

IN THE HIGH COURT OF FIJI

IN THE WESTERN DIVISION AT LAUTOKA

HBC NO. 119 OF 2013

BETWEEN : **MUNIRATNAM KUMAR SAMY** 14 Puriri St, Miramar,
Wellington, New Zealand, Driver as the Sole Executor and
Trustee of the Estate of Munsamy late of Chinakoti, Ba,
Fiji, Cultivator Deceased, Testate

PLAINTIFF

AND : **ABIHYAS SHARMAS** of Yalalevu, Ba, Carpenter

1ST DEFENDANT

AND : **REGISTRAR OF TITLES**

2nd DEFENDANT (NOMINAL)

Appearances : Mrs J. Naidu for plaintiff
First defendant in person
No appearance for second defendant

Date of Hearing : 17.1.2017

Date of Ruling : 17.1.2017

R U L I N G

Introduction

1. This is a summons before me filed by the plaintiff.
2. By his summons dated 27 July 2016 and filed on 28 July 2016, in conjunction with a supporting affidavit, the plaintiff seeks the following orders:
 1. **THAT** an Order granted for the property the Crown Lease Number 8008 being LD Reference Number 4/1/2059 being Lot 6 on Plan BA 2376 Pt of Naikubukubu Formerly CT 3023 (Farm 875) situated in the province of Ba containing an area of 4.5729 hectares

together with all improvements there on be transferred to the Plaintiff herein pursuant to the Mortgage between the parties subject to the consent of Director of Lands.

2. **THAT** the Deputy Registrar shall execute any necessary memorandum of transfer and other incidental documents.
 3. **ANY** other orders the Honourable court deems just and equitable.
 4. **THAT** cost of his application together with cost of sale to be deducted from the sale price.
3. The application is made pursuant to Order 31, rule 2 of the High Court Rules 1988, as amended (“HCR”).
 4. The first defendant (hereinafter may be sometimes referred to as “the defendant”) filed his affidavit and opposes the orders being granted. While stating that the lease in question has already expired, he is asking refund of the sum of \$3000.00 being the sum obtained by the plaintiff’s father (Munsamy) on account of the sale and purchase agreement.

The Background

5. In August 2009, the original plaintiff (now being substituted by his son, Muniratnam Kumar Samy as the sole Executor and Trustee) and he entered into a Memorandum of Terms of Sale of the property for the purchase price of \$39,000.00. He paid a sum of \$3000.00 as a deposit upon execution of the agreement. The balance purchase price was to be paid by cane proceeds. The balance sum of \$36,000.00 was secured by a registered Mortgage over the property (Crown Lease). The defendant defaulted in the payment and fell into arrears of \$36,000.00. This resulted in the plaintiff bringing the 169 proceedings

to recover possession of the property from the defendant. The defendant agreed to deliver up possession of the property to the plaintiff. On 19 September 2013, the court accordingly ordered that the defendant to vacate the property after four months of the date of the order. The defendant has vacated the property in compliance of the order. The plaintiff now makes application under O. 31, r. 2 for an order that the defendant to transfer the property to the plaintiff.

The Law

6. The application is made pursuant to O.31, r. 2 of HCR. Rule 2 needs to be read with rule 1, which sets out:

Power to order sale of land (O.31, r.1)

1. *Where in any cause or matter relating to any land it appears necessary or expedient for the purposes of the cause or matter that the land or any part thereof should be sold, the Court may order that land or part to be sold, and any party bound by the order and in possession of that land or part, or in receipt of the rents and profits thereof, may be compelled to deliver up such possession or receipt to the purchaser or to such other person as the Court may direct.*

Manner of Carrying out Sale (O.31, r.2)

2. (1) *Where an order is made, whether in court or in chambers, directing any land to be sold, the Court may permit the party or person having the conduct of the sale to sell the land in such manner as he thinks fit, or may direct that the land be sold in such manner as the Court may direct for the best price that can be obtained, and all proper parties shall join in the sale and conveyance as the Court shall direct.*

(2) *The Court may give such directions as it thinks fit for the purpose of effecting the sale, including, without prejudice to the generality of the foregoing words, directions –*
 - (a) *appointing the party or person who is to have the conduct of the sale;*

- (b) *fixing the manner of sale, whether by contract conditional on the approval of the Court, private treaty, public auction, tender or some other manner;*
- (c) *fixing a reserve or minimum price;*
- (d) *requiring payment of the purchase money into Court or to trustees or other persons;*
- (e) *for settling the particulars and conditions of sale;*
- (f) *for obtaining evidence of the value of the property;*
- (g) *fixing the security (if any) to be given by the auctioneer, if the sale is to be by public auction, and the remuneration to be allowed him.*

The Decision

7. The plaintiff by his application seeks an order that the defendant transfers the property to the plaintiff. The plaintiff is the registered proprietor of the property.
8. Originally, the plaintiff has initiated this action through originating summons under s. 169 of the Land Transfer Act ("LTA") seeking vacant possession of the property. On 19 September, 2013, the court granted the order sought and terminated the proceedings. There is no question of execution as the defendant delivered up possession of the property as ordered.
9. The current application has emerged as an interlocutory application within a terminated action. In the application the plaintiff seeks the defendant to transfer the property to him (plaintiff). The relief sought by the plaintiff in the application appears to be a substantive relief under the guise of interlocutory application. The law cited by the plaintiff is not relevant to his application.
10. The order that the court made on 19 September 2013 is a conclusive judgment that brought the action to termination. The court has made its final judgment in this matter. The court is therefore functus officio.

There is no question of execution. Therefore, the court cannot make any further order. This application is a misconceived one. I therefore dismiss the application with summarily assessed costs of \$250.00 payable by the plaintiff to the defendant in two weeks.

The Outcome

1. Application dismissed.
2. The plaintiff will pay summarily assessed cost of \$250.00 to the first defendant in two (2) weeks.

M. H. Mohamed Ajmeer
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17/1/17

M. H. Mohamed Ajmeer

JUDGE

At Lautoka

17 January 2017

