

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 271 of 2014

BETWEEN : **MALTI DEVI**

PLAINTIFF

AND : **AMBIKA PRASAD**

FIRST DEFENDANT

SHARON SYLVIA PRATAP

SECOND DEFENDENT

REGISTRAR OF TITLES

THIRD DEFENDENT

BEFORE : Hon. Justice Kamal Kumar

COUNSEL : Mr. A. Nand for the Plaintiff/Applicant
Mr. S. Kumar for the First & Second
Defendants/Respondents
Ms. T. Sharma and Ms. L. Bali for the Third
Defendant/Respondent

DATE OF RULING : 20 May 2016

RULING

(Application for Interlocutory Injunction)

1.0 INTRODUCTION

1.1 By Inter-parte Summons dated 18 September 2014, and filed on the same day Plaintiff/Applicant sought following injunctive orders:-

“i). An injunction restraining the 1st and 2nd Defendants whether by themselves or their agents or servants or otherwise howsoever from doing the following acts or any of them that is to say:

a. To transfer, mortgage or deal with the said property to any other party until the finalization of their action;

b. To spend or use the monies being the consideration sum of the transfer of the said property from 1st Defendant to the 2nd Defendant.

ii) The time for service of these documents be abridged;

(iii) Costs;

(iv) Such further or other relief as to this Honourable Court seems fit and proper.”

1.2 On 25 September 2014, being returnable date of the Summons this Court pointed out to Counsel for the Applicant, that Inter-parte Summons does not describe the land which is subject matter of this proceedings.

1.3 Counsel for the Applicant, then sought leave to withdraw the Inter-parte Summons filed on 18 September 2014 and file fresh summons which leave was granted by Court.

1.4 On 29 September 2014, Applicant filed fresh Inter-parte Summons seeking following Orders:-

“i) An injunction restraining the 2nd Defendant whether by herself or her agents or servants or otherwise howsoever from doing the following acts or any of them that is to say to transfer, mortgage or deal with the property comprised in the Certificate of Title No. 25243 being Lot 44 on DP4921 to any other party until the finalization of this action;

ii) An injunction restraining the 1st Defendant whether by himself or his agents or servants or otherwise howsoever from spending or using the monies being the consideration sum of the transfer of the property comprised in Certificate of Title No. 25243 from 1st Defendant to the 2nd Defendant until finalization of this action.”

(“the Application”)

- 1.5 On 1 October 2014, being returnable date of the Application this Court granted interim injunction in respect to prayers (i) and (ii) of the Application, directed Applicant to serve Application and Affidavit in Support on First and Second Respondents' Solicitors and directed parties to file Affidavits and Submissions and adjourned the Application to 7 November 2014 at 10.00am, for hearing.
- 1.6 No Submissions were filed by parties, as directed by this Court and on 7 November 2014, time for filing of Submissions was extended until 26 November 2014, and the Application was adjourned to 27 November 2014 at 2.30pm, for hearing.
- 1.7 On 27 November 2014, Counsel for the Applicant informed Court that First and Second Respondents Reply to Submission was only served on the date of hearing.
- 1.8 Counsel for the Applicant in response to question from Court, stated that Submissions in Reply of First and Second Respondents do not raise any new issue. As a result the Court granted leave for First and Second Respondents to use the Submission in Reply.
- 1.9 On 27 November 2014, this Court struck out Amended Statement of Defence filed on 30 October 2014, by First and Second Respondents on the ground that the Amended Statement of Defence was filed after the pleadings were closed and without leave of the Court.
- 1.10 Counsel for Applicant and First and Second Respondents then made Oral Submissions whilst the Third Respondent did not make any Submissions. The Application was then adjourned for Ruling on Notice.
- 1.11 Following Affidavits were filed on behalf of the Parties:-

For Applicant

- (i) Affidavit in Support of Applicant sworn and filed on 29 September 2014 (hereinafter referred as "**Applicant's 1st Affidavit**");
- (ii) Affidavit in Reply of Applicant sworn and filed on 15 October 2014 (hereinafter referred as "**Applicant's 2nd Affidavit**").

For First and Second Respondents

- (i) Affidavit in Opposition of First Respondent sworn on 6 October 2014, and filed on 7 October 2014 (hereinafter referred to as “**First Respondent’s Affidavit**”);
- (ii) Affidavit of Second Respondent sworn on 6 October 2014, and filed on 7 October 2014 (hereinafter referred to as “**Second Respondent’s Affidavit**”).

For Third Respondent

- (i) Affidavit of Sangeeta Chand sworn and filed on 15 October 2014.

