

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**CIVIL JURISDICTION**

HBC 63 of 2022

**BETWEEN:**                **NITYA NAND** of Korovuto, Nadi.

**PLAINTIFF**

**A N D:**                    **ITAUKEI LAND TRUST BOARD** a body corporate of Victoria Parade, Suva  
incorporated pursuant to the Native Land Trust Act Cap, 134, Law of Fiji.

**DEFENDANT**

Appearances:        Ms. Veitokiyaki for the Plaintiff  
                              Mr. Tuicolo for the Defendant  
                              Ms. Vikash for Naresia & Associates in HBC 69 of 2021

Date of Hearing:     02 November 2022

Date of Ruling:     09 June 2023

## **R U L I N G**

### **INTRODUCTION**

1. Before me is an Originating Summons filed by Nitya Nand dated 07 March 2022 seeking the following orders:
  - (1) that the Terms of Settlement dated 27<sup>th</sup> October 2021 that becomes the Order of the Court in Civil Case file no. 170 of 2017 be set aside forthwith.
  - (2) that costs of the application be costs in the cause.
2. The application is supported by an Affidavit of Nitya Nand sworn on 03 March 2022. Nand deposes as follows at paragraphs 3 to 12:
  - (3) That I recalled at the time when the parties were having talks in and out of the Court regarding the settlement of access road, I was sickly and suffering from certain diseases for about more than 6 months. I thought I had kidney problems and at times suffer from severe pressure and headache.
  - (4) That I was also not in a good state of mind at the time of such negotiation and leading to the signing of Terms of Settlement. I annex herein copies of the correspondences regarding my medical condition marked as Annexure "NN-1".
  - (5) I also wish to say that after I signed the Terms of Settlement, Sailesh Kumar bulldozed the existing access road to be used and will become permanent. I was not fully explained in Hindustani language the Terms of Settlement and its effect as I was not well educated.

- (6) That I was of the view all along that the existing access road will be shifted towards the boundary of my land as previously discussed with the Defendant's solicitors.
  - (7) After the Terms of Settlement was signed with the Defendant's solicitor (Cati) came to inspect the property and one Sailesh Kumar came with a bulldozer to bulldoze the existing access road without any Order, causing damage to the top rich soil that I am using for planting.
  - (8) That I was informed by the Defendant's solicitor (Cati) on the day Sailesh Kumar brought the bulldozer that I do not have any right on the land as I have surrendered the lease to them.
  - (9) Thereafter, Sailesh Kumar and his servants and agents started to bulldoze the access road with heavy machines destroying or damaging the rich top soil which I used for farming and cultivation. I annex herein copies of the photographs marked as Annexure "NN2".
  - (10) I verily believe that the Defendant was supposed to survey the land first for the access road, the width of the road and not to encroach onto the farmland but fails to do so. That there is no survey done by the Defendant so far, as previously ordered as part of the Terms of Settlement.
  - (11) I verily believe that the Defendant then proceed to give direction to Sailesh Kumar to proceed with labelling and grading the access road with heavy machines that I seriously condemn.
  - (12) That I wish to defend the case together with consolidated files Nos. 170 of 2017 and 69 of 2021.
3. The matter was first called before me on 22 March 2022. I gave the Defendant 14 days to file and serve an Affidavit in Opposition and then 14 days thereafter to the Plaintiff to file and serve a Reply, and then adjourned the case to 03 May 2022 for Hearing at 10.30am.
  4. On 03 May 2022, Ms. Veitokiyaki appeared for the Plaintiff and Ms. Raitamata for the Defendant.
  5. Ms. Veitokiyaki informed the Court that the parties were "working things out" and the hearing was then vacated. I then adjourned the matter to 03 June 2022 for mention.
  6. On 03 June 2022, Mr. Lesikmoala appeared for the Plaintiff and Ms. Raitamata for the Defendant. Ms. Raitamata advised the Court that the parties were in settlement talks. I then adjourned the matter to 04 July for mention to see if they have settled.
  7. On 04 August 2022, Ms. Veitokiyaki appeared for the Plaintiff. There was no appearance by the Defendant. Ms. Veitokiyaki advised the Court that the parties could not settle. I then adjourned the case to 23 August 2022 at 10.30am for Formal Proof.
  8. On 23 August 2022, Mr. Naivalu appeared and advised that Mr. Maopa was sick. The Formal Proof was vacated. The matter was then adjourned to 08 September 2022 to fix formal proof.
  9. On 08 September 2022, Mrs. Veitokiyaki appeared for the Plaintiff and Mr. Tuicolo for the Defendant. I gave iTLTB 14 days to file and serve Affidavit in Opposition to the application to set aside the consent order and adjourned the case to 27 September 2022 for mention.

10. By 27 September 2022, iTLTB still had not filed an Affidavit in Opposition. Mr. Tuicolo sought leave, which was granted, to file and serve by close of business. I gave the Plaintiff 14 days to file and serve Reply and then adjourned the case to 02 November 2022 for Hearing at 10.30am.
  
