

IN THE HIGH COURT OF FIJI
AT LABASA
CIVIL JURISDICTION

Civil Action No. HBC 27 of 2020 [LBS]

BETWEEN:

SARENDRA SINGH
PLAINTIFF

AND:

ITAUKEI LAND TRUST BOARD
1ST DEFENDANT

AND:

FIJI PINE LIMITED
2ND DEFENDANT

BEFORE:

Acting Master L. K. Wickramasekara

COUNSELS:

Sen Lawyers for the Plaintiff
Legal Department of iTaukei Land Trust Board for the 1st Defendant
Young & Associates for the 2nd Defendant

Date of Hearing:

By Way of Written Submissions

Date of Ruling:

27 September 2024

RULING

- 01.** The Plaintiff by way of Summons filed on 01/05/2024, has sort leave to amend its Statement of Claim filed on 25/05/2020. This application was supported by an affidavit of Sarendra Singh, the Plaintiff, sworn on 01/05/2024.
- 02.** The proposed amendments, as averred in the Affidavit in Support, is made on two grounds. Firstly, that during the cause of the proceedings, a joint survey of the land in dispute had been conducted on the direction of the Master of the Court and thereupon the land claimed by the Plaintiff in this action has now been identified and demarcated. Secondly, that during the pendency of these proceedings, the 2nd Defendant, Fiji Pine Limited, has entered the land claimed by the Plaintiff and has commenced harvesting pine trees thereof in order to defeat the Plaintiff's cause of action.
- 03.** A copy of the proposed Amended Statement of Claim is annexed with the Supporting Affidavit marked as annexure 'A'.
- 04.** Although the Court granted sufficient time for the Defendants to respond to this application, only the 2nd Defendant has opposed the said application and has filed an Affidavit in Opposition on 12/06/2024 as sworn by one Vika Fane, the Geographic Information Systems and Landowner Affairs Officer of the 2nd Defendants.
- 05.** That the contention of the 2nd Defendant in opposing the proposed amendment is firstly on the basis that although a joint inspection of the land in dispute had been conducted there was no 'mapping of the inspected area' undertaken by the Plaintiff. In line with the above objection, the Defendant claims that the Plaintiff has no legal or equitable right to the said land in question, as the 2nd Defendant has the proper lease over this land, and thus the Plaintiff has no cause of action regarding the same.
- 06.** Secondly, the 2nd Defendant submits that the Plaintiff's amended claim falls out of statutory time limit and thus in breach of section 4 of the Limitations Act and accordingly statute barred. It is submitted that the Plaintiff filed its claim in the year 2020 and had failed to obtain leave from Court to bring a claim out of time.
- 07.** An Affidavit in Reply on behalf of the Plaintiff, sworn by Sarendra Singh, has been filed on 24/06/2024. Plaintiff in reply has claimed that the Agricultural Tribunal decision in favour of the previous lease holder, Dullu Singh, who was the grandfather of the Plaintiff, was made in 1995 and since then the 2nd Defendant lost any legal rights over the land in question. As the 2nd Defendant had failed to appeal the said decision it had effectively terminated any rights of the 2nd Defendant to the said land in question. It is further submitted that the 1st Defendant offered the lease for the said land in question to the Plaintiff in 2011 and by accepting the same, the Plaintiff is

now the rightful leaseholder of the said land. The Plaintiff therefore submits that he is bringing this action as against the recent actions of the Defendants as the rightful tenant/leaseholder of the land in question and therefore it is not statute barred.