2.0 BACKGROUND FACTS

- 2.1 Malti Devi, the Applicant and Ambika Prasad, the First Respondent was married on 24 February 1996, at Labasa Marriage Registry (“the Marriage”).
- 2.2 Applicant and First Respondent had two children out of the Marriage namely Shivneel Prasad and Navneel Prasad.
- 2.3 The Marriage was dissolved pursuant to Order made in Suva Magistrates Court Family Court Action No. 05/SUV/0377.
- 2.4 On 13 March 2009, the Magistrates Court in respect to an Application by the Applicant for Property Distribution made following Orders:-
 - “a. *The property at 44 Valili Street, Nakasi, be sold and the proceeds of the sale be first applied towards the payment of the secured charge to the FNPF and then towards all costs incurred in selling the property. The balance proceeds shall then be applied towards the parties’ entitlements to be paid to the parties equally;*
 - b. *Either party shall cause the property to be advertised for sale within 1 month from the date of the order and the property shall be sold at the highest offer;*
 - c. *The potential buyers and their financiers are at liberty to inspect the property without any interference from the parties and if the applicant is organizing the sale then she is at liberty to accompany the potential buyers to inspect the property. The Defendant is restrained from interfering with the Applicant and the potential buyers when they are on the property to inspect the same;*

- d. The conveyance transaction shall be carried out by the Applicants Solicitors and the Defendant is at liberty to engage his Solicitors to protect his interest. All costs for the conveyance transaction shall be paid from the proceeds of the sale;*
- e. Until the property is sold, the Defendant shall pay to the Applicant 50% of all rental income with effect from this month;*
- f. There shall be no distribution of the other properties being the Applicant and the Defendant's monies held in the FNPF."*

2.5 The property situated at 44 Valili Street, Nakasi, Suva is known as Lot 44 on Deposited Plan No. 4921 "Nakasi" in the District of Naitasiri, Island of Viti Levu containing three perches and two tenths of a perch comprised and described in Certificate of Title No. 25243 (hereinafter referred to as "**the property**").

2.6 The property was transferred to the First Respondent on or about 9 March 1991 for \$14,000.00.

2.7 On 12 September 2006, the Applicant lodge Caveat against the property being Caveat No. 595114 which Caveat was removed after First Respondent applied for its removal, and the Applicant failed to obtain an order from Court for extension of the Caveat within the prescribed time.

2.8 After the property distribution Order, the Applicant attempted to lodge second caveat against the property but it was not accepted by Third Respondent on the ground that the Applicant needed to obtain Court Order to lodge second caveat.

2.9 The property has been sold by First Respondent to Second Respondent for consideration sum of \$50,000.00.

3.0 APPLICATION FOR INTERLOCUTORY INJUNCTION

3.1 Counsel for Applicant and First and Second Respondents relied on the principle stated by Lord Diplock in **American Cyanamid Co. v. Ethicon Ltd** [1975] AC 396 which are:-

- (i) Whether there is a serious question to be tried;
- (ii) Whether damages would be adequate remedy; and

(iii) Whether balance of convenience favors granting or refusing Interlocutory Injunction.

3.2 It is well established that the jurisdiction to either grant or refuse interlocutory injunctions is discretionary.

3.3 Lord Diplock in **American Cyanamid v. Ethicon Ltd** [1975] AC 396 stated as follows:-

“My Lords, when an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff’s legal right is made upon contested facts, the decision whether or not to grant an interlocutory injunction has to be taken at a time when ex-hypothesi the existence of the right or the violation of it, or both, is uncertain and will remain uncertain until final judgment is given in the action. It was to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved that the practice arose of granting him relief by way of interlocutory injunction; but since the middle of the 19th century this has been made subject to his undertaking to pay damages to the defendant for any loss sustained by reason of the injunction if it should be held at the trial that the plaintiff had not been entitled to restrain the defendant from doing what he was threatening to do. The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff’s need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff’s undertaking in damages of the uncertainty were resolved in the defendant’s favour at the trial. The court must weigh one need against another and determine where “the balance of convenience” lies.”

3.4 In **Series 5 Software v. Clarke** [1996] 1 All E.R. 853 Justice Laddie stated that the proper approach in dealing with Application for Interlocutory Injunction:

“(1) The grant of an interim injunction is a matter of discretion and depends on all the facts of the case. (2) There are no fixed rules as to when an injunction should or should not be granted. The relief must be kept flexible. (3) Because of the practice adopted on the hearing of applications for interim relief, the court should rarely attempt to resolve complex issues of fact or law. (4) Major factors the court can bear in mind are (a) the extent to which damages are likely to be an adequate remedy for each party and the ability of the other party to pay, (b) the balance of convenience, (c) the maintenance of the status quo, and (d) any clear view the court may reach as to the relative strength of the parties’ cases.”

