

IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 0006 OF 2023
[Labasa High Court No: HBC 28 of 2020]

BETWEEN : **ANITA WATI**

Appellant

AND : **MANIKAMPILLAY, PADMA WATI,**
LATCHMAMMA, RAMLINGAM

First Respondents

DIRECTOR OF LANDS

Second Respondent

REGISTRAR OF TITLES

Third Respondents

Coram : **Prematilaka, RJA**
Qetaki, JA
Andrews, JA

Counsel : **Mr A. Nand, & Ms A. Singh for the Appellant**
Mr. R. Dayal for the 1st Respondents
Mr. T. Cagilaba, for the 2nd and 3rd Respondents

Date of Hearing : 4th and 15th November, 2024

Date of Judgment : 28th November, 2024

JUDGMENT

Prematilaka, RJA

[1] I agree with the orders set out in the judgment of Qetaki, JA.

Qetaki, JA

Background

[2] This is an appeal against the judgment of the High Court at Labasa by High Court delivered on the 28th of February 2023. In the Notice of Appeal filed on 7th March 2023, the Appellant seeks the following Orders/or Relief:

1. That the judgment delivered in Civil Action No. HBC 28 of 2020 by the Honorable A.L.B Brito-Mutunayagam on 28th day of February 2023 be set aside;
2. That the Court do Order for the Orders as prayed for in the 1st and 2nd Defendants/Appellants Statement of Defence and Counterclaim filed on 24th March 2020.

[3] The Orders sought by the 1st and 2nd Defendants in their Statement of Defence and Counterclaim are:

- A. That the Plaintiffs claim against the 1st and 2nd Defendants be dismissed.
- B. An order for the vacant possession be granted against the 4th named 1st Plaintiff.
- C. Costs of this action on an indemnity basis.

[4] The Orders by Brito-Mutunayagam, J which the Appellant is seeking to set aside are as follows:

- (i) The declaration that the First and Second Defendants hold Lot 8 (CL21772) on trust for the first Plaintiffs and themselves;
- (ii) The first of the First Plaintiffs and the Second Defendant, as executors and trustees of the deceased shall apply to the Third Defendant for the rezoning and subdivision of Lot 8 (CL 21772);
- (iii) Declining the First and Second Defendants' Counterclaim, and
- (iv) The First and Second Defendants shall pay the First Plaintiffs' costs summarily assessed in a sum of \$1500.00.

Further, that the Plaintiffs' claim against the 1st and 2nd Defendants be dismissed; an Order for vacant possession be granted against the 4th named 1st Plaintiff, and costs be on an indemnity basis.

The Facts

The Parties and their relationships to Pernal (deceased)

[5] The 3rd Respondent/3rd Plaintiff is the wife of Pernal (deceased). The rest of the 1st Respondents/1st Plaintiffs and the Appellant/1st Defendant and one Sok Lingam the 2nd Defendant (Not a party to the appeal) are children of the deceased. He died on 2nd on the 2nd day of July 2016 at the Labasa Hospital. In his Last Will of 18 August 2024 he appointed the 1st First Respondent /1st name First Plaintiffs (Manikam Pillay) and the Appellant/1st Defendant (Anita Wati) as Executors and Trustees. The deceased was originally the registered proprietor of Crown Lease No.6009 which comprised Lot 8, (a residential block comprising of 2 acres 1rood and 13 perches) and Lot 12. The Appellant/1st Defendant and Sok Lingam 2nd Defendant are currently the owners of Lot 8 (now No.21772). The First Respondents/Plaintiffs claim that the Appellant/1st Defendant and Sok Lingam/2nd Defendant hold their lots on Lot 8 on trust for the 1st Respondents/First Plaintiffs.

Lot 8, Allocation and Litigation History

[6] The Statement of Claim states that the deceased advised all his beneficiaries that Lot 8 is retained by him for the benefit of his wife. He instructed the 1st and 2nd Defendants to subdivide and allocate Lot 8 in terms of the prior arrangement and his Last Will.

His children built their houses on Lot 8 during his lifetime with his consent and are occupying same.

- [7] The Lease was transferred to the 2nd First respondent/2nd First Plaintiff (Padma Wati). She mortgaged Lots 8 and 12. The arrangement between the deceased and 2nd Plaintiff was that she would alienate and re-transfer Lot 8 to the deceased, which did not eventuate.
- [8] The deceased filed action against her in Labasa Civil Action No.15 of 2008. The 1st and 2nd Defendants (Anita Wati and Sok Lingam) filed action against the 2nd Plaintiff and 3rd Defendant (Padma Wati) and Director of Lands in Labasa Civil Action No. 48 of 2017. In both cases the terms of settlement reached were made Orders of the Court.
- [9] In Labasa Civil Action No.15 of 2008, Order was made that Lot 8 be conveyed to 1st and 2nd Defendants (Anita Wati and Sok Lingam). In Labasa Civil Action No. 48 of 2017, the Director of Lands was ordered to prepare a new lease for Lot 8 in the name of the 1st and 2nd Defendants (Anita Wati and Sok Lingam).
- [10] The Plaintiffs state that the Orders omitted to state that the 1st and 2nd Defendants (Anita Wati and Sok Lingam) hold Lot 8 on trust for them. A new residential lease was issued in respect of Lot 8 in the names of the 1st and 2nd Defendants. The Plaintiffs state that the 1st and 2nd Defendants failed to comply with the Order to subdivide Lot 8 and are in contempt of Court. The actions of the 1st Defendant amounts to fraud. The particulars of fraud are pleaded.

