

IN THE HIGH COURT OF FIJI AT LABASA

CIVIL JURISDICTION

CASE NUMBER: HBC 62 of 2007

BETWEEN: DEO RAJ
PLAINTIFF

AND: BAS DEO
1ST DEFENDANT

AND: REGISTRAR OF TITLES
2ND DEFENDANT

Appearances: Mr. A. Sen for the Plaintiff.

Mr. D. Prasad for the 1st Defendant.

Date/Place of Judgment: Thursday, 22 August 2013 at Labasa.

Coram: The Hon. Justice Anjala Wati.

JUDGMENT

Catchwords:

Contract - Sale and Purchase Agreement - Question of voluntarily entering into and execution of agreement - Non est factum - Breach - Specific Performance - Damages.

Cases Referred To:

Fiji Development Bank v. Navitalai Raqona [1984] 30 FLR 151.

Saunders v. Anglia Building Society [1971] A. C. 1004.

The Cause

1. The plaintiff claims from the defendant specific performance of the sale and purchase agreement of 20 April 2006 wherein the parties had agreed to the sale and purchase of 1927 square metres of the defendant's land described as CT 36633 being Lot 2 on DP 8712 containing an area of 7596 square metres situated in the district of Savusavu.
2. The plaintiff says that after entering into the agreement he started cultivating the land and thereafter the defendant subdivided the land into two Lots which are now Lots 5 and 6 of the approved plan and sold the same at a higher sum to two different people. The plaintiff says that he placed the caveat on the said Lots and he wants the two Lots to be transferred to him together with damages which he suffered due to the breach by the defendant.
3. The defendant denies that he ever agreed to the sale of 1927 square metres but only an area of 630 square metres was agreed to be sold. It is alleged that the plaintiff took advantage of his illiteracy and got him to sign an agreement for sale of 1927 square metres of land. He states that the value of the land of 1927 square metres is now \$40,000 and the plaintiff's placement of a caveat over his proposed interest is causing him loss and damage. He thus claims that a sum of \$40,000 with interest be paid by the plaintiff.
4. At the trial, Mr. Diven Prasad, counsel for the 1st defendant advised the Court that he will not pursue the counter-claim. I therefore grant leave that the counter-claim be withdrawn and struck out.

The Agreed Facts and the Issues

5. The parties have agreed to the following:
 1. *The plaintiff is the registered proprietor of Certificate of Title No. 36633, known as Natuvu, containing 7596 square metres in the district of Savusavu in the Island of Vanua Levu, Lot 2 DP 8712.*

2. *There is in existence a sale and purchase agreement dated 20 April 2006 between the plaintiff and the defendant which states that the defendant would sell and transfer 1927 square metres of the said land to the plaintiff for a sum of \$4,000.*
3. *The defendant has undertaken a subdivision of the said Certificate of Title into various lots.*
4. *A sum of \$2,000 has been received by the defendant as payment towards the purchase price, the area of sale being in dispute.*
6. The parties require the following issues to be decided by the Court:
 1. *Did the defendant understand the contents of the sales and purchase agreement dated 20 April 2006 at the time of the execution?*
 2. *Was the defendant tricked into executing the sale and purchase agreement?*
 3. *Is the plaintiff entitled to the area in terms of the sale and purchase agreement?*
 4. *Is the plaintiff entitled to reliefs as prayed for being specific performance of the agreement?*
 5. *Is the plaintiff entitled for damages for breach of contract?*
 6. *Has the defendant incurred any loss and damages by the actions of the plaintiff?*
7. The last issue from paragraph 6 above is struck out as the defendant does not wish to proceed with his counterclaim.

The Evidence, the Law and the Analysis

8. The first 3 issues can be summarized to require the Court to determine whether the defendant had voluntarily agreed to sell to the plaintiff an area of 1927 square metres of his land to the plaintiff?
9. The plaintiff in this respect testified that he had a land dealing with the defendant. He knew the defendant from a very long time. The defendant used to come to him. He is a market

vendor. The defendant used to be a telephone exchange operator. One day the defendant came to him and asked him for \$2,000. He gave him that amount of money.

