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

CIVIL ACTION NO. HBC 124 OF 2022

BETWEEN	:	**TOTIVI RATU** of Tavualevu, Tavua. **PLAINTIFF**
AND	:	**I-TAUKEI LAND TRUST BOARD** a statutory body established under the Itaukei Land Trust Act Cap 134. **1ST DEFENDANT**
AND	:	**ISOA TUWAI** of Natutu, Ba. **2ND DEFENDANT**
AND	:	**REGISTRAR OF TITLES** of Civic Towers, Suva. **3RD DEFENDANT**
BEFORE	:	Hon. Mr. Justice Mohamed Mackie
APPEARANCES	:	Mr. Prakash, for the Plaintiff Ms. Raitamata, for the 1st Defendant Mr. Kant, for the 3rd Defendant
DATE OF DECISION	:	25th November, 2022

RULING

A. INTRODUCTION:

1. The plaintiff, in person on 22nd April,2022 , filed his writ of summons , along with the statement of claim, against the defendants seeking the following reliefs:

   (i) For a Declaration that the purported surrender document No. 59374 registered on 26th October, 2021 was fraudulent and/or void and that the Plaintiff's title to Instrument of Tenancy No. 10017/2005 under TLTB File Reference No. 4/42018 is 'indefeasible' within the meaning of the Land Transfer Act 1971 and is entitled to protection thereunder.

   (ii) For an order that the First defendant restore the name of the plaintiff on the said Instrument of Tenancy No. 10017/2005 under TLTB File Reference No. 4/42018 as the last registered proprietor of all that land known as Vatianato, in the District of Tavua, in the Province of Ba, containing an area of 649 acres comprised in the said Instrument of Tenancy.

(iii) For an Order that the First and Second defendants by themselves or by their servants agents or otherwise howsoever be restrained from dealing with the property comprised in the Instrument of Tenancy No. 10017 or in any manner whatsoever in respect of the purported surrender of the same.

(iv) For an order that the Third defendant by itself or by their servants agents or otherwise howsoever be restrained from dealing with the property comprised in the Instrument of Tenancy No. 10017 or in any manner whatsoever in respect of the purported surrender of the same.

(v) Exemplary, punitive and general damages against the First and Second defendants.

(vi) Costs on a solicitor client basis.

(vii) Such further and any other relief that the Honorable court deems fit.

2. The plaintiff also ,simultaneously, filed a Notice of Motion , supported by his affidavit sworn on 21st April,2022, together with the annexures thereto marked as "TR 01" to "TR 10", seeking injunctive orders as per paragraphs (c) against the 1st and 2nd defendants and as per paragraph (d) against the 3rd defendant ,which are identical to paragraphs (iii) and (iv) in the prayer to the statement of claim. The injunctive orders prayed for are;

(c) For an Order that the First and Second Defendants by themselves or by their servants agents or otherwise howsoever be restrained from dealing with the property comprised in the Instrument of Tenancy No. 10017 or in any manner whatsoever in respect of the purported surrender of the same, until final determination of this matter..

(d) For an Order that the Third Defendant by itself or by their servants agents or otherwise howsoever be restrained from dealing with the property comprised in the Instrument of Tenancy No. 10017 or in any manner whatsoever in respect of the purported surrender of the same, until final determination of this matter.

3. On behalf of the 3rd defendant, the acknowledgment of service being filed on 2nd May, 2022 by the Attorney General's Office , the statement of defence and the affidavit in response were also filed on 7th July,2022 and 15th August,2022 respectively.

4. On behalf of the 1st and 2nd defendants, though an acknowledgement of service was filed on 5th May, 2022 by the in-house counsel of the 1st defendant, so far neither a statement of defence nor an affidavit in response has been filed.

5. Accordingly, the plaintiff, having done a search for the statement of defence by the 1st and 2nd defendants, and found the absence of it, has filed summons for default judgment against the 1st and 2nd defendants, which awaits the adjudication.

