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

CIVIL ACTION NO. HBC 249 OF 2016

BETWEEN : **GANESH SAMI** formerly of Legalega, Nadi, but currently residing in Sydney, Australia, Nurse.

FIRST PLAINTIFF

AND : **SHIVNESH SAMI** currently of Legalega, Nadi, Pundit.

SECOND PLAINTIFF

AND : **I-TAUKEI LAND TRUST BOARD** is a Statutory Body having its registered office at 431 Victoria Parade, Suva.

FIRST DEFENDANT

AND : **RATU TAITO LOU NALUKUYA** of Saunaka Village, Nadi, Landowner.

SECOND DEFENDANT

AND : **SHIVANI NAIR** of Legalega, Nadi, Domestic Duties.

THIRD DEFENDANT

Appearances : Mr K. Patel for the plaintiff
Ms E. Raitamata for the first defendant
No appearance for the second defendant
Third defendant appeared in person

Date of Hearing : 4 June 2018
Date of Ruling : 4 June 2018

RULING

[on amendment of judgment]

Introduction

[01] This is an application to vary and correct the final orders in the judgment delivered on 23 August 2017. The correction in the orders is sought to include *'the temple Lot identified as the subdivided Lot 3 borne out of the subdivision of Instrument of Tenancy No. 1796: TLTB No. 4/10/5011'* in place of *'Native Lease Agreement for Lease TLTB Ref No. 10/7841'* referred to in the judgment. This application has been supported by an affidavit.

[02] The application is made pursuant to section 18 (1) of the High Court Act, Cap 12 (*'HCA'*), Order 20 Rule10 of the High Court Rules 1988 (*'HCR'*) and inherent jurisdiction of the High Court.

[03] The defendants neither filed objection nor advanced any argument in opposition to the application.

Background

[04] The plaintiffs brought an action to the High Court seeking among other things a declaration that the iTaukei Land Trust Board, first defendant (*'iTLTB'*) cancels any third party application for residential lease TLTB Ref No. 10/7841 and an injunction restraining the defendants, their servants or their agents or whosoever otherwise from engaging in any sort of transaction on Native Lease Agreement for Lease TLTB Ref No. 10/7841.

[05] Following a formal proof hearing, the court granted the relief as asked for in the prayers of the statement of claim. The final orders of the court read as follows:

1. *Injunction is granted restraining the Defendants, their servants or their agents or whosoever otherwise from engaging in any sort of transaction Native Lease Agreement for Lease TLTB Ref No. 10/7841.*

2. *Declaration Order is granted for the 1st Defendant to rectify the Native Lease Agreement for Lease TLTB Ref No. 10/7841.*

3. *Declaration Order is granted for the 1st Defendant to cancel any third party application for residential lease for Native Lease Agreement for Lease TLTB Ref No. 10/7841.*

4. *That there is no order as to costs.*

[06] In the present application, the plaintiffs seek to vary and correct *'Native Lease Agreement for Lease TLTB Ref No. 10/7841'* wherever it appears in the orders to read as *'the temple Lot identified as the subdivided Lot 3 borne out of the subdivision of Instrument of Tenancy No. 1796: TLTB No. 4/10/5011'*.

The Law

[07] Section 18 (1), HCA states:

> *'18 (1) The High Court has the jurisdiction conferred on it by the Constitution of Republic of Fiji and by any other written law and all other jurisdiction necessary for the administration of justice in Fiji.'*

[08] Order 20, Rule 10, HCR provides:

> *'10 Clerical mistake in the judgments or orders, or errors arising therein from any accidental slip or omissions, may at any time be corrected by the Court on motion or summons without an appeal.'*

[09] In *re Sadanand Sharma* [2009] FJHC 212; HBM010.2009 (24 September 2009), a case authority relied upon by the plaintiffs. In that case Inoke J (as he was then)

referred to, at paras [13] & [14], a number of English cases that dealt with alteration, variation of any judgment or order after it has been entered:

[13] Paragraph 556 states: "As a general rule, except by way of appeal, no court, judge or master has power to rehear, review, alter or vary any judgment or order after it has been entered either in an application made in the original action or matter or in a fresh action brought to review the judgment or order. The object of the rule is to bring litigation to finality, but it is subject to a number of exceptions."

