

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

CIVIL ACTION NO. HBC 9 OF 2021

BETWEEN : **UMA PRASAD** of Malele Tavua, Fiji, Cultivator as administrator of Estate of PRASHANTIKA ANJANI DEVI also known as PRASHANTIKA ANJINI DEVI of Maqere, Tavua, Deceased. **1ST PLAINTIFF**

AND : **SWASTIKA DEVI** of Maqere, Tavua **2ND PLAINTIFF**

AND : **CHANDAR PRAKASH** of Vatia, Tavua **1ST DEFENDANT**

AND : **LALTA DEVI** of Baru, Rakiraki **2ND DEFENDANT**

BEFORE : Hon. Mr. Justice Mohamed Mackie

APPEARANCES : Mr. S. Kumar, for the Plaintiffs.
Mr. Koroi, for the Defendants

HEARING : By way of written submissions.

DATE OF DECISION : 12th April, 2023.

JUDGMENT

1. Before me is an Originating Summons preferred by the Plaintiffs on 18th January 2021 , seeking the following reliefs against the Defendants ;
 - a. **For a Declaration** that the Transfer of the property comprised in Certificate of Title Number 27439 being Lot 1 on DP 5386 part of land known as 'Nasivi' comprising an area of fourteen (14) acres and two (2) roods one perch and five tenths of the perch, together with sugarcane contract number 2857 Tagi Tagi Sector, by 1st Defendant to the 2nd Defendant under an instrument of Transfer dated 15th day of October, 2019 and bearing the Dealing No. 884072 registered with the Registrar of Titles on the 18th day of November, 2019 was an alienation of property by the 1st Defendant to the 2nd Defendant with the intent to defraud the Plaintiff the creditors;
 - b. **For a Declaration** that the 2nd Defendant at all times has held the property in trust for the 1st Defendant so as to defeat the judgment of Civil Action HBC 58 of 2005 (Consolidated with HBC 74 of 2005), and Civil Action No. HBC 74 of 2005 (Consolidated with HBC 54 of 2005) between the Plaintiffs and the 1st Defendant;

- c. **For an Order** that the 2nd Defendant re-convey the property described in Certificate of Title Number 27439 being Lot 1 on DP 5386 part of land known as 'Nasivi' comprising an area of fourteen (14) acres and two (2) roods one perch and five tenths of the perch together with sugarcane contract number 2857 Tagi Tagi Sector to the 1st Defendant and attends to all things usual and necessary for re-conveyance including signing a Transfer, Capital Gains Tax Return and a Capital Gain Tax Declaration and obtaining a Capital Gain Tax Certificate from the Fiji Revenue and Custom Services.
- d. **For an Order** that the Registrar of Titles be directed to cancel the Transfer dated 15th day of October, 2019, bearing the Dealings No. 884072 registered with the their Office on the 18th day of November, 2019 and 1st Defendant be restored as the Proprietor of Certificate of Title Number 27439 being Lot 1 on DP 5386 part of land known as 'Nasivi' comprising an area of fourteen (14) acres and two (2) roods one perch and five tenths of the perch together with sugarcane contract number 2857 Tagi Tagi Sector.
- e. **For a Order** that the said property comprised in Certificate of Title Number 27439 being Lot 1 on DP 5386 part of land known as 'Nasivi' comprising an area of fourteen (14) acres and two (2) roods one perch and five tenths of the perch together with sugarcane contract number 2857 Tagi Tagi Sector be transferred as part satisfaction of judgment sum of Civil Action HBC 58 of 2005 (Consolidated with HBC 74 of 2005), and Civil Action No. HBC 74 of 2005 (Consolidated with HBC 54 of 2005) between the Plaintiffs and the 1st Defendant.
- f. **For an Order** that if 1st Defendant neglects to execute all necessary documents to effect the said transfer then the Chief Registrar of the High Court be ordered to execute all such documents to effect the transfer.
- g. That the Defendants pay the cost of this application to the Plaintiffs on indemnity basis on a joint and several basis.
- h. Any other orders this honorable Court deems just.
2. The Originating Summons is supported by an Affidavit of the 1st Plaintiff, Uma Prasad, sworn on 15th January 2021 and filed on 18th January 2021, together with the documents annexed thereto marked as "UP-1" to "UP-9". The Summons states that it is filed pursuant to Section 51 of the Property Law Act, Section 167, 168 of the Land Transfer Act, any other Rules of the High Court and under the inherent jurisdiction of the High Court.

