

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBC 53 of 2016

BETWEEN : **VIJENDRA KUMAR** of Maro, Sigatoka, Farmer.

PLAINTIFF

AND : **HONEY DEW FARMS LIMITED** a limited liability company
having its registered office at 2 Khans Building, Main Street, Nadi.

1ST DEFENDANT

AND : **NAIVALU, EDI, INOSI** and all other illegal Occupants of Maro,
Sigatoka.

2ND DEFENDANT

Counsel : Mr. E. Sailo for the Plaintiff
Ms. Vaurasi for the Defendants

**Written Submissions
by Defendant on** : 12th December, 2017

**Written Submissions
by Plaintiff on** : 12th December, 2017

Date of Ruling : 12th February, 2018

Ruling by : Hon. Mr. Justice Mohamed Mackie

RULING OF THE COURT
[On Preliminary Issues]

A. Introduction:-

1. When this matter was taken up for trial on 6th November, 2017 before me, the learned Counsel who appeared for both the Defendants (Defendant's Counsel) moved for the following issues to be tried as preliminary issues, for which the learned Counsel for the Plaintiff (Plaintiff's Counsel) did not object and both the Counsel agreed to dispose the matter by way of written submissions, which they have duly filed.

- a. No consent was obtained by the Plaintiff from the Director of Lands for the Sale and Purchase Agreement.
 - b. No consent was obtained by the Plaintiff from the Director of Lands to institute the Writ of Summons against the Defendants.
 - c. Since the lease over the subject property is expired and a new lease has been issued, no order could be made to eject the Defendants.
2. The contention of the Defendant's Counsel with regard to the 1st issue above was that in the absence of the consent of the Director of Lands, the Sale and Purchase agreement becomes null and void and cannot be enforced.
 3. The Counsel for the Defendants also argued that since no consent has been obtained from the Director of Lands to institute these proceedings, the Plaintiff could not have filed this action against the Defendants.

B. Brief Facts

4. Before dealing with the above issues, it is pertinent to briefly look into the facts of this case, as averred in the respective pleadings of both the parties. By his statements of claim dated 1st April, 2016 the Plaintiff states;
 - a. That he was and is the registered lessee of the land comprised in the Crown Lease No:- 5701 being lot 2 in plan N 1954 part of **Maro** situated in the Province of **Nadroga** and the Legal proprietor of all the improvements including the House and Crops on the said lease.
 - b. By the Sale and Purchase Agreement dated 23rd October, 2013 the 1st Defendant agreed to purchase the said property from the Plaintiff for \$ 70,000.00 and on same being signed the 2nd defendant, who is an employee of the 1st Defendant, occupied the part of the dwelling house therein upon the instructions of the 1st Defendant.
 - c. The 1st Defendant failed to complete the transaction despite several requests being made by the Plaintiff and his Solicitors.
 - d. The Plaintiff through his Solicitor's letter dated 13th November, 2014 terminated the Agreement forfeiting the deposit of \$15,000.00 as liquidated damages and the Defendants failed to response to the said letter of termination and the 2nd Defendant failed vacate from the land in question.
 - e. Due to 2nd Defendant's action the Plaintiff has suffered loss and damages up to \$ 26,500, 00. Accordingly, Plaintiff claims, among other reliefs, vacant possession from the 2nd Defendant, judgment in a sum of \$ 26,500.00 and for general damages.

5. Both the Defendants by their joint statement of defence and counter claim dated 27th May 2016, among other things, averred as follows, while denying most of the averments in the statement of claim.
- a. Sale and purchase Agreement was entered into between the Plaintiff and the 1st Defendant for the 1st Defendant to purchase the land for \$70,000.00,
 - b. Consent of the Director of Lands was to be obtained by the Plaintiff ,
 - c. Plaintiff breached the said Sale & Purchase Agreement by failing to provide necessary particulars to the Lands Department for Director's consent and by not paying the arrears of rentals until 4 months after expiry date of settlement ,
 - d. The Agreement was subject to the consent of the Director of Lands,
 - e. It was an implied term of the Agreement that the Plaintiff would do all that is reasonable to obtain the Consent of the Director of Lands,
 - f. The Plaintiff is estopped from terminating the contract and forfeiting the deposit of \$ 15,000.00,
 - g. He failed to obtain the consent of the Director of Lands and failed to observe the several terms of the contract and thereby the 1st Defendant suffered special damages and loss of bargain. Accordingly, Defendants prayed for, among other reliefs;
 1. the dismissal of the Plaintiff's action,
 2. a Judgment granting the Counter claim, directing the Plaintiff to execute a deed transferring the Land in question in the 1st Defendant's name , in failure of which for the Registrar of this Court to execute same.

