

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

CIVIL ACTION NO. HBC 61 OF 2018

BETWEEN : **MAIKELI NAKIA JNR** of Lomolomo Village, Lautoka, Farmer.

PLAINTIFF

AND : **CAROLINE BARBARA NAIVALUWAQA** and **KALO RADINIMATUKU**
trading as **PEARL INVESTMENTS PACIFIC** a partnership firm whose
registered office is located at 33 K.M. James Road, Balawa, Lautoka.

DEFENDANTS

AND : **REGISTRAR OF TITLES** of Suva.

FIRST NOMINAL DEFENDANT

AND : **DIRECTOR OF LANDS**, Lands Department, Suva.

SECOND NOMINAL DEFENDANT

AND : **THE ATTORNEY GENERAL OF FIJI**

THIRD NOMINAL DEFENDANT

Appearances : Mr N. Nawaikula for the plaintiff
: Ms N. Khan for the defendants
: Mr J. Mainavolau for the nominal defendants
Date of Trial : 10 June 2019 & 30 July 2020
Date of Judgment : 11 December 2020

J U D G M E N T

Introduction

[01] The plaintiff brings this action against the defendants seeking relief:

- i. *A declaration that the transaction between the plaintiff and the defendants in respect to the State land without Title comprised in LD Ref 4/7/2338 known as Lot 1 LDSW 462 PT, of Lomolomo, Kubunasarava & Togoloa Tiri be declared null and void due to fraud on the part of the defendants;*
- ii. *An order that the first and second defendants revert the State Land without Title comprised in LD Ref 4/7/2338 known as Lot 1 LDSW 462 PT, of Lomolomo, Kubunasarava & Togoloa Tiri to the plaintiff;*
- iii. *An order that the Police officers and the officers of Fiji Independent Commission Against Corruption to investigate as to how the State Land without Title comprised in LD Ref 4/7/2338 known as Lot 1 LDSW 462 PT, of Lomolomo, Kubunasarava & Togoloa Tiri was transferred to the defendants within 3 months;*
- iv. *General damages for fraud and breach;*
- v. *Interest on general damages;*
- vi. *Cost of this action on Solicitor/Client indemnity basis;*
- vii. *Any other relief that his court may deem fit.*

[02] The first to third defendants are nominal defendants. The plaintiff does not seek any relief against them.

Background

[03] The grounds facts are stated in the statement of claim. The statements of claim plead:

3.1 The plaintiff was and is the Trustee of the Estate of Maikeli Nakia late of Lomolomo Village, Lautoka pursuant to the Probate No. 44679 granted by the High Court on 15 March 2006.

3.2 In early June 2016, the defendant approached the plaintiff to sell the Estate land being State Land without Title comprised in LD Ref 4/7/2338 known

as Lot 1 LDSW 462 PT of Lomolomo, Kubunasarava & Togoloa Tiri in the District of Vuda and in the Province of Ba having an estimated area of 7.0794 hectares (subject to survey) (the '*land*').

- 3.3 The plaintiff consulted the beneficiaries of the Estate and all agreed to sell the land to the defendants for the sum of \$500,000.00.
- 3.4 In late June and/or early July 2016, the defendants engaged the service of Messrs Iqbal Khan & Associates of Lautoka who prepared the Sale and Purchase Agreement and the same was executed by the plaintiff in his personal capacity upon request of the defendant and their solicitors.
- 3.5 Thereafter, in early August 2016, the defendants prepared renunciation document and requested the plaintiff to have the same signed by all the Trustees [beneficiaries] of the Estate of Maikeli Nakia.
- 3.6 The defendant told the plaintiff that it will be easier, simpler and cost effective to have the lease transferred to the plaintiff from the Estate of Maikeli Nakia rather than transferring the property from the Estate of Maikeli Nakia to the defendants.
- 3.7 The explanation that was given to the plaintiff by the defendants was explained to the beneficiaries of the Estate of Maikeli Nakia by the plaintiff who then agreed to sign the renunciation document but did not forgo their interest and shares from the Estate.
- 3.8 The beneficiaries signed the renunciation documents on 25 August 2016, wherein they legally transferred and/or renounced their interest and/or shares from the Estate to the plaintiff.
- 3.9 The defendants knew that the plaintiff was not that much literate and/or not well educated and they knew that they can easily take advantage of the plaintiff being not well educated.
- 3.10 Thereafter, the defendants prepared all necessary documents and have the same signed in their vehicle in the absence of the witnessing officer and only explanation given by the defendants were that the documents

that the plaintiff is required to sign is in respect to the lease being transferred to the plaintiff from the Estate.

