

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO - HBC 230 OF 2017

BETWEEN : **CHANDRA LOK** (fathers name Ballaiya) of Natabua, Lautoka,

PLAINTIFF

AND : **ITAUKEI LAND TRUST BOARD** a statutory body registered
under the provisions of Native Land Trust Act

FIRST DEFENDANT

AND : **HARI NARAYAN** of Toko, Tavua, and **VIKASH**
VENTESH NAIDU

SECOND DEFENDANT

Appearances : **Mr. Vipul Mishra** for the plaintiff.
Mr. Salesi Mucunabitu for the first defendant.
Mr. Salvin Nand for the second defendant.

Trial : **11th and 12th March 2020**

Written Submissions: **13th August 2020 (Plaintiff's)**
29th April 2020 (First defendant's)
26th March 2020 (Second defendant's)

Judgment : **Friday, 18th September, 2020.**

J U D G M E N T

(A) INTRODUCTION

(01) On 31st October 2017, the plaintiff brought this action against the defendants claiming damages for breach of contract, trespass and loss of production opportunity. The plaintiff also seeks damages for breach of court order and seeks an injunction restraining the defendants from interfering with the plaintiff's quiet and peaceable occupation and cultivation of lease No: 44656.

- (02) The reliefs, as sought above, are premised on alleged breach of statute and breach of contractual duties on the part of the first defendant and contempt and defiance of court order on the part of both defendants.

(B) THE FACTUAL BACKGROUND

- (01) The statement of claim which is as follows sets out sufficiently the facts surrounding this case from the plaintiff's point of view as well as the prayers sought by the plaintiff.

A. *CAUSE OF ACTION AGAINST THE FIRST DEFENDANT*

1. *The Plaintiff is the proprietor and holds an Agricultural Lease No. 44656 known as Lot 1 DP 1700 "Toko" (part of) situated at Toko in the District of Tavua in the island of Viti Levu containing an area of 25 acres 2 Roods 08 Perches (hereinafter called "the Lease".)*
2. *The period of the lease is 957 years 10 months and 8 days from the 1st of January, 1950. It is registered at the Registry of Titles and has the protection of the indefeasibility provisions of the Land Transfer Act.*
3. *The Lease came to the Plaintiff from his father the late Mr Ballaiya and the lease was transferred to Mr Ballaiya by the Official Receiver.*
4. *The Plaintiff has been paying rental to the Defendant. It has been accepting the same under their File Reference TLTB Ref No:4/1636. Three of the rentals received and receipted by them in the name of the Plaintiff are as follows:-*
 - a. *\$5,817.09 on 25th June, 2014*
 - b. *\$ 623.50 on 4th January, 2016*
 - c. *\$ 311.80 on 8th June, 2017*
5. *The Plaintiff has a sugar cane contract on the said land.*
6. *The Plaintiff's nominated surveyor Mr Wacokecoko was given survey instructions dated 26th of June, 2014 by the First Defendant for TLTB 4/4/1635 for the lease of an area of 15.3974 hectares and for a period of 966 years from 1st of January, 1941. The rental of \$564.00 per annum was stated and the land was described as 'Toko Subdivision Lot 1 in the Tikina of Tavua belonging to the Mataqali Tilivasewa'.*
7. *The Plaintiff has paid consideration of \$115.00 as survey instruction fee to the First Defendant. On the basis of the survey instruction by the First Defendant the Plaintiff has paid his surveyor to do a survey based on the said instructions and which survey has been done and carried out. The plan has been lodged but the First Defendant is not processing the same despite several requests.*
8. *Instead the First Defendant has breached the Plaintiff's lease rights and has tried to terminate his lease. It has tried or has given part or all the lease to the Second Defendants who are named as Mr Hari Narayan and Mr Vikash Venkatesh Naidu and are entertaining*

their application to lease the Plaintiff's land and are encouraging and allowing trespass thereof.

9. *The First Defendant have given notice to the Plaintiff's caretakers and assistants who were on a premises on the lease at the Plaintiff's behest and request to assist him the management looking after and cultivation of the land.*
10. *As a result they have been forcibly evicted from the house on the land which they were occupying by the First and/or Second Defendants and/or their servants and agents. This house has now been taken over and occupied by the Second Defendants. The Plaintiff's farm has suffered loss and damage as a result.*
11. *The actions of the First Defendant and/or their servants and/or agents are in breach of the Lease and/or provisions of the Agricultural Landlord and Tenant Act in particular Sections 9(f). No notice to vacate in terms of the Act has been given by the First Defendant to the Plaintiff and it is in breach of the said Statute.*
12. *The First Defendant has also said it is contemplating terminating the Plaintiff's lease in a letter to Nawaikula & Associates dated 12th July, 2015.*
13. *The Plaintiff is up to date in its rent up to the time of the issue of this writ of Summons and the First Defendant continues despite his payment of rental and attempts to cultivate and earn income from the land to encourage and give comfort to trespassers on the land and leased to him.*
14. *The Plaintiff has paid the survey instruction fee and a receipt No. 147775 dated 25th of June, 2014 has been issued; the instruction No. NW0627 and the TLTB Reference No being 4/4/1636.*
15. *As a result the Plaintiff has suffered losses and damages.*
16. *The First Defendant is in breach of statute and its contractual duties as landlord.*
17. *It has committed trespass and encouraged and facilitated the same and this continues and has not been stopped or withdrawn despite notice.*

B. SECOND CAUSE OF ACTION AGAINST BOTH THE FIRST AND SECOND DEFENDANTS

18. *The Plaintiff after giving notice to vacate obtained an order for possession with costs to be taxed if not agreed against the Second Defendant Hari Narayan in the High Court decision namely Chandra Lok v Hari Narayan, Lautoka High Court Civil Action No. 033 of 2005 on the basis of his Lease No. 44656.*
19. *The Order for possession was made after a full trial. Thereafter writ of possession was issued and the same was executed by the Sheriff of Fiji and possession of the area and premises occupied by the Second Defendant Hari Narayan on Lease No. 44656 was delivered and handed over the Plaintiff with the keys.*