LAW:

3. Section 51 of the Property Law Act states as follows.

Alienation with intent to defraud creditors

- "51.(1) Save as provided by this section, every alienation of property with intent to defraud creditors shall be voidable at the instance of the person thereby prejudiced.
- (2) This section does not affect any law for the time being in force relating to bankruptcy.
- (3) This section does not extend to any estate or interest in property alienated to a purchaser in good faith not having, at the time of the alienation, notice of the intention to defraud creditors".

- 3.1. According to section 51 of the property law Act, any alienation of property undertaken with the intent of defrauding creditors shall be deemed to be voidable at the instance of the person prejudiced.

4. Section 168 of the Land Transfer Act reads as follows:

Power of Court to direct Registrar.

"168. In any proceedings respecting any land subject to the provisions of this Act, or any estate or interest therein, or in respect of any transaction relating thereto, or in respect of any instrument, memorial or other entry or endorsement affecting any such land, estate or interest, the court may by decree or order direct the Registrar to cancel, correct, substitute or issue any instrument of title or make any memorial or entry in the register or any endorsement or otherwise to do such acts as may be necessary to give effect to the judgment or decree or order of such court"

- 4.1. Section 168 of the Land Transfer Act empowers this Court to direct the Registrar by order or by decree to; cancel, correct, substitute or issue any instrument of title or make any memorial or entry in the register or any endorsement or otherwise to do such acts as may be necessary to give effect to the judgment or decree or order of such Court ; where in any case such land is subject to legal proceedings and judgment has been obtained thereof ; in allowing the Court to give effect to its judgment or decree.

THE BACKGROUND & EVIDENCE:

AFFIDAVIT IN SUPPORT:

5. The 1st Plaintiff's Affidavit in support gives details of several actions fought before this Court by and between the parties, of which the first one was the action no HBC-99 of 2004 commenced in the year 2004 by the 1st Defendant hereof to evict the Plaintiff from the land and premises in suit. I, find most of the facts in the averments in the Affidavit in support, except for the facts and the outcome in the action no. HBC 58 of 2005, are not immediately relevant in determining the matter at hand. However, for the purpose of lucidity and easy comprehension, I shall briefly give the history behind the Application at hand, as narrated in the Affidavit in support.
1. That the 1st Plaintiff entered into a Sale and Purchase Agreement marked as "UP-1" on 21st May 2002 with the 1st Defendant to purchase from him a piece of land, along with the house therein and other chattels, in the Certificate of Title Number 27439 being lot 1 on DP 5386 part of land known as "Nasivi" comprising an area of fourteen acres Two roods and one perch and five tenth of a perch (A-4, R-2,P-1 & 5/10) , together with the sugar cane contract number 2857 Tagi Tagi sector (**the very land & premises in relation to which Orders hereof are sought**) for a sum of \$60,000.00 on account of which the Plaintiff instantly paid an advance of \$10,000.00 and the balance was agreed to be paid in \$5,000.00 installments every year until the balance sum is fully paid and settled.
 2. That as per the Agreement, the 1st Plaintiff and his family on 24th may 2002, went into the subject matter land and premises with furniture / fittings and cattle. However, he did not stay back there for that night, but left his two daughters, namely, **Prashanthika Anjani Devi** and **Swatsthika Devi**, to stay there, allegedly, on the request of the first Defendant to attend to the cattle in the next morning.

