

IN THE HIGH COURT OF FIJI AT SUVA

CIVIL JURISDICTION

Civil Action No. HBC 03 of 2014

BETWEEN

SHIU KUMAR NAIDU of Manikoso Housing Nasinu in the republic of Fiji.

PLAINTIFF

AND

MANJULA DEVI TARAI & URAIA TARAI both of Lot 18 Kaicaca Lane,
Manikoso Housing, Nasinu in the republic of Fiji.

DEFENDANTS

Counsel : Mr. S. Singh for the Plaintiff
Mr. K. Singh for the Defendants

Date of Hearing : 21st September, 2017

Date of Judgment : 31st October, 2017

JUDGMENT

- [1] The plaintiff who is the father and the father-in-law of the 1st and 2nd named defendants respectively, instituted these proceedings by writ of summons seeking to obtain the vacant possession of the property described as Housing Sub Lease No. 296873, Lot 18 on DP 7692, Naitasiri comprising 410 square meters. The plaintiff also claimed damages for not being able to rent the premises out from the day he became its registered proprietor.
- [2] The case of the defendant briefly is that he and the defendants became the registered proprietors of the property which is the subject matter of these proceedings (the property) by a mortgagee sale. When this property was advertised for sale the defendant placed their tender and it was approved by the Housing Authority. The purchase price was \$40,000.00. Since the defendants did not have sufficient funds to pay the initial payment the plaintiff paid the initial payment of \$14,980.00 and the plaintiff and the defendants were registered as proprietors. Although it was agreed by the defendants to pay the balance sum of \$25,200.00 they could not pay the installments as required by the Housing Authority and fell into arrears. With the understanding that the property would be transferred to him, the plaintiff paid the arrears of \$24,731.25 and on 16th January, 2013 the property was registered in his name. Once the property was transferred to him the plaintiff served the defendants with notice to vacate the premises but to no avail.
- [3] The defendants while denying that they consented to transfer the property to the plaintiff averred that their signatures found on the transfer documents have been forged. The defendants claimed general damages and damages for mental stress and anxiety. They also prayed for an order directing the plaintiff to transfer their respective shares in the property to them.
- [4] At the pre-trial conference the parties admitted the following facts:
1. The first named defendant is the eldest daughter of the plaintiff and the second named defendant is the son-in-law of the plaintiff.
 2. The defendant lodged their tender for the purchase of the said property (*HASL 444399 being Lot 18 of DP 7692*) on the 20th of June

2005 whereby the tender was approved at the price of \$40,000.00. (*The words and figures within brackets were interpolated by the counsel for the plaintiff at the commencement of the hearing with the consent of the counsel for the defendants*).

3. On or about 31st March 2008, the plaintiff financed the defendants in purchasing the said property in paying a sum of \$14,980.00 to the Housing Authority.
4. It was agreed amongst the parties that a sum of \$25,020.00 were to be paid by the defendants in securing the tender.
5. On or about 11th April 2006, the names of the plaintiff together with the defendants were registered on the lease.
6. The defendants defaulted in the payments of the remaining sum to the Housing Authority.
7. On 16th January 2013 the said property was registered in the name of the plaintiff.
8. The defendant is in occupation of the said property till to date.
9. The plaintiff had filed an application under section 169 of the Land Transfer Act for eviction against the Defendants but the learned Master had found that the defendants had an arguable case to determine the right of possession to the said property and had dismissed the summons mainly on the fact that the registration of the transfer in the name of the plaintiff was dated erroneously as 16 January 2012 when it should have been 16 January 2013.
10. The Registrar of Titles on the 6 December 2013 has rectified the error.

[5] The Housing Authority sub-lease was tendered in evidence marked as "P1" by the plaintiff. In the said lease the property is described as "*Lot 18 on DP No. 7692*" and the number of the lease is given as **296873**. When the lease was re-registered on 17th July 1998 a new number has been allocated, which is **444399**. In the minutes of the pre-trial conference the number of the lease is given as **444399** and the plaintiff, in his statement of claim, has given the number of the lease given as **296873**. However, it is clear from "P1" both these numbers are given to two leases in respect of the same property which is *lot 18 on DP No. 7692*. In deciding whether the plaintiff is entitled to have the defendants removed from the property which is the subject matter of this

action what is important is to identify the property correctly and not the number of the lease and there is no disagreement between parties that the dispute which led to the institution of these proceedings is in respect *lot 18 on DP No. 7692*.

- [6] It is the evidence of the plaintiff that the balance sum due to the Housing Authority was to be paid by the defendants. Since they failed to pay the amount due, the Housing Authority had issued a demand notice requiring the plaintiff and the defendants to pay \$22,853.30 within 30 days from the date of the service of the demand notice which the defendants failed to meet. Although the defendants had sought more time to pay the amount the Housing Authority had, by its letter dated 30th January 2012 (P4), declined the request and the Housing Authority advertised the property for mortgagee sale (P5). The plaintiff testified further that after the Housing Authority advertised the property for sale he paid the balance sum (\$24,731.25) and the defendants told him to have the property if he wants to. After paying the money with the consent of the defendants the plaintiff had the property transferred in his name. The settlement notice and the transfer document were tendered in evidence marked as "P6" and "P7" respectively. The defendants tendered in evidence the statement of account as "D5" which clearly shows that the defendants were in arrears. The 2nd named defendant said that he gave the money to his wife to pay the installments but did not know what happened to the money. If this is correct he should at least have inquired from the 1st named defendant who is his wife as to what happened to the money he gave, when he received the demand notice. The 1st named defendant also admitted that they were in arrears.
- [7] The plaintiff while denying the allegation of forgery stated that the defendants signed the consent form (P8) and the transfer (P7) in his presence. It is a fact admitted by the defendants that at the time these documents were executed the 2nd named defendant was serving a jail sentence. The plaintiff's evidence is that he took a solicitor to the prison and obtained the signature of the 2nd named defendant to "P8". The plaintiff called Mr. Nacolawa, the Solicitor who accompanied him to the prison and in whose presence the 2nd named defendant, according to the plaintiff, signed "P8" to testify at the trial.
- [8] Mr. Nacolawa testified that in 2012 he went to Natabua Prison and obtained the signature of the 2nd named defendant to "P7" and "P8". He stated further that he

