

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 34 of 2016

BETWEEN : **ARVIND KUMAR** of Rovadrau Deuba, Nakulevu, Navua.

PLAINTIFF

AND : **MARY JOAN NELSON** of 49 Carnavon Street, Suva, Business
Lady.

DEFENDANT

Mr. Anil Jatinder Singh for the Plaintiff.
Mr. Jadhav Prashneel Prakashan for the Defendant.

Date of Hearing : - 13th December 2016
Date of Ruling : - 03rd March 2017

RULING

(A) INTRODUCTION

- (1) The matter before me stems from the Plaintiff's application for '**Summary Judgment**' against the Defendant, by way of Summons dated 12th August 2016, made pursuant to Order 13, rule 6 (1) and Order 86, rule 1 and 2 of the High Court Rules, 1988 and the inherent jurisdiction of the Court.
- (2) In support of the application, the Plaintiff relies on the following;
 - ❖ Writ of Summons and Statement of Claim filed on 04th March 2016.
 - ❖ Affidavits of 'Arvind Kumar', the Plaintiff sworn on 14th June 2016 and 22nd September 2016.

(3) The Plaintiff by the Summons filed, seeks the following Orders;

- (1) *That the property comprised in CT 23929 being Lot 1 on DP No. 5959 part of Deuba Block 2 situated at Deuba, Navua having an area of 4.8296 hectares be transferred to the Plaintiff by the Defendant and the Defendant to pay the balance purchase price on settlement date.*
- (2) *That the Defendant to do all necessary paper work/documents to ensure the property comprised in CT 23929 being Lot 1 on DP No. 5959 part of Deuba Block 2 situated at Deuba, Navua having an area of 4.8296 hectares be transferred to the Plaintiff.*
- (3) *Alternatively, the Deputy Registrar of the High Court of Lautoka to sign all necessary documents to effect the transfer of property comprised in CT 23929 being Lot 1 on DP No. 5959 part of Deuba Block 2 situated at Deuba, Navua having an area of 4,8296 hectares to the Plaintiff.*
- (4) *The costs of the application be summarily assessed in the sum of \$3,000.00 against the Defendant.*

(4) The Plaintiff's application for 'Summary Judgment' is vigorously contested by the Defendant. The Defendant filed an Affidavit in Reply sworn on 14th September 2016.

(5) The Plaintiff and the Defendant were heard on the Summons. They made oral submissions to Court. In addition to oral submissions, Counsel for the Plaintiff and the Defendant filed a careful and comprehensive written submission for which I am most grateful.

(B) THE FACTUAL BACKGROUND

(1) What are the circumstances that give rise to the present application?

(2) To give the whole picture of the action, I can do no better than set out hereunder the averments/assertions of the pleadings.

(3) The Plaintiff in his Statement of Claim pleads *inter alia*;

Para 1. THE Plaintiff is a farmer, who entered into an Agreement to purchase property from the Defendant.

2. THE Defendant is a Business lady, who claimed that she is the owner of the property which she offered to sell through a Real Estate agent known as (Paradise Real Estate).

THE ORAL CONTRACT

- a) *THE Defendant offered to sell and the Plaintiff agreed to buy property known as CT 23939 being Lot 1 on DP No. 5959, part of Deuba Block 2, consisting of 4, 8296 Ha with improvements hereinafter referred to as ("the property").*
- b) *THE Defendant informed the Plaintiff that she has purchased "the property" for the sum of \$55,000.00 on or about 19th March, 2004.*
- c) *THE Defendant is on the verge on obtaining the Title to the property from Vakacegu Vunise Savu.*
- d) *THE Defendant was willing to sell the property to the Plaintiff for the sum of \$120,000.00.*
- e) *THE Plaintiff agreed to purchase the property.*
- f) *THE Agreement was entered on or about March, 2009.*
- g) *THE Defendant agreed to obtain the Title in her name and complete the transaction with Vakacegu Vunise Savu.*

THE SALE AND PURCHASE AGREEMENT

- 3) *ON or about the 1st April 2009, the Plaintiff and the Defendant agreed to enter into a formal Written Agreement.*
- a) *DATED 1st April, 2009*
- b) *PRICE - \$120,000.00*
- c) *DEPOSIT - \$20,000.00*
- d) *BALANCE of \$100,000.00 to be paid at the Titles Office on settlement.*
- e) *THE Vendor would be the Registered Proprietor of the property on or before settlement at the Titles Office, when the Plaintiff would pay the balance sum by way of a cheque.*
- f) *THE Plaintiff was to get vacant possession but the Parties agreed that upon Execution of the Sale and Purchase Agreement and payment of the Deposit, the Plaintiff would have occupation to farm the property.*
- g) *THE Contract was stamped on the 4th April, 2009.*
- h) *THE Plaintiff and the Defendant agreed that Specific Performance will be a remedy.*
- 4) *THE Plaintiff and the Defendant agreed to a Common Lawyer for drafting the Agreement and attending to all matters leading up to settlement.*