11. The Affidavit in Opposition of Laisenia Talavutu sworn on 27 September 2022 was filed on 29 September 2022. Talavutu deposes as follows on paragraphs 4 to 25:
  - (4) The Plaintiff is the lessee of the land known as “Korosamiti No. 4 Lot 1 on ND 2364” in the district of Sikituru in the province of Ba with an area of 4 acres 2 roods owned by the Mataqali Nalevaka, Tokatoka Nalevakla by virtue of Native Lease dated 26 June 2008 hereinafter referred to as “the said lease”, and a copy of which is attached hereto and marked as exhibit “LT 1”.
  - (5) On or about September 2017, the Board filed an action HBC 170 of 2017 in the Lautoka High Court for declarations amongst other orders that the Plaintiff in this matter and who was the Defendant in the 2017 matter was in breach of his lease conditions and had unlawfully occupied the 25 meter access road that services the back lots of the said lease.
  - (6) A terms of settlement was later entered into by the Board and the Plaintiff in this matter which was executed in person by the Plaintiff and Solicitor and the Solicitor for the Board on the 27 of October 2021, and whereas a copy of which is attached hereto and marked as exhibit “LT 2”.
  - (7) The Board has taken steps to work towards the processing and formalization of the currently used access road and the discontinuance of the matter as per the Terms of Settlement.
  - (8) The terms of the settlement was made into an Order of the Court which has finalized the matter.
  - (9) The backlot owners who were using the access road have also complained to the Board that the Plaintiff in this matter is hindering their use of the access road or their attempts to keep and maintain the access road in a condition fit for their use.
  - (10) The reported actions of the Plaintiff still amounts to breach of his lease conditions.
  - (11) I am informed by our Legal Counsels and I further believe that the reliefs sought by the Plaintiff within this matter should be dismissed as there was a substantive matter HBC 170 of 2017 which is the relevant action. Filing new actions causes delay to our work in administering our duties and compliance with the Orders in terms of the settlement.
  - (12) There is a risk that if orders were granted in terms of the Applicant’s Originating Summons dated 7 March 2022, it will affect the Board’s ability to continue conducting its administrative duties related to the said lease. This would also mean that, the Board will have to continue its actions regarding the breaches against the

said lease for which the Plaintiff has to pay penalties and unlawful occupation of the access road.

- (13) I have read and understood the Affidavit of Nitya Nand filed on the 04 March 2022 (hereinafter referred to as “the Supporting Affidavit”) and seek leave to refer and respond to its contents.
- (14) I have no issues with paragraph 1 of the Supporting Affidavit.
- (15) I have no issues paragraph 2 of the Supporting Affidavit.
- (16) I am not aware of and therefore deny paragraph 3 of the Supporting Affidavit.
- (17) I am not aware of and therefore deny paragraph 4 of the Supporting Affidavit. Furthermore, it is on the Plaintiff to prove that he was not in a good state of mind as claimed.
- (18) I have no issues with the use and maintenance of the access road and I am not aware of the Plaintiff’s educational background or the translation of the Terms of Settlement as per paragraph 5.
- (19) I am not aware of the Plaintiff’s views, as the Terms of Settlement refers to the currently used access road and therefore deny paragraph 6 of the Supporting Affidavit.
- (20) As to paragraph 7 of the Supporting Affidavit I am informed by our Legal Officer Josefata Cati and believe that there is an order for the Plaintiff to ensure the access road is usable by the backlot owners and the order dated 21 April 2021 was forwarded to our office by the Plaintiffs in the Civil Action No. 69 of 2021, Mr. Sailesh Kumar who is the back lot owner and uses the access road. Furthermore, the backlot owners have taken the initiative on themselves to maintain and keep the access road usable due to the Plaintiff’s non action on maintaining the access road. A copy of the relevant Court order is attached hereto and marked as exhibit “LT 3”.
- (21) As to paragraph 8 of the Supporting Affidavit I am advised by our Legal Officer Josefata Cati that the Plaintiff has been reminded of the Terms of Settlement and at no point in time was he told that he did not have any rights on the said lease. A copy of email correspondence from Josefata Cati on his response to the allegations is attached hereto and marked as exhibit “LT 4”.
- (22) As to paragraph 9 of the Supporting Affidavit, I am not aware of the damages and put the Applicant to strict proof.
- (23) As to paragraph 10 of the Supporting Affidavit, there is no specific mention of survey within the Terms of Settlement to be done and put the Applicant to strict proof. Furthermore, should the Plaintiff allow the Board to continue with its procedures to formalize the access road, this would be shown to the lease plan for the said lease.

(24) I am not aware of paragraph 11 and put the Plaintiff to strict proof.

(25) As to paragraph 12, the Board objects to this proposition as the Terms of Settlement has been finalized and is an order of the Court. If matters are not finalized, then it only adds more work on the parties involved and use of resources.

12. I am not inclined to set aside the Terms of Settlement in question. As a rule, a Terms of Settlement which has been entered between the parties can only be set aside on any of the grounds which are normally applicable to set aside a contract – namely, mistake, undue influence, fraud, misrepresentation. None of these grounds is disclosed in the supporting affidavit.

13. In this case, the plaintiff did enter into the Terms of Settlement with the benefit of legal counsel. The Plaintiff changed his mind about the Terms of Settlement – apparently – because of certain conduct of the other parties. If he is aggrieved that the other parties had acted in breach of the Terms of Settlement – then he should be taking steps to enforce the Terms of Settlement. That is the ideal course. The Terms of Settlement was sanctioned by this Court and made a formal Order after the counsel presented it to Court. This Court will be loath to, without good reason, release the parties from their obligations thereunder – especially – considering that this is a situation where the Terms of Settlement is about providing access to the other parties who are landlocked.



A handwritten signature in blue ink, appearing to be "Anare Tuilevuka", is written over a horizontal dotted line.

Anare Tuilevuka  
**JUDGE**  
Lautoka

**09 June 2023**