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

CIVIL ACTION NO. HBC 126 of 2018

BETWEEN	:	**DAYA WATI** of Waikuru, Rakiraki,Domestic Duties **DEFENDANT –APPELLANT**
A N D	:	**BIR CHAND** of Waikuru, Rakiraki. Taxi Operator **PLAINTIFF - RESPONDENT**
BEFORE	:	Mr. A.M. Mohamed Mackie-J
APPEARENCES	:	Ms. A. Chand, for the Defendant- Appellant. Mr. Samuel K. Ram, for the Plaintiff- Respondent.
DATE OF HEARING	:	26th June 2023.
WRITTEN SUBMISSIONS:		By the Appellant filed on 25th July 2023. By the Respondent filed on 26th June 2023.
JUDGMENT	:	On 16th August 2023.

JUDGMENT

A. INTRODUCTION:

1. This judgment is pronounced pursuant to the hearing held before me on 26th June 2023 in relation to an Appeal preferred by the Defendant- Appellant ("the Appellant") with the leave of this Court being obtained as per my ruling dated 8th February 2023, to Appeal against the Ruling dated 21st October 2020 pronounced by the learned Master ("the Master").

2. Prior to the said Ruling of the Master, the Appellant had on 3rd April 2019 filed a Summons before the Master seeking to set aside the default judgment that had been entered by the Master on 24th September 2018 against him on the Application filed by the Respondent on 21st June 2018 praying for the reliefs, *inter alia*, the vacant possession pursuant to Section 169 of the of the Land Transfer Act.

B. THE SUBJECT MATTER:

3. As per paragraph 1 of the Originating summons, the subject matter of this action is described as all that Land contained in Certificate of Title Number 32667, a piece of land known as "WAIKUMU AND KAKOVA" and containing eight acres three thousand two hundred and twenty four square meters, be the same a little more or less and situated in the District of Rakiraki in the Island of Vitilevu and being lot 2 on deposited Plan No7583.

C. HISTORY:

4. The events that took place before the Master after filing of the Originating Summons on 21st June 2018 are as follows.

a. On 24th of July, 2018, being the summons returnable date, directions were given for the Appellant's Affidavit in opposition to be filed before 21st August 2018, the Respondent's Affidavit in reply to be filed before 4th September 2018 and the matter to be mentioned on 5th September 2018.

b. On 5th September 2018, on an application made on behalf of the Appellant, further directions were given for the Affidavit in opposition to be filed during the course of the day (i.e. 5th September 2018), the Affidavit in reply by the Respondent to be filed before 19th September 2018 and the matter to be mentioned on 24th September 2018. But, the Affidavit in opposition was filed only on 6th September 2018, not on 5th September 2018. No leave was obtained to do so.

c. Accordingly, when the matter had come up before the Master on 24th September 2018, as the Appellant and her counsel were absent and there was no appearance or representation on her behalf, following order was made by the Master, as per the minutes of the Master.

> **"Appearance:**
> *Ms. Vuli for the Plaintiff.*
> *No appearance for the Defendants*
> **Counsel's Submissions:**
> *No appearance for the defendant though, the time was granted for Affidavit in opposition. Plaintiff's counsel seeks orders in terms.*
> ***Orders***
> *Having gone through affidavit supporting the originating summons, I make order in term. No costs".*

d. The perfected order was filed on 19th October 2018 and sealed on 22nd October 2018, which was, admittedly, served on the Appellant. It is to be noted that the sealed order contained an additional sentence to the effect ***"AND UPON READING the Affidavit in opposition of Daya Wati sworn on 5th day of September 2018 and filed on 6th September 2018",*** which was not a part of the Master's hand written order, as per his minutes.

e. On 3rd April 2019, the Appellant filed her summons, supported by her Affidavit, seeking to set aside the default judgment entered by the Master on 24th September 2018 and for the stay of execution of the said order.

f. After entertaining the Affidavit in opposition by the Respondent, the Affidavit in reply by the Appellant and pursuant to the hearing, the Master by his impugned Ruling dated 21st October 2020 dismissed the Appellant's Summons filed to have the Order dated 24th September 2018 set aside, with no order for costs.

g. It is against the said Ruling , the Appellant, having obtained leave to Appeal, is before this Court to have the reliefs, inter-alia, to have the said Ruling dated 21st October 2020 and the default judgment entered on 24th September 2018 set aside, and to have the Respondent's Application filed on 18th June 2018 for vacant possession dismissed with costs.

