

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 195 of 2018

BETWEEN

HORNG HUEY JEN of No. 16 Carew Street, Flagstaff,
Suva, Businesswoman.

FIRST PLAINTIFF

AND

HUANG YU CHUNG 457 Don Ping Road, Taiping District 411,
Taichang City, Taiwan.

SECOND PLAINTIFF

AND

HUANG WEI CHENG 457 Don Ping Road, Taiping District 411,
Taichang City, Taiwan.

SECOND PLAINTIFF

AND

HUANG HO of Flat 5, Lot 28 Namaka Park,
Martintar, Nadi.

FOURTH PLAINTIFF

AND

HUANG YU CHIN 457 Don Ping Road, Taiping District 411,
Taichang City, Taiwan.

FIFTH PLAINTIFF

AND

HUANG TAN HSIANG of C/- Mamlakah Lawyers,
McGregor Road, Suva, Unemployed.

DEFENDANT

Counsel : Mr. O'Driscoll G. for the plaintiffs
Absent an unrepresented

Date of Hearing : 24th November 2020

Date of Ruling : 11th December 2020

RULING

[1] The plaintiffs filed this writ of summons seeking the following reliefs against the defendant:

- (a) An order that the defendant is estopped from refusing to transfer Lots 3, 2, 13, 14 and 15 on DP 8188 contained in CT 29754 and Lot 4 on DP 8188 contained in CT 42903 along with Lot 5 of DP 8188 contained in CT 42904 from the respective plaintiffs.
- (b) A declaration that Lot 3 on DP 8188 contained in CT 29754 and Lot 4 on DP 8188 contained in CT 42903 along with Lot 5 on DP 8188 contained in CT 42904 rightfully belong to the 1st plaintiff.
- (c) An order that the defendant transfer Lot 3 on DP 8188 contained in CT 29754 and Lot 4 on DP 8188 contained in CT 42903 along with Lot 5 on DP 8188 contained in CT 42904 to the 1st plaintiff.
- (d) A declaration that Lots 2, 13, 14, and 15 on DP 8188 contained in CT 29754 rightfully belong to 2nd to 5th plaintiffs respectively.
- (e) An order that the defendant transfer Lots 2, 13, 14, and 15 on DP 8188 contained in CT 29754 to 2nd to 5th plaintiffs respectively.
- (f) An order that the defendant do all that is necessary and normally required to facilitate the transfer of the said lots to the respective plaintiffs.
- (g) In the event that the defendant neglects and/or refuses to transfer any of the lots then the plaintiffs seek that Chief Registrar be authorised to sign any necessary documentation to effect the transfer of lots 2, 3, 4, 5, 13, 14 and 15 on DP 8188 to the plaintiffs.
- (h) In the event that the defendant has disposed of any of the said lots general damages be awarded to the respective plaintiffs affected.

- (i) Costs of this action.
- (j) And order for such further and other reliefs as the court deems just.

[2] The plaintiffs on 24th March 2020 filed summons pursuant to Order 14 rule 1 of the High Court Rules 1988 seeking the following orders:

- (i) That a declaration be made that the 1st plaintiff is the owner of part of Certificate Title No. 29754 being Lot 3 on DP 8188 Veisari (part of) in the District of Rewa Province of Naitasiri by virtue of natural love and affection created when the defendant has approved to transfer Lot 3 to the 1st plaintiff as a gift as accepted in paragraph 6 of the defendant's affidavit in response sworn on 4th May 2018.
- (ii) That a declaration be made that the defendant's interest in part of Certificate Title No. 29754 being Lot 3 on DP 8188 Veisari (part of) in the District of Rewa Province of Naitasiri be extinguished.
- (iii) That a new title be issued in respect of part of Certificate Title No. 29754 being Lot 3 on DP 8188 from the defendant to the 1st plaintiff.
- (iv) That the defendant be compelled to do all that is necessary and incidental to execute a transfer of part of Certificate Title No. 29754 being Lot 3 on DP 8188 from the defendant to the 1st plaintiff.
- (v) Alternatively to (iv) for an order that the Chief Registrar of the High Court be Authorised to execute necessary paper work including, but not limited to, transfer and Capital Gains Tax Return and declaration to effect transfer of Lot 3 on DP 8188 to the 1st plaintiff.
- (vi) That the costs of this application be paid by the defendant.
- (vii) For such further and other reliefs and orders as are deemed fit in the premises.

[3] Order 14 rule 1 of the High Court Rules 1988 provides:

Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has given notice of intention to

defend the action, the plaintiff may, on the ground that that defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against that defendant.