Counterclaim

- [11] The 1st and 2nd Defendants state that in Civil Action No.15 of 2008, the deceased gave Lot 8 to them, during his life time for their use and benefit. They now hold an indefeasible title to Lot 8, and no equitable right arises. That the deceased was not the owner of Lot 8 in terms of the Court Order of 28th April 2010. The action is statute barred as the cause of action against the 1st and 2nd Defendants arose on 28th April 2010. The deceased did not have power to bequeath a land he did not own. The 1st

and 2nd Defendants state that the 4th named 1st Plaintiffs (Ram Lingam) has been residing on the property as a trespasser without their consent and counterclaim for vacant possession of the property from him.

Fourth and Fifth Defendants Position

[12] The Director of Lands and Registrar of Titles state that lot 1 of Lot 8 is prepared in the names of the 1st and 2nd Defendants in accordance with the Order made on 12th April 2018 in Civil Action No. HBC 48 of 2017. The 1st and 2nd Defendants have failed to comply with Orders 6 and 7 of 12 April 2018, in HBC 48 of 2017.

First Plaintiff's Reply

[13] The Orders of Court were made in good faith for the First and Second Defendants to hold Lot 8 in trust for all the beneficiaries, as the deceased had grown old. In 2016, when the deceased came to know of the fraudulent intention of the 1st and 2nd Defendants, he executed his Last Will to give effect to his intentions to distribute Lot 8 to his wife and all his children.

Discussion

High Court

[14] The trial judge considered the statement of claim by the plaintiffs, the statement of defence of the first and second defendants, before turning to the statement of defence of the 3rd and 4th defendants. After setting out the facts, the trial judge identified and listed thirty-one (31), issues arising from an assessment of the materials before him for his consideration. He did not seem to deal with all the issues listed.

[15] The trial judge considered the two preliminary issues raised by counsel for Anita Wati (1st Defendant) and Sok Lingam (2nd Defendant) at the commencement of the High Court hearing, namely:

- (a) *Can the Solicitors for the plaintiff institute an action contesting the same issues which has been decided in Civil Action No.15 of 2008 and 48 of 2017?*
- (b) *Can the deceased Permal who died on or around 2016 devise and will something which has been disposed of by him in Civil Action No. 15 of 2008?*[16]Counsel submitted on their behalf that that the deceased agreed in Civil Action No.15 of 2008 to give Lot 8 to the Anita Wati and Sok Lingam. In Civil Action No. 48 of 2017, the Director of Lands was ordered to prepare a new lease for lot 8 in their names. That the matter is *res judicata* until a separate action is filed to set aside both orders. Counsel for the defendants replied that Anita Wati and Sok Lingam held Lot 8 in trust for Manikam Pillay, Padma Wati, Latchmamma and Ram Lingam (Plaintiffs) and they failed to comply with the orders.

[16] The leaned judge stated that at the hearing, counsel for Anita Wati and Sok Lingam (1st and 2nd Defendants) agreed to the lease instruments, Probate, orders of court and the proposed subdivision produced by PW1 (Manikam Pillay). That in Civil action No. 15 of 2008 filed by the deceased (late Permal) against Padma Wati (2nd Plaintiff) the orders of court of 28th April 2010 are *inter alia* as follows: the second plaintiff transfer Lot 8 to the 1st Defendant (Anita Wati) and 2nd Defendant (Sok Lingam): *there now exists a proposed subdivision prepared by the plaintiffs, copy of which is attached.*

[17] Anita Wati and Sok Lingam (1st and 2nd Defendants) filed an action against Padma Wati and Director of Lands (2nd Plaintiff and 3rd Defendant) in Civil Action No. 48 of 2017. On 12 April 2018, the following terms of settlement were entered:

- (a) the Director of Lands was ordered to prepare a new lease for Lot 8 in the names of Anita Wati and Sok Lingam (1st and 2nd Defendants) , who were ordered to subdivide Lot 8 and transfer Lot 7 of Lot 8 to Anita Wati (1st Defendant).
- (b) Under the circumstances, the learned judge is of the view that the case for Manikam Pillay, Padma Wati, Latchmamma and Ram Lingam (1st Plaintiffs), is that Anita Wati and Sok Lingam (1st and 2nd Defendants) are currently the owners of Lot 8.
- (c) The issue of *res judicata*, therefore does not arise. The learned judge also noted that the proposed subdivision plan contains a division of Lot 8 to several lots.

- (d) Also, the deceased (the late Permal), in his Will bequeathed lots 1 to 8 of Lot 8 to Manikam Pillay, Padma Wati, Latchmamma, and Log Lingam (1st Plaintiffs) and to Anita Wati and Sok Lingam (1st and 2nd Defendants).

[18] Manikam Pillay (PW1), in evidence in chief said that his house was on lot 8. In cross examination, he said that Sok Lingam's (2nd Defendant) house was on lot 8 of Lot 8 and the house of PW2 (Ram Lingam), was on lot 2 of Lot 8. Ram Lingam confirmed this in his evidence. But Padma Wati (2nd Plaintiff) had dismantled her house.

