

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

**CIVIL ACTION NO. HBC 189 OF 2021**

**BETWEEN** : **UDAY RAJ** of Naikabula, Lautoka, Registered Bailiff  
**PLAINTIFF**

**AND** : **SEMITI SAINI & TAINA RADINIVITILEVU** both of Waiyavi, Lautoka,  
School Teacher and Finance Executive, respectively.  
**1<sup>ST</sup> DEFENDANT**

**AND** : **NACOLAWA & CO** a Law Firm having its registered office at 111  
Vitogo Parade, Lautoka.  
**2<sup>ND</sup> DEFENDANT**

**AND** : **SEMBA** of Lautoka  
**3<sup>RD</sup> DEFENDANT**

**AND** : **FIJI DEVELOPMENT BANK OF FIJI** a bank registered under the Fiji  
Development Bank Act and having its registered office at 365 Victoria  
Parade, Suva.  
**4<sup>TH</sup> DEFENDANT**

**AND** : **I-TAUKEI LAND TRUST BOARD** is a Statutory Board having tis  
registered office at 431 Victoria Parade, Suva.  
**5<sup>TH</sup> DEFENDANT**

**BEFORE** : Hon. Mr. Justice Mohamed Mackie

**APPEARANCES** : Mr. R. Reuben for the Plaintiff  
Ms. B. Kumari for the 1<sup>st</sup> Defendant  
Mr. S. Nacolawa, the 2<sup>nd</sup> Defendant (in person)  
Mr. N. Lajendra for the 4<sup>th</sup> Defendant  
No Appearance by or on behalf of 3<sup>rd</sup> and 5<sup>th</sup> Defendant

**DATE OF HEARING** : 24<sup>th</sup> February, 2023.

**DATE OF JUDGMENT** : 29<sup>th</sup> March, 2023

**Ruling**

**( On Injunction Application against the 4<sup>th</sup> Defendant )**

1. The Plaintiff , UDAY RAJ, by filing his Writ of Summons and the Statement of Claim against the defendants hereof, prayed for the following reliefs:
  - a. AN ORDER that the First Defendants do pay the sum of \$50,000 (fifty thousand dollars) to the Plaintiff as full and final purchase price for the 5 acres on Native Lease Number 274374;
  - b. AN ORDER that the first Defendants do hereby transfer the remaining acres to the Plaintiff;
  - c. A declaration that the Fourth Defendant is in default of their statutory obligation in giving wrong advise to the Plaintiff and causing him to lose his subject property to the First Defendants fraudulently;
  - d. A declaration that the Fifth Defendant is in default of their statutory obligation in not properly assessing the loan application of the First Defendants and paying the Plaintiff directly;
  - e. A declaration that the Second Defendant is in default of its statutory obligation and professional obligation as a legal practitioner by forcing the Plaintiff to execute the sales and Purchase Agreement without giving an opportunity for independent legal advice and having a Hindi Translator;
  - f. Damages for breach of contract;
  - g. Damages for negligence;
  - h. Damages for distress and mental anguish caused to Plaintiff's;
  - i. Exemplary damages against the second defendant for breach of legal practitioners Act as pleaded from paragraph 6 to 46.
  - j. Post judgment interest;
  - k. Cost of this action on a strict solicitor client indemnity basis;
  - l. Any other remedy that the court deems just and fair.
  
2. The Plaintiff on 21<sup>st</sup> September, 2021 filed his Notice of Motion seeking the following Orders against the defendants.
  1. THAT the First Defendants and/or their servants and/or their agents do forthwith refrain from dealing with the subject property in any manner until the final determination of the matter.
  2. THAT the First Defendants and/or their servants and/or their agents do hereby refrain from evicting the Plaintiff until the final determination of this matter.
  3. THAT there is no dealing of the subject property by any of the parties in any manner whatsoever until the final determination of this matter.
  4. SUCH further and/or other order as this Honourable Court may deem just and equitable in the circumstances.
  5. THAT the service of this Motion be abridged.
  6. THAT cost of this action be cost in the cause.

