

IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 110 of 2019
[High Court at Lautoka Case No. HBA 009 of 2018]

BETWEEN : **MEHMOOD KHAN**

Appellant

AND : **PAULIASI RATU**

Respondent

Coram : **Jitoko, VP**
Basnayake, JA
Sharma, JA

Counsel : **Mr. N. R. Padarath for the Appellant**
Ms. N. Mishra for the Respondent

Date of Hearing : **08 May 2023**

Date of Judgment : **26 May 2023**

JUDGMENT

Jitoko, VP

Introduction

- [1] The history of this case closely resembles a Greek tragedy, one of a tale of love and sacrifice with the flaw provided by the intervention of a demi-god.
- [2] In or about 1976, the respondent was approached by the older brother of the appellant, on behalf of his family, to marry his sickly sister. In return, the respondent was given with the approval of the mother, Khatiza, 2 acres of their state land and a house, to live in with his wife. The arrangement was by oral agreement. The land, originally in the appellant father's name had passed on to the appellant's mother, at the time of the arranged marriage, and on 21 January 1987, the land was transferred to the appellant, the present leaseholder.
- [3] The two families appear to live quite contently and happily for a long time, and the evidence show that it was only in October 2014 that discontent began to emerge, when the appellant through his solicitors, served a notice on the respondent, to vacate the property, with the threat of eviction proceedings to follow, if he failed to comply within 30 days.
- [4] The respondent failed to comply with the Notice, replying that the appellant's late mother had promised to give him 2 acres of the land after marrying her daughter, and to stay and looked after her.
- [5] The appellant commenced proceedings in the Ba Magistrates Court on 20 January 2015. In his Writ of Summons, he alleged that the Respondent was a trespasser to his land and sought an order for vacant possession.
- [6] The Magistrates Court decided in its Ruling of 28 February, 2018 that he lacked jurisdiction to hear and determine the matter. The appellant's appeal was heard before Ajmeer J on 30 July 2019 and in his judgment of 24 September, 2019, His Lordship set aside the Magistrate's Finding and Order but at the same time heard the case and dismissed the appellant's action with costs.

[7] In his judgment, Ajmeer J after examining the evidence and the history of how the respondent had come into the land at the invitation of the mother and family of the appellant, found that at paragraph 39 of the judgment:

“[39] The respondent did not come to an unoccupied house or land without any colour of right. He came to occupy the house or the land with the permission and approval of the owner of the house or the land.”

[8] He concluded, in dismissing the action:

“...that the respondent entered into and remains in occupation of the property with the consent of the predecessor in title of the appellant, his mother.

[9] Leave to appeal out of time against the decision of the High Court was granted by this court on 29 May, 2020.

[10] The grounds of appeal before this Court are set out as follows:

1. *The Learned Judge of the High Court erred in law in the interpretation and application of the law of trespass, particularly when he held at paragraph 43 of his decision, that a person who enters into a land and remains in occupation with the license or consent of a predecessor in title is not a trespasser.*
2. *The Learned Judge of the High Court erred in law in not taking into account the law that, a person, while having permission and consent to enter a land, will become a trespasser as soon as the consent or permission is withdrawn or cancelled. The Learned Judge erred in law in not considering that a formal notice was given to the respondent cancelling any permission he may have had to enter and remain on Appellant’s property, and therefore making him a trespasser.*
3. *The Learned Judge erred in law in holding that respondents evidence that, he was given permission to remain on the land in consideration for marrying the sickly daughter of the predecessor in title, was sufficient to establish that the respondent was not a trespasser when, the purported consideration for marriage was unlawful, immoral and could not, on reasonable grounds, be inferred to be the basis upon which a person would be transferred land or given irrevocable permission to remain on land indefinitely.*
4. *The Learned Judge erred in law in not considering that consent of the head lessor was required for the respondent to remain in occupation of the property, and that without such consent his occupation was illegal.*

[11] Submissions were filed by the Legal Aid Commission on behalf of the appellant on 22 October 2020, and the respondent on 19 November, 2020.

