

**IN THE HIGH COURT OF FIJI**

**AT LABASA**

**[CIVIL JURISDICTION]**

**CIVIL ACTION NO. HBC 35 OF 2024**

**BETWEEN** : **SHIU KUMARI**  
**Plaintiff**

**AND** : **RAJ PATTI, SATENDRA PRASAD & ROHIT RAM**  
**KHELAWAN**  
**Defendants**

**Counsel** : **Mr A. Kohli for the Plaintiff**  
**Mr. R. Dayal for the Defendants**

**Date of Hearing** : **15 August 2024**

**Date of Ruling** : **15 August 2024**

**EX TEMPORE JUDGMENT**

**(Motion seeking interim injunctive orders under O.29, r.1)**

[1] The parties are closely related. The first name defendant is the mother of the plaintiff. The second and third named defendants are the brothers of the plaintiff.

[2] The claim itself involves a dispute over a parcel of land in Savusavu. The defendants inherited the land from their grandfather. The plaintiff says that their grandfather promised her what is, in effect, a life interest in a small piece of the defendant's parcel of land. She has built a house on the land at a cost of, she says, \$60,000 and has lived there with her family since about 1997. In March 2024, she moved out temporarily. The defendants used the plaintiff's absence to take control of the house and place tenants in. It appears they have kept the plaintiff off the property.

[3] The defendants say that the plaintiff has no rights to the house or the land upon which the house is situated, that their grandfather made no such promise and, in fact, desired that the plaintiff be not permitted to remain on the land. They say that along with their

father they took pity on the plaintiff in 1999 and gave her some of the land to use to build a house until she was able to source her own land. They say the house that she built cost no more than \$10,000.

[4] There is common ground, albeit little, between the parties. It is not in dispute that the plaintiff was given some land to build a house and that she did build a house. The dispute is whether the permission came from the plaintiff's grandfather or father (in 1997 or 1999). Also in dispute is whether the permission to use the land was for her lifetime or for a short time until she found her own land.

[5] The other common ground is that the plaintiff has essentially lived in the house since 1997 or 1999, although, according to the defendants, the plaintiff has moved out on occasion. The defendants also say that they have made it clear to the plaintiff that she has overstayed her welcome – they have apparently previously served her with a Notice to Vacate.

### **Present proceedings**

[6] This proceeding was filed by the plaintiff on 11 June 2024 by way of a Writ of Summons. The plaintiff seeks by way of relief:

- i. Declarations that, firstly, the plaintiff is the beneficial owner of the land in question, and, secondly, that the defendants hold the land in trust for the plaintiff.
- ii. An order that the defendants be restrained from interfering with her peaceful occupation of the land.
- iii. An injunction restraining the defendants from stopping the plaintiff from using the driveway which allows her access to her house.
- iv. Damages and costs.

[7] The defendants have filed a defence and counterclaim. Their defence is that the plaintiff has no locus standi and that her claim is misconceived and bad in law. The

counterclaim is for their alleged loss of rental income and use of the land over the previous 20 years whilst the plaintiff has lived there.

### **Motion for Injunction**

[8] The plaintiff's Motion was filed on 6 August 2024 supported by an affidavit by the plaintiff attesting to the truth of her pleadings. She also provides an undertaking as to damages relying on the value of her house (allegedly \$60,000) as the basis of her ability to pay any damages. The injunctive relief sought by the plaintiff is an order that *'the Defendant be restrained from stopping the Plaintiff access to the land containing 2 ½ chains x 2½ chains comprised in Lot 1 on DP 10049 being subdivision of balance of land contained in CT 23922 upon which is constructed the Plaintiff's residence'*.

[9] The matter was scheduled for mention tomorrow, 16 August 2024, but I am returning to Suva tomorrow and I asked counsel whether they were available to have the matter dealt with today. I am most grateful to counsel for accommodating me. Mr Kohli is ready to argue the matter. Mr Kumar advises that the defendants oppose the application and wish to file an affidavit in opposition. Mr Kumar proposes that the parties file written submissions and that the matter is determined on the papers. I enquired from Mr. Kumar what the defendants intend to depose to in their affidavit. He informs me that they will depose to the truth of the content of their pleadings in defence and will also annex a copy of their grandfather's Will.

[10] I am satisfied that the defendant's proposed evidence will not take the matter any further. I am happy to take the pleadings at face value. The pleadings show that there are material factual disputes key to determination of the substantive issue. The factual disputes cannot be resolved on this interlocutory application and can only be determined at trial. The grandfathers Will cannot, of itself, take the matter any further. I have, therefore, decided to determine the plaintiff's Motion on the current papers.

### **Decision**

[11] The power of the Court to provide injunctive relief is contained at O.29, r.1. The provision reads:

- (1) *An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in the party's writ, originating summons, counterclaim or third party notice, as the case may be.*
- (2) *Where the applicant is the plaintiff and the case is one of urgency and the delay caused by proceeding in the ordinary way would entail irreparable or serious mischief such application may be made ex parte on affidavit but except as aforesaid such application must be made by notice of motion or summons.*
- (3) *The plaintiff may not make such an application before the issue of the writ or originating summons by which the cause or matter is to be begun except where the case is one of urgency, and in that case the injunction applied for may be granted on terms providing for the issue of the writ or summons and such other terms, if any, as the Court thinks fit.*

[12] The law is settled on where the Court may make an order for an interim injunction. In *Korovulavula & Anor v Fiji Development Bank* [1997] FJHC 197, Pathik J stated:

*The principles to be followed in considering the granting of injunctive relief are set out in the leading case of American Cyanamid Co v Ethicon Ltd (1975) A.C. 396. The House of Lords there decided that in all cases, the Court must determine the matter on a balance of convenience, there being no rule that an applicant must establish a prima facie case. The extent of the court's duty in considering an interlocutory injunction is to be satisfied that the claim is "not frivolous or vexatious", in other words, "that there is a serious question to be tried".*

