

IN THE HIGH COURT OF THE REPUBLIC OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 156 OF 2013

BETWEEN : **ANAND KUMARAN** of Malomalo, Sigatoka Farmer as Sole
Executor in the Estate of Vadivelu aka Wadiwellu
Goundar of Malomalo, Sigatoka, Fiji, Farmer, Deceased
Testate.

Plaintiff

AND : **MERIDIAN MANAGEMENT LIMITED** a limited liability
company having its registered office at Lot 20, Waqadra
Industrial Subdivision, Nadi

Defendant

Counsel:

Mr R Singh for the plaintiff

Ms Barbara Doton for the defendant

Date of Hearing : 23 May 2014

Date of Judgment : 22 August 2014

J U D G M E N T

Introduction

1. This is an application for summary judgment filed on 7 November 2013 by plaintiff, Anand Kumaran. The plaintiff has filed three affidavits in connection with his application. One is affidavit in support sworn on 29 October 2013. This annexes Exhibits 'A'-1', another affidavit in reply (to the affidavit of defendant in response)

sworn on 10 February 2014 and the supplementary affidavit filed on 11 June 2014.

2. In his application the plaintiff seeks the following orders;

(a) *That the Defendant pay the sum of \$300,000.00 (**THREE HUNDRED THOUSAND DOLLARS**) to the Plaintiff.*

(b) *Order for interest to be paid at the rate of 12% be calculated on the sum of \$300,000.00 (**THREE HUNDRED THOUSAND DOLLARS**) until date of payment applied pursuant to clause 12 of the Loan Agreement entered on the 10th June 2005.*

(c) *That the defendant within 14 days of an order being made do all things necessary to subdivide and obtain two separate residential lots from the land comprised in Crown lease Number 5917769 (hereinafter referred to as the said land) in accordance with clause 3 of the Sale & Purchase Agreement entered on the 10th of June 2005.*

(d) *That costs of this application on indemnity basis.*

3. The application is made pursuant to Order 14 of the High Court Rules 1988 (HCR) and to the inherent jurisdiction of the court.

4. Defendant, MERIDIANT MANAGEMENT LIMITED (MML) opposes the application. It filed affidavit of Mohammed Altaaf (Director of MML) sworn on 13 December 2013 in opposition. This affidavit exhibits no documents.

5. In addition both parties filed their respective written submissions.

Background

6. The Plaintiff brought this action as Executor and Trustee in the Estate of his father, Vadivelu (hereinafter referred to as 'the said deceased'). He has been granted a probate. The Plaintiff seeks balance of the purchase price and interest and compliance with other conditions in respect of the sale of the said land by the deceased to the Defendant.

7. I have gathered the following facts, which are not in dispute, from the pleadings and affidavits. They are as follows:

- a) That the said deceased and the defendant entered into a Sale and Purchase Agreement (SPA) on the 10th of June, 2005 for the purchase of the said land in the sum of \$305,000.00.
- b) The same day the defendant also entered into a Loan Agreement (LA) with the Plaintiff for the payment of the sum of \$300,000.00 for the purchase of the said land from the Plaintiff.
- c) To further secure the payment of the balance sum of \$300,000.00 the Defendant executed a Mortgage in favour of the said deceased.
- d) The said Mortgage was discharged in June 2006 and on 29 June 2006 another Loan Agreement (addendum) was entered into between the deceased and the Defendant.
- e) In July 2006 the said land was transferred to the Defendant and the Defendant has now surrendered the Lease for the said land and obtained a development lease for the said portion of the land. The defendant has possession, control and occupation of the said land. The said land now is covered under a Hotel/Residential Development Lease known as Crown Lease 591776.
- f) The defendant has paid a total of \$5,000.00 and the Plaintiff alleges that the sum of \$300,000.00 remains to be paid.
- g) The defendant does not disagree that it entered into the aforementioned SPA and LA.
- h) The defendant does not allege that payment under the SPA and the LA has been made.

8. The Statement of Defence raises two points of law, i. e. illegality and statute bar. There are as follows:

- a) The SPA is null and void and unenforceable as there is no consent granted by the Director of Lands to the SPA pursuant to Section 13 of the Crown Land Act.
- b) The Plaintiffs actions is statute barred pursuant to Section 4 (1) the Limitation Act as monies were payable under the L A on or before 31st of December 2005.

