

IN THE HIGH COURT OF FIJI AT LAUTOKA

CIVIL JURISDICTION

CASE NUMBER: HBC 0059 OF 2000L

BETWEEN: DAYA SHANKAR SHARMA

PLAINTIFF

AND: GIRDHAR SHARMA AND HARI RAM

DEFENDANTS

Appearances: Ms. V. Patel for the Plaintiff.
Mr. H. A. Shah for the Defendants.

Date/Place of Judgment: Monday 03 March 2014 at Suva.

JUDGMENT

Catchwords:

s.169 vacant possession - refusal to vacate on the ground that there is beneficial interest in the property- property purchased by trustee and one of the beneficiaries after Courts sanction that the property be sold and the beneficiaries be at liberty to purchase the same-in that situation the beneficial interest extinguishes and converts to sale proceeds for which distribution was sought but the action for distribution lay in abeyance for a decade-the pending action cannot be a bar to the action for vacant possession as the sale was sanctioned and the application for distribution and setting aside of the transfer of the property in question should have been prosecuted with due diligence.

Legislation:

Land Transfer Act ("LTA"): s. 169

The Cause

1. The plaintiff applies for an order for vacant possession of all that premises known as Flat 1, R S Sharma building situated in Sigatoka Town on Lot 42, DP No. 2456 comprised in Certificate of Title No. 10035 pursuant to section 169 of the Land Transfer Act.

Grounds in Support

2. The Plaintiff says that he is the registered proprietor of the property in question. Before he bought the subject property, he was the registered proprietor of the said premises as executor and trustee in the estate of Ram Shankar Sharma.
3. The subject property was advertised for sale in terms of the order of the Lautoka High Court in Civil Action No. 201 of 1996L. The order for sale was made on 4 October 1996 and was by consent when the defendants were present in Court.
4. In terms of the order, the building was put on tender but no written response was received in respect of the first advertisement. On 5 May 1997, the plaintiff as the beneficiary of the said estate submitted his offer to purchase the said property for \$150,000.
5. On 15 May 1997, the first named defendant through his solicitor Messrs Babu Singh & Associates offered to purchase the said property for \$150,000 VEP subject to finance but failed to do anything further in respect thereof.
6. The property was advertised for the second time on 21 March 1998. In March 1998 he received two written tenders for the purchase of the said property, one from the second named defendant for \$100,000 and the other from a M.S Khalil for \$140,000.
7. Since both the tenders were lower than his offer, the property was sold to him and a transfer was registered on 22 January 1999.

8. Prior to the transfer to him, the defendants who were also beneficiaries under the said estate were in occupation of part of the building being Flat 1 pursuant to an arrangement with him as executor and trustee.
9. After he purchased the premises, the defendants were advised that they would have to pay rental in respect of the said premises. No rent has ever been paid by the defendants and they continue to occupy the said property.
10. By a letter dated 20 September 1999, he caused a notice to be served on the defendants asking them to pay arrears of electricity charges owed by them in respect of the said premises and for them to vacate the premises within one month.
11. The letter was served on the first named defendant Girdhar Sharma or about the 21 day of September 1999 by Jone Tove of Sigatoka.
12. By a further letter dated 22 December 1999 he caused a notice to be served on the 2 named defendant Hari Ram to vacate the said premises on or before the 22 January 2000. The letter was served on the second defendant Hari Ram by Jag Deo Singh of Sigatoka.
13. Despite the notices, the defendants are in occupation of the said premises and refuse or neglect to quit.

Grounds in Opposition

14. The first named defendant filed an affidavit and indicated that the same was filed on behalf of the 2nd named defendant as well.
15. It was deposed by the first named defendant that the plaintiff and the defendants are all beneficiaries together with several others in the estate of Ram Shankar Sharma.
16. The said Ram Shankar Sharma died on 17 February 1985 and probate pursuant to his will dated 13 July 1979 was granted to the plaintiff by the High Court of Fiji.

