

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

CIVIL ACTION NO. HBC 276 of 2018

BETWEEN : **MOHAMMED ZHEEM** of Kerebula, Nadi
PLAINTIFF

AND : **NADIRUL NISHA ALI** of Leeds Shop, Nawaka, Nadi
DEFENDANT

BEFORE : Mr. Justice Mohamed Mackie-J.

APPEARANCES : Ms. Begum with Ms. Ali, for the Plaintiff.
Ms. Veitokiyaki, for the Defendant.

TRIAL ON : On 7th November, 2022.

WRITTEN SUBMISSIONS: Not filed by both the parties.

DATE OF DECISION : 10th February 2023.

JUDGMENT

A. INTRODUCTION:

1. The Plaintiff by way of his Writ of Summons, together with the statement of Claim (SOC), commenced this action against the Defendant on 21st December, 2018 seeking the following reliefs;
 - a) *A declaration that the actions of the defendant and her cohorts was uncalled for;*
 - b) *The sum of \$45,800.00 (Forty- Five Thousand Eight Hundred Dollars) being the damages caused by the Defendant and her cohorts;*
 - c) *Damages for breach of Sub Lease;*
 - d) *Loss of income in the sum of \$250,000.00 for at least 10 years.*
 - e) *Alternatively, for an Order that the Defendant give up the premises to the Plaintiff to continue with the sub-lease Agreement in place;*
 - f) *General and punitive damages for uncalled conducts;*
 - g) *Interest under the Law Reform (Miscellaneous Provisions) [Death & Interest] Act restricted to the sum to be within the jurisdiction of this Honorable Court ;*
 - h) *Costs on a Solicitor Client indemnity basis;*
 - i) *Any other relief or orders which this Honorable Court deems just and expedient.*

2. The Defendant filed her Statement of Defence on 1st March, 2019, and subsequently on 24th July, 2020, filed her Amended Statement of Defence wherein she, while admitting her Marriage with her deceased Husband, **Mansoor Ali** (the Plaintiff's alleged Lessee), denied the rest of the averments in the SOC and moved for the dismissal of the claim, together with an order for costs on Solicitors/ client indemnity basis.
3. After filing of the Reply to the Amended Statement of Defence by the Plaintiff's Solicitors on 24th February, 2021, parties filed the Pre-Trial Conference Minutes with 2 Agreed Facts and 18 issues to be determined at the trial.
4. At the trial held before me on 7th November, 2022, the Plaintiff and 6 other witnesses on his behalf gave evidence marking documents from "Pex-1" to "Pex-6", including the purported Sub Lease Agreement and the Letter dated 5th July, 2018 sent from the Plaintiff's Solicitors to the Defendant. Only the Defendant gave evidence for and on her behalf without marking any document.

B. HISTORY:

5. The Plaintiff in his Statement of claim, *inter-alia*, averred **THAT**;
 - a. The Plaintiff, as the Sub- Lessee, on 24th January, 2018, entered into the Sub-Lease Agreement marked as "Pex-1" with one, Mansoor Ali, as the Lessee, who is the now Deceased Husband of the Defendant, for the Plaintiff to carry on with the Business that was run by Mansoor Ali, until the building which consisted of a dwelling House (upstairs) and the shop building (downstairs), was destroyed by Fire broke out on 12th January, 2018.
 - b. The Defendant on 3rd July, 2018, together with her Son, Talish Tanzil, the Tui Nawaka, namely, Ratu Driu Borabora Naevo and his cohorts, forcefully entered the premises and removed the Plaintiff and the Stocks. He also alleges that the Defendant stole and damaged the stocks.
 - c. He claims damages in a sum of \$45,800.00, which according to him includes \$23,000.00 being the cost of repairs done to the building damaged by fire and \$16,000.00 being the amount paid as Goodwill payment to **Mansoor Ali**.

C. DISCUSSION:

6. It is the onus of the Plaintiff to substantiate his claim against the Defendant on preponderance of evidence / balance of probability that the Defendant is liable to the Plaintiff as averred in the Statement of Claim. Only when the liability is established the Court will look into the question of assessment of damages, which in this case should largely depend on the evidence of all 05 supporting witnesses called by the Plaintiff.
7. At the outset, this Court has to be satisfied on the evidence available before it, both oral and documentary, whether the Plaintiff has a valid cause of action against the Defendant and, if so, whether the plaintiff has proved it through evidence adduced at the trial.

