

IN THE HIGH COURT OF FIJI AT SUVA

CIVIL JURISDICTION

Civil Action No. 185 of 2016

BETWEEN

JITENDRA PRASAD of 2244 Cooley Avenue, East Palo Alto,
CA 94303, USA, Chef.

PLAINTIFF

AND

DINESH PRASAD of 66, Bureta Street, Suva, Unemployed.

DEFENDANT

Counsel : Mr. A. Pal for the plaintiff.
Mr. A. Singh for the Defendant.

Date of Hearing : 08th November, 2016

Date of Order : 06th December, 2016

ORDER

(On the application for preservation of property)

- [1] The plaintiff and the defendant entered into a sales and purchase agreement for the defendant to sell the property comprised in iTaukei agreement to lease No. 4/14/8162 in extent of 408 square meters with the building. On 04th January, 2016 the defendant executed the transfer instrument and the consent to assign form.
- [2] The plaintiff was later informed by the TLTB officers that the house is situated outside the boundaries of the land in question. The plaintiff instituted this action to recover the value of the property which was \$65,000.00 and other incidental expenses incurred by the plaintiff.
- [3] The plaintiff on 19th September, 2016 filed an application for preservation of property under and in terms of Order 29 rule 2 and Order 32 rule 1 of the High Court Rules.
- [4] Order 29 rule 2(3) of the High Court Rules provides that where the right of any party to a specific fund is in dispute in a cause or matter, the Court may, on the application of a party to the cause or matter, order the fund to be paid into court or otherwise secured.
- [5] At the commencement of the hearing the learned counsel for the defendant objected to the plaintiff's affidavit in reply on the ground that it was filed after the day allocated for filing of the same. However, later the learned counsel informed court that he would discuss with the learned counsel for the plaintiff as to what paragraphs that should be struck out from the affidavit and inform court in writing before 11th November, 2016, but they did not file any such paper. Therefore, I will prepare the order on the basis that there was no objection to the affidavit.
- [6] The learned counsel for the plaintiff submitted that this application is similar to an application for a freezing or *Mareva* injunction. Freezing injunctions are issued to preserve the properties of the defendant to prevent him from disposing of them with the intention of defeating the judgment which would finally enter in favour of the plaintiff, after taking into consideration whether (1) the plaintiff has a good arguable case; (2) the assets of the defendant are within the jurisdiction of this court and (3) there is a real risk of removal or disposal of the assets.

- [7] In the instant case since there is no application to freeze the assets of the defendant the grounds No. (2) and (3) above do not arise for consideration.
- [8] I will now consider whether the plaintiff has a good arguable case. At this stage it is important to consider the lease agreement entered into between the plaintiff and the Native Land Trust Board. This agreement describes the land in question as follows;

Name of Land	-	Naikakawalu (part of)
Tikina	-	Namata
Province	-	Tailevu
Area	-	408 Square Meters

- [9] There is a sketch attached to this lease agreement but no boundaries are shown. Only the length and the width of the land are given.
- [10] The plaintiff does not allege fraudulent misrepresentation on the part of the defendant. It is averred in the affidavit in reply of the defendant that he acquired this land by an agreement of lease from the previous lessee on 12th September, 2011 and at that time the land was vacant as the building and the other improvements on the land had been destroyed by fire. He averred further he constructed the present house on the foundation remaining on the land on the belief that it was within the boundaries.
- [11] Clause 26 of the agreement reads as follows:

This agreement forms the whole of the agreement between the parties respecting the subject matter hereto and no representation, warranty or statement not included or specifically provided for herein shall form part of the agreement between the parties.

- [12] In the circumstances the defendant cannot be faulted for not identifying the land before entering into the agreement. The plaintiff, after examining the lease agreement and the sketch attached to it, should have known that the boundaries are not properly depicted on the sketch. In such circumstances he should have asked the plaintiff to demarcate the boundaries before purchasing it.

- [13] The learned counsel for the plaintiff relied on clause 9 of the sale and purchase agreement which provides that the vendor shall be required to point out the boundaries or the survey pegs of the property to the purchaser.
- [14] The plaintiff also relied on clause 22(b) of the sale and purchase agreement which provides that no delay or omission by any party to this agreement to the exercise of any of the rights accruing to that party shall operate as a waiver of any breach or default by the defaulting party of any such provisions.
- [15] This is the very reason why the plaintiff should have waited without purchasing the property before the defendant pointing out the boundaries.
- [16] Since the defendant has failed to point out the boundaries or survey pegs to the plaintiff he should not have purchased the property. There had been no compelling reason for the plaintiff to purchase the property without first ascertaining the boundaries and if he does so he is doing it at his own risk.
- [17] For the above reasons I hold that the plaintiff does not have a good arguable case and make the following orders:
1. The application of the plaintiff seeking an order on the defendant to pay \$65,000.00 into court, pending the determination of this action is refused.
 2. The plaintiff shall pay the defendant \$500 as costs of this application within 14 days from today.


Lyone Seneviratne,

JUDGE



06th December, 2016.