

IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

CIVIL ACTION NO. 384 OF 1999



Between:

SUNDAR MASIH SUKHU as sole surviving
Executor and Trustee of the ESTATE OF
SUKHU MAHAJAN

Plaintiff

and

SUVA CITY COUNCIL

First Defendant

and

ATTORNEY GENERAL

Nominal Second Defendant

and

THE REGISTRAR OF TITLES

Nominal Third Defendant

Mr. G. P. Shankar for the Plaintiff
Ms. T. Waqanika for the 1st Defendant
Ms. M. Rakuita for the 2nd & 3rd Defendants

Date of judgment: 30.8.2006

JUDGMENT

By originating summons dated 19 August 1999 the plaintiff **Sundar Masih Sukhu** (the 'plaintiff') as the sole surviving executor and trustee of the Estate of late Sukhu Mahajan, seeks the following orders against the defendants:

1. *For a Declaration that the plaintiff is entitled for the revocation of the Dealing No. 174569 entered on 15 day of February, 1980, fully described as Lot 59, in the Certificate of Title No. 6576 in the Deposited Plan No. 1657, situated in Suva 3 Miles, containing an area of 1 rood 39.8 perches, which was dedicated by the Estate of Sukhu, enjoining Ratu Mara Road and Fletcher Road, as a by-pass public road, to be known as "NASOLO ROAD", and which has not been constructed by the Defendants;*
2. *For an order that the Defendants de-register/transfer the said dedication under Dealing No. 174569 and register the said piece of land back to the Estate of Sukhu Mahajan and/or alternatively pay a fair current market price for the said land and its use since dedication.*

This action involves the law as to 'dedication' of land.

The plaintiff filed an affidavit in support of the summons. There were other affidavits filed by the parties for Court's consideration.

The defendants in this action are the first defendant the **Suva City Council** (the 'S.C.C') and the second and third nominal defendants respectively the **Attorney-General** and **The Registrar of Titles** (the 'D2' and 'D3' respectively).

Background facts

The plaintiff is the sole surviving executor and trustee of the estate of his late father Sukhu Mahajan s/o Laloo ('**Sukhu**') who died on 31 December 1973.

He is also one of the beneficiaries under the Will of Sukhu, Probate (No. 13303) whereof was granted to the plaintiff and his two brothers.

The said Sukhu owned a large piece of undeveloped land (DP1657) which he wanted to subdivide. The S.C.C would not approve of the subdivision unless Sukhu dedicated part of the land as a Public Road to join Ratu Mara Road and Fletcher Road.

The dedication did take place on 1st **June 1970** being **Dealing No 174569**. The plaintiff said that the deceased was '**forced**' to dedicate the land being **Lot 59 DP 1657** comprising **1 rood 39.8 perches** (the '**land**')

The plaintiff says that although the dedication of the land was made on **1 June 1970**, Suva City Council registered it as late as **15 February 1980**. Two letters of complaint were written by the plaintiff and his brother, dated 29 April 1982 and 11 October 1989 respectively to S.C.C for allegedly allowing 'commercial use' of the land by Kings Hotel and Suncourt Hardware Limited. In those letters S.C.C was asked to return the land to the owners if it was not used for the purpose and intention behind the dedication.

The Affidavit in reply by S.C.C (Affidavit of **Eroni Ratukalou**, Divisional Eng. Services S.C.C dated 17.8.99) denied that the plaintiff's father was '**forced**' to dedicate the land for Public Road, and went on to state that it was subdivided in 1948 by the late Sukhu Mahajan and a pedestrian mall which was created by him was of his own free choice where the present Nasolo Road is situate.

Further affidavit of Eroni Ratukalou stated that in 1973 Sukhu Mahajan sold 2 lots and that the S.C.C accepted the dedication and that in 1979 the Director of Town & Country Planning approved the land to be used as a road. According to Eroni, subdivision was approved in 1970 and this fact was admitted

by the plaintiff in his affidavit in response to affidavit in reply dated 6th March 2000.

