

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

Civil Action HBC No. 170 of 2021

BETWEEN : **MOHAMMED ASHWAK ALI** of Kermode Road, Lautoka, Fiji, Self Employed. **PLAINTIFF**

A N D : **YUNUS BUKSH** of Field 40, Lautoka, Fiji, Retired **DEFENDANT**

BEFORE : Hon. Mr. Justice Mohamed Mackie

APPEARANCES : Ms. S. Narayan, for the plaintiff
Ms. A. Ali, for the defendant

HEARING : 23rd May 2023.

WRITTEN SUBMISSIONS: By the Plaintiff on 20th July 2023.
By the Defendant on 23rd May 2023.

DATE OF DECISION : 31st July, 2023.

RULING

1. This Ruling is pronounced pursuant to the hearing held before me on 23rd June 2023 in relation to the Originating Summons filed by the plaintiff on 10th August 2021 seeking the following reliefs against the defendant.
 - a) *An Order for Specific Performance against the Defendant to sell all that property contained and described in iTaukei Lease No. 32486 (TLTB Ref. 4/7/ 40688) Land known as Waiyavi Subdivision Stage 5 Lot 15 on SO 2031 in the Tikina of Vitogo and Province of Ba having an area of 811 m2 to the plaintiff pursuant to the Sale and Purchase Agreement dated 11th day of October 2019.*
 - b) *An Order for the Defendant to execute all the necessary documentation in regard to the sale of the property; and*
 - c) *Alternatively, the Deputy Registrar of High court of Fiji be ordered to execute all necessary documents if the Defendant refuses to execute the same.*
 - d) *Costs to be paid by the defendant on Solicitors / Client indemnity basis.*

2. The Originating Summons states that it is made pursuant to the Order 86 Rule 1, 2, 3 and 6 of the High Court Rules 1988 and the inherent jurisdiction of this Court.
3. The Originating Summons is supported by an Affidavit of the Plaintiff sworn on 20th July 2021 and filed on 10th August 2021, together with the annexures marked as "A" to - "F".
4. The defendant on 4th November 2022 filed his Affidavit in opposition, together with an annexure marked as "A", subsequent to which the plaintiff on 14th March 2023 filed his Affidavit in reply with no annexures.
5. Learned Counsel for both the parties made oral submissions at the hearing and also filed written submissions as aforesaid.
6. The plaintiff through his Originating Summons is seeking specific performance of an agreement, pursuant to order 86 rule 1, 2, 3 & 6 of the High Court Rule 1988, which order & rules are generally utilized to grant Summary judgment on an Application being made in an action begun by **writ indorsed with claim.** (vide order 86 rule-1)

THE LAW:

Application by plaintiff for summary judgment (O.86, r.1)

1.-(1) In any action begun by writ indorsed with a claim –

(a) for specific performance of an agreement (whether in writing or not) for the sale, purchase, exchange, mortgage or charge of any property, or for the grant or assignment of a lease of any property, with or without an alternative claim for damages, or

(b) For rescission of such an agreement, or

(c) For the forfeiture or return of any deposit made under such an agreement, the plaintiff may, on the ground that the defendant has no defence to the action, apply to the Court for judgment.

(2) An application may be made against a defendant under this rule whether or not he has acknowledged service of the writ.

Manner in which application under rule 1 must be made (O.86, r.2)

2.-(1) an application under rule 1 shall be made by summons supported by an affidavit verifying the facts on which the cause of action is based and stating that in the deponent's belief there is no defence to the action.

Unless the Court otherwise directs, an affidavit for the purposes of this paragraph may contain statements of information or belief with the sources and grounds thereof.

(2) The summons must set out or have attached thereto minutes of the judgment sought by the plaintiff.

(3) The summons, a copy of the affidavit in support and of any exhibit referred to therein must be served on the defendant not less than 4 clear days before the return day.

Judgment for plaintiff (O.86, r.3)

3. Unless on the hearing of an application under rule 1 either the Court dismisses the application or the defendant satisfies the Court that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of the action, the Court may give judgment for the plaintiff in the action.

