

IN THE HIGH COURT OF FIJI AT LABASA

CIVIL JURISDICTION

CASE NUMBER: HBC 35 of 2011

BETWEEN: **SADIQ KOYA**

PLAINTIFF

AND: **DALIP NAICKER**

DEFENDANT

Appearances: Ms. R. Lal for the Plaintiff.

Mr. P. Lomaloma for the Defendant.

Date/Place of Hearing: Thursday, 13 February 2014 at Labasa.

Date/Place of Judgment: Friday, 14 February 2014 at Labasa.

Coram: The Hon. Justice Anjala Wati.

JUDGMENT

Catchwords:

Correction of orders-application of Order 20 Rule 10-jurisdictions to administer justice-can slip rule be used to clarify the intention of the Court.

Cases Referred To:

Bristol-Myers Squib Co. v. Baker Norton Pharmaceuticals Inc (No 2) [2001] RPC 45.

Legislation:

The High Court Act ("HCA"): s. 18 (1).

The High Court Rules 1988 ("HCR"): Order 20 Rule 10, Order 45 Rule 10.

The Cause

1. On 16 October 2013, following a trial, the Hon. Justice Balapatabendi made the following orders:

- "1. The Plaintiff's claims are dismissed.*
- 2. The Defendant is entitled to the vacant possession of the land within three months from this judgment, if the plaintiff fails to pay \$32, 318.90 to the defendant.*
- 3. The Defendant is ordered to transfer the title upon the payment of \$32,318.90.*
- 4. A sum of \$2,000 is payable by the plaintiff to the defendant as costs summarily assessed".*

2. By a motion dated 31 January 2014, the defendant seeks an order that the third order in paragraph 1 above be corrected to read that *"the defendant is ordered to transfer the title to the 4 acres of land agreed to be sold to the plaintiff as per the agreement dated 31 May 1996 being part of Lot 5 of CT 26412 upon payment of the sum of \$32,318.90"*.
3. The application is purported to be made under Order 45 Rule 10 and Order 20 Rule 10 of the HCR and upon the inherent jurisdiction of the Court.

The Grounds/Submissions in Support

4. The defendant says that in the judgment the Hon. Judge mentions at paragraph 1 that *"the plaintiff instituted this action seeking inter alia, the specific performance of the agreement dated 31 May 1996 for the sale of the 4 acres of freehold land being part of CT 26412 Lot 5 on DP 6360 in the island of Taveuni sold to the plaintiff by the defendant"*.

5. The defendant says that when the order was sealed there was a typographical error and the land was described as the whole of CT 26412 and not the 4 acres which was in dispute. The defendant stated that the solicitors for the parties were discussing the execution of the order in November and December 2013 but the solicitor for the plaintiff closed the office in December and the defendant's solicitor could not contact them further. The Hon. Justice Balapatabendi was to have left Fiji in December so the solicitors for the plaintiff wrote to the Chief Registrar for the clarification of the order. A reply was received from the Deputy Registrar Northern dated 3 December 2013 through which the Deputy Registrar advised that the *"slip rule has no application in this cause. The land, subject matter of the proceeding is appropriately described in the statement of agreed facts which has been reproduced in the judgment. No further description of the cause is therefore required"*.
6. The defendant says that on 30 January 2014, the solicitors for the plaintiff wrote to the defendant's solicitors seeking transfer of the whole of CT 26412 without enclosing any payment of the amount ordered by the Court.
7. The defendant says that order must be corrected to reflect the 4 acres of the CT 26412 that ought to be transferred pursuant to the order because if the correction is not made, there would be injustice to the defendant.
8. Mr. Lomaloma argued that although the Hon. Justice Balapatabendi did not correct the orders and stated that the slip rule has no application, that direction was not a judicial pronouncement but only an administrative direction. The Court thus is not functus in hearing this application.
9. Mr. Lomaloma argued that slip rule can be used to clarify the intention of the Court on what it meant by granting the orders.