8. It is not the quantity of the witnesses or extent of the evidence unfolded before the Court that decides the desired outcome of the action for a party. Unarguably, it is the quality of evidence that matters in adjudication.
9. The Plaintiff in paragraph 9 of his SOC states that he is unaware whether the deceased Mansoor Ali, as the owner of the property and the business, had bequeathed the said property, together with all other residues, to anyone or has demised intestate or testate. He does not aver that he brings the action against the Defendant either in her personal capacity or as the Executor / Administrator of her deceased husband Mansoor Ali, who purportedly had entered into the Sub-lease Agreement with the plaintiff.
10. On careful scrutiny of the total evidence adduced by the Plaintiff, nowhere I find convincing evidence against the Defendant that it was she who forcefully entered the shop premises in suit on the 3rd of July, 2018 and took the stocks away.

It is to be observed that by answering the 2nd question under the examination in chief, what the Plaintiff has categorically stated is that on the fateful day, ie; the 03rd July, 2018, while he was not present at the Shop, it was the landowner, Tui Nawaka, who telephoned him requiring to come to the shop and when came, he was asked to open the shop and once he opened and went inside, the Landowner too came in with 4-5 iTaukei men, the Defendant and her son. He does not state about any specific act committed by the Defendant or at least a word uttered by her.

Admittedly, the Plaintiff did not have an Agreement with the Defendant. The purported Sub-lease Agreement was with the Defendant's late Husband for which the Defendant was neither a party nor a witness at least. She has pleaded complete ignorance about the sub-lease Agreement between her Husband and the Plaintiff, and no contrary was even suggested to her by the Plaintiff's Counsel when she was under cross examination

Further , it is to be noted that when the Plaintiff entered into the purported Sub-lease Agreement and thereafter, the Plaintiff has been very well aware that the Landowner was none other than Tui Nawaka- **Ratu Asaeli Driu Borabora Naevo**, who according to the plaintiff had collected the rent time to time from the Plaintiff .

Plaintiff in his letter dated 4th July, 2018 (page 8 in Tab-1) addressed to the Prime Minister, has clearly stated that it was Ratu Naevo, who came with the thugs and removed him and his things from the shop. It is the plaintiff's further evidence that it was Ratu Asaeli , the Landlord who gave him the verbal and written Notices for him to vacate and they had a meeting as well in that regard at the Residence of Ratu Asaeli.

Though, the Defendant and her Son had been present at the scene on the day of the incident, there is no even an iota of evidence that they forced or caused the Plaintiff to leave the place.

According to the Plaintiff, the said Tui Nawaka, being the Landowner of the premises in suit, after giving verbal and written Notices to the Plaintiff to vacate, has also called the Plaintiff and gone to the premises in suit on the day of the incident, along with some persons to have the Plaintiff evicted . It is also in the Plaintiff's evidence that it was none

other than the Landowner Tui Nawaka himself got down a vehicle and sent all the removed goods to the Plaintiff's place.

When the said Tui Nawaka himself, as the landowner, was doing all what was needed to have the Plaintiff evicted from the premises in question correctly or wrongly, there had been hardly any need for the Plaintiff to have actively get involved in the alleged eviction process. Being the original Lessee, the former occupant and the person who actively ran the business in the premises in question before the fire, the Defendant cannot be blamed or found fault with for her presence at the time of the incident.

It is un-contradicted evidence of the Defendant that she was not living with her Husband Mansoor Ali, during the time material to the whole incident and there was a DVRO in operation. It transpires through the scrutiny of the evidence that, if at all the "Pex-1" Sub-Lease Agreement was entered into; it was done so between the Plaintiff and Mansoor Ali, behind the back of the Defendant, when she was residing elseward as the estranged wife of Mansoor Ali.

