

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 355 of 2018

- BETWEEN** : 1. **ANIL KUMAR** of Koroqaqa, Baulevu, Nausori, Farmer.
2. **SURESH PRASAD** of Koroqaqa, Baulevu Road, Nausori, Farmer and works in Customs of EFL.
3. **SALESH KUMAR** of Koroqaqa, Baulevu Road, Nausori, Taxi Driver.

PLAINTIFFS

- AND:** 1. **DIRECTOR OF LANDS AND SURVEYOR GENERAL** of Nasese, Suva.
2. **EKEVATI SAUMUDU** of Koroqaqa, Nausori, Surveyor with Lands Department.
3. **REGISTRAR OF TITLES** of Suvavou House Victoria Parade, Suva.
4. **THE ATTORNEY GENERAL OF FIJI** of Suvavou House, Victoria Parade, Suva.

DEFENDANTS

Counsel : **Plaintiffs: Mr. Sunil Kumar**
: **First, Third, and Forth Defendants: Ms. S. Taukei with Mr. B. Sharma**
: **Second Defendant Ms. N. Raikaci**
Date of Hearing : **13th and 14th of July, 2020**
Date of Judgment : **31.7.2020**

JUDGMENT

INTRODUCTION

1. Plaintiffs were relatives and cultivated a land subjected to an Approval Notice of Lease (ANL) comprising an area of approximately thirteen acres (4.5653 ha). This ANL was granted in 1973 to late Ram Kumar, who was the late father of first Plaintiff and he obtained transfer of the said ANL from the administrator of his late father's estate in 1996. He had allowed two of his cousin brothers to cultivate and also to reside on the same land, without seeking regularizing and seeking approval in terms of ANL. Second and third Plaintiffs were children of the uncles of the Plaintiff who had occupied in

separate houses and also cultivated separate areas on the land with the concurrence of first Plaintiff but none had obtained consent form the Director of Lands (DOL) for building and or residing in houses build on land and or for cultivation in said land. The land was an agricultural land and Protective Lease in terms of State Lands Act 1945 and statutory extension in terms of Section 13 of Agricultural Landlord and Tenant Act 1966 was granted in 1984 effective for 1.7.1982 for twenty years. Before expiration of the said statutory extension, in 2002 Plaintiffs sought an extension of that and or registered lease, which was denied by DOL's letter of 3.7.2002 where first Plaintiff was informed that land comprised in ANL will be subdivided and he will only be given a portion of that. First Plaintiff had replied to said letter on 31.7.2002 and requested a registered lease for entire land under expired ANL. In 2010 all three Plaintiffs requested to subdivide entire land under expired ANL among themselves as they had already cultivating and was also living separately. DOL had divided land in to two parts and fresh ninety nine year lease was issued to the first Plaintiff, and second Defendant was granted ANL for 2.1993 ha (the remaining part of land under expired ANL subjected) for thirty years. Subsequently, he was issued with a registered lease for the remaining period. Having accepted and paid for the said offer by first Plaintiff for the subdivided portion of land under ANL given to him, this action was filed by him along with his cousin brothers, seeking to reclaim lease granted to second Defendant. It is trite law that in order to reclaim registered title granted to second Defendant, first the registered title granted to second Defendant needs to be cancelled. Plaintiffs had alleged fraud and or negligence on the part of Defendants for cancellation of title to second Defendant. It was admitted fact at the hearing all the Plaintiffs were occupying as well as cultivating the land subjected to ANL granted to late Ram Kumar. Only first Plaintiff, as the trustee of the estate of late Ram Kumar, was legally entitled to occupy and or cultivate the land hence all of them were violating conditions of ANL, as well as Section 13 of the State Lands Act 1945. Plaintiffs failed to prove fraud and or negligence on the part of the Defendants for reclaim of registered lease granted to second Defendant. As Plaintiffs had violated statutory provisions as well as terms of the contracts they cannot seek remedy under equity for damages. Land was a scarce resource hence distribution of that was a Policy decision of DOL. Late Ram Kumar was not given a registered lease from 1.7.1972, and was given only ANL and land area was not surveyed and approximately it was thirteen acres. This was an agricultural land statutory extension expired in 2002. After that first Plaintiff was informed that said land will be subdivided and he will be given a portion and accordingly he was granted 2.3776 ha for 99 year lease. Plaintiffs who had violated conditions of ANL cannot have exclusive rights to an expired ANL and cannot claim said land which they occupy and cultivated illegally. There was no promise or intimation that he would be given entire land after expiration of ANL in 2002. Land needs to be subdivide due to increase of population and other factors, so any subdivision of agricultural land under ANL after expiration of statutory extension cannot be considered fraud. Agricultural Land utilization and distribution by DOL was purely a policy consideration. In my mind there was no fraud committed in first Defendant granting part of land to the second Defendant. Plaintiffs who had violated conditions of expired ANL, cannot complain that land was not given to them

