IN THE HIGH COURT OF THE REPUBLIC OF FIJI

(WESTERN DIVISION) AT LAUTOKA

Civil Action No. HBC 146 of 2013

BETWEEN : **iTAUKEI LAND TRUST BOARD,** a statutory body duly incorporated under the iTaukei Land Trust Act (Cap 134).

PLAINTIFF

AND : **SOHAN SINGH** and **MAHENDRA SINGH** both of Navatu, Ba, Cultivators, respectively.

DEFENDANTS

Counsel : Mr Lutumailagi for plaintiff

Defendants in person

Date of Hearing : 03 March 2015

Date of Judgment : 28 April 2015

J U D G M E N T

Introduction

[1] This judgment concerns with an originating summons.

[2] By the originating summons dated 28 August 2014 ('OS') the plaintiff seeks the following orders against the defendants:

(a) ***FOR A DECLARATION*** *that the Instrument of Tenancy No. 12077 issued to the Defendants and registered on the 18th June, 2013 for a 30 years agricultural lease effective 1st January, 2013 over the land known and referred to as Veisaru No. 2, be rescinded for mistake, on the grounds that a part, that is to say approximately 2.9754 hectares of the said land, is already leased out to a third party, one Ishok Chand, of Veisaru, Ba, Cultivator under the Instrument of Tenancy No. 7347;*

(b) ***FOR AN ORDER*** *that the Defendants surrender the Instrument of Tenancy No. 12077 to the Plaintiff to enable the Plaintiff to rectify and*

correct the same by reducing the area from 7.2155 hectares to 4.2401 hectares to correlate with the Defendant's actual use and occupation on the ground;

(c) ***FOR AN ORDER*** *that the Defendants play the Plaintiff the costs of this application;*

(d) ***SUCH FURTHER OR OTHER ORDERS*** *as this Honourable Court deems just and expedient;*

[3] The plaintiff filed two affidavits namely affidavit of Soloveni Masi in support of this application and affidavit in reply sworn and filed on 22 January 2015. The affidavits of the plaintiff annexes 12 documents marked **'SMA'** to **'SML'**.

[4] In response, the defendants filed an affidavit sworn by Sohan Singh, first named defendant.

[5] It ought to be noted that the application does not state which authority it is filed under.

[6] At hearing, both parties read and relied on their respective affidavits. Further, only counsel for the plaintiff sought time to file written submissions. The court accordingly granted 14 days for the plaintiff to file its written submissions. But, nonetheless it did not file any.

Background

[7] (a) The plaintiff, iTaukei Land Trust Board ('iTLTB'), is a statutory body established under the iTaukei Land Trust Act (Cap 134) ('iTLTA') and the trustee and administrator of itaukei land by virtue of the provisions of the iTLTA. It is empowered by section 4 of the iTLTA with the powers of control and administration of itaukei land for the benefits of its itaukei owners. S.4 (1) of the iTLTA provides that, the control of all native land shall be vested in the Board and all such land shall be administered by the Board for the benefit of the Fijian owners.

[7] (b) The defendants, Sohan Singh and Mahendra Singh, are lessees by virtue of Instrument of Tenancy No. 12077 (IOT 12077) which covers

an area of agricultural land approximately 7.2155 hectares in the Tikina of Bulu in the Province of Ba. The lease is issued to the defendants for 30 years on 1 January 2013 and registered on 18 June 2013. The plaintiff now says the extent in IOT 12077 was wrongly stated to be 7.2155 hectares and it has to be less than the stated area. The plaintiff seeks order that the defendants surrender their Instrument of Tenancy to the plaintiff to enable the Plaintiff to rectify and correct the same by reducing the area from 7.2155 hectares to 4.2401 hectares to correlate with the Defendant's actual use and occupation on the ground.

Plaintiff's Evidence

[8] Through affidavit evidence the plaintiff states that, before the issuance of the lease to the defendants, a third party by the name of Manito Naulivou of Nailaga, Ba, Farmer held a lease to the adjoining land, by virtue of Instrument of Tenancy No. 7347 (IOT 7347) covering an area of agricultural land approximately **5.3834hectares** with effect from 1 January 2001. The IOT 7347 was registered on 11 July, 2001. The plaintiff further states that, due to typographical error, the IOT 7347 was wrongly stated to be for an area of **2, 4080 hectares**. The IOT 7347 was transferred for a consideration of $3,000 to a third party, namely Ishok Chand, on 17 September, 2007. In October 2008, the third party, Ishok Chand, wrote to the Plaintiff with an enquiry regarding the arrears accumulating for the ground rent of the land in question ("SMD").