08. Abiding by the directions of the Court, both parties have filed comprehensive written submissions regarding the application and the matter was fixed for Ruling on written submissions.
09. In its written submissions, it is submitted on behalf of the 2nd Defendant, that the Plaintiff is trying to bring this claim based on the Agricultural Tribunal decision in 1995 (although the 2nd Defendant nor the Plaintiff were parties to that proceedings) and an offer for lease made to the Plaintiff allegedly by the 1st Defendant in 2011. Pursuant to Sec. 4 of the Limitations Act, it is argued that the Plaintiffs' claim is statute barred. As the Plaintiff has failed to obtain leave of the Court to bring a claim which is time barred, the 2nd Defendant claims that allowing the amendment shall cause irreparable damage to the 2nd Defendant.
10. As per the written submissions on behalf of the Plaintiff, it is submitted that the Plaintiff is the rightful tenant of the said land in question, which is now being clearly identified through a joint survey as directed by the Court and that the Plaintiff is bringing this action due to the recent actions of the Defendants which are infringing on the Plaintiff's proprietary rights over the land in question. Plaintiff therefore asserts that his cause of action is not time barred. Furthermore, the Plaintiff claims that the 2nd Defendant has recently trespassed into the said land in question and has commenced harvesting pine trees therein. Plaintiff therefore submits that he is within the provisions of Order 20 Rule 5 to bring in a new cause of action for trespass due to the change of circumstances as submitted in the proposed Amended Statement of Claim.
11. Having considered all affidavits for and against the application and the comprehensive written submissions of the parties, I now proceed to Rule on the Summons for Amendment of Statement of Claim, as follows.
12. Pursuant to the original Statement of Claim filed on 25/05/2020, the Plaintiff's case against the Defendants was filed on alleged infringement of its proprietary rights over the land in question, premised on the Agricultural Tribunal decision in 1995 over the land in question as filed by his grandfather, Dullu Singh, against the Fiji Pine Ltd and Lands Department and the offer for tenancy made to the Plaintiff by the 1st Defendant in 2011 over this land.
13. It is interesting to note that none of the Defendants had taken up any preliminary objection regarding the issue that the claim of the Plaintiff being time barred pursuant to Sec. 4 of the Limitations Act as against the initial claim filed on 25/05/2020. The pleadings under the initial claim had already been closed by the time the current

application for leave to amend the Statement of Claim was filed by the Plaintiff on 01/05/2024. I therefore find that this is not the proper proceeding to deal with a challenge to the cause of action under the Limitations Act. The current summons is only for leave to amend the Statement of Claim and is governed by Order 20 Rule 5 of the High Court Rules. This rule provides reads as follows.

Amendment of writ or pleading with leave (O.20, r.5)

- 5.-(1) *Subject to Order 15, rules 6, 8 and 9 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.*
- (2) *Where an application to the Court for leave to make the amendment mentioned in paragraph (3), (4), or (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the Court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so.*
- (3) *An amendment to correct the name of a party may be allowed under paragraph (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the Court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or, as the case may be, intended to be sued.*
- (4) *An amendment to alter the capacity in which a party sues may be allowed under paragraph (2) if the new capacity is one which that party had at the date of the commencement of the proceedings or has since acquired.*
- (5) *An amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment.*

14. The above rule in its plain meaning gives a broad discretion to the court to allow amendment of pleading at any stage of proceedings, and such discretion should be exercised in accordance with the well-settled principles. I shall consider the settled principles of law in this regard and for clarity highlight some of the well noted cases forthwith.

15. **Lord Keith of Kinkel** delivering the opinions of the House of Lords in *Ketteman and others v Hansel Properties Ltd* [1988] 1 All ER 38, held at page 48 that:

“Whether or not a proposed amendment should be allowed is a matter within the discretion of the judge dealing with the application, but the discretion is one that falls to be exercised in accordance with well-settled principles”.

16. The court should be guided by its assessment of where justice lies when exercising this discretion in each case. **Lord Griffiths**, in that above case, concurring with **Lord Keith of Kinkel**, held at page 62.

“Whether an amendment should be granted is a matter for the discretion of the trial judge and he should be guided in the exercise of the discretion by his assessment of where justice lies. Many and diverse factors will bear on the exercise of this discretion. I do not think it possible to enumerate them all or wise to attempt to do so”.

17. There are several authorities that set out the guiding principles on the question of amendment. See **Jenkins L. J.** in **R. L. Baker Ltd v Medway Building & Supplies Ltd** [1958] 3 All E.R. 540. P. 546).

“I repeat the second half of the rule “and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.” I do not read the word “shall” there as making the remaining part of the rule obligatory in all circumstances, but there is no doubt whatever that it is a guiding principle of cardinal importance on this question that, generally speaking, all such amendments ought to be made “as may be necessary for the purpose of determining the real questions in controversy between the parties.” (Underlining added).

18. The courts and the tribunals exist for the very purpose of deciding the rights of the parties in each case. The duty that casted on them is to decide the matters in controversy between the parties. It, therefore, follows that all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties. See **Bowen L.J.** in **Cropper v. Smith** (1883)26 Ch. D. 700 stated at pages 710 and 711.

19. The practice of Bramwell L.J., which His Lordship expressly mentioned in **Tildesley v. Harper** (1878) 10 Ch. D. 393, at pages 396 and 397, clearly sets the principle that can guide the court in exercising the discretion on amendment of pleading. His Lordship held that:

“My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by this blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise.”

20. When exercising the discretion, the court is bound to investigate the injury or the injustice that the proposed amendment may cause to the other party, irrespective of the delay that can be compensated through the appropriate cost. “However negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs” (per Brett M.R.in Clarapede v. Commercial Union Association (1883) 32 WR 262, p263).

