, this Court need not delve into the question of possession or to make any order on it. The only remaining substantial question that needs adjudication is the claim for damages and the quantum of it.

C. Analysis & Determination:

17. This is a formal proof matter. But, still the plaintiff must prove his case with satisfactory and admissible evidence. The duty of the court in an uncontested matter is not in any manner lesser than that in a contested matter. The court must not blindly accept and

act upon on any evidence adduced or material tendered by a party, but should consider them judicially.

18. The fact that the opposing party is absent or certain oral or documentary evidence led is not objected to, will not absolve the trial judge from the onerous duty of evaluation of evidence on it and in deciding the admissibility of it. Standard of proof will remain unchanged. According to Law the burden of Proof is squarely on the Plaintiff to prove its claim on the balance of probability. The Court in **Narayan n Krishna [2012] FJMC 223**, held that:

"The burden of proof lies upon the party, who substantially asserts the affirmative of the issue (Robins v National Trust Co. (1927) A.C. 515). The burden of proof in any particular case depends on the circumstances in which the claim arises. In general the rule which applies is "Ei qui affirmant non ei qui negatincumbit probation".

19. It was held in **Levy v AssicurazioniGenerali (1940) A.C. 791** that "this rule is adopted principally because it is but just that he who invokes the aid of the law should be the first to prove his case, and partly because in the nature of things, a negative is more difficult to establish than an affirmative".
20. The standard of proof required in civil cases is generally expressed as proof on the balance of probability. Lord Denning in "**Miller v Minister of Pensions (1947) 2 All E.R 372**) held that "if the evidence is such that the tribunal can say "we think it more probable than not' the burden is discharged, but if the probabilities are equal it is not".
21. Therefore, this court has to see whether there was sufficient and convincing evidence from plaintiff with regard to the claim made by him. Whatever the decision arrived at by the court at the end of the day finally must be based on and supported by the evidence adduced at the trial.
22. The Plaintiff by way of Affidavit evidence, has substantiated his averments in the Statement of claim and in his Affidavit in support of the Summons that he became the owner of the Land in question on 5th August, 2019 and accordingly took the possession thereof. It has also been adduced that the quarters that stood in the farm, which was occupied by the Father of the Defendant , along with the Defendant, as the laborer of the previous owner, was though vacated by the Defendant's Father, the Defendant refused to vacate and continued to be in possession and thus became a trespasser therein.
23. It is also submitted by way of evidence that the Defendant being in occupation without any right or title thereto interfered with the Plaintiff's attempt to clean the land in order cultivate Sugar cane and other marketable crops. Plaintiff says that as a result of the Defendants unlawful occupation and hindrances caused by him, the Plaintiff was prevented from doing the timely cultivation of the Sugar cane and as a result he has suffered loss and damages.

24. It is also in the evidence of the Plaintiff that the Defendant dismantled the roof of the Quarters he was occupying unlawfully and removed the Tin sheets and the doors thereof causing further damages, in respect of which the Plaintiff has submitted a quotation dated 14th June, 2022 marked as "B" for a sum of \$2,900.00 being the expenses involved in repairing it.
25. On the evidence adduced, I am convinced that if not for the Defendant's interference and disturbance with the Plaintiff's activities of cleaning the land and cultivation of it, the Plaintiff would have successfully carried out his cultivations and other related activities and would have earned the income estimated by him as per his evidence.
26. I am also satisfied with the manner in which the Plaintiff has assessed the loss of income resulted due to the interference caused by the Defendant to the farming activities of the Plaintiff and the damages caused to the quarters by the Defendant.
27. Though, the Defendant was duly served with the writ and the subsequent summons for judgment, the Defendant neither filed an acknowledgment of service and/ or his Statement of Defence nor any opposition thereto. Thus, the Plaintiff's evidence on his claim for the loss of income from the cultivation and on the damages caused to the Quarters by the Defendant remains unchallenged and there is no reason for this court to disregard the Plaintiff's evidence and his claim.
28. However, I am not inclined to grant damages to the Plaintiff on account of Defendant's occupation of the Quarters as prayed for by the Plaintiff, though the occupation turned to be illegal as he became a trespasser. It is true that, had the Defendant occupied a similar place elsewhere, he would have had to pay \$100.00 or more. The Defendant was occupying the Quarters not on rent. No evidence to show that the Plaintiff had to store his farming equipment and Fertilizers at some alternative place by paying rental for it. It is also not the contention of the Plaintiff that, if not for the Defendant's occupation, he would have earned income by renting out it. Hence, claim for damages under this head is baseless.

D. Conclusion:

29. The Plaintiff succeeds in his claim for damages against the Defendant in a sum of \$8,000.00 on account of the loss of expected income from the Sugar cane and other cultivations, which was aborted due to the Defendant's interference. The Plaintiff is also entitled for a further sum of \$2,900.00 being the damages caused to the dwelling Quarters cum Store by the Defendant.

The Plaintiff's claim for damages at the rate of \$100.00 per month for a period of 32 months on account of the Defendant's occupation of the dwelling quarters / stores cannot be granted for the reason stated above.

Considering the circumstances, I am of the view that it is justifiable to impose a reasonable cost payable by the Defendant unto the Plaintiff, which is summarily assessed as \$600.00.

E. Final Orders:

- a. The Plaintiff succeeds in his claim for damages as per paragraphs (b) and (c) below.
- b. The Defendant is ordered to pay the Plaintiff \$8,000.00 being the damages for the loss of income from the cultivation.
- c. The Defendant is also ordered to pay the Plaintiff a sum of \$2,900.00 being the damages caused to the house.
- d. The Plaintiff's claim for damages for the loss of purported rental income from the house is declined.
- e. The Defendant shall pay the Plaintiff a summarily assessed cost in a sum of \$600.00
- f. This judgment shall be sealed and served on the Defendant within 28 days.



A.M. Mohamed Mackie
Judge

At High Court Lautoka this 5th day of October, 2022.

SOLICITORS:

For the Plaintiff: Mishra Prakash & Associates
For the Defendant: In Person