[19] DW2, (Mr. Amit Kohli, Solicitor) said that:

- (i) He filed Civil Action No.15 of 2008 on behalf of the deceased (the late Permal), and the deceased did not raise concern that the land was to be given to his other children apart from Anita Wati and Sok Lingam (1st and 2nd Defendants).
- (ii) In cross- examination, he said that the subdivision was part of the terms of settlement in Civil Action No.15 of 2008.
- (iii) The learned trial judge held that in his view, the proposed subdivision plan and the Last Will indicate the intention of the deceased, that he wanted the land subdivided and distributed, as reinforced by the evidence that three children of the deceased built their houses on lots corresponding to the lots bequeathed to them.

[20] Anita Wati, DW2 (1st Defendant) categorically stated in cross examination that:

- (iv) She knew of the subdivision plan and *“it was Sok Lingam and my responsibility to subdivide the land and give – and give it to them.... We did not do because the lease was not registered under mine and Sok Lingam name”*.
- (v) In re-examination, she explained that she did not attend to the subdivision after the lease was granted in her name, as the present action was filed.
- (vi) In the learned judges view, the evidence of Anita Wati (1st Defendant) fortifies the case for the plaintiffs that Lot 8 was held in trust for them by the 1st and 2nd Defendants (Anita Wati and Sok Lingam).

The High Court decided in favour of the Plaintiffs and granted as prayed – see Order as earlier stated in paragraph [4] above.

Grounds of Appeal

[21] The following grounds of appeal were filed by the appellant on 07th March 2023:

1. That the learned trial judge erred in law and in fact in not considering the submissions filed by the appellants in any way.
2. That the learned trial judge erred in law and in fact not considering the equitable principle of *Ademption* as the specific asset being CL 21772 given under the Will of the deceased in Probate Number 60872 has ceased to be part of the Will makers estate as CL 21772 has been issued to the appellant in her personal name along with another Sok Lingam by 3rd respondent on the 28th day of September 2018.
3. That the learned trial judge erred in law and in fact by failing to consider the fact that destruction, loss or parting with ownership of the property in anyway other than sale will adeem the gift given under the Will of the deceased as the gift being CL21772 the deceased had parted with ownership of this property to the appellant pursuant to Court Order made on 28th April 2010.
4. That the learned trial judge had erred in law and in fact when it failed to consider the case of *Re Freer [1982] 22 CH D 622 (Ch)* whereby no question of the Will makers intention arises in considering whether ademption has taken place.
5. That the learned trial judge erred in law and in fact in not considering the submission of the appellants (1st and 2nd respondent as was then) on preliminary objections filed on the 23rd August 2022 in any way.
6. That the learned trial judge erred in law and in fact in not considering the case of *Green v Rozen [1955] 2 All Er 797* in reaching his conclusion that matters which had been settled on comprise specially being the High Court Order made on 28th day of April 2010 in civil Action No. 15 of 2008 and order sealed on 13th April 2018 and Civil Action No. 48 of 2017 cannot be re-litigated unless and until those orders are set aside in a separate action.
7. That the learned trial judge erred in law and in fact at paragraph 15 of the judgment when His Lordship had stated that “*the issue of res judicata does not arise.*” when in fact the order made on 28th day of April 2010 was settled and the effect of the orders equally applied to all parties under Order 45 Rule 8 of the High Court Rules 1988.
8. That the learned trial judge erred in law and in fact that the burden to prove the existence of the trust lies on the person propounding it which in this case was the plaintiff/1st respondents’ burden of proof of which was not properly discharged.

9. That the learned trial judge erred in law and in fact in not considering the case of *Wati v Kumar* [2019] FJSC 5 in which the trial judge erred to consider each and every element of constructive trust to reach the decision in favor of the plaintiffs/1st respondent.
10. That the learned trial judge erred in law and in fact when it did not consider the evidence of Ami Chandra Kohli in the following ways:
 - a. that “*the deceased did not raise or said anything that the property is to be held on trust in favor of all children?*”
 - b. That it was the 1st named 1st appellant who had brought the deceased to the Solicitor to file a case for recovery of land against Narsamma Naidu.
 - c. That the point of contact was always the 1st named 1st appellant with Amy Chandra Kohli and legal fees was always paid by her with no contribution from the appellant.
11. That the learned trial judge erred in law and in fact when it failed to analyse from the evidence at hand that there is no evidence of common intention as there is no evidence adduced in court to show either by express agreement that the deceased had indicated to the appellants / 1st and 2nd defendants to hold CL 21772 on trust prior to the orders made in Civil Action No.15 of 2008 or at the time orders were made in Civil Action No. 15 of 2008.

The appellant reserves its rights to file further grounds of appeal upon receipt of the records.

Case for the Appellant

[22] ***Ground 1, 5, 6 and 7:*** The Appellant submits that the learned judge did not consider Order 45 Rule 8 of the High Court Rules after the parties had completed their submissions on the preliminary arguments raised by Counsel for Anita Wati and Sok Lingam (1st and 2nd defendants) at the hearing, the gist of which is that the orders made in Civil Action No. 15 of 2008 and 48 of 2017 were equally enforceable to all the parties as if they were a party.

