



The land was part of a residential subdivision described as Lot 22 Wainibuku Subdivision containing an area of 2 acres 0 roods and 38 perches. The father held the land, which was Crown Land, under a Residential Lease described as Crown Lease No. 2842 registered on 27 February 1956.

The Lease was for a term of ninety-nine years commencing on 8th May 1954. It provided, inter alia, that no more than one dwelling house be erected on the demised land and that that land *"shall, together with the dwelling house and any accessory outbuildings to be erected thereon, be used for residential purposes only."*

It is worth recording that

- (a) On 11 October 1991 a Mortgage over the property was registered in favour of the Bank of Baroda;
- (b) On 27 March 1992 a caveat was lodged and registered by the Appellant in respect of any dealings with the land;
- (c) The abovementioned Mortgage and Caveat were each cancelled on 17 November 1994 and 16 November 1994 respectively; and
- (d) On 17 November 1994 the Appellant, by transfer No. 369084 became the registered lessee of the

said property.

Despite possible inferences or suggestions to the contrary, the Appellant became the registered lessee without any fraudulent conduct whatever on his part. This was conceded, both before the learned Judge of first instance and in this Court, by Mr Seru, Counsel for the Respondent.

Shortly put, he became the lessee by paying to or on behalf of his father, the previous registered lessee, the sum of twenty five thousand dollars (\$25,000.00) to relieve the father from his financial pressures including that from the Mortgagee, the Bank of Baroda.

According to the Appellant's affidavit in support of his application, the Respondent was occupying a *"lean to house"* on the land which occupation was unlawful because, *"he is occupying a protected Crown Lease and the consent was never applied for nor granted to him before he went into occupation."*

In response to this, the Respondent swore in his affidavit that:

- (a) He was the second youngest brother of the Appellant (Plaintiff) in a family of seven brothers and two sisters who were all born and brought up upon *"the family land in question."*

- (b) His father gave him authority and permission to reside on the family property, and *"that permission continues to this day despite the transfer to the Plaintiff."*
- (c) *"Our father had promised to his children, including the Defendant, that one day in the future he will subdivide the land for us but unknown to the other children, our father transferred the property only to the Plaintiff without subdividing the land as promised by him."*
- (d) The father's permission continues and the Defendant *"has an equity to remain on the family land as he had played his part in contributing towards the upkeep and development of the land and premises."*
- (e) He (the Defendant) *"has an equitable right to live and reside on the family land as the Plaintiff holds the land in trust for all the other children of the family."*

This latter assertion is the nub of the Defendant's case and of his attempt to maintain the order of Scott J. At one stage the learned Judge appears to have harboured the possibility that there just might be an element of fraud in this case.

Additionally, he concluded his reasons for judgment by stating, "although the rights (of the Respondent) do not amount to a dealing with the land, they must, it seems, run with the land until the expiry of the lease or the death of the grantee whichever occurs soonest. As Rooney J. said in *Jai Chand v. Sheila Maharaj* (1981) 27FLR 91,99 'the equity granted to the Defendant is valid against the Plaintiff, his heirs and assigns.' Were this not so the mere sale of the land would defeat them."

He went on then to say;

"Given the serious questions of law and fact raised I am not satisfied that this is an appropriate case to be dealt with summarily (see generally *Gurdial Singh v. Shiu Raj - FCA Repts 82/220*) I therefore (the underlining is mine) decline to grant the Order for possession sought."

It would appear from the above that His Lordship had found an equity established. Why not determine the matter by refusing possession on that basis? Certainly it was a very different case from that cited above.

His Lordship's reference to the possibility of fraud can have had no bearing on his decision to base his refusal of possession on the need for a full scale trial, the summary procedure being inappropriate. His Lordship had himself adverted to the concession by competent Counsel for the Respondent, Mr Seru, who on the resumed hearing after an adjournment (apparently

proposed by the learned Judge), to allow the question of fraud to be further investigated, conceded that the only argument against possession being granted was that it would be "*unjust and inequitable*" to order the Defendant to leave the land.