The Legislature & Principles

9. The plaintiff may, under HCR O.14 r.1, apply for summary judgment against the defendant on the ground that the Defendant has no defence to a claim. HCR O.14 deals with summary judgment. O.14 r.1 provides that:

*“1.-(1) Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has given notice of intention to defend the action, the plaintiff may, **on the ground that that defendant has no defence to a claim included in the writ**, or particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the court for judgment against that defendant.*

(2) ...

(3) ... (Emphasis added).

10. Under Ord. 14, r.3 (HCR) the plaintiff may obtain summary judgment against the defendant on the claim or part. That rule provides that:

*“3.-(1) **Unless** on the hearing of an application under rule 1, either the Court dismisses the application or **the defendant satisfies the Court with respect to the claim or the part of a claim, to which the application relates that there is an issue or question in dispute which ought to be tried** or there ought for some other reasons to be a trial of that claim or part, **the Court may give such judgment for the plaintiff against that defendant on that claim or part** as may be just having regard to the nature of the remedy or relief claimed”*
(Emphasis added).

11. Fiji Court Appeal in **Carpenters Fiji Ltd v Joes Farm Produce Ltd** [2006] FJCA 60; ABU00 19U.2006S (10 November 2006), laid

down the well-established principles in relation to the entry of summary judgment under para 21 as follows:

- (a) *“The purpose of 0.14 is to enable a plaintiff to obtain summary judgment without trial if he can prove his claim clearly and if the defendant is unable to set up, a **bona fide** defence or raise an issue against the claim which ought to be tried.*
- (b) *The defendant may show cause against a plaintiff’s claim on the merits e.g. that he has a good defence to the claim on the merits or there is a dispute as to the facts which ought to be tried or there is a difficult point of law involved.*
- (c) *It is generally incumbent on a defendant resisting summary judgment, to file an affidavit which deals specifically with the plaintiff’s claim and affidavit and states clearly and precisely what the defence is and what facts are relied on to support it.*
- (d) *Set off, which is a monetary cross claim for a debt due from the plaintiff, is a defence. A defendant is entitled to unconditional leave to defend up to the amount of the set off claimed. If there is a set off at all, each claim goes against the other and either extinguishes or reduces it **Hanak v Green** (1958) 2 QB 9 at page 29 per Sellers LJ.*
- (e) *Likewise where a defendant sets up a **bona fide** counter claim arising out of the same subject matter of the action, and connected with the grounds of defence, the order should not be for judgment on the claim subject to a stay of execution pending the trial of the counterclaim but should be for unconditional leave to defend even if the defendant admits whole or part of the claim. **Morgan and Son Ltd -v- Martin Johnson Co** (1949) 1 K 107(CA). See 1991 The Supreme Practice Vol 1 especially at pages 146, 147, 152 and 322.”*

12. The supreme Court Practice 1999 edition at paragraph 14/04/05 page 173 states as follows in respect of the requirements of the affidavit to be filed in defence to the application for summary Judgment;

‘The Defendants affidavit must “condescend upon particulars” and should as far as possible deal specifically with the Plaintiff’s claim and affidavit, and state clearly and concisely what the defence is, and what facts are relied upon to support it.’ (Emphasis added).

Determination

13. The plaintiff applies for summary judgment for the payment of the sum of \$300,000.00, being the balance purchase price of the said

land from the plaintiff and specific performance in accordance with clause 3 of the SPA entered on the 10th of June 2005.

14. The defendant opposes summary judgment being entered against it on the ground that, i) the claim is statute barred, ii) agreements are illegal, iii) the plaintiff has failed to comply with procedural requirements of Ord. 14 and iv) inadmissibility of evidence. It is to be noted that all four defences raised by the defendant are points of law, and no factual issues raised. I will deal with each one of defences in turn.

Statute bar

15. Firstly, let me take the issue of statute bar. The defendant submits that the plaintiff claims payment of money under the LA dated 10 June 2005 and the claim against the defendant would be statute barred under the Limitation Act. The defendant relies on s. 4 (1) & 12 of the Limitation Act.
16. In contrast, the plaintiff's counsel Mr Rupesh Singh submits that, the claim is not for money owed under simple contract, rather it is an action for the payment of monies owed under the sale and purchase agreement for the sale of the said land. S. 4 (1) of the Limitation Act has no application to the plaintiff's case, and the relevant section applicable is s. 8 of the Limitation Act.
17. S. 4 (1) of the Limitation Act, so far as material provides:

*'4-(1) the following **actions shall not be brought after the expiration of six years from the date on which the cause of action accrued**, that is to say-*

(a) Actions founded on simple contract or on tort;

(b) ...;

(c) ...;

(d) ...;' (Emphasis added).

