

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA FIJI

CIVIL CASE NO: HBC 52 OF 2013

BETWEEN : **DONALD MANI** of 9 Kini Street, Suva, Fiji, Businessman

PLAINTIFF

AND : **MICHAEL CHANDRA MANI** of 27 Adam Place, Lautoka, Occupation
unknown to Plaintiff

1ST DEFENDANT

AND : **SHIRLEY ROSINA MANI** of 27 Adam Place, Lautoka, occupation unknown
to Plaintiff

2ND DEFENDANT

Appearances : Ms. Prena Preetika for the Plaintiff
Defendants appeared in Person

J U D G M E N T

Introduction

1. **Statement of Claim**

The Plaintiff filed a Writ of Summons on 28 March 2013 against the Defendant's claiming inter alia the following reliefs from Court:

- (a) That the Plaintiff is entitled to possession and the Defendants are to give up Vacant Possession of the property described as Housing Authority Sub Lease No. 313037 as Lot 2 on DP No. 5961 situated in the district of Vuda in the province of Ba containing an area of 1103m² ["The Property"].
- (b) The sum of \$48,000.00 as rental income for the past 5 years.
- (c) Interest and Costs of and incidental to this proceeding on an indemnity basis.

2. The summary of the facts stated in his Statement of Claim are as follows:

- (i) That the Plaintiff is the registered proprietor of the property and the Defendants who are still occupying the said property were the predecessors in title.
- (ii) That on or around 29 August 2006, the Defendants entered into an agreement with one Umesh Kumar for the sale of the property.
- (iii) That on or around 12 October 2006 the Plaintiff entered into a written agreement with the Defendants for the sale and purchase of the same property. Particulars of the said agreement were:
 - a. Parties agreed that \$86,595.97 is the outstanding balance owed under the mortgage to FDB as at 11/10/06;
 - b. The Plaintiff to pay the FDP arrears being \$3181.12 as at 11/10/06 and pay installments of \$1,000.00 until Plaintiff makes arrangements from his finance institution to pay off FDB;
 - c. The Plaintiff was to transfer his land located at 25 Adams Place to the Defendants after paying ANZ bank;
 - d. The Plaintiff to pay all other liabilities of the Defendants to a total amount of \$26,781.12;
 - e. The agreed purchase price is \$168,377.09.
- (iv) The said Agreement was terminated by the Defendants as advised by the Fiji Development Bank and the Plaintiff was not able to secure finance from the said Bank.
- (v) After further negotiations between the parties on or around 15 March 2007 the Plaintiff entered into another Agreement with the Defendants. The particulars of the said agreement were:
 - a. The Defendants agreed to sell their property situated at Lot 27 Adam Place Lautoka to the Plaintiff;
 - b. The total purchase price is \$F130,000.00;
 - c. The Defendant acknowledge receiving \$40,000.00 from the Plaintiff;
 - d. The balance of \$90,000.00, to be paid within or before 60 days;
 - e. The Plaintiff to pay all legal cost for the Transfer.
- (vi) That acting on the agreement the Plaintiff took a \$90,000.00 loan from Bank of Baroda and in fact the Bank also acted on an agreement letter dated 15 March 2007 signed by the Defendants.

- (vii) In pursuance to the said agreement on or around the 21 May 2007 the Defendants signed the Transfer of Lease and transferred the said property to the Plaintiff on a consideration sum of \$90,000.00 which was paid to the mortgagee to dispose the Defendants debts.
- (viii) The Plaintiff had to pay an extra amount of \$33,977.34 in which \$25,375.00 was paid to the Defendants account in FNPF for withdrawal of FNPF charge and \$8,602.34 was paid to the Fiji Development Bank.
- (ix) Knowing that the property had been transferred to the Plaintiff as agreed, the Defendants wrongly claimed that they have the right to continue occupying the property claiming that \$15,000.00 is owed to them by the Plaintiff. In breach of the Agreement the Defendants continued to occupy the property and have refused vacant possession of the said property to date.
- (x) The Plaintiffs purpose of acquiring the said property was to place the said property on rent and by reason of the matters aforesaid the Plaintiff had suffered loss on rental income and damages. Particulars of loss and damages are;
 - a) Loss of rental income assessed at a sum of \$800.00 per month for 60 months = \$48,000.00 (11/01/2008 – 11/01/2013 = 5 years)

