

**IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION**

CIVIL ACTION NO.: HBC 28 of 2018

**BETWEEN : EVELYN RITA CHAND
PLAINTIFF**

**AND : SUSHIL PRASAD SHARMA
FIRST DEFENDANT**

**: PAULA LAGOLIA SILI & SALOME NAMATA
SILI
SECOND DEFENDANTS**

**: TITUS NARAYAN
THIRD DEFENDANT**

APPEARANCES/REPRESENTATION

PLAINTIFF : Mr. A K. Singh [A.K. Lawyers]
FIRST DEFENDANT : Appearing In Person
SECOND DEFENDANT: Mr. M Nand [Nands Law]
THIRD DEFENDANT : Mr S Fatiaki [Sherani & Co.]
RULING BY : Master Ms Vandhana Lal
DELIVERED ON : 23 March 2023

RULING

1. There are two applications for determination:
 - i. The Third Defendant's summon dated 22 March 2018 for an order that the Third Defendant be struck out as a party as there is no reasonable cause of action against it.

- ii. The Plaintiff's application dated 11 February 2019 for injunction.

The Third Defendant's Application for Striking out.

2. The said application is made pursuant to Order 18 Rule 18(1)(a).
3. The Third Defendant is said to be a real-estate agent who is said to have prepared the Sales and Purchase Agreement for the sale of CT 19761 being Lot 1 on DP 1796 to the Second Defendant by the First Defendant.

The Plaintiff claims that the First Defendant and the Third Defendant committed fraud against the Plaintiff full particulars of fraud are outlined in paragraph 15 of the claim.

4. According to the Third Defendant, the Third Defendant was only engaged to facilitate the sale of the property as is common practice within the industry of the Real Estate Agency. The Plaintiff had executed an authority to sell.

The Third Defendant was not a party to the agreement hence no claim can be maintained against him for damages or any claim arising of the sale.

Has the Plaintiff by pleading fraud against the Third Defendant outlined reasonable case of action against the Third Defendant?

5. In the particulars the Plaintiff claims the First Defendant and Third Defendant colluded in trying to dispose the matrimonial property without the knowledge of the Plaintiff to deny the Plaintiff her share of the matrimonial property.
6. She also claims there was a conflict of interest when the Third Defendant acted for both the First and Second Defendant being Vendor and Purchaser respectively.
7. Whether or not the First Defendant and Third Defendant colluded to dispose off the property is a matter for trial with evidence under oath.

This Court cannot summarily make assessment and decide on the pleading alone.

8. For this reason, the Third Defendant's application for striking out shall fail and is struck out.

The Plaintiff's Application for Injunction

9. The Plaintiff seeks orders against the First and Second Defendants by their servants and/or agents or lawyers to be immediately restrained from dealing or transferring CT 1976 Lot 1 on DP 1896 and that the status quo of the property to remain.
10. The guiding principle for injunction is outlined in American Cyanamid-v-Ethicon Company Ltd [1975] 1 ALL ER 504.
11. The property in question is said to be a matrimonial property of the Plaintiff and First Defendant and subject to a property distribution litigation between the Plaintiff and First Defendant and with the Family Court Nausori.
12. The Plaintiff claims she had contributed towards the property via income she received from her taxi permit.
13. The Plaintiff alleges the First Defendant without the Plaintiff's knowledge and consent entered into a Sale and Purchase Agreement with the Second Defendants.
14. The Plaintiff alleges the First Defendant and Third Defendant committed fraud when the Sales and Purchase Agreement was executed between the First and Second Defendants.
15. The Plaintiff seeks declaratory orders concerning the sale and purchase agreement, amongst other orders.
16. According to the Second Defendant, any restraining orders will be prejudicial as there is already an order for specific performance against the First Defendant.

17. The perusal of the claim shows that though the Plaintiff alleges fraud however there is nothing in the claim to show the Second Defendants committed fraud.
18. There is nothing in the pleadings to suggest that the Second Defendants are not a bona fide purchaser.
19. In Suva High Court Civil Action HBC 358 of 2017, the Second Defendants who were the original Plaintiffs there obtained orders for specific performance of the sale and purchase agreement dated 08 September 2011 by entering the consent orders obtained in Civil Action HBC 253 of 2012.
20. The said matter went up to the Court of Appeal where the Court of Appeal made following findings:

- On paragraph 34 it held:

“After this court delivered judgment on 14 September 2017, and the Consent Judgment became effective 30 days from the date of the judgment, the First Respondent was in law entitled to the remedy of Specific Performance. The First Respondent, though the beneficiary of the Consent Judgment is not a party to the Appellant’s claim in Civil Action 311/2017 filed against the lawyers. That dispute is between the Appellant and the lawyers. Accordingly, even if the First Respondent had been made a party, the matter for determination will not in law, impact on the rights of the First Respondent, which flow from the SPA which remains valid and enforceable through the Consent Judgment”.