The S.C.C wrote a letter dated 28 May 1982 to the plaintiff in reply to their letter dated 29/4/82 wherein they clarified that the road in question is a public road, and that the Management of Kings Hotel undertook to improve the condition of the road at their own cost. Another letter was written by the S.C.C dated 28.12.89 to the plaintiff where they confirmed that Nasolo Road is a public road and that S.C.C has no intention to part with it. However, in the same letter they stated that that the Management of Kings Hotel and Suncourt Hardware Limited were allowed to use the area for parking of vehicles after doing improvement to the road at their own cost. According to Eroni Ratukalou in his affidavit, the Director of Town and Country Planning allowed the land for vehicular traffic use in 1986. Furthermore Mr. Eroni stated that development of Nasolo Road had nothing to do with Suncourt Hardware Limited constructing commercial building and timber yard on adjacent land and that part of Nasolo Road has been used by the PWD for Nabua By-Pass and this has been formed as a slip road for vehicular access to Suncourt Hardware Limited and Kings Hotel.

Finally, Mr. Eroni stated that the "said land" is a slip road which provides access to two properties and it is still used as a public road, without this the two properties would not have any access; therefore the dedication of the land was to provide vehicular access to the two properties as well as being used as a road.

Plaintiff's submission

The plaintiff says that the dedication of the land was made on **1 June 1970** for the purpose of 'public road'. The dedication was for civic pride and public use and not for the benefit of the two companies but the S.C.C has allowed its misuse. Reference was made to a letter from Suva City Council dated 20 December 1989 annexed to defendant's affidavit dated 25th November 1999

where they advised that the land on which "Nasolo Road" is situate, is still a public road and that the management of Kings Hotel and Suncourt Hardware Limited had done improvement to the road at their own cost.

The plaintiff alleges that the predominant purpose on the part of S.C.C was to allow Suncourt and Kings Hotel to benefit from the road.

Counsel for the plaintiff, the late Mr. G.P. Shankar, referred the Court to the Supreme Court of New South Wales case of **Chambers v Lane Cove Municipal Council** [1970] 3 N.S.W.R 299 at 99. This was a case which went on appeal before **Street J** who at p.304 said that **Monahan D.C.J's** attention was directed to the dispute whether there existed any doubt as to whether or not the disputed land was a public road. There **Monahan DCJ** said:

"Is there then a doubt as to whether the disputed strip is a public road? If I had to resolve the issue as to whether or not it is a public road, I would probably resolve it in the negative, but it is only necessary to show that there is room for doubt..."

In the present case, Counsel submitted that the road was formed 32 years ago, and has been used for the benefit of the said commercial bodies. He submits that the Defendant now says it was 'pedestrian mall' whereas the documents show the "road" as clearly abandoned and not used for 32 years.

Mr. Shankar submits that in law there **must be acceptance** of the dedication and acceptance may be inferred by use of road or street.

He says that here no inference could be drawn of its acceptance of transfer because no public road has been formed. He says that the position here is somewhat similar to the case of **Howell & Others v District Land Registrar** [1908] 27 NZLR 1074 at 1075 where it was **held**:

“That the instrument was not registrable, there being nothing in either the Land Transfer Acts or the Public Works Act to authorise its registration; and that it did not operate as an effective dedication, there having been no public user of the roads, or any acceptance of the dedication by the local authority or by the Crown.”

Counsel in reply to the S.C.C’s submission stated:

That the definition of public road in Roads Act or Public Order Act could not apply and that the 1st defendant’s counsel is wrong in saying that land is used for the purpose for which it was dedicated.

The dedication was not for public use or thoroughway or walkway. It is expressly for Public Road, road in this context must be understood as street or highway or formed motorable road but not extended to thoroughfare or walkway.

