IN THE HIGH COURT of FIJI
AT LABASA
CIVIL JURISDICTION

CIVIL ACTION No: 10 of 2012

BETWEEN : ONE HUNDRED SANDS LIMITED a duly incorporated limited liability company having its registered office at C/- BDO Zarin Ali, Level 8, Dominion House, Thompson Street, SUVA and having its postal address at PO Box 500, Savusavu, FIJI.

PLAINTIFF

AND : ILIMO TULEVU, retired Pastor of Nukubalavu, Natewa Bay, Vanua Levu.

1st DEFENDANT

AND : MRS VANI TULEVU Domestic Duties of Nukubalavu, Natewa Bay, Vanua Levu.

2nd DEFENDANT

Appearances : Ms. Muir of Siwatibau& Associates for the Plaintiff.
: Mr. Nawaikula of Nawaikula Esquire for the Defendants.

Before : Master Robinson.

R U L I N G

Introduction

In a Summonsdated 4 March 2013 the defendants sought an order from the Court that the initial Originating Summonfiled by the Plaintiff to be converted into a writ action. The initial Originating Summons was an application by the plaintiff filed on the 1 March 2012, for an order for vacant possession against the defendants under Order 113 of the High Court Rules.

The defendants prior to this application had also applied to this court for the consolidation of this action with another action in which the defendants sued the iTaukei Land Trust Board(hereinafter referred to as iTLTB) for the granting of the lease to the plaintiffs without their consent. The lease granted appears to relate to the land on which the defendants occupy. The application was denied due to a defect in the application.

Thisapplication made pursuant to Order 28 rule 9 seeks the following orders from the Court:-

(a). **THAT** the pleading in this matter is to continue as if began by Writ and the plaintiff is to file its Writ within 21 days from the date of hearing in this matter;

(b). **THAT** the plaintiff is to include the iTLTB as a party to the new action in order that either parties can make their claims against it, if they so choose, and in order that the ITLTB can assist the Court in explaining its involvement in the matter;

(c). **THAT** the defendant is to plead its counter claim to the summons and the matter to take its normal cause thereafter; and

(d). **THAT** costs in this application is to be cost in the cause.

Background

The plaintiff entered into an agreement with the theiTLTB in May 2007 to lease, for tourism purposes, a portion of land known as 'Nukubalavu" which is situated at Viani Bay in Cakaudrove, Vanua Levu. The land in question is native land and belonged to the land owning unit or the MataqaliSinu of the YavusaNavadra in Viani Village whose consent was first obtained prior to the granting of the lease. For these purposes the contracting parties drew up and signed a document titled an *Agreement to Lease"* (hereinafter referred to as "the lease") on the 2nd May 2007.The land as stated on the lease is subject to survey but consists of approximately 20.4475 HA. The term of the lease was for 99 years and the consideration was $400,000:00. Upon payment of the consideration and the rental the Plaintiff was to take possession of the land and to thereafter proceed to the construction of the tourist resort in accordance with the provisions of the lease.

From the affidavit filed in support of the application it appears that some of the members of the landowning unit were residing on the land which is now leased. This land is outside the village boundary but that some villagers have chosen to reside there rather than in their village so that they can cultivate and live on their traditional land. The affidavit evidence seems to show that these people agreed to relocate to another place or to their village on payment to them of certain monies towards relocation to enable the plaintiff to lease their land for tourist purposes.In fact there are some evidence of payments made to those people and they in turn have relocated either to their village or to other places.

The defendants, however do not wish to relocate and state that they were not consulted before the lease was granted nor did they consent to it. That their family house and farm is on the portion of land and that they should not be relocated anywhere else. That the 1st defendant in particular states that he has been in continual occupation for as long as he can remember and that he is now 78 years of age. In relation to the payment of monies for their relocation the defendants affidavit evidence appears contradictory in that some payment were paid to them through third parties and some payments were for purposes other than relocation.

It is within the above scenarios that the initial originating summons pursuant to Order 113 was filed and thereafter this application to convert the matter to a writ action. This is what has to be determined now.

The Application.

