

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**CIVIL JURISDICTION**

HBC 54 of 2010

**BETWEEN:**            **SHIRI KRISHNA** father's name Ram Sarup of Navakai, Nadi but temporarily of Sacramento, USA, a retired person.

**PLAINTIFF**

**A N D:**                **RATU LIVAI VOLAVOLA DABEA** of Navakai, Nadi, a Fuelling Inspector.

**FIRST DEFENDANT**

**A N D:**                **DIRECTOR OF LANDS**

**SECOND DEFENDANT**

**A N D:**                **ATTORNEY GENERAL**

**THIRD DEFENDANT**

**A N D:**                **REGISTRAR OF TITLES**

**FOURTH DEFENDANT**

Appearances:            Hari Ram for the Plaintiff  
                                 Ms. Sangeeta Chand for the Defendants  
Date of Hearing:         13.04.2011 & 06.05.2011  
Date of Ruling:         07.02.2020

**R U L I N G**

1. Before me is a Summons filed on 24 November 2010 by the Plaintiff seeking the following Orders:
  - (i) An Order that the Crown Lease No. 16460 granted to the First Defendant be cancelled.
  - (ii) Costs.

2. The Summons is supported by an affidavit sworn by Shiu Sahay ("Sahay") 19 November 2010.
3. Sahay is the lawfully appointed attorney of the plaintiff, Shri Krishna ("Krishna")<sup>i</sup>. According to Sahay, Krishna is the registered lessee of Crown Lease No. 10020 and known as Lot 1 Plan SO 497 Solawaru, Enamanu and Nubu situated at Navakai ("CL 10020"). This land 1.5091 hectares in acreage<sup>ii</sup>.
4. The Summons is opposed by an Affidavit sworn by Adivuna Drikalu ("Adivuna") on 16 December 2010.

#### C.L 16460 WAS CARVED OUT OF C.L 10020

5. In June 2002, Krishna and the first defendant ("Ratu Livai") entered into two agreements. The first was a Tenancy Agreement<sup>iii</sup>. The second was a Sale and Purchase Agreement entered into on 05 June 2002.
6. It appears to be clear from the affidavits sworn by Sahay and Adivuna that CL 10020 was subdivided into two lots at some stage out of which Lot 1 and Lot 2 were created.
7. Lot 1 became C.L 16460. It is the Lot which is the subject matter of the sale and purchase agreement between Krishna and Ratu Livai. CL 16460 was registered in favour of Ratu Livai on 21 April 2006. It has an area of 1496 square meters.
8. Lot 2 was sold by Krishna to one Jenendra Chand for the sum of \$10,000.00.
9. Ratu Livai is the current registered proprietor of C.L 16460. He went in occupation of Lot 1 in 2002 pursuant to the Tenancy Agreement, although, the transfer to him happened a few years later pursuant to the sale agreement.
10. Notably, CL 10020 was issued for a term of twenty eight (28) years eight months and twenty two days from 09 July 1984. Sahay says that it was to expire on 31 December 2012. According to Adivuna, it expired later on 31 March 2013.

## WHY KRISHNA WANTS LOT 1 (C.L. 16460) CANCELLED?

11. Krishna wants C.L 16460 cancelled for the following reasons:
  - (i) firstly, he alleges that Ratu Livai has not paid the consideration for the purchase of Lot 1.
  - (ii) secondly, he alleges that the transfer to Livai was carried out by their common solicitor without any knowledge of Krishna or Ratu Livai.
  - (iii) thirdly, he alleges that prior to the transfer, there had been a mortgage on CL 10020. This mortgage remains undischarged to this day<sup>v</sup>.
  
12. The consideration for Lot as stated in the sale and purchase agreement was seventy thousand dollars (\$70,000)<sup>v</sup>. This was to be settled by following arrangement:
  - (i) that Ratu Livai would pay Krishna the sum of ten thousand dollars (\$10,000) as deposit on 17 June 2002.
  - (ii) that the balance of sixty thousand dollars (\$60,000) was to be paid by Ratu Livai at settlement.
  - (iii) Krishna was to transfer "the said portion of the said Crown Lease" in exchange for the consideration sum.
  
13. Notably, Krishna has not seen fit to join the common solicitor or the mortgagee as parties in these proceedings.

## WHAT KRISHNA ALLEGES AGAINST THE COMMON SOLICITOR

14. Messrs Patel & Sharma, Nadi was the common solicitor for Ratu Livai and Krishna. Patel & Sharma prepared the Sale and Purchase Agreement and the Tenancy Agreement. They were also retained by the parties to carry out and complete the transactions under the Sale & Purchase Agreement.
  
15. Sahay deposes in his affidavit that, contrary to the Sale & Purchase Agreement, Patel & Sharma prepared an Instrument of Partial Transfer in favour of Ratu Livai. The consideration stated in this instrument was \$55,000 instead of \$70,000 which is stated in the sale and purchase agreement.
  