Leave to defend (O.86, r.4)

4.-(1) A defendant may show cause against an application under rule 1 by affidavit or otherwise to the satisfaction of the Court.

(2) The Court may give a defendant against whom such an application is made leave to defend the action either unconditionally or on such terms as to giving security or time or mode of trial or otherwise as it thinks fit.

(3)

Directions (O.86, r.5)

5.....

Costs (O.86, r.6)

6. If the plaintiff makes an application under rule 1 where the case is not within this Order, or if it appears to the Court that the plaintiff knew that the defendant relied on a contention which would entitle him to unconditional leave to defend, then, without prejudice to Order 62, and in particular, to rule 4(1) thereof, the Court may dismiss the application with costs and may, if the plaintiff is not an assisted person, require the costs to be paid by him forthwith.

7. When considering the applicability of Order 86, it is pertinent to look at the Order 5 Rule 4 of the High Court Rules 1988 as well, which states as follows:

Proceedings which may be begun by writ or originating summons (O.5, r.4)

(1) Except in the case of proceedings which by these Rules or by or under any Act are required to be begun by writ or originating summons or are required or authorized to be begun by petition, proceedings may be begun either by writ or by originating summons as the plaintiff considers appropriate.

(2) **Proceedings-**

(a) ***in which the sole or principal question at issue is, or is likely to be, one of the construction of an Act or of any instrument made under an Act, or of any deed, will, contract or other document, or some other question of law, or***

(b) ***in which there is unlikely to be any substantial dispute of fact, are appropriate to be begun by originating summons unless the plaintiff intends in those proceedings to***

apply for judgment under Order 14 or Order 86 or for any other reason considers the proceedings more appropriate to be begun by writ. (Emphasis mine)

THE PLAINTIFF'S CASE:

8. The plaintiff by his originating summons is seeking Summary Judgment against the defendant pursuant to Order 86 Rules 1, 2, 3, & 6 above on the foundation as set out within his Affidavit in support, which, *inter-alia*, states as follows.
1. *That the defendant is the registered proprietor of the property contained in iTaukei Lease No. 32486 (TLTB Ref. 4/7/40688) Land known as Waiyavi sub division Stage 5 Lot 15 on SO 2031 in the Tikina of Vitogo and province of Ba having an area of 811 m2. (the subject matter)*
 2. *That on 11th day of October 2019 he and the defendant entered into a Sale and Purchase Agreement with the defendant, whereby the defendant agreed to sell and he agreed to purchase the subject matter land on "as- is where-is " basis and free of all encumbrances for a sum of \$57,000.00. (Fifty seven thousand dollars).*
 3. *That the agreement was subject to prior consent of the iTLTB as Lessor of this dealing. At that time the defendant owed the lessor Board as rates and penalties in a sum of \$5045.00, which he paid when applying for consent and also he paid the application fees for consent in a sum of \$109.00. He also paid a deposit of \$5,000.00 out of the agreed price.*
 4. *Accordingly, the consent was granted by the iTLTB and as per clause 6 of the agreement the defendant handed over the property unto him on which he spent various sums of monies for the development such as , landscaping , valuation, pegging etc.*
 5. *That as per the agreement the defendant agreed to corporate and proceed with due diligence and execute all documents to complete the transaction and transfer documents were executed by both parties.*
 6. *That when he was ready to settle the deal there was no response from the defendant and due to delay , laxity and negligence on the part of the defendant to diligently attend to the transfer and settlement , the consent of iTLTB expired.*
 7. *His Solicitors requested the defendant to sign a new application for consent and though it was signed by the defendant, it was not on the iTLTB legal form. Since then, the defendant has refused and or neglected to execute the application for consent despite repeated requests were made and he (the plaintiff) was ready and willing to complete the sale.*
 8. *That the defendant has breached the agreement by failing to comply with the terms and conditions of the agreement. That he through his Solicitors served a notice dated 25th November 2020 requiring to specifically perform the agreement, but the defendant failed to respond to any of the notices. That he prays for Orders as per the originating summons.*

