

IN THE COURT OF APPEAL, FIJI

[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 013 of 2020

[High Court at Lautoka Case No. HBC 190 of 2016]

BETWEEN : MOHAMMED AIYUB
1st Appellant

MOHAMMED HASSAN
2nd Appellant

MOHAMMED FAREED KHAIRATI
3rd Appellant

MOHAMMED ABDUL GAFFAR KHAIRATI
4th Appellant

AND : MOHAMMED SHAHEEM KHAIRATI
1st Respondent

FAIZAL HUSSEIN KHAIRATI
2nd Respondent

Coram : Jitoko, VP
Lecamwasam, JA
Sharma, JA

Counsel : Mr. S F Koya and Mr. S A Koya for the Appellants
Mr. V M Mishra for the 1st Respondent
Ms. A. Chand for the 2nd Respondent

Date of Hearing : 10 May 2023

Date of Judgment : 26 May 2023

JUDGMENT

Jitoko, JA

- [1] I have the advantage of reading in advance the draft judgment of Lecamwasam JA and I agree with it.

Lecamwasam, JA

- [2] This is an appeal filed by the appellant, being aggrieved by a ruling dated 27 January 2020, made by the learned High Court Judge at Lautoka on the following grounds of appeal.

- 1 The Learned Judge erred in law and/or in fact in holding that the First Respondent was entitled to purchase Certificate to Title No. 7200 without placing a Tender addressed to the Deputy Registrar of the High Court at Lautoka as required under Clause 5a of the Order made on the 15th day of February 2019.*
- 2 The Learned Judge erred in law and/or in fact in not taking into account that the Second Respondent accepted the First Respondent's offer to purchase Certificate of Title No. 7200 knowing that the First Respondent failed to place a Tender addressed to the Deputy Registrar of the High Court at Lautoka as required under Clause 5a of the Order made on the 15th day of February 2019.*
- 3 The Learned Judge erred in law and/or in fact in not taking into account that the First and Second Respondents colluded in having Certificate of Title No. 7200 transferred to the First Respondent.*
- 4 The Learned Judge erred in law and/or in fact in not taking into account that the Second Respondent failed to give the beneficiaries of the Estate of Khairati a chance to place their Tenders as under Clause 5a of the Order made on the 15th day of February 2019 for the purchase of Certificate of Title No. 7200.*
- 5. The Learned Judge erred in law and/or in fact in holding that the beneficiaries of the Estate of Khairati did not want to purchase the property at the highest Tender received.*

- [3] In this case the Appellants sought an order for committal against the Plaintiff and the 2nd Respondent for contempt and breach of an order made on the 15 February 2019 by the learned High Court judge at Lautoka.

[4] The committal was sought by the Appellants mainly on the following grounds (as per statement of committal filed by the Appellants (the Defendants in the substantive matter) as per page 35 of High Court Record)

- (a) *The Plaintiff and the Respondent had failed to comply with Consent Order made on the 15th of February 2019 made by the Honourable Justice Ajmeer.*
- (b) *The Plaintiff failed to put in a Tender with a deposit of \$200.00 (Two hundred Dollars) addressed to the Deputy Registrar for the purchase of Certificate of Title No. 7200 and therefore breaching and being in contempt of order numbered 5 of the Consent Order made on the 15th day of February 2019 and sent his offer to purchase Certificate of Title No. 7200 directly to the Respondent.*
- (c) *The Respondent accepted the Plaintiff's offer sent directly to the Respondent for purchase of Certificate of Title No. 7200 and therefore was in breach and in contempt of the Consent Order made on the 15th day of February 2019.*
- (d) *The Plaintiff and the Respondent are in contempt of a lawful and legally binding Consent Order when they failed to abide with order numbered 5 a.*

[5] It is pertinent to mention that all these arose as a result of a ruling based on a settlement dated 15 February, 2019 made by the learned High Court judge at Lautoka in the substantive matter in this case and which goes thus:

1. *THAT the Deed dated 6 May, 2009 shall be unenforceable.*
2. *THAT the Estate of Khairati shall be distributed on the basis of the Settlement letter dated 17 July, 2006.*
3. *THAT the First Defendant; Mohammed Aiyub shall be removed as the Trustee of the Estate of Khairati.*
4. *THAT Mr. Faizal Hussein Khairati, Project Manager of Jacks of Fiji (son of the beneficiary and previous Trustee of Nadi, Fiji Mr Mohammed Hussein) is hereby appointed the Trustee of the Estate of Khairati to complete the administration of the Estate of Khairati.*