18. To determine whether or not the plaintiff action is statute barred, it is pertinent to read and understand the terms of the L A. Cl. 2 of the agreement provides:

'The parties hereby agree that interest shall be payable on the loan backdated to 1st April 2005. Simple interest at the rate of 9% per annum is payable on the loan from 1st of April 2005 to 31st December 2005. Interest of 12% would be payable on \$100,000.00 which will be the balance of loan owed as at 1st January 2006 from 1st January 2006 till full repayment of the loan.

It is hereby agreed that \$12,800.00 is the interest from 1st April, 2005 to 31st December 2005.'

19. While clause 2 of the L A states about the interest rate payable by the Lender, clause 3 (i) explains the terms of repayment as follows:

'Repayment

- (a) The borrower may repay the loan only as provided by this agreement.
- (b) The borrower will repay the loan on or before 31st December 2006, as follows:
 - (i) \$200,000.00 on or before 31st December 2005.
 - (ii) \$100,000.00 on or before 31st December 2005
- (c) The parties hereby agree that the borrower has paid the sum of \$12,000.00 being the major portion of the interest that was payable to 31st December 2005 and that the sum of \$800.00 remains to be paid. The lender acknowledges receipt of \$12,000.00. The balance of \$800.00 should be paid on or before 31st August 2005.
- (d) Subject to paragraph (c) and (d) above, the borrower may, during the term of this Agreement at its absolute discretion pay any amount as a repayment of the principal loan amount and is free to repay the loan at any time before the final payment date without any penalties.
- (e) **In any event the whole loan amount is to be paid by the Borrower to the Lender on or before the 31st December 2006.'**
(Emphasis added).

20. The plaintiff commenced this action against the defendant on 5 September 2013. The last date, according to the L A, for the whole amount to be paid is 31 December 2006. The plaintiff

claims the sum of \$300,000.00 from the defendant. If it were a claim founded on simple contract, the plaintiff should have brought the action within 6 years of the date on which the cause of action accrued i. e 31 December 2006. Pursuant to s. 4 (1) (a) of the Limitation Act, an action founded on simple contract must not be brought after the expiration of six (6) years from the date on which the cause of action accrued. Cause of action would accrue, if it were a claim on simple contract, to the plaintiff from 31 December 2006, being the last date to settle the whole amount. Since the action is commenced on 5 September 2013, the defendant says the claim is statute barred.

21. Interestingly, Mr Singh argues that, the claim is not for the money owed under simple contract, but it is a claim for the recovery of proceeds of sale of the land. As such the relevant section applicable under Limitation Act is s.8. That section provides:

“8 (1) no action shall be brought to recover any principal sum of money secured by a mortgage or other charge on property or to recover proceeds of the sale of land, after the expiry of twenty years from the date when the right to receive the money accrued” (Emphasis added).

22. The deceased and the defendant entered into the SPA on 10 June 2005 for purchase of the land for consideration of \$305,000.00, paid a deposit of \$5,000.00, at the same time entered into the LA in relation to the balance consideration of \$300,000.00, this was further secured by a Mortgage executed by the defendant in favour of the deceased and the mortgage was later discharged but without payment, In July 2006 the land was transferred to the defendant and the defendant has now obtained a development lease for the portion of the land. But the balance consideration sum still remains unpaid.