17. The defendants say that they have also brought another action in Lautoka High Court being Civil Action No. HBC 0016/2000L. In that case they have sued the present plaintiff for distribution of the estate property and in particular CT 10035 and for the setting aside of the transfer of the said property to the plaintiff.
18. The defendants say that in Lautoka HBC 201 of 96L, a Court order was made on 4 October 1996 but the first named defendant says that he did not authorise or instruct his solicitor Mr. Babu Singh to consent to such orders.
19. The first names defendant further asserts that did not see the tender advertisements in the papers as the same was not brought to his knowledge and attention by his solicitor.
20. The first named defendants further allegation is that he did not at any stage instruct or authorise Mr. Babu Singh to offer to purchase the said property and he is not aware of any tenders from anyone else.
21. The first named defendant admitted occupying Flat 1 in the building situated on CT 10035 but says that he occupies the same as the beneficiary of the said estate as that is his rightful entitlement and not due to any arrangement by the plaintiff. He is entitled to occupy the said premises without any rental.
22. The defendants say that there should be a full investigation of their grievance in Civil Action No. HBC 0016 of 2000L.

Submissions

23. The plaintiff's counsel submitted that the Court had ordered that the subject property be sold and that the beneficiaries were also at liberty to purchase the property. The plaintiff purchased the property as a beneficiary because he had offered the highest price. After purchase he gave the defendants notice to vacate the property and he is rightfully entitled as the registered proprietor to seek that order

as he now is the sole owner of the building. The defendants no longer have any right on the property because it does not belong to the estate.

24. The defendants counsel Mr. Shah submitted that after the order of 4 October 1996, a tender was advertised in the Fiji Times of 6 December 1996. That advertisement indicated that the tenders closed on 13 December 1996. Another advertisement was on 21 March 1998. Two tenders were received, one dated 22 March 1998 and the other dated 23 March 1998. The plaintiff's offer dated 5 May 1997 has nothing to do with the tender procedure.
25. Mr. Shah argued that there was no communication made to defendants that the plaintiff intended to purchase the trust property thus the plaintiff's letter dated 5 May 1997 is suspicious. There was no need for the advertisement in 1998.
26. There was a letter dated 15 May 1997 from Messrs Babu Singh and Associates to the plaintiff's solicitor. There is no response to this letter. In fact no communication was made to the defendants that the plaintiff had himself made an identical offer on 5 May 1997. Mr. Shah argued that even when the property was being transferred, the defendants were not told of the transfer.
27. Mr. Shah argued that on 22 January 1999 the property was transferred to the plaintiff. This is the same day the plaintiff obtained the loan from ANZ Bank and mortgaged the property to ANZ. The consideration of the sum of \$150,000 is not even paid for the property.
28. Mr. Shah argued that to date there had been no distribution of the estate funds. No proper accounts have been rendered. No sanction of the Court was sought in respect of the sale and no report was made back to the Court of the alleged sale.
29. It was contended that the Court has powers to review a trustee's decision. The plaintiff as a trustee had a fiduciary relationship with the beneficiaries. He thus ought to have acted in good faith at all times. He did not do so. The defendants as beneficiaries are seeking by a writ action a proper and fair distribution of the estate property. They are also seeking to set aside the transfer of the trust property.

The Law and Analysis

30. In Lautoka Civil Action No. HBC 201 of 1996L the Court had sanctioned the sale of the subject property. It had also sanctioned that the beneficiaries also submit offers for the purchase of the property. The order reads as follows:

- “1. That all the property belonging to the estate of Ram Shankar Sharma be sold by Public Tender subject to a condition that the beneficiaries be entitled to submit offers for purchase of the said property either jointly or severally with the right to treat the value of their respective shares as part of the purchase price.*
- 2. That all moneys realised from the sale of the properties be paid into the Trust Account of Vasantika Patel, Solicitor for the Plaintiff and be applied in the first place in payment of just debts due and owing by the said estate to any creditor and the residue thereof be distributed and paid to the beneficiaries in terms of the Will of the said deceased.*
- 3. That the costs of and incidental to this application be paid to the plaintiff by the estate on the indemnity basis”.*

31. It is incorrect for the defendants to say that the Court had not sanctioned the sale. The Court could not sanction the sale to anyone in particular at that stage. It was only possible to sanction a sale and grant orders that the beneficiaries had a right to purchase the property.

