

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 360 of 2015

BETWEEN: **INDAR SEN** of Buiduna, Nausori, Businessman.

PLAINTIFF

AND: **SATISH PRAKASH** of Sawani, Nausori.

DEFENDANT

BEFORE: **Hon. Justice Kamal Kumar**

Counsel: **Mr J. Vulakauvaki for the Plaintiff**
Mr R. Singh for the Defendant

Date of Hearing: **27 July 2017**

Date of Judgment: **31 August 2018**

JUDGMENT

Introduction/Chronology of Events

1. By Originating Summons filed on 24 November 2015, the Plaintiff seeks following orders:-

- “1. That the Defendant be ordered to specifically perform the Sale and Purchase Agreement executed between the parties on the 28th day of October 2012;**
- 2. That the Defendant be ordered to deliver the original Certificate of Title immediately to the office of the Registrar of Titles for settlement and endorsement of Transfer pursuant to the transfer document executed between the parties on 7th day of October 2015;**
- 3. Alternately, an order for special damages in the sum of \$314,720.00 as pleaded in paragraph 26 of the Affidavit in Support of this application;**
- 4. An order for general damages;**
- 5. That costs be awarded against the Defendant on a Solicitor/Client indemnity basis.”**

2. On 25 January 2016, Plaintiff/Applicant filed Notice of Motion for Injunction seeking following Orders:-

- “1. An order restraining the Defendant from in anyway interfering with the Plaintiff’s peaceful occupation, enjoyment, access, usage, and cultivation of the farm known as CT No. 37386.**
- 2. An order restraining the defendant from accessing the farm as contained in CT 37386.**
- 3. An order restraining the Defendant from in any way causing trouble, harassing and disturbing the Plaintiff whilst cultivating and occupation of the said farm on CT 37386 until full hearing and determination of the substantive action filed herein.**
- 4. That costs of this action be costs in cause.**
- 5. This application is made under the Inherent Jurisdiction of this Honourable Court.”**

(“the Injunction Application”)

3. On 22 January 2016, Defendant filed Summons seeking following Orders:-

“1. That the Plaintiffs action be struck out and or set aside against the Defendant on the following grounds:-

(i) That the Plaintiff’s action is improper in procedure and has been wrongly filed;

(ii) It is an abuse of the process of the Court;

(iii) It is prejudicial to the Defendant.

2. That the Plaintiff pay costs on a full Solicitor/client indemnity basis.”

(“the Striking Out Application”)

4. Ruling in respect to the Injunction Application and Striking Out Application was delivered on 11 May 2017, whereby Interlocutory Injunction was granted and the Striking Out Application was dismissed with an Order for Plaintiff to file Amended Originating Summons with Plaintiff’s Affidavit sworn on 5 November 2015, to stand in support of Amended Originating Summons and for Defendant to file and serve Affidavit in Opposition.
5. On 15 May 2017, Plaintiff filed Amended Originating Summons seeking the same Orders as prayed for in original Originating Summons and quoted at paragraph 1 of this Judgment.
6. On 2 June 2017, Plaintiff was granted Leave to file fresh Amended Originating Summons to include full description of subject property when both parties were directed to file Submissions and this matter was adjourned to 27 July 2017, for hearing.
7. On 6 June 2017, Plaintiff filed Second Amended Originating Summons with full description of the subject property in prayer of the Originating Summons.
8. Following Affidavits were filed by the parties:-

Plaintiff

- (i) Affidavit of Plaintiff sworn on 5 November 2015, and filed on 24 November 2015 (**“Plaintiff’s 1st Affidavit”**);

(ii) Affidavit in Reply of Plaintiff sworn on 10 June 2017, and filed on 12 June 2017 (“**Plaintiff’s 2nd Affidavit**”)

Defendant

Affidavit in Opposition of the Defendant sworn on 22 May 2017, and filed on 23 May 2017 (“**Defendant’s Affidavit**”).

9. Plaintiff and Defendant filed Submissions on 22 June 2017 and 11 July 2017, respectively.
10. Hearing was concluded on 27 July 2017, and adjourned for Judgment on Notice.

