

**IN THE HIGH COURT OF FIJIAT SUVA**  
**CIVIL JURISDICTION**

**Civil Action No.HBC 256 of 2010**

**BETWEEN** : **WAKAYA LIMITED**  
Plaintiff

**AND** : **MARSHA NUSBAUM**  
1<sup>st</sup> Defendant/ Counterclaim Plaintiff

: **KENNETH CHAMBERS**  
2<sup>nd</sup> Defendant/ Counterclaim Plaintiff

**AND** : **DAVID H. GILMOUR**  
1<sup>st</sup> Counterclaim Defendant

**AND** : **MELIKI T. TUINAMUANA**  
2<sup>nd</sup> Counterclaim Defendant

**AND** : **RENEE D.S. LAL**  
3<sup>rd</sup> Counterclaim Defendant

**AND** : **DILIP K. JAMNADAS**  
4<sup>th</sup> Counterclaim Defendant

**BEFORE** : **Hon. Justice Kamal Kumar**

**COUNSEL** : Applicant in Person  
Mr. K. Jamnadas for Respondent and 1<sup>st</sup> & 4<sup>th</sup>  
Counterclaim Defendants

**DATE OF HEARING** : 26 November and 8 December 2015

**DATE OF JUDGMENT** : 20 April 2016

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**RULING**

**(Application for Interlocutory Injunction by 2<sup>nd</sup> Defendant/2<sup>nd</sup> Counterclaim Plaintiff)**

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## **1.0 Introduction**

1.1 By Summons filed on 28 September 2015, the 2<sup>nd</sup> Defendant/2<sup>nd</sup>Counterclaim Plaintiff (hereinafter referred to as **“the Applicant”**) sought following injunctive orders.

- “1. *That the plaintiff and counterclaim defendants by themselves, and/or through their servants, and/or agents, or howsoever, shall be restrained from preventing, hindering or in any way restricting the 2<sup>nd</sup> counterclaim plaintiff and/or his invitees, passing over, crossing and/or re-crossing, at any time of the day or night on foot, by vehicle of any description or on horseback, or by any means whatsoever over the residue land in Certificate of Title 42/4168 for access to or egress from Lot 6 on Deposited Plan 4648 in Certificate of Title 27687 on Wakaya Island until further order of the Court.*
2. *That the Police shall assist in the enforcement of this Order.*
3. *That the plaintiff and counterclaim defendants by themselves, and/or through their servants, and/or agents, or howsoever, be restrained from preventing, hindering or in any way restricting the 2<sup>nd</sup> counterclaim plaintiff and/or his invitees, agents or employees from compliance with the statutory obligation in section 7A of the Land Sales Act (Cap 137) until further order of the Court.*
4. *Such further or other relief this Honourable Court deems appropriate.*
5. *That the plaintiff shall pay indemnity costs on this application.”*

**(“the Application”)**

1.2 On the same day, the Applicant filed Application to Strike out Defense to Amended Counterclaim unless 1<sup>st</sup> and 4<sup>th</sup> Counterclaim Defendants file Defense to Amended Counterclaim or alternatively Defendants be ordered to file Amended Defense to Counterclaim which application was returnable on 2 October 2015.

1.3 On 30 September 2015, Solicitors for 1<sup>st</sup> Defendant (1<sup>st</sup> Counterclaim Plaintiff) sought leave and filed Application seeking Leave to withdraw as her Solicitor.

- 1.4 All Applications were called on 2 October 2015, when this court declared that Messrs H.M. Patel Lawyers, have ceased acting for the 1<sup>st</sup> Defendant/1<sup>st</sup> Counterclaim Plaintiff and the parties were directed to file and serve Affidavits and Submissions and the Application was adjourned to 25 November 2015, at 2.30pm for the hearing.
- 1.5 On 24 November 2015, the 1<sup>st</sup> Defendant/ 1<sup>st</sup> Counterclaim Plaintiff e-mailed the High Court Registry advising that she is in New Zealand caring for her partner, who had heart surgery and authorizing her son to represent her on 25 November 2015.
- 1.6 On 25 November 2015, the Applicant informed the Court that the 1<sup>st</sup> Defendant/1<sup>st</sup> Counterclaim Plaintiff had no interest in the Application. However, in the interest of justice, I adjourned the Application to 26 November 2015, at 9.30 am to enable 1<sup>st</sup> Defendant/1<sup>st</sup> Counterclaim Plaintiff's son to be present.
- 1.7 On 26 November 2015, the Applicant and the Plaintiff (hereinafter referred to as **"Respondent"**) and 1<sup>st</sup> and 4<sup>th</sup> Counterclaim Defendants by their Counsel made Submissions in respect to Application for Interlocutory Injunction only and the Application was adjourned to 27 November 2015, for Applicant to file Supplementary Affidavit with liberty for Respondent and 1<sup>st</sup> and 4<sup>th</sup> Counterclaim Defendants to file Affidavit in Reply. The Application was adjourned to 8 December 2015, at 9.30am for hearing.
- 1.8 On 8 December 2015, Applicant and Respondent, the 1<sup>st</sup> and 4<sup>th</sup> Counterclaim Defendants made further Submissions and the Application was adjourned for ruling on notice.
- 1.9 Following Affidavits were filed by the parties:-