23. The recitals of the LA states as follows:
- (A) **'The Borrower is desirous of purchasing the Lender's Native Land No. 235541 for \$ 305,000.00 and paid a deposit of \$5,000.00 towards the said purchase.**
 - (B) The Borrower and the Lender have agreed that **the balance of \$300,000.00 to be treated as a Loan** by the Lender to the Borrower in terms of this Agreement.
 - (C) The Borrower and the Lender have entered into a separate Sale & Purchase Agreement in respect of the Crown Lease No.235541.
 - (D) Whereas the parties had entered into a Loan Agreement dated 30th September 2004, which said agreement is being cancelled and this Agreement shall now regulate the arrangement between the parties in respect of the loan.' (Emphasis added).
24. According to the recital of the LA it is abundantly clear that the defendant had intended to purchase the deceased's Native Land for the consideration of \$305,000.00 and had paid a deposit of \$5,000.00 and the balance had been treated as a loan. This is not an ordinary loan agreement, where the borrower will get the money from the lender. Here, that is not the case. The balance consideration in relation to the sale of land had been treated as a loan and secured by the L A. In my judgment, therefore the plaintiff claim is not founded on simple contract as argued by the defendant, but it is a claim for recovery of proceeds of the sale of land. So, the relevant provision of the Limitation Act applicable to the plaintiff's claim is section 8. Pursuant to section 8 of the Limitation Act action to recover proceeds of the sale of land could be brought within 20 years from the date when the right to receive the money accrued. The plaintiff has brought this action well within the limitation period. As such, the defence that the claim is statute bar misconceived and therefore fails.

Illegality

25. The second objection to the claim is that the plaintiff's claim is based on an illegal contract. The objection of illegality appears to be an alternative objection to the claim. The defendant submits that, in the event that the Court finds that the Plaintiff's application is not statute barred, the Plaintiff still cannot claim

any monies from the Defendant as its claim is based on an illegal contract.

26. It is the contention of the defendant, that Crown Lease No. 235541(in relation to which the SPA and subsequent transfer documents were made) states that it is a Protected Lease. This being the case pursuant to section 13(1) of the Crown Land Act, it shall not be lawful for the lessee (the deceased) thereof to deal with the land.
27. Section 13 (1) of the Crown Land Act (now State Land Act) provides:

“it shall not be lawful for the lessee thereof to alienate or deal with the land comprised in the lease or any part thereof, whether by sale, transfer , sublease or in any manner whatsoever, nor to mortgage, charge or pledge the same without the written consent of the Director of Lands first had and obtained, nor, except at the suit or with the consent of the Director of Lands, shall any such lease be dealt with by any court of law or under the process of any court of law...”
(Emphasis added).

28. Following the SPA, the LA and subsequent Mortgage and instrument of transfer the defendant has become and is now the owner of the property.
29. The argument that the dealings were not consented by the Director of Lands is untenable. All the dealings affecting the land comprised in the Crown Lease No. 235541 had been consented by the Director of Lands. The SPA (Plaintiff’s Exhibit- C) bears Director of Lands’ Endorsement of Consent. The consent to this was given on 15 September 2005. At hearing, counsel for the defendant admitted that there was consent to the SPA when pressed by the court.

30. The Mortgage executed by the defendant (Plaintiff's Exhibit E) to secure the balance consideration has been admitted by the defendant. The defendant in its affidavit of Mohammed Altaaf ,at para 8, admits entering into a mortgage as alleged by the plaintiff and further deposes that, the Crown Lease was transferred to the defendant pursuant to instrument of transfer executed by Vadivell for the transfer of the said land. The mortgage was consented by the Director of Lands on 15 September 2005. The mortgage instrument also bears Director of Lands' endorsement of consent. Therefore the argument that the mortgage was not consented by the Director of Lands is also untenable and bound to fail.
31. The defendant admits that, the LA was entered between the plaintiff and the defendant on 10 June 2005 together with the SPA. But, submits, that although the SPA purports to bear the consent of the Director of Lands there no consent for the LA. According to the defendant the LA is dealing as it facilitated the sale and was used as consideration.
32. The LA only secures the balance payment of the consideration. In my opinion it is not a dealing with the land. In any event the LA is referred to in the SPA. Clause 2. b) of the SPA states as follows:
- 'The balance purchase price of Three Hundred Thousand Dollars (\$300,000.00) is being financed by the Vendor and shall be paid by the Purchaser to the Vendor in terms with the Loan Agreement between the parties of even date'.**
33. The Director of Lands had consented to the SPA. He had consented to the entire terms of the SPA. When giving consent, the Director of Lands knew that there is a loan agreement between the parties in respect of the balance purchase price of the land. Therefore the loan agreement was also consented by the Director of Lands. In my judgment, therefore it would be absurd to argue that the LA was not consented by the Director of Lands. The argument that the LA

and subsequent addendum were not consented by the Director of Lands is also untenable and doomed to fail.

