

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

CIVIL ACTION No. HBC 63 OF 2011

**BETWEEN** : **ATUNAI SA RAVOUVOU** of Nasau, Nadi, Farmer, suing as  
Administrator of the Estate of Semi Ravouvou late of Saunaka,  
Nadi.

**PLAINTIFF**

**AND** : **ABBAS KHAN** of Vancouver, Canada, Truck Driver.

**DEFENDANT**

**Appearances** : Mr R. Matebalavu for the plaintiff  
Ms A. B. Swamy for the defendant

**Date of Hearing** : 12 June 2018

**Date of Ruling** : 12 June 2018

**R U L I N G**

[01] This ruling concerns a summons filed by the plaintiff.

[02] By his summons filed 23 January 2018 together with an affidavit sworn by the plaintiff (*'the application'*) the plaintiff seeks the following orders:

1. (a) *Transfer to the Plaintiff land comprised in Certificate of Title No. 38814 and Certificate of Title No. 38818 where the Plaintiff currently resides free of all charges, fees and encumbrances.*
- (b) *Execute the transfer instruments transferring the land comprised in Certificate of Title No. 38814 and Certificate of Title No. 38818.*
- (c) *Upon sale and settlement of next succeeding sale of the first land from Deposited Plan No. 4098 shall pay forthwith at settlement the sum of \$50,000.00 to the Plaintiff by way of Bank Cheque to the Trust Account of the Solicitors for the Plaintiff Esesimarm & Co. Solicitors, of Suva.*

*(d) The duplicate copies of Certificate of Title No. 38814 and Certificate of Title No. 38818 be delivered into the custody of the Solicitor for the Plaintiff.*

*Alternative to paragraph 1 (c) above*

2. *An order to direct the sale of one of the remaining lots from Deposit Plan No. 4098 being the lots comprised in Certificate of Title No. 38811, Certificate of Title No. 38812, Certificate of Title No. 38813, Certificate of Title No. 38815, Certificate of Title No. 38816, Certificate of Title No. 38817, Certificate of Title No. 38819 and Certificate of Title No. 38820 by public tender and that the money to arise from such sale be lodged in Court to the credit of this action subject to further order and consequential directions as may be necessary and that provision be made for the costs of the application."*

[03] This application is made pursuant to order 42 rule 3, Order 45, rule 5 and Order 36 of the High Court Rules 1988 (the HCR).

[04] O 45, R 3 provides, so far as material:

*"3 (1) Subject of paragraph (2), a judgment or order which requires a person to do an act must specify the time after the service of the judgment or order, or some other time, within which the act is to be done."*

[05] O 45, R 5 empowers the court to fix another time for doing an act in the judgment or order. Rule 5 states:

*"Judgment, etc. requiring act to be done: order fixing time for doing it (O.45, r.5)*

*5.-(1) Notwithstanding that a judgment or order requiring a person to do an act specifies a time within which the act is to be done, the Court shall, without prejudice to Order 3, rule 4 have power to make an order requiring the act to be done within another time, being such time after service of that order, or such other time, as may be specified therein.*

*(2) Where, notwithstanding Order 42 rule 3(1), or by reason of Order 42 rule 3(2), a judgment or order requiring a person to do an act does not specify a time within which the act is to be done, the Court shall have power subsequently to make an order requiring the act to be done within such time after service of that order, or such other time, as may be specified therein.*

*(3) An application for an order under this rule must be made by summons and the summons*

*must, notwithstanding anything in Order 65, rule 9, be served on the person required to do the act in question.*"(Emphasis supplied)

