

IN THE HIGH COURT OF FIJI  
AT LAUTOKA  
WESTERN DIVISION

PROBATE JURISDICTION

HPP No. 18 of 2014

BETWEEN : VIMLA WATI of Solovi, Nadi

AND : ASUDA DEWAN of Saweni Beach Road, Saweni, Lautoka

FIRST DEFENDANT

AND : THE DIRECTOR OF LANDS Government Buildings, Suva

SECOND DEFENDANT

AND : REGISTRAR OF TITLES Ground Floor, Civic Tower, Suva

THIRD DEFENDANT

AND : ATTORNEY GENERAL Level 7, Suvavou House, Victoria Parade, Suva

FOURTH DEFENDANT

Counsel : (Ms) Setaita Senikuba Ravai for the Plaintiff  
Mr. Wasu Sivanesh Pillay for the First Defendant  
Mr. Joseva Mainavolau, AG's Chambers, for the Second,  
Third and Fourth Defendants.

Date of Hearing : Thursday, 05<sup>th</sup> Friday 06<sup>th</sup> April, 2018

Date of Judgment : Friday, 28<sup>th</sup> September, 2018

JUDGMENT

(A) INTRODUCTION

In the Statement of Claim filed on 06<sup>th</sup> May 2014, the Plaintiff mainly sought relief from this Court in the form of a pronouncement against the will purported

to have been executed on 11<sup>th</sup> August 2009 by Aripitri aka Hari Pathry deceased (the testator).

**(B) THE FACTUAL BACKGROUND**

(1) **The Statement of Claim** which is as follows sets out sufficiently the facts surrounding this claim from the Plaintiff's point of view as well as the prayers sought by the Plaintiff.

1. *The Plaintiff is the widow of Aripitri aka Hari Patri aka Hari Pathry.*
2. *The 1<sup>st</sup> Defendant is the son of Aripitri aka Hari Patri aka Hari Pathry and Plaintiff's step son.*
3. *The Plaintiff commenced a relationship with the said Aripitri aka Hari Patri aka Hari Pathry in 1977, and the relationship was formalized by marriage on 04<sup>th</sup> October, 1977.*
4. *The said Aripitri aka Hari Patri aka Hari Pathry had been married twice before 1977. He had 5 children from his first marriage, 4 girls and 1 boy. The son being the 1<sup>st</sup> Defendant.*
5. *After the death of the first wife of Aripitri aka Hari Patri aka Hari Pathry, he remarried and had further children from the second wife, whilst the children were very young as their mother died in 1976, the children were taken care of by their maternal grandparents.*
6. *The Plaintiff had two children of her own first a daughter born on 29<sup>th</sup> June, 1978 and then a son born on 4<sup>th</sup> November, 1980.*
7. *In 1977, the 1<sup>st</sup> Defendant was a class 6 student and 12 years old. The Plaintiff took care of him and his four sisters as well as her own biological children.*
8. *The Plaintiff lived with Aripitri aka Hari Patri aka Hari Pathry and the children on a property known as Crown Lease No. 17818 being lot 15 ND 5003 Nakorokoro consisting of 1.6313 ha hereafter referred to as the Land.*
9. *The Plaintiff was the homemaker as she also did tailoring work from home, to assist the family income and she worked on the said land and assisted in the farm.*
10. *In May, 2002 the said Aripitri aka Hari Patri aka Hari Pathry (Plaintiff's husband) suffered a stroke, which affected the right side of his body and his speech pathology. After a medical treatment Aripitri aka Hari Patri aka Hari Pathry made a slight recovery but not fully.*

11. *In the 2006 the said Aripitri aka Hari Patri aka Hari Pathry suffered a second stroke and head injury, as a result he was virtually bed ridden or wheel chair bounded. His health continued to deteriorate slowly from 2006 onwards.*
12. *On 2<sup>nd</sup> day of October, 2009 he executed his last will nominating the Plaintiff as the trustee of all his property which was prepared by the Solicitors Messers Chandra Singh & Associates.*
13. *Since December, 2009 Aripitri aka Hari Patri aka Hari Pathry was losing his speech and memory rapidly and by the end of December 2009 he could not speak and did not recognize anyone, he had no control of the Bladder and bowel and he had total memory loss.*
14. *The said Will is the Last Will and Testament of said Aripitri aka Hari Patri aka Hari Pathry.*
15. *On 26<sup>th</sup> November, 2013, the 1<sup>st</sup> Defendant obtained Probate No 52962 on a purported prior will dated 11<sup>th</sup> August, 2009 of the said deceased Aripitri aka Hari Patri aka Hari Pathry.*
16. *The said Will was not the last Will of Aripitri aka Hari Patri aka Hari Pathry and therefore is a nullity and should be set aside.*
17. *The value of the estate shown as \$30,000.00 is also false and further grounds of nullity.*

#### FIRST CAUSE OF ACTION

18. *Probate No, 52962 is a nullity and should be set aside as the will dated 11<sup>th</sup> August, 2009 was not the last will of Aripitri aka Hari Patri aka Hari Pathry.*
19. *Probate should be granted to the Plaintiff on the last will dated 2<sup>nd</sup> October, 2009.*
20. *Whereof the Plaintiff seeks declaration that Probate No. 52962 granted on 26<sup>th</sup> November, 2013 is a nullity.*