- [4] Mr. Valenitabua, the solicitor on record of the defendant was present in court but informed that he had no instructions to represent the defendant.
- [5] In **Carpenters Fiji Ltd v Joes Farm Produce Ltd** [2006] FJCA 60; ABU0019U.2006S (10 November 2006) the Court of Appeal stated that the following are some of the well-established principles relating to the entry of summary judgment:
- (a) The purpose of O.14 is to enable a plaintiff to obtain summary judgment without trial if he can prove his claim clearly and if the defendant is unable to set up, **bona fide** defence or raise an issue against the claim which ought to be tried.
 - (b) The defendant may show cause against a plaintiff's claim on the merits e.g. that he has a good defence to the claim on the merits or there is a dispute as to the facts which ought to be tried or there is a difficult point of law involved.
 - (c) It is generally incumbent on a defendant resisting summary judgment, to file an affidavit which deals specifically with the plaintiff's claim and affidavit and states clearly and precisely what the defence is and what facts are relied on to support it.
 - (d) Set off, which is a monetary cross claim for a debt due from the plaintiff, is a defence. A defendant is entitled to unconditional leave to defend up to the amount of the set off claimed. If there is a set off at all, each claim goes against the other and either extinguishes or reduces it **Hanak v. Green (1958) 2 QB 9 at page 29 per Sellers LJ.**

(e) Likewise where a defendant sets up a bona fide counter claim arising out of the same subject matter of the action, and connected with the grounds of defence, the order should not be for judgment on the claim subject to a stay of execution pending the trial of the counter claim but should be for unconditional leave to defend, even if the defendant admits whole or part of the claim. **Morgan and Son Ltd v. S. Martin Johnson Co (1949)** **1 KB 107 (CA)** .

[6] Before making an order under Order 14 rule 1 above the court has to be satisfied that the defendant has no defence to the 1st plaintiff's claim or part thereof.

[7] All four plaintiffs came to court seeking the above orders on the basis that the defendant promised to transfer the certain portions of the land as averred in the statement of claim, to them but did not complete the transfers.

[8] The plaintiffs originally filed an originating summons (HBC 75 of 2018) and later instituted these proceedings and withdrew the earlier action. However the 1st plaintiff in this application relied on the affidavit filed by the defendant 04th May 2018, in the earlier action.

[9] In paragraph 6 of the earlier action the defendant has averred:

I only had approved the transfer of Lot 3 on DP 8188 to her and not anything further. We had talked about Lot 3 in DP 8188 only as a gift I will give her and not lot 1 and /or Lot 5.

[10] The 1st plaintiff in addition has averred that the defendant even prepared the Partisan Transfer and also obtained the Capital Gains Tax Assessment but did not lodge the Partisan Transfer with the Registrar of Titles for registration. The defendant in paragraph 8 of the same affidavit states that the plaintiff organised the payment of Capital Gains Tax and attended to the other statutory requirements without his presence.

- [11] The question here is whether the admission of the defendant that he approved the transfer of Lot 3 on DP 8188 creates an agreement enforceable in law.
- [12] There is no sale and purchase agreement between the parties. It is common ground that the defendant is the owner of this property and he is free to do anything which is not illegal with his property.
- [13] Before considering the averments in the 1st plaintiff's affidavit in support I must say that the said affidavit is defective for the reason that it is not the original affidavit or photocopy of the original affidavit. It has not been signed by the 1st defendant and a Commissioner for Oaths. The place where the affirmant has to sign it is written, "**(SGD) HORNG HUEY JEN**" and where the Commissioner for Oaths has to sign it is written, "**(SGD) Shahrukh S.A. Ali**". (*Emphasis is mine*). Further, there is also no official stamp of the Commissioner for Oaths placed on the affidavit.
- [14] As I always say affidavits are sworn evidence and for the court to consider such evidence there must be a properly executed affidavit before it. Since the affidavit in support is defective the court cannot rely on its contents.
- [15] The next issue is whether the promise made by the defendant that he would transfer Lot 3 on DP 8188 in his affidavit filed on 04th May 2018 has the effect of an agreement enforceable in law.
- [16] The plaintiffs came to court on the basis that the 1st plaintiff was in a de facto relationship with the defendant for 28 years up until 2015 and now they are separated. The 1st plaintiff do not say on what basis she is entitled to have this land registered in her name. Although the courts are not supposed to make findings based on assumptions, in this matter since it is not clear the basis of the 1st plaintiff's claim the court has to make an attempt to ascertain the grounds relied on by the 1st plaintiff taking into consideration the material available.

