

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

HBC NO. 138 OF 2015

IN THE MATTER of the LAND TRANSFER ACT

AND

IN THE MATTER of the application for Extension of
CAVEAT NO. 346936 under the LAND TRANSFER ACT

BETWEEN : SHYLIN SHEETAL ROSHAN also known as SHYLIN SHEETAL PRASAD and NITIN ROSHAN both of Ba, Bank Officer and Technical Officer respectively.

PLAINTIFFS

AND : KALARA KURUKANAWA of Yalalevu, Ba, Market Vendor.

FIRST DEFENDANT

AND : REGISTRAR OF TITLES

SECOND DEFENDANT

Before : A.M. Mohamed Mackie- J

Appearance : Mr. Padarath for the Plaintiff
Ms. Narara for the 1st Defendant
2nd Defendant no more a party.

Date of Judgment : 25th January 2019

J U D G M E N T

A. INTRODUCTION

1. This is an action commenced by the plaintiffs against the defendants by way of their writ of summons and the statement of claim dated 25th August 2015, filed and issued on 26th August 2015 moving for, *inter-alia*, the following final reliefs.
 - a. Specific performance of the agreement dated 25th day of February 2015 between the Plaintiffs and the Defendants.
 - b. Damages for breach of agreement in lieu of or in addition to specific performance, and
 - c. Costs on an indemnity basis.

2. The Plaintiffs, along with the writ of summons, also filed their even dated inter-partes summons and moved for the following orders too;
 - a. That the Caveat number 346936 registered affecting the land known as Lot 66 on deposited Plan number 1203, in the district of Ba, on the island of Viti Levu containing an area of 38.5 perches with all improvements thereon under certificate of title number 7684 be extended until the final determination of this cause.
 - b. Further and/or in the alternative the defendants and/or their agents and/or their servants be restrained from in any way selling , transferring, dealing with or alienating the land in question until the final determination of this matter.

3. The orders for the extension of caveat and a temporary injunction as aforesaid restraining the 1st defendant from selling, transferring, dealing with or alienating the land in question being granted by M. Ajmeer – J on 11th September 2015 and on 30th October 2015 respectively, the application for interim injunction was refused by the ruling dated 03rd December 2015 delivered by the same judge. The learned judge in his ruling formed the view that the damages to the plaintiff would be adequate.

4. Subsequently, after considering the summons filed on behalf of the Second Defendant for striking out, by ruling dated 4th May 2016, it has been ordered for the second defendant to cease as a party and accordingly his/her name has been removed from the proceedings. The caveat also stands removed on a subsequent application made by the 1st defendant. Vide document No-14 in the Plaintiff's bundle of documents.

B. Background

5. On 25 February 2015 the plaintiffs and the 1st defendant entered into a sale and purchase agreement which is marked as "PE-2" (Tab-1). By this agreement the 1st defendant agreed to sell a property in question to the plaintiffs for the consideration of \$105,000.00. According to the agreement the sale was to be completed on 25 May 2015. The plaintiffs paid to the defendant the sum of \$5000.00 as deposit. According to the plaintiffs they were ready and willing to fulfill and perform their obligation under the agreement. The 1st defendant refused to sell and confirmed her refusal in writing on 29th March 2015 which is marked as "PE-11". As a result of the breach, the plaintiffs claim specific performance and/or in the alternative claim damages in lieu of specific performance.
6. The 1st defendant filed statement of defence and stated that the sale and purchase agreement was signed by her under circumstances that were (a) fraudulent, (b) unconscionable, (c) oppressive and (d) unfair to her. She also states that the plaintiffs manipulated, forced and/or unduly influenced her. She pleads non est factum.
7. It is alleged that the 1st defendant, having failed and neglected to honor the agreement to sell with the plaintiffs, subsequently agreed to sell the same land and premises unto a third party by an agreement dated 28th May 2015 as evidenced by the document No-11 in the Plaintiff's bundle of document and proceeded to obtain an advance of \$10,000.00 from the new buyer out of the agreed sale price of \$110,000.00. Vide document Number 12 in the plaintiff's bundle of documents.
8. It is under the above circumstances, after communicating with the 1st

defendant as evidenced by the letters dated 7th July 2015 and 14th August 2015 in order to sort out the issues and having failed in it, the plaintiff resorted to this legal action. Vide documents number 13 and 15 in the plaintiff's bundle of documents.

