

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

ACTION NO:- HBC 379 of 2020

IN THE MATTER of Partial Transfer of Lot 1 on DP 10879 part of CT No. 41130 from **SHAN MOHAMMED** of Nabitu, Sigatoka, Farmer as Transferor and **TAKI MOHAMMED** of Nabitu, Sigatoka, Farmer as Transferee under Land Transfer ACT 1971.

BETWEEN: **TAKI MOHAMMED** of Nabitu, Sigatoka.

PLAINTIFF

A N D: **SHAN MOHAMMED** of Nabitu, Sigatoka.

FIRST DEFENDANT

A N D: **REGISTRAR OF TITLES**, Civic Towers, Suva.

SECOND DEFENDANT

A N D: **ATTORNEY GENERAL OF FIJI**, Government Buildings, Suva.

THIRD DEFENDANT

Appearance : Ms. Paayal Lal for the Plaintiff
 No Appearance for the First Defendant.
 Ms. Suliana Taukei with Mr. Vimal Ram for the Second and Third Defendants.

Hearing : Tuesday, 28th June 2022 at 9.30am

Decision : Tuesday , 26th July, 2022 at 9:00am

DECISION

(A) INTRODUCTION

[01]. The matter before me stems from the plaintiff's Originating Summons filed on 15.12.2020 seeking the grants of the following orders:

(a) *AN ORDER that the instrument of Partial Transfer executed by SHAN MOHAMMED on 14th July, 2016 is registrable in the present form over Certificate of Title No. 41130.*

(b) *AN ORDER that in the absence of original Certificate of Title No. 41130 the Registrar of Titles to **dispense with the production of Original Title** (owners copy) including Provisional Title Application for registration of the Partial Transfer dated 14th July, 2016 and issue a new separate Title to Taki Mohammed in respect of Lot 1 DP 10789 part of CT No. 41130.*

(c) *Any such further and other relief as this Honorable Court may deem just:*

(d) *Costs of this action.*

[Emphasis added]

[02]. The application is made pursuant to Order 7, Rule 3 of the High Court Rules, 1988 and under sections 26, 45, 129 and 168 of the Land Transfer Act Cap 131 and pursuant to the inherent jurisdiction of the court.

[03]. The originating summons is supported by an affidavit sworn by the plaintiff on 30.11.2020.

[04]. The defendants strongly opposed the application and filed the affidavits in opposition followed by an affidavit in reply there to.

[05]. The plaintiff and the second and third defendants were heard on the summons. The first defendant did not attend the hearing. In addition to oral submissions by counsel for the plaintiff and the second and third defendants, they filed written submissions for which I am grateful.

(B) **BACKGROUND**

- [01]. The plaintiff says that he entered into a “**Deed of Trust**” on 30.08.2020 with his brother Shan Mohammed (the first defendant) as trustee to purchase Lot 20 of DP 7144 being part of CT No. 4135 comprising an area of 4.986 ha at Nabitu, Sigatoka from JP Bayly Trust for the consideration of \$23, 343.69 (annexure “A” referred to in the affidavit of the plaintiff sworn on 30.11.2020)
- [02]. The plaintiff says that he had paid the survey fees for preparation of subdivision of the said land and a partial transfer was executed by the first defendant as trustee in favour of the beneficiary, plaintiff (annexure “C” referred to in the affidavit of the plaintiff sworn on 30.11.2020).
- [03]. The plaintiff says that when he requested the first defendant to release CT No: 41130 for registration of partial transfer he was informed that Certificate of Title was kept with his son-in-law in Auckland for safe keeping.
- [04]. The plaintiff says that his solicitors sent several letters to the son-in-law of the first defendant who is in Auckland to obtain CT 41130 for registration (annexures E, F, G, and H referred to in the affidavit of the plaintiff sworn on 30.11.2020).
- [05]. The plaintiff further states that since he did not receive any co-operation from the first defendant and his son-in-law (Yusuf Mohammed Zubeen), he was advised by his solicitors to make an application to the Registrar of Titles (the second defendant) to dispense with the production of duplicate CT 41130 in terms of section 26 of the Land Transfer Act.
- [06]. The second defendant had refused that application and had requested the plaintiff to obtain a Court Order. Now the plaintiff seeks the following orders from this court;
- (1) *AN ORDER that the instrument of Partial Transfer executed by SHAN MOHAMMED on 14th July, 2016 is registrable in the present form over Certificate of Title No. 41130.*
- (2) *AN ORDER that in the absence of original Certificate of Title No. 41130 the Registrar of Titles to **dispense with the production of Original Title** (owners copy) including Provisional Title Application for registration of the*

Partial Transfer dated 14th July, 2016 and issue a new separate Title to Taki Mohammed in respect of Lot 1 DP 10789 part of CT No. 41130.

