

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 319 of 2023

BETWEEN : VIDYA WATI of Wainibokasi, Nausori, Domestic Duties.

Plaintiff

A N D : SEMI MATALAU the authorized spokesman and the Turaga ni Mataqali of Natogadravu village, Nakelo.

1st Defendant

A N D : TUINABOU DEVELOPMENT & CONSTRUCTION (FIJI) LTD a Limited liability company, having its registered office at Natogadravu Village.

2nd Defendant

A N D : I-TAUKEI LAND TRUST BOARD, a duly constituted body under the I-Taukei Land Trust Act under cap 134.

3rd Defendant

Counsel: Plaintiff: Mr. K. Singh
1st and 2nd Defendants: Ms. B. Malimali
3rd Defendant: Ms. E. Raitamata

Date of Judgment: 23.10.2023

JUDGMENT

INTRODUCTION

1. Plaintiff instituted this action against Defendants seeking orders of the court to obtain a lease, in terms of an offer by third Defendant, for 99 year lease. She had occupied in the house on the land for which she had applied a 99 year lease . She held lease for a larger agricultural lease, which included Plaintiff's house and surrendered it.
2. It was surrendered on request of third Defendant, in expectation of residential lease after development and subdivision.

3. First defendant was chiefly title holder, who on behalf of iTaukei land owners had initiated the development of the lands for lease and second Defendant is legal entity that created for the said development and sale of leases for the benefit of owners. Third Defendant is the statutory body who manage and administrate all iTaukei land including the land for which Plaintiff is seeking relief.
4. Plaintiff had surrendered agricultural lease she held as trustee and administrator on 8.2.2011. Before that Plaintiff was offered a land known as 'Nakavikavatu S/D Lot 5, District of Nuku Area of 0.1638 ha (subject to survey)' for 99 year lease from 1.1.2011 by third Defendant. This offer was dated 24.12.2010.
5. Third Defendant had not informed the offer made to Plaintiff. to first and or second Defendants, and also acceptance of the said offer by Plaintiff.
6. Said offer for lease (P2), contained some conditions including consideration of \$6,893.50 within six weeks and also sign further documents relating to the offer. No further documentation signed between parties.
7. Plaintiff did not pay consideration in offer within six weeks . but sought further time for that and fully paid by way of three installments 24.6.2011..1.5.2012. 7.5.2013
8. Undisputed evidence of third Defendant . was that any payment after due date in terms of offer letter needs to be done with the approval of Estate Officer of third Defendant. Not only Plaintiff had paid the total consideration in the offer letter, but also annual rentals for the said land that was offered for 99 year lease annually.
9. After accepting total consideration, stated in the offer on 8.7.2014 issued to Plaintiff, third Defendant had issued a Lease to second Defendant for an area of 6.3106 ha including the area under its offer to Plaintiff . This lease was duly registered on 21.7.2014 hence obtained rights derived from indefeasible tile.
10. Second Defendant became the lessee of a larger land for the development and sale including the land that was offered by third Defendant. and accepted and fully paid and awaited 99 year lease to Plaintiff.
11. First and second Defendants had not sold the subdivisions which Plaintiff is claiming in this action and they are willing to offer them for their commercial value to Plaintiff.
12. Plaintiff states that she had paid for the sum stated in the offer by third Defendant for residential land parcel . and awaited the lease of that for 99 years .
13. Strangely, third Defendant is seeking an order of the court to grant an order directing second Defendant to provide a lease to Plaintiff for the sum already paid to third Defendant, when it had not done so before the grant of Development Lease to second Defendant.
14. Second Defendant's title for the Lease of the land is indefeasible, and there is no claim proved against it. Second Defendant had not entered in to an agreement with second Defendant, so after obtaining indefeasible title for development it had exercised its

legitimate rights as developer. It had cleared the area leaving a lot where Plaintiff's dwelling situated.