- 5) *SUBSEQUENT to the Execution of the Sale and Purchase Agreement, the Plaintiff began to invest heavily in improving the Land for farming and occupation.*
- 6) *ON or about 8th May, 2009, the Plaintiff through the Common Solicitor, demanded payment of \$3000.00 for Stamp Duties and Legal Fees and payment of \$100,000.00 on or before the 31st May, 2009.*
- 7) *THE Plaintiff conducted a search before making the payments and found out that the property was not transferred to the Defendant and that she was not in a position to settle at the Titles Office.*
- 8) *THE Plaintiff orally informed the Common Solicitor's that settlement could only take place upon the Defendant receiving the Title and the Plaintiff was informed that it was under process and that he would be advised of further progress.*
- 9) *THE Plaintiff did not hear from the Defendant and on or about the 19th December, 2014, he engaged an independent Solicitor and inter alia, gave notice for completion of the Sale and Purchase Agreement.*
- 10) *ON or about 3rd February, 2015, the Plaintiff not receiving any reply, caused a reminder to be given to the Common Lawyer.*
- 11) *ON or about 5th February, 2015, the Common Lawyers advised the Defendant by letter that the Plaintiff was ready to settle.*
- 12) *ON 5th February, 2015, the Common Lawyers advised the Plaintiff Solicitors that the settlement letter was referred to the Defendant.*
- 13) *ON the 12th February, 2015, instead of attending to settlement, the Common Lawyers advised that they were no longer acting for the parties and that direct contract had to be made with the Defendant.*
- 14) *ON the 29th April, 2015 the Plaintiff advised the Defendant that he was ready for settlement.*
- 15) *ON or about 6th July, 2015, the Plaintiff again by email, contacted the Common Solicitors to see if the matter could be settled without resort to litigation.*
- 16) *THE Defendant has not responded to the Plaintiff's request for settlement and further, the Defendant has not proceeded to have the property transferred in her name, to effect settlement.*

PARTICULARS

- a) *THE Defendant entered into a contract of Sale of the said property.*
- b) *THE Defendant accepted \$10,000.00 from the Plaintiff as deposit and part payment.*

- c) *THE Defendant is aware that the Plaintiff is ready and willing to settle.*
- d) *THE Defendant is avoiding Settlement and causing the Plaintiff loss.*
- e) *THE Defendant had contracted to transfer the property to the Plaintiff.*
- f) *THE Defendant has not transferred the property in his name to avoid or delay settlement.*
- g) *THE Defendant has breached the Contract of Sale and Purchase Agreement and the Plaintiff is entitled to Specific Performance.*

(4) Wherefore, the Plaintiff claims from the Defendant;

- Para*
- 1) *SPECIFIC Performance of the said Agreement.*
 - 2) *ALL necessary and consequential accounts, directions and injuries.*
 - 3) *THE Defendant to complete transfer to herself and then to the Plaintiff or alternatively, that the Deputy Registrar of the High Court of Fiji at Lautoka, Execute the Transfer documents, transferring the property to the Plaintiff.*
 - 4) *DAMAGES for breach of contract in lieu or in addition to specific performance.*
 - 5) *COSTS of this Action.*
 - 6) *ANY other or further relief that the Honourable Court deems fit, just and expedient.*

(C) **ANALYSIS**

- (1) The Plaintiff's 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 judgement (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.

- (2) The Plaintiff's application for Summary Judgment is made on the ground that the Defendant has no defence to the action.

The Plaintiff submitted that; (Reference is made to the Plaintiff's written submissions)

On or about the 1st of April, 2009, the Plaintiff and the Defendant entered into a Sale and purchase agreement wherein the Defendant as Vendor was selling CT 23929 being Lot 1 on DP No. 5959 part of Deuba Block 2 situated at Deuba, Navua having an area of 4.8296 hectares (hereinafter referred as "the property") to the Plaintiff in the sum of \$120,000.00.

The Plaintiff paid the Defendant \$20,000.00 and the balance was to be paid on settlement on which date the Defendant was to complete her purchase of the same land. On the 8th of May, 2009 the Defendant through the Common Solicitors demanded stamp duty, legal fees and payment of \$100,000.00 being the balance price to be paid on settlement.

The Plaintiff conducted a search as is usually required before settlement and found out that though the Defendant was asking for \$100,000.00 she had not completed the transfer onto her name of the said property which she was the owner and which she had promised.

The Defendant had bought the property from Vakacegu Vunise Savu. The Plaintiff waited for the transfer and finally on 19th of December, 2014 gave the Defendant 14 days to complete transfer of sale and purchase agreement dated 1st of April, 2009. A reminder was sent on the 3rd of February, 2015 and on 19th of April, 2015 the Defendant was given personal notice to complete the transaction.