Preliminary Issue of Jurisdiction

[12] The High Court per Ajmeer J had correctly addressed the question of the Magistrates Court jurisdiction in action against trespass by concluding that the Magistrates' Court has the jurisdiction to hear and determine all suit involving trespass to land as clearly set out under Section 16 (1) (d) of the Magistrates Court Act, that is, the Resident Magistrate shall exercise jurisdiction:

“(d) in all suits involving trespass to land or for the recovery of land (including any building or part thereof) irrespective of its value, where no relationship of landlord and tenant has anytime existed between any of the parties to the suit in respect of the land or any part thereof)....”

[13] The qualification and/or limitations is set out at Section 16 (2) (a) as follows:

*“(2) A Magistrates Court shall not exercise the following jurisdiction –
(a) in suits wherein the title to any right, duty or office is in question....”*

[14] Quite clearly, the Resident Magistrate in this instance was wrong in concluding that he did not have the jurisdiction to hear and determine the case, and even more so given that he had already heard the case.

Agreed Facts

[15] The appellant was the trustee and executor of the estate of his late mother, Khatiza alias Khatisea. The mother was the leaseholder of a 3.4108 hectares of land (LD 4/1/1506) having inherited it from her husband Sher Khan, the appellant's father.

[16] On 21 January, 1987, the appellant after the death of his mother transferred the land to himself.

[17] The respondent is married to the appellant's sister. He had been invited by Khatiza, the mother, onto the land to occupy some two (2) acres of the land. He had been in continuous occupation of the land for over 47 years.

[18] In October 2014, the appellant’s solicitors served notice on the respondent to vacate the property. The respondent refused, and in January 2015, the appellant began court proceedings to evict the respondent.

Consideration

[19] This appeal is squarely based on the issue of whether the respondent, is lawfully entitled to stay on the land, notwithstanding that the license given by the predecessor leaseholder, has subsequently been revoked by the new owner.

[20] The appellant’s submission is that the respondent is now a trespasser. The High Court, having heard all the evidence, had determined that the respondent was not a trespasser.

The Law of Trespass to Land

[21] Generally acknowledged as wrongs to property, the tort of trespass to land is committed when an individual or the object of an individual intentionally, or negligently, enters the land of another without a lawful excuse.

[22] Halsbury’s Law of England (4th Edition, Vol 45) at para. 1384 defines it as:

“Unlawful entry. Every unlawful entry by one person on land in the possession of another is a trespass for which an action lies, even though no actual damage is done. A person trespasses upon land if he wrongfully set foot on it, rides or drives over it or takes possession of it, or expels the person in possession of it, or expels the person in possession, or pulls down or destroys anything permanently fixed to it, or wrongfully takes minerals from it, or places or fixes anything on it or in it, or if he erects or suffers to continue on his own land anything which invades the airspace of another or if he discharges water upon another’s land, or sends filth or any injurious substance which has been collected by him on his own land onto another land.”

[23] Street on Tort (16th Edition at Chapter 12) explains trespass to land as follows:

“This tort protects the interest of the claimant in having her land free from the unjustified intrusion of another. Because of this emphasis on physical interference with possession, it follows that it is not the function of the tort to protect ownership.”

[24] A trespasser is defined in Clerk & Lindsell on Torts (15th Edition 1982) at p. 631 as:

“... a person who has neither right no permission to enter on premises.”

Appellant's Submissions

- [25] The respondent had come into possession of the land in question on the invitation of his, the appellant's mother, the predecessor in title. It is not in dispute that the respondent had acquired a license to enter and remain on the land.
- [26] The appellant submitted that the right to remain on the land terminates on the death of the grantor of the license and cited **Hsieh Shane Gary v Chang Ho Ying** (2017) HKEC, 1246, a Hong Kong High Court authority, in support.
- [27] In any case the appellant, being the successor in title to the land, has the lawful authority to revoke or cancel the license. He had done so in this case through his solicitor's letter of notice demanding the respondent to vacate the property.
- [28] Furthermore, there was no formal agreement as in a contract that can serve to protect the interests of the respondent. He referred to the passage and the proviso in Halsbury Laws of England (4th Edition Vol 45) at paragraph 1406:

“A license to enter land which is not coupled with the grant of an interest in the land is revocable. However, if such a license arises by virtue of a contract between the plaintiff and the defendant, it is a matter of construction of the contract whether the license is revocable or not ...”