**For Applicant**

- (i) Affidavit of Applicant sworn and filed on 28 September 2015, (**"Applicant's 1<sup>st</sup> Affidavit"**);
- (ii) Reply Affidavit of Applicant sworn and filed on 22 October 2015 (**"Applicant's 2<sup>nd</sup> Affidavit"**);

- (iii) Applicant's Supplementary Affidavit on Access sworn and filed on 30 November 2015 ("**Applicant's 3<sup>rd</sup> Affidavit**");
- (iv) Applicant's Supplementary Affidavit sworn and filed on 14 December 2015 ("**Applicant's 4<sup>th</sup> Affidavit**").

**For Respondent/1<sup>st</sup> and 4<sup>th</sup> Counterclaim Defendants**

- (i) Affidavit of Petero Vatu sworn and filed on 16 October 2015 ("**Vatu's 1<sup>st</sup> Affidavit**");
- (ii) Affidavit of Petero Vatu sworn and filed on 4 December 2015 ("**Vatu's 2<sup>nd</sup> Affidavit**").

**2.0 Background Facts/Chronology of Events**

**Background Facts**

- 2.1 On or about 28 May 1969, property comprised and described in Certificate of Title No. 42/4168 was transferred to the Plaintiff.
- 2.2 On or about 29 May 1973, property comprised and described in Certificate of Title No. 42/4168 was transferred to Pacific Hotels Development Limited ("**PHDL**").
- 2.3 Subsequently PHDL subdivided the property comprised in Certificate of Title No. 42/4168 in stages and sold some lots.
- 2.4 On 10 February 1983, Certificate of Title No. 42/4168 (excluding lots sold) was transferred to Plaintiff.
- 2.5 On or about 5 July 1985, Wakaya Limited as Vendor entered into a Sale and Purchase Agreement with one Edward Daniel Nusbaum, for sale of lot known as Lot 94 at that time and subject to proposal plan approved by Director of Town and Country Planning on 18 April 1974 (Annexure "D" of "Applicant's 1<sup>st</sup> Affidavit and Annexure "PV1" of Vatu's 1<sup>st</sup> Affidavit).

- 2.6 On 10 February 1993, lot known as Lot 6 on Deposited Plan No. 4648 (formerly Lot 94) (hereinafter known as **“Lot 6”**) was transferred to Edward Daniel Nusbaum.
- 2.7 Subsequently Certificate of Title No. 27687 was issued over Lot 6 in favour of Edward Daniel Nusbaum.
- 2.8 On or about 19 September 2007, Edward Daniel Nusbaum transferred Lot 6 on Deposited Plan No. 4648, Island of Wakaya, District of Wakaya containing 1 acre 3 roods and 5 perches comprised and described in Certificate of Title No. 27687 (hereinafter referred to as **“CT 27687”**) to Marsha June Ferre Nusbaum, the 1<sup>st</sup> Defendant/1<sup>st</sup>Counterclaim Plaintiff pursuant to terms of Marriage Settlement filed in the Cass County Superior Court in the State of Indiana, USA on 3 April 1998.
- 2.9 On 14 June 2013, Marsha June Ferre Nusbaum transferred one undivided half share in CT 27687 to the Applicant subject to the following:-
- (i) Registered Mortgage No. 748851;
  - (ii) Easement Certificate No. 162746;
  - (iii) Restrictive Covenant No. 333584 ‘A’;
  - (iv) Right of Way Easement No. 333585;
  - (v) Easement Certificate No. 333586.

