

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

Civil Action No. 255 of 2012

**BETWEEN** : **SHAKUNTALA** of Malolo, Nadi, Domestic Duties.

**PLAINTIFF**

**AND** : **DAVENDRA RAJU** of Malolo, Nadi.

**DEFENDANT**

# **R U L I N G**

## **BACKGROUND**

1. On 12 February 2016, I handed down a judgement on the case between Sahkuntala Devi and Davendra Raju. Below I reproduce an extract from that judgement:

### **INTRODUCTION**

1. The background to this case is set out in an extempore ruling I gave on 03 June, 2015 which I reproduce in full below. This is my ruling on the issue of whether or not the defendant, namely Davendra Raju ("**Raju**") has a right to remain in occupation of that portion of the land which is at the heart of the dispute between the plaintiff, Shakuntala, and Raju. The land in question is legally described as Crown Lease No. 496921 being Lot 4 on Plan ND 5169 Part of Nacaqara & Navo formerly CT 11913 (farm 2619) on the island of Viti Levu district of Nadi comprising an area of 6.1917 h.a.

### **BACKGROUND**

2. Below is a full extract of my extempore ruling of 03 June 2015.

#### **Introduction**

[1]. *The plaintiff, Shakuntala, is the registered proprietor of Crown Lease No. 496921 being Lot 4 on Plan ND 5169 Part of Nacaqara & Navo formerly CT 11913 (farm 2619) on the island of Viti Levu district of Nadi comprising an area of 6.1917 hectares ("**property**").*

[2]. *She files a summons pursuant to section 169 of the Land Transfer Act (Cap 131) seeking an Order that the defendant, Davendra Raju, do show cause why he (Raju) should not give up immediate vacant possession of part of the property. That he and his family has been occupying for so many years now.*

[3]. *Section 169 states as follows:*

(section 169 cited).

#### **Shakuntala's Affidavit**

[4]. *Shakuntala deposes inter alia in her affidavit in support of the summons that Raju:*

*..is a squatter who is unlawfully and illegally occupying part of the land comprised in the said land nor has he paid any rent or reward and as such he is deemed to be a*

*trespasser and his unlawful and illegal occupation is preventing us from utilising our own land"*

#### **Raju's Affidavit**

[5]. Raju, by his affidavit filed herein opposing the application, refutes any allegation that he is squatting on the land. He justifies his occupation of part of the property by highlighting that the predecessor in title to the property, namely, one Katanna Raju, was his uncle (his father's elder brother). Katanna was also the father in law of the plaintiff, Shakuntala.

[6]. Davendra Raju deposes that his uncle, Katanna Raju, informally adopted him and his siblings in 1969 when his biological father, namely Rajanna, left them in the care of Katanna. That decision by Rajanna to leave his children in the care of his older brother, Katanna, was made following the breakdown of his (Davendra Raju's) father's marriage to their mother.

[7]. Katanna passed away intestate in 1980. According to Davendra Raju, Katanna had desired to leave the house (which Davendra Raju occupies) and one acre of land to Davendra Raju – and this was well known to all the immediate family members. This allegation is refuted by Shakuntala.

[8]. It appears that Katanna's son, namely Bal Krishna, took over letters of administration of the Katanna estate. Krishna also died some years later, but, before he passed on, he had, in October 1984, gifted the leasehold to his wife, Shakuntala, who is the plaintiff.

[9]. Davendra Raju deposes that he believes that Bal Krishna transferred the property to Shakuntala in order to "cheat me out of my interest in the leasehold". This allegation is refuted by Shakuntala. It presupposes that Davendra Raju has an interest in the land.

[10]. Davendra Raju also deposes that his late biological father had given up his leasehold in Farm No. 2624 to one Subermani, who is the eldest son of his uncle/foster father on the understanding that Subermani would pay Davendra Raju's father the sum of \$30,000 in consideration. Raju annexes to his affidavit a note from his biological father (who has since deceased) setting out the nature of the arrangement and pointing out that Subermani has never paid him that sum of \$30,000.