In the absence of a contract, the appellant was at liberty to revoke the license.

- [29] The appellant concedes that the respondent had been invited by her late mother to come and stay on the property, upon him marrying his, the appellant's sister. However, this was merely an informal family arrangement and would have been deemed illegal under Section 13 of the State Lands Act 1945, as the arrangement would have amounted to a dealing in the land requiring the approval of the Director of Lands, which in this instance, was not obtained. In support, the appellant referred to the Privy Council decisions in **Chalmers v Pardoe** [1963] 3 All ER 552, where a lessee of native land had invited another person to build on part of his native lease, with assurance that he would acquire an interest in the part of the land. The Privy Council held that the erections of the building constituted a

“*dealing*” in the land and since the consent of the Board was not obtained, the dealing was unlawful under the Ordinance.

- [30] Chalmers case was followed in the Court of Appeal’s decision of **Ram Narayan v Ram Kisun** (1968) Fiji Court of Appeal (unreported) where the defendant, had with leave and licence of the plaintiff, had been occupying about ½ acre native lease for the last forty years without the consent of the Native Land Trust Board. The Court in that case would have declared the defendant a trespasser following the law laid down in Chalmers case, but for the fact that the plaintiff had not formally revoked the license, until after the issuance of the Writ.

The Respondent’s Submission

- [31] The respondent who had appeared in person in the early proceedings, was assisted in the High Court and before this Court, by the Legal Aid Commission.

- [32] In his evidence in both the Magistrates’ Court and High Court, he has remained firm in emphasizing that he was brought onto the land in question at the invitation of the appellant’s late mother, upon his marrying her daughter, the appellant’s sister. He was told by the mother to move into the two (2) acres holding with a building on it, and to stay and look after the family. At page 223 of the Magistrates’ Court record, the respondent said that:

“...they came to see me if I could marry their older sister. Plaintiff elder brother came to see me to marry their sister. Their sister was sickly....That was in 1976 and I told them I wanted to take her to the village, and they told me to stay there and live at 2 acres of land.”

- [33] Given that he had spent more than 45 years living with his wife and children on the 2 acre property, the respondent submitted that he had acquired some form of legal right to stay on the property. In support of this contention, the respondent referred to Section 78 of Land Transfer Act 1971 of possession through vesting order application, although he concedes that he has not made any move towards lodging a vesting order application before the Registrar. He referred to **Prasad v Sami** [2019] FJCA 100 in support in which the Court observed:

“I am of the view that mere possession for more than 20 years itself would qualify the respondent to seek protection under section 172 of the Land Transfer Act. The application of Vesting Order will give an additional boost. Therefore, where the application for a vesting order amounts to a current right or a future right is immaterial.”

[34] In his evidence before the Magistrate’s Court (at p.219 of the Record), the respondent confirmed that he had sought the assistance of the Lands Department if he can lease the piece of land he is staying on, but was told *“just to wait for the court proceeding.”*

[35] Finally the respondent raised the defence of estoppel.

[36] I will deal with this later

Consideration

Is the Respondent a Trespasser

[37] The High Court was aware of the invitation given to the respondent by the predecessor lessee to, upon marrying the appellant’s daughter, to come and live on the land to which for the time being, she was the lessee. There was no agreement in writing or formal contract entered into, but a simple verbal invitation which is a common practice in the farming and rural areas of Fiji.