3. That at 11: 00 pm of the same night, the 1st Plaintiff received a call from Lausa Police Station asking him to come to the Police station and when he went there, the Police informed him that his two Daughters were involved in a Motor Vehicle accident whilst travelling in a Car driven by the 1st Defendant, who had bumped a train in Lausa.
4. That his 2 Daughters were seriously injured; one recovered with scares and pieces of glasses in her body (the 2nd plaintiff hereof) and the other Daughter, was in Coma for a year and died.
5. That he duly paid the subsequent installment of \$5,000.00 for the year 2003 unto the 1st Defendant and when he went, after 10 days of the funeral activities of the deceased Daughter, to pay for the year 2004, the 1st Defendant refused to accept it stating that the payment is delayed.
6. That the 1st Defendant filed the writ action no. **HBC 99 of 2004** against him on 8th April, 2004, in which he was seeking, inter-alia, the relief for the ejection of the Plaintiffs.
7. That, in the meantime, he instructed his Solicitor Mr. Haroon Ali Sha, to file an injury case against the 1st Defendant and accordingly, the action no-HBC 58 of 2005 was filed by him as the administrator of his deceased Daughter. This action was later consolidated with action no. HBC 74 of 2005, which was subsequently filed by his other Daughter, who was also a victim of the said Motor Car accident.
8. That his defence in the said action No- HBC 99 of 2004 was struck out and later he was coerced by his former Solicitor and the 1st Defendant's Solicitor (Plaintiff's Solicitor in the said action) to enter into a settlement. As a result, at the end of May 2011, he was forcefully evicted from the land and premises. Though, he tried to contact his former solicitor, Mr. Haroon Ali Sha, he did not respond and later when he went to see him a sum of \$ 40,000.00 was demanded to return the files.
9. That through his current solicitor, Mr. Sunil Kumar, he filed action no. HBC 45 of 2018 against his former Solicitor Mr. Haroon Ali Sha, the 1st Defendant hereof, and 1st Defendant's former Solicitor, Mr. S.K. Ram, to have the purported terms of settlement set aside. This action is now pending for the decision on the striking out application filed by the Defendants in the said Action no; HBC 45 of 2018.
10. That his action No-HBC 58 of 2005 and his other Daughter's action No- 74 of 2005 being consolidated and taken up for trial, Hon. A.G. Stuart, by his Judgment dated and pronounced on 30th January, 2020 awarded him, being the Administrator of the Estate of the deceased Daughter PRASHANTHIKA ANJANI DEVI, a total sum of \$ 252,340.00 and to the 2nd Plaintiff hereof, who was the Plaintiff in consolidated action no. HBC 74 of 2005, a sum of \$ 35,260.00, together with a sum of \$7,500.00 being the costs for both actions.
11. That the said Judgment was sealed and served on the 1st Defendant on 16th June, 2020, after which the 1st Defendant started spreading rumors that he has disposed all his properties and there is nothing left, which could be attached to judgment and realized.
12. That on subsequent search by his Lawyers for the aforesaid certificate of title, it was unveiled that the 1st Defendant, by an instrument of Transfer dated 15th October 2019, had transferred the said land and premises unto LALTA DEVI, the 2nd Defendant hereof and

registered it with the Registrar of Title on the 18th day of November, 2019, with the intent that if he lose the cases (HBC 58 of 2005 & HBC 74 of 2005) he would have no assets and the Plaintiffs therein will not be able to recover anything.

13. That the consideration shown therein is \$10.00 and by way of Natural Love and affection, which clearly indicates that the 2nd Defendant is keeping the property registered under her name on trust for the 1st Defendant.
14. That at the time the said Transfer was affected; the 1st Defendant was awaiting the judgment in consolidated cases no. HBC 58 of 2005 and HBC-74 of 2005, which had been fixed to be delivered on 20th January, 2020 and satisfied.
15. That he believes from the foregoing circumstances that the said Transfer was a fraudulent alienation of the property by the 1st Defendant unto the 2nd Defendant with a view of defeating the judgment of case no. HBC 58 of 2005 and HBC 74 of 2005 rendering the judgment against the 1st Defendant non-enforceable. That both the Defendants have colluded with each other to defraud and obstruct the order of the Court.
16. That he is advised and believe that this Court has jurisdiction under section 51 of the Property Law Act and under section 167 and 168 of the Land Transfer Act to order that the fraudulent Transfer be brought into this Court and be cancelled and the land be reverted to the 1st Defendant so that judgment be effected and the order of this Court be enforced.