32. In this case, the plaintiff is a beneficiary and he also had a right to purchase the property. It is understood that for the benefit of the estate, the trustee obtains the highest offer by the potential purchasers for the sale of the property and the plaintiff indeed accepted the offer which on the evidence before me was the highest offer.

33. There was no order to the effect that the Court must be informed of the progress of the sale so the plaintiff did not have to report back to the Court as asserted by the defendants.

34. The first named defendant denies making any offer for the purchase of the property. The second named defendant made an offer for \$140,000 subsequent to the offer by the plaintiff to purchase the property at \$150,000. The offer by the second named defendant was \$50,000 less than the plaintiff's offer.
35. Out of all the offers, the plaintiff's offer was the highest and the property was sold to him. The plaintiff thus has become the registered proprietor by buying the property and he had all the right to ask the defendants to vacate the said property.
36. The defendants' rights in the asset have been converted into cash and the beneficial right on the property has extinguished. If the defendants' think that the plaintiff has failed to comply with order No. 2 in distributing the sale proceeds, a contempt proceedings could be brought against him, where he would be answerable for failure to comply with the order of the Court.
37. The defendants no more have a right on the property as beneficiaries. The property is sold. If the beneficiaries are unhappy with the way the estate has been managed, the trustee could be sued for damages and proper accounting of the estate funds. It was indicated that the defendants had filed a case in Lautoka High Court being HBC No. 0016 of 2000L where they have asked for proper distribution of the estate funds and also for a setting aside of the transfer of this property. On my checking with the registry, indeed there is an action in Court but the defendants have been so negligent in not prosecuting that matter since 6 April 2004. The file has been in abeyance. Under the new case management system that matter ought to have been long struck out for failure to prosecute with due diligence. The defendants cannot expect to file a case and wait in the system. They have to vindicate their rights if they felt they have any. That file has not moved for almost a decade and I cannot give cognizance to that matter which is abandoned by the defendants.
38. In respect of HBC 201/96L, the issues regarding the sale of the properties have been settled. There is no appeal from that order. The first named defendant states that he did not instruct his counsel to consent to such orders. If he did not then he should have long made an application for setting aside of the consent orders. He cannot just

sleep on his rights. By their failure to challenge the orders, the defendants have accepted the same and cannot complain about the same now in this matter.

39. The first named defendant also denies knowledge of a lot of other matters. The other denial is that he did not see the tenders to act on. He cannot blame anyone else for being oblivious and for not making his own enquiries in respect of the property.
40. The third allegation was that the plaintiff did not tell the beneficiaries that he wanted to purchase the property. The plaintiff need not. He had the order which authorised him to offer to purchase and he did offer and fortunately for him, his offer was the highest. He proceeded to accept the highest offer which was his and purchase the property. There is no allegation in the affidavit that there were other higher offers which could have been accepted. The defendants', if they were interested in the matter could have enquired about the progress of the sale.
41. The defendants' could have, at least, when they found out that the property was sold to the plaintiff, with diligence prosecuted their case, but nothing has happened. They do not seem to be interested in pursuing with the matter but the plaintiff is interested in getting his property vacated and I find that the defendants' now have not shown any cause to stay on the property.

Final Orders

42. The defendants are to give vacant possession of the property to the plaintiff within 3 months from the date of the service of the order on them.
43. The affidavit of service must be filed in Court.
44. The 3 months time is given to the defendants to relocate.

45. The plaintiff shall have costs of this proceeding in the sum of \$550 which is summarily assessed.

Anjala Wati

Judge

03.03.2014

To:

1. *Ms. Vasantika Patel for the Plaintiff.*
2. *The Defendants.*
3. *File: HBC No. 0059 of 2000L.*