5. *THAT Certificate of Title No. 6225 and 7200 shall be sold to the highest bidder after:-*
 - a. *Two consecutive English Newspaper advertisements allowing fourteen (14) days for Tenders to be received with \$200.00 deposit with all tenders to go to the Deputy Registrar of the High Court, Lautoka and he shall open the same in the presence of both party's lawyers and/or the parties themselves.*
 - b. *The properties (each of them) shall be offered to each beneficiary at the highest tender received. If there is more than one beneficiary wanting to buy then it shall be sold to the one who offers the highest price.*
 - c. *The person(s) awarded the tender shall pay a deposit of the (10%) percent to be paid within 10 days of the tender acceptance into Court and sale and purchase agreement shall be done by a lawyer chosen by the new Trustee.*
 - d. *If the highest tenderer for either property does not settle or come up with the funds to settle with 42 days from time of acceptance that the deposit shall be forfeited and the property be offered and sold to the second highest tenderer with the same procedure being followed and so on until the property is sold.*
6. *THAT the costs of the advertisements shall be paid by the Defendants.*
7. *THAT the Estate tractor parked at the residence of Faizal Hussein Khairati shall be sold in same manner by the Trustee to the highest tenderer.*
8. *THAT the money from all the sales shall be paid into Court.*
9. *THAT the loss of income for the Estate of Mohammed Ibrahim as prayed for in relief F of the statement of claim is agreed at \$20,000.00.*
10. *THAT the costs of this action shall be paid to the Plaintiff and the same to be assessed by the Court, if not agreed and whether the same is paid by the First Defendant personally to be also determined by the Court.*

11. *THAT the Plaintiff shall be at liberty to file affidavit with the bills of costs and fees incurred by him for the present hearing as well as other costs such as air flights.*
12. *THAT the distribution of the shares between the beneficiaries shall be determined and assessed by the Court.*
13. *THAT the parties and the new Trustee shall be at liberty to apply generally.*
14. *THAT this settlement shall be the full and final settlement between the parties.*

[6] And the above ruling was made after the closure of the Plaintiffs case and midway through the Defendants case as the parties settled the matter and the learned Judge made the above consent order in terms of the settlement. What is important and relevant to the issue at hand is paragraph 5 of the above consent order and the Appellants rely mainly on the breach of the above paragraph.

[7] On a plain reading of paragraph 5 it is evident that there are two (2) limbs to paragraph 5 and a) deals with the publication of advertisements. Publication is meant for the public to know that the subject matter is for sale and inviting public to offer bids, thereby one can gauge or ascertain the market value of the property. As per the above 5 a, tenders to be received with a deposit of FJD\$200.00. Anyone who is interested in buying the property is thereby allowed to bid subject to tender the deposit of \$200.00 being deposited with the Deputy Registrar and it is crystal clear that above 5a applies to any prospective buyers to furnish tenders with \$200.00. When the Deputy Registrar receives the bids from prospective buyers, it is his duty to open the same in the presence of both parties/their lawyers.

[8] After such exercise, once the market value is known, only 5.b. applies. Under 5.b, each property has to be offered to each beneficiary at the highest tenders received. And nowhere in 5a or 5b places requirement of the beneficiaries to tender the deposit of \$200.00. Although there is no requirement as such, if a beneficiary wishes, is not precluded from

placing a tender but of course with the deposit of \$200.00. In the instant case, there was no need for the beneficiaries to tender, since under 5b it was incumbent on the Deputy Registrar to offer each property to each beneficiary at the highest tender received.

[9] What had happened in this case is not that the beneficiaries placed any tenders with the Deputy Registrar, it was the Deputy Registrar acting under 5b made the offer to the beneficiary that is the 1st Respondent and he had bought it for \$110,000.00 i.e. \$10,000.00 above the highest bid. Therefore I do not see any collusion between the 1st and the 2nd Respondents and there is no breach of the requirements contained in the consent order.

[10] In view of the above, I do agree with the learned High Court Judge in his findings and I answer the grounds of appeal thus:

1. No
2. No
3. No
4. There is no material before court, the other beneficiaries had wanted to purchase Certificate Title No. 7200
5. No

[11] Since I have dealt with the substantive issue straight away, it is redundant to deal with the issue of nature of the application whether it is interlocutory or not though the parties have addressed court at length in regard to that issue.

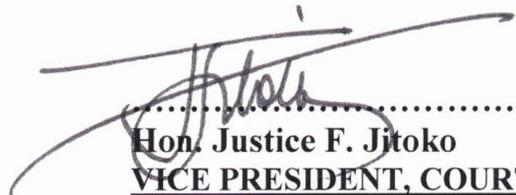
[12] **Sharma JA**

I have read the judgment compiled with the reasons therein, and accordingly agree with the orders made.

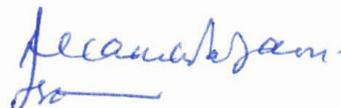
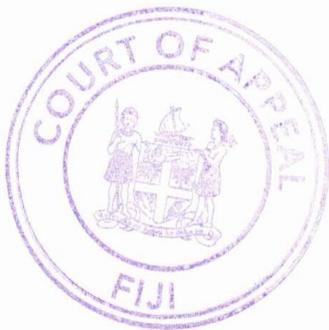
[13] For the reasons given above, I dismiss the appeal with costs of \$5,000.00 payable by the Appellants to the Respondents.

[14] **Orders of the Court**

1. *The High Court judge's ruling is affirmed*
2. *Appeal is dismissed*
3. *Appellants to pay \$5,000.00 as costs to the Respondents*



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Hon. Justice F. Jitoko
VICE PRESIDENT, COURT OF APPEAL



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Hon. Justice S. Lecamwasam
JUSTICE OF APPEAL



.....
Hon. Justice V. D. Sharma
JUSTICE OF APPEAL

Solicitors

Siddiq Koya Lawyers for the Appellant
Mishra Prakash & Associates for the 1st Respondent
Anishini Chand Lawyers for the 2nd Respondent