20. *The Second named Second Defendant is related to the Second Defendant Hari Narayan and is aware and of and/or should be aware of the said order for possession.*
21. *The First Defendant has been made aware of this High Court proceeding and the judgment for possession against Mr Hari Narayan and the execution and his eviction by the Sheriff from the property.*
22. *Despite this and in defiance of the delivery of possession to the Plaintiff by the Sheriff of Fiji pursuant to the order for possession made by the High Court the Second Defendants have re-entered and taken possession of the premises which the Second Defendant Hari Narayan had been evicted from with the encouragement and assistance of the First Defendant.*
23. *The First Defendant has purported to terminate the Plaintiff Lease and has now effectively given at least a portion of his lease to the Second Defendants and are processing a lease application by them.*
24. *The Actions of the Defendants are in contempt of Court Order made and the execution of the High Court of the order for possession.*
25. *The Plaintiff gave notice to the First Defendant of its entitlement and the Plaintiff and his surveyor Mr. Taniela S Wacokecoko saw Solicitor of the First Defendant Mr. Inoke Lutumailagi who promised to rectify things but nothing has happened.*
26. *The Plaintiff also gave a letter of reminder dated through his Solicitor to no avail.*

THIRD CAUSE OF ACTION AGAINST SECOND DEFENDANT HARI NARAYAN

27. *The Plaintiff was also in the Magistrates Court Tavua by the Defendant Mr Hari Narayan in Tavua Magistrates Court despite the fact that he had an order for possession against him and was evicted by the Sheriff and had lost his claim against the Plaintiff in the High Court of Fiji.*
 28. *The same constituted another act of contempt of and defiance of the High Court and constituted abuse of process.*
 29. *The said action has now been dismissed.*
- (02) The plaintiff claims from the defendants;
- a. *An Injunction restraining the defendants and/or their servants and/or their agents from in any way interfering with the Plaintiff quiet and peaceable occupation and cultivation of Lease No. 44656.*
 - b. *Further and/or in the alternative an Injunction restraining the First Defendant and/or its servants and/or it's from in any way interfering with the Plaintiff quiet and peaceable occupation and cultivation of the area of 15.3974 hectares for a period of 966 years from 1st of January, 1941 of the land known as Toko Subdivision Lot 1 in the Tikina of Tavua belonging to the Mataqali Tilivasewa.*

- c. *Damages for breach of contract and/or trespass and loss of production opportunity.*
- d.) *Damages for acting in defiance and/or in breach of Court order against the Defendants and contempt of court.*
- e. *Damages for acting in defiance and/or in breach of Court order against the Second Defendant Hari Narayan for taking a second action against the Plaintiff in Tavua Magistrates Court of the same or similar cause as High Court Action in Chandra Lok v Hari Narayan, Lautoka High Court Civil Action No. 033 of 2005 despite having lost the same.*
- f. *An order that the chattels of the Plaintiff and premises be returned to his possession forthwith by the Second Defendants and that means profit be paid for the period the Plaintiff has been deprived of occupation of his premises.*
- g. *Damages for trespass.*
- h. *Damages against the First Defendant for breach of landlords and statutory duties.*
- i. *Aggravated Damages.*
- j. *Interest under the Law Reform and (Miscellaneous Provisions) (Death and Interest) Act at the rate of 10 percent per annum until payment*
- k. *Costs.*

(C) THE DEFENCE

(01) The first defendant in its statement of defence pleaded inter alia;

- 1. *THAT the 1st Defendant admits paragraph 1 of the claim only insofar as the Plaintiff is compliant to the condition of his lease.*
- 2. *THAT the 1st Defendant denies paragraph 2 of the claim and puts the Plaintiff into strict proof of the same.*
- 3. *THAT the content of paragraph 3 of the sad claim is denied and puts the Plaintiff into strict proof of the same.*
- 4. *THAT the content of paragraph 4 of the facts are admitted only insofar as the payment was done for lease rental due for the month and the same is compliant with TLTB's policies and procedures.*
- 5. *THAT the 1st Defendant admits paragraph 5 of the claim.*
- 6. *AS TO PARAGRAPH 6 the Board admits this paragraph only insofar as the Plaintiff was in complying with our instructions.*

7. *AS TO PARAGRAPH 7 the facts are admitted only insofar as the Plaintiff has paid the Survey Instruction fee, the rest of the paragraph is denied, the Plaintiff has not submit its scheme plan. Even if the Plaintiff submits the scheme plan, the Board will not entertain any dealings to the land due to issues surrounding the Toko 999 lease policy.*
 8. *THAT the Board denies the allegation contained in paragraph 8 of the claim,. The Board puts the Plaintiff to strict proof of the same.*
 9. *THAT the Board denies the allegation contained in paragraph 9 of the said claim and puts the Plaintiff into strict proof of the allegation.*
 10. *THAT the Board denies each and every allegation contained in paragraph 10 of the claim and puts the Plaintiff to strict proof of same.*
 11. *THAT the Board denies each and every allegation contained in paragraph 11 of the said claim and puts the Plaintiff to strict proof of each of the said allegations.*
 12. *AS TO PARAGRAPH 12 the facts are admitted only insofar as the letter was addressed to Nawaikula Esquire regarding a different case and not on this current case, the letter was highlighting the fact that the 999 year lease was under scrutiny by all the government institutions due to the landowners' plea and request for amendments to the lease terms.*
 13. *THAT the Board denies each and every allegation contained in paragraph 13 of the said claim and puts the plaintiff to strict proof of the same.*
 14. *AS TO PARAGRAPH 14 the fact is admitted only insofar as the survey instruction is issued for complying purposes by the Plaintiff.*
 15. *THAT the Board denies paragraph 15 of the claim and puts the Plaintiff to strict proof of each of the said allegations.*
 16. *THAT the Board denies each and every allegation contained in paragraph 16 of the said claim and put the Plaintiff to strict proof of each of the said allegations.*
 17. *THAT the Board denies allegation contained in paragraph 17 of the said claim and put the Plaintiff to strict proof of the allegations.*
- B. SECOND CAUSE OF ACTION AGAINST BOTH THE FIRST AND SECOND DEFENDANTS
18. *THAT the Board admits paragraph 18 of the claim only insofar as the court action between the 2 parties, the Board is not a privy to the fact that the Plaintiff had issued a notice since it was not a party to the court case.*
 19. *THAT the Board admits paragraph 19 of the claim only insofar as there was a court action between the 2 parties, it however denies the fact that the Plaintiff had issued an Order for Possession since it was not a privy to such information nor was it a party to the said proceedings.*