6. Accordingly, parties, on 26th September, 2022, proceeded for hearing into the Notice of Motion for the injunctive reliefs, with no affidavits being filed by the 1st and 2nd defendants. However, the learned counsel for the 3rd defendant, in addition to the affidavit in response sworn by one **Krystal Prasad** on behalf of the 3rd defendant, has filed helpful written submissions as well, for which I am thankful. The plaintiff seems to have chosen not to file affidavit in reply to the 3rd defendant's affidavit in response.

7. Accordingly, at the hearing held before me on 26th September, 2022, counsel for the Plaintiff and the counsel for the 1st to 2nd and 3rd defendants made oral submissions, while the counsel for the 3rd defendant filed his written submissions as well.

B. BACKGROUND:

8. As per the statement of claim , the plaintiff states;

1. *"That he is the customary landowner and proprietor of the itaukei land comprised in Instrument of Tenancy No.10017 under TLTB file reference No.4/4/2018 for the land known as Vatianato , in the District of Tavua, in the province of Ba, containing an area of 649 acres and the period of tenancy is 30 years from the 1st July,2001.*

2. *That the subject land was originally occupied by him and his immediate family members as customary landowners prior to the issue of tenancy.*

3. *That the Instrument of Tenancy was later formalized only to facilitate commercial farming and he has been paying rental to the first defendant.*

4. *That the subject land has always been occupied and shared by the plaintiff and his two other brothers and their respective extended family members. They have their homes, livestock, farming gardens and a grave yard and there are more than 20 members of the family permanently reside on the said land.*

5. *That the second defendant is an agent, servant and an employee of the first defendant, who specifically advised and persuaded the plaintiff that it would be best for the plaintiff's benefits for the plaintiff to surrender his tenancy and*

make a new application for d New development Lease and the second defendant would assist the plaintiff in the process to fulfill the requirement of the first defendant.

6. *That the plaintiff accepted the 2nd defendant's advice in good faith and executed the surrender of the said tenancy on 30th September, 2021 by paying total surrender fees of $983.00.*

7. *That in breach of their position, the first and second defendants thereafter disregarded the plaintiff's rights and the reason for his surrender....*

8. *That the first and the second defendants colluded with an interested party to mislead the plaintiff and thereafter they are now entertaining and processing an application for a Development Lease by the interested party "Tilivaseva Holdings Pte Ltd "over the subject matter land. This interested party is a private Company owned by two individuals by the name of Ratu Nacanieli and Tevita Ralulu and it does not in any sense represent the interest of the members of the land-owning unit of Mataqali Tilivaseva.*

9. *The directors of that Tilivaseva Holdings Pte Ltd now have given verbal notice to the plaintiff and his entire extended family and they now face the danger of being evicted from the said land by the defendants and the interested party, their servants, agents and employees.*

10. *That the first defendant inspected the said land on Friday 8th April,2022 with the intention of formalizing an offer of new lease to the interested party , and as such , the Plaintiff's land and house are in danger of being taken over and occupied by the first and second defendants and the interested party.*

11. *That the first and second defendant's action amounts to an abuse of its power as trustees and are in breach of the iTaukei Land Trust Act, Trust Law, Customary law and morality".*

C. LEGAL PRINCIPLES:

9. An interlocutory injunction is a remedy that is both temporary and discretionary in nature. (***American Cyanamid v. Ethicon Limited[1975] UKHL 1; [1975] UKHL 1; [1975] 1 All ER 504 per Lord Diplock)*** As a temporary remedy, it is obtained before the final determination of the parties' rights in an action and so it is framed in such a way as to show it is to last only until the determination of the matter concerned.

10. The principles on granting of interim injunctions and whether to dissolve such an injunction pending determination of the matter are settled. As stated by Lord Diplock in Cyanamid(supra), they are:

(i) Whether there is a serious question to be tried;
(ii) Whether damages be an adequate remedy, and;
(iii) In whose favor the balance of convenience lies.

11. In ***Digicel (Fiji) Ltd v Fiji Rugby Union [2016] FJSC 40; CBV0004.2015 (26 August 2016),*** Saleem Marsoof J stated:

"According to the procedure adopted by our courts which are called upon to decide any application for interlocutory injunction, the evidence consists entirely of admissions on record by way of pleadings and the content of affidavits that are filed by the parties".