The **Local Government Act Section 107** requires the S.C.C to declare streets and it is upon declaration that it vests in the Council. The Council has not declared it. The dedication document signed by late Sukhu is **no more than an offer**. Reference is also made to **section 108-111 of Local Government Act**, but the strip of land dedicated does not become City Council’s property for not making a declaration and not constructing a road. **Section 91-94** is relevant because this strip of land was never in fact purchased by the Suva City Council nor compulsorily acquired by it.

There has been no transfer of this strip as in other dedications by Sukhu. Dedication is just an offer and it has not been accepted because acceptance has not been demonstrated by declaration as required by the Local Government Act.

In **The Mayor, Councillors and Citizens of the City of Brunswick v Baker** 21 CLR 407 at 416 it is stated in the judgment that:

“In truth, until the public has consented, the dedication is not absolute. In effect, it is nothing more than an offer to give, and, as a dedication, is inchoate merely, but when accepted it is complete and absolute and attaches to the land”.

In reply to the submission of 2nd and 3rd defendants, counsel submits:

When land was dedicated for specific purpose, it is expected that it would be used for that purpose, but if not used for the purpose it must revert to and transferred to the person or trustee who dedicated it. It would seem that dedication in effect creates a trust whereby the public authority holds it in trust to use the land for specific purpose for which it was dedicated for.

In **Rowans v AG** [1977] 2 NZLR 559 the State approached Rowan to acquire large amount of land for the proposed intermediate school. After discussion, the State acquired it for 12,375.00 pounds in August 1962. During 1964-1969 Rowans advised the Education Board if there was any surplus land from the land acquired by the State they would buy it back. At page 568 **Smellie J.** said:

“that on the face of it, the plain meaning and intent of the section appears to be remedied bringing to an end a perceived injustice where land could be compulsorily taken by the crown for one and arbitrarily used for another without giving the original owner opportunity to buy it back.”

In the present case there was no question of repurchase because it was not purchased from Sukhu but **dedicated by him** ‘without payment of a single penny’.

For the above reasons counsel says that in the present case, the Suva City Council not having used the land for the purpose for which it was dedicated, arbitrarily used it for other purposes and mainly for the benefit of commercial enterprises, the land should revert to the plaintiff.

First defendant’s (S.C.C’s) submission

The 1st Defendant (S.C.C) submits that the land is used for the purpose for which it was dedicated.

Counsel says that in considering this case one has to bear in mind as to what is meant by ‘**public road**’. ‘**Public Road**’ is defined in s.2 of Cap. 175 to mean “**any road, street or thoroughfare ... and includes all carriageways ... belonging or appertaining to a public road and such waste land adjoining**

any public road as may be reserved for its protection or benefit by order by the Minister under the same section”.

Based on this definition, she says that Nasolo Road is a public road. The question is whether that is actually so.

The **Public Order Act, Cap. 20** defines the term ‘public’ as the ‘public or any class thereof’. The Act also defines ‘public place’ as:

- “(a) any highway, public street, public road, public park or garden ... whether a thoroughfare or not; or
- (b) any (i) land or open space whether such land or space is closed or unenclosed; and (ii) place or building of public resort, other than a dwelling house, to which for the time being the public have or are permitted to have access whether on payment or otherwise.”

The question is whether Nasolo Road is used for a restricted class or are persons permitted or invited to have access? By reference to authorities counsel demonstrated difference between public and private road.

Counsel referred to the case of **R v Beaumont, Crim L. R [1964] 665** where the Court of Criminal Appeal held “that there was no evidence that the general public used the road. The court was unable to accept the contention that where a particular class of persons uses a road the number of persons in the class makes the road one to which the public has access.”

The commentary made on this case reads that “if only a restricted class or person is permitted or invited to have access, the case would fall on the side of the place being private. If only a restricted class is excluded the place would be public”.

