

IN THE HIGH OF FIJI
CIVIL JURISDICTION
AT LABASA

Civil Action No. HBM 1 of 2019

BETWEEN: **SURESH CHAND**

APPLICANT

AND: **SANT RAM and SHIU RAM**

RESPONDENT

BEFORE: **Hon. Acting Chief Justice Kamal Kumar**

COUNSELS: **Mr H. Robinson for the Applicant**

Mr A. Bale for the Respondent

DATE OF JUDGMENT: **10 June 2020**

JUDGMENT

(Application for Committal Order)

1. On 12 February 2019, Applicant filed Ex-parte Notice of Motion for Leave to Issue Committal proceedings against the Respondents, Affidavit in Support and Statement of Facts.

2. On 13 February 2019, Justice Amaratunga granted Leave to issue Committal proceedings.
3. On 14 February 2019, Applicant filed Notice of Motion for Committal and Affidavit in Support with returnable date of 26 February 2019.
4. Notice of Motion, Affidavit in Support with copy of Order (Leave) and Statement was served on the Respondents on 8 February 2019.
5. On 26 February 2019, parties were directed to file Affidavits and Submissions and this matter was adjourned to 14 March 2019, for hearing.
6. On 14 March 2019, the Application for Committal was heard and adjourned for Ruling on Notice.

Application for Committal

7. In this instance, the Applicants has complied with Order 52 Rules 2; 3(1)(2)(3), (5) of High Court Rules 1988.
8. Her Ladyship Justice Scutt (as she then was) in **DR v MR, Attorney-General of Fiji and Human Rights Commission** (Amicus Curae) HBM 65 of 2008L (30 March 2009) after analyzing various case authorities identified the principles and factors to be taken into account when dealing with Application for Committal, which are as follows:-
 - (i) The burden of proof lies with the Applicant and standard is beyond reasonable doubt. For disobedience of a Court Order, it must be shown that Respondent has willfully disobeyed the Order. An unintentional act of disobedience is not enough: **Steiner v Wilby Steiner Ltd** (1966) WLR 986;
 - (ii) The prescribed procedural steps antecedent to exercise of jurisdiction must be scrupulously observed and strict compliance insisted upon. **Gordon v. Gordon** (1946) TLR 217 (2 January 1946); **Natural Waters of**

Viti Ltd v. Crystal Clear Mineral Water (Fiji) Ltd [2005] FJCA 46; ABU00 & 001A.2004L (22 April 2005);

- (iii) Jurisdiction to commit should be used sparingly and in serious case (**Shark v. Rice** [999] FJCA AAU807.U.97s (12 November 1999);
- (iv) Order must be in unambiguous term and direct what is to be done and when or by when it is to be done. **Iberian Trust Limited v. Founders Trust and Investment Company Limited** [1932] 2KB87;
- (v) The Order must be indorsed with a “Penal Notice”.
- (vi) Means of obeying the Order lies with the Respondent. **Attorney-General v. Walthamstow Urban Council** 11 TLR 533.

9. The relevant Magistrates Court Order in Civil Action No. 2 of 2009 reads as follows:-

“Order

Before the Resident Magistrate Mr. Tomasi Bainivalu on the 15th day of August 2014.

Upon hearing M. Sadiq, Counsel for the Plaintiff and Upon hearing Mr A. Kohli, Solicitor for both Defendants.

It is hereby ordered by consent as follows:-

1. *That the Defendant shall Transfer the block 5 in the proposed sub-division of CT 21230 to the Plaintiff forthwith.*
2. *That the Plaintiff shall pay no more money for the said block to the Defendants.*
3. *That the Plaintiff shall pay the whole cost of the Transfer.*
4. *That each party shall bear their own costs.*
5. *The matter is adjourned to 12th November, 2014, for mention.*

DATED at Labasa this 22nd day of October 2014.