- On paragraph 37 of the Ruling of Court of Appeal found that the First Defendant does not allege the Second Defendant mislead him or induced him against his Will. The First Defendant’s complaint is against the

lawyers. It further found that an action for breach of professional duties would be maintainable and this would not impinge the right of the Second Defendant to enjoy the benefit of the consent judgment;

- The Court of Appeal further held;

38. The affidavit of the Appellant filed in Civil Action 441/1999 indicates that he did originally intend to honour the terms of the SPA, and he did not, at or after that time dispute the contents of the SPA. If this Court were to accept the submissions that are now made on behalf of the Appellant it would tantamount to permitting the Appellant to benefit to the prejudice of another party from a state of affairs that he had created;

41. In my view, at the time Civil Action 358/2017 was filed, the action for specific performance (Civil Action 253/2012) had been concluded by way of a consent order and was therefore not in dispute. When this court delivered judgment on 14 September 2017, the Consent Judgment entered in CA253/2012, became operative;

42. Between the period 4 November 2015 when the Order was sealed, and the 14 September 2017, when this court delivered judgment dismissing the Appellant's appeal, the Appellant did not take up the position that the Terms of Settlement and the Consent Order had been obtained by fraud and or undue influence. The action instituted by the Appellant against the lawyers seeking an order setting aside the Consent Judgment was filed only on 21 November 2017, a

period of more than two years after the Consent Judgment came into effect;

43. When the SPA was executed, there was no indication that the Appellant did not know what he signed, and Titus Real Estate was his agent. In fact, in Civil Action 441/1999, when he was named as the 3rd Defendant in an action for injunction to prevent the sale of the disputed property, and the Plaintiffs in that case registered a Caveat in respect of this property, the Appellant moved to remove the Caveat because it was the intention of the Appellant to proceed under the SPA;

44. The affidavit of the Appellant filed on 21 May 2012 in Civil Action 441/1999, demonstrate clearly that he knew as far back as 2012 when he filed that affidavit that he was contractually bound to fulfill his obligations under the agreement, and he wanted the freedom to sell the property in accordance with the SPA, entered on 8 September 2011, which he had entered into voluntarily. The relevant portions of his affidavit reproduced above reflect that at the time, he intended to comply with the SPA.

21. The Court of Appeal upheld the High Court's finding in HBC 358 of 2017 that the consent judgment was not invalid.
22. The Court of Appeal dismissing the First Defendant's appeal made orders as follows:
 - a) *The Appellant shall attend at the office of the Registrar of Titles in Suva, on or before 30 November 2022 and produce the Duplicate of Certificate of Title no.19761 Lot 1, DP 1796 and the Certificate of payment of Capital Gains Tax on this disposal;*

- b) *The First Respondent shall attend the office of the Registrar of Titles in Suva, at the same time pay to the Appellant the balance purchase price of \$270,000, less payment of all utilities bills outstanding as at 30 November, 2022;*
- c) *If the Appellant fails to comply with Order (2) above, the Registrar of Titles is directed to take steps under the provisions of section 168 of the Land Transfer Act 1971 to dispense with the delivery of the duplicate title, and to accept for registration the stamped Transfer in favour of the First Respondent;*
- d) *The Registrar of the High Court of Fiji, Suva is hereby appointed to execute any other documents that may be required to give effect to the orders made above;*
- e) *If the Appellant fails to comply with (2) above, the balance purchase price shall be paid into the Trust Account of the High Court, and released to the Appellant only upon him providing to the Registrar of the High Court, the Certificate of payment of Capital Gains Tax;*
- f) *The Appellant shall quit and deliver vacant possession of the property held under Certificate of Title No. 19767 to the Plaintiffs within twenty-eight (28) days of the date of the lodgment of the Transfer at the Registry of Titles.*

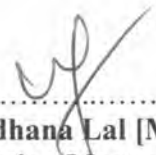
23. Furthermore, in HBC 358 of 2017 a writ of possession has been issued on 20 February 2023.

24. With orders made by Court of Appeal on 30 September 2022 regarding orders in HBC 358 of 2017, this Court has no jurisdiction to now to restrain the First and Second Defendant from dealing with the said property.
25. Any Orders made will be superfluous and of no use.

Orders

26. The Third Defendant's application for striking out dated 22 March 2018 is dismissed. Parties to bear own costs.
27. The Plaintiff's application for injunction is dismissed. Parties bear own costs.




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Vandhana Lal [Ms]
Acting Master
At Suva.

23 March 2023

TO:

1. **Suva High Court Civil File No. HBC 28 of 2018;**
2. **A.K. Lawyers, Solicitors for the Plaintiff;**
3. **Sushil Prasad Sharma, the First named Defendant appearing in person;**
4. **Nands Law, Solicitors for Defendants;**
5. **Sherani & Co., Solicitors for Third Defendant.**