

IN THE HIGH COURT OF FIJI
AT LABASA
CIVIL JURISDICTION

CASE NUMBER: HBC 60 of 2009

BETWEEN: PETER IAN KNIGHT and ROSALIA LUSIANA CHUTE as
executors and trustees in the estate of Adi Susie Vulase
a.k.a Susie Leonard

Plaintiffs

AND: NASIR KHAN

Defendant

Appearances: Mr. Peter Knight for the Plaintiffs.
No appearance of the Defendant.

Date/Place of Trial: Monday 19 January 2015 at Labasa.

Date/Place of Judgment: Friday 23 January 2015 at Labasa

Coram: The Hon. Madam Justice Anjala Wati

JUDGMENT

Catchwords:

Sale and Purchase of Land – agreement – obligation of parties – performance of the agreement- specific performance – termination of agreement – occupation of the property – past occupation lawful – future occupation in law and equity- mesne profits – damages- costs.

Cases Referred to:

1. *Swordheath Properties Limited V. Tabet* [1979] 1 WLR 285.
2. *Inverugie Investments Limited v. Hackett* [1995] 1 WLR 713.

Legislation:

Indemnity, Guarantee and Bailment Act Cap. 232 (“IGBA”): s. 59(d).

The Cause

1. Originally the action was brought by the deceased Adi Susie Vulase. Upon her death on 8 June 2010, Probate No. 50370 was granted devolving the administration of the estate onto the personal representatives Mr. Peter Ian Knight and Ms. Rosalia Lusiana Chute.
2. By an order of Master Robinson of 29 November 2012 the personal representatives were substituted as the plaintiffs in the cause.
3. The plaintiffs main cause of caution is for vacant possession of all that land situated at Vuna Taveuni being Lot 4 on DP8841 comprised in the Certificate of Title 35459 containing an area of 2.0048 hectares ("**the property**").
4. The plaintiffs also seek a declaration that there is no binding agreement between the deceased and the defendant for the sale of the property between them.
5. The plaintiff claims mesne profits too for the period the defendant took occupation of the property until delivery of vacant possession.
6. The plaintiffs say that the deceased is the registered proprietor of the property. It is averred that the initial agreement to sell the property was made in writing on 17 July 2001. The agreement was signed by both parties. The parties agreed to the sale of 5 acres of land for the price of F\$27,500 with settlement to occur when title of the property became available.
7. The plaintiffs say that in or about 2002 the defendant moved onto the property and has since constructed a dwelling on the property and has cultivated the property and earned income and to date continues in occupation.
8. According to the plaintiffs, the agreement dated 17 July 2001 was cancelled but in or about 2003, the plaintiffs say that the defendant requested the deceased to

sell the property to his wife Farida Bi for a price of F\$32,695 of which a deposit of \$4,000 was paid. The deceased agreed in writing to sell the property for F\$32,695.00. The letter was not signed by the defendant or his wife. Subsequent to this agreement, the defendant verbally advised the deceased that he was no longer interested in purchasing the property as he was moving to Labasa and the agreement (if any) was cancelled.

9. Then in 2006 there was a verbal conversation between the parties where the defendant indicated that he was still interested in purchasing the property and the deceased verbally agreed to sell the property to the defendant for \$50,000. The defendant also verbally agreed to this. Pursuant to this agreement, the deceased at the request of the defendant, wrote a letter to the Manager of Fiji Development Bank Savusavu dated 22 May 2006 in which she stated that she agreed to sell the property to the defendant for \$50,000.
10. Since 2003, neither the defendant nor Farida Bi has made any further payments towards purchase of the property.
11. The plaintiffs say that the deceased made a written demand to the defendant to deliver up vacant possession but he refused to do so and remains in occupation.
12. The plaintiffs says that there is no binding agreement with the defendant to sell the property and section **59 (d) of the IGBA** is relied upon to bring the claim for vacant possession of the land.

Defence and Counter-Claim

13. The defendant says that he agrees that the land in question was sold to him under a sale and purchase agreement dated 17 July 2001 on which he paid \$4000 which payment is recorded on the agreement itself. He says that the agreement provided that the transfer would be completed upon the plaintiff acquiring a title for the property.