Consent to institute proceedings

34. At this point, I must turn to the contention that there is no consent to institute legal proceeding pursuant to section 13 (1) of the State Land Act. It is true that the court should not deal with any protected lease. Section 13 (1) enacts: - ... ***'nor, except at the suit or with the consent of the Director of Lands, shall any such lease be dealt with by any court of law'*** ... The issue of consent to institute proceedings was not raised at the oral hearing. However, the defendant in its written submission raised that issue. The plaintiff has obtained to institute the proceedings against the defendant. The Director of Lands has granted his consent to institute proceedings by letter dated 8 August 2013. In that letter Acting Director of Lands states:

...

**'RE: CONSENT TO INSTITUTE LEGAL PROCEEDINGS
CROWN LEASE NO. 235541 LOT 25 DP 4724**

We refer to your 4 October 2012 letter whereby you have sought consent to institute legal proceedings against Meridian Management Limited to recover the sale price of the transfer.

Consent is hereby granted for you to commence proceedings.

However, please do note that Crown Lease No. 235541 has been surrendered following the transfer of the same to Meridian Management Limited.

Sgd/Acting Director of Lands'

35. A copy of the above consent letter has been exhibited to the supplementary affidavit of the plaintiff filed on 11 June 2014 (Exhibit A) the same has been served on the defendant's solicitors on 6 June 2014. The court could accept proof of consent at any

time prior to making an order, see **ANZ Banking Group Ltd v Chand** [1992] FJHC 78; [1992] 38 FLR 61.

36. It is apparent that the plaintiff has obtained the Director of Lands' consent to commence proceedings against the defendant to recover the sale price of the transfer of the Crown Lease No. 235541. In the circumstances, the argument the plaintiff did not obtain consent of the Director of Lands to institute proceedings is groundless and accordingly I reject that argument as well.

Procedural Objection

37. I now return to the procedural objection raised by the defendant. The defendant submits, that the plaintiff has set out all the particulars and facts however has made no reference at all to the statement of claim therefore the application should be refused as there is no due verification of the claim. The defendant tempts to argue that there has been non-compliance of Ord. 14 of the HCR by the plaintiff.
38. The plaintiff may, after the defendant has given notice of intention to defend the action, apply for summary judgment on the ground that that defendant has no defence to a claim included in the writ (Ord. 14, r.1). The plaintiff has filed his affidavit in support of his application for summary judgment. Under Order 14 Rule 2 of the H C R, an application for summary judgment must be supported by an affidavit verifying the facts on which the claim, or part of a claim to which the application relates is based and stating that the deponent's belief there is no defence to the claim or part, or no defence except as to the amount of any damages claimed.
39. It is to be noted that the plaintiff's supporting affidavit clearly verifies the facts on which his claim is based and it clearly verifies the allegations in the statement of claim. Furthermore, at para 19.4 of the affidavit in support the plaintiff deposes that:

‘For the reasons as aforesaid I verily believe that there is no defence to my claim and seek orders in terms of the summons filed herewith.’ (Emphasis provided).

40. It is seen that the plaintiff’s affidavit in support verifies the allegations in the statement of claim and states his belief that the defendant has no defence to the claim. Therefore the supporting affidavit of the plaintiff complies with the requirements of Ord. 14, r.2 of the HCR. In my judgment, therefore, there is no substance in the argument that the plaintiff has failed to comply with the requirements of Ord.14, r.2 in filing his affidavit in support. I reject that argument as well.

Inadmissibility of Evidence

41. Another argument advanced by the defendant against the summary judgment is that, the plaintiff has annexed onto his affidavit copies of Sale & Purchase Agreement, Loan Agreement and Addendum as evidence of his claim against the Defendant, however the said documents cannot be admitted as evidence as they are contrary to the requirements under the Stamp Duties Act. Counsel for the defendant relies on section 41 of the Stamp Duties Act. That section provides:

‘except as aforesaid no instrument executed in Fiji or relating (whosoever executed) to any matter or thing done or to be done in any part of Fiji shall except in criminal proceedings be pleaded or given in evidence or admitted to be good, useful or available in law or equity unless it is duly stamped in accordance with the law in force at the time when it was first executed.’ (Emphasis added).

42. Presumably, according to section 41 of the Stamp Duties Act, no instrument executed in Fiji shall be given in evidence unless it is duly stamped in accordance with the law in force at the time when it was first executed.