[14] The general rule is cited in ***Thynne v Thynne*** *[1955] 3 All E R 129, 142 by Hodson LJ, from the decision of Lindley LJ in* ***Preston Banking Co v William Allsup & Sons*** *[1895] 1 Ch at p 144:*

"In my opinion, it is of the utmost importance, in order that there may be some finality in litigation, that when once the order has been completed it should not be liable to review by the judge who made it."

In ***Thynne v Thynne*** *[1955] 3 All E R 129, the parties were secretly married on 8 October 1926, and on 27 October 1927, they went through a second ceremony of marriage in the presence of their relations and friends. In a subsequent petition for divorce, the date of marriage was incorrectly stated as 27 October 1927 as well as the church in which the parties were married. The mistake was an honest mistake which the petitioner's lawyers were not aware of. The decree nisi and decree absolute bore the same mistakes. The petitioner applied to have the marriage date and place corrected in the petition and the decrees nisi and absolute. The Judge at first instance refused the amendment taking the view that the decree absolute was a nullity. That left the parties in a state of uncertainty. If it was assumed that the decree was a nullity and a new petition was filed it would be met by the rules which forbade the filing of a fresh petition whilst another petition on the same matter remained unresolved. And if it was sought to remove the decree, the answer might well have been that it was a perfectly good decree or that it was not void. On appeal, the English Court of Appeal allowed the correction to be made. Morris LJ at page 145 explained the principles in this way:*

"In addition to powers resulting from rules of court, it is clear that there are necessary powers which are inherent in the jurisdiction of the court. It would, I think, be undesirable to limit the scope of those powers as a result of any words which describe them. I respectfully agree with what was indicated by Evershed, LJ, in Meier v Meier [1948] P at p 95:

'I prefer not to attempt a definition of the extent of the court's inherent jurisdiction to vary, modify or extend its own orders if, in its view, the purposes of justice require that it should do so.'

...If the meaning and intention of the court is not expressed in its judgment or order then there may be variation. In Lawrie v Lees, Lord Penzance said (7 App Cas at p 34):

'I cannot doubt that under the original powers of the court, quite independent of any order that is made under the Judicature Act, every court has the power to vary its own orders which are drawn up mechanically in the registry or in the office of the court – to vary them in such a way as to carry out its own meaning and, where language has been used which is doubtful, to make it plain. I think that power is inherent in every court.'

To the same effect were the judgments in Re Swire (1885) 30 Ch D 239. Lindley LJ said at p 246:

'...if an order as passed and entered does not express the real order of the court, it would, as it appears to me, be shocking to say that the party aggrieved cannot come here to have the record set right.... It appears to me, therefore, that, if it is once made out that the order, whether passed and entered or not, does not express the order actually made, the court has ample jurisdiction to set that right, whether it arises from a clerical slip or not.'

...

If the court, in the circumstances I have postulated, is powerless to act, it would seem as though the court was enslaved by its own decree. Where a court has decided an issue and the decision of the court is truly embodied in some judgment or order that has been made effective, then the court cannot re-open the matter and cannot substitute a different decision in place of the one which has been recorded. Those who seek to alter must in those circumstances invoke such appellate jurisdiction as may apply. But if a case arises where in the interests of accuracy it seems desirable to amend some part of a judgment, other than its operative and substantive part, it would seem to be regrettable if the inherent powers of the court were limited or confined. The powers extend in my judgment to enable a court so to amend a judgment that it carries out the intention of the court. Particular words and particular forms (unless specified by the legislature) are the servants of the law and not its master."

Discussion

[10] The action brought by the plaintiffs relates to Lots 3 & 4. These lots arose out of a subdivision of the agricultural land of which the first plaintiff's mother (Parmawati) was the registered lessee under an Instrument of Tenancy issued

under Agricultural Landlord and Tenant Act (*'ALTA'*) in August 1985 (No. 1796; TLTB No. 4/10/5011). The iTLTB converted the agricultural land into residential lots. The plaintiffs applied for the residential lease for both Lots 3 & 4. The subdivided Lot 3 included the temple the plaintiffs built.