D. NOTICE & GROUNDS OF APPEAL:

5. This Court by its ruling dated 8th February 2023, while granting the extension of time, also granted leave to Appeal and Stay of the Master's Orders, and accordingly, the Appellant on 15th February 2023 filed her Notice and Grounds of Appeal, which are reproduced bellow for the sake of convenience and clarity.

1. *The learned Master erred in Law and in Fact in finding that the Appellant did not depose an Affidavit with meritorious defence;*
2. *The learned Master erred in Law and fact in not addressing the Appellant's submissions in respect of the fraud by the Respondent;*
3. *The learned Master erred in Law and Fact in failing to consider the length of the time that the appellant had been occupying the disputed land;*
4. *The learned Master erred in Law in failing to take into consideration the principle established by the Fiji Court of Appeal in Prasad V Sami [2019] FJCA 100; Civil Appeal No.ABU 118 of 2017 , that mere possession of land for more than 20 years qualifies a Defendant to seek protection under section 172 of the Land Transfer Act;*
5. *Withdrawn.*
6. *Withdrawn.*

E. DISCUSSION:

6. It is on record, that when the leave to Appeal was granted, in addition the above grounds 1 to 4 above, this Court also raised a new ground to the effect whether the Master's default judgment dated 24th September 2018 was entered regularly or irregularly, and left it open for both the Counsel to address the Court on it too at the Appeal hearing. (Vide paragraph 29 of my Ruling dated 8th February 2023).

7. To begin with, let me deal with the above ground first, as the answer to it would decide the direction in which this Court should proceed for the final determination of this Appeal. If the Court finds that the default judgment had been entered "**irregularly**", then the Appellant can have the same set aside as of a right, however subject to the availability of meritorious defence. On the other hand, if the Court finds that the default judgment had been entered **"Regularly"**, the Appellant is bound to adduce meritorious defence in order to have the default judgment set aside.

8. It is also on record, that the reason for this Court to raise a new ground is stated in paragraph 26 of my leave Ruling dated 8th February 2023, wherein I have made an observation to the effect that "Though *the Defendant had made default in appearing in person or through her Counsel on 24th September 2028, the instant order made by the*

Master on that day, without going into the contents of the Affidavit that had already been filed, cannot be seen and treated as a regularly made Order".

9. Learned Counsel for the Appellant , by relying on the above portion of my Ruling , in paragraph 9 her written submissions seems to have taken the view that this Court had already held that the default judgment entered by the Master was "irregular " as the Appellant had filed an Affidavit in opposition to the substantive Application.

10. However, the answer to the above question, in my view, largely depend on the answer to the question whether the Appellant had in fact filed an Affidavit in opposition as he was directed and expected of, in order to proceed with her defence.

11. Apparently, before the Master entering the default judgment on 24th September 2018, learned Counsel for the Respondent had made submissions, pursuant to which the Master, having recorded as " *No appearance for the defendants though the time was granted for Affidavit in opposition*" , has proceeded to make orders in terms of the Summons, as per the Application of the Respondent's Counsel, in the following wordings

> *"Having gone through the affidavit supporting the Originating Summons, I make Orders in terms. No costs"*

12. The above minutes very clearly show the fact that the Master, at that juncture before entering the default judgment, had not considered the contents of the Affidavit in opposition that was filed of record. This is further substantiated by the last 2 lines of the paragraph 2 of his Ruling dated 21st October 2020, wherein he says "... *Having read the* ***affidavit*** *the court granted the order in terms of the summons, in the absence of the defendant*". Here the Master uses the word **"affidavit"** and not the **"affidavits"**.

