

IN THE HIGH COURT OF FIJI
IN THE WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 22 OF 2017

BETWEEN : **NEELESK VIJAY RAM & SHALESHNI LATA CHARAN** both of
Korovuto, Nadi, and School Teachers respectively.

PLAINTIFFS

AND : **JITEN KUMAR** of Nacovi, Nadi, Cultivator.

1ST DEFENDANT

AND : **LOWERANCE ANAND NITESH** of Nacovi, Nadi and **DIRECTOR**
OF LANDS

2ND DEFENDANTS

Appearances : (Ms) Setaita Ravai for the plaintiffs
First defendant appeared in person
(Ms) Aqela Koila for the first named second defendant
Mr Josefa Mainavolau for the second named second defendant

Hearing : Tuesday, 06th October, 2020 at 9.00 a.m

Judgment : Friday, 27th November, 2020 at 9.00 a.m

J U D G M E N T

[A] **INTRODUCTION**

- (01) The matter before me stems from the plaintiffs' application for 'summary judgment' for specific performance in respect of a contract concerning an area of land.
- (02) The application is made by way of summons filed pursuant to Order 86, rule 1, (1)(a) of the High Court Rules, 1988.

(03) The application is opposed by the defendants.

[B] THE AFFIDAVITS FILED

- (1) The affidavit of Mr Neelesh Vijay Ram, the first-named plaintiff, in support, sworn on 15-05-2019.
- (2) The affidavit of Mr Jiten Kumar, the first defendant, in opposition, sworn on 10-12-2019.
- (3) The affidavit of Mr Lowerance Anand Nitesh, the first named second defendant, in opposition, sworn on 05-08-2019.
- (4) The affidavit of Mr Neelesh Vijay Ram, in reply, (to the affidavit in opposition of first named second defendant), filed on 19-08-2019.

[C] BACKGROUND FACTS

Plaintiffs' case

- (01) The plaintiffs and the 1st defendant entered into a sale and purchase agreement on 1st June 2012 for the purchase of a partial piece of the 1st defendant's property in Nadi. The property has an area of 1009 square meters which was comprised in Crown Lease No. 214939 being the land known as Nacobi Settlement Subdivision containing an area of 3.2299 hectares. This is Lot 26 on ND 3904. The said agreement is marked as annexure "NVR-1" in the affidavit in support of Mr. Neelesh Vijay Ram.
- (02) The consideration sum for the purchase of the property was \$20,000.00 as per clause 1.1 of the said agreement for which the plaintiffs have already paid the 1st defendant a part payment of the purchase price in the sum of \$15,000.00. The balance of the purchase price, i.e, \$5,000.00 was to be paid at settlement.
- (03) As stipulated under clause 4, the plaintiffs would take possession of the property upon execution of the said agreement and further in clause 7, it was incumbent on the 1st defendant to ensure that all relevant documents are executed for the plaintiffs to obtain the lease for the said property. That is, it was the 1st defendant's responsibility to ensure that a new lease is issued to the plaintiffs for the partial area of 1009 square meters as the 1st defendant was to surrender the old lease being Crown Lease No. 214939 and execute the transfer documents in favour of the plaintiffs and apply to the 2nd named 2nd defendant for a new lease in the name of the plaintiffs.
- (04) The 1st defendant applied for and received a new lease for the property which is the subject of this proceeding which is Crown Lease No. 829049 being the land known as Nacobi (part of) formerly Lot 26 ND 3904 (Part of Balance CG 1274) and containing an

area of 1009 square meters situated in the district of Nadi in the island of Viti Levu and being Lot 2 on DP 10330. This new Lease is marked as annexure “NVR-4” in the affidavit in support of Mr. Neelesh Vijay Ram.