43. Surprisingly, the objection that the documents namely the SPA dated 10 June 2005, the LA dated 10 June 2005 and the addendum to the LA dated 29 June 2006 were not duly stamped by the Commissioner of Stamp Duties was not raised in the affidavit in opposition filed by the defendant. This objection was only taken by the defendant during the hearing.

44. It will be noted that the documents can be stamped on the direction of the court. Section 39 of the Stamp Duties Act provides that:

'39.-(1) on the production of an instrument chargeable with stamp duty as evidence in any civil judicature, the officer whose duty it is to read the instrument shall call the attention of the judge or magistrate to any omission or insufficiency of the stamp thereon and, if the instrument is one which may legally be stamped after execution, it may, on payment to such officer of the amount of the unpaid duty and the fine payable by law, be received in evidence, saving all just exceptions on other grounds'

45. In **Carpenters Fiji Ltd v Prasad** [2012] FJHC 940; HBC26.2005, the High Court dealt with a similar issue where the issue of stamped documents were raised after trial and at the written submission stage. The High Court stated under paras 19 & 22 that:

*"19) though the Plaintiff's Counsel made no effort to submit any case law or authorities empowering Court to accept such documents even after trial, upon being duly stamped, the Privy Council case of **Njie and Others vs Amadou Cora (The Gambia)** [1997] UKPC 41 (28th July 197) at paragraph 7 as per Lord Clyde states as follows (with Lord Goff of Chieveley, Lord Griffiths, Lord Jauncey of Tulichettle, Lord Steyn agreeing);*

*"7 Furthermore it does not seem to their Lordships that the Court was correct in believing that it had no discretion but to reject the evidence. **No doubt it is of importance that the proper duty should be paid on all instruments which are to be given in evidence but where the matter is open to remedy it is preferable that the duty be paid with any due penalty so as to enable the ends of justice to be served than that the courts should be deprived of evidence which might***

be material to a proper resolution of the case which is being tried.

The powers of the Court of Appeal in Gambia appear to be sufficiently wide to enable the omission to be rectified without the necessity of rejecting all the documents, which were not duly stamped. Precisely how as matter of procedure the court should decide to achieve a remedy in such circumstances must be a problem for the Gambian courts to decide as a matter peculiarly within their own jurisdiction. So far as the present case is concerned the documents had already been admitted in evidence, albeit contrary to the Act, but a late stamping under the eye or at the order of the Court of Appeal could have given a retrospective validation of what had been done and any possible rejection of the evidence obviated. The documents have now been stamped and their Lordships have had no hesitation in taking them into consideration.”

“22) In the case of Prabha Wati v Nardeo Mishra HBC 37 of 2003 (unreported judgment of 21/04/2010 of this Court) this Court discovered that a particular document was not stamped in the court of writing the judgment, and consequently the judgment was differed till the stamp duty and penalty was recovered and the document duly denoted. However, it was the original document that was produced in evidence in that case and the counsel graciously concede their error in not bringing the non-stamping to the attention of Court. In that case this Court advised the Deputy Registrar in writing of the duty cast on the officers of Court by section 39 and other provisions of the Stamp Duties Act, and to train the officers accordingly.”

46. After the matter was fixed for judgment, the plaintiff on 11 June 2014 has filed a supplemental affidavit annexing a copy of stamped L A and stamped SPA marked as Exhibit ‘B’ and Exhibit ‘C’ respectively. Since the documents (SPA & LA) are now stamped, they may be now admitted in evidence. As stated in **Nijie’s** case (supra) where the matter is open to remedy it is preferable that the duty be paid with any due penalty so as to enable the ends of justice to be served than that the courts should be deprived of evidence which might be material to a proper resolution of the case which is being tried. It was also open under s.39 of the Stamp Duties Act to the plaintiff to cure the omission to stamp the documents annexed along with his affidavit. The documents are now duly stamped. In the circumstances, the argument that the documents relied on by the plaintiff cannot be admissible in evidence as they are unstamped also fails.