The summons was supported by an affidavit sworn at Labasaby the 1st defendant Mr. IlimoTulevu on 28 February 2013. The defendant's sworn affidavit states briefly that:-

(i) the plaintiff is trying to evict him from the land of his birth where he was raised as a child and which he has occupied and continue to occupy under customary beneficial occupation over 70 years;

(ii) that the portion of land was allocated to him and his family as his share of his parents customary reserve in accordance with custom and tradition;

(iii) that he knows that some of the members of the Mataqali want my land to be leased to the plaintiff and iTLTB has probably acted on their desire in purportedly granting the lease to the plaintiff but that he says that the granting of the lease is wrong in that it is contrary to the iTLTB Act.

(iv) That he and his wife live on this land and have planted coconut trees there from the 1940's to the 1960's and built a house there in 1990;

(v) That my two brothers have traded off their share to the plaintiff and some Mataqali members have given their consent by which they have effectively chosen to change their way of life forever.;

(vi) that I have opted not to, and opted instead to maintain the way of life that my ancestors have done for thousands and thousands of years and I have expressly stated that position to the plaintiff, to the Itaukei Land Trust Board and to the other members of my Mataqali;

(vii) that I sincerely and verily believe that this case should now progress as it begun by Writ orders that the plaintiff is to file a statement of claim that the iTLTB is to be included as a party and the defendants are to plead their counter-claims;

(viii) that most if not all of the facts put forward by the plaintiff has even saw the need to file a reply affidavit is disputed by the defendant and that the factual issues are not agreed and the resolution of these factual issues can no longer be resolved by Affidavit evidence because of that and there is real need that evidence is properly scrutinized by the examination and cross examination of witnesses in a trial;

(ix) that the originating process is appropriate only where issues of fact are not disputed but it is not the case here;

In opposing the application the plaintiff filed a sworn affidavit deposed by Ms. Barbara L'Ami, Company Director of Narain Heights Savusavu. She states that:

1. She is currently employed by the plaintiff as its Director of Client Relations and Property Management, and is authorized by the plaintiff to swear this affidavit on its behalf;

2. that she is in charge of the plaintiff's property management and related matters since 1st February, 2010 and that some of the matters deposed herein are within my personal knowledge and others have been obtained from accounts and records maintained in the relevant files;

3. that the plaintiff vigorously opposes the application in that the defendant should have brought the application promptly and expeditiously and that this application has delayed the hearing of the substantive matter;

4. that it has been a year since the originating summons was filed and nine months since the Notice of Appointment but there has been no progress in getting the matter to a hearing on account of the defendants constant request for further time and various interlocutory applications;

5. that an Order 113 applications is summary in nature and that this summary application is bogged down in interlocutory applications and is unreasonable;

6. that the defendant in paragraph 3 of the affidavit refers to order 28 rule 27 and she is informed that there is no rule 27 in Order 28;

7. that as to the defendants request that the iTaukei Land Trust Board be included in the action I remind that the iTaukei Land Trust Board is not a party to this action and that the plaintiff is not seeking relief from them and that there is no provision in Order 28 rule 7 or 8 for the addition of other parties;

8. As to the deponent's request that the defendants are to plead their counterclaim to the summons, the plaintiff's Originating Summons has been on foot for almost a year and the defendants have never raised any counterclaim against the plaintiff to date, nor do they provide any particulars of any such alleged counterclaim against the plaintiff in their Affidavit in Support;

9. that in response to paragraphs 4, 5, 9, 10 and 11 of the said Affidavit, they are denied and she states that the same are scandalous and vexatious and should be struck out, as the deponent is seeking to rely on stereotypes and local prejudices rather than material facts or tenets of law;

10. that the plaintiff has filed an Originating Summons pursuant to Order 113 of the High Court Rules for vacant possession of the said land. The plaintiff as an investor in Fiji's tourist industry is assured that the Lease Agreement issued by the iTaukei Land Trust Board is legally binding and enforceable, and that is the basis of the plaintiff's Originating Summons;

11. that if the matter is converted to a Writ action and the plaintiff ordered to file a statement of claim, it will no longer be a summary proceeding and the plaintiff will suffer significant further delay and

additional expense, in addition to the 9 month's delay already suffered by the plaintiff in this matter;

12. that if the summons is converted to a writ action the iTaukei Land Trust Board would still not be a party, as they are not a party to the Originating Summons which the defendants seek to convert to Writ action;

