

IN THE HIGH COURT OF FIJI  
(WESTERN DIVISION) AT LAUTOKA  
CIVIL JURISDICTION

**CIVIL ACTION NO. HBC 261 OF 2020**

**BETWEEN** : **MAHENDRA PRASAD** of 15 Dimascio Place, Oakhurst, NSW, Australia.  
**PLAINTIFF**

**AND** : **PREM CHANDRA** of 8653 Golden Saga Drive, Elkgrove, CA 95624, United States of America as the sole Executor and Trustee of the **ESTATE OF RAM PADARATH**  
**DEFENDANT**

**BEFORE** : Hon. Mr. Justice Mohamed Mackie

**APPEARANCES** : Mr. S. Koya for the Plaintiff  
Defendant absent and no representation.

**DATE OF DECISION** : 3<sup>rd</sup> October 2022

**JUDGMENT**

**A. Introduction:**

1. The plaintiff, by filing his writ of summons, along with the statement of claim on 26<sup>th</sup> November, 2020 against the Defendant, has sought, *inter-alia*, the following reliefs.
  - a. *An Order that the Defendant pay the Plaintiff the sum equitant to the current market value of the Agreement for Lease No-10/006526.*
  - b. *Alternatively, for an Order that the Defendant do transfer Agreement for Lease No.10/006526 to the Plaintiff.*
  - c. *Interest for the Plaintiff at 6% per centum per annum from the 1<sup>st</sup> day of January 1970 to the date of full payment of such award under the Law Reform ( Miscellaneous provisions) (Death and Interest) Act Cap 27 of the Laws of Fiji.*
  - d. *Cost of this action on a Solicitor Client indemnity basis.*
2. Though, the writ of summons, together with the statement of claim, was reportedly served on the Defendant, who is said to be resident out of the jurisdiction, by obtaining necessary orders for such service, the Defendant neither entered an appearance in response to the Writ nor filed his acknowledgement of service and/ or defence to the Plaintiff's claim.
3. Then, the Plaintiff caused his Solicitors to file summons dated 8<sup>th</sup> April, 2021, supported by his Affidavit sworn on 1<sup>st</sup> March, 2021, together with the annexures marked as "A" to "M" seeking the same reliefs, which too was, reportedly, served on the Defendant in the aforesaid manner

on 16<sup>th</sup> June, 2022. Though, 42 days' time period had been allowed, the Defendant did not respond to the said Summons too.

4. The said Summons had been filed pursuant to Order 13 Rule 6 sub rule (2) and (3) of the High Court Rule. In my view the sub rules hereof will not apply as far as the facts and circumstances hereof are concerned.
5. However, as a result of the Defendant's failure to respond, the plaintiff's claim was heard by way of formal proof, as moved by the Plaintiff's Solicitors, wherein the Plaintiff and 4 other witnesses gave evidence to substantiate the Plaintiff's claim.

**B. The Factual Background:**

6. The statement of claim filed and the Affidavit sworn by the Plaintiff on 1<sup>st</sup> March, 2021 sets out as follows, the facts surrounding this claim from the plaintiff's point of view, as well as the reliefs sought by the plaintiff.

(1). That the Defendant is sued in his capacity as the sole Executive and Trustee of the Estate of RAM PADARATH, who died on 6th April, 2002.

(2). That the Plaintiff was raised by one late RAM PRATHAPH, who is the Uncle of the Plaintiff and had adopted the Plaintiff at the age of 9 after the demise of the Plaintiff's Father by giving shelter, food and clothes to the Plaintiff. RAM PRATHAP also gave the plaintiff 0.1459 hectares of land as a gift to build his own house, which land was on Agreement of Lease No-10/006526, known as Oso Sub-division (formerly Lot-1 on ND 3315) in the Island of Viti Levu and the District of Nadi having an area of 0.1459 hectares.

(3) That the Plaintiff funded the construction of a three (3) bedroom house therein by utilizing his life saving, at the approximate cost of \$25,000.00 (Twenty Five Thousand).

(5). That the plaintiff out of generosity allowed his another uncle late RAM PADARATH, and his son PREM CHANDRA, the Defendant hereof to occupy the house. This occupancy by the late RAM PADARATH and his son was on a temporary basis only.

(6). That the late RAM PADARATH, without the Plaintiff's knowledge obtained an Agreement for Lease in his name for the same land, which was given to the Plaintiff by his Uncle the late RAM PRATHAP. That the late RAM PADARATH, being well aware that the Plaintiff had spent his own money to construct the (3) bedroom house, deceived the Plaintiff by obtaining an Agreement for Lease in his name. The Plaintiff lost his life savings on this (3) bedroom house.