- (05) The plaintiffs allege that upon receiving the new lease under his name, the 1st defendant has breached his obligations under the agreement by failing to transfer the said lease to the plaintiffs. The plaintiffs further allege that the 1st defendant has also breached the agreement by failing to give the plaintiffs access and possession of the said property as per clause 4 of the agreement.
- (06) Accordingly, the plaintiffs applied for a Caveat on the said property and brought this action against the 1st defendant seeking orders for specific performance of the said agreement as well as other declaratory orders as stated in the plaintiffs’ statement of claim.
- (07) The plaintiffs brought this action against the 1st defendant by way of Writ of Summons filed on 7th February, 2017 seeking the following orders:-
- (i) *A declaration that the defendant is holding the property described in Crown Lease No. 829049 being the land known as Nacobi (part of) formerly Lot 26 ND 3904 (Part of Balance CG 1274) and containing an area of 1009 square meters situated in the district of Nadi in the island of Viti Levu and being Lot 2 on DP 10330 on trust for the plaintiff.*
 - (ii) *An Order that the defendant execute the transfer of property described in Crown Lease No. 829049 being the land known as Nacobi (part of) formerly Lot 26 ND 3904 (Part of Balance CG 1274) and containing an area of 1009 square meters situated in the district of Nadi in the island of Viti Levu and being Lot 2 on DP 10330 to the plaintiff and in his absence the Deputy Registrar execute on his behalf.*
 - (iii) *Specific Performance of the said agreement by the defendant and the plaintiffs.*
 - (iv) *Injunction restraining the defendant from transferring, encumbering the said property to other third parties.*
 - (v) *Further or other that the Court may deem fit to facilitate the transfer of Partial property.*
 - (vi) *Costs on an indemnity basis.*
 - (vii) *Damage for breach of contract and demolishing illegal building.*

- (08) On 31st March, 2017, the plaintiffs obtained injunctive orders against the 1st defendant wherein the following orders were made by the Master;
- (i) *The defendant and/or his servants and/or his agents be restrained from all building and/or any manner of works in the portion/part/piece of land described in Crown Lease No. 829049 being the land known as Nacobi (part of) formerly Lot 25 ND 3904 (Part of Balance CG 1274) and containing an area of 1009 square meters situated in the district of Nadi in the island of Viti Levu and being Lot 2 on DP 10330 until final determination of the proceedings.*
 - (ii) *The defendant and/or his servants and/or his agents be restrained from charging or encumbering or transferring or selling or damaging or modifying the portion/part/piece of land described in Crown Lease No. 829049 being the land known as Nacobi (part of) formerly Lot 26 ND 3904 (Part of Balance CG 1274) and containing an area of 1009 square meters situated in the district of Nadi in the island of Viti Levu and being Lot 2 on DP 10330 until final determination of the proceedings.*
 - (iii) *The defendant and/or his servants and/or his agents be restrained from any way proceeding with any act or process whereby they alienate the portion/part/piece of land described in Crown Lease No. 829049 being the land known as Nacobi (part of) formerly Lot 26 ND 3904 (part of Balance CG 1274) and containing an area of 1009 square meters situated in the district of Nadi in the island of Viti Levu and being Lot 2 on DP 10330 to any third party.*
- (09) On 28th June, 2017, the 1st named 2nd defendant filed an ex-parte notice of motion which was later made inter-parte seeking leave that the 2nd named second defendant be joined as defendant in this proceedings.
- (10) On 10th July, 2017 the Master of the High Court granted orders in terms of the 1st named 2nd defendant's application and the 2nd named second defendant became a party to this proceedings.
- (11) Thereafter, the plaintiffs together with the 2nd defendants attended to the filing of pleadings and when pleadings were closed, all other pre-trial steps were completed and on 14th August, 2018, the plaintiffs filed Summons under Order 34 to enter action for trial.
- (12) The first defendant did not file his statement of defence to the plaintiffs' claim. Nevertheless, he filed his affidavit in opposition to the plaintiffs' application for summary judgment.

First defendant's case

- (13) He asserted in his affidavit in opposition that on 14-01-2004, he had entered into a sale and purchase agreement with the first named second defendant to sell one quarter acre of state land for consideration of \$7,000.00.
- (14) He further asserted in his affidavit that he thought that the first named second defendant is not interested in the land because he evinced an unwillingness or inability to render substantial performance of the contract and therefore, on 01-06-2012, he entered into a sale and purchase agreement with the plaintiffs to sell 1009 square meters (the same piece of land) for a consideration of \$ 20,000.00. The land is comprised in Crown Lease No-214939 which had an area of 3.2299 hectares. He had received \$15,000.00 as part payment of the purchase price and the balance \$5,000.00 is to be paid at the date of settlement.
- (15) He claimed that he had informed the plaintiffs (prior to receiving money) that he had sold the same piece of land to the first named second defendant and received money from him. He further claims that the plaintiffs willingly entered into the sale and purchase agreement with notice of an earlier equitable interest of the first named second defendant in the land.
- (16) However, the first named second defendant constructed a house on the subject land and he is in occupation of the land.
- (17) After realizing the consequences of selling the same parcel of land to two buyers, as a settlement, he informed the plaintiffs that he is willing to return the payment of \$15,000.00 and pay them extra \$5,000.00. The plaintiffs did not agree and is demanding the property.