13. that the defendants have also admitted requesting and receiving monies from the plaintiff for relocation, and the receipts and letters of request are there in the affidavit evidence and that these raise issues of estoppels and/or laches, which can easily be dealt with on affidavit evidence;

14. that in response to paragraph 15, she states that the defendants' customary rights do not apply to dealings with the plaintiff, as the plaintiff is not i Taukei, and such customary rights only apply between members of the i Taukei. Further, the plaintiff is entitled to rely on the Land Register kept by the iTaukei Land Commission, and the defendant is not registered as the owner of the said land in that Register;

15. that in response to paragraphs 16, 17, 18, 19, 20, 21 and 22, I say that all the Defendants really need to do is produce copies of their passports, so that this Honourable Court may determine for itself where they were staying and residing all these years prior to their moving onto the said land in or about 2010, and that can be done by affidavit evidence annexing the same;

16. that in the circumstances, the plaintiff humbly and respectfully requests this Honourable Court to dismiss the defendants' latest application as being defective and as an abuse of process [as it clearly is a roundabout way of trying to obtain consolidation of the defendants' claim against the i Taukei Land Trust Board with the plaintiffs' claim against the i Taukei Land Trust Board with the plaintiff's action], with indemnity costs to the Plaintiff;

17. that in the event that this Honourable Court does not grant the defendants' application for conversion to a writ action, then the plaintiff further requests for an order for transfer of this action to Suva High Court as per the plaintiff's application for the same, as there being no application for oral evidence this matter is suitable to be heard in Suva on affidavit evidence; and

18. that if this Honourable Court is minded to grant the defendants' application for conversion to a Writ action, then the plaintiff requests the Court's directions granting the Plaintiff 28 days to file its Statement of Claim against the defendants, and 28 days thereafter for the defendants to file their Statement of Defence.

The Submissions.

At the conclusion of the hearing on the 22 March the parties were given 21days to file submissions, the Plaintiff's submission was received within the specified time and unfortunately the defendantssubmission was received very much later. Nonetheless both parties provided helpful submissions.

The Plaintiff's submission in brief is that:-

1. thedefendants have been late complying with the rules in the filing of their affidavits in opposition from the beginning and that this application will delay the matter further;

2. that they oppose any application to include the iTLTB as a party as there is no provision for this under Order 28 of the rules;

3. thedefendants application is defective in that the Summons is made under Order 28 rule 27 where there is no existing rule 27;

4. that the defendants application under Order 28 rule 8 relating to a claim requires that the defendant bring his application for a counter claim on the originating summons to be brought in at an early stage of the proceedings as is practicable and that it has to inform the Court of the nature of the claim;

5. that the defendants do not have a counter claim against the plaintiff and in any event the application for a counter claim is a year late;

6. the defendants have not pleaded that they are bringing this application under Order 28 rule 9 and therefore their summons is defective in seeking such orders without pleading the basis thereof;

7. that the defendants application is vexatious and oppressive to the Plaintiff and constitute an abuse of process;

8. That an application under Order 113 is a summary proceeding for the possession of land and the Supreme Court Practice states that:-

> **"In proceedings under this Order, the only claim that can be made in the Originating Summons is for the recovery of possession of land; notwithstanding 0.15, r.1, no other cause of action can be joined with such a claim in proceedings under this Order, and no other relief or remedy can be claimed in such proceedings, whether for payment of money, such as rent, mesne profits, damages for use and occupation or other claim for damages or for an injunction or declaration or otherwise. The Order is narrowly confined to the particular remedy described in r.1...."**

9. That, in the context of Order 113 proceedings such as these, the defendant's request to add another party to the proceedings so that they can bring a counterclaim is unsuitable and inappropriate.

10. There is no other remedy that can be claimed under Order 113 other than vacant possession. The plaintiff itself will be required to bring separate proceedings against the defendant to recover the damages and loss it has incurred due to their actions.

11. That the defendants' claim against TLTB is a disguised judicial review of iTLTB's decision to lease the said land, and the same is wholly inappropriate to be brought as a claim or counterclaim in the plaintiff's action under Order 113 for vacant possession of the land, or even by writ of summons as the defendants have done.

12. That the plaintiff has not only paid the lease premium, rents and relocation amounts, but the defendants themselves have claimed and collected compensation from the plaintiff pursuant to the Lease.

13. That the plaintiff opposes the application because it would frustrate the application under Order 113 which a summary proceedings.