explained the contents of the documents to the 2nd named defendant before he signed it and there was no force used on him to sign the document. I do not see any reason why the court should not rely on the evidence of Mr. Nacalowa. The 2nd named defendant could easily have proved that the plaintiff and Mr. Nacalowa did not come to meet him to the prison by calling an officer from the Natabua prison. In fact the solicitors of the defendants served subpoena on an officer of the Fiji Correction Services who wrote to the Registrar informing his difficulties in attending court with such a short notice. However, the defendants did not make arrangements to call the officer from the Fiji Correction Services to testify at the trial who could tell the court whether the plaintiff and Mr. Nacalowa in fact, came to the prison to see the 2nd named defendant.

- [9] The 1st named defendant is a Ward Assistant at the CWM Hospital. She testified how they became the lessees of the property which is not disputed by the plaintiff. On 13th April, 2012 she has delivered a baby by a cesarean section at the CWM Hospital and thereafter another surgery has been performed to prevent further confinements. The birth certificate of the child was tendered in evidence marked as "D4". While admitting that she was in default of payment, she testified that the Housing Authority refused her request to settle the dues at the rate of \$100.00 per week. She also said that her signature is there in the transfer document but did not know how it came to the documents. She, later in her evidence denied having signed the transfer documents and stated that she never agreed to transfer the property to the plaintiff. When questioned whether she went to Mr. Raman Singh's office she replied that she saw Mr. Raman Singh for the first time in court. It was also her evidence that she was not in a proper health condition to travel to Mr. Raman Singh's office.
- [11] Mr. Raman Singh, a solicitor, said in his evidence that the 1st named defendant came to his office and signed the transfer documents on 19th April, 2012 in his presence.
- [12] Dr. Kitone Waqanisau, the O & G Registrar testified that the 1st named defendant was discharged from the hospital on 20th April, 2012. If this evidence is correct it was not possible for the 1st named defendant to go to Mr. Raman Singh's office and signed the transfer documents. The evidence of this doctor created a doubt in the mind of the court for the reason that he gave evidence without the patient's folder. He stated further that he had some information from electronic records according to

which the 1st named defendant had been discharged from the hospital on 16th April, 2012.

[13] The learned counsel for the plaintiff confronted the 1st named defendant with a submission filed by her in Civil Action No. 151 of 2013 which has been signed by the defendants themselves. The 1st named defendant admitted that she signed this document. In that document the defendants have stated that on 19th April, 2012 the 1st named plaintiff was on sick leave, unfit to travel and was resting at home. This shows that the evidence of Dr. Kitione Waqanisau that the 1st named defendant was discharged from the hospital on 20th April, 2012 cannot be correct.

[14] Whether the 1st named defendant was not fit to travel on the 19th April, 2012 was a fact within her personal knowledge. The plaintiff and his solicitor could only say that she came to the solicitor's office with the plaintiff and I have no reason to disbelieve the plaintiff and Mr. Raman Singh, the solicitor. The defendants could have called the doctor who treated her to testify that she was not medically fit to travel out of home on that day. For reasons best known to the defendants they sought not to adduce any evidence in that regard.

[15] From this evidence two questions arise for determination. They are:

1. Has the plaintiff establish the fact that the defendants consented to the transfer of the property; and
2. If the above question is answered in the affirmative, has have the defendants been successful in their defence that their signatures have been forged?

[16] The defendants were not successful in challenging the evidence of the two witnesses who are solicitors, before whom the two documents were signed by them. There is no reason for these two witnesses to come before the court and make a false testimony.

[17] The evidence of the first named plaintiff's witness Dr. Kitione Waqanisau cannot be relied upon. I have given reasons for my decision above, in the analysis of his evidence. On the other hand as I have already stated above the 1st named plaintiff did not call a doctor to testify that she was not in a proper health condition to travel to Mr. Singh's office to sign the transfer documents. Her bare statement that she was

not fit to travel is not sufficient for the court to conclude that both the plaintiff and Mr. Singh were not telling the truth. Therefore, the court concludes that the defendants have signed the transfer documents and the allegation that their signatures have been forged is baseless.

[18] The plaintiff claimed damages at the rate of \$450.00 per month for not being able to rent the premises out. However, the plaintiff was not able to tell court how he arrived at the amount claimed. Special damages must be pleaded and proved. When he was questioned whether he obtained a report from a valuer he answered in the negative. A bare statement from the plaintiff without any evidence from someone who is qualified to ascertain the amount that could have been charged as rent for these premises is not sufficient for the court to conclude that this house could be given on rent for \$450.00 per month. Therefore, the claim of the plaintiff for damages must necessarily fail.

[19] For the reasons aforementioned the court makes the following orders:

- (1) The defendants are ordered to hand over the vacant possession of the Housing Sub Lease No. 296873 (444399), Lot 18 on DP 7692, Naitasiri comprising 410 square meters to the plaintiff.
- (2) The plaintiff's claim for damages is dismissed.
- (3) The defendants are also ordered to pay the plaintiff \$3000.00 as costs (summarily assessed) of this action.
- (4) The defendants' counter claim is dismissed.




Lyone Seneviratne

JUDGE

31st October, 2017