In my opinion there was ample opportunity for the litigants in this hearing, under a section of a Statute which provides, inter alia, expressly for a hearing to show cause before a Judge in chambers, S.169 Land Transfer Act (Cap. 131 p.61), to proceed to determine the matter once and for all without the expenditure of further monies on costs etc.

There is no reason why this Court should not proceed to decide the matter on the material before us, giving due weight to the learned Judge's observations.

An application to show cause must contain certain particulars (S.170). These were complied with.

Section 172 provides inter alia that:-

*"If the person summoned appears he may show cause why he refuses to give possession of such land and, if he proves to the satisfaction of the judge a right to the possession of the land, the judge shall dismiss the summons with costs against the proprietor, mortgagee or lessor or he may make any order and impose any terms he may think fit."*

It may be observed here that Part XVII of the Land Transfer Act provides that any person claiming any estate or interest in the land under the Act, "by virtue of an unregistered agreement or other instrument or transmission, or of any trust expressed or implied or otherwise howsoever," may lodge a caveat. (See S.106). No caveat was ever lodged or attempted to be lodged over the dealings in the land.

As to the facts relied on by the Respondent to establish the equity or right to equitable relief, Mr Maharaj referred us to

- (a) the vague and imprecise nature and extent of the alleged promise of the father;
- (b) the absence of any written memorandum or note (cf. S.59 Indemnity, Guarantee and Bailment Act Cap. 232);
- (c) the need for the consent of the Director of Lands to any such transfer as would be involved;
- (d) the need for the relevant Authority to approve any proposed subdivision.

Anyone of these submissions would be enough to defeat the claim of the Respondent.

Mr. Maharaj then submitted that S.39 and 40 of the Land Transfer Act in themselves were sufficient warrant for the learned Judge to have made an order for possession.

It is not necessary to set out in full the whole of these sections. The "gist" of the sections is obvious from the headnotes

"S.39 Estate of registered proprietor paramount, and his title guaranteed.

"S.40 Purchaser not affected by notice."

As to S.39 (1), it is enough to say, that if there is no fraud and the case does not fall within the exceptions (a) (b) and (c), (and in our view there is clearly no evidence of fraud and nothing to bring it within the exceptions) then the registered proprietor holds the land subject only to such encumbrances as may be notified on the folium of the register (and there were none).

From S.39(2) it is clear that no equity such as is alleged can be acquired by possession or user adversely to or in derogation of the title of the registered proprietor.

S.40 again excepts fraud, and protects an acquiring registered proprietor's interest as lessee which "shall (not) be affected by notice, direct or constructive, of any, trust or unregistered interest, any rule of law or equity to the contrary notwithstanding,...."

Mr Maharaj referred us to a considered decision of this Court on these two Sections namely (Raghupal Singh v. Chabildas Devidas 1978 FLR 483) which clearly puts an end to the case for the Defendant.

In that decision their Lordships also discussed and applied the Privy Council decision in Frazer v. Walker 1967 AC 569 involving ss.62 and 63 of the Land Transfer Act 1952, of New Zealand, sections not dissimilar from S.S. 39 and 40.

In our opinion the appeal must be allowed, the judgment of His Lordship Mr Justice Scott set aside. In lieu thereof it is ordered that the Respondent give immediate possession to the appellant of the land referred to in the originating proceeding of 29 March 1995.

We have carefully considered the question of costs of this appeal and those of and incidental to the hearings before Scott J. We order the defendant to pay the plaintiff's costs in this Court and in the Court below. Costs to be taxed by the Registrar in the absence of agreement between the parties.

*E. A. Williams*

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Sir Edward Williams  
Judge of Appeal

*M. Casey*

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Sir Maurice Casey  
Judge of Appeal

*P. Hillyer*

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Mr. Justice Peter Hillyer  
Judge of Appeal