[17] If the 1st plaintiff's claim is based on a family arrangement there need not be a formal written agreement. The law on family arrangements was discussed in the following judgments.

Balfour v Balfour [1919] 2 KB 571 –

The defendant was a civil servant stationed in Ceylon. His wife alleged that, while they were both in England on leave and when it had become clear that she could not again accompany him abroad because of her health, he had promised to pay her £30 a month as maintenance during the time that they were thus forced to live apart. She sued for breach of this agreement.

The Court of Appeal held that no legal relations had been contemplated and that the wife's action must fail.

In that case Atkin LJ made the following observations:

It is necessary to remember that there are agreements between parties which do not result in contracts within the meaning of that term in our law. The ordinary example is where two parties agree to take the walk together or where there is an offer and an acceptance of hospitality. Nobody would suggest in ordinary circumstances that those agreements result in what we know as a contract, and one of the most usual forms of agreement which does not constitute a contract appears to me to be the arrangements which are made between husband and wife.... To my mind those agreements, or many of them do not result in contracts at all...even though there may be what as between other parties would constitute consideration... They are not contracts because the parties did not intend that they should be attended by legal consequences.

Merritt v Merritt [1970] 2 All ER 760, [1970] 1 WLR 1211 –

The husband left the matrimonial home, which was in the joint names of husband and wife and subject to a building society mortgage, to live with another woman. The husband and wife met and had a discussion in the husband's car during which the husband agreed to pay the wife £40 a month out of which she must pay the outstanding mortgage payments on the house. The wife refused leave the car until the husband recorded the agreement in writing and the husband wrote and signed a piece of paper which stated "**in consideration of the fact that you will pay all charges in connection with the house...until such time as the mortgage repayments has been completed I will agree to transfer the property in to your sole ownership**". After the wife had paid off the mortgage the husband refused to transfer the house to her.

The Court of Appeal held that the parties had intended to affect their legal relations and that an action for breach of contract could be sustained.

In **Pettitt v Pettitt** [1970] AC 777, [1969] 1 All ER 385, a woman purchased a matrimonial home for herself and her husband to live in out of her own sums and conveyed the home into her name. The husband and wife cohabited the home together, during which the husband made alterations and improvements to the home. Following the couple's divorce, the former husband claimed that he had a beneficial interest in the home as his contributions to the property had increased its value.

Several members of the House of Lords, though accepted the principle enunciated in **Balfour v Balfour**, thought the decision on the facts very close to the line. It was also observed that though many agreements between husband and wife are not intended to be legally binding, performance of such agreements may well give rise to legal consequences.

Lord Diplock said:

Many of the ordinary domestic agreements between man and wife do not possess the legal characteristics of a contract. So long as they are executory they do not give rise to any chose in action, for neither party intended that non-performance of their mutual promises be subject of sanctions in any court. But this is relevant to non-performance only. If spouses do perform their mutual promises the fact that they could not have been compelled to do so while the promises were executory cannot deprive the acts done by them of all legal consequences upon proprietary rights; for these are within the field of law of property rather than of the law of contract. It would, in my view, be erroneous to extend the presumption accepted in *Balfour v Balfour* that mutual promises between man and wife in relation to their domestic arrangements are prima facie not intended by either to be legally enforceable to a presumption of a common intention of both spouses that no legal consequences should flow from the acts done by them in performance of mutual promises with respect to the acquisition, improvement or addition to real or personal property...for this would be to intend what is impossible in law.

- [18] I will now consider the applicability of the principles enunciated in the above decisions to the facts of this matter. The facts of **Balfour v Balfour**, are deferent from the facts of **Merritt v Merritt** and **Pettitt v Pettitt**. In **Merritt v Merritt** the property in question was jointly owned by the parties and they agreed in writing that the wife would pay the amount due on the mortgage and husband would transfer the property to the wife once the mortgage is discharged. In **Pettitt v Pettitt** the husband claimed beneficial interest on the wife's property on the basis the he effected improvements which had the effect of increasing its value. In the matter before this court it is only the promise that the defendant would transfer the

property to the 1st plaintiff. Facts of this matter are somewhat similar to the facts of **Balfour v Belfour**, where the husband promised to pay the wife £30 per month as maintenance failed to pay and the House of Lords held that a promise of this nature does not create a binding contractual relationship between the parties.


[19] For the reasons aforesaid I make the following orders.

ORDERS

1. The summons filed on 24th March 2020 is struck out and the orders sought there in are refused.
2. There will not be an order for costs.



11th December 2020


Lyone Seneviratne

JUDGE