47. There was no factual dispute in this case. The defendant entered into SPA with the plaintiff for the purchase of the land for the consideration of \$305,000.00. The defendant only paid the sum of \$5,000.00 as deposit. Thereafter the defendant did not pay the balance price of the land, albeit the defendant entered into LA and promised to settle the balance payment in two instalments before 31 December 2006. The balance price of the land still remains unpaid. The defendant did not pay the interest either in accordance with the LA. The property has been transferred to the defendant. After becoming the owner of the property (without paying the agreed consideration), the defendant had taken up stance that the transactions (the SPA & the LA) are illegal and the claim is statue barred, and refusing to pay the balance consideration.
48. The defendant does not say that the balance consideration has been paid to the plaintiff. Instead, the defendant raised points of law, such as illegality, procedural impropriety and statutory bar. I have already rejected all the points of law raised by the defendant to attack the claim.
49. In **Siddiq Faizal Koya and Another v Dominion Finance Limited** [2010] HBC 2009, the High Court stated that:

'... if the defendants only suggested defence is a point of law and the Court can see at once that the point is misconceived the plaintiff is entitle to judgment...' (Emphasis added)

Conclusion

50. In matter at hand, too, the defendant's only suggested defence is a point of law, and I have already seen that the points raised by the defendant are misconceived. In my judgment, the plaintiff has proved his claim clearly and the defendant is unable to set up a bona fide defence, or raise an issue against the claim which ought to be tried. The plaintiff is therefore entitled to summary judgment.

I would accordingly enter summary judgment against the defendant in the sum of \$300,000.00.

Interest

51. The plaintiff will be entitled to interest on the judgment sum. In terms of LA (cl 2) the interest is payable by the defendant on the balance consideration as follows:

'The parties hereby agree that interest shall be payable on the loan backdated to 1st April 2005. Simple interest at the rate of 9% per annum is payable on the loan from 1st of April 2005 to 31st December 2005. Interest of 12% would be payable on \$100,000.00 which will be the balance of loan owed as at 1st January 2006 from 1st January 2006 till full repayment of the loan.

It is hereby agreed that 412,800.00 is the interest from 1st April, 2005 to 31st December 2005'

52. The plaintiff at para 13 of his affidavit in support states that the defendant had made some payment towards interest, which the defendant denies and at para 15 of the affidavit in response the defendant states, that I deny the allegations contained in paragraph 13 of the affidavit and state the plaintiff cannot claim any monies allegedly owed under the Loan Agreement as they are unenforceable, null and void and of no effect. Counsel for the defendant also, at hearing, submitted that the defendant never made any payment towards interest. Since the defendant had admitted that they did not make any payment towards interest, they have to pay interest from the beginning. Under the LA the parties agreed that interest shall be payable on the loan backdated to 1st April 2005. So, the defendant must pay interest at the agreed rate of 12% pa (that is the applicable interest rate under the LA for repayment after 2006) from 1 April 2005 till date of payment.

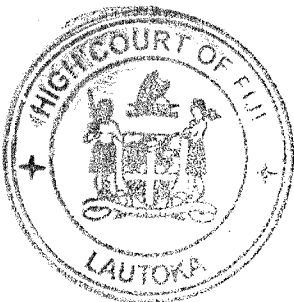
Cost

53. The plaintiff is entitled to costs of these proceedings as a successful party. The plaintiff seeks indemnity costs in the sum of

\$8,500.00, submitting that the defendant has exhibited a total disregard of the plaintiff's his deceased father's right and interest in respect of the dealing that the parties entered into. I do not think it is justifiable to award indemnity cost against the defendant. In making his application for summary judgment the plaintiff had filed three affidavits including supplemental affidavit with documents and written submission. He had also made few appearances through his counsel. Having considered all these, I summarily assessed costs at \$1,850.00.

Final Orders

- (i) There will be summary judgment in favour of the plaintiff in the sum of \$300,000.00.
- (ii) The defendant must pay interest at the rate of 12% per annum calculated on the judgment sum from 1 April 2005 to the date of payment.
- (iii) The defendant must forthwith do all things necessary to subdivide and obtain two separate residential lots from the land comprised in Crown Lease Number 591776 in accordance with clause 3 of the Sale & Purchase agreement.
- (iv) The defendant must pay summarily assessed costs of \$1,850.00 to the plaintiff within 21 days of this judgment.
- (v) Orders accordingly.



At Lautoka

22/08/14

Solicitors:

Messrs Patel & Sharma, Barristers & Solicitors for the plaintiff
Messrs Rams Law, Barristers & Solicitors for the defendant

.....
M H Mohamed Ajmeer
Master of the High Court