[11]. I observe that Shakuntala does not address this allegation in her affidavit in reply.

#### **1994 Actions**

[12]. Davendra Raju deposes that in 1994, Shakuntala had issued an eviction notice against him to vacate the house. He, Davendra Raju, then instituted Civil Action No. HBC 0225 of 1994/L on 18 August 1994.

[13]. Apparently, Mr. Justice Sadal made a ruling that Writ Action 225 of 1994L be determined first before Shakuntala's section 169 application.

[14]. I observe that civil action HBC 225 of 1994 has not been dealt with. The same goes for Civil Action HBC 65 of 1994 (Shakuntala's original section 169 application filed in 1994).

[15]. I am inclined to follow suit with the wisdom of Sadal J to determine Writ action 225 of 1994 first. The best course to adopt is to consolidate all files and to set a date for directions to take this matter to trial at the earliest.

[16]. Accordingly, I dismiss Shakuntala's application. I also now Order that civil action HBC 65 of 1994, HBC 225 of 1994 and 255 of 2012 be consolidated. The case is now adjourned to **Thursday 11 June 2015 at 10.30 a.m.** for directions. Registry to serve a copy of this ruling to Davendra Raju by Friday 05 June 2015. No Order as to costs.

## EVIDENCE

### *Shakuntala's Evidence*

3. Shakuntala is the registered proprietor of the land in question. She produced in Court a copy of the original lease which proves this fact. She said that Davendra Raju is/was the first cousin of her late husband, Bal Krishna ("**Krishna**"). Krishna had one other brother who was called Subermani (also now deceased). Krishna left school in 1960 to take up farming. Krishna's and Subermani's father (i.e. her father in law) was Katanna Raju ("**Katanna**"). Katanna had worked as a barman at the Lautoka Hotel for quite some time during his lifetime. On the eve of Katanna's retirement, Subermani had approached Katanna for his (Subermani's) share of anticipated portion of Katanna's estate. Katanna obliged and would give Subermani some cash and also a taxi to drive. Krishna, however did not ask for his. Instead, he and Shakuntala and their young family would continue to live on the land to look after Katanna and his wife. The land was registered under Katanna. Shakuntala says that the house which she and Krishna were occupying was built by Katanna and Krishna. She said Krishna worked the farm and then built the house.
4. Shakuntala said the house which Davendra Raju has been occupying was built by Krishna and Katanna and the land is under Katanna's name.
5. Sometime in the early 1980s, Katanna passed away. He died intestate. According to Shakuntala, before he died, Katanna had told Krishna and her that the "*share would go to Krishna*". Subermani, Krishna's elder brother, knew of that arrangement. After Katanna passed on, Subermani signed some documents and the land was transferred to Krishna. Subermani was not interested in anything as he had already taken his share.
6. Shakuntala said that when Krishna acquired the land, it was still under mortgage to ANZ Bank and also to Westpac Banking Corporation Limited. Krishna had to take up paid employment as a waiter/barman at the Travelodge Hotel in Votualevu in Nadi (now the Tanoa Hotel). From his wages, and partly also from proceeds from the cane farm, Krishna was able to pay off the mortgage. Some years after acquiring the land, Krishna started developing Parkinson's disease. It was then decided that the property be transferred to Shakuntala. This happened in 1993. Two years after the transfer to Shakuntala, Krishna passed away in 1995.
7. Shakuntala asserts that she is now the registered proprietor of the property. For some years now, she has been giving Davendra Raju a notice to vacate. However, he has stayed put. She says that whenever she tries to talk to Davendra Raju about moving out, he would become agitated and would threaten her and demand of her to give him that particular house which he and his family occupy. She says Davendra Raju is lying about having built that house.
8. In cross-examination, Davendra Raju put to Shakuntala that at the time the house was built (by him), the lease was then on CSR lease. Shakuntala refuted that Davendra Raju had built the house. She insisted, as she had said earlier in her evidence in chief, that Raju was a carpenter by trade and that he did help Katanna in tilling the land and also in other maintenance work. She said Raju may have helped in the construction of the house because of his skill, but he was duly paid for his assistance.
9. Davendra Raju put to Shakuntala that in 1970s, Bal Krishna was working in a hotel whilst he (Raju) was working the farm. Shakuntala answered that Raju "was a visitor" and "help". He would tie their bullocks and for these he was paid.
10. There was a lot of cross-examination from Raju regarding the repairs done to the house over the years and one occasion after the hurricane. I gather that the whole point of this time of cross examination by Raju was to prove that he had paid for the