21. **Lord Brandon of Oakbrook**, in the case of Ketteman and others v Hansel Properties Ltd (*supra*) having analyzed the authorities, summarized the proposition at page 56 as follows:

The effect of these authorities can, I think, be summarized in the following four propositions. First, all such amendments should be made as are necessary to enable the real questions in controversy between the parties to be decided. Second, amendments should not be refused solely because they have been made necessary by the honest fault or mistake of the party applying for leave to make them: it is not the function of the court to punish parties for mistakes which they have made in the conduct of their cases by deciding otherwise than in accordance with their rights. Third, however blameworthy (short of bad faith) may have been a party's failure to plead the subject matter of a proposed amendment earlier, and however late the application for leave to make such amendment may have been, the application should, in general, be allowed, provided that allowing it will not prejudice the other party. Fourth, there is no injustice to the other party if he can be compensated by appropriate orders as to costs.

22. The Supreme Court Practice of 1999, under the heading '**General principles for grant of leave to amend**' at page 379, summarized the principles developed by the English courts on the amendment of pleadings. These principles have, frequently, been applied by the courts in Fiji in exercising the discretion on amendment of pleading (see: National Bank of Fiji v Naicker [2013] FJCA 106; ABU0034.2011 (8 October 2013); Colonial National Bank v Naicker, [2011] FJHC 250; HBC 294. 2003 (6 May 2011)).

23. The Fiji Court of Appeal in Reddy Construction Company Ltd v Pacific Gas Company Ltd [1980] FJLawRp 3; [1980] 26 FLR 121 (27 June 1980), succinctly summarized the test applicable and held that:

“The primary rule is that leave may be granted at any time to amend on terms if it can be done without injustice to the other side. The general practice to be gleaned from reported cases is to allow an amendment so that the real issue may be tried, no matter that the

initial steps may have failed to delineate matters. Litigation should not only be conclusive once commenced, but it should deal with the whole contest between the parties, even if it takes some time and some amendment for the crux of the matter to be distilled. The proviso, however, that amendments will not be allowed which will work an injustice is also always looked at with care. So, in many reported cases we see refusal to amend at a late stage particularly where a defence has been developed and it would be unfair to allow a ground to be changed”.

24. Again, in *Sundar v Prasad* [1998] FJCA 19; Abu0022u.97s (15 May 1998) the Fiji Court of Appeal further emphasized the test and stated how the balance to be made between the interest of the party seeking the amendment and the other side which incurs the cost. The Court unanimously held that:

Generally, it is in the best interest of the administration of justice that the pleadings in an action should state fully and accurately the factual basis of each party’s case. For that reason amendment of pleadings which will have that effect are usually allowed, unless the other party will be seriously prejudiced thereby (G.L. Baker Ltd. v. Medway Building and Supplies Ltd [1958] 1 WLR 1231 (C.A.)). The test to be applied is whether the amendment is necessary in order to determine the real controversy between the parties and does not result in injustice to other parties; if that test is met, leave to amend may be given even at a very late stage of the trial (Elders Pastoral Ltd v. Marr (1987) 2 PRNZ 383 (C.A.)). However, the later the amendment the greater is the chance that it will prejudice other parties or cause significant delays, which are contrary to the interest of the public in the expeditious conduct of trials. When leave to amend is granted, the party seeking the amendment must bear the costs of the other party wasted as a result of it.

25. The objection raised by the 2nd Defendant regarding the cause of action of the Plaintiff being time barred pursuant to Sec. 4 of the Limitations Act 1971, is not merely an objection against the proposed amendment to the Statement of Claim. The challenge regarding the time limitation is in respect of the preliminary basis and/or the alleged proprietary rights on which the Plaintiff had brought this action upon. The current proceeding, however, is concerned only in respect of the proposed amendment and not on a challenge to the preliminary basis and/or the alleged proprietary rights of the Plaintiff. Such challenge could properly be dealt either by way of a separate proceeding or in the trial proper.