20. *THAT the Board denies each and every allegation contained in paragraph 20 of the said claim and put the Plaintiff to strict proof of each of the said allegations and repeats paragraph 18 & 19 6 of its Defence herein.*
21. *THAT the Board admits only insofar that there was a High Court matter between the parties but denies that the Sheriff had executed the order since it was not a party to the case and therefore put the Plaintiff into strict proof of the same.*
22. *THAT the Board denies the allegation contained in paragraph 22 of the claim. The Board puts the Plaintiff to strict proof of the same.*
23. *THAT the Board denies the allegation contained in paragraph 23 of the said claim and puts the Plaintiff into strict proof of the allegation. The Board further states that the Toko land dealings is currently on hold due to issues raised by landowners on the current 999 lease term.*
24. *THAT the Board denies the allegation contained in paragraph 24 of the claim and puts the plaintiff into strict proof of the same.*
25. *THAT the Board denies each and every allegation contained in paragraph 25 of the said claim and puts the Plaintiff to strict proof of each of the said allegations.*
26. *AS TO PARARAPH 26 the facts are denied and seek further better particulars from the Plaintiff since no date is given as to the alleged remainder letter issued to the Board.*
27. *THAT the Board denies the allegation contained in paragraph 27 of the said claim puts the Plaintiff into strict proof of the allegation. The Board further states that it does not have privity to such information.*
28. *THAT the Board denies the allegation contained in paragraph 28 of the claim repeats paragraph 27 above.*

WHEREFORE, the 1st Defendant prays as follows:

- a) *The Plaintiff's claims be wholly dismissed;*
- b) *The Plaintiff's claims to costs and damages be wholly dismissed.*
- c) *Cost of and incidental to this action.*

(02) The second defendant in its statement of defence pleaded inter alia;

1. *THAT as for paragraph 1 – 7 they do not know the facts alleged therein, they put the Plaintiff to very strict proof and add that the Plaintiff has no locus standi to bring this action because the 1st Defendant has never granted to him consent either to be its tenants or sub-tenant.*
2. *THAT as for paragraph 8 – 11 they deny that the 1st Defendant is in breach and add that the 2nd Defendant has every right to deal with the land because the Plaintiff has been there without its consent.*

3. *THAT further to paragraph 1 & 2 above the 2nd Defendants says that the Plaintiff had already sold his interest to one of the 2nd Defendants, Hari Narayan in 2001 for the sum of \$6,000.00.*
4. *THAT we admit paragraph 12 of the statement of claim.*
5. *THAT as for paragraph 13 – 17 we say that payment of rent and issue of survey instruction does not create a tenancy and neither do they imply consent by the 1st Defendant.*
6. *THAT as for paragraphs 18 – 21 we admit we were evicted and add that after eviction the 1st Defendant ITLTB notified the Plaintiff to vacate on the basis that it is not the registered proprietor and further to that TLTB advice us to lodge application to lease the subject land on the basis of our occupation and the reason why we returned to our home.*
7. *THAT as for paragraph 22, we repeat paragraph 21.*
8. *THAT we admit paragraph 23.*
9. *THAT we deny paragraph 24 and repeat paragraph 6 & 7 above.*
10. *THAT we are not aware paragraph 25 – 26.*
11. *THAT as for paragraph 27 – 29 we deny any contempt of court and say that even the Plaintiff is admitting in paragraph 23 of its statement of claim that our occupation is under the sanction of the 1st Defendant TLTB.*

WHEREFORE the 2nd Defendant prays that the Plaintiff claim is dismissed with costs.

(D) THE PLAINTIFF'S REPLY TO DEFENCE

The plaintiff's reply to defence is as follows;

1. *As to paragraph 4:*
 - a. *The rental accepted was not for a month or months. The yearly rental is approximately \$623.50 approximately and it seems to vary because the First Defendant (hereinafter called the board) charges for administration and other expenses and/or for items they are not entitled to charge under the provisions of the Agricultural Landlord and Tenants Act (ALTA) of the Laws of Fiji which governs this agricultural lease.*
 - b. *The Board's policies and procedures are subject to and must comply with legislation, the rule of law and ALTA and the provisions of the Land Transfer Act indefeasibility provisions and the case law.*
 - c. *He paid \$5,817.09 to the Board as its Accounts Section told him that was what he had to pay to bring his rental up to date at that time.*

- d. *There had been litigation about whether the Plaintiff was the legal owner and the Plaintiff had asked for time to pay rental as his brother Mr Balram had taken him to Court about ownership of his Lease. This was so as the rightful owner has the duty to pay the lease rental and the Plaintiff paid after the Supreme Court determined in his favour.*
 - e. *Others were (and are) also making claim on his lease or parts thereof and have built on it such as the Second Defendant Hari Narayan and renting or occupying residential houses on it without his authority or consent despite his objections and the Board seems to be cooperating and/or colluding with them despite its duties contractual and statutory to the Plaintiff as its Tenant.*
 - f. *The Second Defendant Hari Narayan was one such person and the other Second Defendant is his son and they both live on premises on the Plaintiff's Lease despite the Plaintiff obtaining an order for possession against the Second Defendant and the Court Sheriff having evicted the Second Defendant and his family.*
 - g. *They have with the assistance and support of the First Defendant re-taken possession despite High Court order for possession against the Second Defendant and are in contempt of Court.*
2. a. *As to paragraphs 6, 7, 12 and 23 the Board is not entitled to breach the provisions of the Agricultural Landlord and Tenant Act of the Laws of Fiji (hereinafter called "ALTA") which governs this agricultural lease and provides statutory protection to the Plaintiff as tenant.*
 - b. *The Board is obliged to process the Plaintiff's survey and give him a proper lease in accordance with their own survey instructions within a reasonable time.*
 - c. *They are not entitled to use delaying tactics saying they will not entertain dealings because the Plaintiff has a 999 year lease and that the landowners have issues unless Parliament amends ALTA.*
 - d. *The Board has breached the plaintiff's rights to quiet and peaceful occupation with the result he is not able to enjoy and/or occupy and/or cultivate and earn income from his land.*
 - e. *The Plaintiff has tried to get Police and use the Court's processes to assist him the enforcement of his rights but the Board's actions are leading to his efforts being rendered ineffective.*

The Plaintiff in reply to the Second Defendants' Statement of defence says as follows: -

1. *As to paragraph 2 they have no right to deal with the Plaintiff's lease. The Plaintiff is entitled to protection under the provisions of the Agricultural Landlord and Tenant Act of the Laws of Fiji which governs this agricultural lease and the provisions of Section 39 and 40 of the land Transfer Act and indefeasibility provisions. They are trespassers.*
2. *As to paragraphs 3 and 6, Mr Hari Narayan has already litigated and lost on this and the Plaintiff will rely on the decision of Justice Jiten Singh and pleads res judicata. He was*

evicted by the Sheriff of Fiji from the Plaintiff's lease by way of execution under a writ of possession. The actions of the Defendants in denying and abusing the Plaintiff's rights and preventing the enjoyment of his lease is an abuse of process and contempt of an order of the Court.