[9] It was also the plaintiff's evidence that, the Plaintiff caused a site inspection to be conducted on the said land to look into the grievance raised by Ishok Chand and it was confirmed at the site inspection that the actual areas supposed to be covered under IOT 7347 was 5.3825 and not 2.4080 hectares as averred. The affidavit evidence further states that, there was a **mistake of fact** as to the subject matter of IOT 7347 as it should have been for an area of 5.3835 hectares and not 2.4080 hectares.

[10] The affidavit of the plaintiff goes on to state that, by letter dated 20th June 2011, the Plaintiff advised the Sugar Cane Growers Fund ('SCGF') as mortgagee of the facts and requested the return of the IOT 7347 to enable it to rectify and amend its area. SCGF released the said IOT 7347 to the Plaintiff.

[11] The plaintiff further states in its affidavit that, on the said IOT 12077 was also issued by the Plaintiff by mistake as it purported to lease out to the defendants a part of the land in question, that is to say approximately 2.9754 hectares, that was already been held by Ishok Chand under IOT 7347. Upon realizing this mistake, the plaintiff requested the defendants to surrender their lease to enable the plaintiff to rectify and correct the same to solve the issue amicably.

Defendants' evidence

[12] The defendants in their affidavit state that, the area given to the third party by the plaintiff was only 2.4080 hectares and not 5.3834 hectares. The third party got the lease in 2001 and since then he is cultivating only 2.4080 hectares and the rest of the area was still vacant. They were offered iTaukei land known as Veisaru No.2 of BULU for an area of 7.2155 and asked to pay $2,000.00 and $500.00 as premium and rent respectively. Their area should not be reduced after issuing lease on the ground of mistake.

The Law

[13] The originating summons filed by the plaintiff does not state which authority the application is made under.

[14] O.7 of the High Court Rules (HCR) carries general provisions in it in relation to originating summonses and should be read with O.28, which deals with procedure and provides a general code regulating proceedings by originating summons. O.7, r.3 states that, every originating summons must include a statement of the questions on which the plaintiff seeks the determination or direction of the High

Court or, as the case may be, a concise statement of the relief or remedy claimed in the proceedings begun by the originating summons with sufficient particulars to identify the cause or causes of action in respect of which the plaintiff claims that relief or remedy.

[15] Order 5 of the HCR deals with the ***'Mode of Beginning Civil Proceedings'.*** Rule 2 sets out the ***"Proceedings which must be begun by Writ."*** Rule 3 deals with ***"proceedings which must be begun by originating summons "***. Rule 4 provides for *"proceedings which may be begun* ***by writ or originating summons "***. (Underlining provided).

[16] Presumably, the present proceedings by originating summons appear to have begun under Rule 4 which provides as follows:-

'4. - (1) Except in the case of proceedings which by these Rules or by or under any Act are required to be begun by writ or originating summons or are required or authorised to be begun by petition, proceedings may be begun either by writ or by originating summons as the plaintiff considers appropriate.

(2) Proceedings -

(a) in which the sole or principal question at issue is, or is likely to be, one of the construction of an Act or of any instrument made under an Act, or of any deed, will, contract or other document, or some other question of law, or

(b) in which there is unlikely to be any substantial dispute of fact,

are appropriate to be begun by originating summons unless the plaintiff intends in those proceedings to apply for judgment under Order 14 or Order 86 or for any other reason considers the proceedings more appropriate to be begun by writ.' (Underlining provided).

[17] Interestingly, O.28, r.9 of the HCR provides that:

"9. - (1) Where, in the case of a cause or matter begun by originating summons , it appears to the Court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause or matter had been begun by writ, it may order the proceedings to continue as if the cause or matter had been so begun and may, in particular, order that any affidavits shall stand as pleadings, with or without liberty to any of the parties to add thereto or to apply for particulars thereof.

(2) Where the Court decides to make such an order, Order 25, rules 2 to 7, shall, with the omission of so much of rule 7(1) as requires parties to serve a notice specifying the orders and directions which they require and with any other necessary modifications, apply as if there had been a summons for directions in the

proceedings and that order were one of the orders to be made thereon.

(3) This rule applies notwithstanding that the cause or matter in question could not have been begun by writ.