In **Harrison v Hill**, 1932 S.C (J) 13, Lord Justice General (Lord Clyde) stated that:

“...I think that when the statute speaks of the public in this connection, what is meant is the public generally, and not the special class of members of the public who have occasion for business or social purposes to go to the farmhouse or to any part of the farm itself; were it otherwise, the definition might just as well have included all private roads as well as all public highway....”

Counsel for the S.C.C Ms. Tanya Waqanika submits that Nasolo Road is a ‘public road’; *‘it is accessible to all members of the public; the road is used as an access way to the bus station that sits along Ratu Mara Road; the road is not fenced off, and there is no sign of “Trespassers Not Allowed”; the SCC looks after the upkeep and maintenance of the place; all Council-owned public road has always been accessible to the general public; none of the businesses nor SCC impose a fee of any kind to the general public for using Nasolo Road.’*

Submission by 2nd & 3rd Defendants

It cannot be disputed that 2nd & 3rd defendants are joined only because of the second declaration sought. This declaration is reliant upon the first declaration which is the revocation of the land and for it to be returned to the Estate. It is submitted by D2 and D3 that no order against the State can be sustained by this action except for the second declaration sought, if this relief is given.

The issue

The issue for Court’s determination is: Whether Lot 59 DP 1657 comprising an area of 1 rood 39.8 perches (the ‘land’) being part of the land owned by the Estate of the late Sukhu Mahajan which was dedicated to the Suva

City Council for use as a "Public Road" is used by the 1st defendant ('S.C.C') for the purpose for which it was dedicated? If not, should it revert to the Estate of the late Sukhu Mahajan?

Consideration of the issue

I have before me for my consideration useful written submissions from all counsel.

At the request of the parties I made an inspection of the **locus in quo** during the trial in company with counsel representing the parties. This inspection was of much assistance in ascertaining the facts.

There is no dispute that the plaintiff's deceased father, the late Sukhu Mahajan was the lawful owner of the land in question situated at 3 Miles in Suva which was dedicated in writing being the said dealing No. 174569 as "Public Road". The plaintiff is seeking reliefs as stated hereabove.

Circumstances leading to dedication

Before determining the issue one must examine the circumstances leading to the dedication.

The plaintiff in his affidavit dated 17th August 1999 alleged that his father was 'forced' to dedicate the land as 'Public Road' and in return his application for subdivision of land would be approved. A copy of application for subdivision made by Sukhu Mahajan dated 17th January 1953 is attached as annexure in this affidavit along with a copy of the Dedication Dealing dated 1 June 1970. The affidavit in reply of **Eroni Ratukalou**, the Director of Engineering Services of the Suva City Council dated 25 November 1999 (1st defendant) denied the allegation that Sukhu was 'forced'. However, Eroni Ratukalou stated that in 1973, Mr.

Sukhu Mahajan sold 2 lots after approval for subdivision of land was granted in 1970 and this fact is admitted by the plaintiff in his affidavit in response to affidavit in reply dated 6 March 2000.

The events leading up to the dedication of land is an important factor, because it shows that the dedication was a **condition precedent** to the approval of subdivision of land to Mr. Sukhu. Mr. Sukhu Mahajan has received the benefit of the "act of dedication of land" and this is evident in the subdivision of land granted in 1970 by the S.C.C and the sale of 2 lots of land by Mr. Sukhu Mahajan in 1973.

It appears that there existed two reasons to dedicate. The first one is the expressly stated purpose contained in the dedication document which was for "Public Road" and the second is the consideration in exchange for the approval granted to Mr. Sukhu Mahajan for the sub-division of his land. The legal issue that is made by counsel in their respective submissions focuses only on the first purpose which is that the dedication was for 'public road' and it is this legal issue which will form the basis of the analysis of the evidence herein.

The law and findings of Court on dedication

At the risk of being lengthy I have set out hereabove the arguments on the issue from the parties particularly because the late Mr. Shankar argued forcefully on the issue with reference to authorities.

