

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

CIVIL ACTION NO. HBC 312 OF 2022

BETWEEN : **ANITA DEVI** of Solovi, Nadi, Fiji **1ST PLAINTIFF**

AND : **SUSHIL CHAND** of Solovi, Nadi, Fiji **2ND PLAINTIFF**

AND : **SHIU KUAR** of Solovi, Nadi, Fiji **3RD PLAINTIFF**

AND : **RITESH RABINESH KUMAR** of Solovi, Nadi, Fiji **4TH PLAINTIFF**

AND : **KANTI LAL** as the Executor and Trustee in the **ESTATE OF SUSHILA WATI** **DEFENDANT**

AND : **THE DIRECTOR OF LANDS** **INTERESTED PARTY**

BEFORE : Hon. Mr. Justice Mohamed Mackie

APPEARANCES : Mr. S. Lutumailagi, for the Plaintiff
Mr. S. Nand for the Defendant.
Mr. S. Kant, for the Interested Party

DATE OF HEARING : 9th October, 2023

W. SUBMISSIONS : By the Plaintiff on 31st October, 2023.
By the Defendant on 9th October, 2023 & 9th November, 2023(reply)
By the Interested Party on 9th October, 2023

DATE OF JUDGMENT : 12th April, 2024

JUDGMENT

A. INTRODUCTION & BACKGROUND:

1. On 16th November 2022, the above named 4 Plaintiffs, namely, **Anita Devi, Sushil Chand, Shiu Kumar and Ritesh Rabinesh Kumar** filed their **Originating Summons**, which was

subsequently amended on 30th November 2022, seeking the following substantial reliefs against the Defendant and the Interested Party.

- 1) *The Defendant herein namely KANTI LAL be removed from the Lease that is to be issued or approved by the Interested Party (Director of Lands) in Lot 7 NDSW 1133-Proposed Subdivision of Lots 36 & 42 ND 4184 – Pt. of Nacaqara & Navo;*
- 2) *Declaration that the Plaintiffs have rights in the property currently being occupied by each plaintiff in the Crown Land Lease No. 7584 LD/ 4/10/ 1467 situated at Nakoke, Nadi*
- 3) *The Defendant to carry out subdivision of Crown Land Lease No. 7584 LD/ 4/ 10/1467 situated at Nakoke, Nadi at the Defendants cost into quarter acre lots as per the initial arrangements between the Plaintiff, Hira Lal and Sushila Wati.*
- 4) *That the Interested Party to effect Transfer of each Lot after being subdivided by the Defendant to grant separate Lease to each Plaintiff.*
- 5) *The Defendant pay the costs of this application on a Solicitor Client Indemnity basis.*
- 6) *Any further orders or other relief that this Honorable Court deems fit.*

2. The above Originating Summons was supported by individual Affidavits sworn and filed on 16th November 2022 by all the Plaintiffs, namely, **Anita Devi** (with annexures “A” to “C”) **Sushil Chand** (with annexures “A” to “D”), **Shiu Kumar** (with annexures “A” to “C”) and **Ritesh Rabinesh Kumar** (with annexures “A” to “D”).
3. The Amended Originating Summons states that it is filed pursuant to Order 7, Order 28, Order 32 rule 2 and other general provisions of the High court Rules and the inherent jurisdiction of this Court.
4. Subsequently, on 17th November 2022, the aforesaid Plaintiffs filed an EX-parte Notice of Motion seeking, inter alia, injunctive reliefs in terms of sub-paragraphs 1 & 2 thereof which read as follows;
 1. *That the Defendant and/or its agents be restrained from interfering, dealing with, transferring, sealing, alienating or otherwise disposing of land comprised in Crown Land Lease No. 7584 LD/ 4/ 10/ 1467 situated at Nakoke, Nadi.*
 2. *That the Defendant and/or its agents be restrained from effecting and continuing with the Subdivision of Crown Land Lease No. 7584 LD/ 4/ 10/ 1467 situated at Nakoke, Nadi.*
 3. *That time for service of this motion be abridged.*
 4. *That Costs of this application be costs of the cause.*
 5. *Such further or other order(s) that this Honourable Court may deem fit, just, expedient and necessary in the circumstances.*