exclusively. Second Defendant who was and ex-employee of Lands Department had not committed a fraud in his application for a land and he said that he was given a portion of land that was prone for floods and used as grazing by Plaintiffs as well himself. Though he had access to information regarding lands and had also checked the availability of the said land for lease that cannot be considered as a fraud to cancel his registered title. Even if I am wrong on that, Plaintiffs' first claim was to reclaim and that fails as they had violated conditions of ANL prior to expiration of that in 2002. So there was no room for Plaintiffs' claim for aggravated and or punitive damages.

Facts of the Case

2. ANL bearing LD Ref. No. 4/14/1494 of the state land situated at Lot 1656, Koroqaqa, Baulevu, granted to late Ram Kumar in 1973 effective from 1.7.1972. It was an agricultural land and was subjected to Agricultural Landlord and Tenant Act 1966.
3. Initial ANL for ten years and it was subsequently extended in terms of Section 13 of Agricultural Landlord and Tenant Act 1966 for thirty years from 1.7.1982.
4. ANL granted to the late Ram Kumar, was transferred to the 1st Plaintiff on 30.12.1996 by the administrator of the estate of late Ram Kumar.
5. The 2nd and 3rd Plaintiff are the 1st Plaintiffs cousins and they were not authorized and or sought regularizing their presence on the land in terms of the said ANL any time prior to the expiration of said ANL.
6. ANL expired on 1.7.2002 after the statutory renewal of 20 years from 1982.
7. Before expiration of ANL first Plaintiff sought a registered lease and or extension of ANL from DOL for which he was informed that both requests were declined and that the land subjected to ANL granted to him would be subdivided and only a portion would be given on registered lease.
8. The lease was not renewed and the DOL subdivided the same land into two Lots and one comprising of 2.377 ha was offered for 99 year lease from 1.7.2002 and this was accepted by first Plaintiff unconditionally. This was subsequently registered in the name of first Plaintiff.
9. A part of land earlier subjected to expired ANL, was granted to the second Defendant, an employee of the Department of Lands, at that time under a fresh ANL for thirty years from 1.1.2013.
10. Second Defendant was granted registered lease for the remaining period of his ANL for land area of 2.5744 ha.

11. By the writ and statement of claim filed on 21. 11. 2018, the Plaintiffs claim amongst others, that the lease to the 2nd Defendant was issued through the fraudulent conduct of the 1st and 2nd Defendants. That the actions of the first and second Defendants are deceitful and tainted with fraud.
12. The Plaintiffs seek the following orders:
 - a. that the land allocated to the second Defendant be reverted to the Plaintiffs and be equally divided into three separate leases as requested by them in 2010;
 - b. aggravated and punitive damages against 1st and 2nd Defendants for making the Plaintiffs run from pillar to post to get information in regards to their wrongful doing;