At the outset I must state that the authorities referred to by Mr. G.P. Shankar (now deceased – may his soul rest in peace), got the wrong end of the stick in pursuing his arguments and with respect, the authorities he referred to in my view are all irrelevant and do not apply to the facts and circumstances of this case. In doing so I think he was oblivious to the actual situation on the ground.

Also, apart from what the plaintiff has stated in his affidavit evidence, there is no other evidence in support of his arguments.

It is not disputed that Sukhu owned the 'land' and he dedicated it as a 'Public Road' as per Dealing No. 174569 in return for approval being granted to the Subdivision of his land.

The Document is headed '**Dedication of Road**' and in the body of the document it is stated: '**do hereby dedicate the above described land as a Public Road**'.

At this point I would like to refer to the following passage from the judgment of their Lordships delivered by **Lord Scott of Foscote** in **Man O'War Station Ltd v Auckland City Council** [2002] 3 NZLR (Privy Council) (Judgment No. 2) 584 at 603 on the nature of a dedication which is apt:

"The aphorism "once a highway, always a highway" underlines an important aspect of the nature of an effective dedication. The acts and circumstances from which the dedication is to be inferred must justify the inference of an intention to bestow on the public a continuing right of user of the road, not a right the continuance of which is subject to the occurrence, or non-occurrence, of some future event such as the payment of rent."

On the evidence before me, I find as fact and I accept the S.C.C.'s submission in toto that the land which was dedicated had been and is being used as a 'public road'. In other words it is being used for the purpose for which it was dedicated. This is supported by the memorial endorsed on C.T 6576 which states "**Dedication Road, No. 174569 regd. 15 February 1980 at 2.15 pm as to 1 Rood 39.8 perches being Lot 59 on D.P. 1657.**" The public use of the road corresponded with the plaintiff's intentions as well as those of S.C.C. In these circumstances, in my view, there was every reason on the evidence, for inferring animus dedicandi on the plaintiff's part.

The plaintiff was insistent that although dedication was done so long ago, the land was not a public road and it was being used by the business houses he mentioned.

On the evidence and on site inspection that does not appear to be the position. Putting aside the fact that there was proper dedication, although not registered for a long time afterwards, there is clear evidence that the land was used by the public as a public road. The public may not have known of the dedication or the exchange of the land for subdivision, but many years passed, as alleged by the plaintiff, but the plaintiff has not shown an intention to assert any private right opposed to the public user which had lasted for many years.

Further in **Farquhar v. Newberry Rural Council** [1909] 1 Ch. at 16 **Cozens Hardy M.R** said:

"When you find long user coupled with the existence of persons competent to dedicate I decline to look into what was, or was said to be, actually in the mind of the person so dedicating."

Also in this regard the following extract from the judgment of **Coleridge J** in **Regina v Morgan Thomas**, 7 EL. & BL. (1857) is very much in point:

"In substance they seem to be that a turnpike road was to be made under a temporary Act, but in fact was only partially made. Whilst the Act continued in force, the road was treated as a highway repairable by parish. Then came the South Wales Turnpike Act, (7 & 8 Vict. C.91). Under section 34 the Turnpike Act might have been terminated, but it appears it was not; and it continued in force till it expired, by efflux of time, in 1848. Things then reverted to the state they were in at common law before the Act passed. The owner of the land which had been taken for the turnpike road might resume it, and the parish might decline further to repair it, or the public to use it. But the owner might allow the public to continue to use the road; and, if the public did use it as a highway the burthen of repair would fall

upon the parish, whether they would or not; for after reasonable evidence of dedication and user it is no answer to an indictment against the parish that they have not adopted the highway.”
(underlining mine)

What does dedication mean and its effect?