### **Chronology of Events**

- 2.10 On 25 August 2010, Plaintiff, Wakaya Limited filed Writ of Summons with Statement of Claim against the Defendants seeking damages, cost and interest.
- 2.11 On 25 August 2010, his Lordship Justice Hettiararchchi (as he then was) granted interim injunction in favor of Plaintiff restraining the Defendants/Counterclaim Plaintiffs from entering Wakaya Island or CT 27687.
- 2.12 On 1 September 2010, Defendants/Counterclaim Plaintiffs applied to expedite the hearing of the injunction application, for Plaintiff to produce Meliki Togavua Tuinamuana for cross-examination at the inter-parte hearing of injunction application and for Plaintiff to consolidate all actions for rate recovery.

- 2.13 On 6 September 2010, his Lordship Justice Hettiararchchi (as he then was) delivered Interlocutory Judgment whereby he dismissed the application to dissolve interim injunction.
- 2.14 On 21 September 2010, Defendants filed Appeal in Fiji Court of Appeal which appeal was allowed and Court of Appeal made following Orders:-
- “(i) The interim injunction granted by Justice Hettiarachchi on 25th August 2010 be dissolved and other orders, if any, in the Court below be set aside.*
  - “(ii) Any caveat lodged by the respondent preventing registration of a transfer of 50% interest in Lot 6 to Kenneth Chambers to be removed by Wakaya Limited forthwith.*
  - “(iii) The matter be referred to the Master for the assessment of damages suffered by the appellants Kenneth Chambers and Marsha Nusbaum by reason of the respondent's interim injunction.*
  - “(iv) The Respondent is to pay the appellant's costs of \$3,000.00 in this Court and \$ 3,000.00 for their costs below.”*
- 2.15 On 23 September 2010, Defendants filed Statement of Defence and Counter-claim.
- 2.16 On 10 November 2010, Plaintiff filed Reply to Defence and Defence to Counter-claim.
- 2.17 On 1 December 2010, Defendants filed Reply to Defence to Counter-claim.
- 2.18 On 31 January 2011, Order on Summons for Directions was made by the Court.
- 2.19 On 1 March 2011, Court directed parties to file Affidavit Verifying List of Documents and Copy Pleadings. Since 2<sup>nd</sup> Defendant was acting in person Pre-Trial Conference was not to be held.
- 2.20 On 2 March 2011, Plaintiff filed Affidavit verifying List of Documents.
- 2.21 On 14 March 2011, Plaintiff filed Petition in Supreme Court of Fiji to appeal the Fiji Court of Appeal decision.
- 2.22 On 29 April 2011, Defendants filed Application to join Counterclaim Defendants.

- 2.23 On 12 May 2011, the Applicant (2<sup>nd</sup> Defendant) filed Application for Further Discovery.
- 2.24 On 24 June 2011, the above Applications were adjourned to 5 July 2011 for Oral Submissions and after which was adjourned to 22 August 2011, for ruling.
- 2.25 On 27 January 2012, ruling on joinder application was delivered whereby the four counterclaim Defendants were joined as parties to this action.
- 2.26 On 3 February 2012, Application for Further Discovery was dismissed.
- 2.27 On 6 March 2012, the Defendants as Counterclaim Plaintiffs filed claim against the Counterclaim Defendants.
- 2.28 On 3 April 2012, 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Counter-claim Defendants filed Statement of Defence to Counterclaim.
- 2.29 On 9 May 2012, the Supreme Court of Fiji delivered its Judgment and made following Orders:-
- “37.(1) *The petition for special leave to appeal is granted.*
- (2) *The judgment of the Court of Appeal is varied to the effect that the interim injunction issued by the High Court is dissolved and the direction to refer the matter to the Master for assessment of damages is quashed;*
- (3) *The parties are directed to proceed with the trial before the High Court on the substantive matters;*
- (4) *The costs awarded in the Court of Appeal in favour of the Respondents to stand;*
- (5) *There will be no costs regarding this application and the parties to bear their own costs.”*
- 2.30 On 20 April 2012, 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Counter-claim Plaintiffs filed Application to Strike out Claim against them.
- 2.31 On 23 May 2012, Defendants filed Application to Strike out Plaintiff's Claim.
- 2.32 On 25 May 2012, the then Master of the High Court referred the Applications in 2.30 and 2.31 to a Judge.
- 2.33 The Applications were adjourned for hearing on 30 October 2012.