C. Submissions:

6. It is to be noted that the Defendant's Counsel, in the written submissions filed as aforesaid, has reframed the 1st and the 2nd preliminary issues, shown in paragraph 1 above, to appear as follows,
- a. *Whether the consent of the Director of Lands was obtained pursuant to the said agreement?*
 - b. *Whether the consent of the Director of Lands was obtained before the Plaintiff instituted these proceedings?*
7. On a careful scrutiny of the above two issues, it is clear that the above two issues, as they stand reframed, are no more the issues of law, but the issues of facts, which do not warrant the Court to try them as preliminary issues, since they can be duly answered at the end of the trial after taking the evidence. Further, the Counsel has not raised any consequential issue to

be answered on the validity of the Agreement and the maintainability of the present action, in the light of the answers to be given to the above two issues (a, b).

8. However, in paragraph 4.4 and at the conclusion of the written submission, it is submitted on behalf of the Defendants that since the Plaintiff did not obtain the written consent of the Director of Lands prior to the dealing, it renders the Sale and Purchase dealing null and void. (The Counsel seems to be considering the Sale and Purchase Agreement between the parties as a “dealing” with the Land in question)
9. It was also urged by the Defendant’s Counsel, in paragraph 4.7 of the written submissions, that the Plaintiff did not obtain the written consent from the Director of Lands prior to instituting this action in terms of section 13 of the Act.
10. Both the Counsel have, in their respective written submissions, drawn the attention of the Court to several decided authorities on the question of obtaining the consent of the Director of Lands before dealing with the Crown Lands.
11. The Counsel for the Plaintiff in the written submissions maintains the position that the Plaintiff applied for the consent to file action against the Defendants and the Director of Land has in fact, given the consent to file action to evict the **tenants** and the reason for giving consent in such nature has to be ascertained at the trial through the relevant witness from the office of the Director of lands. It appears that the Plaintiff is considering the 2nd Defendant as a trespasser, with the expiry of the Plaintiff’s Sale and Purchase Agreement with the 1st Defendant and on the failure of the 2nd Defendant to respond to the letter sent by the Plaintiff’s Solicitors requiring the 2nd Defendant to vacate.

D. Law & Analysis:-

12. **Section 13(1) of the State Lands Act provides:**

“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 affected without such consent shall be null and void”.

13. As far as the first objection is concerned, the counsel for the Defendant argues that the Sale and Purchase agreement is a dealing and falls within the ambit of the above provision.
14. The question here arises for the determination is, whether entering into a Sale and purchase Agreement by two parties in respect of a Crown Land, would strictly fall in to the acts of Alienation or Dealing, which could culminate in the Sale or Transfer or Sublease or Mortgage or Charge or Pledge and thereby contravene the relevant Sections of the Act.
15. In my view, the mere signing of a Sale and Purchase Agreement by and between two parties need not necessarily fall within the meaning of “Dealing” until and unless it affects the rights and interest of the State / Land Owners in any manner. For instance , if such a S.P.A paves the way for the would be buyer to remove Earth, engage in Mining of Sand or Minerals or Fossils or removal of Trees or to engage in any act that brings detrimental results, before the actual sale takes place, it is such a SPA that has to be necessarily executed with the prior consent of the Director of Lands.
16. In the Agreement in question, the Parties have clearly admitted that the proposed Sale and Purchase is subject to the consent of the Director of Lands and it does not state that the very act of entering into the Agreement for that purpose itself needs the consent of the Director. If that is the requirement, they would not have entered into such an Agreement at all.
17. When a person, who is looking for a land to purchase, finds a right land for him at the right price he was looking for, and if seller also finds that he is going to get a price what he was expecting, subject to any other considerations, they generally bind themselves by an agreement until it materialises and they are at liberty to do so without the intervention of a third party, unless such agreement is detrimental to such a third party.
18. The Plaintiff and the 1st Defendant in this action have merely put their intention to buy and sell the land in question by the impugned Sale and Purchase Agreement and the element of “dealing” within the meaning of the relevant section 113 takes place only at the time of finalizing the Sale and purchase, in terms of the agreement entered for that purpose, however, subject to the consent of the Director of Lands, which is a precondition.
19. According to the Section, what is made null and void is any Sale/ Transfer/ Sublease/ Assignment/ Mortgage or other alienation or dealing effected without such consent of the Director of Lands. For such an invalidation or nullification to take place, there should have been a dealing in any manner stated above and in the absence of such a dealing no invalidation or nullification can take place.

