IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 289 of 2019

BETWEEN: **NEEL KANT** PANDEY of 7 Pelargonium Terrace, Goodwood Heights, Auckland 2105, New Zealand and **SUSHIL KAN PANDEY** of 31 Elwyn Street, Northgate, Queensland 4013, Australia as the Executors and Trustees of the Estate of Hari Prasad.

Plaintiffs

AND: **NARSHIM SWAMY, RITESH MANI, MEERA SAMI and RAM SAMI** all of Naisosovou, Nadi.

Defendants

Before : Master U.L. Mohamed Azhar

Counsels: Mr. V. Sharma for the Plaintiff
Mr. V. Filipe for the Defendants

Date of Ruling: 12th April 2023

RULING

(Dismissal of an application under section 169 of Land Transfer Act, subsequent writ action, *res judicata* and striking out under O 18, r 18)

01. The plaintiff commenced this action against the defendants by way of writ and sought order on the defendants to immediately deliver the vacant possession of the land comprised in Certificate of Title No. 19443 part of Naisosovou Lot 1 on D.P.4497 situated in the District of Ba in the island of Vitilevu comprising a total area of 20 acres, 2 roods and 36 perches (hereinafter referred to as **the subject property**) to the plaintiff, and to pay the damages and costs. The plaintiff instituted two actions prior to this action. The first one was the Originating Summons pursuant to Order 113 of the High Court Rules which was struck out for non-appearance of the plaintiff. The second was another Originating Summons pursuant to section 169 of the Land Transfer Act.

02. The then Master of the High Court heard the second application of the plaintiff and ordered the defendants to deliver the vacant possession of the subject property to the plaintiff. The defendants were successful on appeal to the judge against the ruling of the then Master. The plaintiff then preferred an appeal to the Court of Appeal and was unsuccessful as the Court of Appeal unanimously upheld the decision of the judge. It is after the said decision of the Court of Appeal the plaintiff commenced this current action against the defendants.

03. This defendant then filed the current summons before me pursuant to Order 18 rule 18 seeking to strike out this action on the ground of *res judicata* and abuse of the process of the court. The plaintiff objected the summons and argued that, the plaintiff is not prevented from bringing a writ action after failing in an application under section 169 of Land Transfer Act. The sole question is whether the doctrine of *res judicata* applies to this situation or not.

04. The doctrine of res judicata prevents a party from later controverting any issue or question that had already been decided by a court and also prevents a party from obtaining same relief for the second time from the same party. The speech of **Sir James Wigram VC** in **Hendersen v. Hendersen** (1843) Hare 100 is considered to be most authoritative on this doctrine. He held at page 115 as follows;

> "In trying this question, I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

05. The above paragraph sets a general rule that, the courts require the litigants to bring forward the entire case for adjudication. This requirement is not limited to issues or the points upon which the courts may form their opinion and pronounce the judgement, but it extends to each and every point which properly belonged to the subject of the litigation and which the litigants exercising reasonable diligence and care might have brought forward at the time of adjudication. It is expected from a litigant to bring all the issues that a litigant exercising reasonable diligence and care might have brought. Thus it involves the application of an objective test in which the conduct of the litigant is compared to that of a reasonable person under similar circumstances. The rationale is

that all the aspects of a matter will be finally decided by a court of law and in that sense it is based on the public policy that litigation should not drag on forever and the defendant should be protected from the successive oppressions by the multiple suits. This proposition was unanimously upheld by the English Court of Appeal in **Barrow v. Bankside Agency Ltd** [1996] 1 All ER 981.

06. The decisions that followed **Hendersen** (supra) declared that, bringing any such new issues, which the litigants could have put forward for decision on the first occasion but failed to raise, as an abuse of the process of the court (**Greenhalgh v Mallard** [1947] 2 ALL ER 255 at 257; **Yat Tung Investment Co Ltd v. Dao Heng Bank Ltd** [1975] AC 581 at 589 – 590, [1975] 2 WLR 690 at 696.

07. The House of Lords in **Johnson v. Gore Wood & Co (a firm)** [2001] 1 All ER 481 expressed well-balanced view for the courts to adopt when applying the doctrine of Res Judicata set out in **Henderson** (supra). Accordingly, bringing of a claim or the raising of a defence in later proceedings may amount to abuse if the court is satisfied that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. However, it is necessary to identify any additional element such as collateral attack on a previous decision or some dishonesty, before abuse may be found, but where those elements are present the later proceedings will be much more obviously abusive. Moreover, there will rarely be a finding of abuse unless the later proceedings involve with, what the court regards as unjust harassment of a party. It always better for the court to ask whether, in all circumstances of the case, the conduct of a party is an abuse and if it is so, then to ask whether such abuse is excused or justified by special circumstances or not. The overriding factor, however, should be the interest of justice.

08. On the other hand, in Australia the decision in **Port of Melbourne Authority –v- Anshun Proprietary Limited [1981] HCA 45; [1981] 147 CLR 589** extended the rule in **Henderson** (supra) to the *'reasonableness'*. This doctrine is now known as "*Anshun Estoppel*". It was held in that case that:

> "In this situation we would prefer to say that there will be no estoppel unless it appears that the matter relied upon as a defence in the second action was so relevant to the subject matter of the first action that it would have been unreasonable not to rely on it. Generally speaking, it would be unreasonable not to plead a defence if, having regard to the nature of the plaintiff's claim, and its subject matter it would be expected that the defendant would raise the defence and thereby enable the relevant issues to be determined in the one proceeding. In this respect, we need to recall that there are a variety of circumstances, some referred to in the earlier cases, why a party may justifiably refrain from litigating an issue in one proceeding yet wish to litigate the issue in other proceedings e.g. expense, importance of the particular issue, motives extraneous to the actual

litigation to mention but a few. See the illustrations given in Cromwell v County of Sac. (1876) 94 US (24 Law Ed, at p 199) (at p603)

It has generally been accepted that a party will be estopped from bringing an action which, if it succeeds, will result in a judgment which conflicts with an earlier judgment. In this respect the discussion in Brewer v Brewer [1953] HCA 19; (1953) 88 CLR 1 is illuminating. (at p603)".