Ground/Submissions in Opposition

10. The plaintiff opposes the application on the grounds that the Hon. Justice Balapatabendi has already clarified that the slip rule has no application and the land which was the subject matter of the proceedings is appropriately described in the statement of agreed facts which has been reproduced in the judgment. The Hon. Judge has said that no further description of the cause is required. This Court thus is functus officio and cannot deal with the same issue that has been dealt with by the trial judge.
11. The plaintiff says that paragraph 5 of the judgment describes the title as CT 26412 being Lot 5 on DP 6360 situated in the island of Taveuni. The third order of the judgment requires the defendant to transfer the title to the plaintiff upon payment of \$32,318.90.
12. The plaintiff says that the slip rule is an inappropriate remedy in this matter. It is only available in instances where there is a clerical mistake in judgments or orders, or errors arising from any accidental slip or omissions. More importantly the presiding judge has addressed the issue. It is not in the competency of the Court to correct a record where no mistake has been made. The remedy available to the defendant is to appeal the order and not this application.
13. The plaintiff says that there no typographical error as alluded to by the defendant. The order was perfected by the defendant's solicitor. At no time after the judgment did the defendant's solicitor make an application to the Hon. Court under the slip rule. He only did so after the plaintiff's solicitor tried to enforce the order. The order has not been stayed and there is no appeal against the said order. In compliance with the orders, the plaintiff's solicitors wrote to the defendant's solicitor's asking them for the draft transfer in readiness for the settlement. In further compliance with the orders, the plaintiff's solicitors on 27 January sent a transfer to the defendant's solicitors. On 24 January 2014, the plaintiff deposited in his solicitors trust account the judgment sum. The defendant does not wish to comply with the order and has made this application. The plaintiff says that he will be prejudiced as he is 76 years old and has resided in Taveuni for the last 53

years. He has also borrowed money from one Gary Tarte to make payment as per the judgment. He is incurring costs and expenses daily for this loan.

The Law and Analysis

14. The defendant says that he brings this application under Order 20 Rule 10 and Order 45 Rule 10 of the HCR and upon the inherent jurisdiction of the Court.

15. I will first all of outline the two Orders respectively:

“Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omissions, may at any time be corrected by the Court on motion or summons without an appeal”

“Without prejudice to Order 47, rule 1, a party against whom a judgment has been given or an order made may apply to the Court for a stay of execution of the judgment or order or other relief on the ground of matters which have occurred since the date of the judgment or order, and the Court may by order grant such relief, and on such terms, as it thinks just”.

16. Section 18(1) of the HCA states that the High Court has all other jurisdiction necessary for the administration of justice in the Fiji Islands.

17. The defendant says that the third which is sought to be corrected in fact should not read that the whole title ought to be transferred but that 4 acres of the title which was the subject of the dispute ought to have ordered to be transferred.

18. When the correction was sought, administratively the judge stated that he need not correct the orders as the description of the land is in the agreed facts. The Judge did not have the benefit of the argument from the parties and did not make a judicial pronouncement on the issue. I thus do not find that this Court is functus. It would have been proper that when the Judge was faced with an issue of this kind, that he called both the counsel back in Court and heard them. He could have then decided on the matter. If

that was done, I would today not have to deal with the matter because I would then be functus.

19. Further, from the response of the Judge I find that his Lordship assumed that what the defendant wanted was the description of the land which he had already described in the agreed facts. The judge did not attend to the issue of whether when he stated that the title should be transferred, the whole land was to be transferred or the part of the land namely 4 acres of the same. The judge made no mention of this.
20. The letter seeking clarification reads as follows:

"I write in reference to the above matter.

On the 16th of October 2013 a judgment was delivered by the Honourable Justice Balapatabendi finding in favour of my client the defendant that is Dalip Naicker. The order was then drafted by our office and filed in the High Court Registry in Labasa on the 31st of October 2013. However our order had stated that:

1. *The Defendant is entitled to vacant possession of CT26412 being Lot 5 on DP 6360 situated in the island of Taveuni (the said land).*
2. *The defendant is ordered to transfer the title to the said land to the plaintiff upon the payment of \$32,318.90.*

We realized that we did not specify that the said land was in fact 4acres being part of CT 26412 being Lot 5 on DP 6360 which was the land that was under dispute. We redrafted the order to include the above description and took it for sealing on the 28th of November 2013 but we were told that the order given by the Judge just stated "the land" and that the clerks did not have the power to interpret the judgment. We were asked to write a letter requesting that the High Court Labasa seek clarity as to the description of "the land" from Honourable Justice Balapatabendi..."

21. The response to the request was:

“ Your letter dated 29th November 2013 is hereby acknowledged. The same has been referred to Hon. trial Judge. I have been directed by the Hon. Trial judge to inform you that,... “slip rule has no application in this case. The land, the subject matter of the proceedings is appropriately described in the statement of agreed facts which has been reproduced in the judgment. No further description of the cause is therefore required”,....”