14. The defendant says that over a period of time the entire sum of the purchase price was paid to the deceased. The other payments that he made were recorded in the deceased person's land sales file. The payments were cleared sometimes in May 2008.
15. The defendant says that the agreement dated 17 July 2001 was never cancelled and that his wife never entered into a second agreement with the deceased. He also contends in his defence that he never told the deceased that he is moving to Labasa and to cancel the second agreement.
16. Sometimes in 2008 the deceased demanded a sum of \$50,000 from the defendant by stating that she would only transfer the title upon receipt of the said sum and the defendant refused to pay on the basis of 17 July 2001 agreement.
17. The defendant says that he never requested the deceased to write a letter to the Fiji Development Bank for sale of land in the sum of \$50,000.
18. The defendant says that since all monies were paid in 2008 the defendant through his solicitors informed the deceased to complete the transfer. The deceased did not reply. She wrongful failed to complete the transfer of the property and acquired the title in her personal name.
19. The defendant says that he moved onto the property in 2002 and constructed thereon a wood and iron building and has cultivated the land under the sale and purchase agreement. He cultivated the land with 3 acres of coconut and 2 acres of yaqona and dalo and continues to do so. The improvements on the property are in excess of F\$100,000. He never received any eviction notices and is entitled to occupy the property.

20. The defendant seeks that the plaintiffs claim be dismissed and that specific performance of the agreement dated 17 July 2001 be granted or alternatively damages be granted in addition to or in lieu of specific performance.

Defence to Counter-Claim

21. The plaintiffs say that the agreement dated 17 July 2001 did not identify or adequately identify the parcel of land to be sold.
22. The plaintiffs further say that the sum \$4000 was not paid in 2001 but in 2003 and that no further sums were paid.
23. The plaintiffs deny that the deceased received any request to transfer the property and say that there is no binding agreement to transfer the property and that they are entitled to vacant possession of the property.

Trial and Evidence

24. There is no Pre-Trial Conference minute in the Court records. Mr. Sen who represented the defendant withdrew from records in December 2014.
25. On the trial date, the defendant's wife came to Court and informed that the defendant was sick and not available.
26. The Court asked her to provide some reliable evidence of his sickness and that he was unfit to attend Court and give evidence. No such evidence was provided. An adjournment was thus refused on the basis that there is no reliable evidence of the defendant's sickness. The matter proceeded to trial.
27. The Court informed the defendant's wife that she could give evidence on behalf of the defendant as his witness but that she did not have any right of cross-examination and opening and closing submissions on the basis that no witnesses

in civil cases have that prerogative. That right would have been accorded to her if she was a party to the proceedings. She was also informed that if she chose to give evidence then she would be subjected to cross-examination.

28. The defendant's wife informed the Court that she would like to give evidence on behalf of her husband and that she understood the trial procedures explained to her. There were therefore two witnesses in the trial: one each on behalf of the parties.

PW 1

29. The plaintiffs witness was one Mr. Tevita Masinamoa. He is from Navaca settlement in Taveuni and is the cousin of the deceased. He said that he knows Mr. Nasir Khan as he lives in the same area. He said that Nasir Khan lived in that area since 2001. That was the time he moved on the property to live there. He also knows Farida Bi. The whole family lives on the land.
30. A house is built on the property. The house is of corrugated iron. The family has been farming the land since they moved in. They are planting vegetables, dalo and yaqona on the property.
31. According to his knowledge the defendant has not paid anything more than \$4,000 for the land.
32. The witness then finally tendered 14 documents which were marked as plaintiffs' exhibit 1 to 14 ("**P Ex**"). I shall give a brief description of each exhibit:

• **P Ex - 1**

Certificate of Title 35459 indicating that Adi Susie Vualse is the registered proprietor of the property and that there is a charge by the mortgagee NBF, a caveat by the defendant and a charge by FIRCA, in order of priority.

- P Ex -2

Probate No. 50370 appointing the current plaintiffs as the personal representatives of the deceased. Attached to the probate was the will of the deceased.

- P Ex -3

Sale and Purchase Agreement dated 17 July 2001 between the deceased and the defendant.

