

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

HBC 10 of 2022

BETWEEN : **VATEA BUI** formally of 30 Kennedy Avenue, Martintar, Nadi.

PLAINTIFF

AND : **MICHAEL GARGIONI** of 124, Tinderboz Road, Blackmans Bay, Australia as Sole Executrix and Trustee in the Estate of Paul Gargioni.

DEFENDANT

Appearances: Mr. R. Singh for the Plaintiff
N/A for the Defendant
Date of Hearing: 30 January 2024
Date of Ruling: 10 September 2024

R U L I N G

(Formal Proof)

1. Mrs. Vatea Bui filed a writ of summons and statement of claim on 02 August 2022. Bui is now 81 years of age. I was told on the day of hearing that she now resides in the US. The subject matter of the claim is a piece of freehold land comprised in certificate of title no: 11483 containing 303 perches situated in Waqadra in Nadi (“**property**”).
2. Erected on the property is a building containing three flats. Bui and her family were tenants over one of these.
3. Bui became interested in purchasing the property after residing there for some time. She talked to Mr. Paul Gargioni, who was her landlord and the registered proprietor of CT 11483. Sometime in 2002, Gargioni and Bui entered into a sale and purchase agreement.
4. The agreement which was tendered in court is a copy annexed to an affidavit of Rina Doreen Komai sworn on 14 February 2022. This affidavit was filed in support of an application to serve the *writ* and claim out of jurisdiction.

5. Komai is the daughter of Bui. She also holds a Power of Attorney No. 40820ⁱ which was granted by Bui.
6. The copy of the agreement which Bui relies on is not signed by Gargioni and is undated. However, there is a supplementary affidavit sworn by Komai on 14 February 2022 in which is exhibited a letter by Pillai Naidu & Associates dated 16 September 2005 (Naidu was then acting for Bui), and a response by Janend Sharma Lawyers dated 17 September 2005 (Sharma was acting for Gargioni). These letters contain concessions by Sharma which establish beyond dispute the following facts:
 - (i). that Gargioni and Bui did enter into a sale and purchase agreement over CT 11483.
 - (ii). the agreed sale and purchase price was \$115,000.
 - (iii). a deposit of \$21,000 was paid by Bui on 14 January 2003 by direct deposit into the Trust Account of Hari Ram, Barrister & Solicitorⁱⁱ.
 - (iv). the balance price was to be paid by monthly installments of \$1,400ⁱⁱⁱ.
 - (v). the payment of the balance was to be secured by a mortgage to be given by Bui to Gargioni.
 - (vi). by the sales and purchase agreement, Bui was to pay all costs and disbursements including the transfer and the stamp duty required on the transfer and the mortgage.
 - (vii). however, settlement did not happen because Bui failed and/or refused to pay stamp duty.
7. The letter from Janend Sharma Lawyers further alleges that:
 - (i). Bui was in substantial arrears of the monthly instalments.
 - (ii). Gargioni, accordingly, was going to take vacant possession of the property.
8. At the hearing, Komai confirmed that she was forced to vacate the property at some point by men who were agents of Gargioni.
9. There is a letter dated 21 October 2004 by the Office of the Commissioner of Stamp Duties to Mr. Hari Ram (Solicitor) which categorically states that Bui's application for exemption of stamp duty on the transfer had been refused. Hari Ram, from what I gather, had acted for both Gargioni and Bui at the time.

10. Bui's case is premised on an allegation of fraud. The particulars of fraud alleged are set out in paragraphs 7 to 14 of the statement of claim as follows:

- 7) THAT the Plaintiff paid a deposit in the sum of \$21,180.62 (Twenty One Thousand One hundred and Eighty Dollars and Sixty Two cents) by making a payment into the Trust Account of the nominated solicitors for the deceased. The deceased had use of the deposit.
- 8) THAT the Plaintiff executed a mortgage over the said land to secure the balance purchase price of the said land and the deceased executed a transfer document for the transfer of the said land and undertook to transfer the said land unto the Plaintiff.
- 9) THAT the Plaintiff took possession of the said land after payment of the deposit.
- 10) THAT the mortgage was never registered as the deceased already had a mortgage over the said land in the name and in favour of **Bruce Mearns Mackie** being instrument number 395517 registered on the 6th May 1996.
- 11) THAT the said mortgage has now expired.
- 12) THAT at all material times the Plaintiff took the view that the said land was transferred in her name and the Mortgage executed by her to secure the balance payment of the consideration sum was duly registered with the Registrar of Titles.
- 13) THAT in good faith the Plaintiff by installment has paid the entire purchase price to the deceased which the deceased received in full which sum the deceased accepted.
- 14) THAT in breach of the agreement, and notwithstanding requests made, the deceased wrongfully and fraudulently failed and refused to transfer the said land to the Plaintiff and register the mortgage however kept uplifting and receiving monies.