[38] In his view, Ajmeer J came to the conclusion that the respondent’s entry to the land was neither unlawful nor with force. He was invited by the owner of the land and his occupation of the land and the house given to him and his new wife to occupy, was lawful. He had entered and remained on the land, under a license properly granted by the owner.

[39] Ajmeer J concluded that:

“the respondent entered into and remains in occupation of the property with the consent of the predecessor in title of the appellant, his mother. The respondent has been in such occupation for more than 45 years. He was given permission by the appellant’s mother, the then owner to occupy the property in consideration of her daughter’s marriage with the respondent. The respondent, who came to occupy with the consent of the predecessor in title, and who is in such occupation for 45 years cannot be labelled as a trespasser.

The respondent, in my opinion, is not a trespasser. He has an equitable right to occupy the property....”

[40] The respondent’s counsel in her written submission, had argued that the facts of this case has raised, with the conduct of the appellant’s mother and the acquiescence of the appellant’s family, equitable estoppel in favour of the respondent. Counsel referred to the New Zealand cases of the Privy Council decision in **Plaimmer v Wellington City Corporation** (1884) 9 App Cas 699 and **Denny v Jessen** [1977] 1 NZLR 635 and in support, and the dissenting judgment and the statement of the principle of Lord Kingsdown in the House of Lords case of **Ramsden v Dyson** (1866) LR1HC129 at p.170 as follows:

“The rule of law applicable to the case appears to me to be this: If a man, under a verbal agreement with a landlord for a certain interest in land or, what amounts to the same thing, under an expectation, created or encouraged by the landlord that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him lays out money upon the land, a Court of equity will compel the landlord to give effect to such promise or expectation.”

[41] In **Inwards & Ors v Baker** [1965] 2 QB 29, there was a license given by a father to his son to build a bungalow as his home on the father’s land. The son lived on the land continuously, in the expectation and belief that he would be allowed to remain there for his lifetime or for so long as he wished.

[42] There was no contractual agreement or promise by the father as to the son’s length of occupation. The father died and in this will, he vested the land including the bungalow in trustees for the benefit of persons other than the son.

[43] The trustees brought proceedings for possession of the bungalow and the County court judge made an order for possession.

[44] The son appealed and the court had to determine whether equity and estoppel had been raised by the expectation of being allowed to remain in occupation by the landowner.

[45] In allowing the appeal the English Court of Appeal held that:

“... where a person expended money on the land of another in the expectation, induced and encouraged by the owner of the land that he would be allowed to remain in occupation, an equity was created such as the court would protect his occupation of the land, and the court had power to determine in what way the equity so arising could be satisfied.”

[46] The court noted that the fact that the son spent money on the land belonging to his father in the expectation that he would be allowed to remain in occupation for as long as he wanted, created equity to protect his interest.

[47] Lord Denning MR in his judgment summed up the son’s case thus:

“He has a license coupled with an equity, “and continued, (at p.37):

“So in this case, even though there is no binding contract to grant any particular interest to the licensee, nevertheless the court can look at the circumstances and see whether there is an equity arising out of the expenditure of money. All that is necessary is that the licensee should, at the request or with the encouragement of the landlord, have spent the money in the expectation of being allowed to stay there. If so the court will not allow the expectation to be defeated where it would be inequitable so to do. In this case it is quite plain that the father allowed an expectation to be created in the son’s mind that this bungalow was to be his home. It was to be his home for his life or, at all events, his home as long as he wished it to remain as his home.”

[48] Later on at p.37 Lord Denning added:

“It is for this Court to say in what way the equity can be satisfied. I am quite clear in this case it can be satisfied by holding that the defendant can remain there as long as he desires to use it as his home.”

[49] Danckerts L J in the same case offered how equity is to be expressed at p.38

“In my view the case comes plainly within the proposition state in the cases. It is not necessary, I think, to imply a promise. It seems to me that this is one of the cases of an equity created by estoppel, or equitable estoppel, as it is sometimes called by which the person who has made the expenditure is induced by the expectation of obtaining protection, and equity protects him so that an injustice may not be perpetuated.”