14. The plaintiff disputes that oral evidence of witnesses will be requiredbut submits that the issues to be determined would be legal not factual and that the issues would be as follows:-

    (a) Whether the defendants can plead alleged defects in iTLTB's

lease procedures as a defence to the lessee's claim to vacant possession of the leased land;

(b) Whether the defendants are stopped from contesting the validity of the Lease by their substantial delay in instituting legal proceedings against iTLTB and/or or their conduct in claiming compensation from the Plaintiff;

(c) Whether a native landowner can claim beneficial occupation of native land in Fiji while residing in Australia on a permanent basis;

(d) Whether a native landowner can claim a personal right to occupy native land registered in the name of the Mataqali when the Mataqali has consented to the same being leased; and

(e). Whether a native landowner can claim customary or traditional rights of occupation as paramount against a non-native lessee holding Lease Agreement from TLTB.

15. That the only factual issue to be determined is in respect of the defendant's residence in Australia at the material time which could be verified easily.

16. In this regard we refer to the case of **Rajendra Prasad Brothers Ltd v FAI Insurances (Fiji) Ltd, [2002] FJHC 231, HBC0205d.2001s (7 May 2002)**, in which the High Court of Fiji refused the defendant's summons to have the proceedings instituted by originating summons continue as if begun by writ;

17. It was argued by the defendants that there were seriously disputed issues of fact making affidavit evidence inappropriate. The plaintiff submitted that the Court could take judicial notice of the events of the coup of 19 May 2000, in which the plaintiff's shop in Suva was looted and destroyed by fire, which the defendants contended was caused by the events in Parliament. The Court refused their application.

18. We submit that a similar situation exists in these proceedings. The most relevant and reliable evidence as to the defendants' whereabouts at the material time will be their passports or Immigration report, and this can most suitably be provided by way of affidavit evidence.

19. Once this Honourable Court has determined where the defendants were located most of the time, the issue becomes a legal one of what constitutes beneficial occupation and whether that can even be raised as a defence to a vacant possession application by a third party lessee, or can only be raised against TLTB.

20. We submit that in their circumstances affidavit evidence will be suitable and appropriate for the resolution of these proceedings, and we ask that the defendants' application be dismissed with indemnity costs to the Plaintiff.

21. In the alternative, if the Court is minded to convert this action to a writ action, then we would suggest that appropriate directions be given as to whether the affidavits already filed are to be treated as pleadings or whether the plaintiff should be ordered to file and serve a statement of claim, with the defendants to file statement of defence thereafter.

22. That the matter be transferred to Suva as there is no judge permanently assigned to Labasa and therefore there will be long delay in having the matter completed.

The defendant's through its counsel submits the following:-

1. That the Court has the power to order a matter initiated by originating summons to continue as if begun by writ.

2. That prior decisions show that in circumstances where affidavit evidence clearly showed that the defendant had some claim to title that in such application should be by writ action.

3. Further that where the affidavit filed shows that there is significant dispute between the parties as to the facts or versions of events than the Court could not resolve these disputes without taking oral evidence.

4. That there is dispute as to when or whether the defendant is in

actualoccupation of the land, whether he has received any compensation and whether the title granted to the plaintiff is good against the whole world and defeats the customary right of the defendant to occupation of the land.

5. That in the matter of *Ratu No 2 v Native land Development Corporation [1987] FJSC 9; [1991] 37 FLR 146* (17 February 1987) a land owner in Lami sued the iTLTB and NLDC over a lease issued over the land he customary occupied. The High Court considered the native owner had a right and awarded him damages. The native owner argued both S3 of the Native Lands Act & S8 of the Native Lands Trust Act.

6. That the defendant has a right to counter-claim and that such a counter claim is allowable in matters instituted by originating summons.

Determination.

The defendant's application can be summarisedas follows:-

(i). that the portion of land from which he is to be evicted is his traditional land which has been occupied and continued to be occupied by him under customary beneficial occupation for over 70 years and that he and his wife have built a house on the land;

(ii). that he knows that other members of the Mataqali including his two brothers have opted to lease the land to the plaintiff and that the iTLTB may have acted on their desire but that the granting of the lease was wrong in that it is contrary to the iTLTB Act and further he has opted not to lease his portion and to make the iTLTB a party to the proceedings; and

(iii). that most if not all of the facts put forward by the plaintiff are not agreed and the resolution of these factual issues can no longer be resolved by affidavit evidence and there is real need that evidence be properly scrutinized by the examination and cross examination of witnesses in a trial.