AFFIDAVIT IN OPPOSITION:

6. The averments in Paragraphs 5 to 30 of the 1st Defendant's Affidavit in opposition are in relation to the 1st plaintiff's averments in paragraphs up to 37 of his Affidavit in support, which are, inter alia, on the Agreement to sell, Plaintiffs' commencement of possession, the Motor Car accident, victimization of his both Daughters, eviction of the plaintiff and other pending actions, most of which are admitted facts and not directly relevant to the issue at hand. I shall only consider the averments in paragraphs from 38 to 51 of the 1st Plaintiff's Affidavit in support and paragraphs 31 to 50 of the 1st Defendant's Affidavit in opposition, which are material in deciding the matter before me now.
7. The 1st Defendant admits the judgment in consolidated actions No. HBC 58 of 2005 and HBC 74 of 2005 have been pronounced in the Plaintiffs' favor, but states that he is challenging the judgment of the High Court. Further, the 1st Defendant, while admitting the transfer of the property unto the 2nd Defendant and the registration of it in her name, as averred in paragraphs 43 and 44 of the 1st Plaintiff's Affidavit, takes up a position that it was done owing to the Love and affection towards her and put the Plaintiff to strict proof of the rest of the allegations.
8. The 1st Defendant states that the 1st Plaintiff is making baseless allegations, and the property being a family property, after the demise of the Mother, was to devolve on his two Brothers and since the Mother and two Brothers moved to New Zealand, it was transferred to him and subsequently, with the agreement of his Brothers, he transferred it to their sister, the 2nd Defendant.
9. Further, the 1st Defendant admits that the property was transferred months before the judgment was delivered.

AFFIDAVIT IN REPLY:

- 10.**The 1st Plaintiff by his Affidavit in reply sworn and filed on 22nd September, 2022, by responding only to the relevant averments in the Affidavit in opposition, has stated neither he nor his Solicitor has been served with any documents and/ or grounds of Appeal in relation to the Judgment in actions no.HBA-58 of 2005 and HBC 74 of 2005. The Plaintiff also questions that if the transfer was done under Love and affection, why he entered into a sale and purchase agreement with him and why he waited to transfer till October 2019, three months prior to the Judgment.
- 11.**By way of further reply, the 1st Plaintiff states that the Last Will of the Defendant's Father does not suggest any of the 1st Defendants' entitlement to the share in the residue and there is no mention about the Certificate of Title number 27439 in respect of the land in question here.

MY ANALYSIS AND DECISION:

- 12.**The propriety of the commencement of these proceedings, by way of an Originating Summons, is not seriously disputed by the Defendants. What the court must decide is whether it is appropriate to grant the reliefs that have been sought in the circumstances pleaded by the plaintiffs.
- 13.**The modes of beginning civil proceedings are prescribed by Order 5 of the High Court Rules. Civil proceedings in the High Court may be begun by writ, originating summons, originating motion or petition. Subject to any provision of an Act or the High Court Rules, Order 5 Rule 2 specifies the proceedings to be begun by writ. Proceedings by which an application is to be made to the High Court or a judge under any Act must be begun by originating summons, except where such application is expressly required or authorised to be made by some other means. Except where proceedings 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. Proceedings in which there is **unlikely** to be any substantial dispute of fact are appropriate to be begun by originating summons.
- 14.**The fact that the 1st Defendant CHANDAR PRAKASH on 15th October, 2019, transferred his right, title and interest in the land and premises in question, while the Plaintiffs' claim in Action no HBC 58 of 2005 and HBC 74 of 2005 was pending for judgment on 30th January 2020, unto his Sister the 2nd Defendant by dealing No; 884072, is not disputed. The Registration of it also undisputed.
- 15.**The only issue to be decided in this matter is whether the alienation of the land in question was done by the 1st Defendant deliberately, with the intention of defrauding the Plaintiffs that if the Defendant loses the said actions HBC 58 of 2005 and HBC 74 of 2005 he would have no assets and the Plaintiff will not be able to recover anything. In other words, whether the Defendant intended to make the judgment ineffective by disposing his assets in order to show that he had nothing to execute, if the judgment is obtained in favor of the Plaintiffs.
- 16.**The Plaintiffs hereof are seeking, inter-alia, declarations **(a)**. That the Transfer of the property by the 1st Defendant unto the 2nd Defendant by instrument of Dealing No; 884072 dated 15th