repairs. There allegations were all refuted by Shakuntala. Shakuntala would insist that she and her husband had built the house for their children. Shakuntala would add that Davendra Raju was brought onto the land as a child by her husband's father who was Raju's uncle because Raju's mother had deserted and abandoned the young Raju and his siblings and Raju's father had run off to live with another woman in Rakiraki. Shakuntala said – "we helped them".

#### *Davendra Raju's Evidence*

11. Davendra Raju's evidence is that he built the house which he and his family are currently occupying. This is all he is interested in. He is not interested in anything else. He said that his father's brother, Khatanna, who is Shakuntala's father in law, and predecessor in title before, had brought him to the land to live when he (Raju) was a young boy. This was after her mother and father had parted ways. He said that when the house was built in the early 1970s, he was 21 years of age. He said he had struggled to build that house. When asked who built that house, uncle or him? He said his uncle had built it but had promised him that if he worked the cane farm, he would allow Raju's labour as consideration for the house. As Raju puts it, he was allowed to work the farm to "pay off the house". He said he worked hard. He said his uncle had loaned from the bank to build the house.
12. He said that after his uncle died, other uncles came and told him that the land would be given to him. However, it was transferred to his aunty, Latchamma (Katanna's widow). Raju recounted an occasion the year following his uncle's death when the family all went to one lawyer namely Mr Rishi Shankar. The family members who went were him, his wife, Shakuntala, Bal Krishna, another person whose name is not clear from my records and his aunty Latchamma. At the lawyer's office, he was asked to step outside for a while, while the others remained with the lawyer to discuss something. A short while later, he was asked to come back inside. He said when he got back inside, the lawyer told him in no uncertain terms: "land will be given to you". The lawyer told him he would draw up the documents and then he would contact Raju to collect the documents.
13. Sometime later, when the lawyer Rishi Shankar still had not contacted him, Raju went to see lawyer Ajmal Khan to ask if Shankar might have sent the documents to him. When Khan replied in the negative, Raju then went back to Rishi Shankar's office to search for the document but to no avail. He said at the time, Rishi Shankar had fled the country following the coup.
14. When asked what documents exactly he was looking for at Rishi Shankar's office, Raju said documents containing "that part that Rishi Shankar had said to him". When the Letters of Administration comes out to Aunty, the land will then be transferred to me i.e. the house and the portion of land that I was occupying.
15. When asked, if he understood that his uncle had died intestate and that the intestacy rules would rule him out of any share in the estate, he said the late Bal Krishna and Subermani's wife had written a letter which was given to Rishi Shankar in which they had indicated that the house would be given to him. Asked if he had a copy of that letter, he said he did not.
16. When asked what he thought was the ultimate source of the right to the house that he asserts, he said: "the letter". Asked if he thought Bal Krishna and Subermani's wife might have changed their minds, he said: "yes". He said Bal Krishna and Subermani's wife had written the letter because they knew of the promise that his uncle had made to him.
17. He said under cross-examinations that the letter had been prepared at home at a family general meeting. It was then taken to Rishi Ram. When put to him that there was no letter, he insisted that there was such a letter.

18. Dorothy Mani of Malolo, 74 years gave sworn evidence for Davendra Raju. Dorothy's late husband was Subermani, Bal Krishna's brother. Dorothy reiterated all that Raju had said about having been promised the land by the late Katanna (her's and Shakuntala's) late father in law. She also confirmed there was a meeting before all went to Rishi Shankar's office. Adi Narayan aged 70 years of Malolo as well as one Nagappa 64 years, also of Malolo also gave evidence.