The plaintiffs grounds of opposing the application as expressed in its affidavit briefly put are:-

(1). that there has been a long delay in hearing the substantive matter which is summary in nature and that the defendant should have brought the application promptly and expeditiously and further that this application is unreasonable;

(2). that there is no provision under Order 28 rule 7 or 8 for the addition of other parties and that the party they wish to include is one the plaintiff do not wish to seek relief from;

(3). that theplaintiff as an investor in Fiji's tourist industry is assured that the Lease Agreement issued by the iTaukei Land Trust Board is legally binding and enforceable, and that is the basis of the plaintiff's Originating Summons;

(4). that if the summons is converted to a writ action and the plaintiff be ordered to file a statement of claim it will no longer be a summary proceeding and the plaintiff will suffer significant further delay and additional expense, in addition to the 9 month's delay already suffered by the plaintiff in this matter;

(5). that the defendants have also admitted requesting and receiving monies from the plaintiff for relocation, and the receipts and letters of request are there in the affidavit evidence and that these raise issues of estoppels and/or laches, which can easily be dealt with on affidavit evidence;

(6). that the defendants' customary rights do not apply to dealings with theplaintiff, as the plaintiff is not i Taukei, and such customary rights only apply between members of the i Taukei. Further, the plaintiff is entitled to rely on the Land Register kept by the iTaukei Land Commission, and the defendant is not registered as the owner of the said land in that Register;

(7). that if the Court is to grant the defendants' application for conversion to a Writ action, then the plaintiff requests the Court's directions granting the Plaintiff 28 days to file its Statement of Claim against the defendants, and 28 days thereafter for the defendants to file their Statement of Defence.

The lengthy and detailed affidavits filed by both parties in the application reflect a wide range of issues that are in dispute between them. Some of them are relevant and some are not. Under Order 28 rule 9 if it appears to the Court at any stage of a proceedings commenced by originating summons, that the matter should for some reason to continue as if begun by writ, it may order that the affidavits shall stand as pleadings and thereafter make orders or directions for the matter to continue that way. However it is better not to let affidavits remain as pleadings because affidavits cannot be amended nor can particulars of them be ordered. (*see paragraph 28/8/1 White Book 1999 version).*

Perhaps the most important objection raised by the plaintiff is that the "*agreement to lease*" granted to it is legally binding and enforceable and therefore it is entitled to make the application under Order 113. Further the application is a delaying tactic by the defendant at a cost to the plaintiff. The plaintiff has indeed concentrated on the various clear facts deposed in its affidavit in support of the substantive application to confirm its position that there are no facts in dispute. That is the obtaining of the agreement to lease by the iTLTB through consultation with the members of the Mataqali was within the knowledge of the defendants. That the 1st defendant received compensation as did his brothers who lived on the land after the iTLTB had undertaken a crop count and that apart from that he received further compensation from the plaintiff. That everything which was required by the iTLTB to acquire the consent of the members of the Mataqali was done with the defendant's knowledge and consent. As a result of that consultation and consent the lease was granted to the plaintiff and that although the lease was subject to survey the defendants knew the boundary and gave their consent. This however was not disputed by the defendantsbut what was disputed by them was that they did not agree to lease the portion of the land they were occupying and that the leasing of the land was contrary to the iTLTB Act.

Having taken the above into account I am of the view that it is better to err on the side of caution and follow the observation of the Court of Appeal in the matter of *Reserve Bank of Fiji –v- Gallagher (2006) FJCA 37.*In this matter the Court of Appeal stated, referring in particular to what had transpired in that matter, that the originating summons procedure meant:

a) *there was no proper statement of claim to justify the range of orderssought and to articulate the causes of action relied upon ;*

b) *the facts were placed before the Court by affidavits from which causes of action and/or defences might or might not be able readily to be discerned.; and*

(c) *No cross-examination is usually allowed. The Court was badly placed to decide contested facts.*