[23] The appellant submits that the learned judge erred in his view of the issue of *res judicata*, where at paragraph 15 of the judgment, the learned judge stated:

“....in my view, the case for the 1st Plaintiffs is that the first and second defendants hold their lots on Lot 8 on trust for them. The statement of claim states that the first and second defendants are currently the owners of Lot 8. The issue of res judicata does not arise?”

[24] The appellant submits that:

- (a) The rule in **Green v Rozen** [1955] 2 All ER 797 was not followed. The rule establishes that matters which has been settled on compromise cannot be re-litigated unless and until those compromise are set aside in a separate action.
- (b) The rule applies to both cases (Civil Action No.15 of 2008 and No. 48 of 2017) as the actions were settled through dispute resolution and compromise, and relate to the land in question.
- (c) Civil Action No. 15 of 2008 dealt with the deceased (late Permal) instituting an action against one Narsamma Naidu which was resolved out of court and the terms of settlement were made an order of the court (page 131 of records). The Order was made on 30th April 2010, before the Master as follows:

“1. That the defendant transfer to the plaintiffs all the residential blocks referred to as Lot 8 on Plan M2698 Rara Crown Lease No. 6009. That the said transfer is to be conveyed to the daughter and the son of the Plaintiff namely Anita Wati & Sok Lingam.

2. That the transfer referred to above is subject to the following conditions: -

- i) That the Plaintiff to subdivide the residential block at his own costs inclusive of the provision and registration of all easements and access roads to all the lots on proposed subdivision;
- ii) That all costs of the building of the access road to be borne by the Plaintiff;
- iii) That the Plaintiff to put aside, allocate and transfer to the Defendant Lot 7 of the proposed subdivision;
- iv) That there now exists a proposed subdivision prepared by the Plaintiff, copy of which is attached with this document, and that the Lot 7 referred to above is as that shown in the proposed Plan and marked in red;
- v) That the Plaintiff is to pay to the Defendant the sum of \$1800.00 as rental payment up to 31st December 2010 and that further rental to be paid when due (payment made in Court before Master on 27 April 2010).

3. That to effect and enable the transfer of the residential blocks and to obtain the Consent of the Lands Department and all other relevant authorities the Defendant undertakes to pay the debt owed to the Sugar

Cane Growers Fund within three years and further undertakes not to prolong the period by which the transfer could be effected by taking out further loans from the Sugar Cane Growers Fund or any other financial institutions or encumbering the said land in any manner whatsoever without first consulting and obtaining the consent of the Plaintiffs.

4. The Defendant undertakes to pay the costs of his own conveyance of Lot 7.
5. That the Plaintiffs are to do all that is necessary to protect their interest on the land created by this Terms of Settlement.
6. That the Plaintiff to withdraw the action on execution of this Terms of Settlement and each party are to pay their own costs.”

[25] Was the rule in Green v Rozen (supra) applicable to this case?

The intention of the deceased agreeing to have the property transferred to the appellant together with one Sok Lingam (1st and 2nd defendants), the evidence of PW3 Ami Chandra Kohli is crucial in addressing the issues.

[26] The intention of the deceased was clear, that the property be transferred to Anita Wati and Sok Lingam and not to their other siblings. The evidence of Ami Chandra Kohli confirms that assertion. There was no intention of the deceased to have the property held in trust by them for the other siblings. However, all the other siblings were aware of the Court case, its orders and proceedings.

[27] That action No. 48 of 2017 was filed by the appellant against Narsamma Naidu and 2nd and 3rd respondents seeking compliance of the parties with orders made in Civil Action 15 of 2008. This too was settled by compromise (page 128 of record) seeking an order that Narsamma to sign the conveyancing documents for Lot 8 and 2nd and 3rd respondent to prepare a new lease for the property that was partly surrendered. Again, all the parties were fully aware of the terms and proceedings taking place and at no material time did any of the siblings move the court. Both the Civil Actions had declared that the property is to be transferred to Anita Devi and Sok Lingam (1st and 2nd defendants) and new lease to be prepared in their personal names. It is submitted that, the matter should have been challenged in an action to set aside the judgment already entered in these matters. For the parties to revert back to the same issue

seeking amendments of the orders on whether or not the property is held on trust or not is *res judicata*.

[28] It is submitted that, the deceased may have changed his mind at the time when the will was made however, there is no evidence submitted by the 1st respondent in trial that the land was to be held in trust. If such was an issue than action No.15 of 2008 orders ought to have been set aside and relitigated on the issue of ownership. The situation would have been different if the Will was made prior to the orders made in that action. If it was the intention it would have been crystal clear.

[29] **Grounds 2, 3 and 4**-It is submitted that the ownership flow chart shows clearly that at the time of death of the deceased, the deceased never had legal entitlement of the property in question. Principle of ademption applies. To explain how the principle work, in the case **Johnston v Maclaran** [2002] NSWSC 97, the Supreme Court of New South Wales stated, at paragraph 13 of its judgment:

“13. Roper on Legacies, 4th Ed (William Benning & Co, London 1847 0 at pp 329 and following, sets out the general rule with respect to the Ademption of specific legacies. The learned author says: “The word ademption when applied to specific legacies of stock or of money. Must be considered as synonymous with the word “extinction”. For it should be observed, that if stock, or money, so bequeathed, be sold or disposed of, there is a complete extinction of the subjects and nothing remains to which the words of will can apply (a) for if the proceeds from such sale or disposition were to be substituted and permitted to pass, the effect would be.... To convert a specific into general legacy.”

