

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

CIVIL ACTION NO: HBC 207 of 2016

BETWEEN : **SARAT INVESTMENTS LIMITED** a limited liability company
having its registered office at Gulam Nabi Street, Nausori,
Fiji.
PLAINTIFF

A N D : **ABDUL SADIQ HUSSEIN** a.k.a. **ABDUL SADIQ HUSSAIN**
a.k.a. **ABDUL SADIQ HUSSAIN** of 19 Dunstan Street,
Nausori, Fiji, Businessman.
DEFENDANT

BEFORE : Justice Riyaz Hamza

COUNSEL : Mr. V. M. Mishra with Mr. R. Prakash for the Plaintiff
Mr. B. C. Patel with Mr. R. Singh for the Defendant

RULING

[1] This is an application made by the Plaintiff, by way of a Writ of Summons. The Writ of Summons, together with a Statement of Claim, was filed in Court on 12 August 2016.

[2] In the Statement of Claim the Plaintiff states as follows:

1. The Plaintiff is a limited liability company, incorporated under the Companies Act, and engaged mainly in supermarket business in Nausori, Fiji.
2. That the Defendant is the registered proprietor as to one undivided half share of all that piece of land comprised in Certificate of Title No. 16726, known as "Lagobokola" (part of), being Lot 28 on Deposited Plan No.

1459, situated in the District of Nausori and containing an area of 34.5 perches ("the Land").

3. The Defendant represented to the Plaintiff that the other one undivided half share of the Land was held in the name of his deceased brother Ayad Hussain and the Defendant was beneficially entitled and was to take the transfer of that share of the deceased brother to become the sole proprietor of the Land.
4. That by an Agreement to Lease executed and dated 21 March 2014, the Defendant agreed to lease out the Land to the Plaintiff for a term of 25 years, for the purpose of constructing a commercial building thereon to be used as a supermarket by the Plaintiff ("the Agreement").
5. Pursuant to the terms of the Agreement, the Defendant agreed with the Plaintiff, inter alia:
 - (a) that the Plaintiff will on the basis of the Agreement obtain a bank loan for the construction of a commercial building.
 - (b) the Defendant will execute a mortgage over the leased Land to enable the Plaintiff to obtain the funding required for the construction of a commercial building.
 - (c) to execute a further and detailed lease agreement incorporating the essential terms and finer details.
6. That the Defendant further agreed with the Plaintiff that the Agreement would come into effect upon execution and it was a special condition of the Agreement that the Plaintiff was entitled to place a Caveat over the Land during the term of the lease.
7. That to protect its interests in the leased Land and pursuant to the terms of the Agreement the Plaintiff lodged a Caveat on the subject land comprised in Certificate of Title No. 16726, which Caveat was registered on 28 August 2014 and numbered 802828.
8. That the Agreement has not been terminated and the same is in full force and effect.
9. The Plaintiff has at all times been ready and willing to carry out and comply with the terms of the Agreement. However, the Defendant has failed and/or refused to do the same in breach of the Agreement, the particulars of which are:

- a) The Agreement was executed on 21st March 2014 but the Defendant has failed and/or refused to permit the Plaintiff to construct on the Land and/or obtain approvals of relevant authorities for construction of the commercial building;
 - b) The Agreement was executed on 21st March 2014 but the Defendant has failed and/or refused to give access to the Plaintiff to the Land;
 - c) Since the execution of the Agreement, the Defendant has failed and/or refused to execute a mortgage for the purpose of obtaining finance for construction of the commercial building;
 - d) The Defendant has failed and/or refused to execute a further and detailed lease of the essential terms.
10. That as a result of the non-cooperation of the Defendant and the above said breaches of the Agreement, the Plaintiff was unable to obtain finance from the bank for the construction of the commercial building on the Land.
 11. That as a consequence of the acts and/or omissions of the Defendant, the Plaintiff has suffered inconvenience, loss and damages. The Plaintiff continues to suffer loss and damages and the full particulars of the special damages will be provided before the trial of the action.
 12. That the Defendant has applied to the Registrar of Titles for a Removal of Caveat No. 802828 and a Notice of Removal of Caveat, dated 5 July 2016, has been issued to the Plaintiff pursuant to the provisions of Section 110 of Land Transfer Act Cap 131.
 13. That the Plaintiff claims from the Defendant a specific performance of the Agreement and/or alternatively damages for breach of the Agreement.
 14. The Plaintiff further claims interests under the Law Reform (Miscellaneous Provisions) (Death and Interest) Act Cap 27, Laws of Fiji on any damages awarded.