09. The Fiji Court of Appeal in **Reserve Bank of Fiji –v- Gallagher** Civil Appeal No. ABU 0030, ABU 0031, ABU 0032/2005 (14th July, 2006) upheld that, **Hederson** rule in its extended form and *Anshun* approach are applicable in Fiji. Their Lordships Ward P and Baker JA and Henry JA said as follows at paragraph 70 when the counsel referred to many manifestations of applications of the rule in **Henderson**:

> "Counsel referred us to many manifestations of applications of the **Henderson** rule. We find it unhelpful to review them all since we are attracted by the non-dogmatic approach in **Johnson v. Gore Woods** and the reasonableness approach in **Anshun"**.

10. The nature of the application under section 169 of the Land Transfer Act and the burden of a plaintiff and a defendant should be examined in order to determine whether the issues raised in the current action filed by the plaintiff could have been raised in the previous application he commenced pursuant to section 169 of the Land Transfer Act.

11. The procedure under the section 169 of the Land Transfer Act Cap 131 is a summary procedure to promptly and speedily restore the registered proprietor to the possession of a particular property when the occupier is unable to show his or her right to possess the particular property. The Fiji Court of Appeal in **Jamnadas v Honson Ltd** [1985] 31 FLR 62 held at page 65 that, this section provides a speedy procedure for obtaining possession when the occupier fails to show cause why an order should not be made. The rationale for this speedy remedy, available for the last registered proprietors, stems from the fundamental principle of the statute that, the register is everything and in the absence of any fraud, the registered proprietor has an indefeasible title against the entire world. The Fiji Court of Appeal in **Subaramani v Sheela** [1982] 28 FLR 82 (2 April 1982) held that:

> The indefeasibility of title under the Land Transfer Act is well recognised; and the principles clearly set out in a judgment of the New Zealand Court of Appeal dealing with provisions of the New Zealand Land Transfer Act which on that point is substantially the same as the Land Transfer Act of Fiji. The case is Fels v. Knowles 26 N.Z.L.R. 608. At page 620 it is said:

"The cardinal principle of the statute is that the register is everything, and that, except in case of actual fraud on the part of the person dealing with the registered proprietor, such person, upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against all the world."

12. The *Locus Standi* of the person who seeks order for eviction is set out in section 169. The requirements of the summons, namely the description of land and the time period to be given to the person so summoned, are mentioned in section 170. The other two sections namely 171 and 172 provide for the two powers that the court may exercise in dealing with the applications. The burden to satisfy the court on the fulfillment of the requirements under section 169 and 170 is on the plaintiff and once this burden is discharged, it then shifts to the defendant to show his or her right to possess the land. The duty on the defendants is, not to produce any final or incontestable proof of their right to remain in the properties, but to adduce some tangible evidence establishing a right or supporting an arguable case for their right to remain in possession of the properties in dispute (**Morris Hedstrom Limited –v- Liaquat Ali** CA No: 153/87). Tangible evidence is "physical evidence that is either real or demonstrative" (**Black's Law Dictionary,** 10th Edition, page 678). The exercise of court's power, either to grant the possession to the plaintiff or to dismiss the summons, depends on how the said burden is discharged by the respective party to the proceedings.

13. This procedure is *sui generis* which is specifically provided by the statute for obtaining vacant possession by the last registered proprietor in clear and straightforward cases. The courts to make the decisions solely on the affidavits. However, this procedure cannot be employed in cases where complicated facts and serious issues are raised. (**Lal v Schultz** [1972] 18 FLR 152 (30 October 1972); **Devi v Sharma** [1985] 31 FLR 130 (1 January 1985); **Wati v Vinod** [2000] 1 FLR 263 (20 October 2000);

14. Accordingly, a plaintiff in an application under section 169 of the Land Transfer Act cannot raise all complicated facts and serious issues, and a defendant too. If any of them raises such facts and issues the summons ought to be dismissed and a detailed trail is warranted. That is why the proviso in section 172 of the Land Transfer Act states that, the dismissal of the summons shall not prejudice the right of the plaintiff to take any other proceedings against the person summoned to which he may be otherwise entitled. The statute gives the right to sue the same defendants despite dismissal of the summons. Thus, I am fortified in my view that, the doctrine of res judicata does not apply in this circumstance.

15. The plaintiff was unsuccessful in his application under section 169 of the Land Transfer Act. However, he has the cause of action to sue the defendants in the current way. The proceeding therefore neither abuse of the process of the court nor frivolous. As the result, the action of the plaintiff cannot be struck out under Order 18 rule 18 which is sparingly

used by the court. Therefore, the summons filed by the defendants on the ground of res judicata should be dismissed.

16. Accordingly, the final orders are;

a. The summons filed by the defendants is dismissed, and
b. The parties to bear their costs.

At Lautoka
12.04.2023

HIGH COURT OF FIJI
LAUTOKA

U.L Mohamed Azhar
Master of the High Court