3.11 Unbeknown to the plaintiff, the plaintiff also sign the transfer document wherein he transferred the property from his personal capacity to the defendants which transfer document was registered within the Registrar of Deeds on 1 September 2016. By doing, as mentioned hereinabove, the defendants have committed fraud.

Particulars of Fraud

- i. Transferring the lease into their name without paying considerations sum as agreed under the Sale and Purchase Agreement.*
- ii. Stating the consideration sum in the transfer document to be \$20,000.00 contrary to the Sale and Purchase Agreement wherein the parties agreed that the consideration sum to be \$500,000.00.*

3.12 Upon knowing of the fraudulent transactions as stated hereinabove, the plaintiff approached the defendants and requested them to pay the consideration sum of \$500,000.00 but the defendants have either refused and/or neglected to pay the said sum of \$500,000.00 and/or any sum at all to the plaintiff.

3.13 Pursuant to the Sale & Purchase Agreement entered into between the plaintiff and the defendants, it was inter-alia agreed as follows:-

- i. It is hereby agreed between both parties that the purchaser will be given 2 years period to pay off the said consideration and this will be done every 4 (four) months from the date of the transfer documents have been executed and the said title or Agricultural lease is converted to a tourism lease (clause 5).*
- ii. That the purchaser hereby undertakes to make periodical payments of every 4 (four) months to the vendor but the same amount is subject to the purchaser's direction and consent for the said property; if failure to make payments to the vendor within the agreed stipulated time, both parties*

will make arrangements subject to their discretion and consent for the next payment date; (clause 6)

- iii. *It is hereby agreed by both parties that is the said Title of the said property after transfer is executed is not converted to a Tourism Lease within one month of the execution of this Agreement, the purchaser will have the right to rescind the said Agreement. (clause 7)*

3.14 Further, the defendants have breached the above clauses of the Sale & Purchase Agreement.

Particulars of Breach

- i. Failed to pay as agreed pursuant to Clause 5 and 6 of the Sale and Purchase Agreement.
- ii. Failed to take any action required under Clause 7 of the Sale and Purchase Agreement.

3.15 The plaintiff has now been pressured by the beneficiaries of the Estate of Maikeli Nakia to pay their shares as they were promised by the plaintiff that they will get their shares despite signing of the renunciation documents.

3.16 Due to the defendants breaching the conditions of the Sale & Purchase Agreement and committing fraud, the plaintiff has suffered and is suffering loss and damages.

Defendants' position

[04] The defendants in their statements of defence states:

- i. The defendants have been making demand of the plaintiff for money and have been given monies in the past.
- ii. Pursuant to the agreement payment of the consideration monies is to be paid in 2 years by way of periodic payments after the lease is converted to tourism lease, which is still has not been; and

- iii. All steps have been taken by the defendants to convert the lease to tourism and currently the defendants are just waiting for the Minister's signature.