ANALYSIS

13. At the outset it should be noted that Plaintiffs had not sought cancellation to title to second Defendant, but this technicality should not prevent me from consideration of merits of this action and neither party had raised this issue. It is axiomatic that Plaintiffs were seeking to cancel the registered lease of second Defendant, and by the same token seeking that land to be given to them in equal shares.
14. Plaintiffs were also seeking an order of the court to subdivide the same land under ANL which expired in 2002. They requested to subdivide entire land are under expired ANL equally on 20.9.2010. Apart from cancellation of registered tile of second Defendant first Plaintiff's title for 99 year lease also needs to be altered, too. These were technical defects in the pleadings, but I will not consider them as to refuse the claim *in limine* considering the circumstances of the case.
15. Counsel for first and third and forth Defendants raised a preliminary objection as to the jurisdiction of the court to deal with the action in the absence of consent of DOL for this action in terms of Seciton13 of State Lands Act 1945 states

Section 13— Protected Leases

“13. -(1) Whenever in any lease under this Act there has been inserted the following clause:

“This lease is a protected lease under the provisions of the Crown Lands Act” (hereinafter called a protected lease) it shall not be lawful for the lessee thereof to alienate or deal with the land comprised in the lease of any part thereof whether by sale, transfer or sublease or in any other manner whatsoever, nor to mortgage, charge or pledge the same, without the written consent of the Director of Lands first had and obtained, nor, **except at the suit or with the written consent of the Director of Lands, shall any such lease be dealt with by any court of law** or under the process of any court of law, nor, without such consent as aforesaid, shall

the Registrar of Titles register any caveat affecting such lease,

Any sale, transfer, sublease, assignment, mortgage or other alienation or dealing effected without such consent shall be null and void.”(emphasis is mine)

16. Defendants had submitted several cases, but none of them state that action should be dismissed for want of consent of the DOL. This was not the same as requirement for consent when a person was dealing with land such as transfer or mortgage. An action can end with an order to deal or otherwise. So there was no bar for a party to institute an action specially when the DOL was a party to the action. Consent of DOL was not a prerequisite for an action, if so it may result in denial of justice if the DOL delays and or refuses consent, and action may be outside the time period stated in Limitation Act. The provision was aimed at when DOL was not a party to an action, when protective leases under Section 13 of State Lands Act 1945 were dealt.
17. In *Singh v Reddy* [2009] FJHC 258 Inoke J interpreted section 13 of the Crown Lands Act
Act

“In my opinion, Counsel’s interpretation of s 13(1) in this regard is not correct. **Consent need not be obtained prior to the issue of proceedings.** My reading of the section is that prior consent only applies to when the lessee alienates or otherwise deals with the kind under lease. When proceedings are being issued, the section only requires consent. My interpretation is not inconsistent with the two Court of Appeal decisions cited above by Counsel for the Defendant. “ (emphasis added)
18. In my judgment Plaintiff had instituted this action making DOL a party and alleging fraud and or negligence, against DOL, hence consent of the DOL was not a prerequisite. If the court dismisses the claim, after hearing on the merits of the action, there was no dealing of the land hence no consent of the DOL required. At the same time if the court decides to deal with the land it can direct the DOL to perform an appropriate action to give effect to the orders of the court. So the issue of consent of the DOL does not arise.
19. Even if I am wrong on that, cases submitted by the Defendants do not state that want of consent nullifies the proceedings. So, the consent can be obtained at any time even after pronouncement of the judgment at the time of execution. This would pave way for parties to obtain consent of the DOL more easily, as they have already obtained a judgment in their favour.
20. In the circumstances I reject the preliminary objection raised in terms of Section 13 of the State Lands Act 1945.