Background Facts

11. Defendant is the registered proprietor of property known as Lot 7 on Deposited Plan No. 8639 “LAULAU” in the District of Rewa in the Island of Viti Levu comprised and described in Certificate of Title No. 37386 containing four hectares two hundred and forty square meters (hereinafter referred to as “**the Property**”).
12. On 28 October 2012, Plaintiff and Defendant entered into a Sale and Purchase Agreement whereby Defendant agreed to sell and Plaintiff agreed to purchase the Property for consideration sum of Thirty Thousand dollars (\$30,000.00) on terms and conditions stated in the Sale and Purchase Agreement (hereinafter referred to as “**the Agreement**”).
13. On or about 19 June 2015, Plaintiff was approved loan of \$21,550.00 by Fiji Development Bank for purchase of the Property by the Plaintiff (hereinafter referred to as “**FDB Loan**”) which loan was to be secured by the Mortgage over the Property.
14. On 7 October 2015, Defendant executed Transfer of the Property in favour of the Plaintiff (hereinafter referred to as “**the Transfer**”).

15. The Transfer was duly stamped on 6 November 2015, with stamp duty of Nine Hundred dollars (\$900.00).
16. On 29 October 2015, Defendant as Vendor wrote to Plaintiff as Purchaser stating that he has no interest in selling the property to Plaintiff due to failure by Plaintiff to pay the balance purchase price of \$20,000.00 by 28 October 2015.
17. On 8 November 2015, Plaintiff's Solicitors wrote to Defendant in response to Defendant's letter dated 29 October 2015, advising that Plaintiff still intends to settle.
18. On 13 November 2015, Plaintiff's Solicitor wrote to Fiji Development Bank ("**FDB**") requesting FDB to advise them if it is ready to settle.
19. On 13 and 16 November 2015, FDB wrote to Plaintiff's Solicitors advising that FDB is ready to settle on 18 November 2015.
20. On 18 November 2015, FDB wrote to Plaintiffs Solicitor advising that they were at Titles Office for settlement but could not attend to settlement as Vendor did not turn up for settlement.
21. On the same day FDB wrote to Plaintiff's Solicitor asking them to liaise with Vendor and advise on next course of action.
22. Plaintiff filed this proceeding.

Preliminary Objection

23. Defendant submits that the proceedings should have been commenced by Writ and not Originating Summons on the ground that there are disputed facts which needs to be established by oral evidence.
24. Order 5 Rule 4 of the High Court Rules ("**HCR**") provide as follows:-

“(1) Except in the case of proceedings which by these Rules or by or under any Act are required to be begun by writ or originating summons or

are required or authorised to be begun by petition, proceedings may be begun either by writ or by originating summons as the plaintiff considers appropriate.

(2) Proceedings-

(a) in which the sole or principal question at issue is, or is likely to be, one of the construction of an Act or of any instrument made under an Act, or of any deed, will, contract or other document, or some other question of law, or

(b) in which there is unlikely to be any substantial dispute of fact, are appropriate to be begun by originating summons unless the plaintiff intends in those proceedings to apply for judgment under Order 14 or Order 86 or for any other reason considers the proceedings more appropriate to be begun by writ.”

25. Substantive relief sought by Plaintiff is specific performance of the Agreement.
26. Defendant submits that Plaintiff was to pay the balance consideration sum of twenty thousand dollars (\$20,000.00) and only upon payment of that sum Defendant was to transfer the property to Plaintiff.
27. Defendant further submitted that there was no requirement for Defendant to provide Transfer and Title to the Property to Plaintiff at the time Plaintiff paid twenty thousand dollars.
28. The issues raised in preceding paragraph deals with construction of the Agreement and falls within Order 5 Rule 4(2)(a) of HCR.
29. Furthermore, the facts stated under the heading Background Facts at paragraph 11 to 22 of this Judgment is not substantively in dispute falls within Order 5 Rule (4)(2)(b) of HCR.
30. Since the issue requires construction of contract and there is unlikely to be any substantial dispute of fact in respect substantive relief sought by Plaintiff, Plaintiff had all the right to institute this proceeding by Originating Summons.

31. Defendants preliminary objection is therefore rejected.

Specific Performance

32. Plaintiff submits that Defendant after signing the Agreement held the property in trust for the Plaintiff.

33. This Court in **NBF Asset Management Bank v. Taveuni Estate Ltd & Ors.** C.A. No. HBC 543 of 2004 (25 May 2018) discussed the principle relating to this issue.