Statement of Defence and Counter Claim

3. The Defendants in their Statement of Defence have denied that there was a second agreement between them and the Plaintiff. However they have stated that they put their signatures on a letter addressed to the Bank of Baroda in duress by the Plaintiff to obtain a loan from the said Bank. They have also stated that they had transferred the property to the Plaintiff in good faith and based upon the sale and purchase agreement dated 12 October 2006. It is also stated that they were unaware of the payment of \$8,602.34 paid to the Fiji Development Bank and that the Plaintiff owes them \$15,000.00.
4. In their Counter Claim the Defendants state that the 1st and 2nd Defendants are husband and wife and that the Plaintiff is the brother of the 1st defendant. They state further that sometimes in 2005 they were facing financial difficulties with their repayment of mortgage sums with Fiji Development Bank and as such they arranged a buyer for the property namely Umesh Chand with whom they executed a sale and purchase agreement. The Defendants were intervened by the Plaintiff who suggested that he will take over the debt owed by the Defendants to Fiji Development Bank and transfer the Defendants property in the Plaintiffs name. In furtherance of

taking transfer of the Defendants property, the Plaintiff agreed to transfer the Defendants vacant land situated at 25 Adams Street and pay the Defendants a sum of \$15,000.00.

The following facts are also stated in the Statement of Defence:

- i) That it was an implied term of agreement that the defendants would occupy the property until such time as the Plaintiff transferred the vacant land to the Defendant free of all encumbrances and pay the sum of \$15,000.00.
- ii) That the defendants were asked by the Plaintiff to withdraw the sale and purchase agreement entered into by the defendants and Umesh Chand and was also advised that the Plaintiff would refund the deposit and legal fees.
- iii) That to date the defendants have not been paid \$15,000.00 by the Plaintiff nor has he transferred the vacant land to the defendants and therefore the defendants have not been able to make improvements or erect a house to move in.
- iv) That the defendants are not legal savvy and therefore the Plaintiff got the defendants to put their signature on documents that the defendants at many times were not aware of.
- v) That the Plaintiff has deceived the defendant and have taken advantage of their love, trust and faith for the Plaintiff.
- vi) That the defendants have till to date maintained and looked after the property and the vacant land in good faith that the plaintiff being 1st defendant's brother would one day fulfill the terms of the sale and purchase agreement dated 12 October 2006.
- vii) **Particulars of loss and damages are stated as follows:**

- a) Loss on maintaining vacant land by cutting grass at the sum of \$50 per month for 79 months = \$3950.00 (October 2006 to April 2013);
- b) Loss on maintaining the house at the sum of approximately \$8,000.00

Particular of Damages

- a) Damages for Stress and disturbance;
- b) Damages for loss of reputation and humiliation

Reply to Defence

5. The Plaintiff in his reply to Defence states inter alia that :
- i) The sale and purchase agreement between the Defendant and Umesh Chand was executed in 2006 and not 2005.
 - ii) That the Plaintiff and the Defendants on 15th March 2007 entered into another agreement on the understanding that the 2nd agreement supersedes and nullify the terms of agreement agreed to on the 12th October 2006.
 - iii) That the defendants are fully aware of the 2nd agreement in which a total sum of \$40,000.00 was paid to them.
 - iv) That the defendants have failed to establish a cause or claim against the Plaintiff and they are expecting the Plaintiff to compensate them for illegally occupying the Plaintiffs property for the past 5 years and they have denied the Plaintiff from enjoying the fruits of his labour.

The Hearing

Plaintiffs Testimony

6. The Plaintiff in his evidence stated that he is the registered proprietor of the property and that his brother and the sister in law are still occupying it and refusing to vacate after transferring it to him. He stated that the defendants started to default in their mortgage repayments and the Fiji Development Bank sent default notices to the defendants stating that the bank may seize the property. He also said that he was paying the mortgagee as a help to his brother and he was told by defendants that they are going to sell the property to one Umesh Kumar. The memorandum of agreement between the Defendants and Umesh Kumar was produced as marked Exhibit P2. The Purchase prices given in the said Agreement is \$147,000.00. The Plaintiff testified that he entered into a sale and purchase agreement with the defendants on 12th October 2006 by which he agreed to buy the property for a sum of \$168,377.09 including all the liabilities. When questioned on the payment of \$3000.00 to Umesh Kumar which appeared as item 3 of the agreement he stated that it was the refund of Umesh Kumar's legal fee as he withdrew from the agreement with the defendants.
7. When the Plaintiff was asked why the agreement dated 12th October 2006 was terminated he said

that he came to know from the bank that the defendants have informed the bank that they are not willing to sell the property to the plaintiff and due to that he could not secure the loan from the bank. The Plaintiff tendered to Court the 2nd agreement marked as Exhibit P5. It is addressed to the Manager, Bank of Baroda. The Plaintiff said that the Bank requested to get a letter from the Defendants stating that the property has been sold to him and agreement P5 was signed to fulfill that request. He admitted the contents of the letter and also that \$40,000.00 has been paid to the Defendants and balance to be paid is \$90,000.00 as per the said letter. When asked about the vast difference between the consideration sum of the first agreement and the second agreement, \$168,377.09 and \$130,000.00 he said that he first agreed to pay more than the value of the property as a brother of the 1st Defendant but when he found out the Defendants have withdrawn the earlier agreement he told them that he will do business and pay only the value of the property.

