

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 196 of 2014

BETWEEN : ANTHONY MARK VALENTINE and SHAINAZ ZAREENA BIBI VALENTINE both of Nakasi, Nausori, Fiji, Power Station Operator and School Teacher, respectively.

PLAINTIFF

AND : MOHAMMED SHAFIK of Lot 10, Culvert Place, Davuilevu Housing, Nausori, Retired.

DEFENDANT

BEFORE: Acting Master Vishwa Datt Sharma

COUNSELS: Mr. Shelvin Singh for the Plaintiff.
Mr. Pita Niubalavu for the Defendant.

Date of Hearing: 01st April, 2015

Date of Ruling: 28th May, 2015 (2.15 pm)

JUDGMENT

INTRODUCTION

1. The Plaintiff filed a **substantive application** by way of a **Writ of Summons** against the Defendant on 15th July, 2014 seeking for the following Orders-

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- (i) ***An Order for Specific Performance of the sale and purchase agreement between the Plaintiff and the Defendant dated 17th March, 2014.***
- (ii) ***Further or alternatively, an injunction restraining the Defendant whether by his servants, agents or howsoever from dealing with the property comprised and described in Methodist Church Lease No. 398198 being Lot 10 on DP No. 6432 until further orders of this court.***
- (iii) ***Further or alternatively, damages for breach of contract.***
- (iv) ***Such further relief as to this Honourable Court seems fit and proper.***
- (v) ***Costs of and incidental to this action.***

2. The application was made pursuant to **Order 86** of the **High Court Rules 1988**.

BACKGROUND

3. The Plaintiff and the Defendant entered into a **Sale and Purchase agreement** on 17th March, 2014 for the sale and transfer of the property comprised in **Methodist Church Lease No. 398918** in the agreed sum of \$180,000.

4. The date of settlement was to take place in 90 days in terms of clause 4 of the agreement and a Notice to settle was served onto the Defendant's Solicitors on 07th July, 2014.
5. The Estate agents, Messer's Hardy's Homesell wrote on 11th July, 2014 to advise the Plaintiffs' that the Defendant no longer wished to sell the said property.

The PLAINTIFFS' CASE and APPLICATION

6. The Plaintiff filed a Writ of Summons against the Defendant on 15th July, 2014 and sought for **specific performance** and **damages for the breach of contract** as described hereinabove at paragraph 1 (i) to (v) inclusive.
7. Subsequent to the Writ of Summons application, the Plaintiffs filed an application for **Summary Judgment**.
8. The Plaintiffs claims as follows-
 - (i) The Plaintiffs and the Defendant entered into a Sale and purchase Agreement on 17th March, 2014 for the Sale and Transfer of the property comprised in the Methodist Church Lease No. 398918 for the sum of \$180,000.

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- (ii) Settlement was to take place within 90 days from the date of the signing of the agreement.
 - (iii) The Instrument of Transfer and Mortgage document have been duly stamped by the Plaintiffs’.
 - (iv) The Plaintiffs’ were ready to settle the transaction by 05th June, 2014 and Notice was given to the Defendant to complete his obligations under the Capital Gains Tax.
 - (v) On 01st July, 2014, the Defendant’s Solicitors responded that their client was arranging for an engineer’s certificate and they will indicate a time for settlement once it was done.
 - (vi) On 07th July, 2014, a Notice to settle was served onto the Defendant’s Solicitors.
 - (vii) On 11th July, 2014, the Estate Agency, Messers Hardy’s Homesell wrote to advise the Plaintiffs’ that the Defendant no longer wished to sell the property.

THE DEFENDANT’S CASE

9. The Defendant states as follows-

- (i) Admits executing a Sale and Purchase Agreement dated 17th March, 2014 but further states that no deposit was paid.
- (ii) Refers to clause 5 of the Agreement. The sum of \$180,000 was to be paid and satisfied by the Purchasers into the Trust Account of

Nand's Law. The date of settlement was to be within 90 days from 17th March, 2014. i.e. 15th June, 2014.

- (iii) The Transfer was prepared by the Solicitors for the Plaintiff and executed by the Defendant on 08th May, 2014 and stamped on 05th June, 2014.
- (iv) Refers to a letter dated 30th June, 2014 written by Sherani & Co lawyers (Marked as annexure 'G' of Plaintiff's affidavit) which clearly expresses that the Plaintiffs were only willing to settle if the Engineers Certificate was available.
- (v) That Messers Hardy's Homesell and Ms. Nand's Law agreed to provide the engineer's certificate outside the sale & purchase agreement without further amendments to the sale & purchase agreement.
- (vi) That a caveat was placed by the Defendant's wife in order to protect the interest in the matrimonial property.
- (vii) That he longer wishes to sell the property as he has invested more money in the property due to the breach of the sale & purchase agreement by the Plaintiff.
- (viii) That there are many disputes in this case and summary judgment is not the correct procedure in this case.
- (ix) That the Defendant has a meritorious Defence and the Plaintiff's claim be dismissed.