First named second defendant's case

- (18) He asserted in his affidavit, inter alia, the followings,
 - (1)(a) *On the 14th day of January, 2004 he had entered into a sale and purchase agreement with the first defendant for the purchase of one quarter acre from Crown Lease No. 133989 having LD Ref/4/10/976 Lot 26 ND 3904 which had an area of 3.22 hectares for \$7,000.00 and the same was being subdivided into residential lots by the defendant and upon completion of subdivision the lot purchased and occupied by me is now known as Lot 2 on Crown Lease No. 829049 and DP 10330.*
 - (b) *The subdivision of the land being Crown Lease 133989 was completed and the survey plan registered prior to the issue of new residential leases and hence a lease over the area purchased by him was issued in the name of the first defendant as the Registered Proprietor on 2nd June, 2016 being crown lease number 829049 lot 2 on DP 10330 (LD 4/10/6135).*

- (c) *That upon becoming aware of the completion of subdivision he requested and was given approval by the first defendant to construct a dwelling house though the same was in the name of the defendant as the said property had not yet been transferred to his name.*
- (d) *The consent to build, connect power and water were obtained in the defendants name and against the said main crown lease number 133989 (LD 4/10/976) from the office of the Director of Lands from Lautoka as the Head Lessor who was at all times aware of what was happening on the ground as they carried out inspections prior to giving consent. (Annexure LAN-3)*
- (e) *That though he commenced building a temporary house in 2015 as he needed a place to reside but he did not have proper building plans drawn until 2016 and which were approved by the Nadi Rural Authority and the necessary consent fee paid for obtaining consent to build from the Director of Lands as the head lessor. (Annexed herein and marked "LAN 4" copy of the front page of the building plan).*
2. **THAT** *I did on the 16th of January, 2017 carry out a valuation of the said property at my own expense as per the sale and purchase agreement. (Annexed herein and marked as "LAN 5" is a Copy of the Valuation Report).*
3. **THAT** *because of the sale and purchase agreement I executed with the above name defendant and the completion of subdivision and issue of the new lease 829049 encompassing the area purchased by me and I have currently began construction works on the said property but the defendant is refusing to execute the documents for the transfer of the new crown lease to me but I am informed now and verily believe that he has entered into an agreement with the plaintiff for the sale of the property to them at a far higher price.*
4. **THAT** *the head lessor namely the Director of Lands and staff were all times aware of the subdivision and sale and purchase of the lots to buyers including myself and I have made the necessary application for power and water connection and consent for the connections were granted in writing in my name by the Divisional Land Manager Western acting on behalf as agent and servant of the Director of Lands.*
5. **THAT** *I am informed by my Solicitors and verily believe that this action instituted by the plaintiffs is fraudulent as they have in collusion with the defendant who has not defended this action thereby enabling the plaintiffs to obtain the orders sought to defeat my right and interest in the said crown lease number 829049 as the defendant who is the present registered Proprietor of the said lease has resold the same at a higher price.*

[D] **CONSIDERATION AND THE DETERMINATION**

- (01) The plaintiffs' application for 'summary judgment' is made pursuant to Order 86, rule 1 of the High Court Rules, 1988.

Order 86, rule 1 provides;

Application by plaintiff for summary judgment (O.86, r.1)

1. *(1) in any action begun by writ indorsed with a claim –*
 - (a) for specific performance of an agreement (whether in writing or not) for the sale, purchase, exchange, mortgage or charge of any property, or for the grant of assignment of a lease of any property, with or without an alternative claim for damages, or*
 - (b) for rescission of such an agreement; or*
 - (c) for the forfeiture or return of any deposit made under such an agreement, the plaintiff may, on the ground that the defendant has no defence to the action, apply to the Court for judgment.*
- (2) An application may be made against a defendant under this rule whether or not he has acknowledged service of the writ.*

Order 86, rule 3 provides;