15. Plaintiff's statement of claim is based on contract and estoppel against third Defendant.
16. Plaintiff had entered in to a contract by acceptance and fully payment of the offer sum, though there was a delay in payment.
17. Plaintiff had applied for 1000 square meters for Residential Lot according to P6 . She was offered "Nakavikavatu S/D Lot 5 , District of Nuku Area of 0.1638 ha(subject to survey) Lot 5 of the subdivision. She was offered an area of Nakavikavatu S/D Lot 5 having an area of 0.1638 ha (subject to survey)". This land cannot be located in the approved subdivision plan marked 1D2. This was due to no fault of second Defendant who was unaware of the contract between Plaintiff and third Defendant for "Nakavikavatu S/D Lot 5 , District of Nuku Area of 0.1638 ha (subject to survey).
18. Plaintiff is also seeking an order for adjoining lot 2 and 3 are much excess of area under offer which was subject to survey. Considering the circumstances and amount paid by Plaintiff and the delay in finalizing payment she is entitled to lot 2.
19. Accordingly third Defendant is ordered to obtain a lease for lot 2,in (1D2) from the proposed subdivision, including Plaintiff's dwelling, by payment of the sale price sought by second Defendant. On the evidence submitted this corresponds to Lot 2 of document marked 1D2 which is "Amended Proposed Subdivision of Native land ".

FACTS

20. Plaintiff's case is based on estoppel and breach of contract by third Defendant.
21. Plaintiff stated that here was a contract between the plaintiff and the third defendant due to following facts:
 - a. This was a conditional surrender upon which, the Plaintiff was assured a lot with 99 years lease on which her house is located;
 - b. Application was made for a lot on which the Plaintiff's house was located;
 - c. Offer was given by the third Defendant to the Plaintiff and the Offer was accepted by payment of monies;
 - d. Consideration were paid.
22. **Breach by NLTB**
 - e. No lease been granted till to date;
 - f. Not prior notice been given for cancellation of contract;
 - g. Granted a development lease to the second Defendant.

23. Plaintiff also claims damages from first and second Defendants for destruction of some plants on the land after they had obtained development lease.
24. Plaintiff is seeking declaration that third Defendant had breached the contract it entered by their offer, and also that it had acted in bad faith. Plaintiff seeks an order for third Defendant to issue 99 year residential lease for the land it offered to Plaintiff, or alternatively an order for third Defendant to pay first and second Defendants for the lease of the land.
25. First and second Defendants had also counter claimed against Plaintiff for damages for action of Plaintiff and hindrance to development of the lands.

ANALYSIS

Breach of Contract

26. Plaintiff was a long standing occupant who held an Agricultural Lease No 16812 (marked as P2) as administrator of her father's estate. This was for thirty years from 1.7.1981. The area under that was one Acre one Rood and thirty nine Perches.
27. Before expiration of this Agricultural Lease No 16812, Plaintiff was approached by officers of third Defendant who had sought surrender of the said lease on or around 2010 in lieu of 99 year lease for much smaller subdivided, residential lease.
28. Accordingly, Plaintiff had made an application for Residential Subdivision for 1000 square meters, described as Lot 5 Nakavikavatu S/D on 3.4.2010. This was due to encouragement of third Defendant. The number of subdivision allotment was indicated in the said application, indicating there was already a proposed subdivision even on 3.4.2010 for location of the land to be leased to Plaintiff.
29. Plaintiff was offered Nakavikavatu S/D Lot 5, District of Nuku Area of 0.1638 ha (subject to survey) on 24.12.2010 (marked as P8).
30. Plaintiff had surrendered Agricultural Lease 16812 on 29.12.2010 (P3) and cancellation was registered on the said Lease on 5.2.2011. Having encouraged and created expectation in Plaintiff for a Residential Lease for 99 years Plaintiff had consented to said idea and surrendered her agricultural lease.
31. According to document marked as P8, the offer letter contained certain conditions including payment of consideration within a six week time period. Plaintiff did not have money to pay within such a short period of time and she had requested for extension of time.
32. Plaintiff had written on 23.2.2011 for extension of time for payment of the consideration for the offer of Nakavikavatu S/D Lot 5, District of Nuku Area of 0.1638 ha (subject to survey), marked as P9 and this letter was received by the Manager of Central and Eastern of third Defendant.