8. The Plaintiffs Exhibit P6 is a copy of a cheque for \$90,000.00 drawn in favour of the Fiji Development Bank which proves that he has paid the Defendants debt. He also stated that he had to pay \$8,602.34 to the Fiji Development Bank as an additional penalty. Exhibit P7 is a copy of a cheque which proved that the said amount was paid to Fiji Development Bank. He also revealed that he had to pay FNPF a sum of \$25,375.00 which was an additional charge on the property and that the Defendants never disclosed about the said charge to him.
9. According to the Plaintiffs testimony he has paid \$98,602.34 to the Fiji Development Bank, \$40,000.00 to the Mortgage and \$25,375.00 to the FNPF prior to the transfer of the property to him. Copy of a cheque for \$25,375.00 drawn in favour of the FNPF was marked in evidence as Exhibit p8.
10. It was further stated by him that he wanted to buy the property because he had no option as he has paid for the mortgage many times and that the Bank also told him to buy it. He said that he wanted to rent out the property but part of it is rented by the Defendants for \$400.00 and that he is not receiving any rent from the Defendants. He testified that he has difficulties for paying mortgage as the Defendants are occupying the property and therefore he is seeking sum of \$800.00 per month for five years a total of \$48,000.00 the rent income he has been deprived of in the past and also seeking the same monthly income for another two years from the date of filing the action till 2015.
11. Answering in Cross examination he denied that he made the defendants sign the second agreement letter to the Bank purely for the loan purposes. He also denied having prior knowledge of the charge at FNPF. When he was asked whether he came to FNPF Lautoka and Suva and made the Defendants to write a letter to waive the charge, Plaintiff stated that it was done after he lodged the loan application. When asked whether he agreed to give the defendants the house

worth \$35,000.00 at Adam Street, the Plaintiff said that it was the initial agreement and he wanted to give that land with the mortgage. He denied that arrears accumulated due to his delay in arranging finances and stated that it happened due to withdrawal of defendants consent to the first agreement. When it was put to him that only time the defendants withdrew was when he delayed he denied it and stated that his loan application was not processed due to the Defendants withdrawal letter to the Bank.

12. **Analysis and Determination**

According to the Plaintiffs evidence he has paid \$98,602.34 to the Fiji Development Bank to settle the mortgage of the Defendants. Fiji Development Bank letter (P8) to Neel & Shivam Law Firm confirms that the settlement figure was \$98,602.34. FNPF letter P9 addressed to Neel Shivam Lawyers prove that the Defendants settlement figure to FNPF was \$25,375.00 Exhibit P8 establish that the said amount was paid by the Plaintiff to the FNPF. Upon the evidence presented both in the Exhibits and the Oral evidence it is proved on the balance of probabilities that a total sum of \$123,977.34 was paid by the Plaintiff to the Fiji Development Bank and FNPF.

13. The Defendants have admitted in document Marked P5 that they have received a sum of \$40,000.00 from the Plaintiff and total purchase price is \$130,000.00. When the Plaintiff was asked how he paid \$40,000.00 prior to signing the agreement he stated that it was the amount paid for the Defendants mortgage. In cross examination he denied that the letter P5 was signed purely to facilitate him to get a loan. The Defendants have not adduced any evidence to prove that they have been paying for the mortgage prior to the agreements. Document marked P4 is a notice sent to the Defendants by Fiji Development Bank requesting the Defendants to pay an account balance of \$85,642.13 within 30 days from receipt of it. It is clear from the said notice that the Defendants were in financial difficulties and they were in default repaying the loan. Hence, I accept the Plaintiffs testimony on the payment of \$40,000.00 on the mortgage loan prior to signing the agreement in order to save his brothers property being sold under the mortgage.
14. It emerged from the evidence of the Plaintiff that he has paid a total sum of \$163,977.34 for the Defendants property before it was transferred to him. This amount is almost equal to the consideration sum of the 1st agreement. It is also established by the evidence before Court that the Plaintiff has paid \$33977.94 in excess of the consideration sum of the 2nd agreement.
15. The Defendants relied upon the first sale and Purchase Agreement made on 17th October, 2006. Their Statement of Defence states that there was no other agreement. It is stated by them that \$15,000.00 and the land at 25 Adams Place was not given to them as per the said agreement. The Plaintiff in his evidence stated that the said agreement which was with the Fiji Development Bank

was withdrawn by the Defendants and thereby he could not secure the loan from the said Bank. He stated further as a result he had to go to his Bank, Bank of Baroda and the second agreement was signed on the Banks request to apply for the loan. While the second Defendant was cross examining the Plaintiff on this issue, it was put to him that only time they withdrew was when the Plaintiff delayed.