Judgment for plaintiff (O.86, r.3)

- (3) Unless on the hearing of an application under rule 1 either the Court dismisses the application or the defendant satisfies the Court that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of the action, the Court may give judgment for the plaintiff in the action.*
- (02) The plaintiffs' application for summary judgment is made on the ground that the first defendant has no defence to the action.
- (03) I remind myself that the purpose of 'summary judgment' procedure is to enable a plaintiff to obtain 'summary judgment' without trial if he can prove his claim clearly and if the defendant is unable to set up a bona fide defence or raise an issue against the claim.
- (04) The burden of proof lies with the plaintiffs to satisfy the Court that the defendants have no defence which has any realistic prospect of success. Once the plaintiffs establish the claim, at least the evidential and persuasive burden shifts to the defendants resisting the

application. Thomas J in 'Hibiscus Shopping Town Pty Ltd v Woolworks Ltd'¹ concisely summed up the burden as follows;

“The legal burden of proof is borne by this plaintiff throughout the application, however, when he has established a prima facie right to an order, a persuasive or a evidential burden shifts to the defendant to satisfy the Court that judgment should not be given against him”.

Having thus set out the law, I would pose the question whether the plaintiffs have established before the court a prima facie right to an order for specific performance .

The subject matter – Crown Lease No. 829049

- (05) As I said before, on 01-06-2012, the plaintiffs and the first defendant entered into a written sale and purchase agreement. The first defendant was named as the vendor and the plaintiffs as the purchasers. The agreement concerns an area of land, of approximately 1009 square meters being part of land containing approximately 3.2299 hectares comprised in Crown Lease No. 214939, Lot 26, ND 3904. The land is described as “Nacobi Settlement Subdivision”.
- (06) The vendor, the first defendant is the registered proprietor of all that piece and parcel of land described in the Crown Lease No. 214939, being Lot 26 containing an area of 3.2299 hectares situated in Nadi.
- (07) The property subjected to the plaintiffs’ claim for specific performance, i.e. Crown Lease No. 829049 containing an area of 1009 square meters **did not exist** at the time the sale and purchase agreement was entered into on 01-06-2012. It was leased by the Director of Lands to the first defendant on 05-06-2016. It did not exist until 05-06-2016.
- (08) Therefore, it appears to me that the sale and purchase agreement executed between the plaintiffs and the first defendant on 01-06-2012 was void for uncertainty of the subject matter.

The consent of the Director of Lands

- (09) By an agreement dated 01-06-2012, the first defendant agreed to sell to the plaintiffs who agreed to purchase 1009 square meters of the land contained in Crown Lease No. 214939. The extent of the land described in Crown Lease No. 214939 is 3.2299 hectares.
- (10) In paragraph (2) and (3) of the Statement of Claim, the plaintiffs plead;

¹ (1993) FLR 106 at 109

- (2) *That the consideration of the property was in the sum of \$20,000.00 out of which \$15,000.00 has been paid by the plaintiffs to the defendant.*
- (3) *That inter alia, it was stipulated under the agreement that the plaintiffs would take possession of the property upon execution and further under Clause (7) of the agreement the defendant was to have a new lease for the partial area of 1009 square meters issued in favour of the plaintiffs name at settlement.*
- (11) Section 13 (1) of the **State Lands Act, 1945** in so far as is relevant to this case, provides:

Whenever in any lease under this Act there has been inserted the following clause: "This lease is a protected lease under the provisions of the Crown Lands Act. (Hereinafter called Protected Lease) – It shall not be lawful for the lessee thereof to alienate or deal with the land comprised in the lease or any part thereof whether by sale, transfer or sublease or in any other manner whatsoever, nor to mortgage, charge or pledge the same, without the written consent of the Director of Lands first had obtained ...

"Any sale, transfer, sublease, assignment, mortgage, or other alienation or dealing effected without such consent shall be null and void".