It is also to be noted that the last question to the Plaintiff during her examination in chief in page 6 of the Transcript clearly shows that the very question has been formulated on the basis that it was Matqali who evicted the Plaintiff from his place of business. This is a tacit admission as to who evicted the plaintiff.

11. Above all, I find that the answers given by the Plaintiff during his cross examination, as found in page 15 of the transcript, he has clearly demonstrated that it was none other than the Tui Nawaka, who evicted the Plaintiff and not the Defendant as claimed by the Plaintiff. Those questions and answers are reproduced bellow for the sake of clarity and easy reference.

Cross Examination by Ms. Veitokiyaki

Ms. Veitokiyaki: My lord if the witness could be shown the, his from his own bundle the memorandum the sub-lease Agreement.

Q: *Now Mr. Zheem when you had entered the sub-lease agreement you were aware that the Tui Nawaka was the land owner and the landlord correct?*

A: **Yes my lord.**

Q: *And he was never a party to this sub-lease agreement correct?*

A: **Yes my lord but we had a discussion with him and when he agreed then we had made the agreement.**

Q: *Now witness the Tui Nawaka is the gentleman that had given you the notice for eviction correct?*

A: **Yes my lord.**

Q: *And he is the same person who that also gave you a 7 days' notice?*

A: **Yes my lord.**

Q: *And he is the same person that walked into the shop and closed the shop and evicted you and all the items and your stock from the shop?*

A: **Tui Nawaka was not present inside the shop my lord.** (This answer is totally contrary to his evidence in examination in chief.)

Q: *Now I put it to you that he was the one that had come down because he was the one that called you to come to the shop?*

A: **Yes my lord.**

Q: *And I also put it to you that in no place were the defendants ever present when he came to remove you from the shop?*

A: They were there my lord. They all were present there.

Q: *And I also put it to you Mr. Zheem that in no way were they ever connected with eviction notices given to you by Tui by the defendants?*

A: **When there was no problem with me and Tui Nawaka then this people has had told Tui Nawaka something and that is the reason why Tui Nawaka had evicted me.**

Q: *Now witness you remember receiving the eviction notice from Tui Nawaka? Do you remember receiving the eviction notice that's in your bundle of documents?*

A: **Yes my lord.**

12. The Defendant's mere presence, along with her Son and others, at the scene on the day in question, with no specific evidence of her active participation, is not sufficient to implicate her to the alleged incident, and thus the plaintiff could not have had a valid cause of action against the defendant to commence and continue with this proceedings against her.
13. The Plaintiff for the reason best known to him has not decided to make the said Tui Nawaka as party or to file an action against him and/ or his agents whoever allegedly took part in the incident.
14. The evidence adduced by the Plaintiff against the Defendant does not at all convince this Court to find the Defendant liable for the alleged incident of forcefully entry and the eviction of the Plaintiff and removal of his stocks from the premises in question.
15. In view of the above outcome, the Court need not go into the evidence of other 5 witnesses for the Plaintiff to decide the quantum of the damages allegedly caused to the Plaintiff, as it is not warranted.
16. Even if this Court consider the evidence of those witnesses, which is on the different types of works allegedly carried out by them for the refurbishment of the premises in question, I do not find any tangible evidence to assist the Court in determining the quantum of damages, particularly when one of the witnesses out of them was found to be hostile to the Plaintiff's case as alluded by the learned Counsel for the Plaintiff.



D. CONCLUSION:

17. For the reasons stated above, this Court arrives at a finding that the Plaintiff has not proved his claim against the Defendant on preponderance of evidence. Therefore, the action of the Plaintiff against the Defendant is bound to fail and it has to be dismissed.

However, considering the circumstances, this Court decides not to impose any cost against the Plaintiff in favor of the Defendant.

E. FINAL OUTCOME.

- I. The action of the Plaintiff against the Defendant fails.
- II. The Plaintiff's action dismissed.
- III. No costs ordered and the parties shall bear their own costs.

 
A.M. Mohamed Mackie
Judge

At High Court Lautoka this 10th day of February, 2023.

SOLICITORS:

For the Plaintiff: Messrs; Zoyab Shafi Mohammed Legal

For the Defendant: Messrs; Babu Singh & Associates