13. The Appellant had in fact filed her Affidavit in opposition on 6th of September 2018 and not on 5th September 2028 as she was directed. Neither the Appellant nor her then Solicitor was present in Court on that fateful day to read out the affidavit filed and/ or to notify and move the Court to accept her Affidavit, which had been filed out of time.

14. Another pertinent question that arises here is, Whether the Affidavit in opposition so filed was served on the Respondent's Solicitors when it was filed belatedly? The case record does not have an Affidavit of Service or at least an endorsement of "Acknowledgment "by the Respondent's Solicitors or the Respondent.

15. Had the Affidavit in opposition been served on the Respondent or his Solicitors after belatedly filing it on 6th September 2018, the Respondent's Counsel, who appeared on 24th September 2018, would, undoubtedly, have moved to file the Affidavit in reply for which the Respondent had the right.

16. When pleadings and/ or any document are filed in Court, it is compulsory that the same has to be served on the opposing party, no sooner it is issued by the Registry. If there is no service, it cannot be treated as filing.

17. I find that the wordings found in paragraph 2 of the Sealed Order to the effect that " ***AND UPON READING the Affidavit in Opposition of Daya Wati sworn on 5th of September 2018 and filed on 6th September 2018***" is only an addition which was not a part of the hand written notes of the Master. Wordings or a sentence which was not written or spoken in the well of the Court cannot become a part of a perfected and sealed order. Thus, I prefer to rely of the very hand written and typed notes of the Master on the day in question, and not on the contents of the paragraph 2 of the sealed Order. This seems to have escaped the attention of the Respondent's Solicitors and that of the Registry when perfecting and sealing the Order.

18. Thus, the safest conclusion this Court can arrive at is that the Master did not and need not have relied on the contents of the Appellant's belated and non-served Affidavit in opposition. Instead, the Master, having disregarded it, has proceeded to enter the default judgment on 24th September 2018, which in my view is a "regularly" entered judgment on the basis that no Affidavit in opposition was ever filed by the Appellant to the substantial Application for vacant possession.

19. Accordingly, I come to the conclusion that the Appellant cannot attack the nature of the default judgment and the only way out for the Appellant is to demonstrate that she has meritorious defence to have this Appeal decided in her favour.

The Grounds of Appeal 1 to 4 raised by the Appellant.

20. **GROUND-1;** *The learned Master erred in law and in fact in finding that Appellant did not depose an Affidavit with meritorious defence;*

a. This Court has found that the impugned default judgment was a "regularly" entered on the basis that there was no Affidavit in opposition filed by the Appellant. The reason being that though the Appellant had filed her Affidavit in opposition on 6th September 2018, she had failed to obtain the leave of the Master to file it belatedly and also failed to serve a copy of it on the Respondent's Solicitors. This means there was no evidence in opposition. The Master need not have taken the contents of such an Affidavit in to consideration and no blame can be pinned on him for disregarding such an Affidavit in opposition. However, the Master has correctly observed that the Appellant had failed to show her cause to remain in the disputed property.

b. In any event, the Appellant has had the opportunity of adducing her, purported, merits in her setting aside Application before the Master. The Appellant in paragraph 13 of her Affidavit in support of her setting aside Application has conceded that the beneficiaries of the Last Will of Late Shiu Baran were, none other than , Shiu Baran's wife ,namely, Lakh Pati, and Shiu Baran's grandson, namely, Shanit Salendra Lal , the Son of the Appellant. The interest reserved for them as per the last will was only the right to receive the balance purchase price of $32,000.00 and not any right to remain in the Land.

c. The Appellant and her late Husband, Parameshwar Lal, were neither parties to the Agreement nor beneficiaries of the Last will of late Shiu Baran. The Will clearly states that after the demise of Lakh Pati, the benefit of receiving the balance purchase price would devolve on the grandson of Suibaran, namely Sanit Salendra Lal.