33. Evidence for third Defendant was .Manager Central was a senior management person of third Defendant who had dealt with this subdivision. He could also grant extension of time for payment of consideration. Evidence of Senior Estate Officer who gave evidence for third Defendant was an Estate officer could grant extension of time for payment of consideration and without that no consideration would have been accepted by the third Defendant.
34. So from third Defendant`s own evidence it is safe to deduce that required authorization was granted for Plaintiff to make payments long after expiration of time period given in the offer letter of 24.12.2010 (marked as P8) . Payment of consideration in offer was in 2011, 2012 and even as late as 7.5.2013 .
35. Plaintiff was also allowed to reside on the same dwelling despite surrender of the Agricultural Lease.
36. The last payment on 7.5.2013 of \$1660.90 indicated that Plaintiff had paid total consideration and there was no arrears or balance on her account.
37. Plaintiff had accepted the offer and had paid the consideration. which had taken a longer period. Third Defendant`s own evidence was that by acceptance of total consideration they had approved extension of time for payment.
38. There was no letter withdrawing and or cancelling the offer or any letter from third Defendant denying extension of time period for payment of the consideration.
39. Before surrender of Agricultural Lease she was offered `Nakavikavatu S/D Lot 5. District of Nuku Area of 0.1638 ha (subject to survey) and in these circumstances the extension of consideration can be expected on balance of probability.
40. The absence of written extension is not necessary as by conduct third Defendant had accepted not only the consideration for the offer for `Nakavikavatu S/D Lot 5 , District of Nuku Area of 0.1638 ha(subject to survey) but also collected annual rentals for the said land.
41. In *Naga v Fiji Electricity Authority* [2005] FJHC 401; HBC0237.2002 (31 October 2005)

Winter J discussed the requirements for legally binding contract and held,

Formation of Contract

Intention to be bound

It goes without saying that there is no agreement if the parties did not intend to be bound. It is sometimes a question of considerable difficulty whether the evidence does establish such an intention. That can be particularly so where the parties have signed a preliminary document, for example a heads of agreement, it being anticipated that a more formal and detailed document will be drawn up in due course. The preliminary agreement, however brief it is, can be binding if it was intended to be. (Professor Burrows Canterbury University Update on Contracts NZLS 2003).

The question of whether a heads of agreement constituted a binding contract arose in the case of *Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand Ltd* [2001] NZCA 789; [2002] 2 NZLR 433. The parties agreed that the Court should be guided by this New Zealand Court of Appeal decision and its general statement of principle. I accept the relevance of the case subject to the one reservation that *Fletcher* was about a complex long term commercial oil and gas supply contract and not the settlement by compromise on terms of a case essentially over native land grievances. In my view the bargaining process and resultant contracts are different between the two types of agreement.

A purely commercial arrangement may involve a complex set of inter-related trade-offs that allocate acceptable risk in a deliberate and intended transaction that derives its integrity and durability from the general interests of commerce and the reasonable expectations of commercial men and women about the essence of their bargain. A native land grievance settlement seldom adheres to such a course as its formation, integrity and durability rely on party relationships in addition to the formal rules of contract law. The negotiation formation and interpretation of such a relational arrangement must, in my view, be augmented by good faith principles.

The *Fletcher* case involved a heads of agreement for the supply of gas between Fletcher Challenge Energy and Electricity Corporation of New Zealand. It was summarized by Professor Burrows in this way.

The heads of agreement was a relatively short and summary document. After a lengthy meeting the parties had agreed on most aspects of it but alongside two items (a force majeure clause and a prepaid gas relief clause) had written “not agreed”, they also noted that an efficiency factor was still “to be agreed”. The document was signed by executives of the two companies under the notation “agreed (except where indicated)”. A clause read: “FCE-ECNZ to use all reasonable endeavours to agree a full sale purchase agreement within three months of the date of this agreement”. The heads of agreement was subject to the condition that ECNZ’s board approved it. That approval was duly given. It was held by the Court of Appeal (Thomas J dissenting) that the parties had no contract, because at that stage they could not have intended to be contractually bound. The use of the words “not agreed” beside two items was seen as particularly significant; it suggested that the items in question were important and that more work needed to be done on them. The court considered that the “not agreed” items were so labelled because they were of a kind which could not be expected to be settled for the parties by a court or other third party. At page 450 Blanchard J. said:

“Those provisions, it seems to us, had such substantial financial implications – for ECNZ if they were not included and for FCE if they were – that it would be surprising if the parties had simply left them to be negotiated at a later time. We

consider that they were marked "not agreed" as an indication of their importance, and that they were regarded as essential terms."

The court thus believed that the heads of agreement was in the nature of a progress report from the negotiators, and had been signed simply to indicate that the parties had reached "an important staging post on the way to final agreement".