C. Agreed Facts and issues:

Agreed Fact

1. The fact that the 1st defendant was the title holder for the land in dispute, during the time material, is not disputed.

Agreed Issues

2. Whether there was an agreement for sale and purchase , of Certificate of Title number 7684 between the Plaintiff and the Defendant, dated 25th February 2015?(referred to as the "Agreement")
3. **If so:-**
 - 3.1. Whether the Defendant was forced or enticed into signing the Agreement?
 - 3.2. Whether the signature of the Defendant was procured under the circumstances that were fraudulent ,unconscionable , oppressive and/or unfair to the Defendants for the reasons stated in paragraphs 3(A) to 3 (H) in the Defendant's Statement of Defence filed on 12th October 2015?
 - 3.3. Whether the Defendant understood the meaning and effect of the Agreement and was properly explained its meaning and effect prior to execution?
 - 3.4. Whether, under the circumstances of the case, the plea of non-est factum is made out?
4. **If the Agreement was not made in the circumstances stated in paragraph 3 above, then:-**

- 4.1 Whether the Defendant was required to complete the Agreement in accordance with its terms and conditions?
 - 4.2 Whether the purchasers paid and the Defendant accepted a sum of \$ 5,000.00 (five thousand Dollars) as deposit under the Agreement?
 - 4.3 Whether the 1st Defendant was in breach of the Agreement?
5. Whether the plaintiff is or was entitled to specific performance of the agreement?
 6. If the 1st defendant was in breach of the agreement, whether she has to pay damages to the Plaintiff and, if so, what is the amount of such damages?

D. The Trial

9. At the one day trial held before me on 29th January 2018, Mr. Rajendra Chaudhry, the Solicitor before whom the Agreement to sell and purchase was, purportedly, executed and both the Plaintiffs (husband and wife) gave evidence for and on behalf of the plaintiffs as PW-1, 2 and 3 respectively, while the 1st Defendant gave evidence for and on her behalf without marking any documents. Documents from PE- 1 to PE- 11 were marked on behalf of the Plaintiffs.

E. Discussion:

10. The parties have raised the first agreed issue bearing number 2 querying whether there was an agreement to sell and purchase the land in question in this action. I find that this issue crops up mainly from the averments in paragraph 3 of the statement of defence, where the 1st defendant has taken up a position that though she signed the agreement to sell on 25th February 2015, it was signed under circumstances that were (a) Fraudulent; and/or (b) Unconscionable; and/or (c) Oppressive; and/or (d) Unfair.
11. Since the very act of signing the agreement is admitted, the pivotal task that lies before this court is to ascertain whether the alleged circumstances, pleaded in paragraph 3 of the statement of defence and raised in the consequential

issues 3.1 to 3.4, did actually prevail or present at the time of signing the said agreement.

12. In ascertaining the most appropriate answers to the above issues, the evidence of the Plaintiff's witness, Mr. Rajendra Chaudhry (PW-1), before whom the impugned agreement was, purportedly, executed, would materially assist this court in addition to the evidence adduced by the 1st and the 2nd named Plaintiffs.
13. The Plaintiff's first witness, Mr. Rajendra Chaudhry, has given clear, convincing and compelling evidence as to how both the parties approached him for this purpose, about the 1st defendant's willingness to obtain his services despite being advised to retain another Solicitor to obtain independent advice, the circumstances under which the impugned agreement was signed and how she failed to fulfill her parts in the agreement to sell with the Plaintiffs.
14. Both the plaintiffs have also given corroborating evidence as to how they inspected the premises, negotiated the price and the rest of the terms and particularly the circumstances under which the agreement to sell and purchase was signed before PW-1 at his office. They have also spoken as to how they were to obtain financial facility for the purchase and the payment of advance as evidenced by the Memorandum of Terms of Sale and the Acknowledgment of advance both dated 25th February 2015 and signed by the 1st defendant, by them and the PW-1 Solicitor in the presence of one another being present together at the same time at Mr. Chaudhry's office.
15. PW-1 during his evidence has referred to his affidavit sworn on 27th of October 2015 in support of the plaintiff's case and confirmed the correctness of the contents of the averments therein and that of the documents annexed thereto. Though, the PW-1 and the plaintiffs were subjected to lengthy cross examination by the learned defence counsel, their whole evidence remained totally intact.
16. It is my considered view that the evidence adduced on behalf of the plaintiff, particularly that of the PW-1 Mr. Rajendra Chaudhry, is trustworthy and can