(E) PRE-TRIAL CONFERENCE MINUTES

The minutes of the pre-trial conference record, inter-alia the following;

1. *The Plaintiff is registered as owner of an Agricultural Lease No. 44656. It is agricultural land and comes under the provisions of the land Transfer Act and is situated at Toko, Tavua.*
2. *The Plaintiff has been paying rent for the lease to the First Defendant TLTB Ref No. 4/1636.*
3. *The Plaintiff has paid rent to the first Defendant in the sum of:*
 - a. *\$5,817.09 on the 25th of June, 2014 bringing his rental up to date;*
 - b. *\$623.50 on the 4th day of January, 2015;*
 - c. *\$311.80 on the 8th day of June, 2017.*
4. *Native Lease No. 44656 (hereinafter called "the lease") has a sugar cane contract.*
5. *The Plaintiffs surveyor was given survey instruction dated 26th June, 2014 by the First Defendant.*
6. *The Plaintiff paid \$115.00 fee for survey instruction to the First Defendant.*
7. *The Plaintiff's surveyor did a survey on the basis the said instructions and the Plaintiff has paid him for it.*
8. *This house and about one eight acre of the lease is now occupied by the Second Defendant. They are hostile to the Plaintiff and stop him with others from cultivating his farm and from his occupation of the said part of his lease.*
9. *The High Court made an order for possession and costs against him.*
10. *When he did not vacate, writ of possession was taken out against him which was executed against the Hari Narayan by the Sheriff of Fiji he (and Mr. Vikash Venkatesh Naidu and other members of his family) were removed from the Plaintiffs lease and vacant possession was given to the Plaintiff.*

ISSUES

1. *Whether the Plaintiff is entitled to the statutory protection of the provisions of the Agricultural Landlord and Tenant Act of the Laws of Fiji (hereinafter called "ALTA").*
2. *Whether the First Defendant and/or its servants and/or agents were entitled to evict Ms. Chandra Wati and her family from the house and compound in the Lease No. 44656 when she was there at the behest of the Plaintiff.*
3. *Whether the house taken over and now occupied by the Second Defendants had been occupied by Ms. Chandra Wati and her family at the behest of the Plaintiff as his caretaker and to look after his crop and Lease generally.*
4. *Whether the Plaintiff had earlier given a notice to vacate to the Second Defendant Hari Narayan and when he refused to vacate he had taken issue High Court Action No. 033 of 2005 against him.*
5. *Whether the Plaintiff is entitled to the statutory protection of the provisions of the Land Transfer Act as a registered proprietor.*
6. *Whether the First Defendant has breached the Plaintiffs rights as lessee and as a tenant. Whether the Plaintiff is entitled to the protection of the provisions of the Agricultural Landlord and Tenant Act and the Land Transfer Act.*
7. *Whether the Defendants or any of them are guilty of trespass on the Plaintiffs Lease.*
8. *Whether the First Defendant was entitled to give notice of eviction to the plaintiffs' caretaker Ms. Chandra Wati and her husband and whether it was entitled to evict her from the home she was occupying on the lease with the consent of the Plaintiff.*
9. *Whether the Plaintiff is entitled to have the Board process the Plaintiff's survey done at their own instructions and to give him a proper lease in accordance with their own survey instructions within a reasonable time.*
10. *Whether the First Defendant has attempted to terminate his Lease in all the circumstances.*
11. *Whether the Plaintiff gave written notice to the First Defendant regarding the notice given to him and Ms. Chandra Wati and her husband and whether the Plaintiff and his surveyor Mr. Taniela Wacokecoko saw Mr. Inoke Lutumailagi of the First Defendant.*
12. *Whether Mr. Inoke Lutumailagi promised to rectify the situation.*
13. *Whether the Plaintiff through his solicitor gave a letter of reminder to the First Defendant.*
14. *Whether the Plaintiff was (despite the decision of High Court in Action No. HBC 033 of 2005) sued by the Second Defendant Hari Narayan in Tavua Magistrates Court about the same subject matter.*
15. *Whether the Tavua Court action has now been dismissed.*

16. *Whether the First Defendant conduct has encouraged others to defy the Plaintiff and to trespass on his property and lease and whether the same has caused the Plaintiff distress, loss and damages and prevented him from cultivating his farm.*
17. *Whether the Second Defendants are entitled to possession of the part of the Lease No. 44656 and the house which they occupy despite the order for possession in High Court in Action No. HBC 033 of 2005 and the Sheriff having delivered possession to the Plaintiff.*
18. *Whether the First Defendant and/or the Second Defendants having taken possession from the Plaintiff of his agents are in breach of the order for possession of the High Court and/or in contempt of Court.*
19. *Whether the First Defendant and/or the Second Defendant have breached the Plaintiffs rights to quiet and peaceful occupation of his land.*
20. *Whether the First Defendant and/or the Second Defendants have breached the Plaintiff rights to quiet and peaceful occupation of his land.*
21. *Whether the Second Defendant is in contempt of court and guilty of abuse of process by bringing another action in the Magistrate Court after having lost the action in the High Court.*
22. *Whether the decision of Justice Singh in HBC 033 of 2005 constitutes res judicata and/or estoppel against the Second Defendants.*
23. *Whether the Tavua Court action and its dismissal constitutes an estoppels against the Second Defendant(s).*
24. *If the Plaintiff is entitled to damages and if so the quantum thereof.*

(F) THE WITNESSES

The plaintiff's case

- P.W (1) Lui Mckay
P.W (2) Chandra Wati
P.W (3) Sera Aditamana
P.W (4) Anup Kumar
P.W (5) Chandar Lok (the Plaintiff)

First defendant's case

Uraia Masivau Rakaria
Estate Officer, iTLTB

Second defendant's case

- (1) Vikash Ventesh Naidu

(The second named second defendant)

(2) Sharan Naicker
Geologist

(G) CONSIDERATION AND THE DETERMINATION

(01) What is the plaintiff's cause of action against the first defendant?