5. The above Notice of Motion (the application for injunction) is supported by the Affidavits individually sworn by all the said Plaintiffs on 16th November 2022 and filed on 17th November 2022 along with the same annexures filed along with the Affidavit in support of the Originating Summons (the substantial application).
6. The Application for the above injunctive reliefs being supported before me Ex-parte on 18th November 2022, having heard the Counsel for the Plaintiffs and perused the contents of the Application, Affidavits and the annexures thereto, this Court granted a temporary injunction in terms of paragraph 2 of the Notice of Motion only against the Defendant.
7. An Affidavit in response, on behalf of the Interested Party, was sworn by **Ms. KAVITA PRASAD** (Senior Lands Officer) and filed on 21st March 2023, with annexures "KP-1" to "KP-11". An Affidavit in opposition sworn by the Defendant **KANTI LAL** on 2nd May 2023 was filed on 3rd May 2023, along with annexures marked as "KL-1" to "KL-3".
8. Two Affidavits in reply, to the Defendant's and the Interested party's Affidavits in opposition, both sworn by the 2nd Plaintiff SUSHIL CHAND on 26th June 2023, were filed on 28th June 2023, with the relevant authorities to sign marked as "A" and a further annexure marked as "B".
9. When the Originating Summons and the Application for injunction orders came up for hearing on 9th October 2023, counsel for all parties, having orally addressed the Court, filed their respective written submissions as stated above. I, profusely thank them for same.

B. ANALYSIS

Application for Injunctive Reliefs:

10. The temporary injunction order, which was extended time to time, now stands discontinued from 28th June 2023 due to the absence of any application for extension on behalf of the Plaintiff.
11. The absence of any submissions on the part of the Plaintiffs' counsel at the hearing held on 09th October 2023 or thereafter, in relation to the relief of interim injunction, shows that the Plaintiffs appear to have abandoned their application for an interim injunction order/s.
12. However, for the sake of completeness, I shall briefly examine whether the Plaintiffs' application has any merit to warrant an interim injunction order in place till the final determination on the, purported, substantial reliefs prayed for by the Plaintiffs in their amended Originating Summons filed on 30th November 2022.
13. Injunction is an equitable remedy granted at the discretion of the court. The power which the court possesses to grant injunctions should be cautiously exercised only on clear and satisfactory grounds. An application for injunction is an appeal to an extraordinary power

of the court and the applicant is bound to make out a case showing clearly a necessity of its exercise.

14. In **Hubbard & Another v Vosper & Another [1972] 2 Q.B. 84** Lord Denning said:

"In considering whether to grant an interlocutory injunction, the right course for a judge is to look at the whole case. He must have regard not only to the strength of the claim but also the strength of the Defence, and then decide what is best to be done. Sometimes it is best to grant an injunction so as to maintain the status quo until the trial. At other times it is best not to impose a restraint upon the defendant but leave him free to go ahead. The remedy by interlocutory injunction is so useful that it should be kept flexible and discretionary. It must not be made the subject of strict rules".

15. An interim injunction is a relief that cannot be granted solely or independently without any final or substantive relief being moved for. A party who has not sought any substantive relief or such reliefs sought are doomed to fail owing to any procedural flaws that are fatal to the action or due to the absence of merits, will have no right to seek an interim injunction, as it cannot be a relief by itself, but is only a mechanism that assist to avoid the final relief sought being rendered nugatory.

16. In **American Cyanamid Co. v Ethicon Ltd [1975] UKHL 1; [1975] 2 W.L.R. 316, [1975] A.C. 396** Lord Diplock laid down certain guidelines for the courts to consider in deciding whether to grant or refuse an interim injunction which are still regarded as the leading source of the law on interim injunctions. They are:

- (i) *Whether there is a serious question to be tried at the hearing of the substantive matter;*
- (ii) *Whether the party seeking an injunction will suffer irreparable harm if the injunction is denied, that is whether he could be adequately compensated by an award of damages as a result of the defendant continuing to do what was sought to be enjoined; and*
- (iii) *In whose favour the balance of convenience lie if the injunction is granted or refused.*

17. **Kerr LJ in Cambridge Nutrition Ltd v BBC [1990] 3 All ER 523 at 534** said:

"It is important to bear in mind that the American Cyanamid case contains no principle of universal application. The only such principle is the statutory power of the court to grant injunctions when it is just and convenient to do so. The American Cyanamid case is no more than a set of useful guidelines which apply in many cases. It must never be used as a rule of thumb, let alone as a straitjacket.... The American Cyanamid case provides an authoritative and most helpful approach to cases where the function of the court in relation to the grant or refusal of interim injunctions is to hold the balance as justly as possible in situations where the substantial issues between the parties can only be resolved by a trial".