- P Ex -4

Undated Second Sale and Purchase Agreement.

- P Ex -5

Notice to vacate by the deceased addressed to the defendant.

- P Ex -6

Letter by the deceased to Manager Fiji Development Bank Savusavu which is contended by the plaintiffs to be the third sale and purchase agreement between the parties.

- P Ex -7

Notice to vacate by Tikaram & Associates dated 22 September 2006 on behalf of the deceased and addressed to the defendant.

- P Ex -8

Letter from Sheik H. Shah Esquire dated 13 December 2006 in response to the notice to vacate by Tikaram & Associates.

- P Ex -9

Letter by Crompton to Sheik H. Shah Esq dated 3 December 2007 regarding sale price of the property and notice to vacate.

- P Ex -10

Letter in response by Sheik H. Shah dated 17 December 2007 to Crompton's letter.

- **P Ex - 11**

Letter in response by Crompton dated 5 February 2008 to Sheik H. Shah's letter.

- **P Ex - 12**

Letter in response by Sheik H. Shah dated 27 February 2008 to Crompton's letter.

- **P Ex - 13**

Letter in response by Crompton dated 7 April 2008 to Sheik H. Shah's letter.

- **P Ex - 14**

Letter in response by Sheik H. Shah dated 3 July 2008 to Crompton's letter.

DW 1

33. The defendant's wife Farida Bi gave evidence on his behalf. She stated that the parties first entered into an agreement for sale of the property for \$27,500. A deposit of \$4,000 was paid. The balance was to be paid after they arranged loan from a financier as they did not have money. The deceased agreed to this arrangement and asked them to look for money.
34. They started paying the monies in instalment and the deceased never gave any receipts for the payments they made. To her recollection, they paid about \$22,000. Then the vendor changed the price of the property to \$32,000. They agreed to vary the price. The property was to be sold to her. They then went to Savusavu Fiji Development Bank to secure loan to pay the balance money. The Bank enquired about the price and the title and contacted the deceased who wrote to the Bank and increased the price to \$50,000. When the Bank told them that the price was \$50,000 they did not agree to that price and abandoned the application as their arrangement was to buy at \$32,000. The dispute then arose between the parties. No monies were paid after the price of \$32,000 was agreed to.

35. The witness further stated that she lost all her papers when there was a hurricane in Taveuni but when the instalment payments were made the witness Tevita's mother saw it and she is their witness.
36. On the property they have constructed a 6 bedroom house out of which 2 bedrooms are incomplete. In the five acres of land, they have planted coconut and all types of trees. When they moved in the property, the land was barren.
37. Under cross- examination the witness said that she moved in the property in 2003. The \$4,000 was paid in 2002. However shortly after the first agreement they started cultivating the land but since there was no house on the property they moved in to stay there in 2003.
38. Apart from the \$4,000 paid in 2002, she made cash payments to the deceased. Sometimes monies were deposited in an account nominated by her. She had made note of all these payments in her diary. She also had bank slips of the deposits she made. But all the records have been destroyed in the hurricane.
39. The first \$4,000 was deposited on the first agreement. Then instalment payments were made between \$100 to \$300 at a time. She does not know the specific dates and amounts of payments.
40. The witness then changed her version and said that she made two instalments of \$4000. She also made some instalments of \$100 to \$300 and another instalment of \$7,000 which she made by selling a car. The first \$4000 was paid in 2004. The second \$4,000 was paid in 2005. The instalments of \$100 to \$300 were paid over a period for twice or thrice and the final payment was made in 2008 being the \$7,000.
41. She agreed that the first agreement was superseded by the second agreement in which a price of \$32,000 was agreed for the property.

