

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

**CIVIL ACTION NO. HBC 251 OF 2012**

**BETWEEN** : **MOHAMMED ABU BAKER SADDIQUE** of 5987 Lemon Park Way,  
Sacramento, CA 95824, United States of America, a Driver.

**PLAINTIFF**

**AND** : **MAIMUN NISHA** of Suva in her capacity as the Executrix and Trustee  
of the **ESTATE OF MOHAMMED UMAR FARUQUE.**

**FIRST DEFENDANT**

**AND** : **REGISTRAR OF TITLES** Government Buildings, Suva.

**SECOND DEFENDANT**

**AND** : **ATTORNEY GENERAL** Attorney General's Chambers, Suva.

**THIRD DEFENDANT**

**Appearances** : Mr Anil J. Singh for the plaintiff  
Mr Iqbal Khan for the first defendant  
No appearance for the second & third defendants

**Date of Trial** : 9 November 2017

**Date of Submission** : 5 December 2017 (defendant), 25 January 2018 (plaintiff)

**Date of Judgment** : 12 February 2018

# J U D G M E N T

## **Introduction**

- [01] The plaintiff brought this action against the defendant in her capacity as the Executrix and Trustee of the Estate of Mohammed Umar Faruque seeking among other things: (a) a declaration that the Transfer No. 702754 of the Certificate of Title No. 12304 dated 4 June 2008 is null and void and of no effect, (b) an order that the second defendant cancel the Transfer No. 702754, (c) an order that the name of plaintiff be added to the title as to one undivided half share, (d) an order that the first defendant forthwith give vacant possession of the said property and (e) an order that the first defendant pay mesne profit to the Plaintiff until the determination of this action.
- [02] At the trial, the plaintiff gave evidence and called a witness to give evidence on his behalf. The defendant neither gave evidence nor called witnesses to give evidence on her behalf.
- [03] Both the parties tendered their respective closing submissions for which I am grateful to counsel and their team.

## **Background facts**

- [04] The brief background facts are as follows:
- a) Mohammed Abu Baker Saddique, the plaintiff (hereinafter sometimes may be called '*Saddique*') and Mohammed Umar Faruque, the defendant's husband (now deceased) (hereinafter sometimes may be called as '*Faruque*') are brothers. Both of them were beneficiaries under the Last Will and Testament of Mohammed Ishaque late of Lautoka, their father (hereinafter "*the Deceased*") dated 13 January 1982.

- b) Maimun Nisha, Faruque's wife (the first defendant) is the Executrix and Trustee of the Estate of Faruque late of Nadi who died on the 20th day of August 2012.
- c) Saddique is residing in the USA.
- d) On 25 October 1990, the deceased died leaving behind a Will dated 13 January 1982.
- e) On or about 8 May 1991 the last Will of the deceased was proved in the High Court of Fiji and the administration of the Estate of the deceased was devolved and vested in Ahmed Bi (hereinafter referred to as the "Deceased Wife") as one of the Executrix and Trustee pursuant to Probate No. 26670.
- f) Under his last Will, the deceased directed his Executor and Trustee to pay all his just debts, funeral and testamentary expenses the deceased gave all his real estate to Saddique and Faruque in equal shares.
- g) At the time of his death, the deceased's estate was the proprietor of all that piece and parcel of land comprised in Certificate of Title No. 12304 known as Lot 17 on DP 2631 situated in Nadi together with substantial improvements thereon (hereinafter referred to as the "property"). On or about 18 October 1991, the transmission of death was registered in the name of the deceased wife (Ahmed Bi). The deceased's wife died on 14 June 2005, leaving the Estate of deceased un-administered.

h) The plaintiff alleges that upon the death of the deceased wife, Faruque fraudulently and unlawfully transferred the property to himself by transfer No. 702754 of the Certificate of Title No. 12304 dated 4 June 2008, forging a Deed of Renunciation (DoR), which reads:

*“**WHEREAS, MOHAMMED ISHAQUE** father’s name Mohammed Umar of Fiji Sugar Corporation Limited Compound, Rakiraki, in the Republic of Fiji, Retired Teacher, Deceased, who died on 25<sup>th</sup> day of October, 1990 at Rose Hospital, Alameda, United States, testate, [hereinafter called the “deceased”].*