d. The Agreement does not includes any clause to the effect that the beneficiaries will have the right of *jus-retention* until the balance purchase price is paid and settled. If the balance amount is not paid and settled, the available remedy for the beneficiaries of the Will was filing an appropriate action against the executers of the Will, who are the Respondent hereof and two others, namely, Krishna and Amil Rohit, demanding the fulfillment of their fiduciary duties and not to remain in the property. Even this right is available only to the rightful beneficiary under the will and not to the Appellant.

e. The Appellant's Son, who remained as the beneficiary, is not a party to this action. Since the Appellant's counter claim in Money based, even if he is a party, her claim on the alleged balance amount could not have been taken into account as a defence in the proceedings before the Master under section 169 of the Land Transfer Act.

f. For the Appellant lady to claim any benefit out of the land in question under her late Husband, Parmeshwar Lal, he should have been a beneficiary of late shui Baran's Estate. The next beneficiary, Shanit Shalendra Lal has not claimed the Money. Other beneficiary, Lakh Pati, had her interest only till her death. The Appellant's late Husband also could not have inherited any interest from his Mother Lakh Pati, for the balance purchase price.

g. The beneficial interest of late Lakh Pati and that of the Appellant's Son, Shanit Shalendra Lal, was limited only to the balance purchase price. The Will did not give any interest over the Land and premises for the Appellant to continue to occupy. This ground, necessarily, has to fail.

21. **GROUND -2; The** *learned Master erred in Law and in Fact in not addressing the Appellant's submissions in respect of the fraud by the Respondent.*

a. I don't find any substantial averments of facts in the Affidavit in support of the setting aside Application, with regard to any fraud or particulars of such fraud as to how it was perpetrated by the Respondent, except for averring in paragraph 16 thereof that the Respondent and other trustees fraudulently **attempted to** transfer Mr. Shiu Baran's portion of CT 5636b unto the Respondent.

b. However, I observe that the Appellant's allegation of fraud is aimed at an unregistered Transfer signed on 18th June 1993, which says that the Transfer is "by way of administration, and not by way of Sale". The Respondent claims to have become the registered proprietor by virtue of the instrument of Transfer registered on 30th January 2004, which bears the number 537963 being endorsed on the memorial of the title. This registered instrument dated 30th January 2004, on which the

Respondent claims his registered proprietorship is an independent one from the document about which the Appellant makes an allegation of attempted fraud. The Appellant has not adduced any evidence in support of his allegation of fraud in respect of the instrument on which the Respondent has become entitled to the land in question. This ground has no merits.

22. **GROUND-3;** *The learned Master erred in law in failing to consider the length of time that the Appellant had been occupying the disputed land;*

a. The learned Master, in paragraph 23 of his impugned Ruling, has sufficiently discussed about the claim of the Appellant as to her occupation of the land in question over 25 years and has correctly arrived at the decision that the mere occupation of any property will not give a right to remain in the same unless there are other equitable interests. The Master has arrived at the decision on being satisfied that there is nothing in her Affidavit to show any equitable interest on the subject property.

b. The Appellant may have occupied the property for such or more than such a period of time as she claims. But she should have demonstrated that she had some tangible and inseparable interest in the land in question for her to justify her continued occupation. Here what she claims is the interest in the balance purchase price that was due to her son by virtue of Late Shiu Baran's Last Will, on which she or her late Husband inherited nothing as far as this land in question is concerned.

c. The case law authority relied on by the Appellant' Counsel in **Maharaj v Lal [2018] FJHC 1234** does not state that simply being in occupation for a long time is enough to show cause not to vacate the property. The Appellant has not demonstrated any legal or equitable interest in the subject matter land.

d. The principle that the mere occupation is not sufficient to recognize a party's right of possession to a land is well founded as per the decisions in ***Deo v Ali [2016] FJHC 503; HBC 201/2015 (3 June 2016),*** and ***Wati v Raju [1996] FJHC 105*** wherein it was stated that propriety estoppel must be shown for a party to claim the right of possession, if the length of occupation is raised as defence.