22. I reiterate that it is apparent from his Lordship’s directions that his Lordship thought that he was asked to give the description of the land when he refused stating that the description was not needed as it was already in the agreed facts. The Hon. Judge did not deal with the question of what he meant when he stated that the said land was to be transferred. Was it the whole of the land or just the portion as contended by the defendant?

23. I find that even administratively, his Lordship did not address the issue properly and I have powers under Order 20 Rule 10 of the HCR to clarify the intention of the Court. Order 20 Rule 10 can be used to clarify the intention of the Court. I can clarify what the court meant when it said “the title” is to be transferred. Was it meant that the whole title be transferred or only a portion of the same? The issue can be decided by this Court. There need not be an appeal. *Aldous LJ in Bristol-Myers Squib Co. v. Baker Norton Pharmaceuticals Inc (No 2) [2001] RPC 45 at [25]* following a review of the authorities on the slip rule, stated that it is possible under the slip rule to amend an order to give effect to the intention of the Court.

24. Under the HCA, I also have inherent jurisdiction for administration of justice. I find that clarifying what a Judge intended in his judgment is part of the exercise of administration of justice.

25. Did the Judge mean that 4 acres of the land be transferred or that the entire land be transferred? For this I have to analyse what the parties' respective claims were, what the trial judge found, and what he meant when he gave the orders.
26. The plaintiff's claim in material parts read as follows:

" ...That on or about 31 May 1996 the defendant and the plaintiff entered into an agreement (said agreement) wherein the defendant agreed to sell 4 acres of the land from the said title (said land) to the plaintiff in the sum of \$10,000....

That Pursuant to the agreement the plaintiff took possession of the said land and retained a surveyor Inoke Consultants of Savusavu for subdivision and paid the sum of \$2,300 on 31 August 1996 and a transfer fee in the sum of \$500 to the surveyor.

That upon completion of the subdivision, the defendant refused to partially surrender his title despite the plaintiff's and the surveyor's several requests....

That the plaintiff again retained a surveyor in order to define the pegs placed by Inoke Consultants and again the defendant refused to sign partial transfer and surrender his title and requested the plaintiff to pay him \$5,000 in order for him to sign partial transfer and surrender the title.

The defendant by his action had breached the terms and conditions of the agreement.

Particulars of Breach

1. *Refusing to sign partial transfer and surrendering the Master Title...".*
27. It is abundantly clear that the plaintiffs claim was for specific performance of transfer of 4 acres of land to him. In the defence one of the allegations against the plaintiff was that he did not pay the full purchase price and that he demanded transfer of the whole land.

In his reply to defence the plaintiff stated that he never demanded transfer of the whole land.

28. Having said all that in his reply to defence and outlining his claim to be 4 acres of the defendants land, I cannot fathom how the plaintiff can go back on his claim and ask for the entire land. He never asked for the entire land. Even if the order reads that the entire land ought to be transferred, the plaintiff must in his conscious be the first person to acknowledge the limitations in his claim.
29. Further, the minutes of the pre-trial conference reads:

“ Agreed Facts

1. *The defendant was the registered proprietor of the land comprised in the Certificate of Title No. 26412 being Lot 5 on DP 6360 situated in the island of Taveuni (said Title).*
2. *On or about 31st May 1996, the defendant and the plaintiff entered into an agreement wherein the defendant agreed to sell 4 acres of the land from the said title.*

Disputed Facts

1. *The consideration for the said 4 acres of land from the said title under the agreement dated 31st May 1996.*
2. *The amount the plaintiff paid to the defendant pursuant to the said agreement.*
3. *When the plaintiff occupied the said land.*

Agreed Issues to be Determined

1. *The party who breached the terms and conditions of the agreement.*

2. *Whether the innocent party is entitled to damages for the breach and claim for interest on damages (if any).*
 3. *Whether the defendant is entitled to any restitution.*
 4. *Whether any party is entitled for costs”.*
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30. The minutes of the pre-trial conference indicates that the parties had agreed that the sale and purchase agreement was for the 4 acres of the land of the defendant. What the Court was asked to find was the proper consideration that was to be paid by the plaintiff under the agreement for the sale 4 acres of the land. It was never an issue that the whole land was sold and what consideration was to be paid for it.
 31. The plaintiff right throughout in his cross-examination evidence which I picked from the plaintiff’s own submission indicates that he bought only 4 acres of the land and that he never wanted the entire land although some demand notices mentioned the entire land.
 32. The trial judge was asked to make a finding on the true consideration agreed to be paid for the 4 acres of the land and having found that \$10,000 was already paid, the trial judge found that the sum outstanding under the agreement was the mortgage debt to the Fiji Development Bank.
 33. The order which is sought to be corrected arose out of the defendant’s consent to transfer the land upon payment of the sum of \$32,318.90 as appears from paragraph 41 of the judgment:

“ In my view, the defendant is entitled to vacant possession of the land if the plaintiff fails to honour his obligations as per the agreement. The defendant in his evidence testified that he is agreeable to transfer the title if the debt paid by him to the bank is settled with accumulated interest for the period that the loan was outstanding”.