34. At paragraphs 155 to 160 in Taveuni Estate Ltd. case it is stated as follows:-

“155. It is not doubted, that once someone enters into a Sale and Purchase Agreement or Deed to acquire interest in real or personal property on certain terms and conditions that person acquires a beneficial interest in the property.

156. Jessel M.R. in **Lysaght v. Edwards** (1876) Vol II ChD 499 at page 506 stated as follows:-

“It appears to me that the effect of a contract for sale has been settled for more than two centuries; certainly it was completely settled before the time of Lord Hardwicke, who speaks of the settled doctrine of the Court as to it. What is that doctrine? It is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase-money, a charge or lien on the estate for the security of that purchase-money, and a right to retain possession of the estate until the purchase-money is paid, in the absence of express contract as to the time of delivering possession.”

157. Jessel M.R. at page 508 referred to other case authorities which dealt with the issue as follows:-

“First in the case of Hadley v. London Bank of Scotland (1), I find this passage in the judgment of Lord Justice Turner: “I have always understood the rule of the Court to be that if there is a clear valid contract for sale the Court will not permit the vendor afterwards to transfer the legal estate to a third person, although such third person would be affected by lis pendens. I think this rule well founded in principle, for the property is in equity transferred to the purchaser by the contract; the vendor then becomes a trustee for him, and cannot be permitted to deal with the estate so as to inconvenience him.”

In Shaw v. Foster (2) the general proposition is, I think, laid down by every one of the noble Lords who made a speech on that occasion. Lord Chelmsford says (3): “According to the well-known rule in equity, when the contract for sale was signed by the parties Sir William Foster became a trustee of the estate for Pooley, and Pooley a trustee of the purchase-money for Sir William Foster.” Lord Cairns says (4): “Under these circumstances, I apprehend there cannot be the slightest doubt of the relation subsisting in the eye of a Court of Equity between the vendor and the purchaser. The vendor was a trustee of the property for the purchaser; the purchaser was the real beneficial owner, in the eye of a Court of Equity, of the property, subject only to this observation, that the vendor, whom I have called the trustee, was not a mere dormant trustee, he was a trustee having a personal and substantial interest in the property, a right to protect that interest, and an active right to assert that interest, if anything should be done in derogation of it.”

158. At page 510 of **Lysaght** case (Supra) Jessel M.R. states as follows:-

“It must, therefore, be considered to be established that the vendor is a constructive trustee for the purchaser of the estate from the moment the contract is entered into.”

159. Brief fact of **Lysaght** case is that S. B. Edwards entered into an agreement with Plaintiff to sell his mansion called “The Bury” with

adjoining properties. Prior to completion of Sale, Edwards passed away.

According to Edwards Will dated 22 July 1873, he changed part of his estate including Bury Farm to pay his debts subject to trust and empowered his trustees to postpone sale of real estate at request of his wife.

Plaintiff instituted proceeding to enforce the agreement.

The Court held that the property subject to the agreement was held in trust by Edwards and ownership of the property to be conveyed to the Plaintiff.

160. In **Lee v. Kissun** (1966) 12 FLR 4 his Lordship Justice Marsack V.P. (as he then was) stated as follows:-

“As is stated in Williams on Vendor and Purchaser 4th Edn. p. 59:

“As from the date of the contract for sale (but subject to the condition that the contract be duly performed) the property shall in equity belong to the purchaser.”

The principle is set out in Hals. 3rd Edn. p.558 para. 1040:

“Upon the signing of a contract for sale of land a change takes place in the equitable, but not the legal, interest in the land. At law the purchaser has no right to the land, nor the vendor to the money, until the conveyance is executed. In equity, however, if the contract is one of which specific performance would be ordered, the beneficial interest passes to the purchaser immediately on the signing of the contract, and thereupon the vendor, in regard to his legal ownership and possession of the land, becomes constructively a trustee for the purchaser.”

It is true that the legal estate in the land does not pass by the contract itself; but in equity the property in the land sold is considered as being vested in the purchaser from the date of the contract for sale.”