It is necessary to refer to paragraphs (08) to (11) of the Statement of Claim which states;

8. *Instead the First Defendant has breached the Plaintiff's lease rights and has tried to terminate his lease. It has tried or has given part or all the lease to the Second Defendants who are named as Mr Hari Narayan and Mr Vikash Venkatesh Naidu and are entertaining their application to lease the Plaintiff's land and are encouraging and allowing trespass thereof.*
9. *The First Defendant have given notice to the Plaintiff's caretakers and assistants who were on a premises on the lease at the Plaintiff's behest and request to assist him the management looking after and cultivation of the land.*
10. *As a result they have been forcibly evicted from the house on the land which they were occupying by the First and/or Second Defendants and/or their servants and agents. This house has now been taken over and occupied by the Second Defendants. The Plaintiff's farm has suffered loss and damage as a result.*
11. *The actions of the First Defendant and/or their servants and/or agents are in breach of the Lease and/or provisions of the Agricultural Landlord and Tenant Act in particular Sections 9(f). No notice to vacate in terms of the Act has been given by the First Defendant to the Plaintiff and it is in breach of the said statute.*

(02) By paragraph (11) and (16) of the Statement of Claim, the plaintiff pleaded reliance on the Agricultural Landlord and Tenant Act [Cap 270] (ALTA).

(03) The plaintiff's second cause of action is against both the first and second defendants. It is necessary to refer to paragraphs (18), (19), (22), (23), and (24) of the Statement of Claim which states;

18. *The Plaintiff after giving notice to vacate obtained an order for possession with costs to be taxed if not agreed against the Second Defendant Hari Narayan in the High Court decision namely Chandra Lok v Hari Narayan, Lautoka High Court Civil Action No. 033 of 2005 on the basis of his Lease No. 44656.*

19. *The Order for possession was made after a full trial. Thereafter writ of possession was issued and the same was executed by the Sheriff of Fiji and possession of the area and premises occupied by the Second Defendant Hari Narayan on Lease No. 44656 was delivered and handed over the Plaintiff with the keys.*
 22. *Despite this and in defiance of the delivery of possession to the Plaintiff by the Sheriff of Fiji pursuant to the order for possession made by the High Court the Second Defendants have re-entered and taken possession of the premises which the Second Defendant Hari Narayan had been evicted from with the encouragement and assistance of the First Defendant.*
 23. *The First Defendant has purported to terminate the Plaintiff Lease and has now effectively given at least a portion of his lease to the Second Defendants and are processing a lease application by them.*
 24. *The Actions of the Defendants are in contempt of Court Order made and the execution of the High Court of the order for possession.*
- (04) The plaintiff's third cause of action is against the second defendant. It is necessary to refer to paragraphs (27) and (28) of the Statement of Claim which states;
27. *The Plaintiff was also in the Magistrates Court Tavua by the Defendant Mr Hari Narayan in Tavua Magistrates Court despite the fact that he had an order for possession against him and was evicted by the Sheriff and had lost his claim against the Plaintiff in the High Court of Fiji.*
 28. *The same constituted another act of contempt of and defiance of the High Court and constituted abuse of process.*
- (05) What is the plaintiff's relief claimed against the defendants?
- a. *An Injunction restraining the defendants and/or their servants and/or their agents from in any way interfering with the Plaintiff quiet and peaceable occupation and cultivation of Lease No. 44656.*
 - b. *Further and/or in the alternative an Injunction restraining the First Defendant and/or its servants and/or it's from in any way interfering with the Plaintiff quiet and peaceable occupation and cultivation of the area of 15.3974 hectares for a period of 966 years from 1st of January, 1941 of the land known as Toko Subdivision Lot 1 in the Tikina of Tavua belonging to the Mataqali Tilivasewa.*
 - c. *Damages for breach of contract and/or trespass and loss of production opportunity.*

- d. *Damages for acting in defiance and/or in breach of Court order against the Defendants and contempt of court.*
- e. *Damages for acting in defiance and/or in breach of Court order against the Second Defendant Hari Narayan for taking a second action against the Plaintiff in Tavua Magistrates Court of the same or similar cause as High Court Action in Chandra Lok v Hari Narayan, Lautoka High Court Civil Action No. 033 of 2005 despite having lost the same.*
- f. *An order that the chattels of the Plaintiff and premises be returned to his possession forthwith by the Second Defendants and that means profit be paid for the period the Plaintiff has been deprived of occupation of his premises.*
- g. *Damages for trespass.*
- h. *Damages against the First Defendant for breach of landlords and statutory duties.*
- i. *Aggravated Damages.*
- j. *Interest under the Law Reform and (Miscellaneous Provisions) (Death and Interest) Act at the rate of 10 percent per annum until payment*
- k. *Costs.*

(06) The paragraph one (01) of the Statement of Claim is as follows;

- 1. *The Plaintiff is the proprietor and holds an Agricultural Lease No. 44656 known as Lot 1 DP 1700 "Toko" (part of) situated at Toko in the District of Tavua in the island of Viti Levu containing an area of 25 acres 2 Rods 08 Perches (hereinafter called "the Lease".)*

(07) The paragraph three (03) is as follows;

- 3. *The Lease came to the Plaintiff from his father the late Mr Ballaiya and the lease was transferred to Mr Ballaiya by the Official Receiver.*

(08) One "Ballaiya" of Toko, Tavua, became the lessee of the Native Lease No.: 44656 (the document No. 1 in the Agreed Bundle of Documents) consequent to a transfer from official receiver on the 11th August, 1978. The extent of the Native Land is 25A, 08p. The land is situated at Toko in Tavua in the Western Division. The Native Lease was subject to the provisions of the ALTA as the land was, and always had been, rural and therefore 'Agricultural Land' within the meaning of 'ALTA'.

(09) The Native Land, which Ballaiya held as a lessee is the subject matter of this litigation.