Dedication of land means:

“... the process by which the owner of land grants it to the public for a highway. The effect of dedication is to vest the fee-simple in the corporation if the land is in a borough, and in the Crown if the land is not within a borough. There must be dedication by the owner and acceptance by the public. The owner dedicating must intend to dedicate and in very many cases his intention must be inferred from the words and acts. Similarly, an acceptance by the public may be inferred from use of the road or street by the public and of course can be formally expressed by some authority with power to accept. The common practice of closing a way for one day in every year is sufficient evidence to negative the inference of intention to dedicate a way to the public. Mere user may raise a presumption that there has been dedication; but if the user is shown to have had its origin in a license given by the owner of the land this will rebut the presumption of any intention of dedication.” (Garrow’s Law of Real Property in New Zealand, 4th Ed. page 317)

There is no question of presumption arising in this case as the Dedication of land was lodged by the late Sukhu Mahajan on **1 June 1970** and the Suva City Council registered the Dedication on **15 February 1980**. The Dedication Document expressly stated that the land described as Lot 59 DP 1657, CT Number 6576 situated at Suva, Vitilevu (hereinafter referred to as “**the land**”) is **dedicated as a Public Road**. A memorial to this effect is endorsed on the Title.

The learned counsel Mr. Shankar referred the Court to the case of **Baker** (supra) and cited two sentences from the judgment thereon. I find that he omitted to cite the statements before and after it whereby an incomplete picture was given on the subject matter.

I think that it is pertinent that I refer to the following passages from the judgment in that case delivered by Isaac's J. at p.415 – 416 which are as follows:

"While it is true that dedication is strictly speaking the act of the owner, yet dedication of a public way over private land is in reality a gift. Like a gift it requires two parties to make it complete. In Petersdorff's Abridgment, 2nd ed., vol. v. at p.34 under the title "Highways," it is correctly stated:- "A dedication is supposed to take place through a mutual agreement between the owner of the land and the public; therefore, the consent of both these parties must be expressly or impliedly given".

His Lordship goes on to say at 416 (after the said passage quoted by counsel):

'Blackburn J., in Fisher v. Prowse (1) appears to express this view where he says:- "it is, of course, not obligatory on the owner of land to dedicate the use of it as a highway to the public. It is equally clear that it is not compulsory on the public to accept the use of a way when offered to them". In Cubabe v. Walton on-Thames Urban Council (2) Lord Dunedin appears to use the word "dedication" in its absolute sense as connoting the public acceptance of the offer and consequent finality. His Lordship says:- "At common law if a proprietor chooses to dedicate a highway the parish ipso facto comes under the burden of its repair. The road may be really useful to the proprietor only as the inception of a building scheme. It may be a white elephant to the parish, but the parish is helpless. Once let the proprietor dedicate, the burden of repair is irrevocably cast upon the inhabitants." So in Pratt and Mackenzie on Highways, 16th ed., at p. 176, this passage occurs:- "The common law enabled any person to dedicate a highway to the public; and then it immediately became repairable by the inhabitants of the parish of township."

It thus appears that while the dedication or gift must come from the owner, and requires the consent or acceptance of the public, yet it is not an incorrect – and perhaps is the logically correct – use of language to speak of the completed and irrevocable legal transaction as the dedication.'

Power to dedicate is essential as **Halsbury Vol. 21 4th Ed. at parag 65** points out in the following terms:-

“An intention to dedicate land as a highway may only be inferred against a person who was at the material time in a position to make an effective dedication, that is, as a rule, a person who is absolute owner in fee simple and sui juris. Where, however, a prima facie case is proved of an intention to dedicate, express or implied, it lies upon the defendant to show that the state of the title to the land is or was such as to render any such intention inoperative.”

At p321 **Garrow’s** (ibid) goes on to say that:

“any road or street so dedicated on sale is vested in the borough council where it is within a borough. In all other cases it is vested in the Crown but is under the control of the local authority.”

In this case I find that the land was vested in the Municipality, namely, the S.C.C.