20. There is no specific definition provided in the State Land Act for the term “dealing” and a Sale and Purchase Agreement found in this Action, according to my judgment, does not fall within the ambit of Section 13 of the Crown Lands Act.
21. Entering in to a Sale and Purchase Agreement, subject to the consent of the DOL, and without compromising the rights and authority of the Crown, is not an alienation or dealing within the meaning of the section. Every time an agreement is entered into for the sale and purchase, it is practically impossible for the consent to be obtained, if it is a mandatory requirement under the Section.
22. If all the SPA’s in relation to a Crown Land are to be executed after obtaining the consent , except in case of SPA’s which really intends to alienate or deal with the Land, it will confer a power to the DOL that is not intended by the relevant Act.
23. In *Courts Bros. (furnishers) Ltd V Sunbeam Transport Ltd [1969] 15 FLR 206* the Court of Appeal, considered the requirement of DOL’s consent for an option agreement to purchase a protected Lease.

“The question of what amounts to a dealing in land has been considered by this Court in several cases involving the interpretation of a similarly worded section in the Native Land Trust Ordinance, Cap. 115, section 12. These cases were, however, decided on their own facts, and they offer no general principle which might be applicable to the present case with the exception of Harnarn Singh and Anor. v Bawa Singh (1957) 6 Fiji LR 31. In that judgment it is held that preliminary negotiations for the sale of land do not amount to a “dealing in land”, and accordingly do not require the prior consent of the Native Land Trust Board. It is pointed out that otherwise the absurd position would arise whereby a written agreement, being null and void from the time it was executed, could not be submitted to the Board at all....”

Further

“...Surely, with an agreement for sale and purchase, intended to be followed by a transfer, it is after the agreement has been entered into and before the transfer is made that the Director has to consider the matter and grant or withhold his consent (Of course, it would be different if possession were to be given on the agreement for sale and purchase and the agreement were to be relied on as the purchasers title to the Land so to speak) And so also with an option. Until it is exercised and become a contract of Sale and purchase, it is in my opinion, not dealing in the land. That was clearly enough the view taken by the Director himself when he gave his consent dated 25th June, 1968 to the transaction when the appellant advised him that it was proposing to exercise the option ; and in my opinion his view was the correct one. In deed I think

that, even if the option had been exercised before his consent was sought, the consent could still have been properly obtained prior to the transfer..."

24. In the concurring decision in *Courts Bros. (furnishers) Ltd V Sunbeam Transport Ltd*[1969] 15 FLR 206 (per Hutchinson JA) held , p 211

*"...Looking at the question free of authority I do not think that it is. Sale, transfer or sublease or mortgage, charge or pledge, the precise words used in the subsection, all appear to me to indicate a transaction in which an immediate interest in the land is created in the other person to the transaction. The words "in any other manner whatsoever" may certainly widen the scope of the subsection to cover transactions that do not necessarily fall within the particular words used in it, and so, in *Chalmers v Pardoe* [1963] 3 All ER 552, the Privy Council said that a licence to occupy coupled with a giving of possession would be a dealing within the subsection. **But that does not mean that something that does not confer an immediate interest in the land falls within that word"***

25. The case law authorities submitted by the Counsel for the Defendants are in relation to the real instances of dealings meant by the Section 113(1) carried out without the consent of the DOL.
26. The Sale and Purchase Agreement in this case was, admittedly, subject to the consent of the DOL and happening of other events and therefore; such a condition is regarded as a condition precedent to the formation of the contract. It has been said by **Khan –J. in *Narayan- V- Narayan*** that ‘no contract will arise until the condition precedent has been fulfilled.’ Therefore, entering into a Sale and Purchase agreement does not mean the parties have dealt with the Land. In view of the above the argument of the Defendant’s Counsel with regard to the first issue above has to fail.
27. Let me now move to consider the 2nd preliminary objection raised by the Defendant’s Counsel. As I understand, this objection too is based on Section 13 (1) of the Crown Lands Act.
28. The argument of the Defendant’s Counsel on the 1st date of trial was that; **No consent was obtained from the DOL to institute the writ of Summons against the Defendants** and therefore this action is bound to fail. But, in the written submissions the same issue has taken a different form as follows.

(2) Whether the consent of the DOL was obtained before the Plaintiff instituted these proceedings?

29. The above issue, as it appears now, is a question of facts, for which the answer has to be ascertained through the evidence at the trial. In any event, raising the above issue alone is

not sufficient. For the sake of completeness there has to be a consequential issue by the Defence Counsel to the effect; If the answer to the above issue No: 02 is “No” could the Plaintiff have filed and proceeded with this action?, for same to be answered appropriately.