42. She agreed that in 2006, her husband may have told his lawyer that only a sum of \$6,000 was paid as yet the year 2006. She said that she was not a privy to the conversation between her husband and their lawyer.
43. After 2006, she made another payment of \$7,000 and some instalment payments of \$100 to \$300.
44. The witness said that the deceased stayed in Suva and whenever she came to Taveuni she would visit them and they would give her what she wanted like dalo and the other food items. The deceased even stayed with them. They also gave her money between \$100 to \$300. They gave whatever they had with them at the time. They also used to send her money to Suva. She used to call and ask for money and whatever amount she requested, they deposited in her account.
45. The deceased had breast cancer and told them that her life is short but even if she dies she said that no one could evict them from the property and that they could live on the property.
46. The deceased went to Australia once or twice and before going to Australia she met them at another person's place.
47. She is not lying about the payments she made and the deceased is also not lying. She admitted that they were asked by the deceased to vacate the land but that they did not get any notices in writing although their lawyer responded to the notices except the notice that was personally written by the deceased.
48. They had gone to Savusavu FDB to arrange for finance for the property at \$32,000. When they heard that the owner increased the price to \$50,000 they told the Bank that they will not buy at that price. This happened in year 2004 or 2005.

49. She vehemently denied receiving any notice to vacate from Tikaram & Associates and said that her husband must have informed his lawyer in Suva Mr. Sheik Shah to respond to the eviction notice. Her husband had gone to Suva to engage Mr. Sheil Shah. Mr. Sheik Shah was practicing in Labasa but he had his family there and would be in Suva too.
50. On the property they now have only the vegetable farm. There is no dalo or yaqona since 2012 or 2014 when the hurricane came. They plant dalo and yaqona on one another farm now. This farm they have leased for three years.

The Issues, Law and Analysis

51. From the evidence and the pleadings I find that the Court has to determine the following issues:
1. ***Are there any binding sales and purchase agreement between the parties to the proceedings?***
 2. ***Can specific performance of any existing sale and purchase agreement be granted between the parties?***
 3. ***Is the defendant entitled to occupy the land by virtue of any right?***
 4. ***Has the defendant so far occupied the land by virtue of any right in law or equity? If not, then are the plaintiffs entitled to mesne profits and or damages for wrongful occupation of the land as a trespasser?***

A. The Agreements /Specific Performance/ Vacant Possession

52. I will decide the first three issues together which are whether there are any binding sales and purchase agreement between the parties; whether the

defendant as counter-claimed is entitled to specific performance of any one of it; and whether the defendant has a right in law or equity to continue to occupy the property.

(i) **The First Agreement**

53. The deceased and the defendant entered into the very first agreement on 17 July 2001. The agreement reads as follows:

“ Agreement

This agreement made on 17 July, 2001 between Susie V. Leonard, seller, of Navaca and Nasir Khan son of Hasim Khan buyer.

Susie V. Leonard agrees to sell 5 acres of agricultural land to the buyer for the sum of F\$5,500.00 per acre, a total of 5 acres for the total price of F\$27,500.00 with the agents commission of 5% being taken off the total price, leaving F\$26,225.00 to pay when the title is available with the subdivision is complete.

If the subdivision is not complete with a clean title within 12 months from the 17th day of July, 2001, the buyer is entitled to a refund of 100% plus 5 % interest.

The buyer has permission from the seller to occupy during these 12 months. The holding deposit of F\$26,225.00 is to be deposited into Colonial National Bank account Taveuni Branch, Mr. Brian Leonard 0590232014910.

Bank receipt attached and copies.

Signed

(Not Signed)

Susie V. Leonard

Sgd. Nasir Khan

Buyer

The contents of this agreement was translated to me and I, (sgd. Nasir Khan)

Fully understand the agreement.

Signed: Buyer sgd.

Witnessed by: sgd. and sealed

Vasu Shankaran"

54. The agreement was not signed by the vendor but signed by the defendant. For the defendant to bring any action for sale of the property or claim any interest in the property of the deceased, he must show that the above agreement or note was signed by the deceased.
55. There is evidence before me which has not been contradicted that the sale note of 17 July 2001 was never signed by the deceased. I therefore accept the plaintiffs' evidence that the deceased did not sign the sale note and thus no action on that note or any interest in the property can be brought by the defendant pursuant to s. 59(d) of the IGBA:

" No action shall be brought upon any contract or sale of lands, tenements or hereditaments or any interest in or concerning them unless the agreement upon which such action is to be brought or some memorandum or note thereof is in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised".