Section 163 of the Land Transfer Act Cap. 131 provides as follows:

“163. When any road, street, or other land is vested in any municipality under the provisions of the Local Government Act and no certificate of title has been issued to such municipality in respect thereof, the Registrar may, upon application by the council of the municipality, issue a certificate of title in favour of such council in respect thereof.” (underlining mine).

Under this section the S.C.C. could apply for a Certificate of Title to issue, as a memorial had already been entered.

The plaintiff’s submission that the court exercise its powers under **section 168 of the Land Transfer Act** and order that the dedication be cancelled and

revert to the Estate of Sukhu Mahajan has no substance, as public road has been formed and dedication registered.

I accept Ms Waqanika's submission that Nasolo Road is a public road relying on the said definition of '**Public Road**' in section 2 of Cap 175.

It is stated in the book '**The Principles of the Australian Lands Titles (Torrens) System** (1927) by **Donald Kerr** (at para 639 p304) that:

"A public road or highway is not an easement. It is a dedication to the public of the occupation of the surface of the land for the purpose of passing and repassing." (per Lord Cairns in **Rangeley v Midland Railway Co.** L.R. 3 Ch. at 311).

In **Martin v Cameron** (1893) S.C. 12 NZLR 769 at 771, **Richmond J** stated that:

"First, I am of opinion that the dedication to the public is not affected by the provisions of the Land Transfer Act. A highway is a right of passage for the public in general, not an easement nor any kind of incorporeal hereditament. Commenting on Allnutt v. Pott (1), the editor of Burn's Justice (2) observes "It is also difficult to see to whom a grant can be made: the public cannot be the grantees, nor can a deed-poll be enrolled in any official custody for the protection of the public. The interest created by dedication is sui generis, and, in my opinion, is not a registrable estate or interest under the Act."

In the present case there was a sub-division plan and the owner was required to dedicate the land herein. In this regard s.160 of the **Land Transfer Act Cap. 131** is relevant and pursuant thereto the land was dedicated.

Section 160 provides:

“160. - (1) If the map or plan referring to the sub-division of land contains any road or street not referred to in the grant or certificate of title, the proprietor shall make application to the Registrar to register the dedication of the road or street, and the Registrar shall enter a memorial of the dedication in the register and on the duplicate certificate of title or grant:

Provided that if the land be leased, mortgaged or otherwise encumbered, the Registrar shall not register the dedication unless the lessee, mortgagee or other encumbrancee surrenders or discharges, as the case may be, the portion of the land the subject of the dedication.

(2) If any map or plan referred to in this section purports to sub-divide any land the sub-division of which requires the approval of any city or town council or other authority under the provisions of any Act, such plan shall not be accepted by the Registrar unless it has been endorsed with the approval of such city or town council or other authority.

Provided that no map or plan shall be registered by the Registrar unless it has been certified as correct in every respect by the Director of Lands.” (underlining mine)

Here, on the evidence before me I find there was a proper dedication of the land and there cannot be any dispute about that fact. The plaintiff cannot have any say any more in respect of the user of the land as it is obvious that it is being used for the purpose for which it was dedicated. Although the dedication was not formally registered for sometime, but public use of the road as it was had begun and was continuing. The public right to use the completed road did not depend on the registration but the dedication became binding on the Suva City Council which it accepted. Furthermore, I find as a fact that public had been using the land all along as a public road and I reject the plaintiff's assertion that it was used solely by the two business houses referred to hereabove in respect of which there is no evidence.

I hold that the S.C.C is rightfully entitled to the land in question as the public road vests in the authority (S.C.C) in the sense that it is the owner of the space (land) embraced so long as it is used for the purpose of which it was

dedicated. The S.C.C after dedication was in actual occupation of the road over the land in question "adversely" to the Certificate of Title and the registered proprietors and the plaintiff (**Franklin v Ind & Others** 17 S.A.L.R. 133, Supreme Court). It has been held that "the fee simple of streets within municipalities vests in the city or municipality" (**Barker v Corporation of Adelaide** 1900 S.A.L.R. 29).