30. I need not take a deep dive into the pool of authorities to answer the above consequential issue, against the Defendants, even if the answer to the above main issue No :- 02 is in favour of the Defendants. It means that the consequential issue need not necessarily be answered in favour of the Defendants though the consent has not been obtained by the Plaintiff.

31. In January, 1964, the Supreme Court of Fiji in first instance, in the case of Mohammed Rasul v Jeet Singh and Hazra Singh , (1964) 10 FLR 16, held ;

“There is nothing in the express wording of Section 15 (1) which makes it necessary to obtain the consent of the Director of Lands before an action concerning a Protected Lease is initiated. All what Section 15 (1) provides, in this connection, is that no Court of Law may deal with any such lease without the consent of the Director of Lands. It appears to me that the consent of the Director can therefore be obtained up to any time before the land is actually “dealt with” by the Court, which in my view is certainly not the case at any time before an order has been made by the Court or a Judgment of the Court has been delivered. I can also see no reason why a Judgment of the Court dealing with the land could not properly be made “subject to the consent of the Director of Lands, with liberty to apply for further orders should that consent not be granted.”

The wording of the above judicial decision is perfectly clear to me. “There is nothing in the express wording of Section 15 (1) which makes it necessary to obtain the consent of the Director of Lands before an action concerning a Protected Lease is initiate

I can also see no reason why a Judgment of the Court dealing with the land could not properly be made “subject to the consent of the Director of Lands” with liberty to apply for further orders should that consent not be granted.”

32. In the case of Brennan Sukhdeo and Lusiana Bolalailai v Avendra Narayan [2007] FJHC 142; HBC 406.2006 (7 February 2007) it was held:

“In the present case there is consent albeit obtained after the commencement of proceedings. The critical words in the section are “be dealt with by a court of law”. Simply filing an action in a court is not dealing in land. Action can be discontinued at any time before any orders are made. Dealing with a land occurs if the orders or judgment of a court in some way affects some interest of the lessee in the land. The prior consent of the Director is confined to

transferring, alienating, mortgaging, charging etc. It does not extend to filing of actions....

There is nothing in this section which requires one to obtain the consent of the Director before an action is filed in court. Such consent can be obtained at any time before the land is 'dealt with' by the court. Dealing with occurs when an order is made or judgment is delivered: Mohammed Rasul v. Jeet Singh - 10 FLR 16."

33. It is clear from the above decisions that the consent of the Director of Lands which is required to be obtained pursuant to section 13(1) of the State Land Act (Cap 132) could be obtained after the institution of the action and before making any order affecting the rights of the lessee in the land or before the entering of the judgment in the action.
34. **I have no hesitation whatsoever in relying on the above judicial decisions in the instant matter before me with regard to the issue No:-2 raised by the Defendant's Counsel.**
35. The 3rd issue raised by the Counsel is; 3. **The lease over the subject property is expired; therefore, no orders could be made as the new lease has not been pleaded.**
36. This argument of the Counsel cannot hold water for many reasons. Firstly, the new lease is for the same land, in same extent with the same boundaries. This has not misled or caused any prejudice to the Defendants. The Plaintiff, if needed, can even amend the S.C to accommodate the new lease document, which of course is not seriously warranted.
37. The fact that the 1st Defendant makes its counter claim for the specific performance of the Sales and Purchase Agreement is for the same Land on the same lease, appears to have escaped the attention of the Defence Counsel.
38. The Counsel has also seems to have forgotten that the Defendant is making his counter claim for specific performance relying on the same Sales and Purchase Agreement , which the Defendants claim as null and void in their Statement of Defence. The Defendants cannot blow hot and cold.

E. Conclusion:-

39. Therefore, for the reasons adumbrated above, I cannot uphold the 'preliminary objections' raised by the learned Counsel for the Defendants and the all the above issues have to be answered against the Defendants.

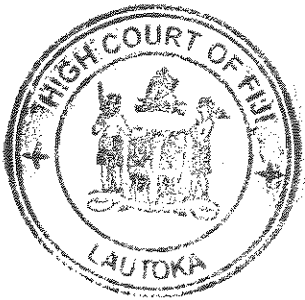
F. Final Orders:-

- (a) Preliminary objections raised by the Defence Counsel overruled.

(b) All the issues answered in favour of the Plaintiff.

(c) Plaintiff is entitled to summarily assessed Cost of \$200.00, to be paid by both the Defendants within next 21 days.

(d) Matter will proceed to trial.



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A.M.Mohammed Mackie

Judge

At Lautoka
12th February, 2018