be acted upon without any hesitation. The sale & purchase agreement has been signed by the 1st defendant after same being duly read over and explained to her in English language and she having fully understood the contents therein. The defendant has not adduced any evidence to impeach the above stance of the plaintiffs. The agreement has been duly executed and there is no doubt on the authenticity of the agreement.

17. Some salient parts of Mr. Chaudhry's evidence is reproduced bellow for the better manifestation.

Examination in Chief by Mr. Padarath

Q: Mr. Chaudhry could you just please read and confirm the contents of the affidavit before you?

A:I acted as a common solicitor for the Plaintiffs, and the 1st Defendant. By a letter dated 20th August 2015 Messrs. Samuel K. Ram wrote to me on behalf of the Plaintiff enclosing a letter from Gordon & Co. dated 16th July 2015, in which certain allegations were made against me and my law firm exhibited hereto, and marked with the letter RC1, a copy of the letter from Messrs. Samuel K. Ram. By a letter dated.....

Q: And could you just tell us Mr. Chaudhry, what was the Defendant alleging?

A: Basically she was alleging that the Sale and Purchase Agreement was not explained to her; and she does not understand English.

Q: And Mr. Chaudhry what was your response to those allegations?

A: Can I read this letter?

Q: Yes please.

A: "The Agreement was executed before Mr. Chaudhry. Both parties were present. Our clerk Vishanti Gosai was also present. It was not executed before any of our clerks. The Agreement was fully explained to Kalara, she fully understands English, Mr. Chaudhry satisfied himself that she understood everything in the English language before witnessing the Agreement. If it was otherwise, he would have sent her to an i-Taukei lawyer. Kalara knew the property she was selling. She knew and agreed to the price. She knew she was getting \$5,000 up front. She was told that because she was selling the property within 5 years of purchasing it, she would have reimbursed the stamp duty that

she was enjoined from initially. She understood this and agreed to it, and a special clause K was added to this effect in the Sale & Purchase Agreement”.

*Q: Mr. Chaudhry, could you now just complete the other contents of your affidavit to confirm ...
your evidence this morning?*

A: Paragraph 4: By letter written 27th August 2015, I responded to these allegations and a copy of the letter is exhibited being R2. “ I hereby confirm the contents of the letter dated 27th August 2015 and the statements made therein are true”. Paragraph 6: “The 1st Defendant also voluntarily released an original title to my office in performance of her part of the Agreement”. Paragraph 7:” I also explained to her that if she had given any conditional exemption from Stamp Duty when she purchased the property, she may be required to pay the amount because she was selling the property within 5 years of purchase. She agreed to this. A copy of the affidavit of Kalara, sworn on 21st October 2015 has been shown to him, together with the Statement of Defence. There was no force or pressure put on the 1st Defendant either by me or the Plaintiffs to execute the Sale and Purchase Agreement. The 1st Defendant speaks English very well and communicated with me in the English language. The Agreement was read to her and the contents were explained to her. She was advised to seek independent legal advice, but she chose not to do so. The sum of \$5,000.00 was given by the Plaintiff directly in cash in my presence, and the presence of my clerks unto. It was never received in our Trust Account. Exhibited hereto and marked with the letter RC3 is an acknowledgment by the 1st Defendant that she had received the said sum.