[Emphasis added]

[07]. The Registrar of Titles, the second defendant says:-

- *There was an easement and mortgage registered on Certificate of Title No: 41130.*
- *The dispensation application was declined because it was an incorrect application (No reasons were adduced).*
- *Section 26 of the Land Transfer Act 1971 is not the correct legal provision for the dispensation of the original or the duplicate Certificate of Title.*
- *Without prejudice to above, the plaintiff has failed to provide his proof of identity together with the dispensation application.*

[08]. The first defendant in his affidavit in opposition filed on 21.01.2022, has opposed the registration of the partial transfer executed on 14.07.2016 on the following grounds (reference is made to paragraph (8) (13) and (14) of the first defendant's affidavit in opposition sworn on 14.01.2022).

[8]. *I agree with paragraph 6 of the Affidavit in Support and further state that I did not release the said Title because I was advised by a Lawyer not to release the same as I would lose all of my land if I consented to the registration of the Partial Transfer. I was not advised that I would only be losing the 4 acres already agreed to be transferred to the plaintiff.*

[13]. *I deny the contents of paragraph 20 and further state that the plaintiff's transfer documents states that the area being transferred is 1.6453ha. The agreement between me and the plaintiff clearly states that the area which will be subject to the transfer will be 4 acres. However, the area states in the transfer document is in excess of 4 acres by 0.6562484 acres or 265.574305223 square meters.*

[14]. *I have no issue in releasing the original title to the plaintiff on the basis that he amends the transfer document to reflect that the area being*

transferred is only 4 acres as per the Deed of Trust that was signed by the plaintiff and me on 30th August 2008.

- [09]. As I understand the affidavit in opposition filed by the first defendant, the first defendant does not dispute the execution of the partial transfer. He seeks to disavow the partial transfer he has executed on the plea of '*non est factum*' and also says that the transfer was to be of four (04) acres however the partial transfer document states that the area to be in excess of 0.6562484 acres or 265.574305223 square meters.
- [10]. The first defendant seeks the partial transfer document to be amended.
- [11]. As to the first defendant's allegation that the partial transfer document stipulating the area of the land being in excess of 0.6562484 acres, the plaintiff replies (reference is made to paragraph (7) and (9) of the plaintiff's affidavit in reply sworn on 15.02.2022).

(7). *That in response to paragraph 8 to 11 of the Affidavit I state that the first defendant ought to release the title and should not claim being misinformed or being illiterate as various telephone conversations were held between the solicitor's office and the first defendant advising about letters being sent to him and explaining the contents of the letter. The first defendant's son-in-law who seems to be literate was also explained the contents of the letter and the need to release the title.*

Furthermore, the first defendant has caused much delay by refusing to release the duplicate title without any good reason when he had in fact signed the Deed of Trust to transfer 4 acres to the plaintiff hence is bound by the terms of the Deeds. The first defendant even signed the partial transfer documents before an independent witness and provided a statutory declaration that he was transferring land from CT 41130 to the plaintiff.

Copies of which are annexed and marked "K", "M", "N" in the plaintiff's affidavit in support filed 15/12/20.

(9). *That in response to paragraph 13 and 14 of the defendant's affidavit, the plaintiff state that the first defendant had not raised any objection previously in regards to the transfer document stipulates the area of the*

land being in excess of 0.6562484 acres and had gone ahead and signed the partial transfer document. In any event, 0.6562484 acres is a very insignificant area of land to raise dispute on. The survey and subdivision of the land is done and the area of the land as per the survey plan is 1.6453 hectares which is equivalent to 4.06 acres hence the transfer documents cannot be amended to state otherwise.

Moreover, as per the Deed of Trust, 4 acres of land which is equivalent to 1.61874 hectares was to be transferred from Shan Mohammed to Taki Mohammed.