The Defendant does not deny the transaction but only says that she entered into an agreement for sale with the registered proprietor on 19th of March, 2004 but further says that the sale did not materialise without giving any reason on oath.

The Plaintiff since possession has poured his money and labour into the land and kept it in a reasonable condition for agricultural and living purposes.

In this matter upon reaching the three Affidavits filed the Court would have no problem in coming to the conclusion that the sale and purchase was a valid document and that the transaction was not complete because the Defendant refuses to have the transfer registered in her name. The Defendant has not given any reason whatsoever as to why that transaction did not materialise. The Court would draw the inference that the reason why the Defendant is doing this is because she is after a higher price as deposed by the Plaintiff in paragraph 3 (1) of his Affidavit in Response dated 22nd of September, 2016.

The Defendant has not provided any evidence as to why she cannot acquire the property into her name and then transfer the same to the Plaintiff.

The person who sold to the Defendant has died and no probate has been issued, therefore, it is within the Courts power to Order that the Defendant complete the transaction within 30 days or alternatively the Deputy Registrar execute all necessary documents to transfer the said property to the Plaintiff and receive the sum of \$100,000.00 from the Plaintiff upon settlement.

It is submitted that there is nothing before the Court as to why the Defendant cannot complete the transaction. The Court should have no hesitation that the Defendant is holding horn to the transfer for an ulterior purposes namely to sell it to a higher buyer.

- (3) The Defendant says;
(I focus on paragraphs 04, 05, 06, 07, 13, 15 and 16 of the Defendant's Affidavit in Opposition)

Para 4. *I admit that the Plaintiff and the Defendant entered into a Sale and Purchase Agreement on the 1st of April 2009 on the advice of our common Solicitor and even when the land in question was still registered under somebody else's name.*

5. *The Defendant was well aware of the fact that the said land is still under a third party's name as we were both verily informed by our common solicitor before we entered into an Agreement. We both took the risk in entering into an Agreement.*
6. *Prior to entering into the Agreement, we were given an opportunity to seek independent legal advice, however, we opted to proceed with signing the Agreement.*
7. *I admit receiving \$20,000.00 from the Plaintiff upon signing the Agreement as deposit and this was all done upon the advice of our common solicitor.*
13. *I entered into an agreement with the Plaintiff on the understanding that the said property will be transferred to me.*
15. *It was unfortunate that the sale between me and the registered proprietor did not materialise.*
16. *I am not in a position to transfer the said land to the Plaintiff as I am not the registered owner of the property.*

- (4) 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.

After an in-depth analysis of the Statement of Claim and the Affidavit material filed in this case, I am of the view that the proceedings involved serious issues of fact and law.

They are;

- ❖ Whether the Plaintiff and the Defendant were in a capacity to enter into a sale of a land which is registered under a third party's name?
- ❖ Whether the Sale and Purchase Agreement relied upon by the Plaintiff is valid in law when the Defendant at the time of signing the Agreement was not the registered owner of the property in question?
- ❖ Can the Defendant be ordered to transfer a land which the Defendant is not the registered proprietor?
- ❖ Can the Plaintiff seek specific performance of an agreement from the Defendant on a land that is registered under a third party's name?

I refuse to embark on those on the bare facts pleaded. They cannot properly be determined on the bare facts pleaded. They 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.

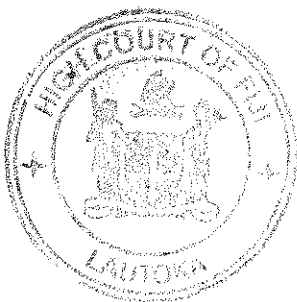
All that can be said is that this is a case which ought to be scrutinised with some care. The matters are not straightforward. Order 86 is for the plain and straightforward, not for the devious and crafty. There is here a case for investigation, and so not for summary decision.

If I may adopt the language of Lord Parker of Waddington in Daimler Co. Ltd v Continental Tyre and Rubber Co. (Great Britain Ltd) 1916, 1A.C. 307, referred to in the Notes to Order 14 in the Supreme Court Practice, if the circumstances of the case are “such as to require close investigation”, this will “preclude the propriety of giving leave to sign judgment under Order 14, rule 1.”

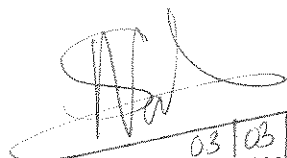
The question is thus whether this is such a case. I think it is. In my judgment “the Plaintiff ought to be put to strict proof of his claim, and exposed to full investigation possible at a Trial”; and the reason is that of justice.

(D) ORDERS

- (1) The Plaintiff’s Summons for Summary Judgment is dismissed.
- (2) The Plaintiff is to pay costs of \$750.00 (summarily assessed) to the Defendant within 14 days hereof.



**At Lautoka
03rd March 2017.**


.....03/03/2017.....
**Jude Nanayakkara
Master**