3. The 4<sup>th</sup> defendant on 2<sup>nd</sup> November, 2021, having caused to file its acknowledgment of service through M/S Lajendra Lawyers subsequently, on 15<sup>th</sup> December, 2021, filed its Affidavit in opposition and the Statement of defence as well.
4. The Plaintiff opted not to file Affidavit in reply for the 4<sup>th</sup> defendant's Affidavit in opposition (Vide my minutes dated 17<sup>th</sup> May, 2022). But, the Plaintiff filed his reply to defence on 21<sup>st</sup> June, 2022 to the Statement of defence filed by the 4<sup>th</sup> defendant. As there was no ostensible objection for the granting of interim injunction against the other defendants, inadvertently it was granted affecting the 4<sup>th</sup> defendant as well.
5. The above Orders dated 17<sup>th</sup> May, 2022 being sealed on 24<sup>th</sup> May, 2022 and served, the 4<sup>th</sup> Defendant being alerted by this Order affecting it filed its Summons on 23<sup>rd</sup> December, 2022 supported by an Affidavit sworn by USENIA LOSALINI, moving to vacate the Order No-3 made on 17<sup>th</sup> May, 2022 and to have a hearing in relation to the relief number 3 prayed for by the Plaintiff in the Notice of Motion.
6. The above Summons being supported on 24<sup>th</sup> January, 2023 with the representation of all the parties, except for 3<sup>rd</sup> defendant, the Court made following orders;
  - a. *The Order No-3 made on 17<sup>th</sup> May, 2022 shall not bind the 4<sup>th</sup> Defendant.*
  - b. *There shall be a hearing into the application for injunction order against the 4<sup>th</sup> Defendant.*
  - c. *The Order made on 17<sup>th</sup> May, 2022 shall be amended, sealed and served.*
7. Accordingly, at the hearing held before me on 24<sup>th</sup> February, 2023 learned Counsel for the Plaintiff and the 4<sup>th</sup> defendant were heard and this ruling is pronounced pursuant to the said hearing.
8. The 1<sup>st</sup> and 5<sup>th</sup> defendants had not filed Affidavit in opposition objecting the granting of injunctive orders as prayed for by the Plaintiff. The 3<sup>rd</sup> defendant did not appear at all though the Notice of Motion was, reportedly, served.
9. The only task before this Court for the time being is to decide whether an injunctive orders against the 4<sup>th</sup> Defendant bank should be issued or not as prayed for in the Notice of Motion filed by the Plaintiff on 21<sup>st</sup> September, 2021.
10. It is observed that in the said Notice of Motion, the Plaintiff had not prayed for any specific injunctive relief against the 4<sup>th</sup> defendant bank. What the Plaintiff had prayed for as per prayer 3 of the Notice of Motion was "***THAT there be no dealings of the subject property by any of the parties in any manner whatsoever until the final determination of this matter***"
11. The only substantial relief prayed for by the Plaintiff against the 4<sup>th</sup> Defendant as per the prayer ( C ) to the Statement of Claim is "**A declaration that the fourth defendant is in**

**default of their statutory obligation in giving wrong advice to the Plaintiff and causing him to lose his subject property to the 1<sup>st</sup> First defendant fraudulently**". (Emphasis mine).

12. The plaintiff's failure to file an Affidavit in reply to the Affidavit in opposition filed by the 4<sup>th</sup> defendant averring the factual positions, *inter-alia*, in relation to the payment made to the Plaintiff by the 4<sup>th</sup> defendant, demonstrates that the 4<sup>th</sup> defendant's position in this regard is uncontested / unchallenged by the Plaintiff.
13. The Plaintiff according to the paragraph 6 of the Statement of claim, having agreed to sell only 5 acres out of his land to the 1<sup>st</sup> defendants, has accepted \$50,000.00 from the 4<sup>th</sup> defendant Bank. But the entirety of the land has been mortgaged by the 1<sup>st</sup> defendants on account of the loan facility obtained by them from the 4<sup>th</sup> defendant Fiji Development Bank. In this regard there may be issues to be decided at the trial between the Plaintiff and the 1<sup>st</sup> defendant, but not with the 4<sup>th</sup> defendant.
14. There is no a valid cause of action or a winnable case against the 4<sup>th</sup> defendant and the whole case against the 4<sup>th</sup> defendant clearly appears to be a misconception. The Bank cannot be restrained from exercising its Mortgage rights over the property in suit as and when needed. Plaintiff has no locus-standi to bring this action against the 4<sup>th</sup> defendant.
15. The plaintiff should have known that whatever rights that he may claim against the other defendants, particularly, the first defendant was subject to the mortgage already in existence with the 4<sup>th</sup> defendant. Therefore, the mortgagee's rights under the mortgage take precedence over the rights of the plaintiff. The plaintiffs are not in a position to tell the 4<sup>th</sup> defendant, the mortgagee, the manner in which it should conduct its affairs.
16. This application is for an interlocutory injunction against the 4<sup>th</sup> defendant Bank until the final determination of the substantive matter. Having considered the facts and the background of the matter which led to the filing of this application, I will consider in brief the law relating to interim injunctions. The following guidelines laid down in *American Cyanamid Co. v Ethicon Ltd* [1975] 2 W.L.R. 316, [1975] A.C. 396 by Lord Diplock, are often considered in granting or refusing an interim injunction:
  - i. *Whether there is a serious question to be tried at the hearing of the substantive matter;*
  - ii. *Whether the party seeking an injunction will suffer irreparable harm if the injunction is denied, that is whether he could be adequately compensated by an award of damages as a result of the defendant continuing to do what was sought to be enjoined; and*
  - iii. *In whose favour the balance of convenience lie if the injunction is granted or refused.*
17. However, these guidelines cannot be considered as the substantive law of injunctions. Lord Diplock in his judgment also said:

18. I would reiterate that, in addition to those to which I have referred, there may be many other special factors to be taken into consideration in the particular circumstances of individual cases.

19. **Kerr LJ in Cambridge Nutrition Ltd v BBC [1990] 3 All ER 523 at 534 said:**

*“It is important to bear in mind that the American Cyanamid case contains no principle of universal application. The only such principle is the statutory power of the court to grant injunctions when it is just and convenient to do so. The American Cyanamid case is no more than a set of useful guidelines which apply in many cases. It must never be used as a rule of thumb, let alone as a straitjacket .... The American Cyanamid case provides an authoritative and most helpful approach to cases where the function of the court in relation to the grant or refusal of interim injunctions is to hold the balance as justly as possible in situations where the substantial issues between the parties can only be resolved by a trial”.*

In **Hubbard & Another v Vosper & Another [1972] 2 Q.B. 84** Lord denning in that case made the following observations:

*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 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. .... 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.*

20. For the court to consider whether there is a serious question to be tried at the hearing of the substantive matter there must be a precise cause of action disclosed against the party against whom the injunctive orders are sought.

21. In this matter the only order sought against the 2nd defendant is;

***“A declaration that the fourth defendant is in default of their statutory obligation in giving wrong advice to the Plaintiff and causing him to lose his subject property to the 1st First defendant fraudulently”.***

22. In view of the purported substantial relief claimed against the 4<sup>th</sup> defendant Bank, I don't see any compelling reason for the court to maintain status quo. The Bank seems to have acted in the manner expected of it when granting loan in its normal course of business. The Plaintiff having surrendered his land as the subject matter of the Mortgage facility granted to the 1<sup>st</sup> defendant, cannot now be heard to say that the 4<sup>th</sup> defendant Bank is in default of its statutory obligation, particularly when he was represented by a Solicitor, who was the 2<sup>nd</sup> defendant.

23. For the above reasons, it is clear that the plaintiffs cannot restrain the 4<sup>th</sup> defendant from exercising its rights under the mortgage as and when need arises.

**ORDERS:**

- I. The injunctive relief sought against the 4<sup>th</sup> defendant Fiji Development Bank is refused.
- II. The Plaintiff's Notice of Motion filed on 21<sup>st</sup> September, 2021 in respect of the 4<sup>th</sup> defendant is dismissed.
- III. The plaintiff is ordered to pay the 4<sup>th</sup> defendant \$1500.00 as summarily assessed costs of this application.



**A.M. Mohamed Mackie**  
Judge

At High Court Lautoka this 29<sup>th</sup> day of March, 2023.

**SOLICITORS:**

For the Plaintiff:	S Nand Lawyers
For the 1 <sup>st</sup> Defendant:	Legal Aid Commission
For the 2 <sup>nd</sup> Defendant:	Nacolawa & Co.
For the 4 <sup>th</sup> Defendant:	Lajendra Lawyers
For the 5 <sup>th</sup> Defendant:	Legal Department, Itaukei Land Trust Board