21. Following Facts were agreed by all the parties at pre-trial conference held. All the parties were represented by legal practitioners at said conference.
- i. An Approval Notice of Lease - LD Ref No. 4/14/1494 (hereinafter referred to as the "lease") for the land situated at Lot 1656, Koroqaqa, Baulevu, having an area of 4.5653 hectares was issued to Ram Kumar for agricultural purpose on 1 July 1972 for a period of 10 years.
 - ii. The lease was renewed on 1 July 1982 for a further period of 20 years to expire on 1 July 2002 via an Approval Notice of Lease dated 6 April 1984.
 - iii. Ram Kumar died on 18 July 1994 intestate. The Letter of Administration No. 31350 for the estate of Ram Kumar was granted to the Public Trustee of Fiji who subsequently transferred the lease to Kala Wati by way of administration in 1997.
 - iv. The lease was transferred from Kala Wati to Anil Kumar (1st Plaintiff) by virtue of Transfer No. 18676 and the Transfer was registered on 6 October 1997.
 - v. The 1st Plaintiff applied for renewal of the lease on 24 March 2000. The 1st Defendant refused the application for renewal via a letter to the Plaintiff dated 3 July 2002 and informed the 1st Plaintiff that the lease will not be renewed but instead the land will be subdivided.
 - vi. On 20 September 2004, the 1st Defendant issued the 1st Plaintiff a written notice for breach of lease conditions being non- cultivation of land. The 1st Plaintiff responded to the said written notice via a letter dated 23 October 2004.
 - vii. On 20 September 2010, the Plaintiffs submitted to the 1st Defendant a proposed plan for subdivision of the subject land in the lease into 3 lots and issuance of separate leases to the Plaintiffs.
 - viii. On 9 July 2012, the Director Town and Country Planning approved the Scheme Plan for the subdivision of the subject land in the lease into 2 Agricultural lots.
 - ix. The subject land was subdivided into two pieces of land.
 - x. On 21 July 2017, the 1st Defendant had written to the 1st Plaintiff notifying him that approval for lease of Lot 1 50 6821 containing 2.3 776 hectares had been granted for a 99 years Agricultural lease effective from 1 July 2002 and the lease document was ready for execution upon acceptance of the terms and conditions by the 1st Plaintiff and payment of the necessary fee.

- x. The 1st Plaintiff accepted the terms and conditions and the lease of Lot 1 SO 6821 containing 2.3 776 hectares was duly executed by the 1st Defendant on 7 December 2017 and registered on 6 February 2018.
 - xii. On 21 March 2018 the 1st Defendant wrote to the 1st Plaintiff advising that the Agricultural lease had been registered and was ready for uplifting upon payment of the outstanding land rental in the sum of \$3057.20. The 1st Plaintiff had been making partial payments towards the outstanding rental although had not cleared the full arrears.
 - xiii. The 2nd Defendant is the lessee of the other agricultural lot being Lot 2.
 - xiv. The 2nd Defendant was and/or is employed by the 1st named Defendant.
22. The Plaintiffs have been occupying the subject state land since their birth. The land that was under ANL was not subjected to a survey and area was approximately thirteen acres in terms of first ANL and 4.5653 ha in terms of ANL issued in terms of Section 13 of Agricultural Landlord and Tenant Act 1966. Both ANLs, granted in 1973 and 1984, were granted late Ram Kumar who was the father of first Plaintiff.
 23. The Plaintiffs called 6 witnesses, Mr Suresh Prasad ('PW1'), Mr Satesh Kumar ('PW2'), Mr Anil Kumar ('PW3') and Mr Sanjay Prasad ('PW4'), Mr Vijay Nath ('PW5') and Mr Jiwan Pratap ('PW6').
 24. Plaintiffs have been residing on the subject Land and there were three houses constructed on it. Neither party sought consent from the DOL to occupy and or cultivate on the ANL.
 25. Clause 7 of the ANLs granted to late Ram Kumar stated as follow
"7. Only such buildings shall be erected on the demised land as are necessary for
 - a. A dwelling or dwellings for the lessee
 - b. Accommodation for imperilments, vehicles, horses, and other stock used in connection with the farm, plantation or any buildings directly connected with the work of a farm plantation."
 26. It was not disputed that second and third Plaintiffs were never granted and or sought approval and or regularization of houses they have erected with knowledge and approval of late Ram Kumar and his successors including and not limiting first Plaintiff.
 27. It was further admitted that second and third Plaintiffs were cultivating separate areas inside land area of ANL which were again illegal subdivision of land informally by first

Plaintiff and or his predecessors. Subdivision was prohibited without written consent of the DOL in terms of clause 20 of the ANLs.