*In Cyanamid (supra) at page 406 Lord Diplock stated the object of the interlocutory injunction thus:*

*"... to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in*

*damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial. The court must weigh one need against another and determine where "the balance of convenience" lies".*  
(emphasis mine)

A similar view was expressed by McCarthy P in *Northern Drivers Union v Kuwau Island Ferries* (1974) 2 NZLR 61 when he said:

*"The purpose of an interim injunction is to preserve the status quo until the dispute has been disposed of on a full hearing. That being the position, it is not necessary that the Court should have to find a case which would entitle the applicant to relief in all events: it is quite sufficient if it finds one which shows that there is a substantial question to be investigated and that matters ought to be preserved in status quo until the essential dispute can be finally resolved ... "*

(*ibid*, 620)

*"It is always a matter of discretion, and ... the Court will take into consideration the balance of convenience to the parties and the nature of the injury which the defendant, on the one hand, would suffer if the injunction was granted ... and that which the plaintiff, on the other hand, might sustain if the injunction was refused ..."* (*ibid*, 621).

...

*As to "balance of convenience" the court should first consider whether if the Plaintiffs succeed at the trial, they would be adequately compensated by damages for any loss caused by the refusal to grant an interlocutory injunction.*

...

In *HUBBARD v VOSPER* (1972) 2 WLR 359, LORD DENNING at p.396 gave some guidance on the principles of granting an injunction which I think is pertinent to bear in mind in this case when he said:

*"In considering whether to grant an interlocutory injunction, the right course for a judge is to look at the whole case. He must have regard not only to the strength of the claim but also to the strength of the defence, and, then, decide what is best to be done. Sometimes, it is best to grant an injunction so as to maintain the status quo until the trial. At other times, it is best not to impose a restraint upon the defendant but leave him free to go ahead. For instance in Fraser v Evans [1969] 1 QB 349, although the plaintiff owned the copyright, we did not grant an injunction because the defendant might have a defence of fair dealing. The remedy by interlocutory injunction is so useful that it should be kept flexible and discretionary. It must not be made the subject of strict rules."*

[13] These principles have been applied up to the present time. In *Alizes Ltd v Commissioner of Police* [2013] FJHC 596, Tuilevuka J noted:

11. *Interim injunctions are a powerful discretionary remedy. But they are not lightly granted. They are granted ex parte only if there is urgency. In other words, if to proceed normally (i.e. inter partes by Notice of Motion or Summons) would be a delay entailing irreparable or serious mischief, (see Order 29 Rule 1(2) as amended in 1991 in LN 61/91).*
12. *The applicant must show a strong enough case to justify the Court not hearing the other side's case. Usually, to show "urgency", the applicant must show that, unless the court intervenes with a restraining order, he has a legal right in the subject-matter of the case which is under an immediate threat of being violated. Apart from that, the applicant must convince the court that the balance of convenience favours the granting*

*of the injunction ex-parte.*

- [14] Balapatabendi J succinctly identified the test as follows in *Vanualevu Muslim League v Hotel North Pole & Ors* [2013] NZHC 151, at 17.4:

*What could be deduced from Lord Diplock's rulings in American Cyanamide Case are in fact tests to be adopted in dealing with an application for interim injunction. The tests could be summarized as follows:-*

- 1. Is there a serious question to be tried?*
- 2. Is damages an adequate remedy?*
- 3. Where does the balance of convenience lie?*

- [15] In order for the plaintiff to be entitled to the interim relief sought she must satisfy each of the three tests. Even if she does so, the Court must still be satisfied that the orders sought are necessary to preserve the status quo – an interlocutory application should not be used to seek orders that must be determined at the substantive hearing.

**Is there a serious question to be tried?**

- [16] It is not necessary for the plaintiff to show that she will succeed with her claim. It suffices simply for her to show that her claim is not hopeless.

- [17] The plaintiff claims that she was promised a life interest in the land in question. She has built a house on the land, incurring the cost of doing so. The outcome of the proceeding will likely turn on the viva voce evidence produced at trial and whatever documentary evidence that may exist. I am satisfied that there is a serious question to be tried.

**Is damages an adequate remedy?**

- [18] In my view, the answer is no. There is a risk, if an injunction is not granted, that the defendants may make changes to the house or the land, including even removing the plaintiff's house.

### **Where does the balance of convenience lie?**

[19] In my view this is the main issue. There is no doubt that one or other party will be affected by the grant or refusal of the injunction. If the order is granted the defendants will be deprived of their proprietary rights over the use of the land and potentially, collection of rental monies if the tenants decide to move out. Mr Kohli stated that if the order is granted the plaintiff hopes to move back into her house and will approach the tenants to this end.

[20] Ultimately however, it is the risk that the plaintiff will lose her house if she is denied access to it (and it is left entirely in the control of the defendants) that persuade me to grant the injunctive relief sought by the plaintiff. If the house is permanently damaged or removed this will thwart any judgment for the plaintiff, if she succeeds with her claim. The injunctive order will, in my view, maintain the status quo (insofar as the condition of the house in question) until the substantive issues are determined.

### **Orders**

[21] My orders are as follows:

- i. The defendants are restrained from stopping the plaintiff from having access to the land containing 2½ chains x 2½ chains comprised in Lot 1 on DP 10049 being subdivision of balance of land contained in CT 23922 upon which is constructed the plaintiff's residence until further orders of Court.
- ii. The costs of this application are to be costs in the cause.



  
D.K.L. Tuiqereqere  
JUDGE

### **Solicitors:**

Kohli & Singh Labasa for the Plaintiff

Sarju Prasad Esquire for the Defendants