#### **ANALYSIS**

19. Shakuntala is the registered proprietor of the property in question. As such, she has every right as legal owner to ask or tell anyone to get off her land.
20. Raju asserts an interest based on what Katanna had, allegedly, promised him. He said he had worked the farm. The interest he asserts appears to be based on a proprietary estoppel.
21. In Wati v Kumar [2013] FJHC 321; HBC45.2009 (5 July 2013), Mr. Justice Balapatabendi reviewed some local as well as overseas cases on how a proprietary estoppel create an equitable proprietary interest which might affect a legal interest.
22. Hence, where party A (legal owner of land) knowingly encourages party B to act, or acquiesces in party B's actions, to party B's detriment and in infringement of the party A's (legal) rights, party A will be estopped from later complaining about the infringement, and party A may indeed be required to make good the expectation which party A encouraged party B to rely on.  
(see Ocean Shores Estates Ltd -v- Karavaki (1997) FJHC 29; East India Co v Vincent (1740) 2 Atk 83; Jackson v Cator (1800) 5 Ves. 688; Jamandas Sports (Fiji) Ltd v Stinson Pearce Ltd (1994) FJCA 20; Dillwyn v Llewellyn (1862) 4 D.F. & G. 517; Crabb -v- Arun District Council (1976) Ch. 179; Pascoe v Turner (1919) 2AER 945; Shamsul Nisha vs Abdul Munif (1999) FJHC 113 45 FLR 246; Sheila Maharaj v. Jai Chand [1986] 1AC 898; Gissing v. Gissing [1971] AC 886, 902 – 911; Waltons Stores (Inter state) v Maher [1988] HCA 7; (1988) 164 CLR 387).
23. In the circumstances of this case, if Raju succeeds in arguing that he, in reliance upon a gratuitous promise by the late Katanna of a gift of the land/house, and thereby, worked the land to the benefit of Katanna, and built on the land in reliance on the promise, it would be wrong to allow Raju to be turned out and the court must then order a conveyance of the land to Raju. And the doctrine has been regarded as providing a remedy to prevent unjust enrichment and also that it would be unconscionable for the landowner to renege on his or her promise.
24. **Halsbury 4th edition** Volume 16 para 1072 says:  
*"The real test is said to be whether on the facts of the particular case the situation has become such that it would be dishonest or unconscionable for the Plaintiff or the person having the right sought to be enforced, to continue to seek to enforce it."*
25. But is Raju able to satisfy this court of the evidential burden that the above carries?
26. Firstly, Raju must prove that the work must have been done in reliance on the Katanna's promise and for the benefit of Katanna. In essence then, since Katanna is for many years now deceased, and the claim is based on an alleged promise of Katanna, Raju's claim is maintainable only against the estate of Katanna. In **HBC 225 of 1994**, which I am also considering here and in which Raju is the plaintiff, he has not sued the personal representative of the Katanna estate. Rather, he has sued Shakuntala in person by virtue of her being the registered proprietor.
27. But even if Raju had sued the personal representative of the estate, the bar is set way up high for him to establish the claim. I say that because, as a matter of principle, Courts will adopt a cautious approach when dealing with contested claims against an estate. This is because of the need to carefully to scrutinize claims based

on promises or representations by deceased persons (see Parveen Varma v Gautam Varma & Ors [2010] NSWSC 786, the New South Wales Supreme Court).

28. Raju bears a very high evidentiary burden to persuade the court on the balance of probabilities of the making of the promise allegedly made by Katanna given that Katanna is not alive to give his version of events.
29. As explained in Weeks v Hrubala [2008] NSWSC 162, at [20], the court generally looks for corroboration of those claims, even though, corroboration is not absolutely required.