10. The next day the defendant showed him the land which he agreed to buy. The land that was shown to him was beside his land. He went to the site with his son, the defendant, his wife and daughter. He showed him the land and also gave him a copy of the plan which the plaintiff tendered as his first exhibit. The plaintiff says that the defendant showed him the area which he was going to sell to him and in his estimation that was about $\frac{1}{2}$ an acre. The area was partly hilly and partly boggy. The defendant told him the price and said that he would sell at \$4,000.
11. The plaintiff stated that one can build on only one side of the land because down the slope the land is boggy. He agreed to the sale. The defendant told him that he had already subdivided the land. From there they went to the market.
12. The defendant went to have the agreement prepared. Apart from the plan he did not have the title or the details of the title. He did not go to have the sale and purchase agreement prepared. The defendant went alone. He took the plaintiff's name and father's name. He does not know where the agreement was prepared but when the defendant came back, both of them went to Savusavu Court to Mr. Peter Howard to sign the agreement.
13. Mr. Howard was in Court. His son had gone with him. They went in the Court in the public gallery. The agreement was presented to Mr. Howard who explained to him in Fijian and explained to the defendant in English and asked whether they both understood what they were signing, they replied that they did and then both of them executed the agreement.
14. The plaintiff says that there was no force or threat on anyone to sign the agreement and Mr. Howard spent about $\frac{1}{2}$ hour with them. A copy of the agreement was given to him. Subsequently he entered the land, cleaned the area, dug the drain and started cultivating. He planted dalo, chillies, and bitter gourd. He worked on the land for one month.

15. One day he was in the market when one taxi driver came and told him that his land was being excavated by the defendant. He went in his car to see the land. One Sushil from Savusavu was standing near the Excavator. He knows the boy.
16. He asked Sushil why he excavated the land and he answered that the defendant had sold the land to him. All his plants had been graded. He went and reported the matter to the police who asked him to issue civil proceedings. When he asked the defendant what happened, he said that he sold half of the land he bought to that Sushil.
17. One Seremaina Ovini testified on behalf of the plaintiff. He stated that he knows the defendant. He has a business in Savusavu. He operates a restaurant and a fish market within the market. He used to be a telephone operator at PNT, now telecom. He knows him socially. They used to go to the same planters club. In the club people of different races came. Most people spoke in English and the defendant also spoke in English. In his knowledge he is a well conversant person. He used to go to planters club most weekends and he has seen him conversing in English. He speaks to the defendant in English.
18. I must say that I do not find any reason to disbelieve the evidence of the plaintiff and his witness in totality. On the other hand, the defendant was very inconsistent in his evidence and it was clear and apparent that he was lying in Court. I will draw the various inconsistencies in his evidence to indicate how the defendant's evidence is concocted and unreliable to an extent that I will not hesitate to say that his dishonesty was at its highest.
19. In his statement of defence, the defendant, stated that *"the plaintiff negotiated with the first defendant to purchase a piece of land when the sub-division will be complete and he pointed out to a piece of land which was reasonable but small in size and the first defendant agreed to sell it to him at \$4,000"*.
20. In his oral evidence he denied the sale and purchase agreement initially and stated that there was nothing in writing. Then he stated that he was not selling the land for \$4,000 but was selling for \$40,000. He also stated that the plaintiff never agreed to buy the land at \$40,000.

21. The defendant is so determined to save his land out of greed because he has now realized that he can fetch more prices for it that he is confusing himself to find the right answer to suit him.
22. He blamed his solicitors by saying that he never stated that the land was agreed to be sold at \$4,000. I believe that the defendant is lying now and that he told his lawyers that the sale price of the land was \$4,000.
23. Another inconceivable evidence is when the defendant stated that the agreement was done by trick. He was forced to sign the agreement. He was forced out of the house and forcefully taken to sign the agreement but he did not report the matter to the police. He said that he was not explained anything. When a copy of the sale and purchase agreement was given to him, he did not read it. He did not take any action.
24. I accept that the defendant understands English. If he was not explained the agreement, he should have asked Mr. Howard to explain it to him. If Mr. Howard did not explain the document to him, he should have refused to sign the same and looked for a lawyer who would do justice to him.
25. There is no dispute that Mr. Howard witnessed the agreement. If the defendant was forced out of the house, he ought to have reported the matter to the police and Mr. Howard or physically refused to sign and asked for help of his family and friends.
26. It is not a surprise that the defence does not mention anything to the effect that the defendant was physically forced out of the house to sign the agreement. I say this because I find that this is again something that the defendant came up with during his cross-examination to avoid the claim.
27. In fact it is not disputed that the defendant is a telephone operator and that he at least knows how to read the numbers. If he was not read out the agreement, at least he could have seen the numbers and made out what area of land was sold to him and at which price.