Q: Mr. Chaudhry, could you just confirm RC3 for the record that that’s the acknowledgment you were talking about?

A: Yes, that’s the acknowledgment – RC3. I can confirm that the 1st Defendant wanted the money immediately. I explained to the Plaintiffs that they are releasing the \$5,000.00 at their own risk; they are willing to do so. The original Certificate of Title, paragraph 15, is read in my office, it was handed to me by the 1st Defendant who carried out a transaction, and she has made several requests for the title to be released to her. She’s also wanted to release the sum of \$5, 000.00 to me, but I’ve refused to accept it. I requested for a joint authority from the sales through both parties. That’s my affidavit, My Lord.

Q: Mr. Chaudhry just to conclude, you mentioned that the title was given to you, towards the last paragraph of the affidavit. Do you still hold on to the title?

A: No, it was eventually returned to her and I just checked out my file I brought in December 2015 it was returned to her and she signed for it. I've got an acknowledgment of receipt in my file.

Q: Much obliged, Mr. Chaudhry. And during your evidence you made reference to a Sale and Purchase Agreement. If you have a look at this Sale & Purchase Agreement, would you be able to identify it?

A: Yes.

Q: My Lord, we have a copy for Your Lordship a bundle of documents for the Plaintiff for ease of reference. I'll be referring to this during the trial, My Lord. With your leave My Lord; I'll just like to show Mr. Chaudhry Document No. 1 for identification purposes. Mr. Chaudhry is that the agreement you were referring to during your evidence?

A: Yes, this is the Sale & Purchase Agreement, I can see it's a copy but I can see my initials on all the pages and my signature.

Q: Could you go towards the signature portion and just confirm the signatures?

A: That's my signature; I witnessed signatures of both parties 25th February 2015.

Q: My Lord if there's no objection from my learned friend, I'd like to tender the Affidavit as exhibits for the Plaintiff.

Ms. Narara:

We have no objections, My Lord.

18. On the other hand, the 1st defendant sates that, the sale and purchase agreement was signed by her under circumstances that were fraudulent, and/or unconscionable; and/or oppressive; and/or unfair.
19. It is also alleged that the plaintiffs unduly influenced and/ or forced her to enter into the agreement and to obtain the services of their solicitor, she was not given an opportunity to seek independent legal advice, and it was executed before a clerk of Mr. Chaudhry and not before Mr. Chaudhry. Further she alleges that she did not understand the contents of it and nor it was explained to her in a language she could understand.
20. The allegation made by the 1st defendant as to the manner in which the 2nd plaintiff (wife) became aware of the availability of the 1st defendant's land for

sale is immaterial and this court need not go into it. The 1st defendant also states that the plaintiffs and their solicitors demanded that she should execute various documents that she did not understand. Her main defence is that the contents of the agreement were not read out and explained to her in the language she could understand. The 1st defendant has raised non est factum as defence.

In Fiji Development Bank v Raqona, (1984) 30 FLR 151 the Court citing Saunders v Anglis Building Society, (1971) AC 1004 stated that the defence of non-est factum was not lightly to be allowed where a person of full age and capacity had signed a written document embodying contractual terms.

It is not enough to allege that "the mind did not go with the pen", to use the phraseology of Lord Donovan in Muskham Finance Ltd v Howard, (1963)1 All ER 81 at pg 83. His Lordship stated further:

What has to be established, if the plea of non-est factum is to succeed, is that the misrepresentation which caused the signature was a misrepresentation of the character and class of the document in question, and not a misrepresentation simply as to its contents.

21. The first defendant did not give any evidence that the plaintiffs fraudulently got her to execute the impugned documents nor did she call any evidence to that effect. She admits her signature in the document and it was read out to her in English language. However, in her letter to Mr. Chaudhry and evidence she adduces various other reasons for her non-compliance with the agreement.
22. There was no assertion that the plaintiffs or the Solicitor concerned had unduly benefitted from the transaction. As Lord Shaw said in **Poosathurai v Kannappa Chettiar, (1919) LR 47 Ind App 1 at 4** and cited by Lord Scarman in **National Westminster Bank v Morgan, (1985)1 All ER 821 at pg 829:**

"It must be established that the person in a position of domination has used that position to obtain unfair advantage for himself, and so to cause injury to the person relying upon his authority or aid".