*In a case of a person suing a deceased estate the court normally looks for some sort of corroboration: see Re Hodgson (1886) 31 Ch D 177 even though, as a matter of law, corroboration is not absolutely necessary. Experience, however, shows that when plaintiffs are making a claim against a deceased estate the court is wise to look for corroboration (see also Re Hodgson (1886) 31 Ch D 177).*

30. The biggest obstacle that Raju faces is that there is no clear corroborating evidence that the late Katanna did make that promise Raju alleges he made. But even if that promise was indeed made, there is the issue of whether it would be enforceable in the sense of giving Raju an equitable proprietary interest sufficient for him to remain on the land, considering that the property in question is a crown lease and that the promise, is arguably a prohibited "dealing in land" pursuant to section 13 of the Land Transfer Act in that it was made to convey a proprietary interest over which the Director of Lands consent was not sought.  
(I acknowledge that the Privy Council in Maharaj v Chand [1986] FJ-UKPC 11; [1986] FJUKPC 5; [1986] 32 FLR 119 (7 July 1986) did make some observations on the law in this regard, the circumstances in this case before me now are distinguishable).
31. That aside, in terms of the language of the law of proprietary estoppel, it is hard to see how Raju might have suffered any detriment as a result of the promise purportedly made by Katanna (of which promise I still say there is no clear evidence).
32. I say that considering the personal/family circumstances which led to Katanna to bring Raju and his siblings to live with him – which are not disputed. I say that also in light of the inconsistency in the evidence of Raju, who although having insisted earlier that he did build the house, later conceded that his late uncle had built the house himself.
33. Raju was brought onto the land out of a sense of benevolence and family of the late Katanna, Raju's father's younger brother.

### **CONCLUSION**

34. After considering all, I find that Raju has no legal or equitable right whatsoever to remain on the land. Accordingly, I must grant order in terms of Shakuntala's application under section 169.
35. I order that Raju do give vacant possession of the portion of Crown Lease No. 496921 being Lot 4 on Plan ND 5169 Part of Nacaqara & Navo formerly CT 11913 (farm 2619) on the island of Viti Levu district of Nadi that he has been occupying, in favour of Shakuntala. Raju is given until 12 March by which to vacate the said property. I order costs in favour of Shakuntala which I summarily assess at \$800-00 (eight hundred dollars only).

### **APPLICATION BEFORE ME NOW**

2. Before me are two applications. One by the plaintiff seeking leave to issue a writ of possession. The other is an application by the defendant seeking stay of

execution pending appeal. The application for stay is based on the following grounds:

- (i) The Learned Judge erred in law and in fact in allowing the Respondent to proceed with her Originating Summons under section 169 of the Land Transfer Act (Cap 131) without her first obtaining the Consent of the Director of Lands as required under Section 13 of the Crown Lands Act (Cap 132) to institute any proceedings.
- (ii) The Learned Judge erred in law and in fact in consolidating the Civil Action No. HBC 65 of 1994, HBC 225 of 1994 and HBC 255 of 2012 whereas Mr. Justice Sadal made a ruling that Writ Action 225 of 1994L be determined first before the Respondent's section 169 Application.
- (iii) The Learned Judge erred in law in proceeding to hearing of the consolidated Civil Action No. HBC 65 of 1994, HBC 225 of 1994 and HBC 255 of 2012 without first hearing the Writ Action 225 of 1994L.

### **THE LAW**

3. The principles of stay are well established. In **Stephen Patrick Ward v Yogesh Chandra**, CBV 0010/2010, the Honourable Chief Justice reiterated the following factors as applicable:

- (a) whether if no stay is granted, the applicant's right of appeal will be rendered nugatory (this is not determinative). See **Philip Morris (NZ) Ltd. v. Liggett & Myers Tobacco Co. (NZ) Ltd.** [1977] 2 NZLR 41 (CA).
- (b) whether the successful party will be injuriously affected by the stay.
- (c) the bona fides of the applicants as to the prosecution of the appeal.
- (d) the effect on third parties.
- (e) the novelty and importance of questions involved.
- (f) the public interest in the proceeding.
- (g) the overall balance of convenience and the status quo.