ISSUES

10. The issues that this court needs to determine are as follows-

- (i) **Whether summary judgment is available to the Plaintiff as to the nature of his claim in terms of *Order 86 Rule 1 of the High Court Rules 1988*?**
- (ii) **Whether an order be made for Summary Judgment against the Defendant for specific performance of the sale and purchase agreement dated 17th March, 2014? And**
- (iii) **Whether any Costs of and incidental be granted?**

LAWS and PRINCIPLES relating to summary judgment

11. The Plaintiff may, under **ORDER 86 RULE 1** of the **HIGH COURT RULES 1988**, apply for **summary judgment** against the Defendant on the ground that the Defendant has **no defence** to a claim. **HCR O.86** deals with summary judgment. **O.86 r. 1** provides that:

“1 (1) *In any action begun by writ indorsed with a claim-*

- (a) For **specific performance of an agreement** (whether in writing or not) for the sale, purchase, exchange, mortgage or charge of any property, or for the grant or assignment of a lease of any property, with or without an alternative claim for damages, or
- (b) -----,or
- (c) -----.

The plaintiff may, on the ground that a Defendant has **no defence** to the action, apply to the Court for judgment.

12. **Order 86 Rule 3** states as follows-

“3. **Unless** on the hearing of an application under **rule 1** either the Court **dismisses** the application or the defendant satisfies the Court that there is **an issue or question in dispute** which ought to be tried or that there ought to be some other reason to be a **trial of the action**, the Court may give judgment for the plaintiff in the action.”

13. The Plaintiff may, under **ORDER 14 RULE 1** of the **HIGH COURT RULES 1988**, apply for summary judgment against the Defendant on the ground that the Defendant has no defence to a claim. **HCR O.14** deals with summary judgment. **O.14 r. 1** provides that:

“1. (1) Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has given notice of intention to defend the action, the plaintiff may, on the ground that that defendant has no defence to a claim included in the writ, or particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the court for judgment against that defendant.

(2)...

(3)... (Emphasis added).

14. Pursuant to **HCR O. 14 r.3** the Plaintiff may obtain judgment against the Defendant on the claim or part as may be just. **O.14 r.3** states that:

“3. (1) Unless on the hearing of an application under rule 1, either the Court dismisses the application or the defendant satisfies the Court with respect to the claim or the part of a claim, to which the application relates that there is an issue or question in dispute which ought to be tried or there ought for some other reasons to be a trial of that claim or part, the Court may give

such judgment for the plaintiff against that defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed"
(Emphasis added).

ANALYSIS and DETERMINATION

15. The Plaintiff brought the initial **substantive action** against the Defendant by a **Writ of Summons** filed on 15th July, 2014 and sought, inter alia, the following orders-

- (i) *An Order for Specific Performance of the sale and purchase agreement between the Plaintiff and the Defendant dated 17th March, 2014.*
- (ii) *Further or alternatively, an injunction restraining the Defendant whether by his servants, agents or howsoever from dealing with the property comprised and described in Methodist Church Lease No. 398198 being Lot 10 on DP No. 6432 until further orders of this court.*
- (iii) *Further or alternatively, damages for breach of contract.*
- (iv) *Such further relief as to this Honourable Court seems fit and proper.*
- (v) *Costs of and incidental to this action*

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16. It has become appropriate at this stage that I must inform both counsels to this proceedings that no action and or determination was made by the High Court on an alternative order sought for an ***injunction restraining the Defendant whether by his servants, agents or howsoever from dealing with the property comprised and described in Methodist Church Lease No. 398198 being Lot 10 on DP No. 6432 until further orders of this court.***
17. Further the Master of the High Court does not have the Jurisdiction nor is empowered to deal with this order (*Summary Judgment Application*).
18. On 04th August, 2014, the Plaintiff proceeded by filing an **Inter Parties Summons to Summary Judgment with An Affidavit in Support and applied for summary judgment** against the Defendant.
19. **The Summary Judgment application was made under Order 86 Rule 1 of the High Court Rules 1988.**
20. In terms of ***Order 86 Rule 1 of the High Court Rules 1988*** the Plaintiff in an action for **specific performance** of an agreement for sale of any property apply to court for **summary judgment** on the ground that the Defendant has **no defence** to the action.
21. The **Defendant** resisting the **summary judgment** must establish that there is an **issue or question in dispute** with respect to the claim or the

part of the claim which ought to be **tried** or there ought for **some reasons** to be a **trial** of that claim or part. If the defendant fails to do so, then the court will enter **summary judgment** against the defendant on that claim or part thereof.