- (10) Ballaiya executed a 'Deed of Family Settlement' in September, 1982 whereby Ballaiya distributed the Native Land among his five (05) children including the plaintiff. (See; **Chandar Lok v (1) Bal Ram, (2) The Registrar of Titles and A.G., F.C.A., ABU 0005 of 2012, Judgment 30-11-2012**).
- (11) On the 16th June, 1988, Ballaiya by a notarially executed "Power of Attorney", appointed the plaintiff as his attorney.
- (12) Ballaiya died on 03rd July, 1999.
- (13) Prior to the death of Ballaiya, on the 25th March, 1994, the plaintiff on an alleged authority under the "Power of Attorney" caused the transfer of an extent of 20A, 02R of the Native Land (which is the subject matter of this litigation) claiming that a consideration of \$20,000.00 was paid to Ballaiya. The transfer number is 360347.
- (14) The plaintiff who signed in his capacity as the Attorney for and on behalf of the transferor, also became the transferee of the Native Land. This is a self-executed transfer of the property in Native Lease No. 44656 by the plaintiff.

This is how the plaintiff gained the proprietorship of the land owned by Ballaiya, which is the subject matter of this litigation

- (15) Let me have a close look at Transfer No. 360347 which was executed by the plaintiff as the Attorney for and on behalf of Ballaiya to gain the proprietorship of the land.
- (16) The Transfer No. 360347 is marked as annexure 'B' in the Affidavit of the plaintiff sworn on 13-04-2004, in the High Court of Lautoka, Case No. HBC 106 of 2004, Chandar Lok v Registrar of Titles and the Attorney General.
- (17) It is significant to note that the Native Land Trust Board (NLTB), now named as iTaukei Land Trust Board (ITLTB) has **not** endorsed its consent on the executed transfer with the result the transaction of the sale cannot be registered. The letter of iTaukei Land Trust Board dated 12th July, 2015 is clear on this. [The document No. 9 in the Agreed Bundle of Documents] Consent to the transfer is not given. The letter is in the following terms;

12th July, 2015

***M/S NAWAIKULA ESQUIRE,
Barristers & Solicitors,
SUVA.***

Dear Sir,

RE: ALIPATE VUKI

“Without Prejudice”

*In reference to your above mentioned letter dated 7th July, 2015 on the above subject.
This letter serves to confirm as follows:*

(1) There is no record of any consent ever been given by the Board to transfer Leases No. 26573 or 44656 to Chandra Lok.

Be further advised that the Board is contemplating cancellation of the 99 years lease terms in order to regularize the Occupation of this land by issuing fresh leases in line with its duty to the aggrieved members of Mataqali Tilivasewa and Mataqali Navusabalavu of Tavualevu.

For clarifications, please do not hesitate to contact the under-signed on 9995937.

Yours faithfully,

.....
(sgd) Inoke Lutumailagi
SENIOR LEGAL OFFICER WESTERN

(Emphasis added)

- (18) The absence of consent to the transfer by iTLTB vitiates the transfer ab initio. The consent required from the iTLTB cannot be dispensed with by the Registrar of Titles. That being so, the plaintiff at no time was the tenant of the iTLTB. At no time was there a contract of tenancy between the plaintiff and the iTLTB. **ALTA defines a “Contract of Tenancy” as;**

“Contract of tenancy means any contract express or implied or presumed to exist under the provisions of this Act that creates a tenancy in respect of agricultural land or any transaction that creates a right to cultivate or use any agricultural land”.

The definition of the ‘tenant’ reads;

“tenant means a person lawfully holding land under a contract of tenancy and includes the personal representatives, executors, administrators, tenants or any other persons deriving title from or through a tenant”.

(19) On 19-04-2004, the plaintiff filed 'Originating Summons' in the High Court of Lautoka (HBC 106 of 2004) against the Registrar of Titles seeking the grant of the following orders;

- (a) *For an order that the above-named defendant do note Transfer Number 360347 in respect of Lease Number 44656 in favour of the above-named plaintiff on the Defendants Copy of Lease Number 44656.*
- (b) *For an Order that the above named defendant do issue a new and/or Provisional Lease Number 44656 to the plaintiff.*

(20) On 28th May, 2004 the High Court ordered by consent as follows;

- (a) *The above-named first defendant do note Transfer Number 360347 in respect of Lease Number 44656 in favour of the above-named plaintiff on the first defendant's copy of Lease Number 44656.*
- (b) *The above-named first defendant to issue a new and/or Provisional Lease Number 44656 to the plaintiff.*

(21) On 15-02-2015, the plaintiff filed Summons for ejectment under Section 169 of the Land Transfer Act, Cap 131 against the first-named second defendant, i.e., Hari Narayan, {High Court of Lautoka, Civil Action No. 033 of 2005, Chandar Lok v Hari Narayan}. The pleadings of High Court Case No. 033 of 2005 is document no. 2 in the agreed bundle of documents. On 05-05-2005, the High Court ordered the plaintiff to file the Statement of Claim. The Statement of Claim was filed on 16-06-2005, and the plaintiff claimed against the defendant;

- (a) *An order that the Defendant do vacate and deliver up immediate possession to the plaintiff of all that premises on part of land known as Lot 1 on Plan No. 1700 "Toko" (part of) in the District of Tavua on the island of Viti Levu containing an area of 25 acres 2 roods 08 perches and described in Lease No. 44656 being occupied by the defendant.*
- (b) *Damages for unlawful occupation and trespass.*
- (c) *The defendant do pay the costs.*

(22) The defendant delivered its Statement of Defence on 17-10-2005 and alleged fraud which states;

Particulars of Fraud

- (a) *Transferring Lease No. 44656 unto his own name from himself as Attorney for Ballaiya.*