- i. Upon survey of the land the area of land subdivided was 1.6453.*
- ii. The difference is 0.02656 hectares which is equivalent to 0.06 acres.*
- iii. The survey plan was signed or approved by the registered proprietor, Shan Mohammed. He even signed the partial transfer document hence it is not understandable why he will raise an issue now regarding the area of the land being transferred when he had the liberty to raise an objection and not sign the survey plan.*
- iv. The first defendant has unnecessarily caused delay by refusing to produce the duplicate title because of which the plaintiff had to go through great inconvenience and incur cost as well by filing this action.*

[12]. As to the second and third defendants' refusal to accept the plaintiff's lodgment of the application for dispensation with the production of duplicate Certificate of Title No- 41130, the plaintiff replies:- [reference is made to paragraph (6), (8) and (9) of the plaintiff's affidavit in reply sworn on 24.01.2022].

(6). *That in response to paragraph 5, I state that the easement is still on the property which is for the benefit of all the lots affecting DP 7144. Only the mortgage is discharged or cancelled. This is nothing to do with the easement and mortgage. It is not relevant to our case.*

(8). *That I deny paragraph 6 (ii), (iii) and (iv) of the Affidavit and further say that after the Judge in High Court Civil Action No. HBC 379 of 2019 had*

dismissed the application in limine for dispensation with the production of duplicate title on the grounds that the application was irregular/defective, my solicitors had then remedied the defects and re-lodged the application however the Registrar of Titles refused to register the transfer and to exercise its powers under section 26 of the Land Transfer Act 1971.

- (9). *That in response to paragraph 7, 8, 9, 11, 12, 13 of the Affidavit I disagree with what was advised by the Title's office that the dispensation application was an incorrect application.*

I have been advised by my solicitors and verily believe the partial transfer from Mr. Shan Mohammed to myself is made pursuant to a Deed of Trust dated 30th September, 2008 therefore I have become an equitable owner of the said Lot and the survey plan was also signed by Mr. Shan Mohammed after signing the Deed of Trust which has been registered with the Titles office. Therefore, I as transferee and equitable owner of the property am legally entitled to request to dispense with the production of CT 41130 under section 26 of the Land Transfer Act 1971.

Mr. Shan Mohammed and I had signed the Deed of Trust and partial transfer document which is legally binding hence Shan Mohammed cannot now refuse to be bound. Since he is not cooperating therefore the Registrar of Titles ought to consider my application requesting for dispensation of the production of duplicate Title and exercise its powers under s26 of the Land Transfer Act 1971 however Titles office refuses to now even accept the lodgment of the application.

(C) **CONSIDERATION AND DETERMINATION**

[01]. As I understood the submissions of Ms. Lal, counsel for the plaintiff, the plaintiff primarily relies on Section 26 of the Land Transfer Act, 1971 to dispense with the production of the original Certificate of Title No- 41130.

[02]. Section 26 of the Land Transfer Act, 1971 provides:-

26. *The Registrar **may** dispense with the production of the **duplicate** of any grant, **certificate of title**, or other instrument for the purpose of endorsing*

the memorial required by the provisions of section 25 to be endorsed thereon and, upon the registration of any instrument affecting the same, the Registrar shall state in the memorial entered in the register in respect thereof that no endorsement of such memorial has been made on the duplicate grant, certificate of title or other instrument, and the dealing effected thereby shall thereupon be as valid and effectual as if such memorial had been so entered:

Provided that, before registering such instrument, the Registrar shall require the party presenting the same for a registration to make a declaration that such grant, certificate of title or other instrument has not been deposited by way of lien or as security for any loan or other liability, and shall give at least fourteen days' notice in the Gazette and in one newspaper published and circulating in Fiji of his intention to register such dealing.

[Emphasis added]

[03]. As counsel for the second and third defendants correctly pointed out Section 26 of the Land Transfer Act 1971 has to be **read in conjunction** with Section 45 of the Land Transfer Act.

[04]. Section 45 of the Land Transfer Act provides:-

45. *If a transfer purports to transfer the whole or part of the land mentioned in any grant or certificate of title, the **transferor** shall deliver up the duplicate grant or certificate of title of the land, and the Registrar shall, when registering the transfer, enter in the register and on the duplicate grant or certificate of title a memorial cancelling the same as to the whole, or partially according as the transfer purports to transfer the whole, or part, of the land mentioned in such grant or certificate of title:*

Provided that-

(a) *if the whole of the land mentioned in any grant or certificate of title is transferred, the Registrar may, instead of cancelling such grant or certificate, enter in the register and on the duplicate grant of or certificate of title a memorial of such transfer and deliver the duplicate to the transferee;*

(b) *in the case of a transfer to tenants in common, the Registrar may, and shall if the transferees so desire, issue separate certificates of title in favour of each of the transferees for their respective shares, or may issue one certificate of title for the whole of their interests, or the Registrar may enter in the register a memorial of such transfer and deliver the duplicate certificate of title or grant to the transferees;*