22. Both Counsels representing the parties to the proceedings filed in their respective written submissions coupled with case authorities.

(Sale and Purchase agreement dated 17th March, 2013)

23. Both parties to the proceedings do not dispute executing a sale and purchase agreement dated 17th March, 2014 for the Sale by the Defendant to the Plaintiffs of the Defendant's Leasehold property comprised and described in the Methodist Church Lease No. 398918 in the sum of \$180,000.

24. Bearing in mind the nature of the application before this court, it is necessary to read the sale and purchase agreement in its entirety and make particular reference to the following clauses-

- (a) Clause 4.1 which states ' *the date of settlement shall be within ninety (90) days from the date of signing of this agreement or such other date as may be mutually agreed in writing between the parties.*'

(b) Clause 4.2 which reads *'the date of settlement shall not be modified nor in any manner extended unless such other date which is mutually agreed to by the parties in writing.'*

(c) Clause 12 deals with purchasers default and states as follows-

'if the purchasers shall make default in payment of any moneys when due or in the performance or observation of any other stipulation or agreement on the Purchaser's part herein contained and if such default shall continue for the space of fourteen (14) days from the due date then in any such case the Vendor without prejudice to any other remedies available to him may at his option exercise all or any of the following remedies namely:

- (i) May enforce this present contract in which case the whole of the purchase monies then unpaid shall become due and at once payable; or*
- (ii) May rescind this contract of sale and thereupon all monies therefore paid or under the terms of the sale applied in reduction of the purchase money shall be forfeited to the vendor as liquidated damages;*
- (iii) May sue for specific performance of this agreement;*
- (iv) May sue for special and general damages;*
- (v) May re-enter upon and take possession of the said property without the necessity of giving any notice or making any formal demand.*

(d) Clause 13 deals with vendor's default and states as follows-

'if the vendor shall make default in the performance or observation of any other stipulation or agreement on the Purchaser's part herein contained and if such

default shall continue for the space of fourteen (14) days from the due date then in any such case the Purchasers without prejudice to any other remedies available to them may at their option exercise all or any of the following remedies namely:

- (i) May rescind this contract of sale and thereupon all monies therefore paid or under the terms of the sale applied in reduction of the purchase money shall be refunded forthwith to the purchaser without deduction; or*
- (ii) May sue for specific performance of this agreement; or*
- (iii) May claim damages in addition to seeking specific performance of his agreement.*

25. The **Defendant** referred to Clause 4.1 of the agreement that required the parties to complete the sale and transfer within 90 days from the date of execution of the agreement or such other date as may be mutually agreed in writing between the parties. He says that he signed the Instrument of Transfer which was consented by the Methodist Church of Fiji on a belief that the settlement will be effected within 90 days but failed due to the delay on the part of the Plaintiff and the Real Estate Agent and further, the Plaintiff never sent any letters to indicate the date, time and place of settlement. He said he was always told by Ms. Nand's Law that the settlement will be delayed.

26. The **Defendant** also submitted that he signed all the documents in relation to the sale of the land but it was the Plaintiff who was never

ready with settlement and asked for engineer's certificate which was never part of the agreement.

27. The court noted that there is no evidence before this court of the fact that either parties to this proceedings had have sought for an extension of time to complete the settlement nor that they have ever agreed to extend the date of settlement beyond the 90 days' time period.

28. Therefore, in the above circumstances both parties to the proceedings and agreement waived the condition to complete settlement within 90 days' time period.

Reference is made to the case authority of ***Solomons v Halloran (1906) NSWSR, vol VII, 32***: This case talks about whether time is of the essence and states as follows-

'Wherein time is of the essence, it is well settled that a party may by his conduct and course of dealing waive his right to insist upon strict compliance with the terms of the contract in that respect. If for instance, after the stipulated time has been allowed to pass, a party goes on negotiating for completion of the contract or does any act in respect of it which shows that he treats it as still subsisting, he cannot afterwards abandon it without giving reasonable notice of his intention to do so, except in the case where the waiver has only taken the form of substituting an extended time for that originally specified.'