***NOW, I MOHAMMED ABU BAKER SADDIQUE** father’s name Mohammed Ishaque of Sacramento, United States of America, Driver, hereby **RENOUNCE ALL MY RIGHTS AND INTEREST** the estate of **MOHAMMED ISHAQUE** in favour of my brother namely **MOHAMMED UMAR FARUQUE** in his name.*

***SIGNED** by the said **MOHAMMED ABU BAKER SADDIQUE***

*at this 5<sup>th</sup> day of April 2008 before)*

<i>me and I certify that the contents hereof were)</i>	<i>MASaddique/sgd/-</i>
<i>read over and explained to him in the Hindustani)</i>	<i>.....</i>
<i>language and he appeared fully to understand)</i>	<i>Mohammed Abu Baker</i>
<i>the meaning and effect thereof:</i>	<i>Saddique”</i>

- i) Maimun Nisha is now the registered lessee of the entire property and in the occupation of the property unlawfully and deriving income from the property by way of rental.
- j) The plaintiff seeks to cancel the transfer No. 702754 and claim one undivided half (1/2) share of the property.

**Defendant’s case**

[05] The first defendant’s position is that the plaintiff did, in fact, sign the Deed of Renunciation and therefore any income derived from the property after

Mohammed Umar Faruque transferred the property to himself on 4 June 2008 as in all respects lawful. The same was signed in front of a Court Officer namely Satendra Kumar Sharma a Commissioner for Oaths, she further states that only one of the three flats at the property was being rented out from July 2008 to date, however that flat was not under continuous rental during this period, the particulars of which will be submitted to this Honorable Court at the trial of this matter. The first defendant further states that as a legally registered owner, she has not done any illegal acts in obtaining rents from the tenants.

#### **Agreed facts**

[06] The following facts were admitted by the parties as agreed facts at the Pre-Trial Conference (PTC) (See PTC minutes dated 9 June 2016).

1. Mohammed Abu Baker and Mohammed Umar Faruque were brothers and they were sons of Mohammed Ishaque.
2. Mohammed Ishaque by his Will gave the residue of his estate to Mohammed Abu Baker and Mohammed Umar Faruque absolutely in equal shares.
3. The substantial part of the Estate of Mohammed Ishaque was a property comprised in Certificate of Title No. 12304 known as Lot 17 on DP 2631 situated in Nadi together with substantial improvements thereon (herein referred to as "the property").
4. On the 18 October 1991, the Transmission of Death was registered in the name of Ahmed Bi (herein referred to as "mother").
5. That Ahmed Bi the mother of Mohammed Abu Baker and Mohammed Umar Faruque died on 14 June 2005.

## Issues

[07] The issues to be determined by the court are as follows:

1. Whether Mohammed Umar Faruque fraudulently transferred the said Property Certificate of Title number 12304 known as Lot 17 on deposited plan number 2631 under his own name?
2. Whether Mohammed Umar Faruque obtained and executed a Deed of Renunciation from Mohammed Abu Baker on the 5 April 2008.
3. Whether the Plaintiff signed the Deed of Renunciation and renounced his share to Mohammed Umar Faruque or was it obtained fraudulently by Mohammed Umar Faruque?
4. Whether Mohammed Abu Baker is entitled to his half share in the estate of Mohammed Ishaque as lawfully bequeathed to him by Mohammed Ishaque?

## The Law

[08] Section 41 of the Land Transfer Act (LT) declares that any instrument procured or made by fraud to be void. That section provides:

*"Any instrument of title or entry, alternation, removal or cancellation in the register procured or made by fraud shall be void as against any person defrauded or sought to be defrauded thereby and no party or privy to the fraud shall take any benefit therefrom."*

## The Evidence

### *Plaintiff*

[09] Saddique, the plaintiff (PW-1) gave evidence and he called a witness, Dr Yunus (PW-2) in support of his claim.