D. ANALYSIS:

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

12. The first issue for determination is whether there is a serious question to be tried. This is the threshold test or question. In ***Digicel (Fiji) Ltd v Fiji Rugby Union [2016] FJSC 40; CBV0004.2015 (26 August 2016),*** Keith J, referring to the principles set out by Lord Diplock in Cyanamid (supra), stated:

"The court first considers whether there is a serious issue to be tried. That does not mean that the court must be satisfied that there is a strong case for granting an injunction at the trial of the action. If an interlocutory injunction is to be granted, the court only has to be satisfied that the claim is neither frivolous nor vexatious".

13. In Cyanamid (supra) at 406, Lord Diplock stated:

"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-hypothesis 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 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 if 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.

14. In deciding the matter in hand, I shall confine my consideration only to the evidence before me in the form of affidavits, the contents of the Statement of Claim, Statement of Defence and those of the documents annexed to the Affidavit in support & Opposition.

15. At the commencement of the hearing, learned counsel for the Plaintiff informed that the plaintiff will **not** be moving for injunctive orders against the 3rd defendant as prayed for in paragraph (d) of the prayer to the Notice of Motion and will be confining his application only against the 1st and 2nd defendants as prayed for in paragraph (C) thereto. However, even if the plaintiff moves for an injunctive relief against the 3rd defendant, this Court will not be in a position to grant such an order in view of the provisions of the Crown Proceedings Act and due to the fact that no substantive reliefs have been prayed for against the 3rd defendant.

16. The Plaintiff hereof, admittedly, had been a "Tenant" in terms of the Instrument of Tenancy marked and tendered as "TRO-1", which is governed by the AGRICULTURAL LANDLORD AND TENANT ACT. The surrendering of the Tenancy by the plaintiff seems to have taken place in terms of the provisions therein and pursuant to an Agreement entered into between the plaintiff and the 1st defendant.

17. However, it is evident by the annexure "TRO-2" , the letter dated 22nd October,2021 , that the Rent for the Tenancy has been re-assessed and accordingly, the Plaintiff has on 29th November,2021 agreed for the same and paid the new rent on 12th January,2022, while he had already surrendered the Tenancy on 30th September,2021, through the dealing No-59374 signed by both the Plaintiff and the First defendant and was registered on 26th October,2021 as confirmed by the 3rd defendant.

18. The Plaintiff as per his "TRO-3" seems to have demonstrated his continued interest in obtaining a Development Lease in favor of a Company, namely,

"INVEST VITIA FIJI PTE LTD" by submitting an Application with a proposed Master Plan and paying certain initial fee as well for the said purpose.

19. The first defendant by its self-explanatory letter dated 14t February, 2022, which is marked as "TRO-5" by the Plaintiff, has clearly informed the plaintiff that his interest for Tourism development on the subject land has not been successfully considered by the Mataqali Tilivaseva Land Owning Unit.

20. Further , it is observed that a letter dated 24th November,2021 said to have been sent by the first defendant unto the plaintiff as referred in the first defendant's aforesaid letter dated 14th February,2022 , has not been submitted to the Court by the plaintiff. This could, probably, be to hide certain vital facts from the Court.

21. Further, it is observed that none of the would be affected persons (his brothers) , as claimed by the plaintiff, have come before the Court or expressed their solidarity with the Plaintiff at least by filing an affidavit in support of the plaintiff's claim. The members of Mataqali LOU, whose presence before the court would facilitate in deciding whether the Plaintiff has a prima-facie case and a serious question to be tried, have not been made a party.

22. The crucial paragraphs 1 & 3 of the letter dated 14th February, 2022 marked as "TRO-5" sent to the plaintiff by the first defendant is reproduced bellow for the sake of clarity, according to which the Land Owning Unit (Mataqali Tilivaseva) seems to have played the crucial role in not renewing the Lease in favor of the Plaintiff.