October, 2019 and registered on 18th November 2019, was an alienation of property with the intent to defraud the Plaintiff creditors. **(b)** That the 2nd Defendant at all times has held the property in trust for the 1st Defendant so as to defeat the judgment of Civil Action HBC 58 (consolidated with HBC 74 of 2005) and Civil Action Number HBC 74 of 2005 (consolidated with Civil Action HBC 58 of 2005) between the Plaintiffs and the 1st Defendant. **(c)** An order for the conveyance of the said property from the 2nd Defendant unto the 1st Defendant. **(d)** An Order directing the Registrar of Title to cancel the registration of Transfer dated 15th October, 2019 in dealing No; 884072 . **(e)** For an Order for the land in question to be transferred to the plaintiffs as a part of satisfaction of the judgment in the said actions HBC 58 of 2005 and 74 of 2005.

17. I am mindful of the relevant provisions of the Section 51 of the Property Law Act described in paragraph 3 above.

18. Section 51 of the Property Law Act is identical with Section 60 of the Property Law Act 1952 (NZ) and the said section was considered by the Supreme Court of New Zealand in *Regal Castings Limited v Lightbody* [2008] NZSC 87; (2009) 2 NZLR 433.

Discussing the meaning of "Intent to Defraud" his Lordship Elias C.J. said

[5]The meaning of "intent to defraud" has been held to include the purpose of delaying as well as defeating creditors, as the Elizabethan statute had expressly provided. [3]The question of intent to defraud is one of fact. [4]It must be determined at the time of alienation, [5] but the intended prejudice may be to future creditors rather than creditors existing at the date of the alienation. [6]Absence of full value obtained for an asset transferred is evidence from which an inference of intent to defraud may be taken. [7] But full value of itself may not be sufficient to displace intent to defraud, as is illustrated by Lloyds Bank Ltd v Marcan. [8]There, the grant of a lease for a term of 20 years was held to have been made with intent to defraud the mortgagee seeking to enforce the mortgage, despite the fact that the lease was granted for full market rental.

If alienation is voluntary (that is to say, not for valuable consideration) or is at a clear undervalue, so that the fund available to creditors is depleted, [9] it may be easy to infer intent to defraud.[10]

[6]If the debtor retains the benefit of the property, that may be evidence of fraudulent intent.

[7]The financial position of the transferor at the time of the alienation is always a key consideration. It is not determinative against intent to defraud if the transferor is solvent at the time, particularly if he is contemplating entering into a risky venture. [20] But where the transferor's financial position is precarious, it is objective evidence of an intention to defraud if he acts to put property beyond the reach of creditors. [21] Other indications of fraud commonly occurring are transfers to close relatives, particularly where the transfer is at an undervalue, alienations in which the transferor retains the use or benefit of the property. [22] and secrecy in the transfer or a misleading explanation for it.[23]

19. In the same case referring to *Freeman v Pope* (1870) UKLawRpCh 61; LR 5 Ch App 538 Tipping J said:

[89]That case was a Chancery Appeal from Vice-Chancellor James heard by Lord Hatherley LC and Giffard LJ. At the start of his judgment Lord Hatherley said:122 "The principle on which the statute of 13 Eliz c 5 proceeds are this, that persons must be just before they are generous and those debts must be paid before gifts can be made." [90] A little later the Lord Chancellor added: 123 "But it is established by the authorities that in the absence of any such direct proof of intention, if a person owing debts makes a settlement which subtracts from the property which is the proper fund for the payment of those debts, an amount without which the debts cannot be paid, then, since it is the necessary consequence of the settlement (supposing it effectual) that some creditors must remain unpaid, it would be the duty of the Judge to direct the jury that they must infer the intent of the settlor to have been to defeat or delay his creditors, and that the case is within the statute."

