

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 63 of 2009

BETWEEN : **PARMOD KUMAR** of Lot 22 Kavuva Place, Nakasi, Nasinu, Building Contractor.

PLAINTIFF

AND : **D S NARAYAN LIMITED** of 322 Princess Road, Tamavua, Suva.

1ST DEFENDANT

AND : **FIJI PUBLIC TRUSTEE CORPORATION LIMITED** as
Administrator and Trustee of the estate of **SAVITA DEVI** under whose name
Certificate of Title No. 21334 is registered.

2ND DEFENDANT

AND : **THE REGISTRAR OF TITLES** of Suvavou House, Suva.

3RD DEFENDANT

AND : **ATTORNEY GENERAL**

4TH DEFENDANT

BEFORE: **Master Vishwa Datt Sharma**

COUNSEL: **Mr. O'Driscoll** for the Plaintiff
No appearance of the **First Defendant**

Date of Ruling: **1st June, 2017**

JUDGMENT

*[Summons for Summary Judgment pursuant to Order 86 Rule 1 of the High Court Rules,
1988, the Land Transfer Act and the Inherent Jurisdiction of the Court]*

APPLICATION

1. This is the Plaintiff's Summons filed on 02nd July, 2015 seeking the following orders-
 - (a) That Summary Judgment be granted against the 1st Defendant for specific performance;
 - (b) That the transfer of Certificate of Title No. 21334 by the 1st Defendant to the deceased Savita Devi be deemed null and of no effect; That in the alternative an order be made for the 2nd Defendant to sign a transfer to the Plaintiff; and
 - (c) That Costs to the Plaintiff on a full indemnity basis be granted.
2. The Application is made pursuant to *Order 86 Rule 1 of the High Court Rules, 1988 and the Land Transfer Act and the Inherent Jurisdiction of the High Court.*
3. The 1st Defendant was served with the Application and the Court record reveals that no response was filed to the Plaintiff's Summary Judgment Application.
4. Therefore, the matter proceeded to the hearing on an undefended basis.

CASE BACKGROUND

5. The Plaintiff filed a Writ Of Summons on 20th February, 2009 alleging Fraud and sought for the following orders-
 - An order for judgment against the 1st and 2nd Defendants for specific performance;
 - Transfer of the said property by the 1st Defendant to 2nd Defendant be deemed null and void;
 - The transfer be reversed to the original agreement;
 - Declarations; and
 - Damages.
6. The 1st Defendant filed his Defence as is required in law.
7. Thereafter, the pleadings were completed by the parties to the proceedings and finally the matter was remitted before a Judge for hearing and determination.

8. The parties opted to settle and resolve the matter. The Court granted an adjournment stating that if it is no settled, then the matter be put before him for hearing.
9. Subsequently, other Interlocutory applications were filed and the matter was put before the then Master of the High Court to deal with the same and thereafter, on 02nd July, 2015, it prompted the Plaintiff to file a Summary Judgment application against the 1st Defendant seeking the orders as mentioned hereinabove at paragraph 1.
10. Hence, the current application before this Court.

PLAINTIFF'S CASE

11. The Plaintiff submitted that all material facts of this case and all supporting material are contained in the Plaintiff's Affidavit in Support deposed on 30th June, 2015. No opposition has been filed despite the application having been served to all Defendants.
12. The Plaintiff and the 1st Defendant entered into a legally binding contract to which the Plaintiff completed his obligations as per the Agreement.
13. The 1st Defendant subsequently attempted to transfer the said property to his deceased wife, Savita Devi, despite the Plaintiff's legally binding Contract.
14. The 2nd Defendant in nominal and only a party to this proceeding as the current representative of the Estate of Savita Devi, deceased by virtue of a Court Order in other proceedings in which the Estate of Savita Devi is a party.
15. The facts are supported by clear evidence as per the Plaintiff's affidavit.
16. The Plaintiff is entitled to Summary Judgment pursuant to Order 86 Rule 1 of the High Court Rules, 1988, the basis of his claim being an acknowledged sale and purchase agreement as is clear from the pleadings filed.

THE LAW

17. Order 86 Rule 1 of the High Court Rules, 1988 deals with Summary Judgment Applications which provides as follows-

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) *for rescission of such an agreement, or*
- (c) *for the forfeiture or return of any deposit made under such an agreement, the plaintiff may, on the ground that the defendant has no defence to the action, apply to the Court for judgment.*

ANALYSIS AND DETERMINATION

18. The Plaintiff is seeking Summary Judgment against the 1st Defendant for Specific performance and consequential orders as set out hereinabove at paragraph 1 of this Judgment.
19. *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 may apply to Court for Summary Judgment on the ground that the Defendant has no defence to the action.*
20. 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 reason 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.
21. In this case, the 1st Defendant has not filed and served any Affidavit Response in order to defend the Plaintiff's Summary Judgment Application.
22. Reference is made to the Fiji Court of Appeal case of Naidu v Carpenters Fiji Ltd [1992] Fiji Law Rp 28; [1992] 38 FLR 215 (27 November 1992) - wherein the Court said that '*The Appellants did not file any affidavit evidence in answer to the Respondent's application for summary judgment in the High Court and judgment was entered against them.*

On appeal the Court of Appeal-

HELD: while, except in a clear case, it is rare to allow a defendant to show cause other than by affidavit, a defence already served may be a sufficient mode of showing cause.