"1. Landowners, mataqali Tilivaseva (LOU) has resolved with consensus agreement in its meeting with Tltb on 15th December, 2021 that subject land surrendered by Totivi Ratu will not be renewed, but will be leased by the mataqali itself for the proposed Vatia City Integrated Tourism development for the benefit of the mataqali members as a whole"

"3. In view of the above we regret to advise that your interest for Tourism development on the subject land has not been successfully considered by the mataqali Tilivaseva (LOU)".

23. The propriety and/or the legality of the decision arrived at by the Land Owning Unit, namely, mataqali Tilivaseva or that of the decision, if any, made by the 1st and 2nd defendants in this regard, cannot be summarily decided by way of affidavit evidence at this stage of the proceedings. Those questions should be reserved to be decided at the substantial trial.

24. In view of the above state of affairs, this Court is of the view that the plaintiff has failed to establish that he has a prima-facie case or a serious question to be tried in this matter in order to warrant an interim injunction to be issued against the 1st and 2nd defendants.

(ii) Whether damages be an adequate remedy?

25. It is settled law that the court should go on to consider whether, If the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages would be an adequate remedy and if the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage.

26. On the other hand, if the damages would not adequately compensate the plaintiff and if he is in a financial position to give a satisfactory undertaking as to damages, and an award of damages pursuant to that undertaking would adequately compensate the defendant in the event of the defendant succeeding at trial, an interlocutory injunction may be granted. If the plaintiff is not in a financial position to honor his undertaking as to damages, and appreciable damage to the defendant is likely, an injunction will usually be refused: ***Morning Star Co-operative Society Ltd v Express Newspapers Ltd [1979] FSR 113; but not always: Allen v Jambo Holdings Ltd [1980] 1 WLR 1252." (INJUNCTIONS, DAVID BEAN, SIXTH EDITION, P.30)***

27. Nowhere in his affidavit in support, has the Plaintiff stated that an irreparable and unquantifiable loss and / or damages would be caused to him in the event the injunction is not granted. Instead, in his statement of claim what he claim as loss is damages caused to the Instrument of Tenancy by way of wrongful surrender, his travelling costs to Suva & Lautoka, accommodation charges and legal costs. It is to be observed that the very Act, namely, "Agricultural Landlord and Tenant Act", by which the Plaintiff's instrument of Tenancy is governed, has an inbuilt provision for any possible damages on account of termination of Tenancy and eviction. This provision, probably, will take care of the plaintiff.

28. The plaintiff does not query the capacity of the defendant to pay such loss and damages in the event the plaintiff succeeds at the end of the action. The new lease to be given by the Land Owning Unit is said to be more beneficial to all the members of the mataqali Tilivaseva, and none of them, except for the plaintiff, seem to have objected to the move. Even the plaintiff's 2 own brothers, who are said to be living in the land, have not come forward in support of the plaintiff's claim.

29. I am satisfied that in the event the Plaintiff succeeds at the end of the trial, in the absence of an injunctive order , the first defendant will undoubtedly be in a position to pay such loss or damages to the Plaintiff under the relevant provisions of the Act, provided he is entitled for such loss and/or damages.

30. Conversely, if an injunction being granted as prayed for and the plaintiff loses at the end of the trial, the amount of damages that would, possibly, befall on the first defendant on account of the unwarranted injunction, would, undoubtedly, be enormous. The plaintiff, except for giving usual undertaking, has not given any tangible undertaking in the form of any assets or money in respect of the subject property, which is 649 acres in extent and awaits development by none other than the mataqali Tilivaseva LOU itself.

31. In my view, damages would be sufficient to the plaintiff and there is no confusion or uncertainty as to the quantum of it that may result due to the refusal of the application for injunction. I decide that the Plaintiff can be monetarily compensated in the event he succeeds in his action and if damage or loss is caused.

iii) In whose favor the balance of convenience lies.

32. In Professional West Realty (Fiji) Ltd v Professionals Ltd, Civil Appeal No. ABU 0072 of 2008 (21 October 2010) at [37], the Court (per Byrne AP and Calanchini JA) stated:

"Having determined, correctly in our opinion, that the material did raise a serious question to be tried, the learned judge was required to consider the balance of convenience. In some decisions the balance of convenience test is considered fewer than two separate heads and in others the approach is that there are a number of factors that need to be considered in determining the balance of convenience. However, regardless of the approach adopted, the learned judge was required to consider whether an award of damages would be an adequate remedy for the Respondent if successful on the question of liability at the trial of the action".