[30] Even the New Zealand courts followed the above approach. In **Re Rudge** [1949] NZLR 752, 761, Callan J affirms that:

“In question of Ademption.... The primary inquiry is not for the testator’s intention. The test appears to be whether at his death the property of which the testator has made a specific gift in his will, still belongs to him.”

The principle of ademption has been described as follows:

“Ademption occurs when property subject to a specific testamentary gift is not part of the estate when a testator dies. The doctrine operates on the assumption that if the property cannot be found..... the gift cannot take effect.”

(Law Institute Journal Volume 84, Issue 8 pages 36 to 40- topics “*Adeptly Avoiding Ademption*” by Matthew Groves).

[31] However, there are exceptions to the application of the principle, and it is clear that fraudulent or tortious action to dispose the property without the knowledge of the testator was an exception, and this is normally done by the holder of a Power of Attorney of the testator. The exception does not extend to cover the transfer of the property to a third party with knowledge and consent of the owner in their personal names only to hold and distribute property as per the wishes of the deceased in his Will: this is also discussed in the Law Institute Journal (*supra*), in the following terms:

“Over time some minor exceptions to ademption arose that suggested the intention or knowledge of a testator was relevant/One exception was any fraudulent or tortious acts to dispose of property without the knowledge of the testator. A similar exception extended to fraudulent actions by an agent of the testator. These exceptions are consistent with the proposition that “whether the testator had notice or knowledge of the facts is a relevant factor on the question of ademption.”

[32] **Grounds 8, 9, 10 and 11-** The appellant submits that, if the Court decides that the learned judge was correct in terms of Ademption than his Lordship was required to assess whether there is sufficient evidence present to find that constructive trust has been formed. For this case, the case of **Wati v Kumar [2019] FJSC 5**, is relevant where His Lordship Keith, J at paragraph [37] of the judgment stated:

“A constructive trust will arise where it would be unjust to allow the legal owner of an estate to deny that a particular member of his family has a claim to part of the land on the estate. One of the circumstances in which it might be unjust to do that is when there was, to use the words of Lord Bridge in Lloyds Bank PLC v Rosset [1990] UKHL 1 AC 107 at page 132E, “any agreement, arrangement or understanding” that the land would be owned one day by the family member in question. Such an understanding does not have to be based on actual discussions between them. It may be inferred from what they actually did. Both the owner of the estate and the family member has to have had this understanding.in other words, the understanding needs to have reflected their common intention.”

[33] On the application of the above legal principles to this case, the appellants submit that:

- (i) The evidence of Ami Chandra Kohli, discussed earlier, clearly points out that the late Permal, at no material time had an intention or

expressed his intention to his Solicitors that the property being Lot 8 which Narsamma was owner of, to be held in trust for the benefit of the appellant's siblings.

- (ii) At the material time, there was no understanding between the appellant (Anita Wati and Sok Lingam) and the 1st respondent that the appellant was to subdivide the land and give a lot each to her siblings as per the last Will and testament of the deceased Permal.
- (iii) Whether Manikam Pillay, Padma Wati, Latchmamma and Ram Lingam (1st respondents) acted to their detriment or changed their position significantly in reliance to the understanding from the time the case 15 of 2008 was instituted? It is submitted that there is no such misunderstanding in writing which came to light specifying that the land was to be held in trust for the benefit of the first respondents aforesaid.
- (iv) Even if it is agreed that the subdivision scheme was part of the plan which the deceased wanted for his children to hold, the evidence of Ami Chandra Kohli is vital in that it confirms that no such intention occurred in the mind of the deceased when he agreed to have the appellant have the total ownership of the property. Intention changed with time of making the Will however, it is vital to note what the deceased was at the time when the orders were made in relation to Civil Actions No. 15 of 2008.
- (v) None of the first respondents, gave any evidence in Court to suggest that they had significantly relied on the assurance and incurred any expenses on the property. The only person who was residing on the property was Ram Lingam the 4th named first respondent. But there was no evidence produced to say when he was allowed to build his house on the property, and was it after or before the orders were made in Civil Action No. 15 of 2008.

[34] The appellant submits that the final question is whether, in the circumstances of the above submissions and the evidence available, it would be unjust to allow the appellant to deny the 1st respondent that they have a claim in CL 21772, and she is in no doubt that it would not. Appellant says that by the time appellant acquired separate title for Lot 8 now being SL 21772 on 28th September 2018 only after a few months after compliance orders were made by the Master on 12th April 2018 in Civil Action 48 of 2017. It is submitted that when the orders were made in Civil Action No.15 of 2018, the Power of Attorney holder of the deceased (page 166 HCR) was the appellant. If the appellant who would have signed the terms of settlement in Civil action No. 15 of 2008 than, an inference could be drawn that the appellant wanted or intended to deprive the shares of his siblings. However, it is submitted that the evidence of Mr. Ami Chandra Kohli, was that the deceased who signed, after he had understood the contents and agreed to have the property transferred to the appellant. At no time did the deceased wanted the property to be held in trust for his other children.