e. No any kind of evidence was adduced by the Appellant to the effect that she had developed, built and/ or spent on the land in question on the belief that she would get some entitlement to be in possession thereof or could claim any other interest in the land in question.

f. The facts of **Maharaj v Lal (Supra)** are distinguishable from those of the case at hand. In that matter, the occupier had come into the land through a license given by the deceased owner, who had told the occupier that he could occupy the Land, build a house and the deceased would gift one acre of the land to the occupier, which facts are different from those of this case.

g. The Appellant came to the land in question on account of her Marriage to late Shiu Baran's Son Parmeshwar Lal. She occupied one of the House constructed by late Shiu Baran. She was neither given nor promised of any right or interest in the land in question or in the balance purchase price of it. The land in question now stands sold to the Respondent, who is the registered owner and should be in a position to enjoy his indefeasible title and the possession of it in full. This ground too is devoid of merits.

23. **GROUND 4.** *The learned Master erred in Law in failing to take into consideration the principle established by the Fiji Court of Appeal in* ***Prasad V Sami [2019] FJCA 100; Civil Appeal No.ABU 118 of 2017***

a. The Appellant on her own or under her late husband has not shown any right to the land in question. The land belonged to her Father in Law, Shiu Baran, who had agreed to sell it to the Respondent. The person who remained as the beneficiary to the balance purchase price namely, Shanit Shalendra Lal, does not make any claim for that balance purchase price or the right to be in possession of the land. If he opts to claim the balance purchase price, he has to commence proceedings against the executors of the Will, including the Respondent, to compel the fulfillment of their fiduciary duty.

b. No provisions made for withholding the possession of the subject land or part of it on account of the balancer purchase price. However, the Appellant failed to adduce any meritorious defence to have the Ruling dated 21st October 2020 and the Order made on 24th September 2018 in her absence set aside.

c. The case Law authority in ***Prasad v Sami [7th June 2019] FJCA – Civil appeal ABU 118 of 2017*** heavily relied on by the learned Counsel for the Appellant, in my view, will not assist the Appellant hereof. The claim therein was the right to occupy the very land in question while an Application was pending for a vesting Order. The claim therein was directly attached to the Land and not based on a distinct monetary claim like in the case before this Court. The Appellant cannot show and has not shown that she has a right or reason to remain to be in possession of the Land in question.

F. CONCLUSION:

24. For the reasons discussed above, this Court affirms the decision of the Master, who found that the default judgment entered on 24th September 2018 in this case was a regularly entered one and the Appellant has not demonstrated any meritorious defence to have it set aside. The Master's conclusion that the Appellant failed to adduce any meritorious defence to have the default judgment set aside is well founded and does not warrant any interference by this Court by way of Appeal.

The Master's impugned Ruling dated 21st October 2020 made refusing to set aside the default judgment and the default judgment entered on 24th September 2018 shall remain intact. The Appellant's Appeal should be dismissed, with no costs.

G. FINAL ORDERS:

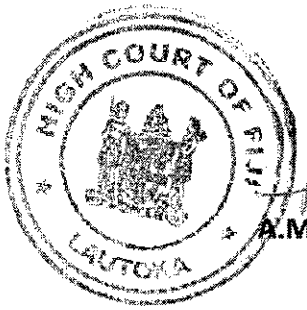
a. The Appeal preferred by the Appellant fails.

b. The Appeal is hereby dismissed.

c. The Ruling pronounced by the Master on 21st October 2020 refusing to set aside the default judgment and the default judgment regularly entered in the absence of the Appellant on 24th September 2018 are hereby affirmed.

d. The stay granted by the ruling of this Court on 8th February 2023 stands vacated.

e. The parties shall bear their own Costs.



A.M. Mohamed Mackie
Judge

At the High Court of Lautoka on this 16th day of August 2023.

SOLICITORS:
For the Appellant: **Messrs. Anishini Chand Lawyers- Barristers & Solicitors**
For the Respondent: **Samuel Ram Lawyers- Barristers & Solicitors**