[3] Accordingly, the Plaintiff has claimed:

- (a) An order for Specific Performance of the Agreement dated 21 March 2014, and that the Defendant do execute all documents and deeds and

carry out all acts to grant a proper lease over Certificate of Title No. 16726; and/or

- (b) Alternatively damages for breach of agreement;
- (c) General damages;
- (d) Interest on damages under the Law Reform (Miscellaneous Provisions) (Death and Interest) Act Cap 27;
- (e) An order for injunction restraining the Defendant and/or by his servants or agents or howsoever from selling, disposing and/or creating any encumbrances and/or dealing with the subject land on Certificate of Title No. 16726 until the determination of this action;
- (f) An order for extension of Caveat No. 802828 on Certificate of Title No. 16726;
- (g) Such further or other order as the Court deems just; and
- (h) Costs of this action.

[4] At the time of filing the Writ of Summons, together with a Statement of Claim, the Plaintiff also filed an Ex-Parte Summons seeking the following Orders from Court:

1. That Caveat No. 802828 on Certificate of Title No. 16726 by the Plaintiff is extended and do remain on the said title until further order of the Court.
2. And that the costs of this application be costs in the cause.

[5] The Summons was supported by an Affidavit, dated 12 August 2016, and deposed to by Prashil Sarnit Verma, a company Director of the Plaintiff Company.

[6] Having heard Counsel for the Plaintiff and being satisfied that Caveat No. 802828 should be extended, on 12 August 2016, this Court made the following orders:

1. The Ex-Parte Summons is made Inter-Parte and the Plaintiff to serve the Summons on the Defendant.
2. Caveat No. 802828 on Certificate of Title No. 16726 by the Plaintiff is extended and to remain on the said title until the disposal of the Inter-Parte Summons.
3. The matter be mentioned for Tuesday 23rd day of August 2016 at 10.30am.

- [7] On 2 September 2016, the Defendant filed his Statement of Defence and Counter Claim. Court granted Leave for the Defendant to file an Amended Statement of Defence and Counter Claim, which was filed on 28 October 2016. On 21 November 2016, the Plaintiff filed their Reply to the Amended Statement of Defence and Counter Claim.
- [8] In addition, on 28 October 2016, the Defendant filed a Supplementary Affidavit in Opposition, in response to the Affidavit filed by Prashil Sarnit Verma.
- [9] The Counsel for the Plaintiff submitted to Court that the Plaintiff would not be filing any further Affidavit in Reply.
- [10] The Inter-Parte Summons was taken up for hearing before me on 27 February 2017 and 7 April 2017. Counsel for Plaintiff and Defendant were heard. Both parties filed comprehensive written submissions and referred to several case authorities which I have had the benefit of perusing.
- [11] The Plaintiff is claiming that it has a caveatable interest in the Defendant's land comprised in Certificate of Title 16726 by virtue of the Agreement to Lease, dated 21 March 2014.
- [12] The main issue for determination in this case is whether the Agreement dated 21 March 2014 is an Agreement for a lease or is an Agreement to agree. A caveatable interest would arise if the Agreement dated 21 March 2014 is an Agreement for lease.
- [13] The Plaintiff claims that they have a caveatable interest on the property and that the onus of proof on the Plaintiff at this interlocutory stage of the proceedings is only to show that the Plaintiff has serious questions to be tried and that the balance of convenience is in favour of the Caveat remaining until the trial of this action.
- [14] Accordingly, the Plaintiff submits that the Caveat be allowed to remain on Certificate of Title 16726, until the full trial of this action when the Court can hear all the

evidence and make final findings of facts and on credibility after hearing the witnesses.

- [15] The Defendant submits that the Plaintiff has no caveatable interest in Certificate of Title 16726 to support the Caveat 802828. The Defendant further submits that Caveat 802828 should be removed from Certificate of Title 16726 and the Plaintiff's claim and the Defendant's counter claim should be allowed to proceed in the normal way.
- [16] It has been brought to my attention that pursuant to the parties filing a Summons to Enter Action for Trial, in terms of Order 34, Rule 3 of the High Court Rules 1988 this matter has now been allocated to another Judge to fix for trial.
- [17] In the circumstances, I am of the opinion that any order I pronounce in relation to the Inter-Parte Summons at this stage of the proceedings would be detrimental to the parties.
- [18] In any event, in making a determination as to whether the Caveat 802828 on Certificate of Title 16726, should be removed or extended, it will be necessary to determine the status of the Agreement, dated 21 March 2014, entered between the parties. In my view the best forum for this matter to be adjudicated upon would be at the trial of this action when Court would have the opportunity to hear all the evidence presented by both parties.
- [19] Therefore, I am of the opinion that the Caveat No. 802828 on Certificate of Title No. 16726 should remain on the said title until the final determination of these proceedings.
- [20] Accordingly, I make the following Orders:

ORDERS

1. Caveat No. 802828 on Certificate of Title No. 16726 to remain on the said title until the final determination of these proceedings.

2. I make no order for costs.



A handwritten signature in cursive script, appearing to read "Riyaz Hamza".

Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

At Suva
This 19th day of July 2019