20.In the light of the guidelines set by the above authorities, it is clear that in this matter the transfer of the land and premises in question at a value of mere \$10.00 by the 1st Defendant unto the 2nd Defendant sister was done with the intent of defrauding the Plaintiffs and in order to avoid the execution of the judgment against this land and premises, in the event the pending judgment is delivered in favor of the plaintiffs.

21.The following facts revealed through the Affidavit evidence of both the parties, clearly demonstrate that the intent of the 1st Defendant was nothing but to defraud the 1st and 2nd Plaintiffs hereof in action No- HBC 58 of 2005 and action no-HBC 74 of 2005 respectively.

- (i) The 1st plaintiff had sued the 1st Defendant owner cum driver, of the Motor Car that caught in the accident, on behalf of the estate of the 1st plaintiff's deceased daughter, seeking damages by action no. HBC 58 of 2005 and the judgment on it was due on 20th January 2020.
- (ii) The 2nd plaintiff hereof also had sued the 1st Defendant by action no. HBC 74 2005, seeking damages for the injuries caused to her by the motor vehicle accident in which the 1st Defendant was the owner cum driver and the judgment on it was due on 20th January, 2020.
- (iii) The Plaintiff had filed action No; 45 Of 2018 against the 1st Defendant and both Solicitors in Action No. HBC 99 of 2004 for the cancellation of the Terms of Settlement entered between the Plaintiff and the 1st Defendant in the said action no-HBC 99 of 2004, wherein the subject matter of the Agreement to sell and Purchase was the very same land and premises.
- (iv) The purported transfer was done on 15th October 2019, while the judgment in both the (consolidated) actions was due to be delivered on 20th January, 2020.
- (v) The 1st Defendant despite the purported transfer remains in the subject matter land and premises, while his sister continues to reside with her in-laws elsewhere.
- (vi) The 1st Defendant continues to reap the harvest and receive the income of Sugarcane from the subject matter land.
- (vii) The Plaintiff has grossly undervalued the property at \$10, 00 and stated that it is transferred for natural love and affection towards the transferee.

- (viii) The 1st Defendant had approached the 1st Plaintiff for the settlement of the personal injury claim that the Plaintiffs were to file, promising to deduct \$20,000 from the sale and purchase price in the Agreement entered into in the year 2002 for the sale and purchase of the land in question.