- 2.34 On 18 September 2012, the Applications were called before his Lordship Justice Kotigalage (as he then was) when his Lordship directed that all applications be placed before him and adjourned the Applications to 5 November 2012.
- 2.35 On 5 November 2012, his Lordship directed parties to file amended pleadings and for this matter to take normal course. This matter was adjourned to 10 December 2012.
- 2.36 On 30 November 2012, 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Counterclaim Defendants filed Application to Strike out 1<sup>st</sup> and 2<sup>nd</sup> Amended Claim against them on the ground that it discloses no reasonable cause of action.
- 2.37 On 10 December 2012, his Lordship Justice Kotigalage (as he then was) directed parties to file pleadings by 24 December 2012, and adjourned this matter to 6 February 2013.
- 2.38 On 24 and 27 December 2012, the 3<sup>rd</sup> Counterclaim Defendant and 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Counterclaim Defendants filed Reply to Second Amended Counterclaim and Statement of Defense to the Counterclaim respectively.
- 2.39 On 31 December 2012, Defendants filed Reply to Defense to Counterclaim.
- 2.40 On 11 January 2013, Defendants filed Affidavit Verifying List of Documents.
- 2.41 On 6 February 2013, parties were directed to file Submissions and this matter was adjourned to 14 May 2013.
- 2.42 On 14 May 2013, the Court dealt with Defendant's/Counterclaim Plaintiff's Application to Strike Out Plaintiff, Wakaya Limited's claim, when by consent following Orders were made:-
- (i) Plaintiff's claim be struck out;
  - (ii) Defendants to pursue their counterclaim.
- 2.43 On 11 November 2013, Defendants filed Ex-parte Application to extend Caveat No. 786396 lodged against Certificate of Title No. 42/4168.
- 2.44 On 18 November 2013, Caveat No. 786396 was extended until further Order of the Court and this matter was adjourned to 28 January 2014.

2.45 On 22 November 2013, his Lordship delivered his ruling in respect to 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Counterclaim Defendant's Application to Strike Out 1<sup>st</sup> and 2<sup>nd</sup> Amended Counterclaim, whereby the Application to Strike out the Amended Counterclaim was dismissed with costs.

2.46 On 28 January 2014, following applications were called before his Lordship Justice Kotigalage (as he then was):-

- (i) Application by Defendants to join Edward Daniel Nusbaum, Registrar of Titles and Attorney-General of Fiji as Counterclaim Defendants;
- (ii) Application to Amend Counterclaim and file 3<sup>rd</sup> Amended Counterclaim;
- (iii) Application for Extension of Caveat.

Parties were directed to file Affidavits, and the applications were adjourned to 7 April 2014.

2.47 On 29 January 2014, Application to Extend Caveat was called before his Lordship when parties were directed to file Affidavits and Application was adjourned to 7 April 2014.

2.48 On 7 April 2014, the Application to join Edward Daniel Nusbaum, Registrar of Titles and Attorney-General of Fiji as Counterclaim Defendants; Application to Extend Caveat and Application to Amend 2<sup>nd</sup> Counterclaim were called before his Lordship Justice Kotigalage (as he then was). Ms Chand appearing for Registrar of Titles and Attorney-General of Fiji informed Court that she has no objection for Registrar of Titles and Attorney-General of Fiji being joined as parties. Mr K. Jamnadas, Counsel for the Respondent and 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Counterclaim Defendants, however, objected to the application for joinder.

Action against 2<sup>nd</sup> and 3<sup>rd</sup> Counterclaim Defendants was discontinued by consent with costs in favor of 3<sup>rd</sup> Counterclaim Defendant reserved for determination at the conclusion of the substantive matter.

All these applications were then adjourned to 12 May 2014, for hearing and parties were directed to file Affidavits.

2.49 On 12 May 2014, all the Applications in paragraph 2.46 were heard by his Lordship Justice Kotigalage (as he then was) and adjourned for ruling on notice.

- 2.50 No ruling having been delivered by his Lordship this matter was referred to this Court and was called before me on 10 September 2015.
- 2.51 On 10 September 2015, parties submitted that the Applications be re-heard by this Court and as such all Applications were adjourned to 2 October 2015, for review and fix hearing date.
- 2.52 The chronology of events from 28 September to 8 December 2015, is stated at paragraphs 1.1 to 1.8 of this Ruling.