Relevant part at the evidence reads as follows;

“Q : Why didn’t you do your part?
A : I was hoping to give you \$168,000.00. You withdrew 1st letter. Then I said it would be a business transaction, not a family transaction.
Q : **Only time we withdrew was when you delayed**
A : No my application was not processed, you withdrew the letter”
[emphasis added]

Though the Defendants contends that the first agreement was not withdrawn it is apparent from the questions of the second Defendant that they withdrew from the agreement due to the delay of the Plaintiff securing the loan. As such I accept the Plaintiffs testimony that the first agreement was withdrawn by the Defendants and the Plaintiff failed to secure the loan from Fiji Development Bank because of the said withdrawal

16. The Plaintiff contended that he came to know about the FNPF charge only after applying for the loan. He stated further that he made the Defendants to write to the FNPF to waive the charge after the loan transaction. If the Plaintiff had prior knowledge of the FNPF charge question arises as to why he did not include that amount as a liability in the two agreements signed. In my view the Plaintiff would not have taken the risk and signed the agreements hoping that the charge would be waived.
17. The Defendants in their Statement of Defence states that they are not legal savvy and therefore the Plaintiff got the Defendants to put their signatures on documents that the Defendants at many times were not aware. In the Defendants written Submissions filed it is stated that second Defendant received secondary and tertiary education in Natabua High School and acquired the skills of clerk/typist. It is stated further therein that upon completion of her education in the year 1981 she attained employment at the National Bank of Fiji, Suva Branch and in the year 1997 the Bank faced a crisis and she was made redundant but attained a package of \$16,000.00 for her service of 15 years to the bank.
18. It is difficult for me to believe that the second defendant with such long work experience in a

Bank signing documents which she was not aware. She being a former employee of a Bank should have been aware of the banking transactions and the documents required in such instances.

19. The Plaintiff further stated in evidence that apart from seeking vacant possession of the property he also seeks a sum of \$48,000.00 as rental income from the date the property was transferred into his name. This evidence was never challenged by the Defendants in cross examination.

Counter Claim

20. Defendants did not call any witnesses to prove their Defence or Counter Claim. Due to the Counter Claim being not proved I hold that it should be struck out and dismissed.

21. **Conclusion**

Having analyzed the evidence of the Plaintiff as above, I find that his evidence was credible and supported by documentary evidence to establish his claim. The Defendants never denied that execution of the transfer of the said property in the name of the Plaintiff.

22. The Defendants are not alleging that the Plaintiff acquired title to the Property in a fraudulent manner. There is no evidence to prove that he acquired the title to the property through fraud. The title under the Land Transfer Act, (Cap 131) is indefeasible in view of the provisions of the sec 39 of the Act and it could only be impeached on proof of fraud.

23. **In Shyam Lal –v- Eric Martin Schultz FLR vol 18 p 152 at 154 MARSACK JA: said**

“The third ground of appeal, in my opinion, can have no validity in view of the provisions of section 39 of the Land Transfer Act. The only circumstance in which the title of the respondent could be impeached would be on proof of fraud that is to say, fraud of the part of the registered proprietor. There is no evidence whatever that respondent had acquired his registered title to the land through fraud; and in fact no allegation of fraud has been made against him. That being so, I would hold that the title of the respondent to the land is not subject to any interest, equitable or otherwise, of the appellant”.

[underlining and emphasis added]

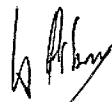
24. From the Plaintiff testimony and the documentary evidence produced at the hearing, I find that the Defendants are occupying the Plaintiffs property free of rent and also collecting rent from a portion of the property even after the Plaintiff became the legal proprietor of it. Therefore, I

conclude that the Defendants occupation of the property is unlawful and the Plaintiff should get vacant possession of it and arrears of Rent amounting to \$48,000.00 as prayed for in the Statement of Claim.

25. The Plaintiff in his evidence stated that he is also seeking arrears of rent income for two years from the date of filing this action upto 2015. However, he has not claimed such a relief in his statement of claim. Therefore I will not make any determination on the rental income for the said two years in this Judgment.

26. **Final Orders**

- a) The Plaintiff is entitled to possession and the Defendant is to give up vacant possession of the property described as Housing Authority Sub- Lease No. 313037 as Lot 2 on DP No. 5961 situated in the district of Vuda in the Province of Ba containing an area of 1103m2.
- b) The Plaintiff is entitled to recover from the Defendants a sum of \$48,000.00 as rental income for the past 5 years.
- c) The Defendants to pay the Plaintiff costs summarily assessed in a sum of \$3,000.00.
- d) The Defendants Counter Claim is Struck Out and Dismissed.



Lal S. Abeygunaratne

[Judge]



At Lautoka
14 May, 2015