28. I see no reason why Mr. Howard would encourage a forced deal. He had neither any pecuniary interest in the subject matter nor any conflict of interest with any party. At least none has been alleged against him.
29. Any prudent person would ask the lawyer to explain the agreement on a land deal especially if he is selling a portion of it only, the price, the time for payment and alike. The defendant should have exercised care and enquired from Mr. Howard of all these details and if he did not he was being careless and the defence of non est factum I am afraid cannot assist him.
30. The general rule is that a party of full age and understanding is normally bound by his signature to a document whether he reads or understands it or not: *Fiji Development Bank v. Navitalai Raqona* [1984] 30 FLR 151.
31. The House of Lords in *Saunders v. Anglia Building society* (1971) A. C. 1004 stressed that the defence of non est factum was not to be allowed where a person of full age and capacity had signed a written document embodying contractual terms. The case also spells out that the plea of non est factum could not be available to anyone who signed without taking the trouble to find out at least the general effect of the document.
32. I do not find that the defendant was under any special disability. He for himself could read the numbers and understands English. He was mentally and physically sound. He ought to have required the solicitor to explain the document to him and if he has not he is bound by his signature. The defence of non est factum has not been established by him.
33. The defendant also stated in his evidence that he took the sale and purchase agreement to his daughter and she remarked that he was selling a big piece in just 4,000. That is the time, the defendant should have acted and moved to cancel the agreement but he took no action because I find that he was a voluntary party to the sale and purchase agreement. He was not forced and he understood what he was signing. He is a person with sound mind and full capacity and he cannot on the facts of this case blame anyone when he executed the agreement. He must now be prepared to honour the bargain for which he is bound in law to do so.

34. The plaintiff stated that he was given a plan of the land he was buying. He exhibited that plan. The plan shows an area of 1927 square metres. On a balance of probability I find that the defendant had given the plan to the plaintiff for the plaintiff to have possession of the same.
35. After the subdivision, the 1927 square metres was subdivided into Lots 5 and 6 of the approved survey plan. The plan was approved on 16 October 2007. Lot 5 consists of 915 square metres and Lot 6 consists of 807 square metres. They total to 1722 square metres, an area close to the agreed portion to be sold. It is understood that after a proper survey, some land can be lost to other Lots for another sizeable Lot to be created, lost to easements and access.
36. I find that the agreed land to be sold was Lots 5 and Lot 6 of the approved plan.
37. It is not disputed that the plaintiff never had the title to the land and that substantiates the evidence that the defendant had gone and prepared the agreement where the correct reflection of the property of the defendant is described. The plaintiff would not be in possession of the land details to be endorsed in the sale and purchase agreement.
38. The defendant says that he went to Messrs Gibson & Company and asked it to cancel the sale and purchase agreement and to Messrs Kohli & Singh's to refund the deposit of \$2, 000. There is no independent evidence to this effect and I find that the defendant is again concocting evidence. If that was the true state of affairs, he would have said that in his defence at least.
39. In the sale and purchase agreement, one had to endorse what portion of the land the defendant was selling since he was not selling the entire land to the plaintiff. At least the defendant ought to have known that. Since the land was not subdivided and specific lots worked out at the time the sale and purchase agreement was entered into, the only possibility is that the plaintiff is telling the truth that the plan which was given to him had an area of 1927 square metres and that was agreed to be sold and hence endorsed in the agreement. The sale and purchase agreement could not have anticipated that the subdivision will contain separate Lots of specific acres because it was prepared before the

survey. So it is out of question that an area of 630 square metres could have been agreed to. The survey was conducted in June 2006 so the parties had pointed out to an area on the land which represented 1927 meter squares to be sold. There cannot be any other possible explanation. How else would the plaintiff know that the defendant's land has a Lot demarcated as Lot 2 containing 1927 square meters?