In the above matter it became clear to the Court that fundamental procedural problems has dogged this litigation namely the totally inappropriate use of the originating summons procedure. There are too many contested facts and litigation was allowed to proceed and rulings and judgments made by different Courts and Judges which could have been avoided had the matter proceeded by writ from the beginning.At paragraph 61 on page 16 the Court stated :-

> *61] The deficiencies of the originating summons procedure combined with way the appeals were argued both in this Court and in the Supreme Court have meant that no Court has ever ruled upon various incidental factual matters which were raised in the High Court in the affidavits and which all Courts have indicated should be dealt with in other proceedings.*

This is not to say that this matter was wrongly instituted from the beginning only that there are too many contested facts that needs to be further discerned by oral evidence. In *WaisakeRatu No. 2 –v- Native Land Development Corporation & Native Land Trust Board; (1991) 37 FLR 146*the plaintiff there was evicted from his traditional land which he has occupied in a similar fashion as the defendants in the current matter. Not only was damages awarded to the plaintiff but there was a whole plethora of issues to be determined regarding his customary right of possession of the subject land. I need not go any further than that but a careful reading of the above case would show the importance of determining this matter properly through oral evidence which could not be determined by summary procedure.

In its submission the plaintiff referred to the similarity between *Rajendra Prasad BrothersLtd v FAI Insurances (Fiji) Ltd, [2002] FJHC 231, HBC0205d.2001s (7 May 2002),* and this matter and therefore this application should be denied. I am of the view however that the two matters are of very different nature, the *Rajendra Prasad Brothers Ltd* matter the defendant

insurer stated that there were disputed issues of facts but the Court held that it could take judicial notice of the event of the coup of 19 May 2000. The basis of the claim in *Rajendra' Prasad Brothers Ltd* matter was for an insurance cover for damages arising frommalicious act, riot, civil commotion and terrorism. This matter in my view is different and is more in the vein of *WaisakeRatu No. 2.* It is indeed true that an application under Order 113 is akin to a summary proceedings under section 169 of the *Land Transfer Act* and is an effective way to obtain possession from persons who have no right to continue in possession. But this is only where the facts are clear and not in dispute.

In *Baiju –v- Jai Kumar (1999) FLR 74* Justice Pathik stated at page 76 that:-

"The application of this Order is narrowly confined to the particular circumstances described in r.1. i.e. to the claim for possession of land which is occupied solely by a person or persons who entered into or remain in occupation without the licence or consent of the person in possession or of any predecessor of his. The exceptional machinery of this Order is plainly intended to remedy an exceptional mischief of a totally different dimension from that which can be remedied by a claim for the recovery of land by the ordinary procedure by writ followed by judgment in default or under O.14. The Order applies where the occupier has entered into occupation without licence or consent; and this Order also applies to a person who has entered into possession of land with a licence but has remained in occupation without a licence, except perhaps where there has been the grant of a licence for a substantial period and the licensee holds over after the determination of the licence (Bristol Corp. v. Persons Unknown) [1974] 1 W.L.R. 365; (1974) 1 All E.R. 593. And further that this order

" *…would normally apply only in virtually uncontested cases or in clear cases where there is no issue or question to try, i.e. where there is no reasonable doubt as to the claim of the plaintiff to recover possession of the land or as to wrongful occupation on the land without licence or consent and without any right, title or interest thereto."*

Justice Pathik after considering the affidavit evidence concluded that it was not possible to make the order sought without going to trial. As already stated above this matter is similar to *WaisakeRatu No. 2* matter and I therefore conclude that it is a proper matter to proceed via a writaction.

Conclusion

The conclusion ought to in my view be that the application to continue the matter as if begun by writ action is granted. It follows that in respect of whether the plaintiff joins another party as a defendant is a matter for them to decide. Given the conclusion it is unnecessary to grant prayer (c). In relation to cost however I am of the view that the defendants should pay for the cost of the application based on the unnecessary delay in making the application.

Orders and Directions

(1). Theapplication to continue the matter as if begun by writ is granted.

(2). That the defendant to pay the cost of this application which is summarily assed at $1000:00.

(3). That the plaintiff do within 21 days file and serve a statement of claim to the defendant.

(4). That the defendant within 21 days thereafter file and serve a statement of defence.

(5). That the matter is further adjourned before me for directions on 18 October 2013.

5 September 2013.

H ROBINSON

MASTER, HIGH COURT, LABASA