THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

CIVIL APPEAL NO. : HBA 3 of 2014

BETWEEN	:	**YIN PING CHAN**	**Defendant/Appellant**
A N D	:	**VILITATI RALULU**	**Plaintiff/Respondent**
COUNSEL	:	**Ms. Raikaci for the Defendant/Appellant** **Mr. S. Kumar for the Plaintiff/Respondent**	
Date of Hearing	:	**24th November, 2015**	
Date of Judgment	:	**27th January, 2016**	

JUDGMENT

[1] This is an appeal from the ruling of the learned Magistrate of Nausori dated 05th December 2013.

[2] The plaintiff-respondent (hereinafter referred to as the respondent) entered into a sales and purchase agreement dated 16th June 2009 with the defendant-appellant (hereinafter referred to as the appellant) to sell her business called ELVIS KANA PLACE for the price of $ 20,000.00.

[3] After the sales and purchase agreement was entered into by the parties the business was handed over to the respondent who carried on the business for about one year and four months before the dispute which led to the institution of this action arose.

[4] The appellant filed writ of summons claiming the refund of $ 20,000.00 paid to the appellant, general damages and costs of the action.

[5] The learned Magistrate awarded $ 8,640 as damages and $ 200 as costs to the plaintiff.

[6] The plaintiff claimed that the amount paid to the defendant on the basis that she had acted in violation of clauses 4 and 14 of the sale and purchase agreement which read as follows;

> **Clause 4** - THAT the vendor shall make all necessary arrangement to transfer tenancy to upon the purchase.
>
> **Clause 14** - That the vendor shall supply the chattels free from any charges to or become payable to any person or body or other authority on a "as is where is basis" as at the date of the full possession of the said business by the purchaser and the Vendor hereby covenants and agrees to indemnify the purchaser against any claim or demand hereafter to be made in respect thereof.

[9] I do not see that there is a violation of clause 4 above because the appellant had promptly handed over the business to the respondent after the signing of the sale and purchase agreement and thereafter at the request of the respondent trained two of his sisters to run the business.

[10] In this case the main question for determination by the learned Magistrate as he correctly understood was whether the appellant had acted in violation of clause 14 of the agreement. The appellant does not deny that the chattels were mortgaged to the Fiji Development Bank as part of the security for a loan. The learned counsel submitted that the appellant was paying the loan instalments regularly. It is not a matter in issue whether the appellant paid the loan instalments regularly or not. The issue is that she suppressed the fact that the chattels were under a mortgage to the bank.

[11] It is common ground that the chattels had already been mortgaged to the Fiji Development Bank at the time of handing over the business and the chattels to the respondent. It was the submission of the learned counsel for the appellant that it was the evidence of the appellant that at the stage of negotiations with the respondent she informed him about the loan with the Fiji Development Bank. It was also his

submission that the sale of the business was on "as is where is basis" and also that it was a "walk in walk out sale".

[12] In my view there is no misapprehension of evidence of the appellant by the learned Magistrate because it is a fact admitted by the appellant that the mortgage of the chattels to the Fiji Development Bank existed at the time this agreement was entered into by the parties. This fact should have been revealed to the respondent before signing the agreement. The fact that the Fiji Development Bank has not seized the chattels is immaterial. Once an agreement is entered into both parties to it must adhere to its terms and conditions. The appellant should have informed about the existing mortgage on the chattels even before the drafting of the agreement. If the defendant was made aware of this position the parties could have arrived at an understanding as to discharging of the mortgage on the chattels.

[13] The learned counsel for the appellant referring to certain paragraphs of the judgment submitted that the learned Magistrate's finding that the evidence of the respondent that the sales and purchase agreement was only given him to sign went unchallenged was incorrect due to the fact that the *jurat* of the agreement very clearly indicates that the contents of the agreement was read over and explained to him.

[14] It is also the submission of the learned counsel that the allegation that the agreement was not signed before a lawyer has not been pleaded in his statement of claim and that the learned Magistrate erred in law in considering this issue which was not pleaded.

[15] In support of his submission the learned counsel cited the following decisions;

In **Palmer v Guadagni [1906] 3 Ch. D 637 at 639** it was held:

> The pleadings must contain fair and proper notice of the issues intended to be raised. This is essential to prevent the other party being taken by surprise.

In **Blay v Pollard and Morris [1930] 1 K.B. 628 at 634** it was held:

> Cases must be decided on issues on the record, and if it is desired to raise other issues they must be placed on the record by amendment. In the present case, the issue on which the judge decided was raised by

himself without amending the pleadings, and in my opinion he was not entitled to take such a course.

[16] It is correct to say that the respondent has not pleaded in the statement of claim that the agreement was not signed before a lawyer. However, the erroneous finding complained of by the respondent does not have the effect of causing any injustice to the appellant for the reason that the execution of this agreement is a fact admitted by both parties.

[17] It is important to note that every mistake in a judgment does not have the effect of vitiating it. The mistake must be such that goes to the root of the matter and it must result in a miscarriage of justice to the parties.

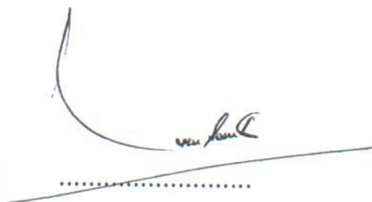
[18] The learned counsel also submitted that the respondent had to close down the business because of his poor business management decisions and he was not well versed with how to run a restaurant. This is also an extraneous matter which was of no relevance to the case before the learned Magistrate.

[19] For the above reasons I make the following orders.

ORDERS

1. The appeal of the appellant is dismissed.

2. The appellant shall pay the respondent $ 1000.00 as costs (summarily assessed).



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Lyone Seneviratne

JUDGE.

28.01.2016