[10] PW-1 in his evidence states that:

- a) My father's name is Mohammed Ishaque. My father had 6 children (3 boys and 3 girls).
- b) My father died on 26 November 1990. He made a Will dated 13 January 1992. I have seen the original. When my father died, I was in the USA. My mother was trustees of my father's estate. The probate was granted to my mother. The property is at 63 Kennedy Avenue, Nadi – it's a building with 3 separate flats.
- c) After my father's death, it was always a rental property. My mother had her own house in the USA. I never took any rental income. I let my mother to have all the rental income.
- d) On 5 June 2005, my mother died. We had a meeting in the USA to divide the property equally between me and my brother (Faruque). My brother was managing the property. He did not send any money or statement of account. I trusted my brother. He was collecting the rent for all 3 flats. He promised to send some money but he never sent.
- e) My brother died in August 2011. I could not make it to his funeral. My American passport had expired at that time.
- f) I came to Fiji in December 2011, before that I was in Fiji few times – May 2006 and left in late June 2006. I travelled on my old passport (PX2). I applied for renewal of passport in November 2011 (PX3).
- g) In December 2011, I contacted my elder brother and younger brother. We went to the Nadi Town Council. Doctor Yunus and I found out that only my brother's name in there. I was disappointed and talked to my solicitor.
- h) My solicitor told me about the Deed of Renunciation dated 5 April 2009 (PX4). I never signed any DoR. P O Box 1951 Lautoka is not mine. I had never operated that box. I did not sign the DoR. My signature has been forged. I did not file it. My signature appears on my passport. The signature on DoR is not mine. My signature has been witnessed by a non-lawyer witness.
- i) I lost my half share of the property. I did not come to Fiji for 15 years after 1992. I did not have a valid passport in 2008 – from 1991 to 2011. I did not have a valid passport to travel.

- j) I want my half share my father gave. I did not renounce my share. They have made a fraudulent DoR.
- k) In the Certificate of Title number 2601 transmission by death is recorded. After my mother, my brother has been recorded by transmission by death.
- l) Maimun Nisha is Trustee of my brother (PX5).
- m) My brother transferred the property to himself (PX6). Before that, he executed transmission by death to himself (PX6).
- n) I also want rental income. Rent market I did not inquire – one bedroom \$500.00- \$600.00. 2 bedroom house \$800.00 - \$900.00

[11] Under cross examination PW1 states that:

- a) I had lost trust in my brother.
- b) I talk to my brother about the property over the phone. I migrated in 1992. I was living in the USA. My mother had full control of the property. After my mother, my brother and I were administrators and trustees of the property.
- c) I did not ask Maimun Nisha about damages by a cyclone in Fiji. They did not report to me about the damage. The property was always in rental. I did not enquire Maimun Nisha about the rental.
- d) My brother took the whole property. He did not give my half share.
- e) My passport is my evidence that I was not in Fiji at that time. DoR, not my signature. I did not sign it.

[12] PW1 under re-examination stated that:

- a) Maimun Nisha is the trustee of my brother's estate. I had nothing to do with ANZ loan obtained by my brother.

[13] PW2, who is a Doctor by profession in evidence states that:

- a) Saddique and Faruque are my cousins. I was very close to each other. Saddique migrated to the USA and made a few trips to Fiji after that.
- b) I know his passport expired when Faruque passed away. He called and told me that he could not come because his passport expired. He was not here in 2008.



- c) When DoR was shown to him, he said this cannot be his handwriting and cannot be his signature.
- d) Faruque and I went to Nadi Town Council and we found Faruque's name as owner. Then Saddique wanted to see a solicitor. We put a caveat on the property. I saw the property yesterday. The building there is pretty old. One bedroom house rental may be \$200.00 - \$400.00. Two bedroom - house \$700.00 to \$1000.00
- e) Faruque did not tell me he has transferred the property to himself.

[14] Under cross examination PW2 stated that Maimun Nisha wanted more than half of that property. It was before last year. I told this incident to my cousin. That was the communication. I know plaintiff's handwriting in his school days. I am not a signature expert.

[15] In re-examination, PW2 stated that Saddique used to write letters to him, still writing. DoR signature is not his signature.

*Defendant*

[16] The defendant opted to not give evidence. She did not call witnesses either. Counsel for the defendant informed the court that the defendant will not be giving evidence and will not be calling witnesses in support of her defence.

**Discussion**

[17] The plaintiff brought this action against the first defendant in her capacity as Executrix and Trustee of the Estate of Mohammed Umar Faruque seeking among other things a declaration that the transfer No. 702754 of the CT No. 12304 dated 4 June 2008, is null and void and of no effect and the plaintiff's name be added to the title as to one undivided half share of the property in dispute, the property at No.63, Kenney Avenue, Nadi.