[50] I am inclined to agree with the general conclusion of Ajmeer J at paragraph [39] above that the license given to the respondent to live and support his family on the 2 acres given to him by his mother-in-law, the predecessor in title to the property, still subsists,

notwithstanding the actions by the appellant. It is a right premised on equity and the doctrine of estoppel.

[51] Baker's case draws a very close parallel to the facts of this case. The relationship in Baker's case was father/son, and in this case, it was mother-in-law/son-in-law. Both were promised and given a plot of land to live on. No formal agreement but only informal arrangement. Both worked hard and spent money to improve the land or the fixtures upon it.

[52] The expectation in both Baker's and this case, is that the licensees were going to remain on the land for their lifetime or for so long as they wished. They were both encouraged to stay on the land, and the landlord acquiesced to the licensees remaining on the land.

[53] On the issue of acquiescence, this Court first notes that the appellant and his family had accepted the respondent into their fold when he was allowed to come and live with them on their land, with his wife and in time, their children. They had come to accept the respondent and his family, as part of them.

[54] The Court also notes that even after the appellant had the land transferred into his name in 1987, there was no immediate act on his part, to revoke the respondent's license to stay and remain on the land. In fact it was not until 2014, some 27 years later, that the appellant through his solicitors, first acted to remove the respondent from the land, by a notice to vacate. Surely, the length of time it took for the appellant to give notice to vacate is tantamount to acquiescence and is enough to convince this court that the doctrine of estoppel has arisen.

Estoppel

[55] At common law, the doctrine of estoppel precludes a man from denying a state of affairs which had previously existed. Equity through the 18th Century has extended it and as Shell's Equity (13th Edition.) notes at p.631:

[56] “By the nineteenth century, both law and in equity, the rule was that there would be an estoppel where by words or conduct there has been a representation of existing facts (not of law) which was intended to be acted upon and was in fact acted upon to his prejudice by the person to whom it was made. The maker of the representation (even if a minor at the time of making it) will not be allowed to allege in proceedings against the person so acting that the facts are other than he had represented them to be.”

[57] It would seem to this Court, on the evidences before this court, that equity based on estoppel is a valid and applicable defence that the respondent can and had relied upon.

Equity v Statute

[58] Counsel for the appellant argued that the family arrangement with the respondent even if it was irrevocable, is null and void as it contravenes statute law and in this case, Section 13 of the State Lands Act 1945. The relevant sub-sections (1) and (1A) are as follows:

“13. (1) Whenever in any lease under this Act, there has been inserted the following clause –

‘This lease is a protected lease under the provisions of the State Lands Act 1945 (hereinafter called a protected lease) it shall not be lawful for the lessee thereof to alienate or deal with the land comprised in the lease of any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever, without the written consent of the Director of Lands.

Any sale transfer sublease, assignment or other alienation or dealing affected without such consent shall be null and void.

(1A) Notwithstanding anything contained in subsection (1), written consent of the Director of Land is not required for any mortgage, charge, pledge, caveat or for any such lease to be dealt with by any court of law or under the process of any court of law.”

[59] The appellant had correctly pointed to the leading authority of **Chalmers v Pardoe** (supra) followed in **Bakar v Talib** (2010) FJHC 8, HBA22.2008L that decided that a license to occupy is “a dealing” in the land and requires the consent of the head lessor. If no consent had been first sought and obtained, then the license to use the land is unlawful.

[60] It has long been accepted that equity cannot arise to defeat the exercise of statutory powers or discretions, or prevent or excuse the performance of a statutory duty: *Chalmers v Pardoe* (supra); **Western Fish Products Ltd v Penwith** D.C. [1981] 1 AUER 204.

[61] Argument is advanced by the respondent that notwithstanding the provisions of the State Lands Act, the appellant through his mother and his family had invited him onto the land and with the encouragement that he stayed on as long as he wanted while looking after the family. The act of staying and looking after the family, was of itself not “*or dealing*” in the land and that equity arises in support of his continuing occupation.