28. When the ANL was transferred to first Plaintiff, he did not take any steps to regularize and or to obtain consent of DOL for subdivision of land. So Plaintiffs had violated conditions of the ANL and now seeking legal recognition of the said violation.
29. First Plaintiff had sought renewal of ANL or registered lease and for this application he had paid a fee on 30.7.2002. The payment of \$30 for the said application was not an offer and first Plaintiff was informed that his request for renewal as well as registered lease for entire land under expired ANL was denied by DOL. He was also informed that the land subjected to expired ANL would be subdivided and a portion would be given to him. There was no mention about the area that he would be given in the said letter of 3.7.2002 and the first Plaintiff had acknowledged the said letter by his letter dated 31.7.2002.
30. First Plaintiff was at no time given any false promise or expectation by DLO and acceptance of \$30 as fee for his application cannot create any legitimate expectation.
31. In the letter of first Plaintiff dated 31.7.2002 it was further revealed that first Plaintiff, had not informed about the second and third Plaintiffs, and again requested entire land to be leased to him, and also requested reasons as to why he would not be given entire land. He knew that he and others had clearly violated conditions of ANL before it expired in 2002.
32. DOL in its letter of 20.9.2004 had indicated that recent visits had indicated land being used for grazing. Plaintiffs dispute this fact, and provided oral evidence that large part of the land was under cultivation by Plaintiffs.
33. Even if Plaintiffs' version of evidence is accepted, it would not change the accepted position that Plaintiffs had acted individually and or collectively in violation of clauses 7 and 20 of the ANL by subdividing it and also allowing second and third Plaintiffs and or their predecessors to build houses for residential purpose on an agricultural land, and had also informally divided land illegally.
34. After, first Plaintiff was informed about that he would not be granted entire land after 2002, all three Plaintiffs had applied to the first Defendant for a subdivision of the Subject Land on 20.9.2010 said letter attached a sketch of the proposed subdivision of land to themselves.
35. PW1 and PW2 were employed during day time, and none had sought consent of DOL for subdivision and or to occupy the land under ANL or even informed of their presence prior to expiration of ANL in 2002.

36. Irrespective of the area under cultivation prior to 2002, first Plaintiff and or his predecessors had allowed parties who were not authorized under ANL, to occupy the land and also to cultivate it.
37. Second Defendant said that first Plaintiff had even allowed third parties to cultivate the land under ANL and he gave assistance to said third party when harvesting the crops on the land.
38. Second Defendant was truthful in his evidence and admitted that he checked the availability of the land when he received information about the said land for his application.
39. The Defendants deny the particulars of fraud and or negligence raised by the Plaintiffs.
40. Plaintiffs allege that first Defendant was negligent in subdividing the land contained in the ANL. After expiration of second extension of ANL on 1.7.2002, by letter of 3.7.2002 first Plaintiff was informed that he will not be granted a fresh lease or extension of ANL for the entire land. He was told that he will be issued with only a portion of the land and he had obtained 99 year lease for nearly half of the land under expired ANL.
41. It was not a fraud to deny subdivision of state land among the relatives of the first Plaintiff. First Plaintiff cannot decide area of land he will obtain after expiration of ANL. After obtaining a lease for nearly half of the land subjected to expired ANL, first Plaintiff compel DOL to grant land to his relatives, on the basis of their illegal occupation and cultivation of land.
42. There was no fraud in granting a ANL to second Defendant upon his application. Plaintiffs allege that his application for land was incomplete as his signature was not witnessed. This was a trivial matter and witnessing can be waived if the person dealing with the application was certain and took responsibility as to the person who made the signature.
43. Prior to grant of land to second Defendant, in 2004 first Defendant lodged a subdivision application with the Director of Town and Country Planning to subdivide the land are under expired ANL for residential purpose and the same was rejected on the basis that the proposal constituted fragmentation of good agricultural land. The same was rejected in 2008. This was the reason in delay in the 'process' of the application that Plaintiffs allege. This was not a fraud committed by Defendants.
44. In 2012, the application for subdivision of the Subject Land was approved based on the Scheme Plan dated 9 July 2012. The Scheme Plan consisted of two Agricultural Lots,

and one of them comprising 2.3776 ha was given to first Plaintiff as he was informed that he would be given only a portion by DOL's letter of 3.7.2002.