40. Then contrary to his statement of defence and his examination in chief and cross-examination, the defendant then changes his story and stated that on the very first day he agreed to sell the plaintiff an area of 630 square metres. If the area was specified than his pleading that he pointed out a small portion of land to be sold is in conflict.
41. If the area of 630 square metres was agreed to by the plaintiff and the defendant to be sold then the defendant should have ensured that that portion was correctly reflected in the sale and purchase agreement and if he did not ensure that he cannot avoid his obligations now.
42. Before the plan was approved, and the Lots allocated, the defendant had breached the agreement by selling Lot 5 to one another person on 14 August 2006. At that time even the survey was not approved.
43. It follows that the defendant never had the intention of carrying out his part of the agreement which he entered into voluntarily.
44. The defendant says that he has never seen the document that the plaintiff produced as his first exhibit which was a plan of part of the land that the defendant had agreed to sell it to him. When I compare that exhibit containing the area of 1927 square metres, it resembles Lots 5 and 6 of the approved plan. The exhibit does not appear to be a document that is self generated or a sham. It indeed is a plan for Lot 2 containing an area of 1927 square metres which was converted by the defendant into two Lots so that he can generate more money and which I find was an afterthought of the sale and purchase agreement entered between the parties.

45. The plaintiff's denial that he ever saw that exhibit is incredible evidence and in light of the many concocted stories he has told the Court, I do not find any basis to rely upon his evidence.
46. From the oral evidence, I find that the defendant voluntarily agreed to sell an area of 1927 square metres to the plaintiff which after subdivision represents Lots 5 and 6 of the approved plan. The defendant has thus not established the defence of non est factum and must now complete his part of the bargain because he breached the sale and purchase agreement.
47. The next issues are whether the plaintiff is entitled to the remedy of specific performance and damages. I find the answer in the affirmative.
48. There is oral evidence from the defendant that there is caveat placed on Lots 5 and 6 for which specific performance is sought.
49. For the breach of the agreement I order that the defendant specifically performs his part of the bargain by transferring the said Lots 5 and 6 to the plaintiff. There is uncontradicted evidence that the plaintiff did suffer monetary loss as a result of the defendant breaching his agreement in that he lost his plants from his field. He had 500 dalo plants; one plant cost \$1.00, chillies and bitter gourd. The value of the chillies and the bitter gourd was not given to me in evidence but in the whole a sum of \$2,000 is a reasonable amount of damages.
50. The sale and purchase agreement provides by clause 11 that if the vendor makes default in the performance of any stipulation or agreement, the defendant "*may claim damages in addition to seeking specific performance of the agreement*".
51. The defendant therefore has to transfer the Lots 5 and 6 without the further balance purchase price of \$2,000 which was to be paid to him. This sum is deducted as damages for breach of the agreement.
52. The plaintiff is definitely entitled to costs from the defendant who has without any basis been defending the claim.

53. The defendant's tenor of the evidence is that he would have otherwise got \$46,000 for Lots 5 and 6. I am not guided by sympathy and emotion. My duty is to see whether the parties had freely and voluntarily entered into an agreement. The agreement I find was validly and voluntarily entered into for a consideration of \$4,000. Comparatively, this is a small sum to that of \$46,000 but that is what the parties had agreed to and after having discovered that the land could sell for more than the happily agreed price of \$4,000, the defendant has no right to renege the agreement.

Final Orders

54. In the final analysis, I find that the sale and purchase agreement dated 20 April 2006 was voluntarily entered into by the parties and that the defendant has breached the agreement. I thus order specific performance of this agreement without any further payments from the plaintiff.

55. The survey has changed the agreed area of the land to be sold but the agreement is still capable of being performed in that the approved subdivision now contains Lots 5 and 6 which resembles the area which was agreed to be sold.

56. I thus order that the defendant transfers Lots 5 and 6 within the next 3 months without any further payment from the plaintiff. If there is any failure by the defendant to carry out the transfers, I order the Deputy Registrar to execute the transfer of Lots 5 and 6.

57. The plaintiff shall have costs of this proceeding in the sum of \$2500 to be paid within 21 days.

Anjala Wati

Judge

22.08.2013

To:

1. Mr. A. Sen, counsel for the plaintiff. 2. Mr. D.Prasad, counsel for the defendant. 3. File: HBC 62 of 2007.