(“the Order”)

10. It is apparent from the Order that the Learned Magistrate and Counsel appearing before the Learned Magistrate did not fully appreciate as to how transfer of lots subject to land being subdivided is carried out.
11. From what I understand the process of subdivision of a freehold land is as follows:-
 - (i) Owner of land through his/her surveyor submits a proposed/draft (commonly called scheme plan) to Director of Town and Country Planning and if in urban area then through local council for his/her approval;
 - (ii) Director of Town and Country Planning (“**DOTCP**”) after assessing the scheme plan and obtaining certain approval and comments from statutory bodies like National Fire Authority, Fiji Roads Authority and Environment Department approves the scheme plan subject to terms and conditions;
 - (iii) Once the owner complies with the terms and conditions to satisfaction of DOTCP and other regulatory bodies, the Surveyor then submits final subdivision plan for DOTCP’s approval;
 - (iv) Once approved by DOTCP, deposited plan (**DP**) number is allocated and Subdivision Plan is registered with Registrar of Titles;
 - (v) Once Subdivision Plan is registered, the Owner can obtain Titles over respective lots or transfer lots to third parties from the DP.
12. It must also be noted that lot numbers and size of lots that was subject to proposed plan sometimes may not be exactly the same once final plan is approved.
13. What is stated at paragraph 11 of this Judgment does not stop the Owner from entering into an Agreement to sell lots subject to the proposed/draft/scheme plan prior to final plan being approved/registered. Of course such sale will be

“subject to survey” with clear understanding that size and lot number may differ.

14. Paragraph 1 of the Order required Respondents to transfer block 5 (can be taken as lot) in the proposed division of CT 21230 forthwith.

15. The Appellant at paragraph 4 and 5 of his Affidavit in Support sworn on 14 February 2019, states as follows:-

“4. That Ram Baran sub-divided his portion of the Land and sold block 5 on the proposed sub-division to Kamlesh Chand.

5. That later the said Kamlesh Chand sold that block 5 on the proposed sub-division to me.”

16. Respondent at paragraph 7 of his Affidavit in Opposition sworn on 5 March 2019, states as follows:-

“7. That paragraph 4 is denied as Ram Baran died on 25th of December 2010. Works on the sub-division was done by my children Rachael Rohini Kesteven and Salesh Biran Prasad in 2015.”

17. The fact that subdivision was completed by his son-in-law and daughter in 2015, cannot be correct for the reason that:-

(i) Subdivision Plan in respect to land subject to CT 21230 must have been approved/registered in 2013;

(ii) Subdivision Plan was allocated number being DP 10216;

(iii) Certificate of Title over Lot 5 on DP 10216 was issued by Registrar of Titles on 13 November 2013 (Annexure “B” of Applicants Affidavit in Support sworn on 14 February 2019) which would not have been possible if subdivision was completed in 2015 and not 2013.

18. From what is stated at paragraphs 10 to 17 of this Judgment, there is no doubt that the Order for Respondent to Transfer block 5 in the proposed sub-division

on CT 21230 is unclear and ambiguous for the reason that there was no proposed subdivision when the Order was made on 15 August 2014.

19. Even if the land was properly described, this Court fails to find as to how the Transfer could be done forthwith.
20. It is common knowledge that there are various steps taken to Transfer a real property. Some of which is drawing up of Transfer with incidental documents, payment of stamp duty, obtaining Capital Gains Tax Certificate from Commissioner of Inland Revenue Services. The process obviously takes time and transfer cannot be carried out forthwith.
21. This Court finds that Order is quite ambiguous and unclear with no fixed time limit to take steps for the transfer forthwith Block 5 even if property was correctly described.
22. There is no doubt the Order does not carry a Penal Notice which is fatal omission by Applicant or his Solicitor.
23. This Court therefore has no alternative but to dismiss the Notice of Motion for Committal.


Costs

24. Both parties filed Affidavits and Submissions with Respondents Counsel handing in case authorities.

Order

25. This Court makes following Orders:-
 - (i) Applicant's Notice of Motion for Order for Committal filed on 14 February 2019 is dismissed and struck out;

- (ii) Applicant do pay Respondents cost assessed in the sum of \$800.00 within twenty-one (21) days from date of this Judgment.


K. Kumar
ACTING CHIEF JUSTICE



At Labasa

10 June 2020

M. Sadiq Esquire for the Applicant

Lal Patel Bale Lawyers for the Respondents