Agreed Facts

[05] At the pre-trial conference ('PTC') held between the defendants and the plaintiff the following facts were agreed between them:

1. *The plaintiff was and is the Trustee of the Estate of Maikeli Nakia late of Lomolomo Village, Lautoka pursuant to the Probate No. 44679 granted by the Probate Jurisdiction of the Suva High Court on 15 March 2006.*
2. *Sometimes in early June 2016, the defendant approached the plaintiff to sell the Estate land being State Land without Title comprise in LD Ref 4/7/2338 known as Lot 1 LDSW 462 PT of Lomolomo, Kubunasarava & Togoloa Tiri in the District of Vuda and in the Province of Ba having an estimated area of 7.0794 hectares (subject to survey) (said 'land').*
3. *The plaintiff consulted the beneficiaries of the Estate and all agreed to sell the said land to the defendants for the sum of \$500,000.00.*
4. *That sometimes in late June and/or early July 2016, the defendants engaged the service of Messrs Iqbal Khan & Associates of Lautoka who prepared the Sale and Purchase Agreement.*
5. *That thereafter, the defendants in early August 2016, prepared renunciation document and requested the plaintiff to have the same signed by all the Trustees of the Estate of Maikeli Nakia.*
6. *The beneficiaries signed the renunciation documents on or about 25 August 2016, wherein they legally transferred and/or renounced their interest and/or shares from the said Estate to the plaintiff.*

The evidence

[06] The plaintiff called two witnesses in support of his claim. His witnesses include: Maikeli Nakia Junior (the plaintiff or PW1) and Laisiasi Nakia (PW2). The plaintiff tendered in evidence five documents marked PEx01-PEx05.

[07] The defendant did not call any witness except for marking two documents, DEx01 and DEx02. At the close of the plaintiff's case, counsel for the defendants made submission for no case to answer. Then the court asked if this would be the position even if the court finds a case to answer. In reply, counsel for the defendants confirmed that the defendant will not be leading evidence even if the court finds a case to answer. The no case to answer submission is made on the basis that on the evidence adduced by the plaintiff the claim cannot succeed.

The law on case to answer in civil proceedings

[08] Submissions of no case to answer are available in civil proceedings as well. At the conclusion of the case for the claimant, the defendant may make a submission of no case to answer. This is made on the basis that on the evidence adduced by the claimant the claim cannot succeed.

[09] In general, the judge may require a defendant to elect to call no evidence before making a submission of no case to answer (see: *Blinkhorn v Hall* LTL 13/4/2000; *Miller v Cowley* [2002] EWCA Civ 1100).

[10] However, there may be circumstances where a submission may be entertained without putting the defendant to an election (see: *Mullan v Birmingham City Council* (1999) *The Times*, 29 July 1999).

[11] Where the court allows a defendant to make submission of no case to answer without being required to elect whether to call no evidence, the test by which the submission is determined is whether the claim has no real prospect of success (*Benham Ltd v Kythire Investment Ltd* [2003] EWCA Civ 1794). On the other hand, if the defendant is put to his election and decides to call no evidence, the submission of no case to answer is decided on the basis of whether the claimant has established the case on the balance of probabilities (*Miller v Cowley* [2002] EWCA Civ 1100).

Discussion

[12] The plaintiff's claim is essentially based on fraud on the part of the defendants. He alleges that the defendants got transferred the lease into their name without paying the consideration sum as agreed under the Sale and Purchase Agreement (SPA), stating the consideration sum in the transfer document to be \$20,000.00

contrary to the Sale and Purchase Agreement wherein the parties agreed that the consideration sum to be \$500,000.00.

- [13] The defendants barely deny the allegation made by the plaintiff and put the plaintiff to the strict proof thereof. Their defence to the plaintiff's claim is that: they had given money to the plaintiff in the past; pursuant to the agreement, payment of the consideration monies is to be paid in 2 years by way of periodic payments after the lease is converted to tourism lease, which is still has not been done; and all steps have been taken by the defendants to convert the lease to tourism and currently the defendants are just waiting for the Minister's signature.
- [14] It is an agreed fact that the plaintiff consulted the beneficiaries of the Estate and all agreed to sell the land (the Estate property) to the defendants for the sum of \$500,000.00.
- [15] Sometime in June/July 2016, the defendants engaged the service of Messrs Iqbal Khan & Associates of Lautoka who prepared the SPA. Thereafter, in August 2016, the defendants prepared renunciation document and requested the plaintiff to have the same signed by all the Trustees of the Estate of Maikeli Nakia. Then, the beneficiaries signed the renunciation document renouncing their share/interest in the Estate to the plaintiff on 25 August 2016. These are all agreed facts.
- [16] The plaintiff was and is the Trustee of the Estate of Maikeli Nakia late of Lomolomo Village, Lautoka and he obtained the Probate No. 44679 granted by the Suva High Court on 15 March 2006.
- [17] In his evidence the plaintiff states that: *it is a state land without title. I obtained approval for sale of the land. I consulted with my brother and other beneficiary and they (defendants) agreed for \$500,000.00 (SPA-PEx2). He signed it (SPA). Ms Ravai (solicitor) explained it. Naivaluwaqa also signed it. I signed only one page. My siblings signed the deed of renunciation (PEx3). It was in August 2016. Later, the Lands Officer told me that I have transferred the land for \$20,000.00. I told him 'no', it was \$500,000.00. Then I lodged caveat (PEx4). I never consented to change the price of \$500,000.00 to \$20,000.00.*