[35] It is submitted that the reason the deceased would have thought of what he had actually done, is crystallized in the evidence of Anita Wati (1st defendant/ now appellant) where the witness gave evidence that at the time Civil Action No. 15 of 2008 was filed no children apart from the appellant agreed to help the deceased get the land back and it was Sok Lingam who was looking after the parents while the appellant was looking after all the legal costs and costs associated with the action No. 15 of 2008 (pages 385 and 386 of HCR). It is submitted, it can be inferred that at the time when the deceased agreed to have the property transferred to the appellant and Sok Lingam was purely based on the assistance that only his two children had provided when the deceased's other children failed to help out. The deceased's intention at that time when the orders were made is crucial not at the time when the Will was made as such intention would have changed. It is submitted that, there is no evidence until the demise of the deceased that the deceased will was that the property was to be held in trust for the benefit of all children.

[36] For the above reasons, the appellant submitted that that it is apparent the learned trial judge did not properly assess the evidence before him and he did not verify the elements of constructive trust and whether such trust was validly made out. That the

burden of proof the trust is established, is with the 1st respondent/ 1st plaintiffs, which burden was never discharged.

Case for the Respondents

[37] On **grounds 1 and 5**, the 1st respondents Manikam Pillay, Padma Wati, Latchmamma and Ram Lingam) say that the learned judge had considered the preliminary objections raised by Anita Wati and Sok Lingam (of the plaintiff) at paragraphs 8 to 15 of the judgment (pages 15 and 16 of record). Counsel for defendants had failed to put the plaintiffs on notice prior to the commencement of the hearing, although he had over two years to do so, to prevent surprising the plaintiffs and the Court at the hearing. He relied on a number of overseas cases, courts had overruled preliminary objections and proceeded to hear the appeal, the court reserved the written ruling and reasons for same on preliminary objection to be delivered with the substantive judgment. A similar situation as in this case, where the preliminary objection was considered in the substantive/final judgment.

[38] On **grounds 2,3, 4 and 6**, submit that the principle of ademption has no application in this case, as the Court order (pages 131-133 record) was made for the appellant and Sok Lingam (1st and 2nd defendants in High Court) to hold Lot 8 on trust for all the beneficiaries as the late Permal had grown old and senile. All the beneficiaries, with the late Permal, had agreed to the sharing proposal. The Clauses of the order are clear and imply that Lot 8 is a trust property and was never meant for the use and benefit of only Anita Wati and Sok Lingam. It submits that when the deceased Narsamma Naidu (2nd plaintiff in HC 28 of 2020) was not able to subdivide and transfer the property, the deceased then asked the Anita Wati and Sok Lingam to institute legal action against Narsamma Naidu and the Director of Lands for compliance with the Court order dated 8th April 2010. It is submitted that, Anita Wati and Sok Lingam kept postponing the institution of a court action, awaiting the demise of the late Permal so that they could carry out “*their ulterior motive of devouring the whole of Lot 8*” especially when the deceased would not be there to challenge what they had intended to do with respect to Lot 8. Had the deceased known of Anita’s intentions with Sok Lingam, he would not have allowed the transfer to them, to occur via the Court order. The late Permal executed his last Will in 2016, when he knew of Anita’s and Sok’s plans to deprive

the other beneficiaries. The Will was in effect an attempt by the late Permal to give effect to his intentions to distribute Lot 8 to his wife and all his children, the will was executed on 18th August 2014 (page 121 to 124, and the Court order was endorsed on the memorial to CL 6009 on 9 August 2017 at 12:14 pm when the CL had expired on 31st December 2015 (page 140 of record).

[39] **Grounds 7, 8, 10 and 11:** That Civil Action No.15 of 2008 was instituted by late Permal during his lifetime. It was ordered :

“That the defendant transfer to the Plaintiffs all the residential blocks referred to as Lot 8 on Plan M2698 Rara Crown Lease No. 6009.the said transfer is to be conveyed to the daughter and the son of Plaintiff namely Anita Wati and Sok Lingam.”

There was an oversight by the deceased in not clarifying in his instructions to the solicitors that the two were to hold all of Lot 8 for all the beneficiaries, including the deceased’s wife. The learned judge recognized this in his judgment at paragraphs 16-19 (page 8) and page 16 of record. Similar sentiments are reflected in pages 73-76 of transcripts (pages 400-402 of record).

[40] The court order dated 30th April 2010 (pages 131-133 record) was made in good faith for Anita Wati and Sok Lingam to hold Lot 8 in trust for the other siblings and them, and their mother. See also judgment at paragraphs 20 and 21 (page 17 of the record). It is submitted that sufficient evidence was adduced in court to show that the deceased had indicated to the appellant / 1st defendant, that CL 6009 is to be held in trust at the time when orders were made in Civil Action 15 Of 2008.The 1st respondents submit that the appeal be dismissed and struck out and costs be awarded to the 1st respondents on indemnity basis.

[41] On **Ground 9**,the respondents (Manikam Pillay, Padma Wati, Latchmamma and Ram Lagan) submit that the case **Wati v Kumar & Another** [2019] FJSC 5, which made pronouncements on the principle of “*constructive trust*” in its judgment, in a factual scenario similar to this case, actually favors their legal position, as the 1st respondents in this case.

