

IN THE HIGH COURT OF FIJI  
PROBATE JURISDICTION

Civil Action No. HPP 7 of 2013

BETWEEN : ERNIE STEINER of Labasa, Retired.

PLAINTIFF

AND : JACOB JOHN STEINER JNR of Nukubati Island, Macuata,  
Planter.

DEFENDANT

Appearances : Mr.Sadiq of Sadiq Esq for the Plaintiff  
Mr. Prasad for Trinity Lawyers. for the Defendant  
Ms. Muir for the interested third party

R U L I N G

Introduction

By Summons returnable on the 17 September 2013 the Nukuubati Resort is seeking leave to be joined as an interested party in this proceeding. The application was made under Order 15 rule 6 of the High Court Rules. The prayers as stated in the Summons are:-

- (a) That the Applicant, Nukubati Resort Limited, be joined as an interested party to this action;
- (b) That this Honourable Court make such further directions as it deems necessary or advisable in its discretion;
- (c) That the Plaintiff's Summons be adjourned to another date; and
- (d) That the costs of this application be costs in the cause.

As is required under Order 15 rule 6(3) the application was supported by an affidavit deposed by Mr. Peter Calvert Bourke who states so far as is relevant the following:-

1. That he is a Director and Shareholders of Nukubati Resort Limited, a limited liability company which operates an exclusive tourist resort on Nukubati Island, Macuata, VanuaLevu, known as Nukubati Island Resort.

2. The Resort operates on land leased from the Defendant, Jacob John Steiner, under Registered Lease No. 571162 dated 28<sup>th</sup> July, 2005 and Lease No. 206888 registered 13 October 1983, which was assigned to the resort by the prior lessee on 7<sup>th</sup> May 1991.
3. The Defendant has recently informed me of the legal proceedings brought against him by the Plaintiff in this action.
4. I am informed by the Defendant and I verily believe that ownership of the land on which the Resort is located is in dispute between the Plaintiff and the Defendant.
5. I verily believe that the Plaintiff's action against the Defendant may have serious consequences for the Nukubati Island Resort.
6. I refer to paragraph 9 of their affidavit in Support, of a Summons yet to be heard the Plaintiff alleges that the Defendant had no right to grant a lease to JaganathNanhuJaduram Limited a lease which was latter assigned to the resort.
7. I refer to paragraph 10 of the said Affidavit in Support, in which the Plaintiff alleges that the Defendant had no right to grant a lease to the Resort.
8. From this it appears that the Plaintiff may be seeking to have the Resort's leases declared invalid.

The Plaintiff objects to the application to have the Nukubati Island Resort be a party to the proceedings and filed an affidavit in support of their objection sworn by one Selina Lee Wah of Labasa retired Bank Officer who states so far as is relevant the following:-

1. That she is the attorney of the Plaintiff by virtue of Power of Attorney No. 52328 and is therefore authorised to make this affidavit.
2. That the Plaintiff objects to the application.
3. That the only relief the Plaintiff wants from the action is to:-
  - (a) To have Probate No. 11062 which was granted to PHILLIP also known as PHILLIP STEINER be revoked as it was obtained under a forged Will dated the 26<sup>th</sup> day of December, 1969 (hereinafter called the "said Will").

- (b) That the said Will was executed after the death of JACOB JOHN STEINER SNR.
  - (c) That the said JACOB JOHN STEINER SNR died Intestate.
4. That upon the revocation of the said Probate No. 11062 the Plaintiff intends to apply and obtain the Letters of Administration.
  5. That the Plaintiff has no intention to evict the interested party but to regularize the granting of a lease to the interested party.
  6. That the Plaintiff upon the granting of the proper lease to the interested party intends to distribute the rent money to all the beneficiaries.
  7. That the application of the interested party is misconceived and ought to be struck out with costs.