29. Reference is also made to the case authority of ***Tradesplus (Fiji) Limited v Moti Chand***, Suva High Court Civil Action No. HBC 65 of 2004, wherein Justice Singh cited the following paragraph from *Webb v Hughes* LR 10 Eq. 281 at 287 as follows-

'But if time be made the essence of the contract, that may be waived by the conduct of the purchaser, and if the time is once allowed to pass, and the parties go on negotiating for completion of the purchase, then time is no longer of the essence of the contract.' (underline is mine as deliberated above and hereunder)

30. Now, in the present case the sale and purchase agreement was executed by the parties on 17th March, 2014 and in terms of clause 4.1 the date of settlement should have been within 90 days' time from the date of the execution, meaning the settlement should be effected and completed on or before 17th June, 2014.
31. The question that arises is -was the settlement effected and or completed then? The answer is no. Reference is now made to paragraphs 9, 10, 11, 12, 13 and 14 respectively of the affidavit in support of the Plaintiff deposed on 04th August, 2014 which is self-explanatory because it was always the Plaintiff who engaged himself through his Counsel putting in an effort to find out the status of the completion of the sale meaning when the sale will be completed. At paragraph 10 of the Plaintiff's affidavit in support, Ms. Nands Law responded to Plaintiff Solicitor's correspondence of 30th June, 2014 wherein he stated that *'the settlement*

will happen as soon as the engineer's certificate is procured'. Following this, Plaintiff's Counsel then wrote further to the Defendant's Counsel on 07th July, 2014 putting him on "Notice of Default of Agreement pursuant to clause 13 of the sale & purchase agreement.' Even then, the Defendant failed to adhere to and complete the obligations in terms of the Sale & Purchase agreement.

32. In the present case before this court, bearing in mind the two case authorities as discussed above of ***Solomons v Halloran (1906) NSWSR, vol VII, 32 and Tradesplus (Fiji) Limited v Moti Chand, Suva High Court Civil Action No. HBC 65 of 2004;*** in terms of the sale and purchase agreement,' time was made the essence of the contract', but it was waived by both parties and that because 'the time was allowed to pass by to date and still continues to do so in order not to complete the settlement, 'then still time is no longer of the essence of the contract in this case'.
33. The **Plaintiff** also relies on the affidavit of the Plaintiff Anthony Mark Valentine and the court has taken the contents into consideration.
34. On the other hand, the **Defendant** also submitted as follows-

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- (i) On a letter written by Plaintiff's Counsel on 30th June, 2014 and in terms of the Plaintiff's affidavit filed, that the Plaintiffs' were only willing to settle if the Engineering Certificate was available.
 - (ii) That the Engineers Certificate was not part of the Sale & Purchase agreement.
 - (iii) The Plaintiffs' failed to settle in terms of the agreement.
 - (iv) The delay was on part of the Plaintiff and the Real Estate Agent.
 - (v) The Defendant was never informed by the Plaintiffs of their readiness for settlement.
 - (vi) That the Defendant wishes to join other parties as third party to this proceeding.
35. If the contention of the Defendant was as outlined hereinabove, then why didn't the Defendant make any efforts or take any action to counter the obligations not fulfilled by the Plaintiff in terms of the Sale & Purchase agreement and or join other relevant parties as third parties to this proceeding?
36. The **Defendant** further adds that the following are the arguable issues that need to be tried and determined at a full trial-
- (i) That 90 days' time frame of completing the settlement has lapsed;
 - (ii) Whether Ms. Nand's Law was acting on instructions of the Defendant;

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- (iii) Whether the Real Estate Agent was authorized by the Defendant to make an undertaking to provide an Engineer's Certificate;
- (iv) Whether the Defendant was ready with the CGT certificate to settle this matter;
- (v) Whether the Plaintiff had deposited the purchasing price into Ms. Nands Law Trust Account as per the terms of the Sale & Purchase Agreement.
37. The responsibility lied with the **Defendant** as well as the **Plaintiff** and both should have made an effort to ensure that the respective obligations were carried out within the time frame of the agreement. One party should not just find a way to point fingers without any reasonable ground and let the obligations not to be fulfilled. After all the Sale & Purchase Agreement is self-explanatory, a binding contract between both parties and both must ensure to give the agreement a value.
38. The **Defendant** also relies on the affidavits filed by him.
39. Reference is also made to the case of *Metalworks & Joinery Limited v Fiji Islands Revenue & Customs Authority*, Justice Pathik applying the Court of Appeal decision delivered by Greig J in *Australia Guarantee Corporation (NZ) Ltd -v- Mc Beth* [1992] 3 NZLR 54 at 58 held in determining the issue before him on the facts and circumstances of this case:-