56. The 17 July 2001 agreement is the only agreement that the defendant accepts in his pleadings. He denied that that agreement was ever cancelled and others entered into between the deceased and him or his wife.
57. In law, thus, the defendant cannot bring an action for specific performance on the agreement dated 17 July 2001 nor can he rely on the same to continue occupation

of the land as the agreement is not legally binding for want of compliance of s. 59(d) of the IGBA.

58. On the evidence before me, I find that if there was any such oral agreement made on 17 July 2001 that was cancelled in that the defendant's wife became the new purchaser and the purchase price was increased to \$32, 695. The documentary evidence and the evidence of the defendant's wife are consistent to this effect. So, on the evidence alone, the defendant cannot rely on this first agreement which was terminated to seek specific performance and continued occupation of the property.

(ii) *The Second Agreement*

59. Plaintiffs exhibit 4 is purported to be the second agreement that was tendered in evidence. The defendant denies in his defence that any second agreement between the parties or his wife was entered into. Paragraphs 3 and 4 of the defence are material:

“3. The defendant categorically denies the allegations contained in paragraph 3 of the statement of claim and says that the agreement between him and the deceased Susie V. Leonard dated 17 July 2001 was never varied or cancelled.

4. The defendant categorically denies the allegations contained in paragraph 4 of the statement of claim and further says that his wife Farida Bi did not at any time whatsoever enter into any agreement with the deceased Susie V. Leonard for purchase of land”.

60. On the defendant's own pleadings and contention, no orders for specific performance or continued occupation can be granted to the defendant on the second agreement. He denies any such agreement and is not seeking any relief on the same. Having made that finding I feel it is my obligation to closely look at the second agreement as the wife's evidence was totally contrary to the pleadings.

The wife stated that the first agreement was varied in that she was the purchaser and the purchase price was \$32,000.

61. I have to thus ascertain on the evidence whether this second agreement is binding between the parties and whether any reliance can be placed on it to seek specific performance and continued occupation of the property by the defendant.

62. The second agreement reads:

“ **To Whom It May Concern**

I Susie Vulase Leonard do agree to sell my Land Lot 4 Title number 35459 to Farida Bi for the sum of \$32,695 (Thirty Two Thousand Six Hundred and Ninety Five Dollars) less deposit of \$4,000 (Four Thousand Dollars) leaving a balance of \$28,695 (Twenty Eight Thousand Six Hundred and Ninety Five Dollars).

Sgd.

Susie V. Leonard”

63. The second agreement this time complies with s. 59(d) of the IGBA in that it was signed by the deceased but not signed by the purchaser. However the other party to the contract is stipulated to be the defendant's wife and not the defendant.

64. For the Court to even deal with the question of specific performance between parties to the contract, the wife should have been made a party to the proceeding by the defendant. However I understand that he does not accept that to be the agreement that was ever made between the deceased and his wife.

65. All the responses to the notices to vacate by the defendant's solicitor recognise that the wife was the party to the sale contract and not the husband. Having acknowledged that the wife was a party to the contract and not including her as a party to the proceeding for the Court to consider the question of specific

performance is the choice of the defendant and he now cannot rely on that agreement to compel the Court to decide the issue of specific performance.

66. The issue now for me to decide is whether the defendant can rely on this agreement to claim for continued occupation of the property as it is an agreement which is signed by the deceased, part performance has been made in terms of payment and occupation, and that he is the spouse of the party to the contract and is expected in matrimonial law to live with his wife in a property they have acquired by law or equity.
67. The second agreement indicates that a sum of \$4,000 has been paid. There is no other reliable evidence of any other payments being made.
68. Apart from the land that is to be sold, the purchase price of the land, and the deposit that was paid there are no other terms in the contract for the parties to comply. The agreement is uncertain in every aspect. A good agreement would have included the clauses on payment, settlement, transfer, occupation, vacant possession and many more.
69. The question of payment is not certain from the agreement but I find that it is now a decade since the defendants made any payments towards the purchase price apart from the \$4,000. There is no evidence before me that either party to the second contract has performed or was willing to perform their part of the bargain at all times.
70. I do take notice that the defendant has made substantial improvements on the land in that he has built a house and cultivated the land for more than a decade. He has worked the farm and that he has produce on the farm as at the date of hearing. However the defendant and his family have had the enjoyment of the farm for the past decade for only a sum of \$4,000. They have reaped the benefit of occupation and it is inequitable to allow them to stay on the land any longer as the defendant does not recognise the second agreement and if the wife does,

there is no evidence that they were at any point ready to complete the agreement. To give them any benefit of continued occupation by virtue of the second agreement is inequitable.