### The Hearing

The matter was then set down for hearing on the 20 September 2013 at which time both parties addressed the Court on the basis upon which the application is made and the reasons of the objection. The interested party relied on their affidavit and the matters deposed in it and referred also to the following prayers in the Plaintiff's Summons dated 13 June 2013 in which the following orders were sought:-

1. An order restraining the Defendant from mortgaging, transferring or dealing in any way the Nukubati Island which is comprised in Certificate of Title Register Vol 53 Folio 5277.
2. An order for the Defendant to deposit the CT Register Vol 53 Folio 5277 and both Leases, that is Lease No. 206888 and Lease No. 571162 which are both in the name of Nukubati Resort Limited in the Court pending determination of this matter.

In its written submission the applicant submits that the allegation by the Plaintiff is that the Defendant has no right to lease to Nukubati Island would affect its status as the lessee. The Applicant is the current lessee under both leases referred to by the Plaintiff and the allegations contained in the affidavits are directed against the Applicant's leasehold interest in Nukubati Island. The applicant therefore requests the Court to be allowed to be a party so that it can protect its interest.

The Defendants main objection is that as stated in the affidavit in opposition and that is that they do not have any intention to evict the applicant only to regularise the lease to the applicant.

### Consideration

It appears clear to the Court that it was the grant of probate to the Defendant which allowed the Defendant to exercise the power as the Trustee and Executor to proceed to the leasing of the Nukubati Island upon which the resort is built and from which it operates. Therefore any issue which may arise to question the validity of this right in the first place may affect any interest legal or equitable which is derived from the exercise of this right. That is in fact the concern of the applicant. They feel that the lease is now under threat. This may be true if fraud is the issue now threatening the validity of the will however whether this will affect the validity of the lease will be discussed later.

This application is made pursuant to Order 15 rule 6 of the High Court Rules, this provision states:-

### ***Misjoinder and non-joinder of parties (O.15, r.6)***

*6.-(1) No cause or matter shall be defeated by reason of the misjoinder or non-joinder of any party; and the Court may determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.*

*(2) Subject to the provisions of this rule, at any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application-*

*(a) order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party;*

*(b) order any of the following persons to be added as a party, namely-*

*(i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, or*

*(ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.*

*(3) An application by any person for an order under paragraph (2) adding him as a party must, except with the leave of the Court, be supported by an affidavit showing his interest in the matters in dispute or, as the case may be, the question or issue to be determined as between him and any party to the cause or matter.*

*(4) No person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorised.*

*(5) No person shall be added or substituted as a party after the expiry of any relevant period of limitation unless either-*

*(a) the relevant period was current at the date when proceedings were commenced and it is necessary for the determination of the action that the new party should be added, or substituted, or*

*(b) the relevant period arises under the provisions of subparagraph (i) of the proviso to paragraph 4(1)(d) of the [Limitation Act](#) and the Court directs that those provisions should not apply to the action by or against the new party.*

*In this paragraph "any relevant period of limitation" means a time limit under the Limitation Act.*

*(Cap. 35)*

*(6) ...*

The provision of the rules relevant to the applicant is rule 6 (2) (b)(iii) that is the Court may order *any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter to be a party to the proceedings.*

The issue of limitation does not arise regarding the applicant and therefore need not be addressed. It may however affect the action between the Plaintiff and the Defendant, the nature of the cause of action is unusual in this extent.

In the exercise of its discretion under this order the Court would look at whether the applicant would be affected by any relief or remedy which is sought in the proceedings. That is whether there was any nexus between the right of the applicant and the relief or remedy sought or whether the applicant will be prejudiced by the remedy sought and most importantly in my view the relief or remedy which in the opinion of the Court would be just and convenient to determine between him and the other parties. There are conflicting positions taken by the Courts regarding the discretionary power to join, one position is that this power is wide as stated by Master Udit in *Prasad -v- Saheed(2008) FJHC 364*. Although I agree that the rule operates with the general proposition of law that multiplicity of actions arising out of the same

facts need to be dealt with in the one action in my view the correct position was expressed by the Chief Justice Hon. Justice Gates in Prasad -v.- The State it was held there that:-

- (1) *The High Court has narrow jurisdiction to join additional parties. It is necessary for a proposed litigant to depose in his affidavit, firstly, as to the nexus between himself and the matters in dispute in the action, and secondly, the remedy the litigant seeks from the court after joinder has been allowed.*