### **3.0 Application for Interlocutory Injunction**

- 3.1 It is undisputed and well established that this Court has unfettered discretion as to whether to grant the interlocutory injunction or not which discretion of course is to be exercised judicially.
- 3.2 The principles to be applied in respect to Application before this Court is that stated by Lord Diplock in **American Cyanamid Co. v. Ethicon Ltd** [1975] AC 396 which are:-
- (i) Whether there is a serious question to be tried;
  - (ii) Whether damages would be adequate remedy; and
  - (iii) Whether balance of convenience favor granting or refusing Interlocutory Injunction.
- 3.3 Lord Diplock in **American Cyanamid v. Ethicon Ltd** [1975] AC 396 stated as follows:-

***“My Lords, when an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff’s legal right is made upon contested facts, the decision whether or not to grant an interlocutory injunction has to be taken at a time when ex-hypothesis the existence of the right or the violation of it, or both, is uncertain and will remain uncertain until final judgment is given in the action. It was to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved that the practice arose of granting him relief by way of interlocutory injunction; but since the middle of the 19<sup>th</sup> century this has been made subject to his undertaking to pay damages to the defendant for any loss sustained by reason***

*of the injunction if it should be held at the trial that the plaintiff had not been entitled to restrain the defendant from doing what he was threatening to do. The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be 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 of 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."*

- 3.4 In **Series 5Software v. Clarke** [1996] 1 All E.R. 853 Justice Laddie stated that the proper approach in dealing with Application for Interlocutory Injunction is as follows:

*"(1) The grant of an interim injunction is a matter of discretion and depends on all the facts of the case. (2) There are no fixed rules as to when an injunction should or should not be granted. The relief must be kept flexible. (3) Because of the practice adopted on the hearing of applications for interim relief, the court should rarely attempt to resolve complex issues of fact or law. (4) Major factors the court can bear in mind are (a) the extent to which damages are likely to be an adequate remedy for each party and the ability of the other party to pay, (b) the balance of convenience, (c) the maintenance of the status quo, and (d) any clear view the court may reach as to the relative strength of the parties' cases."*

- 3.5 His Honour Justice Cook in **Klissers Farmhouse Bakeries Ltd v. Harvest Bakeries Ltd**[1985] 2 NZLR 129 at 142 (paragraphs 20-30):-

*"Whether there is a serious question to be tried and the balance of convenience are two broad questions providing an accepted framework for approaching these applications ... the balance of convenience can have a very wide ambit. In any event the two heads are not exhaustive. Marshalling considerations under them is an aid to determining, as regards the grant or refusal of an interim injunction, where the overall justice lies. In every case the judge has finally to stand back and ask himself that question. At*

***this final stage, if he has found the balance of convenience overwhelmingly all very clearly one way ... it will usually be right to be guided accordingly. But if on the other hand several considerations are still fairly evenly posed, regard to the relative strengths of the cases of the parties will usually be appropriate. We use the word “usually” deliberately and do not attempt any more precise formula: an interlocutory decision of this kind is essentially discretionary and its solution cannot be governed and is not much simplified by generalities.”***

### **Serious Question To Be Tried**

- 3.6 The Application for Interlocutory Injunction must establish that there is a serious question to be tried.
- 3.7 It is well established that the test for serious question to be taken is that the evidence produced to Court must show that Applicant’s claim is not frivolous, vexatious or hopeless.
- 3.8 In **American Cyanamid** Lord Diplock stated as follows:-

***“In those cases where the legal rights of the parties depend upon facts that are in dispute between them, the evidence available to the court at the hearing of an application for an interlocutory injunction is incomplete. It is given on affidavit and has not been tested by oral examination.” (p 406)***

***“It is not part of the court’s function at this stage of the litigation to try to resolve conflicts of evidence in affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.” (p 407)***

- 3.9 His Lordship further stated as follows:-

***“In view of the fact that there are serious questions to be tried upon which the available evidence is incomplete, conflicting and untested, to express an opinion now as to the prospects of success of either party would only be embarrassing to the judge who will have eventually to try the case.”***

- 3.10 Respondent submits that the Applicant has not raised any serious issues and question to be tried and what Applicant is asking for in the Application does not match his pleading.

3.11 Whilst there is no cause of action in the second amended counterclaim in relation to access to CT 27687 the Applicant however has raised the issue of access to CT 27687 in the second amended counterclaim.

3.12 At paragraph 10(a) and 17(d), (j), (k) and (l) of the second amended counterclaim Applicant states as follows:-

*“10. AT DIVERSE times from about 1 January 2010, the plaintiff and counterclaim defendant’s, intending to dishonestly obtain from the defendants for the plaintiff a financial benefit or an interest in land to which the plaintiff was not entitled, falsely represented in writing that the plaintiff was entitled to issue invoices or make demands for “rates” or penalty interest, or to commence and prosecute debt recovery proceedings or foreclosure process for arrears of “rates” and penalty interest:-*

*(a) The plaintiff has not provided legal access, services, utilities or subdivision infrastructure to the defendants’ land”*

*“17. Plaintiff and counterclaim defendants’ at all material times acted with malice in a high-handed, insolent and vindictive manner towards the defendants exhibiting contumelious disregard for the defendants’ rights:-*