23. Next, the statement of defence contends that the first defendant did not receive any legal advice from the solicitor. I do not accept this contention. PW-1

Solicitor categorically said that he explained the contents of the sale and purchase agreement in English language to the first defendant. I accept the evidence of PW-1. His evidence was confirmed by both the plaintiffs. I found PW-1, was to be independent and truthful witness. It was not shown that PW-1 had any vested interests nor was it alleged that he had a conflict of interest.

24. On consideration of the total evidence led, I conclude that the sale and purchase agreement was voluntarily entered into by the first defendant. I find all the above allegations stand best answered through clear and convincing evidence of PW-1 Mr. Rajendra Chaudhry and this court has no reason to disbelieve it. His evidence has successfully withstood the cross examination by the defence.
25. The learned defence counsel, through the cross examination of the plaintiff's witnesses or the examination in chief of the 1st defendant, did not prove the existence of the above alleged circumstances when the agreement was signed.
26. The stance taken by the 1st defendant that she did not understand the English language is only an afterthought. She gave evidence in English language and answered all the questions put by both the counsel and the court during the proceedings, having clearly understood them. She in her examination in chief has admitted she could understand what was read out to her and she signed.
27. Her claim that the contents of the agreement were not read out to her in the language she could understand cannot be accepted. It has been duly read out to her and I am satisfied that she signed it only after understanding the contents therein being duly read out to her by Mr. Chaudhry. My attention is drawn to the letter marked PE-11 written by the 1st defendant addressed to Mr. Chaudhry in English Language indicating her withdrawal from the agreement. This letter does not contain any allegation stated above.
28. The reason adduced in the said letter is that she wants to cancel the deal with the plaintiffs due to her personal reason. She further says that since the house she was planning to buy at a cheaper price after disposing this land, had been sold to someone and she was not interested in selling this land.

29. Further, it is observed that the 1st defendant has entered into the subsequent agreement for the sale of the same land and premises to a third party, which is marked as PE-2, after same being read over to her in English Language . Thus, her defence that she did not understand the English language necessarily fails.
30. Another reason given by the 1st defendant for repudiation and unilateral withdrawal from the agreement was that her children did not like the sale of the house. She has given multiple reasons for her withdrawal from the agreement, but none of it has been proved by her to the satisfaction of this court.
31. In pages 69,70, 72 and 74 the 1st defendant under cross examination has clearly admitted that she signed the agreement after same was read out to her by Mr. Chaudhry, it was read out in English Language and she understood all what were read out . She has also admitted that as she did not want to wait for 3 months she decided to sell the land to a 3rd party and she sold it for \$110,000.00. By this sale she has gained \$5000.00 more.
32. The evidence clearly demonstrates that the 1st defendant having duly agreed to sell her land and premises to the plaintiffs for a sum of \$105,000/= and after obtaining an advance payment of \$5,000/= from the plaintiffs before Mr. R. Chaudhry, subsequently changed her mind, withdraw from and repudiated the said agreement in order to sell the property to a third party at \$110,000/=.
33. The contradictory and unsubstantiated evidence of the 1st defendant and her demeanor during her evidence clearly demonstrated that she deliberately withdrew from the agreement with the plaintiff in order to sell the land and premises to a third party at a higher price and/or for the reasons best known to her.
34. The allegations levelled against the plaintiffs and PW-1 Mr. Rajendra Chaudhry by the first defendant are unfounded and only an afterthought advanced by the 1st defendant in order to justify her wrongful action of repudiating a duly entered contract of sale. The defence adduced by her should necessarily fail.