18. In the case of **Series 5 Software Ltd v Clerk and others [1996] 1 All ER 853** the court, after considering the decision in American Cyanamid and various other authorities on the subject, held that;

In deciding whether to grant interlocutory relief, the court should bear the following matters in mind:

- (1) The grant of an interlocutory injunction is a matter of discretion and depends on all the facts of the case.*
- (2) There are no fixed rules as to when an injunction should or should not be granted. The relief must be kept flexible.*
- (3) Because of the practice adopted on the hearing of applications for interlocutory relief, the court should rarely attempt resolve complex issues of disputed facts or law.*
- (4) Major factors the court can bear in mind are (a) the extent to which damages are likely to be an adequate remedy for each party and the ability of the other party to pay, (b) the balance of convenience, (c) the maintenance of the status quo, and (d) any clear view the court may reach as to the relative strength of the parties' cases.*

19. Apart from the above principles that govern the subject of injunction, another pivotal question that requires consideration, when deciding the grant or refusal of the injunctive relief, is whether the Applicant (the Plaintiffs hereof) has a **prima-facie winnable case**, not only in the light of the applicable principles and law/s, but also on the question whether the procedural requirements under High Court Rules 1988 have been duly complied with, since the failure to do so, on most instances, undoubtedly, would defeat the main action and finally disentitles the substantial relief sought for.
20. For instance, if **no** substantial relief is prayed for at all or such reliefs prayed for are bound to fail owing to the absence of a prima facie winnable case or due to any flaws and/ or failures in relation to the compliance of the Orders and Rules pursuant to the High Court Rules, particularly when the mode adopted in commencing the proceedings is found to be, irremediably, wrong and/ or improper, not only the chances of success in application for injunctive reliefs, but also the chances of obtaining a favorable final relief/s bound to be nil or very minimal.
21. If the Plaintiffs' action is doomed to fail, no purpose will be served by issuing an interim injunction or having such an order in operation. Because, the decision on interim injunction squarely relies on the fate of the action for substantial reliefs. In the absence of a firm foundation for a successful end of the main action, an injunction order will not have a role to play.

Substantial Reliefs Sought:

22. Through the oral and written submissions, learned counsel for the Defendant, having given a brief introduction and factual background of the matter, has addressed the court on the legal aspects of the issues involved under the following topics.
 1. The Plaintiffs have commenced this action against the Defendant on wrong capacity.
 2. The form and format of the Originating Summons is irregular.
 3. Wrong discretion of the land in the defective originating summons.
 4. Failure to rely on correct Order or Rules of the High court.

5. Lack of consent by the Director of Lands
6. Illegality of the agreement/the contract in terms of the section 13 of the State Land Act.
7. Seeking specific performance of an illegal contract.

23. Learned Counsel for the Interested party (DOL) also, has made persuasive submissions on the legal aspect of the matter before the Court, particularly by referring to the requirement of consent by the DOL pursuant to the section 13(1) of the State Land Act.
24. On careful scrutiny of the overall submissions made by the Counsel for the Plaintiff, the Defendant and the interested party, this court stand fully convinced that, in the light of the following analysis, the Plaintiffs' action is bound to fail and proceeding further under these circumstances will not take the Plaintiffs to their desired destination.
25. I find that the failures of the Plaintiffs to follow and their non-adherences to the relevant Orders and Rules of the High Court Rules 1988, the failure to fall in line with the mandatory requirement pursuant to the relevant provisions of the Law, namely, the **State Land Act** (SLA) and to follow other procedural requirements are substantial. The court is not in a position to salvage the plaintiffs' case from the imminent fall of it due to their own faults and failures, which are irremediable.
26. Further, having sensed the complexity of the issues that might crop-up for adjudication and in view of the nature and number of disputed facts highlighted below, which, undoubtedly, would require a full-scale trial, when the matter was mentioned on 21st February 2023 this Court suggested for the Plaintiffs' counsel to consider the conversion of the present action into a writ action by regularizing their position. However, on 12th April 2023, learned counsel for the Plaintiffs intimated that they still want to proceed with Originating Summons as it stood then.
27. The 1st named Plaintiff **ANITA DEVI**, in her Affidavit in support, inter alia, states that the license to occupy ¼ acre of the disputed land was given to her father RAM LINGAM in the year 1976 by the then Lessee HARI LAL, who is the Defendant's father. That after the death of **HARI LAL**, his wife **SUSHILA WATI** became the executrix and Trustee of the subject land, and after her death, their Son the Defendant hereof, namely, KANTI LAL became the lawful Executer and Trustee of **SUSHILA WATI**.