*(d) No legal access, services, utilities or infrastructure provided to defendants land;*

*(j) No disclosure of re-subdivisions of access and reserves on Wakaya Island;*

*(k) Scheme Plan and subdivision consent documents dated 2 April 1974;*

*(l) Easements in gross not registered against plaintiff’s land.”*

3.13 Also at paragraph (b) (page 8) of the Orders sought for 1<sup>st</sup> Cause of Action, the Applicant and 1<sup>st</sup> Counterclaim Plaintiff seeks following relief:-

*“(b)(i): Order that the Plaintiff immediately register an easement in gross in favor of the defendants, protecting the defendants’ equitable entitlement to:*

*(aa). Right of way over the roading network set out in plan No. 180/2001;*

*(bb). Access for quiet recreation in the archaeological sites, the Wakayalailai Preservation Reserve, the 66ft foreshore reserve on all sandy beaches, and in the common land described in the original Scheme Plan for Wakaya Island contained in application No. 1/29/4 approved by the Director of Town and Country Planning on 2 April 1974.*

*(ii) Order permanently restraining the plaintiff, its servants, agents and employees from any interference with the defendants' entitlement to access."*

3.14 From what is stated above, and even though the Applicant and Second Counterclaim Plaintiff has not pleaded their cause of action in respect to access to CT 27687 I hold that the Applicant has raised serious issues in respect to access to CT 27687 that needs to be tried and determined by this Court.

#### **Whether Damages would be Adequate Remedy**

3.15 The Applicant intends to have access to his property situated at Wakaya Island which the Respondent as developer is to provide.

3.16 The Applicant is also required to comply with the provision of Section 7A of Land Sales Act Cap 137.

3.17 If no access road is provided to Applicant, then his property comprised in CT 27687 is of no value to him.

3.18 Also it is Plaintiff's obligation as a developer to provide access to the lots subject to the development plan.

3.19 The right to access to ones' property is a fundamental and legal right and cannot be assessed in damages.

#### **Balance of Convenience**

3.20 The Respondent has raised issue in respect to undertaking as to damages and submits that Applicant's undertaking as to damages is insufficient

3.21 The Applicant in his 1<sup>st</sup> Affidavit gave details of his properties that is owned by him with valuation report.

- 3.22 Even though Applicant in his 1<sup>st</sup> Affidavit stated that he will give undertaking as to damages if injunction is granted he overcame that defect by giving undertaking as to damages in his 2<sup>nd</sup> Affidavit.
- 3.23 I therefore hold that the undertaking as to damages and evidence provided by the Applicant meets the test for undertaking as to damages.
- 3.24 In the same token, I have no doubt that Respondent and 1<sup>st</sup> and 4<sup>th</sup> Counterclaim Defendant will be in a position to meet any damages that will be assessed by this Court against them.
- 3.25 Before I proceed any further, I must make it clear that I have not taken into consideration the following allegations and facts in assessing the balance of convenience:-
- (i) Personal attacks against Applicant, Respondent and 1<sup>st</sup> and 4<sup>th</sup> Counterclaim Defendants;
  - (ii) 4<sup>th</sup> Counterclaim Defendant acted for 1<sup>st</sup> Counterclaim Plaintiff in respect to Transfer of CT 27687 to her;
  - (iii) 4<sup>th</sup> Counterclaim Defendant has signed the certificate in the Easement Certificate No. 333585 certifying it as correct for the purpose of Land Transfer Act Cap 131.
- 3.26 The reason for not taking the above facts into consideration is that they are not relevant to the Injunction Application before this Court.
- 3.27 The Applicant became registered proprietor of one undivided half share in property comprised in CT 27687 subject to the following:-
- (i) Easement Certificate No. 162746;
  - (ii) Restriction Caveat No.333584'A';
  - (iii) Right of Way Easement No. 333585;
  - (iv) Easement Certificate No. 333586.
- 3.28 CT 27687 is subject to Deposited Plan No. 4648 which has memorandum of Easement endorsed therein.