(7). That the plaintiff over the years tried to negotiate with late Ram PADARATH to give him the Land and same was ignored by RAM PADARATH. After the death of RAM PADARATH, the Plaintiff negotiated with the Defendant till late in the year 2018, who is the Son of Late RAM PADARATH, asking for the land.

(8). The Defendant knew that the late Father RAM PADARATH did not build the (3) bedroom house and had cunningly obtained an Agreement for Lease in his name. The Defendant gave the Plaintiff hope and assurance that he will transfer the Agreement for Lease to the Plaintiff and then in late of the year 2018 refused to transfer to the Plaintiff.

(9). That the Plaintiff therefore claims against the Defendant the sum equivalent to the current market value of the land or alternatively , the Agreement to Lease No- 10/006526 to be transferred unto his name. The Plaintiff also claims damages, costs and the interest.

C. **Evidence:**

7. There were 5 witnesses for the plaintiff, including him, and a set of documents containing “A” to “M” (filed as annexures along with the Affidavit in support of the plaintiff’s Summons filed on 12<sup>th</sup> April, 2021), which were collectively marked as “PE-1” at the trial. A letter dated 14<sup>th</sup> January, 2020 sent, after filing of this action, by the Plaintiff’s Solicitors to the Regional Manager iTaukei Land Trust Board, Namaka, was marked as “PE-2” during the trial. The 1<sup>st</sup> to 5<sup>th</sup> witnesses gave evidence as follows.

a. The 1<sup>st</sup> witness, who gave evidence prior to the Plaintiff, was 79 years old INDRA DUTT. He testified that he had worked as a Carpenter during the construction of the house in question in 1970s, and the house was built and the expenses were met by the Plaintiff for the materials, including the payment and his wages. He said that the labor cost was around the time approximately \$6000.00 FJD.

He stated further, that the Plaintiff appeared to be the owner of the house and the land on which it was built and none of the Plaintiff’s uncles or family members objected to the construction of the house, except for coming to observe the construction when it was in progress.

b. Subsequently, the Plaintiff gave evidence as PW-2 in order to substantiate his averments in the pleadings. He said that as he had lost his father when he was 9 years old and he was adopted by his Uncle RAM PRATHAP (father’s brother) , who later gave him the subject matter land as a gift for him in 1970s to construct his own house and accordingly he constructed the house in question by spending his savings.

He stated that once the construction was completed, he allowed his Father’s another brother RAM PADARATH and his Son, the Defendant PREM CHANDRA to stay there temporarily as they did not have a place to reside and after the demise of RAM PRATAP in the year 1994, the lease being expired, RAM PADARATH got the lease under his name without informing him.

PW-2 went on saying that after the demise of RAM PADARATH in the year 2002, the Estate is managed by the Defendant, being his Son, as the sole Trustee & Executor. Plaintiff added further that he is suing the Estate of RAM PADARATH in order to get the house constructed by him and the land given to him by RAM PRATAP after whose demise the Defendant’s Father RAM PADARATH had got the lease transferred unto his name without the knowledge of the Plaintiff. He also stated that though, his Lawyers had communicated with the iTaukei Land & Trust Board about the issue, they have not responded. The letter was marked as exhibit PE-1.

The Plaintiff admitted that he could not get an independent valuation as the property is fenced and a notice is displayed to the effect that “the trespassers would be prosecuted”. The plaintiff values the property at \$ 1,000,000.00 and states that he would like to spend the remainder of his life in the house in question.

c. The 3<sup>rd</sup> witness for the Plaintiff was one DEO NARAYAN, who claimed that he was a neighbor of the Plaintiff at that time and had supplied gravel for \$700.00 for the construction that took place in 1970s and stated further that the price of it would be around 10 times more now. He added that it appeared to him that the land and the house belonged to the Plaintiff.

- d. PW-4, namely, SURESH CHAND, who claimed to be a cousin of the plaintiff, gave evidence that he worked as a watch-man during the building of the house in 1970s and about the Plaintiff's interest in the subject matter land. He said further that it was the plaintiff who spent for the building of the house and paid him for his work as a watch-man. He added further that he was aware that the land had been given to the plaintiff by his uncle RAM PRATAP and after the house was built RAM PADARATH and his Son PREM CHANDRA stayed in the house.
- e. The last witness for the Plaintiff, PW-5, stated that he worked as an assistant Carpenter, he was paid by the Plaintiff and it was the plaintiff who spent for the construction of the house.