71. I have made a finding that only a sum of \$4,000 was paid on the agreement. To substantiate the finding I will address the evidence that was tendered in Court.
72. On the first agreement there is no evidence of any payment. The onus to prove payment is on the defendant. There is no evidence apart from the wife's unreliable oral evidence that more than a sum of \$4,000 has been paid in total for the property.
73. The wife gave evidence that a sum of approximately \$22,000 has been paid. The evidence of the wife was inconsistent to place any reliance on.
74. In her evidence in chief she stated that a sum of \$4,000 and instalment payments between \$100 to \$300 were made to the deceased. In her cross-examination she increased the amount to paying two instalments of \$4,000 in 2004 and 2005, one instalment of \$7,000 in 2008 and various instalment payments between \$100 to \$300. The wife is not even sure of when the first payment was made. She said in her evidence initially that the first \$4,000 was paid on the first agreement then she changes her version and said that the first instalment was made in the year 2004.
75. Plaintiff's exhibit 8 is a letter by Mr. Sheik H. Shah to Tikaram & Associates. This letter was in response to a notice to vacate given to the defendant by Tikaram & Associates. That letter was written 13 December 2006. That letter indicates that only a sum of \$6,000 was paid until the end of year 2006. The material part of the letter reads:

“ ... However we are instructed by our client that your client agreed to sell lot 4 CT 35459 to FARIDA BI for the sum of \$32,695.00 of which Farida paid \$6,000 leaving a

balance of \$28,695.00. Further more Farida and her husband Nazir Khan spent in process \$6,500 to erect a concrete and corrugated iron house on the said lot. Further Farida and Nazir Khan have planted yaqona worth \$23,000 in the said lot”.

76. According to the wife’s evidence she paid a clear \$8,000 and some instalment payments between \$100 to \$300 before end of year 2006. If that is the case then there is definite inconsistency and unreliable evidence of payments by the wife.
77. The wife also stated that she paid \$7,000 in the year 2008. That could not be possible because the dispute between the parties had arisen regarding vacant possession in the year 2006. It is inconceivable that the defendant will pay any more money when he had been asked to evict the property and that if he paid any monies he would not have done so directly to the deceased without obtaining any proof of payment.
78. On the balance of probability I therefore find that the defendant only paid \$4,000 on the property and since a decade has had the enjoyment of exclusive occupation and possession of the property. He has by any calculation received the return for his money and to allow him to continue to stay would be inequitable as there is no evidence that he made any attempts to pay the full purchase price on the second agreement.
79. He did go to the FDB in Savusavu but did not proceed to secure the loan on the second agreement as he was not happy that the price had been increased. The defendant has on his own pleadings and evidence shown to Court that he has cash crops on the land through which he could have easily made the payments but that no sums apart from the \$4,000 were paid.

(iii) The Third Agreement

80. There is no evidence in Court that the second agreement between Farida Bi and the deceased was lawfully terminated except for the assertion in the pleadings. Pleadings are not evidence and I do not find that there is evidence that the

defendant cancelled the second agreement by saying that he is going to Labasa and that he does not need the property anymore. The agreement was between the defendant's wife and the deceased. Any repudiation of the contract can only be made by a party to the contract. That is the basic principle of contract law.

81. I accept the wife's evidence that when she went to secure the loan on the second agreement, the bank enquired about the purchase price and the title. The deceased then wrote a letter and increased the sale price of the land to \$50,000. That is when the defendant did not go through the loan transaction. The defendant ought to have proceeded with his transaction on the second agreement and/or sought the appropriate remedy from Court but neither him nor his wife showed any willingness to proceed even with the second agreement.
82. On the evidence I do find that there was any third agreement between the parties or between the deceased and the defendant's spouse.