16. Sahay seems to allege in his affidavit that neither he nor Krishna were aware that all that Patel & Sharma was doing, and yet, in the same breath so to speak, he confirms that he did execute the Instrument of Partial Transfer as follows:

*The Plaintiff and I had trusted the common solicitor and in good faith I as the lawful attorney of the Plaintiff executed the said Instrument of Partial Transfer without realizing that it was for a totally different amount.*

17. Patel & Sharma also attended to obtaining the consent of DoL on the Instrument of Partial Transfer. Consent was granted on 04 September 2003. Patel & Sharma subsequently presented the Instrument to the Commissioner for Stamp Duties<sup>vi</sup>.
18. Sahay deposes that after DoL consented to the Instrument of Transfer, and after the stamping of the said Instrument, Patel & Sharma, unbeknown to Krishna and Sahay, would proceed to lodge it for registration with the Registrar of Titles, and provided a copy of the Instrument to Ratu Livai.
19. Sahay alleges that whilst CL 10020 was still a valid and subsisting lease, the Director of Lands had gone ahead and issued CL 16460 on 21 April 2006 (legally described as "Solawaru & Enamanu Ba and Nubu or Vakai in the Ba Province in Nadi district and having an area of 1496M<sup>2</sup> being Lot 1 on SO 4697).
20. Sahay says that the Director of Lands wrongfully and unlawfully issued CL 16460 and in doing so, had acted in breach of CL 10020.

***Allegation That Krishna Did Not Authorise Director of Lands To Deal With Lease No. 10020***

21. Sahay says that Krishna never requested nor authorized the Director of Lands to deal with CL 10020 in any manner whatsoever. Neither he nor Krishna ever executed any documents to surrender his rights or interests in CL 10020 or any part thereof.
22. Sahay also asserts that the Registrar of Titles wrongly and unlawfully registered CL 16460 under the Land Transfer Act when CL 10020 is still a valid lease registered under the Land Transfer Act.
23. He says that the leasehold interest in CL 16460 in favour of Ratu Livai is a part of the leasehold interest that was granted by the Director of Lands to Krishna. This interest remains with Krishna. Thus the Director of Lands had wrongfully and unlawfully granted two leasehold interests for the very same land.

## *Plaintiff's Solicitors Wrote To Director of Lands To Cancel The Leasehold Interest*

24. According to Sahay, Krishna's solicitors wrote to the Director of Lands on 10 September 2009 to cancel Ratu Livai's leasehold over CL 16460.
25. Sahay deposes that Krishna had instituted Civil Action No. 08 of 2008 at the Lautoka High Court against Ratu Livai wherein an Order for Vacant was granted. However, the High Court Sherriff refused to execute the Writ of Possession against Ratu Livai when Ratu Livai showed him CL 16460.
26. Sahay deposes that Ratu Livai has not paid any rent nor any consideration for the property. He says that Krishna has not been able to have access to his property which is in a very bad state of repair and that Krishna needs to urgently carry out all the repair works.

## **DEFENDANTS' CASE**

27. According to the affidavit of Adivuna, CL 10020 was subdivided into two lots (Lot 1 and 2 on SO 4697). Also, Krishna had not obtained the consent of the Director of Lands for the Tenancy Agreement with Ratu Livai.
28. The Director of Lands was never aware of the Sale & Purchase Agreement because it was never part of any documentation submitted with the application for partial transfer. Adivuna concedes that CL10020 had not been surrendered up to the time she swore her affidavit. She also confirmed that CL 16460 was registered in favour of Ratu Livai on 21 April 2006.
29. However Adivuna says that the subdivision of CL 10020 and the creation of Lots 1 and 2 out of it was carried out pursuant to Krishna's request. She explained this as follows:

*06 /01/99 Krishna wrote to Divisional Manager Western requesting to subdivide Lot 1 SO 497 as described in CL 10020<sup>vii</sup>.*

*Above request was approved and survey instruction was issued to the Plaintiff's nominated Surveyor.*