- 22.**In this matter, the 1st Defendant knew or ought to have known that he had 3 actions pending before the court, one being the action no. HBC 45 of 2018 seeking for the setting aside of the, purported, settlement in the action no-HBC 99 of 2002, and the other actions being the plaintiffs' actions no. HBC 58 of 2005 and HBC 74 of 2005 claiming for damages, which stood fixed for judgment on 20th January, 2020. Thus, it can be safely concluded that it was with the intent of defrauding the Plaintiffs, the 1st Defendant has calculatedly moved to distance his assets from the reach of the plaintiff by way of the , purported, gift by grossly under valuing the property for \$10.00. (Ten Dollars)
- 23.**Currently, the 1st Defendant is not the title holder, but he continues to occupy the land and premises in suit as before. It is the 2nd Defendant who presently holds the title. It is abundantly clear that the 1st Defendant has borrowed the name of the 2nd Defendant in order to defraud the Plaintiffs. The Last Will of the Defendants' Father has nothing to do with the land in question here.
- 24.**The 2nd Defendant, who holds the title now, has done nothing to safe guard her purported interest and title to the land in question, except for filing an acknowledgement of service and giving her authority to the 1st Defendant to swear Affidavits on her behalf. In the strict sense, the 1st Defendant cannot oppose this Application as he is not the owner of the land.
- 25.**In the absence of a credible explanation by the evidence of the Defendants, the only inference that could be safely drawn is that the 1st Defendant intended to defraud or defeat or defect his would be creditors, the Plaintiffs, by the sham transfer of his land and premises unto his own sister under the guise of love and affection and by under valuing the property for mere \$10, 00. From the evidence adduced, I find that the transferee had full knowledge of the background facts and was not an innocent third party / transferee.
- 26.**If the 1st Plaintiff become victorious in his Actin no. HBC 45 of 2018 and as a result, if the purported terms of settlement in the action; HBC 99 of 2002 is set aside, it is the same land and premises in the originating summons hereof, that will continue to be the subject matter of that action no HBC 99 of 2004 for it to continue between the 1st plaintiff and the 1st Defendant hereof as original parties to that ever first action.
- 27.**The 1st Defendant himself had valued and priced his property in question for \$60,000.00 in the Agreement to sell executed in the year 2002 and as \$80,000.00 in the purported settlement subsequently entered into in the action no. HBC 99 of 2004. But, the 1st Defendant for the purpose of the Transfer had valued it only at \$10.00 (Ten Dollars), which is clearly an under valuation.
- 28.**If there was a family arrangement for the Transfer of the land and premises in question unto the 2nd Defendant sister, the 1st Defendant need not have entered into a sale and purchase agreement with the Plaintiff and enter into a terms of settlement in the action No-HBC 99 of

2004. Further, the 1st Defendant need not have waited till 15th October 2019 when the judgment was to be delivered on 20th January, 2020.

- 29.**The only substantial asset that appeared to be with the 1st Defendant was the land and premises in question hereof, which is the subject matter of the Deed of Transfer in favor of the 2nd Defendant. If the 1st Defendant's only substantial property is disposed and dissipated in this manner, the judgment in favor of the plaintiffs would undoubtedly become unenforceable and nugatory.
- 30.**No prejudice would be caused to the 1st Defendant hereof by the cancellation of the purported Deed of Gift executed in favor of his Sister, the 2nd Defendant, as no order against the 1st Defendant for the Transfer of property would immediately be made now in satisfaction of the judgments in the Plaintiffs' cases, until a means test is done by way of a separate oral hearing.
- 31.**When the alienation of the property is found to be voidable, Section 168 of the Land Transfer Act empowers the Court, in its discretion, to grant reliefs including the cancellation, as may be necessary to give effect to the judgment of the court. **Vide- Nisha v Ali [2021] FJHC 88.2021 (21st December, 2021) and Prasad v Devi [2000] Fiji Law Report 22; [2000] 1 FLR 34 (25th February, 2000).**
- 32.**The Transfer Deed has been executed on 15th October 2019 just 3 months before the judgment in the Plaintiffs' consolidated actions no-HBC 58 of 2005 and HBC-74 of 2005 was to be delivered by Justice A. Stuarts, on 20th January, 2020. This clearly shows the intention behind. No oral evidence is needed to decide on the reliefs claimed for in the Originating Summons at hand.

RESPONSE TO 1st DEFENDANT'S ARGUMENTS:

- 33.**The Plaintiffs did not rely on the assumptions or rumors claimed to have been created by the 1st Defendant for the Plaintiffs to file this Originating summons. Instead, the Plaintiffs caused their own search and found that the property in question had been in fact transferred by the 1st Defendant to the 2nd Defendant with the intent of making any judgment in favor of the plaintiffs unenforceable. The claim of the Defendants that they did not intend to defraud the plaintiff is unacceptable. The allegations by the Plaintiffs in this regard are **not** baseless.
- 34.**The next argument advanced by the Defendants in their written submissions is that the claim of the Plaintiffs is statutory barred under section 4(a), will not hold water. The Plaintiffs' claim for relief hereof is not based on the Agreement to sale and purchase. Any issue arising out of the sale and purchase agreement entered into in the year 2002 will be addressed in action No- HBC 45 of 1018 and if it succeeds thereafter in the initial action number HBC- 99 of 2004.
- 35.**The Application at hand by way of Originating Summons is only to decide a limited question, whether the purported transfer was done by the 1st Defendant with the intent of defrauding the Plaintiffs, for which this Court has arrived at an affirmative answer in view of what have been discussed above.
- 36.**The transfer by the 1st Defendant unto the 2nd Defendant is an admitted fact. The Pleadings in the Originating Summons by way of the averments in the Affidavits and the contents of the documents annexed thereto are more than enough for this Court to arrive at a finding that the Transfer executed by the 1st Defendant in favor of the 2nd Defendant was a sham and with the