23. In this case, the 1st Defendant did file a Defence on 16th April, 2009 wherein he together with the 2nd Defendant stated as follows-

- '1st Defendant is unaware as to when exactly the Plaintiff went into occupation but admits that the Plaintiff currently resides on the subject property;
- 1st Defendant was the registered owner of the said property until 11th April, 2003;
- The Plaintiff and the Defendant entered into a Sale & Purchase Agreement in early February, 1996 for the purchase of CT. No. 21334 DP No. 4988 on terms & conditions therein for a consideration sum of \$15,000 and the Plaintiff paid a deposit of \$2,000;
- The Plaintiff breached other terms & conditions of the Agreement in particular failing to make monthly installments of \$227 per month as agreed upon; and
- 1st Defendant further stated that Savita Devi and Deo Narayan were the Directors of the 1st Defendant and the transfer of CT NO. 21334 was not fraudulent and illegal.'

24. On the other hand, the Plaintiff filed a detailed Affidavit in Support and in summary he deposed as follows-

- 'That since 1996, he had been living with his family at Lot 22 Kauvula Road, Nakasi, Nasinu;
- That this property is situated on Certificate of Title No. 21334 being Lot 22 on Deposit Plan No. 4988;
- That the 1st Defendant was the registered proprietor of the said piece of land on CT 21334 up until sometime in 2003;
- That in 1996, the 1st Defendant and Plaintiff agreed that the Plaintiff would buy and the 1st Defendant would sell CT 21334 for a consideration sum of \$15,500. The Agreement was incorporated in a Sale & Purchase Agreement duly signed by both parties. The Plaintiff was never given a copy of the Sale & Purchase Agreement, however the 1st Defendant's subsequent conduct and Plaintiff's payment of money towards the sale confirms the basic terms of the Sale & Purchase Agreement;
- That the Plaintiff paid a deposit of \$2,000 upfront and a sum of \$3950 in instalments as agreed upon and on 18th July, 2000, paid \$8,500 by a cheque to Savita Devi. By July, the Plaintiff paid a total sum of \$14,450 towards the purchase price with remaining balance of \$ 1,050;
- In October, 2002, the Plaintiff Solicitor received a letter from Kholi & Singh Solicitors demanding a sum of \$31,052-84';
- The plaintiff then instructed his lawyers Tevita Fa & Associates to reply to the letter as follows-

'That the plaintiff has paid a total sum of \$ 5,950 and a balance of \$9,550 remains unpaid. The Plaintiff required a copy of the Sale & Purchase Agreement in order to raise the balance sum of the purchase price with his bank'.

- *'No response was received by the Plaintiff;*
- *A search with the Registrar of Titles office was conducted on 03rd January, 2003 and found that there was an unsuccessful attempt made to transfer the property CT No. 21334 to one Savita Devi, the wife of D.S.Narayan and a director of the 1st Defendant, and Savita Devi has since passed away on 12th December, 2002;*
- *Hon. Mr Justice Scott had made certain order in HBC 171 of 2003 and in November, 2003, the Plaintiff learnt that the property was transferred to one Savita Devi contrary to Hon. Justice Scott's orders;*
- *The Plaintiff adds, that he had always been and still ready and able and willing to perform his part of the said Sale & Purchase Agreement'.*

25. From the Plaintiff's affidavit hereinabove the following can be concluded-

- (i) That the Plaintiff is alleging fraud since the property was transferred to the Deceased Savita Devi;
- (ii) That the Plaintiff had entered into the Sale & Purchase Agreement with the 1st Defendant to purchase the property Certificate of Title No. 21334 on Deposit Plan No. 4988. This is confirmed from the Letter written by Kholi & Singh dated 18th October, 2002 who further states that a sum of \$2,000 was received as a deposit.
- (iii) That the contents of this letter is also evident of the fact that the balance purchase price was \$31,052-84 together with the interest and adjustments therein and upon the failure of the Plaintiff settling the balance purchase price on or before the 02nd November, 2002, would lead to the Agreement being rescinded and forfeiture of the \$2,000 deposit.

26. 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.

27. In this case the Defendant did not make appearances nor did he file and serve any Affidavit Response. However, he did file and serve a Defence which I find is a sufficient mode of showing cause to the Plaintiff's current Summary Judgment Application.
28. The Plaintiff has alleged fraud and the transfer to Savita Devi by the 3rd Defendant was done in defiance of Hon. Mr. Justice Scott's injunctive order and the Principle that a lawful transfer of land could only be done to a living person and not a dead person, since Savita Devi to whom the subject land/property was transferred was a deceased.
29. Further, I find that the 3rd Defendant, Registrar of Titles has denied that the transfer to Savita Devi was illegal and continues to contend that Savita Devi was properly registered and that there was no fraud as alleged. This is confirmed by the Plaintiff in his Statement of Claim at paragraph 30.
30. There are legal issues raised in the 1st Defendant's Defence and allegation of fraud raised by the Plaintiff on the part of the 3rd Defendant, The Registrar of Titles. These are tribal issues and need to be dealt with by the court. The evidence of the parties need to be tested in order to arrive at a just and fair conclusion once and for all.
31. I have taken into consideration the contents of the 1st Defendant's Defence and noted the fact that the 1st Defendant did not appear to counter the Plaintiff's Summary Judgment application but the Court cannot just turn a blind eye to the 1st Defendant's Defence.
32. Therefore, I make reference to the case of *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.'


33. In conclusion, I make the following orders-

ORDERS

- (i) The Plaintiff's Summary Judgment Application is hereby dismissed accordingly.
- (ii) There will be no order made as to Costs at the discretion of this Court.
- (iii) The matter is adjourned for further expeditious directions

Dated at SUVA this 1ST day of JUNE, 2017





MR VISHWA DATT SHARMA
Master of High Court, Suva