

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

Civil Appeal No. HBC 148 of 2021

IN THE MATTER OF Section 169 of the Land
Transfer Act

BETWEEN: **JAI NARAYAN** of Lausa, Ba, Fiji Islands, Farmer.

APPELLANT

A N D: **JAI KISSUN** of Lausa, Ba, Fiji Islands, Unemployed.

FIRST RESPONDENT

A N D: **LUSIL LATA** of Lausa, Ba, Fiji Islands, Domestic Duties.

SECOND RESPONDENT

Appearances : Mr. Dayal (Dayal Lawyers) for the Appellant
: Mr. Anand (Fazilat Shah Legal) for the Respondents

Date of Hearing : Ruling on Submissions
Date of Ruling : 10 March 2026

R U L I N G

INTRODUCTION

1. Mr. Jai Narayan ("**Narayan**") appeals against the decision of the Learned Master Wickramasekara delivered on 24 July 2023.
2. By that decision, the Master had dismissed Narayan's Summons of 12 July 2021, brought under Section 169 of the Land Transfer Act, in which Narayan was seeking an order for vacant possession against Mr. Jai Kisun ("**Kisun**") and his wife Ms. Lusil Lata ("**Lata**").
3. The Grounds of Appeal filed on 11 August 2023 are set out as follows:

- (i) **THAT** the Learned Master erred in law and fact when he started investing previous transfers for Hari Prasad to Champa Wati whereas he should have only considered the last registered proprietor (sic).
- (ii) **THAT** the Learned Master erred in law and in fact when he failed to see that the property was transferred on to Champa Wati before her demise.
- (iii) **THAT** the Learned Master erred in law and in fact by considering the transfer for Hari Prasad and Champa Wati instead of ownership by last registered owner.
- (iv) **THAT** the Learned Master erred in law and in fact by questioning the transfer from Champa Wati to Jai Narayan in absence of any medical report that she was of unsound mind and when the transfer took place.
- (v) **THAT** the Learned Master erred in law and in fact by holding that there were more complicated facts/serious questionings which require hearing between the parties and by simply upholding allegations of fraud in favour of the Defendants without any evidence.
- (vi) **THAT** the Learned Master erred in law and in fact by stating that there were serious issues of law to be tried whereas the Defendants did not have any rights to remain in possession.

THE EVIDENCE AT FIRST INSTANCE

4. In his affidavit sworn on 12 July 2021, filed in support of the Section 169 Summons, Narayan deposed that he is the last registered proprietor of the property described in Certificate of Title No. 19734, Lot 2 on D.P. No. 4363, known as “Nasivi,” comprising 12 acres, 2 roods, and 27 perches (“**property**”). He became the registered proprietor on 10 December 2018. Kisun and Lata presently reside on the property. Despite being served with a Notice to Vacate on 20 May 2021, they have remained in occupation. Narayan contends that he is being deprived of the use and enjoyment of the property.
5. Kisun swore an affidavit in opposition on 21 March 2022. I gather the following facts from his affidavit:
 - (i) Narayan is Kisun’s brother. Their father was the late Mr. Hari Prasad (“**Hari**”). Their mother was the late Mrs. Champa Wati (“**Champa**”).
 - (ii) Kisun was born on the property. He has always lived on the property and remains so to this day with his family.
 - (iii) Hari died and left a Will by which he made various bequests in favour of all his sons. They were to share from the 12-acre plus property. Kisun himself

was to receive 2 acres. He and his family have been occupying this very plot to this day.

- (iv) on **03 October 1989**, the property was transferred to Champa¹ (it is not clear from Kisun's affidavit or from Narayan's affidavit as to whether this transfer happened whilst Hari was still alive or whether it happened after he died)². Notably, under Hari's Will, the plaintiff is appointed executor and another son as trustee.
- (v) Champa fell ill in 2016 and remained bedridden until her death in 2021³. In 2018, the property was purportedly transferred from Champa to Narayan.
- (vi) Champa executed her last Will and Testament on 04 September 2009, by which she devised two acres of the property to Kisun, just as Hari had done in his Will.

6. In his Affidavit in Reply sworn on 26 May 2022, Narayan deposes *inter alia* that:

"...my mother Champa Wati had transferred the property onto my name whilst she was alive hence the Will becomes void for disposal of the said Certificate of Title No. 19734"

7. The matter was heard by the Master on 24 July 2023.

THE MASTER'S RULING

8. In his Ruling, the Master noted the matters set out above. He specifically observed that the Wills of Hari and Champa are not disputed by Narayan. Narayan's case, rather, is built on the principle of Ademption. In other words, at the time of Champa's death, the property no longer formed part of her estate and therefore could not be passed under her Will.

DISCUSSION

9. In **Wati v Pillay** [2024] FJCA 232; ABU006.2023 (28 November 2024), the Fiji Court of Appeal explains the principle of ademption as follows from paragraphs [29] to [30]:

¹ as notated in Certificate of Title No. 19734 (copy annexed to Kisun's Affidavit).

² the date of Hari's death is not clear from the affidavits. No death certificate or probate attached.

³ as per a Medical Report of a Dr. Nushrat Khan dated 30 November 2021 which is annexed to the affidavit of Kisun.