42. Plaintiff had also made consideration through installments, spanning for over three years and she was allowed to remain in the said land in expectation of 99 year Residential Lease in lieu for Agricultural Lease for larger area. Accordingly, a contract was made between Plaintiff and third Defendant when an offer for 'Nakavikavatu S/D Lot 5 , District of Nuku Area of 0.1638 ha(subject to survey) was accepted by Plaintiff through payments of total consideration in 2011,2012 and 2013 was accepted by third Defendant upon request for extension of time for payment.
43. Plaintiff having accepted the offer was legally obliged to provide 99 year lease for Plaintiff , for 'Nakavikavatu S/D Lot 5 , District of Nuku Area of 0.1638 ha(subject to survey), but after total payment of the consideration for said land, second Defendant was granted Development Lease of Area 6.3106 ha including the land offered to Plaintiff.
44. There was no evidence that second Defendant was made aware of the acceptance of offer for a land parcel contained in their Development Lease. So second and third Defendants had proceeded with the conditions contained in the Development Lease and had developed the area. Second Defendant had provided the latest subdivision scheme marked as 1D2 approved by Town and Country Planning on 27.5.2014.
45. There was a breach of contract by third Defendant when it had accepted the total consideration from Plaintiff for specific land, and included the said land in the Development Lease issued and registered in the name of second Defendant. First and second Defendants had no knowledge about the existence of the contract between Plaintiff and third Defendant, when Development Lease was registered, hence no beach of contract by it by subdivision and or development of the land comprised in Development Leas
46. From the evidence adduced by third Defendant they accepted existence of contract between Plaintiff and third Defendant for 'Nakavikavatu S/D Lot 5, District of Nuku Area of 0.1638 ha (subject to survey)'. There was no evidence to find bad faith, on their part and seemed lack of coordination between branches of third Defendant and also lack of specific instructions and or procedures.

Reliefs sought by Plaintiff

47. In terms of the amended statement of claim seeks an 'order that third Defendant had breached their contract with the Plaintiff'. As discussed, a declaration is made that third

Defendant had breached the contract with Plaintiff for the offer of ‘‘Nakavikavatu S/D Lot 5, District of Nuku Area of 0.1638 ha (subject to survey)’ by including and providing a Development Lease to second Defendant.

48. Plaintiff is also seeking an order for third Defendant to issue lease for the property described as ‘‘Nakavikavatu S/D Lot 5, District of Nuku Area of 0.1638 ha (subject to survey)’. This can be done by obtaining a land that was subdivided by second Defendant on lease from them as it had granted Development Lease to second Defendant.
49. The cause of action against third Defendant is regarding some actions where some plants were alleged to have destroyed by development of land. These facts were denied. Defendant as legitimate developer who had obtained title had acted accordingly and not liable for actions it had done in good faith to develop its land. Alternatively, Plaintiff seeks an order ‘that third Defendant pay the first and 2nd Defendant for the lease of the land described as Lot 5 ‘Nakavikavatu’’. This cannot be granted in the form it was sought.
50. It is to be noted that ‘Nakavikavatu S D Lot 5 . District of Nuku Area of 0.1638 ha(subject to survey)’ which was offered is no longer the subdivision that was approved by Town and Country Planning pursuant to registered Development Lease of third Defendant. Second Defendant had left a subdivided area of 1177 square meters including the dwelling of Plaintiff as Lot 2 in the approved subdivision marked 1D2.
51. Perusal of preliminary subdivisions show that some changes were made , depending on requirements and circumstances. and this is a prerogative of second Defendant subject to requirements of local authority and court cannot insist on second Defendant and local authority to change subdivisions. due to the fault of third Defendant as the title to second Defendant is indefeasible.
52. Plaintiff had taken nearly three years to pay total consideration and last payment was on 7.5.2013. By this time several revisions of the subdivision were carried out and second Defendant was unaware of the status of the Plaintiff and her occupation on land.
53. Plaintiff is also partly responsible for the plight she is in due to her delay in finalization of the consideration which had taken nearly three years.
54. Plaintiff is seeking leases over Lot 2 and 3 of subdivision marked 1D2. Plaintiff ‘s house is situated in Lot 2 but stated that its septic tank is situated in the adjoining lot. This is not a reason to claim Lot 3 as such a thing can be adjusted as there was sufficient land to construct a new septic tank.
55. Plaintiff had applied only for 1000 square meter area and in the offer she was offered ‘‘Nakavikavatu S/D Lot 5, District of Nuku Area of 0.1638 ha(subject to survey)’’. This lot which was offered is no longer existing due to various amendments to subdivisions carried out, but part of said lot is remaining in lot 2 of 1D2. Plaintiff had taken time till 7.5.2013 to make total consideration.