26. Moreover, the Plaintiff's position with regard to this objection is that the cause of action against the Defendants arose due to their recent acts as submitted in the initial Statement of Claim and in the proposed amendment and not from the decision of the Agricultural Tribunal that was made in 1995 or the offer made by the 1st Defendant in 2011. Plaintiff's position is that these may be the background on which the Plaintiffs proprietary rights are based upon but not the current cause of action in the matter.
27. As discussed in the foregoing paragraphs, it is the considered view of the Court that any challenge regarding the cause of action being time barred pursuant to Sec. 4 of the Limitations Act 1971, is therefore a matter that needs to be dealt separately on its own merits. The current proceeding is only for leave to amend the Statement of Claim and this application should be dealt only in that regard.
28. The proposed amendments, in Court's view, designed to correctly identify the land in dispute and to rely upon the report of the survey of the said land in question which, in fact was conducted on the directions of the Court. Any issues regarding the said surveyor report can be duly taken up in an amended Statement of Defence following the amendments. As such, the issues raised by the 2nd Defendant on no mapping been done after the survey of the land can be raised in defence rather than being submitted as an objection to this application. Afterall, the said survey of the land was conducted pursuant to the direction by the Court and the Plaintiff is within his rights to rely upon the same in its Amended Statement of Claim. Whereas any objections over the same shall rightfully be made in the statement of Defence by the Defendants.
29. The cause of action in 'Trespass' as per the proposed Amended Statement of Claim is a new cause of action. However, when considering the scope of Order 20 Rule 5 of the High Court Rules, I find that it is covered by Order 20 Rule 5 (5). This cause of action, in Court's considered view, arises out of the same preliminary facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the Plaintiff. There is no dispute over the fact that the 2nd Defendants recent actions in harvesting the pine trees in the land in question in this matter, is a change of circumstance in the initial claim and had arisen after this action was filed. Whatever is the position of the 2nd Defendant regarding the tenancy of the said land in question be, that shall be a matter to be determined at trial by way of proper evidence adduced before the Court. Trial issues are not to be considered in the current proceedings by way of affidavit evidence.
30. On the same token, it is important to note that, although the said cause of action in 'Trespass' may have been arisen after the initial claim was lodged by the Plaintiff, it is still permissible for the Plaintiff to plead the same in an Amended Statement of Claim pursuant to Order 18 Rule 8 of the High Court Rules. This rule reads to the effect,

“ *Matter may be pleaded whenever arising (O.18, r.8)* ”

8. *Subject to rules 6(1), 9 and 14(2), a party may in any pleading plead any matter which has arisen at any time, whether before or since the issue of the writ.*”

31. In the light of the foregoing discussion, it is my considered view that the said amendments, if allowed shall not cause any prejudice to the Defendant as the said amendments not aimed at embarrassing the defence of the Defendants and the Defendants are not made to answer a vague and unforeseeable claim.
32. Having thus considered the application by the Plaintiff and the objections thereof, I do conclude that proposed amendments to the Statement of Claim may favour the interest of justice and assist the parties in clarifying the real issues between them.
33. The Court accordingly concludes that it is in the best interest of the administration of justice that the proposed amendments to the Statement of Claim are allowed and it shall certainly help in fully and accurately bringing out the factual basis of the claim and help resolve the real issues between the parties.
34. Court at the same time notes that the proposed amendments have being brought rather late in the proceedings upon the pleadings in the matter being closed. However, in my view, any prejudice caused to the Defendants due to the delay can be duly compensated by way of costs. In the outcome, I find that the Defendants are entitled to costs in this proceeding.
35. In consequence, this Court makes the following orders.
- 1) The summons filed by the Plaintiff on 01/05/2024, seeking leave to amend the Statement of Claim, is allowed, subject to the following orders of the Court.
 - 2) Plaintiff shall file and serve the Amended Statement of Claim within 07 days from today (That is by 08/10/2024).
 - 3) Plaintiff shall not change the order of the Defendants as per the original Writ and shall continue to refer to the iTaukei Land Trust Board as the first Defendant and the Fiji Pine Limited as the second Defendant in the Amended Statement of Claim.
 - 4) Defendants shall file and serve a Statement of Defence to the Amended Statement of Claim 14 days thereafter (That is by 22/10/2024).
 - 5) Plaintiff may file and serve a Reply to the Statement of Defence 07 days after (That is by 31/10/2024).

- 6) Plaintiff shall pay a cost of \$ 300.00, to the 1st Defendant and a cost of \$ 800.00 to the 2nd Defendant as summarily assessed by the Court, as costs of this proceeding, within 28 days from today (That is by 25/10/2024).
- 7) Summons for Directions to be filed and served 07 days thereafter (That is by 12/11/2024) returnable by 15/11/2024.
- 8) In failure to comply with any of the above orders, the pleadings of the defaulting party shall be struck out subject to a summarily assessed cost of \$ 3000.00 payable to the other parties.

At Labasa
27/09/2024



Kashvapa Wickramasekara,
Acting Master of the High Court.