3.5 Another factor which Courts now take into consideration in addition to the above is **“overall justice”** as stated by His Honour Justice Cook in **Klissers Farmhouse Bakeries Ltd v. Harvest Bakeries Ltd** [1985] 2 NZLR 129 at 142 (paragraphs 20-30):-

“Whether there is a serious question to be tried and the balance of convenience are two broad questions providing an accepted framework for approaching these applications ... the balance of convenience can have a very wide ambit. In any event the two heads are not exhaustive. Marshalling considerations under them is an aid to determining, as regards the grant or refusal of an interim injunction, where the overall justice lies. In every case the judge has finally to stand back and ask himself that question. At this final stage, if he has found the balance of convenience overwhelmingly all very clearly one way ... it will usually be right to be guided accordingly. But if on the other hand several considerations are still fairly evenly posed, regard to the relative strengths of the cases of the parties will usually be appropriate. We use the word “usually” deliberately and do not attempt any more precise formula: an interlocutory decision of this kind is essentially discretionary and its solution cannot be governed and is not much simplified by generalities.”

Serious Question To Be Tried

3.6 The Application for Interlocutory Injunction must establish that there is a serious question to be tried.

3.7 It is well established that the test for serious question to be taken is that the evidence produced to Court must show that Applicant's claim is not frivolous, vexatious or hopeless.

3.8 In **American Cyanamid** Lord Diplock stated as follows:-

“In those cases where the legal rights of the parties depend upon facts that are in dispute between them, the evidence available to the court at the hearing of an application for an interlocutory injunction is incomplete. It is given on affidavit and has not been tested by oral examination.” (p 406)

“It is not part of the court's function at this stage of the litigation to try to resolve conflicts of evidence in affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.” (p 407)

3.9 His Lordship further stated as follows:-

“In view of the fact that there are serious questions to be tried upon which the available evidence is incomplete, conflicting and untested, to express an opinion now as to the prospects of success of either party would only be embarrassing to the judge who will have eventually to try the case.”

3.10 The Applicant in the Statement of Claim sought relief that transfer of property from First Respondent to Second Respondent be set aside on the grounds that:-

(i) The property was sold far below the market price (paragraph 6 of the Statement of Claim);

(ii) The Second Respondent was aware about property distribution order and proceeded to purchase the said property at a price which is substantively below the market price (paragraph 8 of the Statement of Claim);

- (iii) The actions of First and Second Respondents was fraudulent (paragraph 9 of the Statement of Claim).
- 3.11 The First and Second Respondents in the Statement of Defence filed on 29 September 2014 :-
- (i) Denies the contents of paragraph 6 of the Statement of Claim;
- (ii) Admits the contents of paragraph 8 of the Statement of Claim.
- 3.12 I take note that, since the hearing of the Application, the substantive action progressed by way of Summons for Directions and parties complying with Order on Summons for Direction by filing Affidavits Verifying List of Documents. The substantive matter is now at Pre-Trial Conference stage.
- 3.13 I also take note that, after the Amended Statement of Defence filed by First and Second Respondents was struck out for want of Leave no application has been made by any party to amend the pleading.
- 3.14 The issues that need to be tried are:-
- (i) Whether Applicant sold the property at undervalue to avoid Applicant getting her fair share from sale of the property?
- (ii) Whether Second Respondent was a bona fide purchaser for market value?
- (iii) Whether First and Second Respondents were engaged in fraudulent conduct to defeat the Applicant's interests?
- 3.15 The Counsel for First and Second Respondents submit that the Applicant has failed to plead fraud properly and failed to provide particulars of fraud.
- 3.16 Whilst I agree that Applicant should have provided full particulars of fraud to enable First and Second Respondents to respond to the particulars, I do not think it any way affects the injunction application. The Applicant can apply to amend her claim prior to trial if she so wishes on the basis of legal advice from her Solicitors.
- 3.17 The First Respondent at paragraph 12 to 15 of his Affidavit in Opposition stated as follows:-
- “12. That I do not dispute but the Plaintiff's solicitors could not carry out orders of Court within one month as ordered by the Family court.*
- 13. That in response to paragraph 19 of the Plaintiff's affidavit, I say that the Plaintiff and her solicitor had failed to comply with the very order which*

they are relying and had filed two contempt proceedings against me to force me to sell the said property.

