

In the High Court of Fiji  
At Suva  
Civil Jurisdiction

Civil Action No. HBC 209 of 2020

Mohammed Shameen Airud Khan

Applicant

v

iTaukei Land Trust Board

First Respondent

Registrar of Titles

Second Respondent

Counsel: Mr V. Rokodreu for the applicant  
Ms K. Suveinakama for the first respondent  
Ms M. Ali with Mr S. Kant for the second respondent  
Date of hearing: 25<sup>th</sup> March,2021  
Date of Ruling: 15<sup>th</sup> September,2022

**Judgment**

1. The applicant, in his originating summons seeks that the respondents *comply* with the Orders made by Justice Wati on 2<sup>nd</sup> June, 2014; the first respondent grants consent for the transfer of Native Lease 20503, Lot 64 depicted as Lot 9 on Plan M 2716 in Macuata comprising an area of 22 perches by mortgage sale to him; and, the cancellation of the lease by the first respondent be declared null and void.

2. The following facts, as set out in the plaintiff's supporting affidavit are not in dispute. The first respondent initially transferred the lease to one Mohammed Alam. Alam mortgaged the lease to Colonial National Bank, now BSP. He defaulted in his repayments and the lease was advertised for mortgagee sale. The Bank accepted the applicant's tender and entered into a Memorandum of terms of sale with him. The first respondent granted the applicant consent for transfer by mortgagee sale for a period of 3 months. The documents pertaining to the transfer were lodged with the second respondent. The second respondent did not sign the memorial. Alam filed action against the Bank, the insurer, the second respondent and this applicant.
3. On 15<sup>th</sup> October, 2020, I granted an interim injunction restraining the first respondent from dealing with the lease until this determination

***The determination***

4. The applicant's grievance is that the first respondent refuses to grant consent for the transfer of the lease to him, unless he pays the breach fee and arrears of rental. He contends that condition is unfair and inequitable, as he was neither in breach nor in arrears of rental. Alam was in possession of the lease during that period and he or the Bank has to pay the fee and arrears.
5. The position of the first respondent is that the applicant was granted consent only for three months. The applicant was informed that consent for the mortgagee sale would be provided once he or the Bank paid the arrears. The first respondent has an absolute discretion to grant consent under section 12 of the iTaukei Land Trust Act, subject to any condition it imposes.
6. The second respondent states that the lease was cancelled due to breach and non-payment of rent by Alam. The cancellation can only be challenged by a lessee under section 105 of the Property Law. The second respondent cannot enforce the Orders made by Justice Wati. The mortgagee sale is between the applicant and the respondent

7. The issue in this case is whether the condition imposed on the applicant to pay the breach fee and arrears is lawful.

8. Gates J (as he then was) in *Chandra Mani v Director of Lands & AG*, (Civil Action No. HBC 124 of 2001L) stated that the “*purpose of the provision for consent*” is

*"in order to protect the lessor from having his premises used or occupied in an undesirable way or by an undesirable tenant or assignee..." per A.L. Smith LJ in Bates v Donaldson [1896] 2 QB 241 at p.247. In Re Gibbs and Houlder Brothers and Company Ltd's Lease [1925] 1 Ch.575.*

His Lordship considered the issue whether the Director of Lands could insist on prior clearance of rent arrears arising from increases made unilaterally by the Director, before endorsing his consent to an assignment of a State Lease. He said:

***Withholding of consent***

*The conditions that the Director imposed for his endorsement of consent to the transfer were no doubt intended to secure arrears of rental monies which he considered rightly due to the State.*

*To impose a condition in the nature of a fine amounts to a withholding of consent unreasonably: Jenkins v Price [1907] 2 Ch.229 at p.234. The payment being in the nature of a fine was thus unenforceable. (emphasis added)*

9. The facts that gave rise to the litigation filed by Alam are as follows. Alam’s house was destroyed by fire. He had insured the lease. He **filed** action against the Bank, the insurer, the second respondent and this applicant, as the Bank settled the insurer’s claim without reference to him. To recover the shortfall, Alam entered into a sale and purchase agreement with the applicant in the instant case. Justice Wati discharged the injunction obtained against the mortgagee sale and made order for “***the Bank is to proceed to finalize the mortgage sale*** (to this applicant)”. (emphasis added) The case is reported in [2014] FJHC 392(2 June, 2014).

10. The appeals to the Court of Appeal and Supreme Court, [2018] FJSC 10; CBV006.2017 (27 April, 2018) were dismissed.

11. Justice Keith stated :

*..the Bank purported to exercise its power of resale as the mortgagee under the mortgage, and by a deed signed on behalf of the Bank on 20 May 2005, the lease was assigned to Mr. Khan for \$33,333.00. The assignment purported to record that the transfer was registered by the Third Defendant, the Registrar of Titles, on 7 October 2005. In the event, the Bank decided on 28 October 2005 to write off Mr. Alam's debt. In order to ensure that the assignment of the lease did not go ahead in the meantime (thereby rendering nugatory his claim that the Bank had not been entitled to exercise its power of resale), he sought and obtained an interim injunction restraining the Registrar of Titles from registering the transfer of the property to Mr. Khan (notwithstanding that the assignment had purported to record that the transfer had already been registered).*

*Wati J. discharged the interim injunction, thereby freeing the way for the transfer of the property to Mr. Khan to proceed.*  
*Although the way has therefore been clear at all times since Wati J's judgment for the transfer of the property to Mr. Khan to proceed, it has not done so. The Registrar of Titles is waiting for the outcome of this litigation before deciding what to do.* (emphasis added, underlining mine)

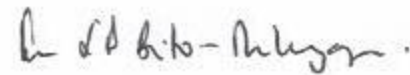
12. The restraining order was finally discharged by the Supreme Court in 2018.

13. In my judgment, there is no legal basis for the first respondent to claim the breach fee and rental arrears from the applicant for the period Alam was in possession of the land. It is unlawful and inequitable to impose that condition on the applicant.

14. I direct the first respondent to grant consent to the applicant for the mortgagee sale and transfer the lease to him forthwith.

15. **Orders**

- i. I direct the first respondent to forthwith grant the applicant consent for the transfer of Native Lease 20503, Lot 64 depicted as Lot 9 on Plan M 2716 in Macuata by mortgagee sale to the applicant.
- ii. The cancellation of Native Lease 20503, Lot 64 depicted as Lot 9 on Plan M 2716 in Macuata by the respondents is declared null and void.
- iii. The respondents shall pay the applicant costs summarily assessed in a sum of \$2000.00.



**A.L.B. Brito-Mutunayagam**  
**JUDGE**  
**15<sup>th</sup> September, 2022**