35. This Court accepts Plaintiffs Submission that upon execution of the Agreement the property was held by Defendant in trust for the Plaintiff.
36. Defendant submits as follows:-
- (i) Under the Agreement Plaintiff was to pay a sum of \$20,000.00 within three years from date of Agreement which is 28 October 2015;
 - (ii) There was no requirement for Defendant to provide Duplicate Certificate of Title over the Property in order for Plaintiff to pay the sum of \$20,000.00;
 - (iii) Plaintiff failed to pay the sum of twenty thousand dollars \$20,000.00 (twenty-thousand dollars) by 28 October 2015 and Defendant terminated the Agreement pursuant to clause 12 of the Agreement.
37. It is well established principle of contract law that:-
- (i) If parties want to perform a contract on a definite date they must state in the contract that “time is of essence”
 - (ii) If time is made of essence then the parties must complete their obligation on the time stated in which case both parties must be ready and willing to settle on that date;
 - (iii) If, time is made of essence and only party is ready and willing to settle on the date stated in the contract then the party who is ready and willing to settle can exercise right to terminate the Agreement subject to provision of the contract;
 - (iv) If time is made of essence and parties continue to work towards completing their obligation under contract after the stipulated time has expired then if a party intends to complete the sale on a particular day then that party will have to issue notice to complete on a particular day and time and make that date and time; time of essence, and party giving such notice must be ready and willing to settle on the day and time stated in the notice.

38. Defendant did not make time for completion (28 October 2015) of the sale transaction as time of essence.
39. Therefore, Defendant had to give notice to complete to the Plaintiff stating date and time on which he intends to complete the sale transaction stating that time is of essence and that Defendant is ready and willing to complete the sale transaction on that date.
40. In this matter, there is no evidence that Defendant has given any such notice.
41. Defendant relies on clauses 5.1, 12 and 18 of the Agreement and submits that the payment of twenty thousand dollars by the Plaintiff to the Defendant was independent of Defendant giving Transfer and Duplicate Certificate of Title in respect to the property.
42. This Court finds it to be quite mischievous and unconscionable on the part of Defendants Solicitor for their failure to quote clause 5.1 of the Agreement in full in Defendant's Submission.
43. It is apparent the failure to quote only words which support Defendant's Submission was intentional.
44. Clause 5.1 of the Agreement in file provides as follows:-

“On the date of settlement (or if such day is a public holiday then the next business day) or such other date as may be mutually agreed in writing between the parties, **the following inter-alia, shall take place:**

- (a) **The Vendor will hand over a registrable instrument of transfer in favour of the Purchasers and the Certificate of Title No. 37386 to the Purchaser upon full payment of \$20,000.00 (Twenty Thousand Dollars) being the balance of the purchase price.**
- (b) The Vendor will have over to the Purchaser receipts for payment of all rates and other outgoings affecting the said property as of the date of the execution hereof (if applicable).

- (c) The parties shall complete such other ancillary and consequential matters as may be reasonably necessary according to conveyancing practices of solicitors in Fiji in relation to transactions such as this.”

(emphasis added)

45. Clause 5.1(a) of the Agreement clearly provides that at settlement Defendant as Vendor will provide to Plaintiff as Purchaser registrable instrument of Transfer and Certificate of Title No. 37386 upon full payment of \$20,000.00 (twenty thousand dollars).
46. This Court rejects Defendants Submission that full payment of \$20,000.00 (twenty thousand dollars) was independent of Defendant as Vendor giving registrable instrument of Transfer and Certificate of Title No. 37386.
47. Hence, this Court holds that giving of registrable instrument of Transfer and Certificate of Title No. 37386 and full payment of \$20,000.00 (twenty thousand dollars) was to occur simultaneously at time of settlement.
48. Clause 12 of the Agreement provides as follows:-

“If the Purchaser shall make default in payment of all moneys when due or in the performance or observance of any other stipulation or agreement on the Purchaser’s part herein contained and if such default shall continue for the space of fourteen (14) days from the due date then and in any such case the Vendor without prejudice to any other remedies available to him may at his option exercise all or any of the following remedies namely:-

- (a) may enforce this present Agreement in which case the whole of the purchase monies then unpaid shall become due and at once payable; or
- (b) may rescind this Agreement for sale and thereupon all monies paid under the terms of this Agreement and applied towards the payment of the purchase money shall be forfeited to the Vendor as liquidated damages; or