(4) Every reference in these Rules to an action begun by writ shall, unless the context otherwise requires, be construed as including a reference to a cause or matter proceedings in which are ordered under this rule to continue as if the cause or matter had been so begun."

Discussion

[18] By originating summons, the plaintiff seeks a declaration that the instrument of tenancy issued to the defendants for 30 years agricultural lease effective 1 January 2013 over the land known and referred to as Veisaru No.2 be rescinded for mistake, on the ground that a part of approximately 2.9754 hectares of the said land, is already leased out to a third party under an instrument of tenancy, and an order that the defendants surrender their Instrument of Tenancy to the plaintiff to enable the plaintiff to rectify and correct the same by reducing the area from 7.2155 hectares to 4.2401 to correlate with the defendants' actual use and occupation on the ground. The second order seems to be one in the nature of mandatory injunction.

[19] It ought to be noted that the third party (Ishok Chand) is not a party to this action. For one reasons or other the third party was not made a party to these proceedings. Maybe, because he had already surrendered his instrument of tenancy for correction on the belief that he will apparently get more area than stated in his instrument of tenancy by scraping from the defendants' land.

[20] This action, it appears, had stemmed following an inquiry made by the third party about his arrears of rent. In October 2008 by a letter (Exhibit 'SMD') the third party had inquired on the rental account and had requested a detailed explanation of his Land Rental Account which he maintains with the plaintiff regarding the arrears he had been charged. It will be noted he had never raised an issue with regard to

extent of land covered by the instrument of tenancy issued to him in 2007.

[21] By letter dated 25 February 2013 (Exhibit 'SMH'), the plaintiff offered the defendants an agricultural lease over iTaukei Land known as Veisaru No.2 of Bulu covering an area of approximately 7.2155. The defendants accepted the offer by making payment of necessary fees and rent including premium of $2,000.00. The plaintiff thereupon issued the Instrument of Tenancy with plan annexed for the land area of 7.2155 for 30 years commencing 1 July 2013.

[22] The plaintiff in its evidence states that, it conducted a site inspection and redefinition of the land in question on 16 May 2014 and confirmed the discrepancy of the area. It is doubtful whether one can confirm the discrepancy of the area without proper survey being done by a qualified surveyor. The plaintiff simply states that the discrepancy was discovered by an inspection. Even it is not clear who had conducted the inspection. Hence the proposition that the discrepancy of the area was discovered by an inspection is unacceptable.

[23] Unsurprisingly, the plaintiff seeks to rectify a mistake of fact through an action begun by originating summons. An action by originating summons is more appropriate where there is unlikely to be any substantial dispute of fact, see HCR O.5, r. 4 (2) (b) which provides that, proceedings in which there is unlikely to be any substantial dispute of fact, are appropriate to be begun by originating summons.

[24] Rule 4 (a) provides that, proceedings in which the sole or principal question at issue is, or is likely to be, one of the construction of an Act or of any instrument made under an Act, or of any deed, will, contract or other document, or some other question of law are appropriate to be begun by originating summons.

[25] The sole or principal question at issue, in this matter, is not the construction of the Instrument of Tenancy given to the defendants or there is no issue involving any question of law. The principal question at issue here is that whether the plaintiff is entitled to rescind the Instrument of Tenancy by reasons of mistake of fact. The plaintiff itself states that the area mentioned in the defendants' lease was overstated by reasons of mistake of fact. So, it is obvious that there is no any construction of the instrument. Amendment or correction in the extent of the lease will not, in my view, amount to construction of the instrument. An instrument of tenancy means the writing evidencing a contract of tenancy, see s.2 of the ALTA. Any amendment or addition to the instrument may be possible by a mutual agreement by the parties.

[26] The plaintiff has chosen to begin these proceeding by originating summons though there is dispute of facts because the plaintiff has left with options as to how the proceedings should be begun. The plaintiff may begin proceedings by originating summons even where there is likely to be dispute of facts, see **Singh v Singh**[1994] FJHC 196; [1994] 40 FLR 156 (4 October 1994).

Applicability of Agricultural Landlord and Tenancy Act (ALTA)

[27] The instrument of tenancy has been issued to the defendants under the ALTA. The ALTA will apply to all agricultural land in Fiji except agricultural holdings having an area of less than 1 hectare, see s.3 (1) (a) of the ALTA. The land area covered under the instrument of tenancy issued to the defendants is approximately 7.2155 hectares. The provisions of the ALTA therefore will apply to the instrument of tenancy issued to the defendants.