[11] Undoubtedly, the body of the judgment refers to Lots 3 & 4 as disputed lands. Confusion has arisen as the judgment refers to *'Native Lease Agreement for Lease TLTB Ref No. 10/7841'* without any reference to lot numbers. This is because of the prayers in the statement of claim. In prayer, the plaintiffs had omitted to include the Lot numbers (3 & 4). Instead, it only refers to the TLTB reference number: 10/7841.

[12] The plaintiffs in the current application seek to vary the judgment so as to include the lot numbers removing the TLTB reference number. The plaintiffs say the reference to 'Native Lease Agreement for Lease TLTB Ref No. 10/7841' in the judgment, in fact, is a land opposite Temple Lot 3 and Lot 4 as shown in the diagram SS-3 in the Affidavit and is not the title reference for temple Lot 3.

[13] Mr Patel, counsel for the plaintiffs submits that the plaintiffs are not seeking a substantive variation to the order of the court which would have the effect of altering the judgment, but a change in form of the wordings to the order which would enable the plaintiffs to enforce the judgment.

[14] In their previous application, the plaintiffs made application to vary the judgment and include entirely a different agreement for lease number which was never pleaded or put in dispute. I refused that application.

[15] In *Thynne* (above), a petition for divorce, the date of marriage was incorrectly stated as 27 October 1927 as well as the church in which the parties were married. The mistake was an honest mistake which the petitioner's lawyers were not aware of. The decree nisi and decree absolute bore the same mistakes. The petitioner applied to have the marriage date and place corrected in the petition and the decrees nisi and absolute. The Judge at first instance refused the amendment taking the view that the decree absolute was a nullity. On appeal, the English Court of Appeal allowed the correction to be made.

[16] The Fiji Court of Appeal in a recent judgment (*Daya Wati v Registrar of Title* (Civil Appeal No. ABU0006 of 2016 (01 June 2018)) varied its judgment by substituting for the order that *'the respondent is advised and directed to issue a fresh Certificate of Title to the entirety of the land in question in the name of the Appellant'* with the order that *'The Respondent register a vesting order in the name of the Appellant in respect of a four fifths undivided share in Certificate of Title 33461.'*

[17] Obviously, the body of judgment refers to Lot number 3 and 4. The plaintiffs had pleaded Lot 3 & 4 as the land in dispute, and the formal proof hearing proceeded on that basis. The final orders of the court have been sealed without reference to Lot number 3 to which the judgment relates. It has been sealed with an incorrect TLTB reference number which does not refer to Lot 3.

[18] In cases only where there is a clerical mistake in a judgment of order or an error arising from an accidental slip or omission, the court is empowered to amend or correct on motion or summons without an appeal pursuant to O.20 R.10. Apart from this rule, the court has an inherent power to vary its own orders so as to carry out its own meaning to make its meaning plain.

[19] I am satisfied that if the correction were not allowed to include the lot number in the final orders, the plaintiffs will be left in a state of uncertainty, and the judgment will be frustrated.

Conclusion

[20] For the foregoing reasons, I would grant leave to the plaintiffs to correct final orders so as to include Lot number 3 in place of incorrectly stated TLTB Ref No. 10/7841. There will be no order as to costs.

The Result

1. Leave granted to correct the final orders in the judgment delivered on 23 August 2017.
2. There will be no order as to costs.

4/6/2018

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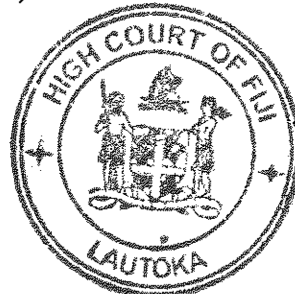
M.H. Mohamed Ajmeer

JUDGE



At Lautoka
4 June 2018

Solicitors:
For plaintiffs: Messrs Krishnil Patel Lawyers, Barristers & Solicitors
For first defendant: Legal Department, iTaukei Land Trust Board
For the third defendant: unrepresented