[18] The defendant's position was that the plaintiff executed a Deed of Renunciation (DoR) renouncing the plaintiff's half share in the property in dispute in Mohammed Umar Faruque and that transfer of the plaintiff's half share in the estate of Mohammed Ishaque by Uma Faruque to himself is valid.

*Whether the plaintiff executed a Deed of Renunciation*

[19] The central issue is whether the plaintiff, in fact, executed a DoR renouncing his half share in the property in Umar Faruque, his (plaintiff's) brother.

[20] The first defendant in her amended statement of defence states that the plaintiff did, in fact, sign the DoR and therefore any income derived from the property after Mohammed Umar Faruque transferred the property to himself on 4 June 2008, was in all respect lawful.

[21] Surprisingly, the first defendant opted to not give evidence, nor called any witnesses in support of her assertion.

[22] Counsel for the 1<sup>st</sup> defendant submits that the plaintiff did not subpoena Satendra Kumar Sharma to prove that he (Mr Kumar) did not witness the plaintiff signing the document despite knowing his address in Fiji. He further submits that the plaintiff did not summon the Registrar of Title to give evidence on whether the transfer document was lawfully executed or otherwise.

[23] The person who alleges the existence of a fact must prove that fact. The plaintiff denies signing the alleged DoR. He denies that the signature that appears on the DoR is not his signature. He says he was in the USA at the time when the deed was allegedly executed. The first defendant relies on the DoR and says the plaintiff signed it and it is valid. The burden is then on the first defendant to prove that the plaintiff did, in fact, sign the document and it was witnessed by a Commissioner for Oaths. In order to prove this, the first defendant ought to have called Mr Satendra Kumar Sharma, a Commissioner for Oaths who witnessed the plaintiff signing the DoR and not the plaintiff. The first defendant did not make any attempt to call Mr Kumar. The first defendant deliberately avoided calling Mr Kumar who would have been a material witness for the first defendant's case if called but she failed to do so.

[24] A Commissioner for Oaths of the High Court of Fiji is a qualified witness to witness and attest an instrument to be registered pursuant to section 122 (1), LT read with Regulation 18, LT, which so far as relevant provides:

*“Every instrument required to be registered under the provisions of this Act shall be witnessed by one person who shall attest such document in the prescribed form, and, in case such witness shall not be a qualified witness, the person so attesting shall appear before a qualified witness who shall endorse upon the instrument a certificate in the prescribed form”.*

Regulation 18 states:

*For the purpose of section 122 the following shall be qualified witnesses-*

...

*(xi) a commissioner for oaths of the High Court of Fiji.*

*...” (Emphasis provided)*

[25] It was not in dispute whether or not a Commissioner for Oaths of the High Court of Fiji, in this case, Mr Kumar, is a competent witness to witness the DoR. If there were a dispute in this regards, the first defendant would have proved this because she relies on that document. The plaintiff was under no obligation to prove that Mr Kumar was not a qualified witness to attest the DoR. I, therefore, reject the first defendant’s contention that the plaintiff had the burden to prove that Satendra Kumar Sharma was not a qualified witness pursuant to section 122, LT.

[26] The first defendant contended that the plaintiff did not summon the Registrar of Title (RoT) to give evidence to establish the Deed's alleged forgery and whether the transfer document was lawfully executed or otherwise. The RoT has been made a party to the proceedings as a nominal defendant for the purpose of complying with any direction that would be made by the court in the case. The RoT is not a competent witness to say whether the signature on the document was forged or not. The RoT has made the relevant entries upon the memorial on the assumption that the documents are duly executed and presented for the record thereof. The plaintiff was not obliged to call the RoT to give evidence on whether the DoR was lawfully executed and the signature appears on the DoR was forged or not.