34. The defendant in his submission stated that *“the defendant is prepared to transfer the land to the plaintiff if he pays the sum of \$25,622.81 plus interest thereon on a reducing balance for 17 months, at the rate of 11.2 percent per year which was the interest charged by the Fiji Development Bank together with any damages and costs awarded by this Honourable Court”*.
35. The defendant meant the land to be 4 acres of the land as appears from part of paragraph 57 of his submission which reads that *“the consideration for the 4 acres of the subject land was \$35,622.81 comprised of the \$10,000 in clause 2 (a) and 2(b) and the debt owed by the defendant to the Fiji Development Bank as at 31 May 1996, the day of the execution of the agreement which amounted to \$25,622.81”*.
36. The defendant had never consented to transfer the whole land for payment of the sum of \$32, 318.90. If the order for transfer was granted on the consent of the defendant than the order cannot mean that the whole be transferred because that is not what the defendant consented to.
37. It is very important that when Judges craft orders, there is no uncertainty surrounding the same. This is one case which shows why care needs to be exercised. What bothers me is that when an issue arose out of the improperly drafted order, the Hon. Judge refused to explain what he meant. Subsequently he left the country and I am bestowed with the task of clarifying what he meant. Although to my mind there is no uncertainty in what his Lordship meant, I am of view that if he intervened and explained his orders, every issue would have been put to rest.
38. The entire case was about the purchase price that was agreed between the parties for the sale of the 4 acres of the land. The plaintiff’s counsel says that his client had claimed specific performance of the 4 acres of the land for consideration of \$10,000. His client’s claim was dismissed and the Court gave an order that the entire land be given to him in \$32, 318.90. I find this argument outrageous. If the plaintiff’s claim for specific performance for the sale of the 4 acres of the land for the consideration of \$10,000 was dismissed, why would the Court give him the entire land in \$32,318.90? The entire land consists of about 7 acres. In that case the Court would have granted the plaintiff his

claim. It is obvious that the Court found that the plaintiff was not correct in asserting that the value of the 4 acres was agreed to be \$10,000 but something more than that which the Court calculated to be \$32, 318.90.

39. There are so many sources from which I find that when the Hon. Justice Balapatabendi ordered that *"The Defendant is ordered to transfer the title upon the payment of \$32,318.90"* his Lordship intended that the 4 acres of the said title be transferred and not the entire land. His Lordship omitted to write 4 acres which I find was an accidental omission.
40. This matter should have been resolved amicably. It always appeared from the pleadings and evidence that the plaintiff had always been insisting on the defendant to transfer to him the entire land which the plaintiff denied and said that he never asked for the entire land. It now appears that the defendant's contention was true. The motive is clear now that he is insisting that the entire land be transferred to him when his claim never was for the whole land and the parties' dispute was the proper consideration agreed to be paid under the agreement for the 4 acres of the land.
41. I can only find malice on the part of the plaintiff in defending this matter. There ought to be costs against the plaintiff for defending this proceeding out of greed only.

Final Orders

42. In the final analysis, I find that there would be injustice if the third order is not amended to include 4 acres of the said title and I therefore order that the same be included. The new orders would now read:

"1. The Plaintiff's claims are dismissed [original order]."

2. *The Defendant is entitled to the vacant possession of the land within three months from this judgment, if the plaintiff fails to pay \$32, 318.90 to the defendant [original order].*
 3. *The Defendant is ordered to transfer the 4 acres of CT 26412 upon the payment of \$32,318.90 [order corrected].*
 4. *A sum of \$2,000 is payable by the plaintiff to the defendant as costs summarily assessed" [original order].*
43. I order costs against the plaintiff for this application in the sum of \$1,500 to be paid before the defendant transfers the land.

Anjala Wati

Judge

14.02.2014

To:

1. *Mr. R. Lal for the plaintiff.*
2. *Mr.P. Lomaloma, for the defendant.*
3. *File: HBC 35 of 2011.*