- (12) In my judgment, the making of payments pursuant to the sale and purchase agreement and the acceptance of those payments by the first defendant constituted a dealing with the land by sale and required prior written consent of the Director of Lands.
- (13) The consent that is required under Section 13 (1) of the State Lands Act is a condition precedent to performance of the agreement rather than a condition precedent to formation of the agreement.
- (14) In my judgment, the payment of a sum of \$15,000.00 without written consent of the Director of Lands having been first obtained constitutes sufficient **performance of the agreement** without prior written consent to render the agreement dated 01-06-2012 unlawful and void *ab initio*.
- (15) The fact that an agreement comes into existence prior to consent being obtained is not of itself a breach of Section 13(1) of the State Lands Act. It is not the agreement itself that requires prior written consent of the Director of Lands, but rather the performance of the agreement that requires prior written consent.
- (16) Generally, a purchaser of land who purchases land under a binding and unconditional contract of sale, has an equitable interest in the land. The extent of that equitable interest is commensurate with the purchaser's ability to obtain specific performance. Of course, a legal estate will later vest in the purchaser upon payment in full of the purchase money and execution of a formal transfer document. The view is that a purchaser's equitable interest is commensurate only with his ability to obtain specific performance.

- (17) In Legione v Hately² for example, Mason and Dean JJ in their joint judgment sated at page 446;

“In this Court it has been said that the purchaser’s equitable interest under a contract of sale is commensurate only with her ability to obtain specific performance (Brown v Heffer [1967] HCA 40; (1967) 116 CLR 344, at p.349).

- (18) In Stern v McArthur³, Deane and Dawson JJ in their joint judgment stated at para 2:

“As Dean J pointed out in Kern Corporation v Walter Reid Trading Pty Ltd [1987] HCA 20; (1987) 163 CLR 164, at p.191, it is not really possible with accuracy to go further than to say that the purchaser acquires an equitable interest in the land sold and to that extent the beneficial interest of the vendor in the land is diminished. The extent of the purchaser’s interest is to be measured by the protection which equity will afford to the purchaser. That is really what is meant when it is said that the purchaser’s interest exists only so long as the contract is specifically enforceable by him. Specific performance in this context does not mean specific performance in the strict or technical sense of requiring the contract to be performed in accordance with its terms. Rather it encompasses all of those remedies available to the purchaser in equity to protect the interest which he has acquired under the contract. In appropriate cases it will include other remedies, such as relief by way of injunction, as well as specific performance in the strict sense.”

- (19) Similarly, the New Zealand position is explained in Sale of Land (2000) 2nd ed by DW McMorland at page 299:

“In broad terms, the passing of the equitable estate to the purchaser depends upon the availability, at least at a theoretical level and without consideration of any defence which might be available to the vendor, of specific performance, or possibly of an injunction. There must be a contract, either directly for the sale of the land or for an option to purchase, such that the purchaser can take all of the necessary steps to obtain specific performance of that contract, the vendor cannot legally prevent those steps being taken, and the circumstances are such that, if the purchaser did take those steps, specific performance would not be unavailable for jurisdictional as opposed to discretionary reasons. It is the ultimate ability in equity to compel the vendor to transfer the estate or interest which gives the purchaser the equitable estate or interest.”

- (20) Of course, as I have said, specific performance can only be obtained if a vendor and a purchaser have entered into a **binding contract**. Usually, one of the many factors to be

² [1983] HCA 11; (1993) 152 CLR 406

³ [1998] HCA 51; (1988) 165 CLR 489

considered is whether damages are inadequate in lieu of specific performance. If not, then the court may order specific performance. Part-performance is usually also relevant.

- (21) In Re CM Group Pty Ltd's Caveat⁴, it was held that property did not pass in equity until the required municipal council approval was obtained. In Brown v Heffer⁵, an interest in equity did not pass because the required consent of the Minister had not been obtained.
- (22) The transaction was prohibited by statute. As a result, the agreement which constitutes the transaction was illegal. As I said, the part payment of the purchase price, before the Director of Lands written consent has been obtained, constitutes performance of the agreement for sale and did involve 'alienating or dealing with the land'. The plaintiffs seek to enforce a contract which is expressly forbidden by Section 13 of the State Lands Act. Since the contract is prohibited by statute, the court is bound not to render assistance in enforcing an illegal contract. The Court cannot render assistance in enforcing an illegal contract. Of course, agreements between parties are not treated as scrap of paper, and relief is given when they are breached. Equally, it is not the function of the court to be a rubber stamp. It is important to remember that a contract might in certain circumstances bind the parties, but it cannot bind the court.