[62] It would seem to all intents and purposes that the provisions of Section 13 of the State Lands Act, makes the so-called family arrangement, unlawful and gives the lessee the right to revoke the license and this prevails over the equitable right of the licensee to remain on the land.

Approval Notice to Lease

[63] There is however, like a Greek tragedy I alluded to at the beginning, a final twist in the tale to this saga.

[64] As of now, the appellant still has to receive a proper lease to the land in question.

[65] It is clear from the evidence including the exhibits tabled in the Magistrates Court that the appellant:

- (1) *As executor and trustee of his mother’s estate had transferred the lease L.D4/1/1506 to himself dated 21 January 1987.*
- (2) *Was issued by the Director of Lands a new Approval Notice for agricultural purpose over the same land for 20 years from 1.1.95, which expired on 31.12.2014.*
- (3) *Was, in an undated Approval Notice, issued supposedly by the Director of Lands a 99 year lease from 1.1.2015 over the same land of 3.4108 hectares.*

(4) *Is still waiting for the issuance of a formal lease from the Director of Lands.*

[66] The Court notes that the 99 year Approval Notice has not been signed nor formally approved by the Director of Lands. The Court furthermore notes that the land is still to be surveyed and approved by the authorities, before a proper lease is issued. In addition, whilst the primary purpose of the Approved Notice states categorically that it is “*Agricultural*” the specific conditions that follows say that it is “*Residential*”.

[67] At the time of the hearing before this court, the appellant has not in its possession or be able to show the court, a copy of the new 99 year old lease. The Court can only assume that the survey is still to be done and certified and approved by the appropriate authorities.

[68] In the examination in chief before the Ba Magistrates’ Court on 19 September, 2017 the appellant confirmed that he had applied for a renewal of the lease and that the Lands Department had approved it (p. 208 of the record) and the Approval Notice was being processed and the proper lease to be issued by the Director of Lands in Suva (pp 209-211) “*after registration*”.

[69] Although the appellant has identified himself as the owner and the registered proprietor of LD 4/1/1506, he has only an Approval Notice document to support his claim. The document itself as exhibited, is not signed by the Director of Lands and the term of a 99 year lease for agricultural purpose is unheard of in my experience.

Conclusion

[70] Until and unless the appellant has been issued as a registered lessee after the “*state land without title, “had been surveyed, he does not possess the full legal persona of a “registered proprietor”*” of a new lease to replace LD 4/1/1506. He therefore lacks the authority to revoke the respondent’s license.

[71] In the circumstances, I believe that until the appellant has assumed the status of a registered lessee, the respondent, continues to enjoy the license to remain on the land with his family.

[72] The respondent is at liberty to pursue other remedies available to him or alternatively, both parties find an amicable way out of this unpleasant family situation.

Basnayake JA

[73] I am in agreement with the reasons and conclusions of Jitoko V. P.


Sharma JA

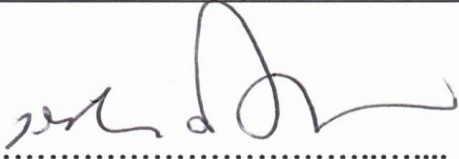
[74] I have read the Judgment and the reasons therein. I agree with the Judgment and the reasons accordingly.

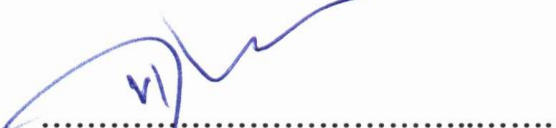
[75] **Orders**

1. *The appeal is denied*
2. *Costs of \$2500.00 is awarded against the appellant and to be paid to the respondent within 14 days.*




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Hon. Justice F. Jitoko
VICE PRESIDENT, COURT OF APPEAL


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Hon. Justice E. Basnayake
JUSTICE OF APPEAL


.....
Hon. Justice V. D. Sharma
JUSTICE OF APPEAL

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