*The plan was registered as per the requirement of the Surveyor's Regulation*

- as Lots 1 and 2 on SO 4697.
- 25/09/02 Messrs Patel and Sharma forwarded to the Director of Lands:  
 (i) an Application for Consent to Transfer and  
 (ii) a Transfer Instrument for the transfer Lot 2 SO 4697 from the Krishna to one Jenendra Chand for the sum of \$10,000.00.  
 The documents were executed by Krishna and Jenendra Chand<sup>viii</sup>.
- 31/10/02 Lands Department wrote to Messrs Patel and Sharma requesting for the following conditions to be met before consent can be endorsed:  
 i. Clearing of exiting mortgage – Westpac Bank  
 ii. Payment of leasehold market value  
 iii. Acceptance of reassessed rental with effect from 1/4/98 and payment of outstanding rental<sup>ix</sup>.
- 10/06/03 Messrs Patel and Sharma forwarded an Application for Consent to Transfer and a Transfer Instrument to the Director of Lands for endorsement of his consent to transfer Lot 1 SO 4697 from Krishna to Ratu Livai for the sum of \$55,000.00. The said documents were duly executed by Mr. Shiu Sahay, a law Attorney of the Plaintiff and the first Defendant<sup>x</sup>.
- 18/08/03 Lands Department wrote to Messrs Patel and Sharma advising them that consent is granted but will only be endorsed subject to the clearance of the existing Westpac mortgage on CL 10020<sup>xi</sup>.
- 22/08/03 Messrs Patel and Sharma replied requesting Divisional Surveyor Western to endorse the consent before the mortgage is discharged as the first Defendant's bank Colonial National Bank would only release the funds to satisfy the debts owed by the Plaintiff to Westpac Bank when the consent is endorsed on the Transfer documents<sup>xii</sup>.
- 04/09/03 Director of Lands endorsed his consent for transfer on Lot 1 SO 4697.
- 05/09/03 Director of Lands endorsed his consent transfer of Lot 2 SO 4697.
- 25/11/03 Messrs Patel and Sharma sent a copy of Stamped Transfer Instrument pertaining to Lot 2 SO 4697 to Lands Department so that the Department can proceed with preparation of lease documents over the subject property for execution by his client Jenendra Chand<sup>xiii</sup>.
- 02/02/05 Messrs Patel and Sharma sent a copy of Stamped Transfer Instrument pertaining to Lot 1 SO 4697 to Lands Department to enable it to prepare lease documents over the subject property for execution by his client the first Defendant<sup>xiv</sup>.
- 16/03/05 Lands Department wrote to Jenendra Chand requesting him to bring CL 10020 and execute Surrender and Lease Documents<sup>xv</sup>.

## *Sahay Actually Executed The Surrender Instrument*

30. Adivuna deposes that Krishna actually subdivided CL 10020 resulting in Lots 1 and 2 on SO 4697. She asserts from records that Sahay himself in his capacity as lawful Attorney of Krishna had executed the Full Surrender Instrument which expressly stated that CL 10020 having an area of 1.5091 hectares was wholly surrendered as from the 31 December 2004 and the said Surrender was accepted on 6 February 2006<sup>xvi</sup>.
31. Adivuna further deposes as follows in response to paragraph 16 of Sahay's affidavit:
- a. On 8<sup>th</sup> August 2005, Messrs Patel and Sharma requested Lands Department to release the title pertaining to the dealing between the Plaintiff and the first Defendant to them and not to the first Defendant. That annexed hereto and marked as "AD 11" is a copy of the said letter.
  - b. On 16<sup>th</sup> November 2005 Lands Department wrote to Messrs Patel and Sharma advising them that the lease documents in favour of their client Jenendra Chand and Surrender Instrument for CL 10020 is sent to Suva for registration and requested them to lodge CL 10020 with the fourth Defendant. Annexed herewith and marked as "AD 12" is a copy of the said letter.
  - c. On 6<sup>th</sup> September 2006 Lands Department again wrote to Messrs Patel and Sharma advising them that Surrender Instrument is stamped and awaiting registration and requested them to lodge CL 10020 with the fourth Defendant. Annexed hereto and marked as "AD 13" is a copy of the said letter.
  - d. Messrs Patel and Sharma failed to lodge CL 10020 with the fourth Defendant hence no Surrender of CL 10020 was ever registered.
  - e. On 22<sup>nd</sup> August 2007, Messrs Patel and Sharma wrote to the second Defendant advising them to cancel the dealing between the Plaintiff and the first Defendant since CL 10020 is encumbered under mortgage to Westpac Banking Corporation and the said Bank cannot release the title to register the Surrender unless the debt is paid off by the Plaintiff. They further said the Plaintiff was relying on the first Defendant to pay him the purchase price of \$55,000.00 so he could pay off the debt to the Bank however first Defendant did not pay any money. A copy of the said letter annexed hereto and marked as "AD 14".

- f. On 17<sup>th</sup> October 2007 Lands Department informed Messrs Patel and Sharma that CL 16460 in favour of first Defendant is registered but cannot be issued until CL 10020 is surrendered and that they are not empowered to cancel the dealing unless both the parties mutually cancel the lease. Till to date the original lease (CL 16460) is still with the Lands Department and is not issued to the first Defendant. Annexed hereto and marked as "AD 15" and "AD16" is a copy of the said letter and the lease.
32. Adivuna deposes that the Krishna's solicitors have been advised that the Director of Lands cannot cancel the lease unless both the parties mutually agree to cancel it.