Scrutton, L.J., clearly indicated in Mahmoud v. Ispahani⁶, what the position is in relation to an illegal contract when His Lordship said:-

"I think the law is laid down in Cape v Rowlands (2 M. & W. 157), where Parke, B., delivering the judgment of the Court said: 'It is perfectly settled that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no Court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute, though the statute inflicts a penalty only, because such a penalty implies a prohibition: Lord Holt, Bartlett v Vinor (Carth. 252). And it may be safely laid down, notwithstanding some dicta apparently to the contrary, that if the contract be rendered illegal, it can make no difference, in point of law, whether the statute which makes it so has in view the protection of the revenue, or any other object. The sole question is, whether the statute means to prohibit the contract? If the contract is prohibited by statute, the Court is bound not to render assistance in enforcing an illegal contract.... .."

And in my view, if an act is prohibited by statute for the public benefit, the Court must enforce the prohibition, even though the person breaking the law relies upon his own illegality. I say nothing about the cases to which Parke B., refer in Cope v. Rowlands (2 M. & W. 157, 158), where the statutory prohibition is for the benefit of a particular person, and not for the benefit of

⁴ [1986] 1 Qd R 381

⁵ (1967) 110 CLR 344

⁶ (1921) 2 K.B. at p.728

the public. It may be that different rules apply to such a case, but in this case it is clear that the prohibition is for the benefit of the public.”

- (23) Further in **Reddy v Devi**⁷, the Court of Appeal in deciding an appeal on the issue of consent of the Director of Lands to a sale and purchase agreement and as to when an agreement may be regarded as being void ab initio stated at paragraph 8 of its Judgment that:-

“It is when an agreement is entered into between parties expressly prohibited by law. This clearly is a case that does not fall within any prohibition imposed by the Act in question.....14] Applying those principles to the instance case, for the agreement to have been regarded void, there needed to be some element in the agreement that was forbidden or prohibited by the statute in question. The only prohibition is an agreement entered into without the consent of the Director.”

(Emphasis added)

Hence, without the necessary consent obtained, the said agreement is illegal, null, void and of no effect as per Section 13 of the Crown Lands Act.

In **Kento (Fiji) Ltd v Naobeka Investment Ltd**⁸, the Court stated the following:-

*“A person is free to enter into an agreement or contract with another person. However, a contract or an agreement will not be enforced by the Court if is illegal. A contract becomes illegal if it is against the public policy under the common law or against any statute. The unenforceability of an illegal contract is based on the Latin maxim **Ex turpi causa non oritur action**”, meaning “**no cause of action arises from a wrong**”. Thus no court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. This will apply equally on the plaintiff and the defendant.....it is the trite law that, no court will lend its aid to a man who founds his cause of action upon an immoral or an illegal contract. This is not for sake of the other party, but founded on the principles of policy. In the meantime, if any action is based on the misrepresentation and not on the illegal contract itself, then it will be allowed to go. There is plethora of English cases which deals this area”.*

[Emphasis added]

- (24) It appears to me that the plaintiffs claim is unenforceable in equity. The Director of Lands has not consented to the contract between the parties to date. Of course, as I have said, specific performance can only be obtained if a vendor and a purchaser have entered into a binding contract. A vendee or buyer takes equitable title to the land upon the execution of an enforceable contract. In the case before me the plaintiffs, vendee, has no equitable right to the property of the vendor, the first defendant, because the

⁷ [2017] FJCA 25; ABU0026.2013 (23 February 2017)

⁸ [2017] FJHC 671; HBC100.2012 (12 September 2017)

contract is void. The plaintiffs have no equitable right to call for a conveyance of the land.

- (25) In my view, the plaintiffs who have the burden of proof in this application has not established its claim so as to activate the second limb of the burden of proof, which shifts a 'persuasive' and 'evidential burden' on the defendants to satisfy the Court that judgment should not be given against them.