The 2nd named Plaintiff **SUSHI CHAND** in his Affidavit in support states that pursuant to an Agreement dated 14th December 2001, the Registered proprietor, the said **SUSHILA WATI**, being the executrix and Trustee of all piece of land, sold unto him the lot 4 on the plan No-5129 for a sum of \$2,700.00 .

The 3rd named Plaintiff **SHIU KUAR** in his Affidavit in support, inter alia, states that the registered proprietor **SUSHILA WATI**, being the Executrix and Trustee, on 28th March 2001 sold a portion of land, being ¼ acre, unto her for a sum of \$3,000.00.

The 4th Plaintiff **RITESH RABINESH KUMAR**, in his Affidavit in support, inter alia, states that by the Agreement dated 13th March 2004, the registered proprietor **SUSHILA WATI** sold $\frac{1}{4}$ acre of land unto him for a sum of \$7,500.00.

28. In essence, the present complaint of all 4 Plaintiffs above is that the Defendant **KANTI LAL**, being the son of aforesaid **HARI LAL** and **SUSHILA WATI**, is now causing a survey to be done, affecting the land in question, whereby the extent of the land to be given to them have been reduced to around Six hundred square meters, while they had been promised $\frac{1}{4}$ acres to each of them. Further, the Defendant is also said to be demanding more money for the expenses of sub-division and as further consideration for the lands.
29. Counsel for the Defendant has taken up several stern positions that the Defendant **KANTI LAL** was never ever appointed as the Executor and Trustee of **SUSHILA WATI** and the Plaintiffs have instituted this action against the Defendant in a wrong capacity. It is submitted further that the land in question was not a part of the **Estate of SUSHILA WATI** as she did not own or became the trustee of it. No evidence is adduced before the court to the effect the Defendant is the Executor and Trustee of the **Estate of SUSHILA WATI**. It is submitted that the Plaintiffs could not have commenced and continued with this action under wrong capacity of the Defendant, which did not exist. Thus, the Defence Counsel argued that the action in hand has to fail necessarily.
30. In the present action, the Plaintiffs have failed to file the substantive originating summons with statements of the questions on which the Plaintiffs seek the determination or direction of the High court or, as the case may be, a concise statement of the relief or remedy being claimed in the proceeding with sufficient particulars to identify the cause of action in respect of which the Plaintiffs claim that relief and/or remedy.
31. The originating process provided for under Order 5 of the HCR 1988 is a fundamental requirement of the rules and any non-compliance would tantamount to an irregularity, which goes into the root as far as the propriety of the mode of commencement is concerned.
32. The Originating summons has not complied with Order 7 Rules 2 and 3 as there is no concise statement as to the identification of the cause of action.
33. There is no proper description of the subject property. Further, the Originating Summons, except for stating the Order and Rule under which the Summons is filed, does not describe as to under which order or rule the relief is sought. Even, if it is assumed that the relief is sought under Order 86 rules 1, 2, 3, and 6 of the High court rules 1988, the present action cannot be decided on an originating summons, as the claim was filed not by way of a writ indorsed with a claim as required by order 86 rule 1 of the High court Rules.
34. When considering the applicability of Order 86, it is pertinent to look at the Order 5 rule 4 of the HCR, which reads 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.*

35. Order 86 does not recognize an action commenced by way of originating summons to seek remedy of summary judgment pursuant to that order. It is when an action is commenced by way of writ indorsed with claim, the plaintiff is supposed to come before the court by way of application under order 86 rule 1 and 2 to obtain a summary judgment under rule 3 thereof, wherein the Defendant is required to obtain leave under rule 4 thereof to defend the action if he / she wishes to do so, and the leave is granted only on being satisfied that there are issues or questions in dispute or other reasons for there to be a trial.