- [18] Under cross examination the plaintiff said: he confirmed that consent to institute the action was obtained (PEx5) and his brother wanted to file the action. He denied agreeing to sell the land for \$20,000.00. Frank told him that \$20,000.00 was for tax. He did not know Kalo. He had known only Frank. He said: I did not transfer for \$20,000.00. Frank did not explain to me. It was signed in Frank's vehicle. When questioned in cross examination, he answered:
- Q. Transfer document was not signed in front of the lawyers, Lawyers defrauded? A: Yes.
- Q. Lease has expired? A: Government can renew.
- Q. Document regarding Pearl Investment? A: I signed
- Q. You had an independent lawyer, KLaw? A: Frank told me to take the document to my lawyer. SPA was signed in front of me.
- [19] During cross examination, he further said: *"She (lawyer Ravai) did not give a copy of the SPA. Frank told me: 'my lawyer has it.' The lawyer told me has given to Frank. Frank's false-he did not explain it to me. I did not agree with the market valuation of \$20,000.00. Frank agreed to pay \$500,000.00 for the land. I blocked the development lease approval because Frank was not honest. We agreed for \$500,000.00. He said he will pay \$20,000.00 each family."*
- [20] The plaintiff appears to be not well educated. He's level of education is Form 4. When giving evidence, he was coherent and consistent. He was unshaken in his evidence that he agreed to transfer the land for \$500,000.00. His evidence is supported by the SPA.
- [21] PW2 (the plaintiff's brother) one of the beneficiaries. He gave evidence regarding signing the deed of renouncement. He said he was under 18 at the time of signing the renouncement document.
- [22] It is an agreed fact that in August 2016, the defendants prepared renunciation document and requested the plaintiff to have the same signed by all the Trustees [beneficiaries] of the Estate of Maikeli Nakia.

- [23] The plaintiff's signature on the transfer document has been obtained under suspicious circumstances without witnesses being present. When signing the transfer document, the plaintiff has been told that the figure \$20,000.00 was for tax.
- [24] On the evidence and having been satisfied on the balance of probabilities, I hold that the defendants agreed to purchase the land for \$500,000.00 and not for \$20,000.00. I further hold that the defendants got transferred the land to them without making the full price money of \$500,000.00 but only \$20,000.00.
- [25] The plaintiff did not dispute receiving \$20,000.00 from the defendants.
- [26] For the reasons given, I conclude that the plaintiff has proved his case on the balance of probabilities. Accordingly, I find a case to answer.
- [27] At the close of the plaintiff's case, I invited the defendants to call their witnesses. Then, counsel for the defendants informed the court that she is not calling any witnesses on behalf of the defendants and made submission of no case to answer. She further confirmed that the defendants would not adduce evidence even if the court finds a case to answer. She was given ample time to file written submissions of no case to answer. However, she did not file any.
- [28] If the defendant is put to his election and decides to call no evidence, the submission of no case to answer is decided on the basis of whether the claimant has established the case on the balance of probabilities (see *Miller v Cowley* [2002] EWCA Civ 1100).
- [29] I have decided that the plaintiff has established his case on the balance of probabilities.