- [27] The plaintiff in his evidence states that he never signed a DoR and the signature on the DoR is not his signature. He further said at the time when it is alleged to have been executed, he was in the USA. He produced his USA passport to establish this fact. He produced copies of his old USA passport which was valid from 9 November 2001 till 8 November 2011 (PEX-2) and copies of his new USA passport which is valid from 29 November 2011 to 28 November 2021 (PEX-3). The alleged DoR is executed on 05 April 2008 (PEX-4).
- [28] PW-2 also confirmed that Saddique was not in Fiji in 2008 and that his (Saddique's) passport had expired at that time.
- [29] The plaintiff in his evidence stated that: He did not come to Fiji for 15 years after 1992. He did not have a valid passport to travel to Fiji in 2008. His old passport expired on 8 November 2001. Thereafter, he obtained his new USA passport (PEX-3) on 29 November 2011. This confirms that the plaintiff did not have a valid passport between **8 November 2001 and 29 November 2011**. The first defendant did not adduce any evidence whatsoever to rebut the plaintiff's evidence that he was in the USA on 5 April 2008, the date on which the alleged DoR was signed. The first defendant asserted that the plaintiff executed the DoR in favour of his brother, Mohammed Umar Faruque and that the plaintiff, in fact, signed the same. However, the first defendant did not present any evidence to prove her assertion. The first defendant must have produced evidence to establish the fact that the plaintiff executed the DoR in favour of her husband, Faruque, for she is alleging the existence of such a fact. On the evidence, I find that the plaintiff could not have signed the DoR on 5 April 2008 as he was in the USA on that particular date. I also find that the signature on the DoR is a forged one and it is not the signature of the plaintiff. Therefore, the DoR is null and void and of no effect.

*Whether Mohammed Umar Faruque fraudulently transferred the said Property Certificate of Title number 12304 known as Lot 17 on deposited plan number 2631 under his own name?*

- [30] The Fiji Court of Appeal in *Subramani v Sheela* [1982] 28 FLR 82 (2 April 1982) held that:

*"The indefeasibility of title under the Land Transfer Act is well recognized; and the principles clearly set out in a judgment of the New Zealand Court of Appeal dealing with provisions of the New Zealand Transfer Act which on that*

*point is substantially the same as the Land Transfer Act of Fiji. The case is Fels v. Knowles 26 N.Z.L.R. 608. At page 620 it is said:*

*“The cardinal principle of the statute is that the register is everything, and that, except in case of actual fraud on the part of the person dealing with the registered proprietor, such person, upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against all the world.”*

- [31] However, a registered title whether in freehold or leasehold is defeasible for fraud. A registration of title procured by fraud is to be void (See section 41, LT). Fraud is an exception to indefeasibility.
- [32] The first defendant, in this case, has become registered proprietor by use of a forged Deed of Renunciation.
- [33] The plaintiff and his brother (Faruque) were to inherit the estate of their father in equal shares but the plaintiff's brother by fraudulent means had the property including the plaintiff's half share registered in his own name on 4 June 2008. Thereafter, the plaintiff's brother created a mortgage in favour of Australia & New Zealand Banking Group Limited on 15 July 2008.
- [34] The first defendant by transmission by death dated 3 October 2012, has registered herself as the administrator of the estate of her late husband (Faruque).
- [35] The plaintiff's brother knew that the plaintiff was entitled to half share in CT 12304 Lot 17 on deposited plan No. 2631 and in order to become the owner of the whole property, he created the Deed of Renunciation by a fraudulent act, forging the plaintiff's signature. The registration of title, recorded on 4 June 2008 making the plaintiff's brother as the proprietor of the property in CT 12304, is void as it is procured by means of fraud. Therefore, the title registered in the plaintiff's brother's name is defeasible.
- [35] It is not in dispute that Mohammed Ishaque (plaintiff's father) by his Will bequeathed the residue of his estate to Mohammed Abu Baker (plaintiff) and Mohammed Umar Faruque (plaintiff brother) absolutely in equal shares.
- [36] There is undisputed evidence that the plaintiff had agreed with his brother that he (brother) administer the estate of their late father and give proper accounts to the plaintiff and that no such accounts were ever provided by the plaintiff's brother.

[37] I, on the evidence, find that the act of the plaintiff's brother was actual fraud as he knew that the plaintiff had a half share in the property.

*Acquisition of the property by the first defendant.*

[38] The first defendant, Maimun Nisha is the wife of the plaintiff's brother. She has acquired the plaintiff's share without paying any consideration and she is not an innocent purchaser who purchased the property for value. The first defendant is and has been not only in possession but also registered as the owner of the property in dispute. The first defendant's title as registered owner is impeached by the plaintiff on two grounds, viz., first, that the registration of the first defendant as owner was procured by fraud, and secondly, that such registration was invalid by reason of invalidity of the DoR, which having the effect of renouncing the plaintiff's half share in the property in favour of the plaintiff's brother, first defendant's husband.