### **APPLICATION OF LAW**

4. I am of the view that the grounds upon which the application for stay are premised are rather weak. They are all procedural grounds which seek to challenge a decision I took to exercise my discretion to consolidate both the section 169 application of Shakuntala (HBC 255 of 2012) with the civil action filed by Davendra Raju (HBC 225 of 1994).
5. The applicant points to the fact that Mr. Justice Sadal had ruled that the latter action be determined first before the former. I had instead, consolidated the two and had dealt with both the affidavits filed and also allowed the parties to give *viva voce* evidence and to call witnesses.
6. In my view, I still retained a discretion to conduct the business of determining the issues between the parties in the mode I thought most appropriate. Of

- course, different if Sadal J had handed down a final ruling on a substantive issue between the parties, but this was not the case.
7. Keith Hawkins, '**The Use of Legal Discretion : Perspectives from Law and Social Science**' defines discretion as:
 

the space ... between legal rules in which legal actors may exercise choice.
  8. The word "choice" denotes that there are more than one alternative courses available to the Court. As SA de Smith and JM Evans (eds), **De Smith's Judicial Review of Administrative Action** (4th ed, 1980) 278 would say, judicial discretion:
 

.....implies power to make a choice between alternative courses of action. If only one course can lawfully be adopted, the decision taken is not the exercise of a discretion but the performance of a duty. To say that somebody has a discretion presupposes that there is no uniquely right answer to his problem
  9. The fact that the Court is essentially making a choice in exercising a discretion is perhaps the main underlying reason why it is hard to question or second-guess the exercise of a judicial discretion.
  10. Kay L.J. in **Jenkins v Bushby** (1891) 1 Ch 484 at p 495 illustrates the respect accorded to that choice from a slightly different angle:
 

"... the Court cannot be bound by a previous decision, to exercise its discretion in a particular way, because that would be in effect putting an end to the discretion."
  11. While the courts have over the years developed guidelines and fetters on the exercise of discretion, a discretion in one case, though highly persuasive, will not be a precedent in another.
  12. In describing the inherent power of the Court to allow or refuse adjournment, Lord Wright in **Evans v. Bartham**(1937) A.C. 473 at 487 said:
 

a typical exercise of a purely discretionary power ... could be interfered with only in exceptional cases, yet it may be reviewed by the Court of Appeal .
  13. As to when that discretionary power can be interfered with, the oft cited case of **House v The King** (1936) 55 CLR 499 said that appealable errors committed in the exercise of a discretion include: acting upon a wrong principle; allowing extraneous or irrelevant matters to guide the discretion; mistaking the facts and failing to take account of a material consideration –

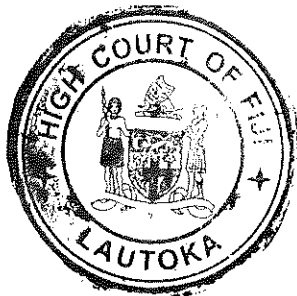


committed in the exercise of a discretion include: acting upon a wrong principle; allowing extraneous or irrelevant matters to guide the discretion; mistaking the facts and failing to take account of a material consideration – but it will not be enough that the appellate court would have exercised the discretion differently.

14. In any event, the effect of amalgamating the two actions does not derogate from the approach of Sadal J. Sadal J's approach arose out of a concern that the issues between the parties could not be dealt with summarily through the section 169 application alone. I shared the same views but chose to amalgamate the two proceedings rather than, as Sadal J would have it, deal with Davendra Raju's writ action first and the section 169 application after. In the event, I did hear the *viva voce* evidence of both parties and then went on to hold that Davendra Raju had not proven his case on a balance of probabilities. My findings and reasoning are all set out above.

#### **ORDERS**

15. Davendra Raju's application for stay pending appeal refused. Order in Terms of Shakuntala's application for issue of writ of possession.



Anare Tuilevuka  
**JUDGE**  
19 October 2016.