**D. Analysis & Determination:**

8. Learned counsel for the plaintiff has tendered brief written submissions in support of the Plaintiff's claim.
9. This is a formal proof matter. But still the plaintiff must prove his case with satisfactory and admissible evidence. The duty of the court in an uncontested matter is not in any manner lesser than that in a contested matter. The court must not blindly accept and act upon on any evidence adduced or material tendered by a party, but should consider them judicially.
10. The fact that the opposing party is absent or certain oral or documentary evidence led is not objected by the opposing party by being present, will not absolve the trial judge from his/ her duty of evaluation and deciding the admissibility of it. Standard of proof will remain unchanged. According to Law the burden of Proof is squarely on the Plaintiff to prove its claim on the balance of probability. The Court in **Narayan n Krishna [2012] FJMC 223, held that:**

*"The burden of proof lies upon the party who substantially asserts the affirmative of the issue (Robins v National Trust Co. (1927) A.C. 515). The burden of proof in any particular case depends on the circumstances in which the claim arises. In general the rule which applies is "Ei qui affirmant non ei qui negatincumbit probation".*

It was held in **Levy v Assicurazioni Generali (1940) A.C. 791** that "this rule is adopted principally because it is but just that he who invokes the aid of the law should be the first to prove his case, and partly because in the nature of things, a negative is more difficult to establish than an affirmative".

11. The standard of proof required in civil cases is generally expressed as proof on the balance of probability. Lord Denning in "Miller v Minister of Pensions (1947) 2 All E.R 372) held that "if the evidence is such that the tribunal can say "we think it more probable then not' the burden is discharged, but if the probabilities are equal it is not".
12. Therefore, this court has to see whether there was sufficient and convincing evidence from plaintiff with regard to the claim made by him. Whatever the decision arrived at by the court at the end of the day finally must be based on and supported by the evidence adduced at the trial.
13. The main relief prayed for by the plaintiff hereof, as per paragraph (a) to the prayers to the Statement of claim is " **An order for the Defendant to pay the Plaintiff the sum equivalent to the current market value of Agreement to Lease No.10/006526**".

The next main relief (b) prayed for is an **alternative one moving for “an Order that the Defendant do transfer Agreement for lease No.10/006526 to the Plaintiff”**. It appears that both the above reliefs involve the land in question as well and not limited only to the house that the Plaintiff claims to have constructed. Plaintiff’s evidence is that the land in question was gifted to him in 1970s by RAM PRATHAP, who had adopted him given him food, shelter and cloths as he had lost his Father at his age of 9. There is no any other supporting evidence oral or documental, except for his oral evidence, with regard to the purported gift made by RAM PRATHAP.

14. The Plaintiff, having constructed a house in the subject land utilizing around \$25,000.00 out of his life saving money as he claims , seems to have slept over his purported right over the land which he says was gifted by his uncle RAM PRATHAP. He has not produced any documentary or other supporting similar evidence to vindicate his right in the land that he claims was a gift. The only document produced on his behalf to show his interest in the subject land is the letter dated 14<sup>th</sup> January, 2020 written to the iTaukei Land Trust Board by his Solicitors, after filing of this action, which was marked as PE-1.

During a long period of nearly 50 years, the Plaintiff could very well have originated several documents to support his claim of gift, particularly, before or soon after the death of his uncle RAM PRATHAP in January 1994 by whom, the plaintiff claims, the land was gifted. At least the Plaintiff could have done so before or after the death of RAM PADARATH in April 2002, by whom the Plaintiff claims the land and house was occupied and the Lease was transferred behind his back.

15. Further, there is no tangible evidence as to whether the land in question is presently held by the Defendant as the Executor and Trustee of late RAM PADARATH. In the absence of any evidence as to the present Lease ownership, the Court cannot proceed to make orders affecting the land in question. Further, Unless, the court has some concrete evidence to prove that the land in question was in fact gifted to the Plaintiff and the Plaintiff has diligently acted to safe-guard such a right, the court cannot grant such a relief as prayed for in paragraph (a) ordering to pay a sum including the value of the land covered by the Agreement for lease No.10/006526.

Further, as far as the relief (b) is concerned, which is an alternative remedy, if granted, would undoubtedly affect present Lease holdership of the land in question. As such the Court cannot grant such a relief in the absence of iTaukei Land Trust Board and other party, who may probably be holding the present Lease, as a party before the Court.

16. Further, the Plaintiff’s claim for the relief (b) seems to be for a specific performance. In considering whether specific performance is applicable and could be granted as a relief one of the rules is that there must have been a valid instrument for the same to have a binding and both parties must have signed it. The remedy of specific performance is discretionary. Equity will only grant specific performance if, under all the circumstances, it is just and equitable to do so. The discretion is, however, not an arbitrary one, but one to be governed as far as possible by fixed rules and principles.