- 3.29 When Applicant became registered proprietor of one undivided half share in CT 27687, he would have and if not then should have conducted a search of said Deposited Plan No. 4648 to check the approved access to CT 27687.
- 3.30 Deposited Plan No. 4648 clearly shows that the property between Applicant's property and foreshore is balance of property comprised in Certificate of Title No. 42/4168 and which is owned by the Plaintiff.
- 3.31 The only legal access that Applicant has to property comprised in CT 27687, is that shown in Deposited Plan No. 4648 and it is undisputed that, that access is via the jetty and the airfield.
- 3.32 From the Affidavit evidence and correspondences between the Applicant and the Respondent's Solicitors it is evidently clear that:-
- (i) Applicant being the registered proprietor of one undivided half share in CT 27687 has access to his property via the jetty or the airfield;
  - (ii) Applicant has access to the common land and public reserves;
  - (iii) Respondent does not permit the Applicant to go to its property through the Respondent's land being balance of Certificate of Title No. CT42/4168 which is between the foreshore and Applicant's property.
- 3.33 As stated earlier, it is Respondent's obligation to ensure that all access road shown on Deposited Plan No. 4168 and other Deposited Plan registered in respect to property subject to Certificate of Title No. 42/4168 are constructed to allow the registered owners of lots on the island to have access to their property via vehicle or on foot or howsoever and the registered owners are allowed to carry out improvements to their properties in accordance with, what is stated in the restrictive covenant registered against the title to their properties.
- 3.34 Respondent has failed, to provide any evidence from a civil road engineer to prove that access roads shown on Deposited Plan No. 4648 and in particular access road from the jetty or airfield to property comprised in CT 27687 have been constructed by the Respondent.
- 3.35 The Respondent submitted that it would have constructed access road to property comprised in CT 27687, if Applicant would have sought its consent to

carry out improvements on the subject property and as such the Applicant should have sought their consent before coming to Court.

- 3.36 I perfectly understand why the Applicant chose to seek Court's assistance and Orders and that is to avoid any unnecessary conflict with the Respondent and/or its officers.
- 3.37 The Respondent also required the Applicant to provide names of the persons that are to come onto his property as Applicant's invitee to which Applicant objects.
- 3.38 There is nothing in the Restrictive Caveat No. 333584'A' or in the Rules and Regulations stated in First Schedule of the Sale and Purchase Agreement between Edward Daniel Nusbaum and the Respondent (Annexure PV2 of Vatu's 1<sup>st</sup> Affidavit) which require the owners of the properties to supply such details.
- 3.39 Since there is no evidence that such rule was in place when the Applicant, the registered proprietor of one undivided half share in CT 27687 or that Applicant at anytime agreed to such rule, Respondent cannot impose any such rule against the Applicant.
- 3.40 Respondent contends they need those details to ensure that they are aware who enters the island and that no illegal activities are carried out on the island.
- 3.41 I do not consider it as a valid reason for Respondent to seek those details unless and until it has an Agreement with all lot owners on Wakaya Island to do so. Obviously, if Respondent becomes aware that anyone on Wakaya Island is engaged in any illegal activity then it is at liberty to report it to law enforcement agencies in Fiji who I am certain are capable of carrying out their duties with due diligence
- 3.42 The Applicant as registered owner of freehold property has all the right to have access to his property with his invitees, servants, workers and guests without seeking any one's permission in the absence of any Agreement to the contrary.
- 3.43 I accept Applicant's evidence that no access road leading upto property comprised in CT 27687 has been constructed.
- 3.44 This is supported by the Respondent's submission that Respondent will construct access road once Applicant seeks Respondent's consent to build on the said property.

- 3.45 There is no evidence that the balance of property comprised in CT 42/4168 adjacent to property comprised in CT 27687 as shown on Deposited Plan No. 4648 has been developed as yet.
- 3.46 At this point, I must clarify that I have not taken into consideration Deposited Plan Nos. 7700, 7701 and 7702 as they have not been registered.
- 3.47 I also bring to parties attention that since copy of Certificate of Title No. 27687 annexed to their Affidavits are not eligible, I obtained copies of the said Title, Deposited Plan No. 4648 together with Restrictive Caveat No. 333584'A' and Easement Certificate Nos. 162746, 333585 and 333586 from Registrar of Titles Office.
- 3.48 In response to Applicant's submission and contention that Edward Daniel Nusbaum, the predecessor on title had been granted access to his lots via boat and the Respondents land I note that such access was with Respondent's consent which was withdrawn in 2004 well before Applicant became co-owner of property comprised in CT 27687 (Annexure "SAZ" of Applicant's 3<sup>rd</sup> Affidavit).
- 3.49 In view of what I said at paragraphs 3.20 to 3.48 and until such time Respondent constructs access road from jetty and airfield to property comprised in CT 27687 in terms of Director of Town and Country Planning's approval and which is suitable for vehicles and machinery and certified to be so by a civil (road) engineer, it is in the interest of justice that Applicant and the 1<sup>st</sup> Defendant be allowed access to the property comprised in CT 27687 through the property subject to balance of Certificate of Title No. 42/4168 and situated between the foreshore and property comprised in CT 27687.
- 3.50 I must at this point, highlight that if the Respondent fails or neglects to construct the access road from the jetty and airfield to property comprised in CT 27687 within a reasonable period from date of this ruling the Applicant may subject to legal advice make appropriate application to this Court.
- 3.51 Respondent submits that it overlooked to have Easement No. 333585 registered against Certificate of Title No. 42/4168 and when they attempted to have it rectified by attempting to register the said Easement against CT No. 42/4168 the