(c) *in the case of a cancellation of a tenancy in common by transfer from tenants in common holding separate titles for their respective shares, the Registrar shall cancel the said certificates of title and issue a fresh certificate of title in favour of the transferee.*

[Emphasis added]

- [05]. Section 45 makes it obligatory for the transferor to deliver the duplicate Certificate of Title for transfer by Registrar.
- [06]. Therefore, the application for dispensation has to be made by the transferor and not by transferee. The first defendant is the transferor in the partial transfer executed on 14.07.2016. The application for dispensation has to be made by the first defendant as the transferor and not by the plaintiff who is the transferee.
- [07]. In those circumstances, I cannot see any impropriety as to the exercise of the discretion by the Registrar when dispensation of duplicate Certificate of Title was made by the transferee, i.e, the plaintiff instead of the transferor. i.e the first defendant.
- [08]. Even assuming for a moment that the transferor i.e, first defendant made the application for dispensation, still the Registrar of Titles has a discretion to dispense with the production of duplicate Certificate of Title for registration. This is subject to the proviso contained in the section.
- [09]. The court has no power under section 26 of the Land Transfer Act, 1971 to order dispensation of production of duplicate Certificate of Title when the Registrar of Titles refuses to do so. Equally what is clear is that section 26 of the Land Transfer Act, 1971 deals only with dispensation of production of **duplicate** certificate of title and not the **original** certificate of title.

[10]. Therefore, the plaintiff's application is misconceived and should be dismissed *in limine*.

[11]. Next, I turn to Section 129 of Land Transfer Act, 1971. This section empowers the Registrar of Title to call for documents. The section provides inter alia the following:-

129. (1) *The Registrar may require the proprietor of or any other person interested in any land or any estate or interest therein in respect of which any instrument is about to be registered under this Act to produce any grant, certificate of title, mortgage, lease, or other instrument in his possession or within his control affecting such land, estate or interest or the title thereto.*

(2) *The Registrar may summon any such person to appear and give any explanation respecting such land, estate or interest, or the instruments affecting the title thereto.*

(3) *If, upon requisition in writing made by the Registrar, such person refuses or wilfully neglects to produce any such instrument or refuses or wilfully neglects to give any information or explanation which he is required to give, or knowingly misleads or deceives any person authorized to demand any such explanation or information, he shall be guilty of an offence and liable to a fine not exceeding two hundred dollars and the Registrar, if the information or explanation so withheld appears to him material, shall not be bound to proceed with the registration of the instrument sought to be registered.*

(4) *Every summons issued by the Registrar under the provisions of this section shall be in the prescribed form, and may be enforced by him in like manner and by the like proceeding as provided in sections 166 and 167 for the case of any instrument issued in error or wrongfully retained.*

[12]. The Registrar of Titles can request the first defendant, the registered proprietor to produce the Certificate of Title, pursuant to the above provision.

- [13]. There is no provision in the Land Transfer Act which empowers the court to make an order to the Registrar of Titles to summon the first defendant and to order the first defendant to produce the Certificate of Title when the Registrar of Titles refuses to do so in the exercise of his discretion.

Besides there is no such order sought in the Originating Summons.

- [14]. Finally, counsel for the plaintiff submitted that the court has the power to direct the Registrar of Titles to dispense with production of the original Certificate of Title in terms of Section 168 of the Land Transfer Act.

However, as per the provisions of section 168, this is done to give effect to the Judgment, Decree or Order of the Court.

- [15]. For the sake of completeness, section 168 is reproduced below:

168. *In any proceedings respecting any land subject to the provisions of this Act, or any estate or interest therein, or in respect of any transaction relating thereto, or in respect of any instrument, memorial or other entry or endorsement affecting any such land, estate or interest, the court may by decree or order direct the Registrar to cancel, correct, substitute or issue any instrument of title or make any memorial or entry in the register or any endorsement or otherwise to do such acts as may be necessary to give effect to the judgment or decree or order of such court.*

- [16]. In the Originating Summons filed, the plaintiff wants the court to declare “*that the instrument of partial transfer executed by Shan Mohammed on 14th July 2016 is registrable in the present form over Certificate of Title No. 41130*”.