Defendants' failure to give evidence

- [30] There is an unexplained failure by the defendants to call evidence. In the circumstance, *Jones v Dunkel* (1959) 101 CLR 298 rule would apply.
- [31] The rule in *Jones v Dunkel* is that when there is an unexplained failure by a party to call evidence, to call a witness or to tender documents or other evidence, the

court may draw an inference that the uncalled evidence would not have assisted the party.

[32] The defendants have failed to adduce evidence through the calling of witnesses. Therefore, there is an unexplained failure by the defendants to call evidence or to call a witness. This leads me to draw an inference against the defendants that the uncalled evidence would not have assisted them.

The relief

[33] The relief sought by the plaintiff includes that:

- i. A declaration that the transaction between the plaintiff and the defendants in respect to the land be declared null and void due to fraud on the part of the defendants;*
- ii. An order that the defendants revert the land to the plaintiff;*
- iii. General damages for fraud and breach;*
- iv. Interest on general damages;*
- v. Cost of this action on Solicitor/Client indemnity basis;*
- vi. Any other relief that this court may deem fit.*

[34] The declaratory relief, in my opinion, would do justice to the plaintiff. The plaintiff confirmed in his evidence that the defendants agreed to purchase the land for \$500,000.00. He also confirmed in his evidence that he wanted to sell the land for \$500,000.00. Therefore, the plaintiff is justly entitled to receive the agreed purchase price of \$500,000.00 from the plaintiff, minus the sum received by the plaintiff. He did not deny receiving \$20,000.00 from the defendants. He also did not deny receiving \$5,000.00 from the defendant in the middle of the trial. Counsel for the defendants submitted that the defendants paid \$5,000.00 to the plaintiff as *ex gratia* payment for out of court settlement. However, counsel for the plaintiff maintained that there was no full and final settlement.

[35] When the defendants got transferred the land to them, the lease was valid. The lease got expired subsequently. For that the plaintiff is not responsible. The defendants should have applied for renewal of it.

Aggravated damages

[36] The defendants had fraudulently transferred the land to them for \$20,000.00 instead of the agreed \$500,000.00. They had breached the SPA. This kind of acts should be deterred. For their high handed action, I order the defendants must pay a sum of \$10,000.00 to the plaintiff, as aggravated damages.

Interest

[37] Under the Law Reform (Miscellaneous Provisions) (Death and Interest) Act 1935, Section 3, the court has the discretion to grant interest on the whole or any part the debt or damages at such rate as it thinks fit. The plaintiff seeks interest. Therefore, I would allow interest on the judgment sum to be calculated at the rate of 4% per annum from the date of writ of summons (23 March 2018) to the date of the judgment.

Costs

[38] As a successful party, the plaintiff is entitled to costs of these proceedings. I consider all, and summarily assess costs at \$3,000.00, which is payable by the defendants to the plaintiff.

Conclusion

[39] For the reasons given, I would give judgment for the plaintiff. Accordingly, the defendants shall pay a sum of \$488,000.00. Further, the defendant shall also pay a sum of \$10,000.00 as aggravated damages. The defendants shall also pay interest on the judgment sum at the rate of 4% per annum from the date of writ of summons (23 March 2018) to the date of this judgment. The plaintiff is entitled to costs of these proceedings which I summarily assess at \$3,000.00.

Result:

1. The defendants shall pay a sum of \$488,000.00 to the plaintiff.
2. The defendants shall also pay interest on the judgment sum at the rate of 4% per annum from the date of writ of summons (23 March 2018) to the date of this judgment.

3. The defendants shall also pay summarily assessed costs of \$3,000.00 to the plaintiff.

M. H. Mohamed Ajmeer
11/12/20

M. H. Mohamed Ajmeer

JUDGE



At Lautoka

11 December 2020

Solicitors:

Nawaikula Esquire, Barrister & Solicitor for the plaintiff

Natasha Khan & Associate, Barrister & Solicitor for the defendants

Office of the Attorney General, Lautoka for the nominal defendants