36. The Plaintiffs are well aware or ought to have been aware that there are number of disputed facts and questions to be tried at a formal trial. Obviously, for the Plaintiffs this process is not going to be a "Cakewalk" due to the disputed facts, inter alia,

- a. Whether Hari Lal had the consent of the DOL to enter into the so-called agreement with **RAM LINGAM**, the 1st Plaintiff's father?
- b. What the authority the late Hari Lal's wife (the Defendant's Mother **SUSHILA WATI**) had to enter into the, purported, agreements with the 2nd to 4th Plaintiffs?
- c. Was there a valid lease issued to Sushila Wati after the expiry of the 1st lease to Hari Lal?
- d. Has the Defendant entered into agreements with the Plaintiffs for the sale of the properties?
- e. Had the consent from the DOL been obtained by late Sushila Wati to enter into the, purported, agreements with the 2nd to 4th Plaintiffs and for them to build in the lands in dispute?
- f. Whether the Plaintiffs are entitled to seek specific performance of the, purported, contracts?
- g. Whether the Plaintiffs have a valid contract in hand, and if it is so, whether such contract is in compliance with section 59 of the Indemnity, Guarantee and Bailment Act?
- h. Whether the Plaintiffs have obtained the consent of the DOL for dealing with the lands and for the construction in the lands in question.

- i. Had the deceased Sushila Wati anything to do with the lands in question? If the answer is negative, can the Plaintiffs sue the Defendant as the executor and Trustee of the **ESTATE OF SUSHILAWATI**?

37. The affidavit evidence before the Court adduced by the Plaintiffs do not provide answer to the above issues, which demand the oral evidence involving several witnesses at a full-scale trial.
38. More importantly, this Court cannot turn a blind-eye or disregard the provisions of Section 13(1) of the State Lands Act, in deciding the validity or otherwise of the so – called agreements/contracts. No evidence adduced to show that the consent of the DOL was obtained or at least an application for that purpose was lodged.
39. Since the disputed contracts/ agreements are found to be without the consent and illegal, no right would exist for the Plaintiffs to have the relief of specific performance of such contract or agreement enforced through the court of law.
40. The Plaintiffs' application by way of originating summons itself is defective and also it is not instituted against the correct party, who is the present registered lessee of the subject land. The so-called contacts/ agreements, the subsequent occupation and erection of the buildings therein were without the expressed consent in writing from the DOL. The question whether the, purported, consent given by the DOL for the utility connections would fulfill the requirement of consent under section 13 (1) is an issue mixed with facts and law that cannot be decided on affidavit evidence alone. Thus, the Plaintiffs' action has to necessarily fail.
41. Considering the circumstances, this Court is of the view that the Plaintiffs should be ordered to pay the Defendant and the Interested party a reasonable amount as costs, for the failure to identify the correct procedure for the commencement of the action, failure to comply with section 13(1) of the SLA, and filing the action against the Defendant on wrong capacity, which if proceed further, is doomed to fail.

C. FINAL ORDERS

- a. The Ex-parte NOTICE of MOTION filed by the Plaintiffs on 17th November 2022 seeking interim injunction Orders is hereby dismissed.
- b. The temporary ex-parte injunction order issued on 18th November 2022 against the Defendant in terms of paragraph 2 of the said NOTICE OF MOTION stands discontinued due to non-extension.
- c. The ORIGINATING SUMMONS filed on 16th November 2022 and amended on 30th November 2022 is also hereby dismissed.

- d. All 4 Plaintiffs shall pay \$600.00 each, totaling to \$2,400.00, to the Defendant and the interested party, who will be entitled for \$1,200.00 each, being the summarily assessed costs.
- e. Cost shall be paid within 28 days from today.
- f. The dismissal of this action hereof will not be a bar for a properly constituted action by the Plaintiffs.



A.M. Mohamed Mackie
Judge



At the High Court of Lautoka on this 12th April 2024.

SOLICITORS:

For the Plaintiffs:

Messrs. Ace Legal, Barristers & Solicitors.

For the Defendant:

Messrs. S. Nand Lawyers – Barristers & Solicitors.

For the Interested Party:

Attorney General's Chambers.*