- (c) may sue for specific performance of this Agreement; or
- (d) may without first tendering the transfer to the Purchaser resell the said property by public auction on such other terms conditions and stipulations as the Vendor may think proper with power to vary the contract of sale buy in at any auction and resell and any deficiency in price which may result and all expenses in attending to a resale or attempted resale be made good by the Purchaser receiving credit for any payment made or applied in payment of the purchaser money. Any increase in price upon resale after deduction of expenses shall belong to the Vendor.” **(emphasis added)**

- 49. Pursuant to clause 12.1 (b) of the Agreement the Defendant as Vendor could only terminate the Agreement if the default by Plaintiff continued for space of fourteen (14) days from due date.
- 50. In this instance, full payment was to be made within three (3) years of date of Agreement (i.e. by 27 October 2015).
- 51. The letter of termination was given by Defendant as Vendor to Plaintiff as Purchaser on 29 October 2015, which was only two (2) days after full payment of \$20,000.00 (twenty thousand dollars) was due.
- 52. Therefore, letter of termination dated 29 October 2015, given by Defendant as Vendor to Plaintiff as Purchaser is not in compliance with clause 12.1 of the Agreement.
- 53. Clause 18 of the Agreement provides as follows:-
 - The purchaser shall be given uninterrupted use of the property upon execution hereof.
 - That in the event the purchaser is unable to make the payments in terms of the agreement than the vendor shall hand back the possession of the property to the vendor and the deposit shall be forfeited.

54. This Court holds that pursuant to clause 12.1 the Defendant as Vendor could only take any action under clause 18 if the default continued for fourteen (14) days.
55. This Court holds that the notice of termination dated 29 October 2015, is unlawful as it is not in compliance with Clause 12.1 of the Agreement and the Defendant as Vendor failed to give notice to complete to the Plaintiff as Purchaser making date and time of settlement as essence and confirming that he is ready and willing to settle at date and time that was to be mentioned in the notice to complete.
56. This Court also takes note of the fact that Transfer of the Property was stamped on 7 November 2015 (10 days after 27 October 2015), which shows that Defendant as Vendor was not ready and willing to settle on 27 October 2015 because he was required to hand over registrable instrument of Transfer to the Plaintiff as Purchaser at settlement.
57. Defendant also raised the fact the Plaintiff as Purchaser was not ready and willing to settle on 18 November 2015, because of the registration of Caveat against title to the property.
58. This Court notes that the Caveat was lodged by Plaintiff as Purchaser under the Agreement to protect his interest as appears from Annexure "S1" of Defendant's Affidavit.
59. Since, the Caveat is lodged by Plaintiff, all that is required of him to get rid of Caveat is to produce Withdrawal of Caveat signed by him at time of settlement.
60. Having analysed the evidence and principles stated in the Judgment this Court holds that the Sale and Agreement dated 28 October 2012, between the Plaintiff as Purchaser and Defendant as Vendor is still on foot. Plaintiff is entitled to order for specific performance of the Agreement by the Defendant.

Costs

61. This Court notes that the parties filed Affidavits and Submissions and at the hearing mostly relied on Submissions filed.

Order

62. This Court makes following Declaration/Orders:-

- (i) Declare that Notice of Termination dated 29 October 2015, given by Defendant to Plaintiff terminating Sale and Purchase Agreement dated 28 October 2012, is unlawful and the Sale and Purchase Agreement dated 28 October 2012, is still on foot;
- (ii) The parties do attend to settlement within fourteen (14) days of this Judgment at Registrar of Titles Office, Suva, and on a date and time to be determined by the Plaintiff;
- (iii) At settlement, Defendant provide Duplicate Certificate of Title No. 37386 to the Plaintiff and/or his Solicitors or Fiji Development Bank in exchange for Bank cheque for the sum of \$20,000.00 (twenty thousand dollars);
- (iv) Defendant do pay Plaintiff's cost of this action assessed in the sum of \$2,000.00 (two thousand dollars) within twenty-one (21) days from date of this Judgment.




K. Kumar
JUDGE

At Suva

31 August 2018

JITEN REDDY LAWYERS FOR THE PLAINTIFF
KOHLI & SINGH FOR THE DEFENDANT