56. In the circumstances Plaintiff's claim for lot 2 and 3 which is more than double the area she had requested in her application and also excess of her offer cannot be accepted considering the circumstances of the case.
57. Part of the contract entered between Plaintiff and third Defendant had got frustrated as the land contained in the said lot that was offered is no longer the basis of subdivision. This was partly due to delay in payment of total consideration by Plaintiff and subdivision plans have gone through several major revisions over three years Plaintiff taken to pay the consideration.
58. Plaintiff was offered "Nakavikavatu S/D Lot 5, District of Nuku Area of 0.1638 ha(subject to survey)". This is the land pleaded in the statement of claim and sought orders for lease. This was "subject to survey" indicated that the offer was not final as approvals from authorities needed and accordingly the offer could be amended at survey.
59. The offer to Plaintiff was "subject to survey" and significant changes had taken place in the said subdivision approved which is marked 1D2. Accordingly the initial contract entered with the Plaintiff had partially frustrated. This is expected considering the circumstances of the action and conduct of the parties to this action.
60. Though the third Defendant had created this situation other parties to this action also had also contributed to the position. In the circumstances Plaintiff cannot insist on Lot 2 and 3 of 1D2. Plaintiff had claimed for the offer which is "Nakavikavatu S/D Lot 5, District of Nuku Area of 0.1638 ha(subject to survey)". As this subdivision was not approved partially the Area 0.1638 is frustrated. Plaintiff is entitled to residential lease of her house and area of 1177 square meters contained in Lot 2 of 1D2.
61. Considering the amount paid and time taken for payment and other circumstances of the case Plaintiff's claim for Lot 3 which is in excess of the offer area is refused. So Plaintiff is entitled for 99 year lease only for Lot 2 in approved subdivision marked as 1D2.
62. Plaintiff is residing in lot 2 of Amended Subdivision and second Defendant had not developed it or granted leases to third party. First and second Defendants were willing to provide the Lot 2 of document marked 1D2 upon payment of its market value. So the alternate remedy sought in the statement of claim is granted for third Defendant to obtain Lot 2 in subdivision marked 1DA from second Defendant upon payment its market price and then provide a 99 year residential lease.

Counter Claim by first and second Defendants

63. Against the Plaintiff counter claimed for not consulting iTaukei owners. The evidence was that request to surrender Plaintiff's Agricultural Lease was from third Defendant

who held the lands in trust for the owners. So the request for surrender was due to application by owners to subdivide the land and sell them. Plaintiff had a valid lease till 30.6.2011 and this hindered the subdivision. This is clear from the survey plans submitted by third Defendant along with Development Lease marked 1D1. So there was no need for Plaintiff to consult the owners as the surrender of Agricultural Lease was conditional on providing her a 99 year lease for Residential Lot from subdivision.

64. By surrender of larger Agricultural Lease before expiration, had helped the Defendants to obtain a larger area for development and subdivision.
65. There was no proof of personal injury claim by the conduct of Plaintiff. Plaintiff had resisted to move from her residence, but this could not affect beyond the subdivision she was claiming.
First and second Defendants had conducted the development and the sale of lease of lands under subdivision despite Plaintiff being in occupation.
66. There was no proof of third Defendant breaching contract with second Defendant or breach of fiduciary duty as it had granted Development Lease to second Defendant there was no evidence of such breaches. Third Defendant had accommodated request of iTaukei land owners to obtain a larger land for development by offering Plaintiff a residential lease for 99 years in exchange of surrendering a larger Agricultural Lease. Accordingly counter claim of first and second Defendants are struck off. Second Plaintiff is allowed a cost of \$4000 summarily assessed to be paid by third Defendant.

FINAL ORDERS

- a. Third Defendant had breached the contract Plaintiff.
- b. Third Defendant to pay second Defendant for the amount it seeks for Lot 2 of approved subdivision marked 1D2, for the lease of the same for 99 years and provide the lease to Plaintiff.
- c. First and second Defendants are restrained from issuing lease for Lot 2 in document marked 1 D2 other than for execution of above order.
- d. Cost of this action is summarily assessed at \$4000 to be paid by third Defendant to Plaintiff.

Dated at Suva this 23rd day of October, 2023.



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Justice Deepthi Amaratunga
High Court, Suva