

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

HBC 190 of 2014

BETWEEN : **ANTHONY RICHMOND ELLIOT** of 23 Vauxhall Street,
Virginia, QLD 4014, Australia, Businessman.

PLAINTIFF

AND : **SUBHADRAMMA aka SUBADRA** as the sole Executrix
and trustee of the estate of **MANIKAWASAM** aka
MANIKAM aka **MANIKAWASAN** aka **MANIKANASAM**
aka **MANIKAMWASAN** of Volivoli, Rakiraki, Domestic
Duties.

1ST DEFENDANT

AND : **DIRECTOR OF LANDS**

2ND DEFENDANT

Appearances: Ms N. Khan for the Plaintiff
Mr. Maisamoa for the Defendant
Date of Hearing: 13 July 2018
Date of Ruling: 10 May 19

RULING

INTRODUCTION

1. Before me is a summons dated 17 April 2018 filed by Maisamoa & Associates for and on behalf of the first Defendant. The summons is filed pursuant to Order 32 Rule 6 of the High Court Rules 1988. It seeks an order that the orders made by the Court on 19 December 2014 and 29 July 2015 against the first and third Defendant be wholly set aside.

2. Order 32, Rule 6 provides that the Court may set aside any order made *ex-parte*.

ORDERS SOUGHT TO BE SET ASIDE

3. The first order that the Applicant seeks to set aside is the one that Mr. Justice Abeygunaratne made on the 09 December 2014 and sealed on 19 December 2014.
4. This was an injunctive order against the applicant in her capacity as the sole executrix and trustee of the estate of her late husband, Manikawasam a.k.a Manikam. The injunction granted on that occasion had the effect of restraining the first defendant from selling and disposing of Crown Lease No. 8642.
5. The second order which the applicant seeks to set aside is the one made on 13 July 2015 and sealed on 29 July 2015. This latter order was made after an *inter partes* hearing. That order was basically to grant a further 14 days to the plaintiff as well as the Director of Lands to file a supporting affidavit to clarify certain issues raised about whether or not the Director of Lands had consented to a certain dealing in question.

BACKGROUND

6. The first defendant's late husband, Manikam, allegedly entered into a sale and purchase agreement with the plaintiff in 2011. Manikam died in 2013. The first defendant is the executor/administratrix of the late husband's estate.

7. In 2014, the plaintiff filed an Originating Summons against the 1st defendant in her capacity as personal representative of the husband's estate. The Originating Summons is premised on the allegation that the late husband had entered into a sale and purchase agreement with the plaintiff.
8. The subject matter of the agreement is Crown Lease No. 8642. The Crown Lease is 7.0011 hectares in size. The sale and purchase agreement is conditional upon several things, one of which is the subdivision a larger piece of land out which, as I gather, is to be carved a piece over which the plaintiff claims an equitable beneficial entitlement.
9. The Originating summons was duly served on the 1st defendant on 25 November 2014. This is established by an affidavit of Zohida Abideen Ali sworn on 27 November 2014.
10. On 09 December 2014, Mr. Justice Abeygunaratne granted some interim injunctive orders to restrain the 1st defendant from selling or disposing of or encumbering the Crown Lease in question.
11. Notably, no motion seeking the injunctive orders had been filed. The sealed Orders, rather, were granted on the Originating Summons. The records show that the matter was then adjourned to 18 December 2014 for mention.
12. However, for one reason or another, the matter was placed before me on 17 December 2014 rather than on the 18 December 2014. On that occasion, I granted similar Orders to the ones that Abeygunaratne J had made and that the Fiji Development Bank be joined as a party and that the Originating Summons be amended accordingly.

13. On 23 December 2013, the Affidavit of one Ilaitia Navunisaravi was filed by the director of lands. The director is a nominal defendant. This affidavit discloses information about the plaintiff's compliance with the regulatory consents to his dealing with the late 1st defendant's husband.
14. On 3 February 2014, the plaintiff filed an Amended Originating Summons. The amendment made is simply to add the Fiji Development Bank in the intituling.

COMMENTS

15. I do note that the affidavit of service of Zohida Abideen Ali sworn on 27 November 2014 deposes that the Originating Summons was duly served on the 1st defendant on **25 November 2014**.
16. The injunctive orders which the applicant seeks to set aside at this time was handed down on **19 December 2014**. Clearly, the 1st defendant could not have been at the hearing because she was served the Originating Summons after the injunctive orders were made.
17. Also, considering that the injunctive orders were made pursuant to the Originating process rather than on any interlocutory motion, it would seem that the injunction would be mandatory and permanent in its effect.
18. There are a lot of other, seemingly serious irregularities about this case which the applicants have highlighted.

19. The claim basically is based on allegations made against the 1st defendant's deceased husband. The 1st defendant appears to be unaware of the agreement. She also said that no money has been paid with regards to the said sale and purchase agreement.
20. It may or may not be the case that there was in fact a valid and enforceable agreement. To be valid and enforceable, consideration must have been paid and the regulatory consents sought and obtained. These are just some of the issues that the 1st defendant has highlighted.
21. In any claim based on an assurance allegedly made by a deceased person, careful scrutiny of the evidence is required¹.
22. In **Weeks v Hrubala** [2008] NSWSC 162 at [20], Young CJ said:

*In a case of a person suing a deceased estate the court normally looks for some sort of corroboration: see **Re Hodgson** (1886) 31 Ch D 177 even though, as a matter of law, corroboration is not absolutely necessary. Experience, however, shows that when plaintiffs are making a claim against a deceased estate the court is wise to look for corroboration.*

23. In **Plunkett v Bull** [1915] HCA 14; (1915) 19 CLR 544, Isaacs J said:

*..... and undoubtedly it is established that in cases of this sort the Court scrutinizes very carefully a claim against the estate of a deceased person. It is not that the Court looks on the plaintiff's case with suspicion and as *prima facie* fraudulent, but it scrutinizes the evidence very carefully to see whether it is true or untrue.*

24. However, there are some serious issues to be tried in this case as highlighted by the applicants based on the above alone. Principal amongst these is the question as to whether or not there was a valid and enforceable sale and purchase agreement between the plaintiff and the 1st defendant's late

husband in 2011, in light of the issues raised about the timing and the alleged lapsed consents.

25. In the circumstances, looking at the overall interests of both parties, I am of the view that the following Orders would do justice:

- (i) the injunction is to continue but is to be deemed an interim injunction to be in force pending the determination of the main issues in this case.
- (ii) in light of the issues raised, this case is to proceed as if begun by writ.

Costs to the 1st defendant which I summarily assess at \$500-00 (five hundred dollars only). Case adjourned to 30 May for directions.



.....
Anare Tuilevuka

JUDGE

10 May 2019.

ⁱ (see New South Wales Supreme Court in Parveen Varma v Gautam Varma & Ors [2010] NSWSC 786); Clune v Collins Angus & Robertson Publishers Pty Limited [1992] FCA 503; (1992) 25 IPR 246, at 253).