Applicant stopped Registrar of Titles to register the same. (Annexure "PV4" of Vatu's 1<sup>st</sup> Affidavit refers).

- 3.52 The letter dated 19 December 2013, from Registrar of Titles to the Applicant (Annexure "PV4" of Vatu's 1<sup>st</sup> Affidavit) state that the Easement No. 333585 was not endorsed on Certificate of Title No. 42/4168 as a result of the Applicant advising her that the rectification of instrument No. 333585 is a substantive issue of trial in this Court.
- 3.53 I cannot see any justification in Registrar of Titles not endorsing the Easement No. 333585 against Certificate of Title No. 42/4168 without Court Order when it is registered against CT 27687.
- 3.54 If the Court at any point in time makes a finding that the Easement No. 333585 was registered against Certificate of Title No. 42/4168 and CT 27687 by fraud then obviously the Court has the power to direct the Registrar of Titles to cancel the Easement.
- 3.55 Until then I cannot see any reason as to why Easement No. 333585 should not be endorsed on Certificate of Title No. 42/4168.

#### **Costs**

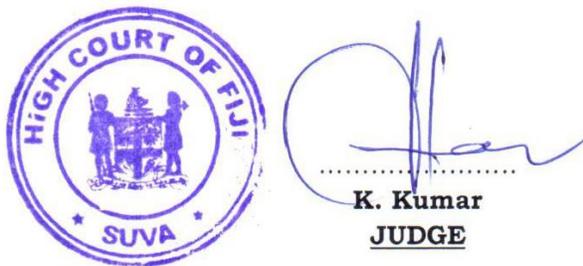
- 3.56 In respect to costs, I take into consideration that:-
- (i) Parties filed Affidavits, Submissions and made Oral Submission;
  - (ii) No application had been made by Applicant to the Respondent for construction of building and to take vehicle and machineries to property comprised in CT 27687.

#### **Orders**

- 3.57 I make following Orders:-
- (i) Registrar of Titles do register Easement Certificate No. 333585 against Certificate of Title No. 42/4168 forthwith;
  - (ii) Until such time Plaintiff/Respondent constructs access road from jetty and airfield to property comprised in Certificate of Title No. 26786 and certified by civil (road) engineer that such access road is suitable for use by vehicle and construction machineries at Respondent's cost, or until further order

of the Court, the Respondent/Plaintiff, 1<sup>st</sup> and 4<sup>th</sup> Counterclaim Defendants whether by themselves, and/or their servants, and/or agents, or howsoever, is restrained from preventing, hindering or in any way restricting the Applicant/2<sup>nd</sup> Defendant/2<sup>nd</sup> Counterclaim Plaintiff and/or his invitees, and workers from passing over, crossing and/or re-crossing, at any time of the day or night on foot or on horseback, over the residue land in Certificate of Title 42/4168 for access to or egress from Lot 6 on Deposited Plan 4648 in Certificate of Title No. 27687 on Wakaya Island;

- (iii) That the Plaintiff and Counterclaim Defendants by themselves, and/or through their servants, and/or agents, or howsoever, be restrained from preventing, hindering or in any way restricting the 2<sup>nd</sup> counterclaim plaintiff and/or his invitees, agents or employees from compliance with the statutory obligation in section 7A of the Land Sales Act (Cap 137) until further order of the Court on the condition that Applicant/2<sup>nd</sup> Defendant/2<sup>nd</sup> Counterclaim Plaintiff complies with terms and conditions of Restrictive Covenant No. 333584'A' registered against Certificate of Title No. 27687;
- (iv) Parties are at liberty to apply within seven (7) days notice;
- (v) Each party bear their own cost of Application for Interlocutory Injunction filed on 28 September 2015.



At Suva

20 April 2016

**Applicant in Person**

**Jamnadas & Associates for the Respondent and 1<sup>st</sup> & 4<sup>th</sup> Counterclaim Defendants**