14. *That the sale was not under value, I bought the said land for \$14,000.00 (fourteen thousand dollars) and I sold the property for \$50,000.00 (fifty thousand dollars) about more than 4 times more.*
15. *That I deny paragraph 20 of the Plaintiff's affidavit and further say that instead of cooperating for sale the Plaintiff had resorted to commit me for contempt proceeding for their failure to comply with Family Court Orders."*

3.18 The First Respondent bought the property for \$14,000.00. He failed to state as whether he bought the vacant land or bought property with improvements.

The First Respondent also failed to attach any valuation report to establish that he sold the property at fair market value.

3.19 First Respondent has blamed the Applicant for issuing contempt proceedings against him in Family Court proceedings and states that Applicant's action forced him to sell the property for \$50,000.00.

3.20 The Applicant at paragraph 9 to 12 of Applicant's 2nd Affidavit responded to paragraph 12 to 15 of First Respondents Affidavit as follows:-

"9. *That with respect to paragraph 12 I say that even though my Solicitors failed to advertise the property for sale within one month the fact that my Solicitors were to carry out the conveyancing transaction as per the orders of the Family Court, which the 1st Defendant failed to inform and or disclose that a potential buyer has come forward.*

10. *That in reply to paragraph 13 of the said affidavit I say as follows:-*

- a. *That either party were to advertise the said property for sale within one month and the property shall be sold to the highest bidder;*
- b. *That all the conveyance transactions were to be carried out by my solicitors and the 1st Defendant was at liberty to engage his Solicitor to protect his interest;*
- c. *That the 1st Defendant advertised the property for sale in June 2014 however it has failed to advise my Solicitors to do the conveyancing transaction for the transfer of the said property.*

11. *That with respect to paragraph 14 of the said affidavit I say as follows:-*

- a. *That the 1st Defendant bought the said land for \$14,000.00 on or about 1991;*
- b. *That there have been developments made on the said land by constructing a two bedroom complete house;*
- c. *At current the said property comprises of two separate houses;*
- d. *As such the market value of the said property would have appreciated over the period of years as enclosed in the annexure marked "C";*
- e. *As per the valuation report carried out in 2009 the market value of the said property back then was \$60,000.00 therefore it would be prudent to say that the value of the said property would have exceeded \$60,000.00 by year 2014.*

12. *That in reply to paragraphs 15 and 16 of the said affidavit I repeat the contents of paragraph 10 hereinabove."*

3.21 At paragraph 4 of Applicant's 2nd Affidavit she states that the property was advertised for sale by her Solicitor in the Fiji Sun in July 2011.

3.22 At paragraph 5 of Applicant's 2nd Affidavit, Applicant states as follows:-

"5. With respect to Paragraph 5 of the said affidavit I say that when the said advertisement was advertised in the Fiji Sun Newspaper plenty potential buyers and their financiers came to inspect the property however the 1st Defendant did not co-operate and did not allow the buyers or their financiers an access to the said property."

3.23 This statement of Applicant has some support in what is stated by the Valuer Rolle Associates in the Valuation Report prepared on 21 August 2009 (Annexure D of Applicant's 2nd Affidavit) on instructions of Applicant, Malti Devi. The Valuer on page 2 of the Report under heading "Main Building" stated as follows:-

"We cannot comment on the internal layout or condition of the improvements, as access was restricted as at the time of inspection. However, we have been advised by the client that structure 1 comprises of two bedrooms, lounge, a combined kitchen and dining, ablution and laundry facilities (these are located within the concrete extension). Structure 2 also comprises of 2 bedrooms, a combined lounge, kitchen and dining, ablution unit and laundry facilities."

- 3.24 After analyzing the Affidavit evidence I am of the view that Applicant's claim is not frivolous, vexatious or hopeless and needs to be tried by this Court by hearing oral evidence of the parties and witnesses.
- 3.25 I hold that Applicant has established that there is serious question that needs to be tried by this Court.