11. At paragraph 15 of the claim, Bui claims the following relief:

- a) that the defendant as sole executor and trustee in the estate of Paul Gargioni be ordered to execute all papers, documents, applications, memorandums required to transfer the land comprised in certificate of title number 11483.
- b) an order that the defendant prepare, file and obtain from the Fiji Revenue Customs Services a Capital Gains Tax Certificate and pay the required Capital Gains Tax for the release of the Capital Gains Tax Certificate to enable the transfer of the land comprised in Certificate of Title number 11483 unto the plaintiff.
- c) an order that in the event the defendant fails to execute any a papers, document% applications and memorandums required to transfer the land comprised in Certificate of Title number 11483 the Deputy Registrar of the High Court execute the same.
- d) damages.

In the Alternative

- e) an Order that the defendant refund the sum of \$115,000.00 to the plaintiff with interest and;
- f) damages.

- g) costs on client solicitor indemnity basis.
- h) any other or further relief as this court may deem fit in the circumstances.

12. I am not inclined to order the defendant to execute all papers and documents and facilitate the transfer of the property in question to Bui. It is hard for me to see how Bui should be entitled to this equitable remedy of specific performance when:

- (a) the evidence suggests that Bui was the one who was responsible for paying, but failed to pay the stamp duty.
- (b) there is no evidence that Bui was ready willing and able to pay for stamp duty then. Hence, the evidence would strongly suggest that the reason why the sale and purchase agreement was not completed was because Bui was not in a position to settle the stamp duty levied on the transaction.
- (c) Bui has somewhat dragged her feet about her claim for specific performance. Here, I would note that her cause of action accrued around 2004 or 2005. However, she only filed her action in 2022, that is, some seventeen years later. While her cause of action is founded on an allegation of fraud, the evidence suggests that she was aware of the facts about fraud, or would have been aware of them, as early as 2005.
- (d) having said that, I have some misgivings about whether or not the alleged facts which she relies on, even if they are assumed to be proven, would be sufficient to establish fraud – considering the point raised in (a) above. Bui’s case could have been better argued along a breach of contract theory. It appears that she steered clear of this path because it would have been caught under the Limitation Act.
- (e) the stamp duty regime was abolished in Fiji as of 01 August 2020. However, arguably, any instrument which took effect before 01 August 2020 remains subject to stamp duty. While it is open to argument as to how this should apply on the facts of this case, there is, notably, nothing in the claim to state that Bui is ready, willing and able now to pay for stamp duty in the event this court were to hold that any instrument of transfer executed now should attract stamp duty.

(f) notably, instead of asserting her readiness and willingness and ability to pay stamp duty should the event arise, Bui instead seeks an order of this Court that Gargioni's estate be directed to pay Capital Gains Tax to facilitate the transfer of the property to Bui.

(g) there is no clear evidence as to how much Bui had settled in terms of installments. The agreement states at clause 4 that Bui was to continue to pay rental on the property, up to the date of settlement. This, as I understand from the agreement, is over and above the \$1,400 per month installment towards the sale and purchase price stipulated under clause 2 b.

13. Having said that, Bui may (or may not) be entitled to whatever monies she did pay Gargioni, subject to proof and if she is able to establish a claim for refund based on an equitable ground. However, she may have to amend her pleadings accordingly.

14. I refuse to grant any order for specific performance. Bui is at liberty to apply.



Anare Tuilevuka
JUDGE
10 September 2024

ⁱ exhibited in the affidavit of Reena Doreen Komai sworn on 17 January 2022.

ⁱⁱ Copy of Receipt No. 1029 exhibited in the affidavit of Reena Doreen Komai sworn on 17 January 2022.

ⁱⁱⁱ Clause 2(b) of the Sale and Purchase Agreement.