THE DEFENDANT'S CASE

9. The defendant in his Affidavit in response, while admitting his registered proprietorship, entering into the agreement, the requirement of consent of the iLTB and giving the possession, takes up, *inter alia*, the following positions;
1. *That prior to the written agreement he had a verbal agreement for the sale of the property for \$70,000.00, excluding all costs, taxes, legal and other fees and expenses, which were to be paid by the plaintiff. He was not able to obtain the services of a lawyer nor was he able to negotiate and communicate much with the plaintiff since he was nor worldly about legal matters and his education was only up to form 5.*
 2. *That he did not read the terms of the agreement as he was of the view that the plaintiff was dealing with him in good faith and his solicitor incorporated the terms that both had agreed upon verbally into the agreement. That the execution was witnessed by the same solicitor who did not explain the terms.*
 3. *That he handed over the vacant possession unto the plaintiff upon obtaining the consent even before the purchase price was paid and he would never have agreed to those terms had he known such terms.*
 4. *That the plaintiff is misleading the court as the sum he paid to the board does not relates to the rates and penalties. One of the condition of the lease, being clause 2 under other conditions, is that if he was to transfer or sell the lease within the first five years, from the commencement of the lease from 23rd October 2015, he would be required to pay 20% of the price as penalty, which based on the sale price hereof of \$57,000.00 is \$11,400.00.*
 5. *That no evidence by the plaintiff for his, purported, expenses in a sum of \$18,000.00 for the development, landscaping, valuation, pegs etc. That there was no provision in the agreement for the deposit of \$ 5,000.00, however it was paid to keep the agreement on hold until he amasses the required funds as he had no sufficient funds. Before the expiry of the consent of 24th March 2019, the plaintiff on 8th February 2020 informed him that he needed to meet and discuss on some unexpected costs.*
 6. *That the consent expired not due to any delay or laxity on his part and the understanding was for the plaintiff would attend all the administration and costs for the sale of the property.*

ANALYSIS & DETERMINATION:

10. The plaintiff's substantial action was begun by way of an originating summons and **not** by writ indorsed with a claim as required by order 86 rule 1 of the High Court Rule.
11. The order 86 does not recognizes an action commenced by way of an Originating summons for a plaintiff therein to seek remedy of Summary Judgment pursuant to that order. It is when the action is begun by way of Writ indorsed with claim, the plaintiff is supposed to come before the Court by way of an Application under order 86 rules 1 and 2, to obtain a Summary Judgment under rule 3 thereof, prior to which the defendant is required to obtain Leave under rule 4 thereof for him to defend the action, if he wishes to do so.

12. The order 86 rule 3 clearly states that ***“unless on the hearing of the application under rule 1 either the Court dismisses the application or the defendant satisfies the court that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of the action, the Court may give judgment for the plaintiff in the action”.***
13. Filing of an action by way of Originating Summons and filing of an Application under Order 86 in a pending writ action are two different methods of obtaining the final relief summarily by avoiding a trial.
14. Whether it is an action begun by way of an Originating Summons or an Application brought pursuant to order 86 in a pending writ action, if the defendant shows that there is an issue or question which ought to be tried or that there ought to be a trial, for some other reason, no summary judgment will be granted.
15. In the matter at hand, the defendant has raised number of issues which, in my view, require deep scrutiny at a trial. He has demonstrated by his Affidavit evidence that the plaintiff's action does not fall within the ambit of order 5 rule 4 sub rule (2) (a) or (b) for the plaintiff to have begun the action by way of an Originating Summons. The oral and documentary evidence of both the plaintiff and the defendant at the trial would , undoubtedly, throw enough light to enable the determination of issues raised by him which are , *inter alia*, such as ;
 - a. *Due to whose fault and/ or inaction, the sale and purchase could not be materialized when the consent of the iTLTB was in force?*
 - b. *Why the plaintiff paid the defendant a sum of \$5,000.00 when there was no provision in the agreement for such a deposit?*
 - c. *Had the defendant in fact agreed to handover the vacant possession to the plaintiff, soon after the consent was obtained, in the absence of any sort of payment out of the sale price?*
 - d. *Whether the defendant's interests was duly looked after by the Common Solicitor, seemingly, arranged by the Plaintiff?*
 - e. *Were the purported development activities carried out during the period of the validity of the consent so obtained?*
 - f. *What is the evidence available to show that the plaintiff was prepared to go through the settlement process when the consent was in force?*
16. As for now, there is no any tangible evidence before me, to answers the above issues, among others, which will have to be ascertained through the oral and documentary evidence to be adduced at the trial.
17. It is true that the process of obtaining a final Judgment in a writ action is a laborious one. At the same time, a party seeking quick relief by way of an Originating Summons or by an Application pursuant to Order 86 in a writ action, should satisfy the court that a