Analysis

- [42] The Appellant had submitted a comprehensive written submissions which did not address the eleven grounds of appeal individually, but have opted to address the grounds in the following order: (1) Grounds 1, 5, 6, and 7 relating to the complaint that the learned judge did not consider the submissions filed by the appellants, and the Appellant's submissions on the preliminary objections filed on 23rd August 2022; the case of **Green v Rozen** and its application to the Court Orders previously made; and in declaring that the principle of *Res Judicata*, stating that it does not arise. .;(2) Grounds 2, 3, and 4, which relate to the complaint that the learned judge did not consider the principle of *Ademption* and its application to the Will of the deceased and not considering the case of **Re Freer**; (3) Grounds 8, 9, 10 and 11 relate to the burden of proving the existence of constructive trust, and the learned judge not considering the case of **Wati v Kumar** on the elements of constructive trust, with the evidence of Mr Ami Chandra Kohli as to the intention of the testator Permal when he executed his last Will and Testament. For some reasons best known to the Respondents, particularly the First Respondents, their written submission did not respond directly as the Appellant had presented her written submissions. It does not assist the Court in assessing and evaluating the grounds and the arguments presented by the parties.
- [43] Grounds 1, 5, 6 and 7: I do not accept the Appellant's submission that the learned trial judge did not consider the submissions filed by the Appellants/Original 1st and 2nd Defendants who were represented by Mr A. Nand, in any way. One only has to read the judgment to appreciate the learned judge's assessment of the submissions and arguments of both the parties. The fact that the outcome of a case does not favour a party to an action, does not mean that the case and submissions of the other side were not considered by the learned judge. To the contrary, the learned judge had carefully considered all the submissions, the facts / evidence and the law, and have arrived at his decision which was in the Plaintiff's favour.
- [44] The Appellant's preliminary submissions featured prominently in the judgment of the learned judge, as discussed in paragraphs [14] to [20] above. However, having considered all the evidence adduced and the submission, as Anita Wati and Sok

Lingam) hold Lot 8 on CL21772 on trust for the 1st Plaintiffs (Manikam Pillay, Padma Wati, and Latchmamma) and for themselves. By virtue of Civil Action 48 of 2017 a term of Settlement was ordered as described in paragraph [8] above. On Ground 5 (Res Judicata):

“14. The 1st and 2nd Defendant filed action against the 2nd Plaintiff and 3rd Defendant in Civil Action No. 48 of 2017. On 12 April 2018, the following terms of settlement were entered: Director of Lands was ordered to prepare a new lease for Lot 8 in the names of the 1st and 2nd Defendants, who were ordered to subdivide Lot 8 and transfer Lot 7 of Lot 8 to the 1st Defendant.

15. In my view, the case for the 1st Plaintiffs is that the first and second Defendants hold their lots on Lot 8 on trust for them. The Statement of Claim states that the first and second defendants are currently the owners of Lot 8. The issue of res judicata does not apply.”

[45] Grounds 2, 3 and 4: The learned judge had identified at least six issues (pages 5 to 7 of judgment) which relate to the submissions by the Appellant/Original 1st and 2nd Defendants that needed to be resolved around the application of the principle of *Ademption*. They are:

“29. Whether the time of making his last Will and Testament gave away the land to the 1st and 2nd Defendants?

30. Whether the 1st and 2nd Defendants were registered lessees of CL6009 or CL21227 at the time the said deceased executed his Last Will and Testament?

31. Do the Plaintiffs have the locus to institute the action on behalf of the Estate of Permal or on their own behalf?

32. Whether the Order made on 28th day of April 2010 in the High Court Civil Action No.15 of 2008 confirmed that the deceased is no longer the owner of the land known as Lot 8 in CL6009?

33. Whether the Order made on 28th April 2008 and 12th April 2018 has any bearings on the deceased in disposing off the property which he doesn't own?”

[46] The listing of the above issues clearly indicate that those issues were firmly in the learned judge's mind to address in the course of his assessment, evaluation and

decision on the facts and evidence before him. Paragraph [4] of the judgment raises the Defence case of the Appellant/1st and 2nd Defendants. Paragraphs 8 and 9 of the judgment discusses Mr Nand's submissions on behalf of the 1st and 2nd Defendants on the two preliminary issues in connection with the principle of *Ademption*. It is critical to note that the lease granted to the Appellant and his brother/Second Defendant. CL 21772 was a completely new lease, not acquired through Transfer of existing lease. Also, it would appear that the deceased's lease had already expired at that time. That the deceased's Will was executed on 18th August 2018. There is a Memorial on the old lease which registered a Court Order, the date of which appears to be obliterated. However, it could be seen that it was registered in 2017, around August as far as I could guess. The Memorial appears to mention Anita Wati and Sok Lingam. The area is far less, only 8428. The implications of the above dates could be far reaching as, if the lease has expired, the Memorial cannot be of value as the title and ownership, goes with the duration of the lease. It raises the question of the new lease being issued while there is the standing wish of the deceased for all the children, and his wife, to have a share from his Estate land, which in turn raises the issue of the Appellant and Sok Lingam holding the land, in trust.