[29]To explain how the principle work, in the case Johnston v Maclaran [2002] NSWSC 97, the Supreme Court of New South Wales stated, at paragraph 13 of its judgment:

“13. Roper on Legacies, 4th Ed (William Benning & Co, London 1847 0 at pp 329 and following, sets out the general rule with respect to the Ademption of specific legacies. The learned author says: “The word ademption when applied to specific legacies of stock or of money. Must be considered as synonymous with the word “extinction”. For it should be observed, that if stock, or money, so bequeathed, be sold or disposed of, there is a complete extinction of the subjects and nothing remains to which the words of will can apply (a) for if the proceeds from such sale or disposition were to be substituted and permitted to pass, the effect would be.... To convert a specific into general legacy.”

[30] Even the New Zealand courts followed the above approach. In Re Rudge [1949] NZGazLawRp 85; [1949] NZLR 752, 761, Callan J affirms that:

“In question of Ademption The primary inquiry is not for the testator’s intention. The test appears to be whether at his death the property of which the testator has made a specific gift in his will, still belongs to him.”

The principle of ademption has been described as follows:

“Ademption occurs when property subject to a specific testamentary gift is not part of the estate when a testator dies. The doctrine operates on the assumption that if the property cannot be found..... the gift cannot take effect.”

(Law Institute Journal Volume 84, Issue 8 pages 36 to 40- topics “Adeptly Avoiding Ademption” by Matthew Groves).

10. At paragraph [31] the Fiji Court of Appeal then goes on to discuss the exception to the rule of Ademption:

[31] However, there are exceptions to the application of the principle, and it is clear that fraudulent or tortious action to dispose the property without the knowledge of the testator was an exception, and this is normally done by the holder of a Power of Attorney of the testator. The exception does not extend to cover the transfer of the property to a third party with knowledge and consent of the owner in their personal names only to hold and distribute property as per the wishes of the deceased in his Will: this is also discussed in the Law Institute Journal (supra), in the following terms:

“Over time some minor exceptions to ademption arose that suggested the intention or knowledge of a testator was relevant/One exception was any

fraudulent or tortious acts to dispose of property without the knowledge of the testator. A similar exception extended to fraudulent actions by an agent of the testator. These exceptions are consistent with the proposition that “whether the testator had notice or knowledge of the facts is a relevant factor on the question of ademption.”

11. Whether or not the principle of Ademption applies or whether the facts will prove that the transfer from Champa to Narayan was indeed vitiated by fraud or any other vitiating factor – was not for the Master to decide. The Master certainly acknowledged this in paragraphs 16 to 18 of his Ruling. He observed *inter alia* at paragraph 16 that the plaintiff’s counsel:

“...wanted the Court to presume that the said transfer must have been done by Hari Prasad, during his lifetime.the Defendant has already pleaded fraud over all transactions relating to this property.....”

12. At first glance, the defendants appear to have a strong and arguable equitable proprietary interest in the two acres of land. Their interest could only be displaced if it is shown that Hari did in fact transfer the property to Champa during his lifetime. Such a transfer would engage the doctrine of Ademption, with the result that any expectation Hari or his siblings might otherwise have had under the Will in respect of their shares in the property, would be extinguished.
13. If it cannot be established that Hari himself transferred the property to Champa during his lifetime, then the evidence would tend to indicate strongly that it was Narayan, acting in his capacity as executor of Hari’s estate, who effected the transfer to Champa following Hari’s death. If that were the case, the transfer would constitute a direct contravention of the express provisions of the Will. It would, therefore, be an invalid transaction.
14. It would also suggest that Narayan, as executor, had stage-managed the transfer to Champa in order to block his siblings from receiving their rightful shares under the Will.
15. Interestingly, at paragraph 3 of the submissions filed by Dayal Lawyers on 25 July 2024 for an on behalf of Narayan, the following fact is asserted:

That after the death of Hari Prasad, the property CT 19734 was transferred to his wife Champa Wati on 03 October 1989.

16. Also, at paragraphs 4) and 5) of the submissions filed by Fazilat Shah Legal for Kisun and Lata, the above is confirmed:

Hari Prasad was the first registered proprietor of CT 19734. Hari Prasad died on 26th June 1989.

The transfer from Hari Prasad to Champa Wati took place on 28th September 1989, some 3 months after Hari Prasad's death. This on the face of it is fraudulent.

17. I note that the information concerning Hari's date of death was not placed before the Master. Had it been, it would have further reinforced the position stated above, namely, that since Champa was not the appointed executrix or trustee in Hari's Will, Narayan, by virtue of his role as executor of the estate, was the person most likely to have orchestrated the transfer to Champa.
18. It also further fortifies the Master's position that, clearly, Kisun and Lata have an arguable case and that there are triable issues which, as the Master rightly observed as follows at paragraph 18, he was not in a position to resolve:

"...there are more complicated facts that need to be determined in the dispute between the Plaintiffs and the Defendants, which fortifies the view that an open court hearing is essential in this matter. The serious questions that exist between the parties in this case are not at all possible to be determined through affidavit evidence.

It is settled law that, complicated facts cannot be investigated and determined on the affidavits only in a summary procedure....

19. In addition to all the above, I gather that a civil action was filed on 11 October 2023 by Kisun and Lata where the above issues will be ventilated (**Civil Action No. HBC 231 of 2023 Jai Ram & Jai Kisun v Jai Narayan & Registrar of Titles**⁴).

CONCLUSION

20. In the final, I dismiss the appeal with costs against the Appellant which I summarily assess at \$800-00 (eight hundred dollars only) in favour of the defendants.



Anare Tuilevuka
JUDGE



⁴ as disclosed in the Submissions dated 16 April 2024 filed by Fazilat Shah Legal.