[39] Lord Lindley In *Assets Co Ltd v Mere Roihi and others* [1905] A.C 176 at 210 states that:

*"Fraud in these sections (i.e., actions seeking to affect a registered title) " means actual fraud, dishonesty of some sort, not what is called constructive or equitable fraud-an unfortunate expression and one very apt to mislead, but often used, for want of better term, to denote transactions having consequences in equity similar to those which flow from Fraud."*

[40] In *Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd* [1926] AC 101 at 106-107 The Privy Council held:

*"If the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent and so also fraud may be established by deliberate and dishonest trick causing an interest not to be registered and thus fraudulent keeping the register clear... The act must be dishonest, and dishonesty must be assumed solely by reason of knowledge of an unregistered interest."*

[41] Fraud is an exception to indefeasibility of a registered title. The Supreme Court of Fiji confirmed this in *Star Amusement Limited v Navin Prasad and Others* Civil Petition No. CBV 0005 of 2012 (Court of Appeal No. ABU 0065 of 2011) at para 42 (page 14) the Court observed that:

"42. The decision in *Subramani & Maria v Dharam Sheela and three others, supra*, is important not only because of the peculiar facts of that case, but also because Marsack JA., in the course of his judgment in that case, referred to with favour the landmark decision of the majority of the Court of Appeal in New Zealand in *Fels v. Knowles* (1906) 26 NZLR 604 in which it was observed at page 620 that-

"The cardinal principle of the statute is that *the register is everything*, and that, except in cases of actual fraud on the part of the person dealing with the registered proprietor, such person, *upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against the world ...* Everything which can be registered gives, in the absence of fraud, an indefeasible title to the estate or interest, or in the cases in which registration of a right is authorised, as in the case of easements or incorporeal rights, to the right registered." (*emphasis added*)"

[42] In *Loke Yew v Port Swettenham Rubber Co Ltd* [1913] AC 491, the rubber company purchased a large area of land from the registered proprietor, Eusope. Although not registered as such, Loke Yew was the owner of part of this land and Eusope only agreed to sell the whole of the land to the rubber company when he was given an assurance by the company that it would not disturb Loke Yew's possession upon becoming the registered proprietor, the rubber company asserted that it was entitled to the whole of the land and Loke Yew sought relief. On the evidence, the court was satisfied that the rubber company had been fraudulent and it ordered the rubber company to execute a transfer of the land in dispute.

[43] The Court in *Yew* (above) was satisfied that there had been a deliberate plan to deprive Loke Yew of his land.

[44] In regards to fraud against the holder of an unregistered interest, the decision of the Court of Appeal of New Zealand in *Efstratiou, Glantschnig and Petrovic v Glantschnig* [1971] AC would be relevant, where

"The husband and wife came from Austria in 1956. There were two children of the marriage aged 14 and 9 respectively as at November 1971. In 1956 the husband bought a property, the wife providing half the deposit. In 1958 the parties separated and in

separation agreement the husband acknowledged that he owed the wife half the deposit. Clause 11 of the agreement provided that the agreement should be void and of no effect if subsequently they lived together. Subsequently in 1958 the parties were reconciled and lived together again. Each provided half of the deposit, but the transfer was taken in the name of the husband alone. In 1968 the wife lent the husband \$1,000 to purchase a ticket to Austria and he returned there for an indefinite stay. On Sunday, 20 April, the husband returned unexpectedly and found K living in the house in compromising circumstances. There was a scene and the wife walked out of the house taking the children with her. On 21 April the wife obtained an interim injunction prohibiting the husband from returning to the house which was served that afternoon. On 22 April the husband showed the injunction to a land agent Petrovic, the third appellant, and instructed him to sell. An agreement for sale at an undervalue was executed that day selling the property to Efstratiou, the first appellant, settlement being fixed for Friday, 25 April. Settlement was completed earlier on 23 April and transfer was registered at 9.30 am on Thursday, 24 April. The wife commenced proceedings to set aside the transfer, requested a declaration that after setting aside the transfer the land was held in trust by the husband for her, and damages against the three appellant in the sum of \$5,000 each. Quilliam J giving judgment set aside the transfer and awarded damages against in the sum of \$2,000 against the husband, \$1,000 damages against the land agent but awarded no damages against the purchaser. The husband, the land agent and the purchaser appealed against the judgment.