B. Past Occupation/ Mesne Profits

83. If the second contract between the parties was lawfully terminated then the defendant and his family would become trespassers on the property. The plaintiffs would then be entitled to "mesne profits". This could be damages for the rent that would have been obtained on a re-letting but for the continued occupation. The rent could be the market rent that could have been obtained.
84. It is not necessary for the owner to prove that the property would have been leased to someone else in the defendant's absence: **Swordheath Properties Ltd. V. Tabet [1979] 1 WLR 285 at 288 and Inverugie Investments Ltd. Hackett [1995] 1 WLR 713.**
85. The deceased would have a right to terminate the contract of sale for the tenant's default of the sale and purchase agreement. The principle in the general law of contract is that if one party to a contract repudiates their obligations under the

contract, the other party may accept the repudiation and terminate the contract and sue for damages for breach of contract.

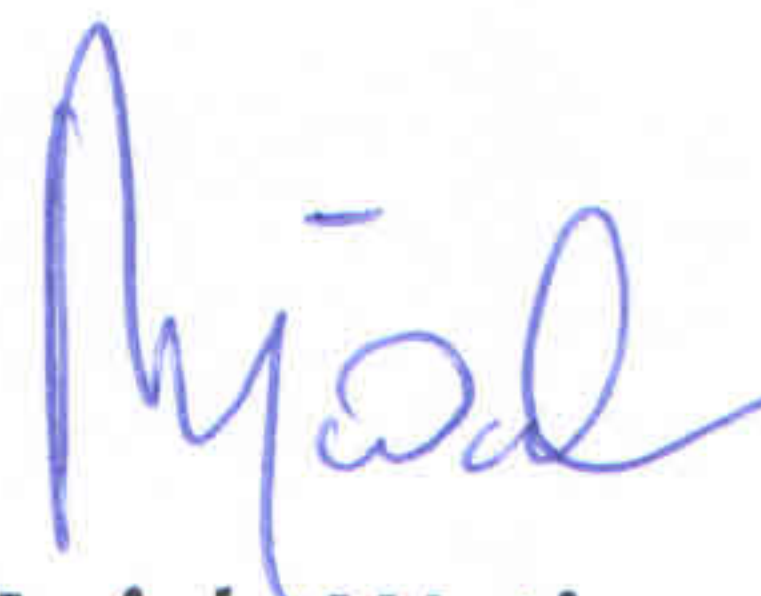
86. The defendant went into occupation of the property after the first agreement. That was cancelled and the defendant's wife entered into the second agreement. The defendant continued to occupy the property based on the second agreement. That second agreement was made with the wife. There is no evidence before me that the wife repudiated the agreement and that repudiation was accepted by the deceased and that she terminated the sale under the second agreement. There were actually no specific terms and conditions for the wife to comply with. There was requirement for payment of monies and the timeframe for that requirement was not stipulated.
87. Since the occupation of the property continued on the basis of the second agreement, I do not find that the defendant was a trespasser on the property. The plaintiffs are therefore not entitled to mesne profits for the unlawful occupation. However I will reiterate that continued occupation based on the second agreement which the defendant does not recognise and in the agreement which the defendant or his wife has shown no willingness to complete is inequitable.

Final Analysis

88. In the final analysis I find that there is no binding sale and purchase agreement between the parties to the proceeding.
89. The defendant has no right in law or equity to continue to occupy the property in question.
90. The plaintiffs are not entitled to mesne profits by virtue of the occupation of the property by the defendant and his family.
91. I therefore make the following orders:

- (a). *The defendant and his servants or agents or whosoever is occupying the property on the defendant's invitation and permission shall give vacant possession of the property to the plaintiffs within 3 months beginning 1 February 2015.*
- (b). *The defendant is entitled to remove his house and harvest his existing crops from the property without damaging the property. This must be done within 3 months beginning 1 February 2015.*

92. I order that each party bears their own costs of the action as the situation they both are in is as a result of both parties not clarifying to each other their obligations and performing the same.



Anjala Wati

Judge

23.01.2015



To:

1. *Cromptons, solicitors for the Plaintiffs.*
2. *Mr. Nasir Khan, the defendant.*
3. *File: Labasa HBC 60 of 2009.*