***Sahay Actually Executed The Full Surrender For C.L 10020 on 31/12/04***

33. Referring to records, Adivuna asserts that Sahay actually executed the full surrender for C.L 10020 on 31 December 2004. However, no surrender was registered as Patel & Sharma did not lodge with the documents the duplicate copy of C.L 10020. The duplicate in fact was retained by Westpac Banking Corporation which had a mortgage (number 346635) over the land. This mortgage remains undischarged.
34. Adivuna questions why Sahay or Krishna have not joined the Mortgagee as a party to this action.

**FIRST DEFENDANT**

35. I observe that a Default Judgement was entered against Ratu Livai on 27 May 2010 on account of his failure to file and serve a Statement of Defence.
36. However, on 05 April 2011, Ratu Livai filed an Affidavit in Opposition. There is no record that he was ever granted leave by this Court to swear and file an affidavit to oppose the Summons.
37. No objection was raised with the filing of this Affidavit. I say this having noted that Ratu Livai was present in Court on 13 April 2011 when this case was called before me.
38. I note that there is nothing in Ratu Livai's Affidavit to indicate that he has ever paid any consideration towards the Sale and Purchase Agreement.



39. It would appear therefore that Lot 1 was transferred to Ratu Livai without him having settled the consideration sum, contrary to the Sale and Purchase Agreement.

### CONCLUSIONS

40. CL 10020 has not been surrendered. That process is hampered by the fact that the mortgagee still retains the duplicate title. However, Lots 1 and 2 have been created out of CL 10020.
41. It appears to me that Krishna is only after Lot 1, understandably, because Ratu Livai has not paid a single cent towards consideration, as far as I can see at this stage.
42. The status of Lot 2 is unclear at this stage. Is Krishna also seeking an Order that Lot 2 be canceled as well? If Lot 1 is cancelled on account of the fact that the subdivision could not be finalized because of the Mortgagee's interest, one would think that Lot 2 should also be cancelled.
43. I am of the view that the best way to proceed is for:
- (i) The mortgagee to be added as a party.
  - (ii) Patel & Sharma be added as a party.
44. I refuse to make the Orders sought for now. Once an interest is registered, the principles of indefeasibility of title apply unless fraud is proved. I accept that a title can be corrected for mistake, but I question whether the circumstances of this case amount to the kind of "mistake" envisaged. I think the issues are triable and the plaintiff should consider whether an Order for Cancellation of CL 16460, or, whether he should pursue an Order for Specific Performance against Ratu Livai to settle the balance of the purchase monies owing, and/or, against Patel & Sharma for other losses incidental.
45. Case adjourned to **Monday 17 February 2020** for mention.



  
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Anare Tuilevuka

**JUDGE**

Lautoka

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- <sup>i</sup> A copy of the Power of Attorney No. 38224 is annexed to and marked "SS1" to Shay's affidavit.
- <sup>ii</sup> A copy of the said Crown Lease is annexed to Shay's Affidavit marked "SS2".
- <sup>iii</sup> The Agreement was for Ratu Livai to pay Krishna a monthly rental of three hundred dollars (\$300.00). This was to commence from 01 October 2002.
- <sup>iv</sup> Sahay also deposes that Westpac Banking Corporation holds a mortgage over CL 10020. That mortgage was given by Krishna on 08 October 1993. That mortgage was consented to by the Director of Lands and it remains undischarged to this day.
- <sup>v</sup> A copy of the said Sale and Purchase Agreement is annexed to Sahay's affidavit and marked "SS4".
- <sup>vi</sup> A copy of the said consent is annexed to Sahay's affidavit and marked "SS5".
- <sup>vii</sup> A copy of the said letter is annexed to Adivuna's affidavit and marked "**AD 1**".
- <sup>viii</sup> A copy of the said Application and Transfer is annexed to Adivuna's affidavit and marked "**AD2**".
- <sup>ix</sup> Annexed to Adivuna's affidavit and marked "**AD3**" is a copy of the said letter.
- <sup>x</sup> A copy of the said Application and Transfer Instrument is annexed to Adivuna's affidavit and marked "**AD4**".
- <sup>xi</sup> Annexed to Adivuna's affidavit and marked "**AD5**" is a copy of the said letter.
- <sup>xii</sup> Annexed to Adivuna's affidavit and marked "**AD6**" is a copy of the said letter.
- <sup>xiii</sup> Annexed to Adivuna's affidavit and marked "**AD7**" is a copy of the said letter.
- <sup>xiv</sup> Annexed to Adivuna's affidavit and marked "**AD8**" is a copy of the said letter.
- <sup>xv</sup> Annexed to Adivuna's affidavit and marked "**AD9**".
- <sup>xvi</sup> A copy of the said Surrender Instrument is annexed to Adivuna's affidavit and marked "**AD10**".