*'The summary judgment procedure is a simple expeditious way to enable a plaintiff to obtain judgment where there is no real defence to the claim made. See **Pemberton v Chappell [1987] 1 NZLR 1 at 2-***

*The essence of the procedure is the plaintiffs own verification by affidavit of his own statement of claim and the allegation made in it: **Harry Smith Car Sales Ltd v Clay com Vegetable Supply Co Pty Ltd [1978] 29 ACTR 21-***

*There has to be balancing between the right of the defendant to have his day in court and to have his proper defences explored and the appropriate robust and realistic approach called for by the particular facts of the case: **Bilby Dimock Corporation Ltd v Patel [1987] 1 PRNZ 84** and **Cegami Investment Ltd v AMP Financial Corporation [NZ] [1990] 2 NZLR 308 at p. 313-***

'Although the onus is upon the plaintiff, there is upon the defendant a need to provide some evidential foundation for the defences which are raised. If not the plaintiffs verification stands unchallenged and ought to be accepted unless it is patently wrong.'

40. I have very carefully perused and borne in mind the following before arriving at my final decision -

- (a) *Plaintiff's Writ of Summons summary judgment application coupled with the affidavit in support;*
- (b) *Other affidavits and pleadings filed on behalf of the Plaintiff;*
- (c) *Written submissions with case authorities;*
- (d) *Defendant's Defence and Affidavit in response;*
- (e) *Other affidavits filed on behalf of the Defendant; and*
- (f) *Written submissions with case authorities.*

41. The power to give summary judgment for specific performance in terms of Order 86 is intended to apply only in clear cases, where there is no reasonable doubt that the plaintiff is entitled to summary judgment, and where it is entitled to judgment and it is inexpedient to allow a defendant to defend for mere purposes to delay the proceedings unnecessarily. Further, it is also important to reiterate at this stage that the ground upon which the Plaintiff may seek summary judgment is when the Plaintiff is able to show that the Defendant has no defence to the action.

Unless, the Defendant satisfies the court that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of the action, the court may give judgment for the Plaintiff in the action. This is the law.

42. Further, as to damages sought, my decision is that damages are normally not awarded in conjunction with an order for specific performance of the contract. I cannot find any exceptional circumstances to award damages.
43. For the aforesaid rational, I find that the Defendant does not have any defence to the Plaintiff's action.
44. Further, the Defendant has not satisfied this court that there is an issue or question in dispute which ought to be tried by this court.
45. This is a proper case to grant summary judgment for specific performance in terms of the Plaintiff's application.
46. Following are the final orders of this court.

FINAL ORDERS

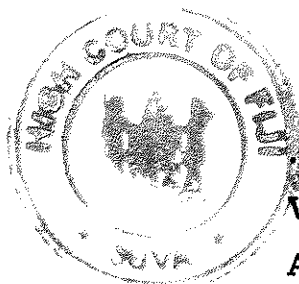
1. The Plaintiff's application for **summary judgment** succeeds.
2. An order for specific performance of the sale and purchase Agreement dated 17th March, 2014 within 14 days or its earliest convenience for the sale by the Defendant to the Plaintiffs of the

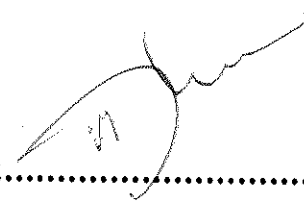
Defendant's leasehold property comprised and described in the Methodist Church lease no. 398918 being Lot 10 on DP No. 6432.

3. An order that the Defendant perform all its obligations under the sale and purchase agreement dated 17th March, 2014 including the removal of the Caveat No. 800208, Obtain a Capital Gains Tax clearance Certificate (CGT) and attend to the Registrar of Titles Office within 14 days from the date of the making of these orders for the settlement of the Transfer of the leasehold property comprised and described in the Methodist Church Lease No. 398918 being Lot 10 on DP No. 6432 in exchange for a Bank Cheque for the sum of \$180,000 from the Plaintiffs.

4. Cost is summarily assessed at \$500 against the Defendant.

Dated at **Suva** this **28th Day of May, 2015**




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VISHWA DATT SHARMA
Acting Master of High Court, Suva

cc. Shelvin Singh – Shelvin Singh Lawyers
Pila Niubalavu – M A Khan Esq.