45. Plaintiffs allege that 'sitting tenants' were not given land but second Defendant was granted land. This was incorrect as first Plaintiff was the only 'sitting tenant' prior to expiration of ANL and other Plaintiffs were his relatives and not tenants under State Lands Act 1945. There cannot be a policy that relatives of the 'sitting tenants' also should be allocated land only because they had occupied the land in violation of the conditions of ANL. This would not only be unreasonable but also inequitable.
46. Without prejudice to above, the allocation of scarce resource such as State Lands, were purely policy matters and exercise of discretion of the DOL was not liable for damages.
47. In UK Court of Appeal decision dealing with the liability of statutory authority for negligence in the exercise of statutory power in *Carty v London Borough of Croydon* [2005] EWCA Civ 19 held,

"It was only where the decision involved the **weighing of competing public interests** which the courts were not fitted to assess that they would hold that the matter was **non-justiciable on the ground that it was made in the exercise of a statutory discretion**. The speech of Lord Browne-Wilkinson in *X v Bedfordshire County Council* did not preclude a ruling that, although the decisions of the defendant were within the ambit of its statutory discretion, **nevertheless they did not involve the balancing of the type of policy considerations which rendered them non-justiciable** (p 585F-G). Lord Hutton then proceeded to apply the Caparo test and concluded that the action should be allowed to proceed to trial." (emphasis added)

48. In this case DOL was the authority that grants leases of State Lands, and both first Plaintiff and second Defendant had made relevant applications for the lease of the said land had also paid relevant fees for such application. Second and third Defendants had not made applications provided by DOL and had not paid relevant fees, but had relied on the application of the first Plaintiff's application.
49. So DOL needed to exercise discretion that involve balancing of policy considerations in allocation of lands to applicants. This involved weighing of competing public interests which were not suited for an action for damages.
50. Plaintiffs in the statement of claim had given particulars of fraud and negligence together without identification of exact breaches that constitute negligence in paragraph 19 of the statement of claim.
51. In my judgment upon the analysis of the evidence of the evidence there was neither fraud nor negligence on the part of the first and or second Defendants so as to cancel the lease granted to second Defendant.

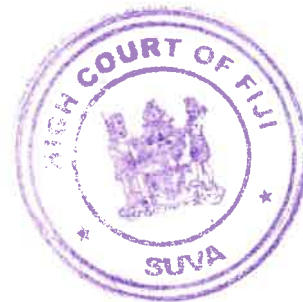
52. Even if I am wrong on the above, second and third Plaintiffs who had violated conditions of ANL that expired in 2002, cannot be given land by court as allocation of State Lands by DOL was a policy decision and not justiciable in the circumstances.
53. Second Defendant was granted ANL in 2013, upon his application made on 28.10.2010. Registered lease was granted in 2016. So, three years had taken for second Defendant to obtain ANL for portion of land and before he made any application first Plaintiff was informed that land under expired ANL would be subdivided and only a portion would be given to him.

CONCLUSION

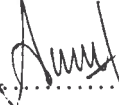
54. Plaintiffs cannot claim entire land under ANL as they have collectively and individually violated express provisions of the ANL by informal subdivision and also allowing houses to be erected on good agricultural land close to a river. DOL had considered applications for lease of the land submitted by first Plaintiff and also second Defendant and had granted 99 year lease to first Plaintiff as the 'sitting tenant'. Second Defendant was granted ANL in the first instance and the area given to him was prone to flooding, too. There was neither fraud nor negligence in the allocation of land to second Defendant. Plaintiffs' action is dismissed and considering circumstances of the case parties bear their own costs.

FINAL ORDERS

- a. Plaintiffs action is dismissed.
- b. No costs.



Dated at Suva this 31st day of July, 2020.


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Justice Deepthi Amaratunga
High Court, Suva