Held, 1 The wife could not have the memorandum of transfer set aside and also an award of damages (see p 598 line 16)

2 Apart from any statutory right, the wife by paying half the deposit had an equitable estate in the matrimonial home and in the absence of countervailing circumstances a resulting trust arose and the husband held the home in trust for himself and his wife jointly (see p 598 line 39). *Gissing v Gissing* [1971] AC 886, 896; [1970] 2 All ER 780, 782 AND *Davis v Vale* [1971] 1 WLR 1022; [1971] 2 All 1021, referred to.

3 If three persons by their joint actions do acts which amount to a breach of trust by one of them, with knowledge of such result, then if the trustee, is liable to make restoration the joint wrongdoers may be held liable jointly with him (see p 599 line 44).

*Blyth v Fladgate* [1891] 1 Ch 337, referred to

4 The land agent, Petrovic, was a party to all that was done, with full knowledge of the fraud upon the wife's equitable interest (see p 600 line 15)

5 The purchaser, Efstratiou, like the agent was a party to the whole scheme (see p 600 line 33).



6 *The Supreme Court in reliance on s 62 of the Land Transfer Act 1952 may in appropriate cases make an order setting aside a transfer duly registered where the registration has been procured by fraud (see p 601 line 32).*

*Assets Co Ltd v Mere Roihi [1905] AC 176, 210; NZPCC 272, 298 and Waimiha Sawmilling Co Ltd (In Liquidation) v Waione Timber Co Ltd [1926] AC 101, 106; NZPCC 267, 272, referred to.*

7 *The true test of fraud is whether the purchaser knew enough to make it his duty as an honest man to stay his hand. If with such knowledge he proceeds without further inquiry or delay to purchase an unencumbered title with intent to disregard the claimant's rights, if they exist, it amounts to fraud (see p 603 line 16).*

*Waimiha Sawmilling Co Ltd (in Liquidation) v Waione Timber Co Ltd [1923] NZLR 1137, 1175 (CA), applied.*

8 *The evidence justified a finding of fraud on the part of the husband and the purchaser and the Court upheld the setting aside of the memorandum of transfer (see p 603 line 27).*

9 *Once the transfer was set aside there was no evidence upon which an award of damages could be made (see p 603 line 32).*

*The judgment of Quilliam J (unreported, Wellington, 10 August 1970), reversed in part."*

- [45] The evidence justified a finding of fraud on the part of the first defendant's husband (Faruque). The first defendant, as the wife (of the plaintiff's brother), had full knowledge of her husband's fraud upon the plaintiff's unregistered interest in the property which was bequeathed by a Will of her husband's father. The first defendant was aware of the plaintiff's rights. The first defendant's husband dishonestly and fraudulently transferred the property in his name, making a false Deed of Renunciation forging the plaintiff's signature while he (plaintiff) was away overseas. The first defendant's title to the property flows from the registration of title of her husband which was procured by fraud and that registration is invalid. Their title is defeasible. The plaintiff is entitled to impeach their title on the ground of fraud. The 1st defendant's husband's act falls within

the definition of section 41, LT. Therefore, the transfer dated 4 June 2008, by instrument No. 702754 should be set aside as it was procured by fraud and I do so.

- [46] After transferring the property in his name by means of fraud, the plaintiff's brother created a mortgage in favour of ANZ Banking Group Ltd on 15 July 2008. This mortgage is registered subsequent to a transfer that was procured by fraud. The plaintiff has nothing to do with this mortgage. The mortgage created by the first defendant's husband should be set aside so far as it relates to the plaintiff's right and it should be registered against the half interest of the first defendant and I do so.

*Loss of income*

- [47] The property in dispute has three flats. According to the plaintiff, one of which had an estimated rental of \$500 and the other two an estimated rental of \$1,000 each. The property is situated in the prime area close to Nadi Town. The first defendant and her husband have, to date, kept all the rental income. They did not show any proper accounts up until now. The first defendant attempted to show that the property was blown away in a cyclone that hit Fiji. However, PW2 denying this, said he saw the property yesterday (a day before the day he was giving evidence). The first defendant did not give any evidence in respect of the rental income. The evidence given in this regards by the plaintiff remains unchallenged. I accept the plaintiff's evidence in respect of the rental income and its accounts. Accordingly, I hold that the plaintiff is entitled to recover loss of rental income from the estate of the 1<sup>st</sup> defendant's husband of which the first defendant is the Executrix and Trustee. The plaintiff is entitled to claim loss of income from April 2008 till 12 February 2018 (date of judgment) in the sum of \$147,500.00 (flat

one-\$500 and other two flats, \$1,000 each (\$2,000)-118 months x \$2,500 x ½ = 147,500.00).