17. Accordingly, in the absence of tangible and convincing evidence as to the purported gifting of the land as claimed by the Plaintiff, this court is not inclined to grant such a relief to the Plaintiff affecting the land in question.

**Monitory Claim:**

18. The Plaintiff's first relief prayed for, as per paragraph (a) to the prayer to the Statement of Claim, is "***An order that the Defendant pay the Plaintiff the sum equivalent to the current market value of the agreement for lease No.10/006526***". This claim, apparently, includes the value of the land as well and not only the value of the house, the plaintiff claims to have constructed.
19. The Plaintiff by his evidence with the supporting evidence of the PW-1, PW-3, PW-4, and PW-5, has demonstrated that it was none other than he who constructed the house in the land in question. The Plaintiff also relies on a photographic evidence marked in PE-1 set of documents to establish as to how he was involved in leveling the land for the construction.
20. The Plaintiff's witnesses, namely. **Indar Dutt** (PW-1), who worked as the Carpenter in the construction of the house, at his age of 79 now, despite being a Parkinson patient, came forward to give evidence on behalf of the Plaintiff. I see his evidence as trustworthy and there was no reason to disbelieve or disregard his evidence as to his contribution for construction. His evidence, that the Plaintiff only hired him, paid him and it was the Plaintiff who appeared to be the owner of the house can be relied and acted upon.
21. The Plaintiff too at his age of 85 came all the way from Australia to give evidence in order to substantiate his claim. His evidence as to his involvement in the construction is convincing. His evidence was clear, though at times he was slow in answering. His demeanor and the uncontradictory answers were persuasive and he was found to be speaking truth from the doc as to his interest in the subject matter, the expenses he incurred for the construction and about his legitimate expectation.
22. PW-3, 4 and 5 also in the ages of 82, 65 and 74 and Lorry hirer, watcher and assistant carpenter respectively gave clear evidence about the role they played by them in constructing the house in question for the Plaintiff. They have substantiated the averments in their respective Statutory Declarations marked and filed as a part of "PE-1" set of documents.

**E. Conclusion:**

23. On careful consideration of the total evidence led in this matter, this Court stands convinced that the Plaintiff has constructed the house in question on the land purported to have been gifted unto him, spending his own money as he claims, and accordingly he should be compensated at the present market value of **only the house**, subject to deduction of any improvement done by the subsequent lessees.
24. The Plaintiff has constructed the house in question by spending his own money with the belief that he would be the next Lease Holder of the land in question and with the legitimate expectation that he would enjoy the fruits of his endeavor in times to come.

25. If the plaintiff is not granted the value of the house, minus the subsequent improvements as stated above, it would be an unjust enrichment for the Estate of RAM PADARATH of which the Defendant is the Executive and the Trustee as per the evidence available in the record.
26. However, as the Plaintiff has failed in establishing a gift by the Late RAM PRATHAP, the Plaintiff cannot be granted relief as per prayer (a) **including the value of the Land** in question. The Plaintiff also cannot be granted the alternative relief as per prayer (b) to transfer the Lease in favor of the Plaintiff for the reason adumbrated above.
27. Unfortunately, the Plaintiff has not been able to obtain the present valuation due to reasons beyond his control. Accordingly, I decide that the Plaintiff be granted compensation on account of the construction done by him, through a process of assessment of damages before this Court or Master , after obtaining a proper Valuation Report to ascertain the present market value of the house in question, however subject to deductions, if any, as stated above. The value of the land shall not be considered for this purpose.

**F. Final Orders:**

- a. The Plaintiff's claim for reliefs as prayed for in paragraphs (a) and (b) of the prayer to the statement of claim is dismissed, subject to his right granted in paragraph (b) below.
- b. The Plaintiff shall be entitled for the recovery of compensation, together with interest as prayed for, on the account of the house constructed by him in the land in question.
- c. The Compensation shall be recovered from the Defendant as the Executor and Trustee of the Estate of late RAM PADARATH.
- d. There shall be an assessment of compensation before a judge or the Master, and the Plaintiff shall be at liberty to obtain a proper Valuation Report for this purpose.
- e. The Plaintiff is entitled for summarily assessed costs, from the Defendant, in a sum of \$3000.00.
- f. This judgment shall be sealed and served on the Defendant out of jurisdiction.

  
A.M. Mohamed Mackie  
Judge



At High Court Lautoka this 3<sup>rd</sup> day of October, 2022.

**SOLICITORS:**

**For the Plaintiff: Siddiq Koya Lawyers**  
**For the Defendant: No Appearance**