[28] Under ALTA, every instrument of tenancy is issued with certain statutory conditions and covenants. S. 9 (1) of the ALTA provides that:

***9.**-(1) The following conditions and covenants shall be implied in every contract of tenancy of an agricultural holding subsisting at or after the commencement of this Act:-*

...

(2) Every contract of tenancy shall be deemed to contain the following clause:-

"This contract is subject to the provisions of the Agricultural Landlord and Tenant Act, and may only be determined, whether during its currency or at the end of its term, in accordance with such provisions. ***All disputes and differences whatsoever arising out of this contract,*** *for the decision of which that Act makes provision,* ***shall be decided in accordance with such provisions.***"(Emphasis provided).

[29] Agricultural Tribunals ('AT') are established by the ALTA to deal with any dispute arising out of the contract of tenancy. The AT may exercise all the powers of a magistrate's court in its summary jurisdiction. S. 18 of the ALTA provides that:

'18.-(1) A tribunal shall have power-

(a) to exercise all the powers of a magistrates' court in its summary jurisdiction of summoning and enforcing the attendance of witnesses, examining witnesses on oath, and enforcing the payment of costs and the production of documents;

(b) ...
(c) ...
(d) ...'

[30] In exercising its jurisdiction a tribunal may declare the tenancy granted by the landlord to the tenant as being null and void and may make any determination or order that a tribunal may make under the provisions of the ALTA. S. 18 (2) of the ALTA states that:

'(2) **Where a tribunal considers that any landlord or tenant is in breach of this Act or of any law, the tribunal may declare the tenancy** or a purported tenancy granted by such landlord or to such tenant as aforesaid, **null and void** and may order such amount of compensation (not being compensation payable under the provisos of Part V) paid, as it shall think fit, by the landlord or by the tenant, as the case may be, and may order all or part of the agricultural land the subject of an unlawful tenancy to be assigned to any tenant **or may make any determination or order that a tribunal may make under the provisions of this Act** (Emphasis added).'

[31] In this case, the plaintiff is seeking to rescind the instrument of tenancy granted to the defendants on the ground that the area of land therein mistakenly over mentioned. As I mentioned earlier, the defendants were offered for agricultural holdings for approximately 7.2155 and they accepted the offer accordingly, made the necessary payments and were granted the instruments of tenancy. The plaintiff turns around and takes the stance that that was not the actually intended area of land for the defendants. In fact, if there is any dispute between the plaintiff and the defendants with regard to area and boundary, the plaintiff could have easily made an application for declaration and order under s.18 (3) of the ALTA which reads as follows:

'(3) **Any application to a tribunal for a declaration**, for compensation or for the ordering of the making of an assignment **or other order or determination** under subsection (2) may be made notwithstanding the provisions of subsection (3) of section **59** but nothing contained herein shall be deemed to permit the ordering or making of an assignment in breach of the provisions of the Subdivision of Land Act or which would otherwise be unlawful.'

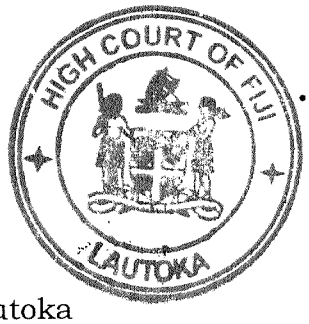
[32] The plaintiff seeks declaration against the defendants that the instrument of tenancy granted to them to be rescinded on the ground of mistake. The defendants have asserted no right against the plaintiff nor formulated any specific claim. A declaration will not be granted against a person who has asserted no right against the plaintiff nor formulated any specific claim, see **Mellstrom v Garner** [1970] 2 All ER 9.

[33] The plaintiff could have made its application to the Agricultural Tribunal for a declaration or other order or determination in relation to the instrument of tenancy issued to the defendants. The Agricultural Tribunal has jurisdiction to deal with such application under s.18 (3) of the ALTA. A declaratory judgment will not be granted where the relevant statute gives exclusive jurisdiction to another tribunal, see **Everret v Griffiths** [1924] 1 KB 941.

[34] For all these reasons, I would dismiss the originating summons filed by the plaintiff on 28 August 2014 with summarily assessed costs of $350.00.

Final Outcome

1. The originating summons filed by the plaintiff on 28 August 2014 is dismissed.
2. The plaintiff will pay the defendants summarily assessed costs of $350.00.
3. Orders accordingly.



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M H Mohamed Ajmeer

Judge

At Lautoka

28 April 2015.