- [48] The plaintiff is also entitled to interest on the judgment sum (\$147,500) at the rate of 4% pa from 5 April 2008, the date on which the cause of action arose till the date of the judgment. The judgment sum together with interest is payable from the estate of the first defendant's husband, Mohammed Umar Faruque.

#### *Possession*

- [49] The plaintiff has been declared that he is entitled to the half share of the property in dispute. He claims possession of his half share. Possession is attributable to ownership. Therefore, the plaintiff is entitled to vacant possession of the half share of the property without any hindrance.

#### *Costs*

- [50] As a winning party, the plaintiff is entitled to costs of these proceedings. He claims costs on an indemnity basis. The first defendant having admitted that the plaintiff has an undivided half share of the property, denied to transfer his half share to him. I considering all, summarily assess costs at \$5,000.00.

#### **Conclusion**

- [51] For the reasons set out above, I declare that the Deed of Renunciation is void and of no effect, as it was obtained fraudulently forging the plaintiff's signature. The subsequent transfers made on the strength of that Deed of Renunciation are also void and of no effect on the ground that such transfer documents were procured by actual fraud. The plaintiff is entitled to the undivided half share of the property.

I would, therefore, set aside the transfer dated 4 June 2008, by instrument No. 702754 and direct and order the Registrar of Titles to replace the transfer dated 4 June 2008, and substitute the name of the plaintiff (Mohammed Abu Baker Saddique) as to one half undivided shares and the name of the defendant (Maimun Nisha) for the rest of the property as administrator of the estate of Mohammed Umar Faruque. I also order that the mortgage created by the first defendant's husband by instrument No. 706665 registered on 15 July 2008, be cancelled so far as it relates to the plaintiff's half share and be registered against the half interest of the first defendant. I will allow the plaintiff's claim for loss of income and for possession of the property. The plaintiff will also be entitled to interest on the judgment sum. The judgment sum together with interest is payable from the estate of Mohammed Umar Faruque. The first defendant will pay costs of \$5,000.00 (which is assessed summarily) to the plaintiff.

#### **Final outcome**

- 1) There will be judgment in favour of the plaintiff.
- 2) The transfer No. 702754 of the Certificate of Title No. 12304 dated 4 June 2008 is cancelled as it was obtained by fraud.
- 3) The Registrar of Titles must replace the transfer dated 4 June 2008 and substitute the name of the plaintiff (Mohammed Abu Baker Saddique) as the owner to one half (1/2) undivided share free from any encumbrances whatsoever and the name of the defendant (Maimun Nisha) as administrator of the estate of Mohammed Umar Faruque.
- 4) The plaintiff is entitled to possession of the one half of the property.
- 5) The mortgage created by the first defendant's husband by instrument No. 706665 registered on 15 July 2008 is cancelled so far as it relates to the

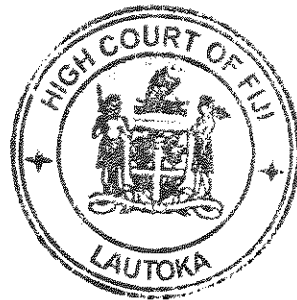
plaintiff's half share and be registered against the half (1/2) interest of the first defendant.

- 6) The plaintiff is entitled to mesne profit (rental) in the sum of \$147,500.00.
- 7) The plaintiff is also entitled to interest on the judgment sum at the rate of 4% per annum from 5 April 2008, the date on which the cause of action arose till the date of judgment.
- 8) The judgment sum together with interest is payable from the Estate of Mohammed Umar Faruque, the first defendant's husband.
- 9) The first defendant will pay the plaintiff summarily assessed costs of \$5,000.00.

*MH Mohamed Ajmeer*  
*12/2/18*

M H Mohamed Ajmeer

JUDGE



At Lautoka

12 February 2018

Solicitors:

For the plaintiff: M/s Anil J Singh Lawyers, Barristers & Solicitors

For the first defendant: M/s M. A. Khan Esquire, Barristers & Solicitors