35. On consideration of overall evidence led, I find that the plaintiffs are entitled to reasonable damages from the 1st defendant on account of the 1st defendant's refusal and failure to honor the agreement to sell duly entered into with the plaintiff for the sale of the land and premises in suit.
36. In view of the above findings, the issue No.2 attracts an affirmative answer in favor of the Plaintiff. Consequently, the issue numbers 3. 1, 3. 2 and 3.4 are answered negatively against the first defendant, while the issue number 3.3 is answered affirmatively in favour of the plaintiffs. The issues number 4.1, 4.2, 4.3, 5 and 6 are also answered affirmatively in plaintiff's favour. However, since the property in question has now been sold to a third party and the plaintiffs have purchased a different property, the question of specific performance will not arise now. Instead the plaintiffs shall be entitled for damages to be assessed hereunder.

F. Damages:

37. The plaintiffs claim specific performance or alternatively damages for breach of agreement in lieu of specific performance. This is a breach of contract. The defendant has clearly repudiated the contract that was duly entered into.
38. Plaintiffs in their evidence have stated that they had to vacate the house they were occupying on rent at the rate of \$150.00 per month on the same street in view of this intended purchase and had to rent out another house at Ba at the rate of \$360, 00 per month for about 2 years after the 1st defendant's refusal to sell the house as agreed.
39. Subsequently, the plaintiffs claim to have purchased another property worth of \$130,000.00, having obtained a new loan facility for \$110,810.00 as evidenced by PE-10. This has not been refuted by the 1st defendant. Further, they have produced a valuation report, in respect of the house they were to buy, spending an amount close to \$1000.00 and claims to have spent on an Engineer's certificate as well. They have had a legitimate expectation of buying this property for \$105,000.00 out of which they, admittedly, paid \$5000.00 as advance and a Bank loan was successfully arranged for the balance amount as evidenced by PE-5.

40. There is unchallenged evidence before the court that the plaintiffs suffered loss and damages at the hands of the 1st defendant. I do not find any reason to disregard the plaintiff's evidence on damages suffered. I accept their evidence.
41. The Plaintiff's advance deposit of \$5000.00 has not been returned by the 1st defendant. The damages can include the return of any deposit paid by the purchaser with interest together with the purchaser's reasonable and legitimate expenses incurred in investigating the title and other connected matters. The learned authors of **Halsbury's Laws of England 4th Edition**[31] at page 468 say:-

"Where it is the vendor who wrongfully refuses to complete, the measure of damages is similarly, the loss incurred by the purchaser as the natural and direct result of the repudiation of the contract by the vendor. These damages included the return of any deposit paid by the purchaser with interest together with expenses which he has incurred in investigation title and other expenses within the contemplation of the parties, and also, where there is evidence that the value of the property at the date repudiation was greater than the agreed purchase price, damages for loss of bargain".

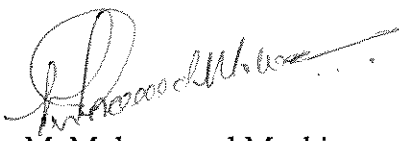
42. They have spent money on the valuation report and the Engineer's report for the premises they had agreed to buy. They were compelled to leave the rented house as they had given notice to vacate in view of the intended purchase of their own house. Considering all the above factors, I assess damages at \$16,000.00, which the 1st defendants shall pay to the plaintiffs.
43. I will also award costs to the plaintiffs, which I summarily assess at \$3,500.00.

G. Final Orders

- a. Plaintiff's action against the 1st defendant succeeds.
- b. Plaintiffs are entitled for damages in lieu of specific performance.
- c. The 1st defendant shall pay unto the Plaintiffs a total sum of Sixteen Thousand Fijian Dollars (FJ \$16,000.00) being the total damages, including the advance of \$5000.00 paid by the Plaintiffs.

- d. The 1st defendant shall also pay unto the Plaintiffs a sum of Three Thousand Five Hundred Fijian Dollars (\$3,500.00) being the summarily assessed costs.




A. M. Mohammed Mackie
Judge

At Lautoka
25th January, 2019