- (b) *Transferring Lease No. 44656 unto his name pursuant to a non-existent Power of Attorney.*
 - (c) *Transferring Lease No. 44656 unto his own name pursuant to a defective Power of Attorney.*
 - (d) *Total failure of consideration.*
 - (e) *Transferring Lease No. 44656 unto his own name with intent to defeat the interests of beneficiaries named in the true last Will and Testament dated the 25th day of January, 1982.*
 - (f) *Transferring Lease No. 44656 unto his own name in the face of a existing Caveat and extended by an Order of the Judge of a High Court of Fiji.*
- (23) In a written judgment dated 22-02-2008, the High Court ordered the defendant Hari Narayan to give vacant possession of the land in Native Lease No. 44656 to the plaintiff.
- (24) In paragraph (3), (4) and (5) of the written Judgment, the learned Judge stated;
- (3) *The defence is that the plaintiff is not the registered lessee of the land in question because the transfer to plaintiff from Ballaiya was of no legal effect due to fraud because it was transferred by the plaintiff to himself under a power of attorney and that there was total failure of consideration.*
 - (4) *Alternatively he says he purchased the land in question pursuant to a sale and purchase agreement dated 18th September, 2001 and that the plaintiff has been paid in full.*
 - (5) *The issues for decision by the Court are:-*
 - (a) *whether the transfer to plaintiff of the lease is vitiated by fraud.*
 - (b) *did the agreement dated 18th September, 2001 pass a legal interest in the land to the defendant.*
- (25) The learned Judge stated his conclusion in paragraph (26) and (27) of his written Judgment as follows;
- (26) *I find on the balance of probability on the basis of evidence before me that there was no dishonesty on part of the plaintiff in the transfer of lease to himself under the power of attorney. Even if the defendant had succeeded and transfer from Ballaiya to the plaintiff held invalid, it would not assist the defendant. It would have meant that the land would revert to the estate of Ballaiya. That would not give any right or interest to the defendant because he is not a beneficiary in the estate of Ballaiya. Secondly, I find*

that the agreement relied upon by the defendant is illegal under the provision of Native Land Trust Act and by virtue of the provisions of Subdivision of Lands Act. I also find that the plaintiff did not authorize anyone to sell land on his behalf.

(27) *I have my sympathies for the defendant. It is obvious that Avinasha Nand Took advantage of his desperate situation and managed to obtain \$5,000.00 from him. Nevertheless, the law of the land must be enforced. The defendant is ordered to give vacant possession of the lease 44656 on or before 30th May, 2008. The defendant is to pay the plaintiff's costs to be taxed if not agreed.*

(26) The plaintiff obtained an order for vacant possession of the Native Lease No. 44656 and the Sherriff of Fiji evicted Hari Narayan and delivered possession to the plaintiff in 2008.

(27) In the present case, at the trial, witness (Ms) Chandra Wati was called by the plaintiff on his behalf. She is the daughter of Mr Satya Nand, who is the eldest brother of the plaintiff. She said that after the eviction process, she and her husband was brought on the land by the plaintiff. She said that she and her husband lived in the house on the land and planted sugar cane, vegetables and looked after a goat farm.

(28) The transcript of (Ms) Chandra Wati's evidence in chief contains this, (page (21) and (22) of the transcript of evidence).

Q: No who cultivated the land?

A: We and one of our friends.

Q: What about Mr. Lok?

A: Yes he comes sometimes and tractor and ploughs the land, we plant the sugar cane and the vegetables there.

Q: Did he bring other laborers as well?

A: Yes, yes, from Lautoka he brings the labourers from there.

(29) The transcript of (Ms) Chandra Wati's evidence given under cross-examination contains this; (page (27) and (28) of the transcript of evidence).

Q: And in return of the place, what were you asked to do? You asked to stay in Tavua and what you had to do for Chandar Lok?

A: I have to look after the farm and the goats and the cows.

Q: How big was the farm? You wouldn't know the acres?

A: It was a big farm, don't know how many acres.

Q: Where you were staying, how big was the house that you are staying?
A: 3 bedroom house.

Q: Would it be correct that you have known Chandar Lok from childhood?
A: Yes, yes

Q: Thank you Madam. You would visit him often?
A: Yes, he uses to visit us often.

Q: In a year, how often would you visit him?
A: No, about 2-3 months like that because he comes to see the farm there.

Q: In year 2001-2002, would you have visited him?
A: Yes.

Q: The house that you are living was the house there when you visited him in 2001-2002?
A: Yes.

(Emphasis added)

- (30) On 26-05-2015, the plaintiff filed summons for ejectment under Section 169 of the Land Transfer Act, Cap 131 against one "Alipate Vuki" alleging that "Alipate Vuki" and his family are occupying part of the land in Native Lease No. 44656.
- (31) In a written ruling dated 11-12-2015, I (when I was sitting as the Master) refused the plaintiff's application for vacant possession. I concluded that the plaintiff has not shown that he is the registered proprietor of the land in Native Lease No. 44656, a condition precedent for proceedings brought under Section 169 (a) of the Land Transfer Act.
- (32) In the Section 169 proceedings before me, the primary defence of the defendant "Alipate Vuki" was that the iTLTB has not consented to transfer No, 360347 and therefore the transfer offends Section 12 of the iTLTB Act and the absence of the consent vitiates the transfer ab initio. The defence submitted to me annexure AV-2, a letter from iTLTB denying consent to transfer No. 360347.
- (33) Besides, the document marked as annexure "A" is just a photocopy of the Native Lease No. 44656. It carried no authentication or certification of the Registrar of Titles as required by the Section 11(2) of the Civil Evidence Act No. 27 of 2002 and Section 14 of the Registration Act, Cap 224.
- (34) Being aggrieved by my decision, the plaintiff moved in appeal to a Judge in the High Court of Lautoka.

My findings that the plaintiff has not established that he is the registered proprietor of the land in Native Lease No. 44656 was upheld in appeal by the Judge of the High Court in a written ruling dated 11-04-2017.

- (35) There is an appeal from that decision of the High Court Judge to the Fiji Court of Appeal. The appeal is still on foot. It is important to note that no application for stay has been made to suspend the Order.
- (36) Upon the basis of the decision of the Master of the High Court dated 11-12-2015, [which was upheld by the Judge of the High Court], the first defendant, iTLTB, demanded possession of the land in Native Lease No. 44656 from (Ms) Chandra Wati and her husband Mr Krishna Murti who were in actual possession of the land. The written notice is in the following terms;

22nd December, 2015

**Mr Krishna Murti & Ms. Chandar Wati aka Kanta
Toko
TAVUA.**

Dear Sir or Ma'am.

"Without Prejudice"

**Re: Lot 1 Plan No. 1700 Toko (Part of) in the District of Tavua
in the Province of Ba (25a 2 r & 8p)**

In reference to the above mentioned land upon which you are occupying the residential premises of Mr Hari Narayan and Mr Vikash Yenktesh Naidu with the permission of one Mr Chandar Lok.