- [17]. The first defendant, Shan Mohammed in his affidavit in opposition filed on 21.01.2022 opposed the declaratory judgment sought by the plaintiff on the following basis;

- *He had signed the Deed of Trust to transfer four acres only.*
- *But according to the transfer document, the extent of the land to be transferred is 4.06 acres.*

- [18]. Moreover, the first defendant in paragraph (10) of his affidavit in opposition filed on 21.01.2022 says that he is illiterate (unable to read or write).

[19]. In reply, Ms. Lal, counsel for the plaintiff argued vigorously: (in verbatim)

- *The first defendant had not raised any objection previously in regards to the extent of the land mentioned in the transfer document.*
- *The first defendant has executed the transfer document and he is bound by it now.*
- *The survey and subdivision of the land is completed and the area of the land as per the survey plan is 1.6453 hectares which is equivalent to 4.06 acres hence the transfer document cannot be amended to state otherwise.*
- *The first defendant had the liberty to raise the objection and not signed the survey plain which in fact he did not raise.*
- *The transfer document stipulating the land is in excess of 0.06562484 acres or 265.574305223 square meters and it is a very insignificant area of land to raise a dispute.*

[20]. All those may be conceded! But the fundamental question which this court is concerned to highlight is this? Is this partial transfer executed on 14.07.2016 is in accordance with the terms and conditions mentioned in the founding Deed of Trust executed on 30.08.2008? The simple answer is “No”.

[21]. The plaintiff’s claim for transfer of land is founded on the Deed of Trust where the plaintiff was the beneficiary and his brother, Shan Mohammed (first defendant) is the trustee. Both parties are bound by the terms of the Deed of Trusts. The transfer document is in contravention of paragraph (2) of the founding Deed of Trust which is in the following terms:-

*That upon the favorable transfer of the said trust property from JP Bayly Trust to the trustee the beneficiary shall there upon carry out surveyor of **a four (4) acre of the land** namely at the Tavatova portion of the property and as one of the beneficiary may apply for a separate Certificate of Title of this portion of this trust property thereafter.*

[Emphasis added]

[22]. According to paragraph (2) of the founding trust deed, the extent of the land to be transferred is only four acres and not in excess of that. However, the transfer document stipulates the area of the land being in excess of four acres by 0.6562484 acres or 265.574305223 square meters, which affects the rights of the first defendant and for that reason there could not have been '*ad idem consensuas*' or meeting of minds for the transfer to have taken effect. Therefore, the transfer is legally flawed resulting in no legal force or avail. The plaintiff cannot raise an estoppel. To raise an estoppel, there must be some representation by the first defendant besides just signing the transfer document and the survey plan. The whole basis of estoppel is that one has made a representation on which someone has relied, so that one is not allowed to deny it. Estoppel does not depend on first defendant just signing the transfer document and the survey plan. It is not his representation. Estoppel depends on making a representation.

The argument of the plaintiff is unsound in law because estoppel has a different juristic basis from just signing a survey plan and the transfer document. It has been common ground that the first defendant is an illiterate person. The doctrine of *non-est factum* originated to assist illiterate persons.

[23]. I hold that the transfer document very clearly contravened paragraph (2) of the founding trust deed and therefore, it is not registrable.

[24]. Furthermore, in the partial transfer document there is no mention about the fact that the first defendant is transferring the property as a trustee in the deed of trust where plaintiff is the beneficiary.


[25]. Finally, there is no proof of any valuable consideration paid in terms of the partial transfer document and therefore, one of the most fundamentals to constitute a transfer is absent.

[26]. Therefore, I declare that the instrument of partial transfer executed by the first defendant on 14.07.2016 is not registrable in the present form over Certificate of Title No. 41130. Consequently, the plaintiff cannot invoke the provisions of section 168 of the Land Transfer Act to give directives to Registrar of Titles.

ORDERS

- [01]. I declare that the instrument of partial transfer executed by the first defendant on 14.07.2016 is not registrable under the law in the present form over Certificate of Title No. 41130.
- [02]. Consequently, I decline to give directives to the Registrar of Titles under section 168 of the Land Transfer Act, 1971.
- [03]. I decline the plaintiff's application to make an order to the Registrar of Titles to dispense with the production of the original Certificate of Title No. 41130 since this court has no power to make the order under section 26 of the Land Transfer Act which should be read in conjunction with section 45 of the Land Transfer Act, 1971.
- [04.] I order that the plaintiff shall pay costs of this proceedings to the second and third defendants in an amount of \$1250.00 (total) within seven days here of.




26.07.2022
Jude Nanayakkara
[Judge]

High Court - Suva
Tuesday, 26th July, 2022