Grounds 8, 9, 10, 11

[47] These grounds are interconnected and will be dealt with together. Ground 8 alleges that the learned judge was at fault in not placing the burden of proving the existence of the trust/constructive trust on the party relying on it, which in this case means that that burden rests with the First Respondent/Plaintiffs. That burden was not properly discharged at the trial. The term "*Trust*" is defined in Stroud's Judicial Dictionary, (6th Edition) Vol 1. Pages 2725-2726), as follows:

"No definition of a 'trust' seems to have been accepted as comprehensive and exact. Strictly, it refers, I think, to the duty or the aggregate accumulation of obligations that rest upon a person described as trustee. The responsibilities are in relation to property held by him, or under his control. That property he will be compelled by a court to administer in the manner lawfully prescribed by the trust instrument or where there be no specific provision written or oral, or to the extent that such provision is invalid or lacking in accordance with equitable principles." (per Mayo J, in Re Scott [1948] S.A.S.R 193,196)

“The word ‘trust’ is not necessary to create a trust, nor will its use necessarily create one (2 Jarm. (8th ed.) 886; Te Teira v Te RoeraTareha [1902] AC 64; but its use is frequently most useful in showing that a trust is intended (per Chitty L.J., Hill v Hill 66LJQB. 335)”

[48] The evidence of the Appellant /First Defendant both in examination in chief and cross examination, from pages 384 to 398, particularly in cross examination, indicates that the appellant is aware of the deceased’s intention, that she and the First Defendant Sok Lingam to hold the land, Lot 8, in trust for all the children including themselves. The learned judge was correct in his judgment from paragraphs 20 to 24, when he stated:

“20. Moreover, DW2, (the first defendant) categorically stated in cross examination that she knew of the subdivision plan and “it was Sok Lingam and my responsibility to subdivide the land and give and give it to them... we did not do because the leaser was not registered under mine and Sok Lingam’s name.

21. In my judgment the evidence of the first defendant fortifies the case for the plaintiffs that Lot 8 was held in trust for them by the first and second defendants...

22. The action of the plaintiff succeeds.

23. In my judgment the fourth of the first plaintiffs is entitled to remain on Lot 8.

24. The counterclaim of the first and second defendants for vacant possession against the fourth of the fourth plaintiffs is declined.” Underlining is for emphasis)

[49] In my view, the Appellant’s/First Defendant’s evidence brings the circumstances surrounding Lot 8 within the meaning of trust (express or implied) and/or constructive trust in line with their definitions/meaning , and, particularly within the meaning of constructive trust as relied upon and quoted by the Appellant in the written submissions, from the case **Wati v Kumar** (supra). Ground 9 states that learned judge erred in not considering the case of **Wati v Kumar** [2019] FJSC 5, before determining the case in the Plaintiff/Respondents favour. I have covered this ground in my observations on Ground 8 above. However, it would appear that this case leans more to the First Respondents than to the Appellant’s favour. The Appellant had knowledge earlier on that there was a subdivision plan and it was her and her brother Sok Lingam’s responsibility to subdivide the land and give the First Respondents their

share. As it turned out, nothing was done to honour the trust placed upon her to facilitate the intention (express or implied), of the deceased after the lease was granted.

[50] The totality of the evidence on this aspect from the written submissions of the parties, and, as highlighted by the First Respondents in their written submissions filed on 11th November 2024, responding to the arguments/issues surrounding the intention of the deceased with respect to Lot 8, points to the conclusion that the deceased intended that all his children and his wife were to benefit from his Estate after his death. I have also covered Grounds 10 and 11 in the above analysis. In Ground 10, it is submitted that the learned judge erred in not considering the evidence of Ami Chand Kohli on the intention of the testator/deceased. In Paragraph 11, the appellant alleges the learned judge is at fault as he failed to analyse from the evidence at hand that there is no evidence of common intention as there is no evidence adduced to show either by express agreement or otherwise that the deceased had indicated in the Appellant/1st and 2nd Defendants to hold CL21772 on trust prior to the orders made in Civil Action No. 15 of 2008, or at the time when orders were made in Civil Action No. 15 of 2008.

Conclusion

[51] This appeal is dismissed, having considered and regard to the material available in the copy record, the facts, and written and oral submissions of the parties and the applicable law.

Andrews, JA

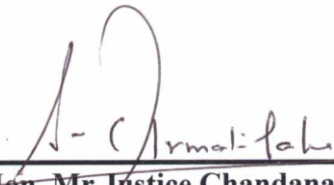
[52] I agree with the reasoning and judgment of Qetaki, JA.

Orders of Court:


1. Appeal is dismissed.
2. The Judgment and Orders delivered on the Civil Action No. HBC 28 of 2020 by Honourable Judge A.L.B Brito- Mutunayagam on 28th day of February 2020 is Hereby Affirmed.

3. Relief sought by the Appellant, that “*The Court do Order for the Orders as prayed for in the 1st and 2nd Defendants /Appellants Statement of Defence and Counterclaim filed on 24th March 2020*” is declined.
4. The Appellant pay Costs to the 1st Respondents the sum of \$3,000.00 to be paid within 21 days from the day of this Judgment.






The Hon. Mr Justice Chandana Prematilaka
RESIDENT JUSTICE OF APPEAL



The Hon. Mr Justice Alipate Qetaki
JUSTICE OF APPEAL



The Hon. Madam Justice Pamela Andrews
JUSTICE OF APPEAL