*Be advised that the Lautoka High Court has decided in the case of **HBC 79/15 Chandar Lok – v-Alipate Vuki** that Chandar Lock "is not the registered proprietor" of the above-mentioned land.*

Be further advised that an application to lease the said land has been received by the Board on behalf of Mr Hari Narayan and Mr Vikash Vektesh Naidu who submit an equitable right to a lease over part of the subject land as owners of the premises you are currently occupying who had also paid \$6,000.00 in land rent to Mr Chandar Lok.

Take notice therefore that you are required to vacate the said land within seven days of receiving this notice to allow the owners of the house to enjoy their premises as their lease application is being processed.

Kindly note that we will take legal action if you fail to adhere to the terms of this notice.

Thank you.

Yours faithfully,

.....
(sgd) Inoke Lutumailagi
SENIOR LEGAL OFFICER

- (37) Pursuant to the notice, Mr Krishna Murti and (Ms) Chandra Wati vacated the land and iTLTB restored Hari Narayan into possession.
- (38) The plaintiff alleges that he has been wrongly evicted and seeks damages from the defendants. The plaintiff relies on **2008** High Court decision, HBC 033 of 2005.

It is important to remember that there is in place a finding of the High Court in **2015** and which was upheld in appeal in **2017** that the plaintiff is not the “registered proprietor of the land” in Native Lease No. 44656.

- (39) The plaintiff claims that he is the registered proprietor of the land in Native Lease No. 44656. Counsel for the plaintiff drew my attention to memorial number 360347. The transfer of Native Lease No. 44656 that benefitted the plaintiff (through the Power of Attorney given by his father) is registered by the Registrar of Titles under memorial number 360347 on 10-06-1994.
- (40) As I said in paragraph (17) and (18) above, the transfer is void. The absence of the consent of the iTLTB to the transfer vitiates the transfer ab initio. The consent required from iTLTB cannot be dispensed with by the Registrar of Titles. The Registrar of Titles is mandated only to register lawful dealings on Native Lands under the provisions of the Land Transfer Act. The Registrar of Titles is under a legal duty to satisfy himself in regard to the availability of the consent of iTLTB when he registers dealings on Native Lands. A further fact to be observed is that the deceased ‘Ballaiya’ had executed his last Will on 13th May, 1992 wherein he named the beneficiaries as the plaintiff, Raj Dewan and Ram Chandar in equal shares. The transfer of the lease by the plaintiff to himself on 25-03-1994 by which he has transferred the entirety of the property to the disadvantage of the other two beneficiaries, goes against the very intention of the deceased when he executed the last Will in 1992. (See; **Chandar Lok v (1) Bal Ram, (2) The Registrar of Titles and A.G., F.C.A., ABU 0005 of 2012, Judgment 30-11-2012**).
- (41) The transfer No. 360347 could not be received for registration or validly registered because the iTLTB has not endorsed its consent on the executed transfer. Consequently, the plaintiff is not entitled to the benefit of registration. In my view, the plaintiff has improperly obtained the registration of transfer No. 360347.
- (42) The registration of transfer no. 360347 is irregular. It is true that the iTLTB has not initiated any action to annul the transfer. In my view, no action is required by the iTLTB to annul the transfer because Section 12 (1) of the iTLTB Act makes any transfer, sublease or any dealing on a Native Land without the consent of iTLTB null and void.
- (43) The plaintiff claims title from registration of a void transfer. The transfer was a nullity. The registration has been improperly obtained. The plaintiff cannot derive title from

registration of a void transfer. The nullity of the executed transfer cannot be cured by subsequent registration which is irregular and improper.

- (44) There cannot be a tenancy under ALTA since the plaintiff did not have a valid title as lessee. No contract of tenancy could be created by a void transfer. Therefore, he has no leasehold interest in the land. At no time there was a legal basis for contract of tenancy. Therefore, the plaintiff at no time was the tenant of iTLTB.

ALTA defines a “Contract of Tenancy” as;

“Contract of tenancy means any contract express or implied or presumed to exist under the provisions of this Act that creates a tenancy in respect of agricultural land or any transaction that creates a right to cultivate or use any agricultural land”.

The definition of the ‘tenant’ reads;

“tenant means a person lawfully holding land under a contract of tenancy and includes the personal representatives, executors, administrators, tenants or any other persons deriving title from or through a tenant”.

- (45) Due to the reasons, which I have endeavored to explain in the preceding paragraphs, the plaintiff cannot invoke the provisions of ALTA.

The plaintiff’s first cause of action fails.

- (46) The plaintiff contends that he obtained indefeasible title by registration. In my view, the plaintiff cannot obtain indefeasible title by improperly obtaining the registration of a void transfer. The concept of indefeasibility of title under the Torrens System should not be allowed in instances where a transfer is ‘*void ab initio*’ as in the present case.

- (47) The iTLTB does not deny the fact that the land rent were paid and accepted. Mr Lui McKay was called by the plaintiff on his behalf. Mr McKay was the Technical Officer of iTLTB. He said that he issued survey instructions for a lease for 38 acres.

The plaintiff argued that the effect above is that he was accepted as a lessee by the iTLTB.

- (48) I do not accept that submission. The transfer is void. There is no existing lease. The payment and acceptance of rent would not operate against iTLTB. iTLTB cannot acknowledge or recognize a continuing tenancy by acceptance of rent because there is no existing lease which has been brought to an end by a notice to quit.

- (49) The second defendant’s re-entry and taking possession of the land is constituted by their application to iTLTB to lease the land after the eviction of the plaintiff upon the High Court decision in 2015 which was upheld in appeal in 2017. Before or until the order is

set aside, the plaintiff should obey the order. The court order is applicable to the plaintiff. The second defendant's re-entry and taking possession of the land is not any "tit for tat" strategy and is distinct from the plaintiff's eviction and it has no connection with the plaintiff's eviction from the land and it was not motivated by any malice towards the plaintiff.

I hold that the second defendant's re-entry and taking possession of the land is not an act of defiance of the High Court order for possession in 2008 or the Tavua Magistrate's Court order.

[H] **ORDERS**

- (1) The plaintiff's claim is dismissed.
- (2) The plaintiff is ordered to pay costs of \$1,500.00 to each defendant within 14 days from the date of the judgment.




.....18/09/2020
Jude Nanayakkara
[Judge]

At Lautoka
Friday, 18th September, 2020