- [06] The defendant opposes this application. However, he did not file any affidavit in response, albeit sufficient time was given to him. Counsel appearing for the defendant was getting adjournments stating that they can sort out the matter and they needed some time to speak to their client.
- [07] At the hearing, the plaintiff informed the court that the defendant had transferred the property to the plaintiff in accordance with the judgment. As such, he is not pressing for the orders in (a) and (b) of the prayer 1 of the application. The only order he was asking was order (c) of the prayer 1 of the application. The plaintiff complains that the defendant has failed to comply with the consent judgment made on 19 October 2016, particularly the payment of \$50,000.00 despite the diverse demands made by the plaintiff for its compliance.
- [08] The states that the defendant, upon sale and settlement of next succeeding sale of the first land from Deposited Plan No. 4098, shall pay forthwith at settlement the sum of \$50,000.00 to the Plaintiff by way of Bank Cheque to the Trust Account of the Solicitors for the Plaintiff Esesimarm & Co. Solicitors, of Suva.
- [09] It will be noted that the consent judgment does not specify the time within which the payment of \$50,000.00 has to be made. Therefore, a necessity has arisen to set a date within which the defendant must comply with the judgment, especially in relation to the payment.
- [10] O 42, R 3 empowers the court to specify a time within which the act in the judgment is to be done while O 42, R 5 to extend the period within which a person is required by the judgment, order or direction to do any act.
- [11] Counsel for the defendant submits that the time limit has been prescribed, that is upon the next succeeding sale-this is the time limit and agreed to between the parties. In support of his proposition, he cites *Singh v Kiran* [2002] FJCA 80, ABU0018U.2001S (29 November 2002) and *Mosese Bakaniceva v Air Terminal Services* [2001] FJHC 46; HBC 382.1999 (11 February 2011).

- [12] In *Singh*, above the High Court made an order requiring the appellant to provide full accounts in the estate. The order did not specify the time within which the appellant was to provide the accounts. The respondent brought contempt proceedings against the appellant for non-compliance of the order. The High Court imposed a fine of \$300.00 in default one month's imprisonment. On appeal, the Fiji Court of Appeal (Full Court) set aside the committal proceedings as no time was set for compliance of the order. The Court of appeal said that 'the O.42 r.3 point was fatal to the respondent and that there was therefore no basis for the contempt order or the subsequent fine. The Court of Appeal then exercised the powers of the High Court, pursuant to Section 13 of the Court of Appeal Act, which allows the Court of Appeal to exercise all the powers of the High Court, set a time within which the appellant must provide the accounts in the estate.
- [13] In *Bakaniceva* (above) the plaintiff applied to set aside a consent order on the ground that he knew nothing about that settlement as he was never consulted about it. Master Tuilevuka (as he was then), refusing to set aside the consent order, held:
- "[29] The only option available to Mr. Tunidau's client is to institute a fresh action to set aside the consent order and then seek leave to file fresh proceedings out of time. His client may have to consider seriously filing a claim against his former lawyers. I dismiss the application with no order as to costs."*
- [14] In the present application, the plaintiff is not seeking to set aside the consent orders. Nor did he ask to vary that order. Only thing he is asking the court to do is to set the time within which the defendant is to make the payment of \$50,000.00.
- [15] It would be difficult for the plaintiff to enforce the order without a definite date for its compliance. The judgment states that the payment of \$50,000.00 is to be made upon the next succeeding sale. The defendant argues that the time limit as agreed between the parties is that the next succeeding sale. It is not clear when the next succeeding sale is to take place. The judgment was delivered on 19 October 2016. The order has not been complied with to date. This would cause injustice to plaintiff.

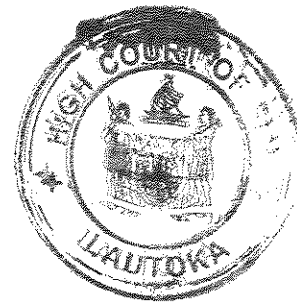
[16] The term 'next succeeding sale' in the judgment does not convey a definite time within which the payment is to be made by the defendant. The defendant has delayed the payment because there is no definite time set in the judgment. As a result of it, the plaintiff is unable to enforce the judgment. Therefore, I act under O 42 R 3 of the HCR and set 3 months as the date act mention in the Judgment is to done. The plaintiff is entitled to cost of this application, which I assess at \$500.00. The defendant will pay \$500.00 as costs to the plaintiff.

**The Outcome**

1. The payment stated in the judgment of 19 October 2016 is to be paid within three (3) months of the date of this ruling.
2. The defendant will pay the cost of \$500.00 to the plaintiff.

*M.H. Mohamed Ajmeer*  
*12/6/18*

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**M.H. Mohamed Ajmeer**  
**JUDGE**



**At Lautoka**  
**12 June 2018**

For the plaintiff: Messrs Esesimarm & Co, Barristers & Solicitors  
For the defendant: Messrs Patel & Sharma, Barristers & Solicitors