Sale and Purchase agreement entered between the first defendant and the first name second defendant

- (26) As I said before, on 14-01-2004, the first defendant and the first named second defendant entered into a written sale and purchase agreement for the same parcel of land. The first defendant was named as the vendor and the first named second defendant was named as the purchaser. The contract concerned an area of lands, of approximately 40 perches, being part of land containing approximately 3.2299 hectares described in Crown Lease No. 214939. [Annexure LAN-1].
- (27) The second named second defendant at paragraph 2(v) of its statement of defence has specifically stated that there was no consent obtained by the first defendant and the first named second defendant for the agreement dated 14-01-2004 which constituted an alienating or dealing with the crown land.
- (28) The first named second defendant took possession of the subject property in 2004 pursuant to the sale and purchase agreement. He has erected a dwelling house on the land without obtaining the Director of Lands written consent. No prior written consent of the Director of Lands as head lessor was obtained for the entry into possession and erection of the dwelling house on the land. However, on 08-09-2015, the Ministry of Lands and Mineral Resources has granted consent to power connection and water meter connection. [Annexure LAN-3]. Does this granting of consent indicate that the Director of Lands is directly involved in the dealing between the first defendant and first named second defendant. Then as a matter of general equitable principle, it would be quite unconscionable, for the Director of Lands to escape the consequences of their actions when things go wrong by pleading illegality under the Act. See; **Native Land Trust Board v Subramani**⁹. **This is a significant issue raised in the first named second defendant's defence which warrants a trial.** The first named second defendant will be highly prejudiced if this court proceeds to enter summary judgment against the first defendant on the basis that the first defendant has no defence to the plaintiffs' claim without considering the first named second defendant's defence because the same piece of land has been earlier sold to the first named second defendant by the first defendant and therefore he has an equitable interest in the same parcel of land. The competing equitable interest of the first named second defendant is an issue which warrants a trial.
- (29) Counsel for the plaintiffs contend that there is no sale and purchase agreement on foot between the first defendant and first named second defendant. Counsel submits that the

⁹ (2010) FJCA 9

first defendant's previous solicitors has lawfully terminated the agreement because the first named second plaintiff has breached the agreement by erecting a dwelling house on the land without obtaining consent of the first defendant.

On a perusal of the agreement, it is quite clear that the land has been sold for residential purpose and the possession is given to the purchaser prior to the execution of the agreement. See; Clause (2) and (5). I fail to see an express covenant in the contract requiring the first named second defendant to obtain the prior consent of the first defendant to erect a construction on the demised land. No valid termination can take place without a breach of an express covenant. It appears to me that the agreement is still subsisting and no termination arises. It would be wrong to compel the first defendant to convey the property to the plaintiffs on the basis that the first defendant has no defence to the claim. To do so would be unjust to the first named second defendant. Because the first named second defendant's contract for sale remains on foot, with all the possible consequences of that fact. The first named second defendant has placed the matter in the hands of the court exercising equity jurisdiction. The control of the matter will be exercised according to equitable principles.

This should be better determined at the trial in light of the actual facts of the case at which the parties and all relevant witnesses give evidence and the facility exists for that evidence to be tested.

Competing equitable interests

- (30) It is quite clear that the same piece of land had been sold to two buyers by the first defendant by contract for sale.
- (31) Where competing equitable interests exist in the same parcel of land, an earlier interest generally, i.e., the first named second defendant's interest, has a stronger claim than the later, i.e., the plaintiffs; "*qui prior est tempore potior est jure*". The earlier, therefore, normally prevails over the latter. See; **Vrkic v Otta International Pty Ltd**¹⁰.

An earlier created equitable interest takes priority over a later-created one. This is another issue which warrants a trial.

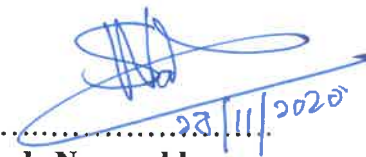
CONCLUSION

- (1) After considering the totality of the evidence, which I am required to do so, I hold that the plaintiffs have not established their claim so as to activate the second limb of the burden of proof, which shifts a 'persuasive' and 'evidential burden' on the defendants to satisfy the Court that judgment should not be given against them. The plaintiffs ought to be put to strict proof of their claim, and exposed to full investigation possible at a trial and the reason is that of justice.

¹⁰ (2003) 12 BPR 22, 535

- (2) Besides, there are number of significant issues raised in the defence of the first named second defendant which warrants a trial.
- (3) This is a case which ought to be scrutinized with some care. The matters are not straightforward. There is here a case for investigation, and so not for summary decision. Accordingly, the plaintiffs' application is dismissed with costs in cause.
- (4) However, I will make an order for a speedy trial.




.....27/11/2020
Jude Nanayakkara
[Judge]

**High Court – Lautoka,
Friday, 27th November, 2020**