sole intention of defrauding the Plaintiffs and disposing, dissipating and distancing the 1st Defendant's properties from the execution of any judgment in favor of the Plaintiffs.

- 37.** The reasons adduced by the 1st Defendant for the transfer of the Property in favor of the 2nd Defendants are not convincing. No prejudice will be caused to the 1st Defendant as no order for the transfer in favor of the Plaintiffs is made now, which has to be considered only after a mean test hearing.

CONCLUSION:-

- 38.** For the reasons adumbrated above, this Court finds that the Plaintiffs hereof have satisfied the required criterions of section 51 of the Property Law Act Cap 130 and Section 168 of the Land Transfer Act Cap 131 and thereby have become entitled to the following reliefs as prayed for in the Originating Summons filed on 18th January, 2021.

- 39.** The 1st Defendant's impugned Deed of Transfer executed on 15th October 2019, in respect of the land described hereof, in favor of the 2nd Defendant, was with the sole intention of defrauding the Plaintiffs hereof and by such act has disposed, dissipated and distanced the said property from becoming the subject matter of execution of the impending judgment.

FINAL ORDERS:

- a. It is hereby declared, as prayed for in paragraph (a) of the prayer to the Originating Summons filed on 18th January, 2021, that the Transfer of property, described above, by the 1st Defendant in favor of the 2nd Defendant on 15th October, 2019 and having it registered on 18th November 2019, constituted an alienation of property with the intention of defrauding the Plaintiffs,
- b. It is also hereby declared, as prayed for in paragraph (b) of the prayers to the said Originating Summons, that the 2nd Defendant had at all times held and is holding the said property on Trust for the 1st Defendant, with the purpose of defeating the impending judgment in Civil Actions no HBC 58 of 2005 and HBC-74 of 2005 against the 1st Defendant,
- c. The 2nd Defendant hereof is ordered, as prayed for in paragraph (c) of the prayers to the said Originating Summons, to re-convey the title of the property and transfer all administrative powers on the said property unto the 1st Defendant. This Order shall be complied within 6 weeks from today.
- d. The Registrar of Title is hereby directed, as prayed for in paragraph (d) of the prayer to the Summons, to forthwith cancel the registration of the Transfer dated 15th October 2019 bearing the Dealing No. 884072, which was Registered on 18th November 2019 and restore the 1st Defendant as the Title holder on the Certificate of Title No. 27439 together with the sugarcane contract No. 2857 Tagi Tagi Sector,

- e. The Order prayed for as per paragraph (e) of the prayer to the Summons will be considered after a mean test hearing.
- f. In the event the 2nd Defendant fails and/ or neglects to execute the Transfer, the Chief Registrar of the High Court is hereby empowered and ordered to take all actions needed for the re-transfer of the Property in favor of the 1st Defendant, however, subject to the payment of disbursements by the 1st and 2nd Defendants.
- g. The Defendants shall pay the Plaintiffs \$3,000.00 in 28 days, being the summarily assessed costs of this Application.
- h. The Plaintiffs are at liberty to move, inter-parte, for further directions and/ or orders, if need arises.
- i. These orders shall be sealed and served on the Defendants and the Registrar of Title forthwith.



A.M. Mohamed Mackie
Judge

At High Court Lautoka this 12th day of April, 2023.

SOLICITORS:*

For the Plaintiff: Sunil Kumar Esquire
For the Defendant: Reddy Law