33. In Honeymoon Island (Fiji) Ltd v Follies International Ltd, Civil Appeal No. ABU0063 of 2007S (4 July 2008) at [13], the Court of Appeal (per Pathik, Powell, and Bruce JJA) stated:

"As a prelude to considering the balance of convenience the Court must consider whether or not the applicant will suffer irreparable loss, being loss for which an award of damages would not be an adequate remedy, either because of the nature of the threatened loss, or because the party sought to be restrained would not be in a position to satisfy an order for damages. "If damages...would be an adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted": American Cyanamid..."

34. In Chung Exports Ltd v Food Processors (Fiji) Ltd., Civil Appeal No. ABU0012 of 2003 (26 August 2003) at [13], the Court (per Eichelbaum, Tompkins, and Penlington JJA) stated:

"The court will consider whether there is a serious question to be tried, and if so, where lies the balance of convenience. The latter will require consideration of such factors as the relative strength of the plaintiff's claim, whether damages will be an adequate remedy, whether the defendant is in a position to pay damages, and any other relevant

factors. If the factors are reasonably balanced, it may be appropriate to maintain the status quo. In the end, the court is required to determine where the overall justice lies".

35. In Professional West Realty (supra) at 43, the Court had this to say:

"The balance of convenience is often approached by considering the harm to the Plaintiff that may result in the event that the injunction is not granted and the harm to the Defendant that may result in the event that the injunction is granted. The onus lies on the Plaintiff to establish that on balance the harm that it is likely to suffer if the injunction is not granted outweighs any detriment to the Defendant in the event that the injunction is granted".

36. The question of balance of convenience arises where there is doubt as to the adequacy of remedies in damages available to either party. The claim of the plaintiff as loss and/or damages hereof stands covered by the relevant Act, by which his Instrument of Tenancy is governed. There is no claim for damages by the defendants for the court to weigh the competing interest of the parties in determining the balance of convenience.

Lord Diplock at para 408E said:

'It is where there is doubt as to the adequacy of remedies in damages available to either party or to both, the question of balance of convenience arises' (at 408E, American Cyanamid case).

37. In this case, I have found that damages would be an adequate remedy to the plaintiff as he has prayed for in the prayer to the statement of claim. Thus, the question of balance of convenience does not arise for any further consideration.

iv. Are there any special factors?

38. Neither party addresses this issue. I do not see any special factors for granting injunction orders as prayed for by the plaintiff.

E. <u>CONCLUSION:</u>

39. As I said earlier, the Plaintiff has not made out a strong prima facie case against the defendants. No serious question to be tried at the trial. The plaintiff can be monetarily compensated in the event he succeeds in his claim at the end of the trial. The balance of convenience does not warrant consideration. Therefore, the maintenance of the status quo pending the trial in this case is not warranted. As the 1st and 2nd defendants have not filed affidavits in opposition, no cost awarded in respect of these proceedings.

F. <u>FINAL ORDERS:</u>

a. The Application for interim injunction, preferred by the plaintiff against the 1st to 3rd defendants, fails.

b. No interim injunction issued against the defendants.

c. The plaintiff shall pay $150.00 as summarily assessed costs unto the 3rd defendant, and no costs ordered in favor of 1 and 2nd defendants.

d. The action will take its normal course, subject to the disposal of the pending summons by the Plaintiff for summary judgment against the 1st and 2nd defendants.

HIGH COURT OF FIJI
LAUTOKA

A.M. Mohamed Mackie
Judge

At High Court Lautoka this 25th day of November, 2022.

SOLICITORS:

For the Plaintiff:	**Law Parmendra**
For the 1st and 2nd Defendant:	**Legal Department, Itaukei Land Trust Board**
For the 3rd Defendant:	**Attorney General's Chambers**