IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

HBC 236 of 2017

BETWEEN	:	**PATRICK JOHN JAY**
		PLAINTIFF
AND	:	**SEMITI DIGITAKI**
		DEFENDANT

BEFORE	:	M. Javed Mansoor, J
COUNSEL	:	Ms. S. Singh for the plaintiff
	:	Mr. A. Rayawa for the defendant
Written submissions	:	7 December 2020
Date of Decision	:	11 August 2022

DECISION

PRACTICE & PROCEDURE: *Application to recall witness after conclusion of trial*

The following case is referred to in this judgment:

a. *Browne v Dunn [1893] 6R 67 HL*
b. *Peter John Keayes and others v Brownyn Ann Searle [1995] FCA 1677 (17 November 1995)*

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1. The plaintiff filed action by writ seeking vacant possession of a land occupied by the defendant, and for the recovery of mesne profits and damages. The plaintiff claimed that he acquired the subject land around 22 April 2013, and that since then the defendant has been in unlawful possession of the land, which is situated in the Tikina of Nausori in the province of Tailevu, and is said to be 1289 square meters in extent. The defendant denied the plaintiff's claims.

2. Trial was concluded on 16 June 2020, after evidence was given on behalf of both parties. The plaintiff gave evidence by skype, as he resides in Australia. Two other witnesses, Mr. Kameli Ritova, an officer of the iTaukei Land Trust Board and Ms. Treta Sharma, the Registrar of Titles and Deeds, also gave evidence on behalf of the plaintiff. The defendant gave evidence on his behalf.

3. After trial was concluded, the plaintiff filed a summons on 19 June 2020 asking for leave to be granted to recall witnesses, in particular, Mr. Kameli Ritova. This was supported by an affidavit of Mr. Patrick John Jay, the plaintiff. The defendant objected. Parties then filed affidavits in respect of the summons for leave to recall witnesses, and agreed to dispose the matter by written submissions. The plaintiff filed submissions on 7 December 2020. The defendant did not file written submissions.

4. It is unnecessary to go into details concerning the main dispute between the parties. Suffice to say that the plaintiff led evidence of his ownership to the land, and tendered title documents and the plan depicting the disputed land, which bears NLTB reference number 4/14/2896.

5. The affidavit in support given by the plaintiff averred that the defendant's lawyer gave evidence from the bar table saying:

a. "The lease diagram does not identify the land which is 4/14/2896

b. The land that is highlighted in the Lease diagram of Plaintiff's exhibit 1 – the Agreement for Lease No. 4/14/2896 is for another lot 14/00/8004

c. The Plaintiff owns Matabai No. 4 TL 1096.7967 which is behind the highlighted lot on the scheme plan and has produced an agreement for lease for the wrong land".

6. The plaintiff stated further in his affidavit *inter alia*:

a. "The scheme plan shows only one highlighted lot which is the lot that the Defendant also confirmed in his affidavit Defence Exhibit No. 2 as being occupied by him.

b. The Plaintiff's second witness – Mr. Ritova of the ILTB confirmed that he had been to the site and confirmed that I am the owner of the land comprised in Agreement for Lease No. 4/14/2896 which is occupied by the Defendant.

c. In the circumstances, Mr. Aca Rayawa falsely gave evidence that the subject lot was behind the highlighted lot (Agreement for Lease No. 4/14/2896). He also falsely stated to the Court that the lot 14/00/8004 is the lease number for the land that I own".

7. Mr. Jay stated in his affidavit that Mr. Rayawa's action in giving evidence from the bar table and the judge recording it and not allowing his lawyer's objection to be upheld was wrong. He stated that he understood from his lawyers that the judge did not allow his lawyer to object to the evidence that was given by the defendant's counsel.

8. The plaintiff's written submissions stated that at the time of closing submissions, Mr. Rayawa, the defendant's counsel, had "presented new evidence from the bar table", and that the new evidence concerned "the lease

diagram of the land included in the Agreement for Lease tendered in as evidence on behalf of the plaintiff as exhibit P1".

9. The plaintiff submitted that as Mr. Rayawa has raised new issues (which are not specified), there's an application before court to recall Mr. Ritova of the ITLTB's Nausori branch to give evidence and clarify the new issues raised by Mr. Rayawa in his closing submissions. The plaintiff submitted that he made the application for leave to recall witnesses to clarify any ambiguity shown by the lease diagram, and alternatively to dismiss the allegations raised in closing submissions by Mr. Rayawa as this offends the rule in *Browne v Dunn*[1]. It was submitted that each party has a duty to put its client's case to the opposing witness, especially on disputed facts, to give the witness the opportunity to explain his or her side of the story. Failure to do so, it was submitted, implies that a party accepts the evidence of the witness. The plaintiff also referred to the Australian Federal Court decision in *Peter John Keayes and others v Brownyn Ann Searle*[2], a decision in which the trial judge's refusal to exercise his discretion in allowing a witness to be cross examined further by freshly appointed counsel when trial resumed was not disturbed in appeal.

10. The defendant opposed the plaintiff's application saying that the application was irregular, and that there are no rules or statutory provisions allowing such an application.

11. Although the court may permit a witness to be recalled in appropriate circumstances, the plaintiff and his counsel are clearly misconceived in this instance. The plaintiff's counsel had a fair opportunity to lead evidence through his witnesses. The plaintiff's complaint is with regard to certain matters submitted by the defendant's counsel after the trial concluded on 16 June 2020. Mr. Rayawa was entitled to make submissions, the court having given the opportunity to both parties to do so. Those submissions, which were made on 17 June 2020, do not amount to evidence. Trial has concluded, and judgment will be given on the evidence produced by the parties, and not on the basis of submissions, which are meant to assist court.

[1] [1893] 6R 67 HL
[2] [1995] FCA 1677 [17 November 1995)

12. Nor will issues be raised solely from submissions. The raising and answering of issues is a matter for court. In this case, the parties have assisted court by agreeing upon issues before the commencement of trial. The court has the discretion to vary or formulate issues agreed by the parties so that the dispute can be effectively and justly adjudicated.

13. If the defendant has not cross examined the plaintiff's witness, that is a matter for the defendant, and the court is competent to make appropriate findings and inferences based on evidence. The rule in *Brown v Dunn* will not assist the plaintiff to recommence the trial and recall witnesses for the reasons stated by him.

14. Leave to recall witnesses is declined. Judgment on the substantive case will be delivered shortly.

ORDER

A. The plaintiff's summons dated 19 June 2020 is struck off.

B. The plaintiff is directed to pay the defendant costs summarily assessed in a sum of $750.00 within 21 days of this decision.

Delivered at Suva this **11th** day of **August, 2022**

M. Javed Mansoor
Judge