trial of the action is not required at all and judgment can be summarily obtained. If the defendant adduces some triable issue/s or question/s **no** judgment would be entered on the originating summons or in an Application pursuant to order 86 rule 3, without going through the process of trial.

18. With all the above looming issues, the plaintiff should **not** have opted to begin his action by way of originating summons. Even if the plaintiff had commenced his action by way of writ of summons, the chances of obtaining a Summary Judgment for specific performance under Order 86 would not have been possible with the emergence of serious issues highlighted above.
19. The defendant resisting an Originating Summons or an Application for summary judgment under Order 86 can show that there is an issue or question in dispute with respect to the claim or the part of the claim, which ought to be tried or there ought for some reasons to be a trial of that claim or part. If the defendant fails to do so, then only the court will enter summary judgment against the defendant on that claim or part thereof.
20. I find that the contents of the affidavit in opposition sworn by the defendant, specifically deals with the plaintiff's claim and I see there are triable issues, appropriate answers to which, at the end of the trial, would dispose this action fully and finally.
21. The Originating Summons hereof or an Application pursuant to Order 86 in an action begun by writ indorsed with claim, in my view, would not dispose this matter fully and finally. No relief is available to the plaintiff either by way of originating summons or by way of an Application under Order 86. The proper mode that the plaintiff should have adopted to begin his action was by way of writ.
22. I shall not discuss the merits of the action here and reserve the same for the judgment after the trial proper. In the interest of justice and in fairness to both the parties, I am of the firm view that the plaintiff's action by Originating summons should be treated as an action commenced by way of writ. The question of Consent by ITLTB and Stamp Duty are matter to be raised at the trial and addressed in the final judgment.

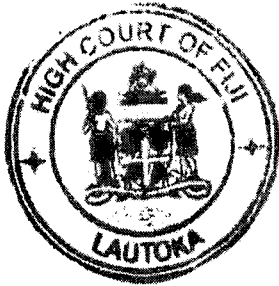
CONCLUSION:


23. This Court declines to give the relief of summary judgment under Order 86 Rules and accordingly decides to act under order 28 rule 9 of the High court Rule 1988 and continue with the proceedings as if it was begun by writ. The affidavits so far filed will stand as pleadings and the parties will be at liberty to add thereto or to apply for particulars thereof. The plaintiff should pay the costs in a sum of \$1,500.00, as provided by order 86 rule 6.

FINAL ORDERS:

- a. Summary judgment sought by the plaintiff, pursuant to order 86 rules 1, 2, 3, & 6, is hereby declined.

- b. The plaintiff's action will be treated as an action begun by writ, pursuant to order 28 rule 9 of the High Court Rule 1988.
- c. The Affidavits so far filed will stand as pleadings, with liberty for the parties to add thereto or apply for particulars thereof.
- d. Costs against the plaintiff is summarily assessed at \$1,500.00 to be paid before the plaintiff makes his next move in this action.
- e. Matter to take its normal cause of action.




A.M. Mohamed Mackie
Judge

At High Court Lautoka this 31st day of July 2023.

SOLICITORS:

For the Plaintiff:

Jiten Reddy Lawyers- Barristers & Solicitors.

For the 1st Defendants:

Interalia Consultancy.