On the evidence before me I accept the counsel's submission that Nasolo Road is a public road, because it is accessible to all members of the public; members of the public use the road as an access way to the bus station that sits along Ratu Mara Road, the road is not fenced off, no sign of "trespassers not allowed" nor does the S.C.C impose a fee of any kind to the general public for using Nasolo Road.

Conclusion

To sum up, on the affidavit evidence before me and having analysed the facts of this case and considering the authorities, it is apparent that the purpose of dedication of land by the late Sukhu Mahajan for 'Public Road' has been fulfilled. The Court's own site inspection has revealed that Nasolo Road is situated on the land that was dedicated and this road is accessible to members of the public and has been so for a long time. That is sufficient acceptance as a public road by the public. *There is no merit in counsel's assertion that the dedication was merely an 'offer'.*

Although counsel for the plaintiff maintains that Nasolo road is predominantly used by Suncourt Hardware and Kings Hotel, I find that that is not so at all. The road is not restricted only to these companies but is accessible to the public as a thoroughfare, vehicular access as well as a slip road to Ratu Mara Road. As correctly pointed out by counsel for S.C.C, there is no sign prohibiting

the public from using the road, neither is there an imposition of fee in order to gain access to the said road.

It is also important to note that the dedication of land was a requirement whereby approval for sub-division of land would be granted to Mr. Sukhu Mahajan. Also Mr. Sukhu Mahajan benefited from the Dedication because in 1973, two lots of land were sold by him. The S.C.C has fulfilled the purpose for which the Dedication was made and this is evident in the existence of Nasolo Road which is open to the public.

All in all on the facts and circumstances of this case the application by the plaintiff in seeking an order for revocation of the dedication or in the alternative for payment of fair price for the land is I consider misconceived and unreasonable. Unreasonable in the sense that the late Mr. Sukhu Mahajan has benefited from the Dedication made in 1970 whereby approval for sub-division of his land was made.

The plaintiff had doubts as to the user of the land as a public road but it has not continuing relevance in the present state of things.

The making of the orders sought, which is strongly pressed by the plaintiff and equally so strongly opposed by the first defendant (the S.C.C) falls significantly short of the reliefs that the plaintiff is seeking from the Court. I find on the facts and circumstances of this case and in law that there is no sufficient utility to justify this Court in exercising its powers to grant the reliefs sought by the plaintiff.

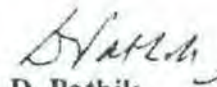
I consider that the following passage from judgment of **Moller J** in **Echolands Forms Ltd v Powell and Others** [1976] 1 NZLR 750 at 757 most apt to conclude my judgment:-

"From Reid v Attorney-General [1920] NZLR 563 it is clear that land dedicated by a person legally competent to do so to the public for purposes of passage becomes a highway when accepted for such purposes by the public; that the question whether, in any particular case, there have been a dedication and an acceptance is a question of fact and not of law; that dedication necessarily presupposes an intention to dedicate – there must be animus dedicandi; that such intention may be openly expressed in words or writing, but as a rule, it is a matter of inferences from evidence as to the acts and behaviour of the person concerned when viewed in the light of all the surrounding circumstances, that acceptance by the public requires no formal act of adoption by any persons or authority; that such acceptance may be inferred from public user of the way in question; and that, even if an express intention to dedicate is proved, it is still necessary to prove also that the way has in fact been thrown open to the public and used by them" (see also Webb v Blenheim Borough [1975] 1 NZLR 57).

Here by the said Dedication document it has been proved that the person legally competent to dedicate had the necessary animus dedicandi and did in fact, dedicate the land concerned.

For the above reasons the Plaintiff does not succeed in his action against the defendants.

The action is therefore dismissed with costs against the plaintiff the sum of \$500.00 to be paid to the first Defendant's solicitor within 28 days.


D. Pathik
Judge

At Suva
30 August 2006