*In Lucy -v- W. T. Henleys Telegraph Works Co. Ltd Imperial Chemical Industries Ltd [1970] 1 QB393 at 404 p Lord Denningsaid; "It gives the court power to add a person as a defendant if his presence is necessary to ensure all matters in dispute are effectively and completely determine;"". This rule operates in congeniality with the general proposition of law that multiplicity of actions arising out of the same fact amounts to abuse of the process of the Court.*

*It appears that this rule was originally construed so as to effectuate what was one of the great objects of the Judicature Acts, namely, to bring all parties to disputes relating to one subject-matter before the Court at the same time so that the disputes may be determined without the delay, inconvenience and expense of separate actions and trials. Under it the court has power to carry out the intention of the Judicature Acts, namely, to secure the determination of all disputes relating to the same subject matter, without delay and the expense of separate actions.(see paragraph 15/6/2 1999 Supreme Court Rules Vol. 1)*

The question which should be asked is whether the applicant would be affected by the remedy sought by the Plaintiff and what remedy it seeks if the resort is joined. In order to determine this is to look at the matter in dispute and find the nexus between that and the applicant. What is the cause or matter in dispute? The dispute in short is the validity of a will. Obviously the applicant cannot be a party to this dispute because it is between two family members and there is no nexus between the applicant and the family notwithstanding that the lease was subsequently granted by the exercise of a power arising from the grant of probate.

Perhaps the applicant's concern arose from a perceived uncertainty about the status of the lease if the Plaintiff was to succeed in proving that the Will was forged and hence the exercise of the power derived from the grant of probate was invalid. In my view this position is misconceived unless of course it was a party to the forgery of the Will. Further it did not take into account the indefeasibility of the title. None of the parties addressed the indefeasibility issue in their submission in detail except the Plaintiff's counsel who stated that the applicant would not be affected by the determination of the issue between it and the Defendant. All the Plaintiff wants to do is regularise the lease. As far as could be understood the lessee is and remains a bona-fide purchaser of a registered lease and the registration of the lease is conclusive

evidence of ownership and is indefeasible by reason or on account of any informality or in any application or document or in any proceedings previous to the registration of the instrument of title. Section 37 of the Land Transfer Act Cap. 131 states:-

*“ No instrument until registered in accordance with the provisions of this Act shall be effectual to create, vary, extinguish or pass any estate or interest or encumbrance in, on or over any land subject to the provisions of this Act, but upon registration the estate or interest or encumbrance shall be created, varied, extinguished or passed in the manner and subject to the covenants and conditions expressed or implied in the instrument.”*

An instrument is interpreted under section 2 of the Land Transfer Act as :-

*“"instrument" includes every document registered or capable of registration under this Act or in respect of which any memorial is by this Act directed, required or permitted to be entered in the Register Book or endorsed on any registered instrument;”*

A lease is a document registered or capable of registration which could be entered into the Register Book and further a lease is also an instrument of title. Section 2 of the Land Transfer Act further defines an "instrument of title" includes a certificate of title, Crown grant, lease, sublease, mortgage or other encumbrance as the case may be;

The registration of the lease under the Land Transfer Act is conclusive evidence of title and as stated earlier is indefeasible. Section 38 states:-

*Registered instrument to be conclusive evidence of title*

*“ No instrument of title registered under the provisions of this Act shall be impeached or defeasible by reason or on account of any informality or in any application or document or in any proceedings previous to the registration of the instrument of title.”*

For a further reference to this issue see Star Amusement Ltd v Prasad [2013] FJSC 8; Star Amusement Ltd v Prasad [2013] FJSC 8; Given the above the applicant's lease being a registered lease under the Land Transfer Act could not be defeated by reason of any result or determination of the dispute between the Plaintiff and the defendant regarding the validity of the Will. Within this scenario its remedy is unclear against either of the parties to the dispute.

Conclusion

I can therefore conclude given the above reasons that the applicant's application to be joined as interested party should be denied with costs to the Plaintiff which I summarily assess at \$500:00.

The matter is therefore adjourned before me to fix a hearing date for the Plaintiff's summons for interlocutory relief.

Dated at Labasa this 30 September 2013.

H A Robinson  
Master, High Court, LABASA.