Whether Damages would be Adequate Remedy

- 3.26 The property distribution Order is for the property to be sold, and net proceeds divided equally amongst the Applicant and the First Respondent.
- 3.27 It is not doubted, that damages could be easily assessed if it is found that the property was sold at undervalue.
- 3.28 However, in cases like this, that is when a Family Court or any other Court makes an Order for sale and distribution of sale proceeds in respect to matrimonial property and where there is allegation that the owner of the matrimonial property attempts to sell or sold the property at an undervalue and there is some evidence to suggest that the new owner was aware of the Court Order and that fact that the registered owner sold or is selling the matrimonial property to defeat other party's interest, then Court should not strike out the Application only on the basis that damages would be adequate remedy and can be assessed.
- 3.29 In this instance, the Affidavit evidence in respect to sale of property being at undervalue, Second Respondent being aware of this, and the fact that First and Second Respondent's conduct was fraudulent are questions to be tried by oral evidence. The property is a matrimonial property and sale was ordered by Family Court.
- 3.30 Therefore, even if damages would be adequate remedy, I am of the view that this Court should consider balance of convenience and not strike out Application on this basis only.

Balance of Convenience

- 3.31 Counsel for First and Second Respondents submit that the undertaking as to damages provided by Applicant is inadequate.
- 3.32 It is not disputed by First and Second Respondents, that even if Applicant is not successful in obtaining the relief in the Statement of Claim she will be entitled to fifty percent of net sale proceeds of the property.

- 3.33 The sale transaction between First Respondent and Second Respondent appears to have been completed.
- 3.34 The First and Second Respondents have failed to state as to what sort of damages will be suffered by them if interlocutory injunction is granted as prayed for by the Applicant.
- 3.35 I therefore find that the undertaking as to damages provided by the Applicant is sufficient.
- 3.36 In assessing balance of convenience I have taken the following into consideration:-
- (i) Property was Applicant's and First Respondent's matrimonial property;
 - (ii) The Family Court made property distribution order after hearing the Applicant;
 - (iii) If the First Respondent sold property at an undervalue then he did so to overcome the intention of the Learned Magistrate when the Order was made, which was to make sure that Applicant receive her fare share from sale of the matrimonial property;
 - (iv) If the Second Respondent was aware of the property distribution order and colluded with the First Respondent to defeat the interest of the Applicant then the transaction between First and Second Respondents could be held to be fraudulent;
 - (v) The sale proceeds of the property are not distributed;
 - (vi) If the Applicant is successful in obtaining an Order to set aside the transaction then it is fair that the property remain in the name of Second Respondent without any charge being created against it until final determination of the substantive action.
- 3.37 This action is at Pre-Trial Conference stage and substantive matter can be set down for trial soon.
- 3.38 I hold that balance of convenience favors the Applicant.

Material Non-Disclosure

- 3.39 Counsel for the First and Second Respondents submit that the Applicant has failed to disclose the contempt proceedings instituted by her in the Family Court and as such the interim injunction should be dissolved as of right.

3.40 The contempt proceeding was in respect to property distribution order, and even if it was disclosed to Court it would not have affected this Court's decision to grant interim injunction because that contempt proceedings was not material.

4.0 COSTS

I take into consideration that Applicant, First Respondent and Second Respondent filed Affidavits, Submissions and made Oral Submissions whereas the Third Respondent only filed Affidavit.

5.0 MISCELLANEOUS

It is with regret I note that, the Applicant's Counsel at pages 5 to 8 of Applicant's Submission copied the contents of this Court's ruling in **Digicel Fiji Limited v Fiji Rugby Union** [2014] High Court Civil Action No. 30 of 2014 (13 March 2014) without acknowledging it as the source. This is clear act of plagiarism. This practice must stop at once in respect to Submissions filed in Court.

I also note that Applicant's Submission does carry page numbers or paragraph numbers which is quite unsatisfactory. Legal Practitioners should take note of this and ensure that Submissions and documents filed in Court are of proper standard and quality.

6.0 ORDER

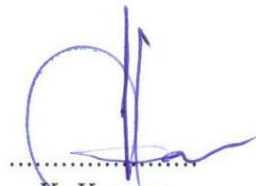
I make following Orders:-

- i) An injunction restraining the Second Defendant/Second Respondent whether by herself or her agents or servants or otherwise howsoever from transferring, mortgaging, charging or dealing with the property comprised in the Certificate of Title No. 25243 being Lot 44 on DP4921 in any way whatsoever until final determination of this action;
- ii) An injunction restraining the 1st Defendant whether by himself or his agents or servants or otherwise howsoever from spending or using the monies being the consideration sum of the transfer of the property

comprised in Certificate of Title No. 25243 from 1st Defendant to the 2nd Defendant until final determination of this action;

- (iii) Costs of the Application for Interlocutory Injunction be costs in the cause.




K. Kumar
JUDGE

At Suva

20 May 2016

Messrs. Kohli & Singh for the Applicant

Sunil Kumar, Esquire for the First & Second Respondents

Office of the Attorney General of Fiji for the Third Respondent