#### SECOND CAUSE OF ACTION

21. *On or about, 14<sup>th</sup> May 2010 the officers of the 2<sup>nd</sup> Defendant visited the Plaintiff's husband, Aripitri aka Hari Patri aka Hari Pathry, upon observation of his death they requested the Plaintiff to write a letter to the 2<sup>nd</sup> Defendant to withdraw a fraudulent transfer of the "Land" that was being processed.*
22. *The officials said that a letter must have a thumb mark of Aripitri aka Hari Patri aka Hari Pathry which was done but the said Aripitri aka Hari Patri aka Hari Pathry did*

*not understand the nature and effect of it as by May 2010 he had no memory and was not in a position to give legal instruction concerning the property.*

23. *In July 2010, the Plaintiff visited the 2<sup>nd</sup> Defendant in Lautoka and the Plaintiff was assured that the land will not be transferred as Ariphitri aka Hari Patri aka Hari Pathry had no capacity to give legal instructions.*
24. *After the death of Ariphitri aka Hari Patri aka Hari Pathry, the Plaintiff discovered that the property has been transferred to the 1<sup>st</sup> Defendant. On 18<sup>th</sup> November, 2010 consent from the Lands Department was granted and the transfer documents was stamped on 18<sup>th</sup> November 2010 and duly registered by the Register of Titles on 20<sup>th</sup> November, 2010.*
25. *The consent granted on 18<sup>th</sup> November, 2010 by the 2<sup>nd</sup> Defendant was fraudulently granted by a corrupt officer of the 2<sup>nd</sup> Defendant as the 2<sup>nd</sup> Defendant was aware that the lessor was incapable of executing a legal instrument on or about 18<sup>th</sup> November, 2010.*
26. *The transfer of Land on 19<sup>th</sup> December, 2010 was a fraudulent transfer and therefore a nullity and be struck out from the Registrar book of Titles office.*

#### PARTICULARS

- i. *The consent dated 18<sup>th</sup> November 2010 was fraudulently given by a corrupt officer of the 2<sup>nd</sup> Defendant. The Probate issued in name of 1<sup>st</sup> Defendant is a Nullity and perpetuation of a fraud to defeat the Plaintiff's interest by the 1<sup>st</sup> Defendant.*
- ii. *On the same day 18<sup>th</sup> November, 2010 the purported transfer document was stamped.*
- iii. *The purported transfer was released by the stamp duties officer without proper inquiry as to the valuation of the property on the same day and registered on the next day, 19<sup>th</sup> November, 2010.*
- iv. *The transfer was not prepared or lodged by Legal firm and the 1<sup>st</sup> Defendant himself certified that it was correct for the purpose of Land Transfer Act.*
- v. *The person Ariphitri aka Hari Patri aka Hari Pathry did not understand the English language nor could he understand the Legal effect of the purported transfer documents.*
- vi. *The 1<sup>st</sup> Defendant caused some other person to place the thumb prints on the Transfer on 04<sup>th</sup> November, 2010 because Ariphitri aka Hari Patri aka Hari Pathry did not leave his home on the said date as it was his son's birthday who came from New Zealand for the occasion.*
- vi. *A small cross (x) placed at all points requiring signatures suggest that it is pre prepared documents and not done by and upon the execution of the transfer.*
- vii. *The consideration sum showed on the Transfer documents state that the property was sold for only \$10,000.00 and was a fraud as the same was never paid by the 1<sup>st</sup> Defendant and the estimated value of the said property is about \$150,000.00 (One Hundred Fifty Thousand Dollars).*

- ix. *The Transfer was therefore without consideration or value.*
  - x. *The 1<sup>st</sup> Defendant took advantage of the incapacity of Aripitri aka Hari Patri aka Hari Pathry and his lack of understanding of the legal implications,*
  - xi. *The 1<sup>st</sup> Defendant further perpetuated the fraud by producing false witness to his father's incapacity.*
  - xii. *The property was 'sold' under value and the fact that it was not impounded and the swiftness of transaction is evidence of the fraud.*
27. *The act of the 2<sup>nd</sup> Defendant's official who gave consent was fraudulent as they were aware of the health of the lessor and his lawful wife's interest.*

#### PARTICULARS

- i. *The 2<sup>nd</sup> Defendant visited the property.*
- ii. *They saw lessor who was bed ridden and lacking in capacity to give legal instructions.*
- iii. *They had written notice from the Plaintiff not to deal in the 'Land'.*
- iv. *The corrupt official refused to give consent to the Plaintiff to institute legal proceedings and deprived the Plaintiff of her right to seek redress in court of law.*
- v. *Whereof the Plaintiff claim that Transfer No. 738372 be declared a nullity and be removed from the Registrar of Titles Records.*

#### THIRD CAUSE OF ACTION

28. *The Plaintiff took care of the seven children's of the Lessor and the lessor since 1977 onwards.*
29. *The Plaintiff besides being a homemaker was also helping in the farm and its improvement.*
30. *The Plaintiff contributed towards the household expenses from being self employed as a tailor.*
31. *The Plaintiff was promised by Aripitri aka Hari Patri aka Hari Pathry that she would inherit the said property in return for her contribution and for being the carer of the lessor and his children including the 1<sup>st</sup> Defendant.*
32. *The Plaintiff had a life interest in hand as such was entitled to live on the land.*
33. *On 27<sup>th</sup> September, 2011 the 1<sup>st</sup> Defendant through its solicitors gave the Plaintiff's Notice to Vacate.*
34. *The Plaintiff informed the solicitors for the 1<sup>st</sup> Defendant that the Transfer*

dealing was illegal and obtained by fraud and was being investigated by FICAC vide letter dated 29<sup>th</sup> September, 2011.

35. The 1<sup>st</sup> Defendant never cared for the lessor except for 3 months from mid-May, 2009 when the Plaintiff went overseas and the 1<sup>st</sup> Defendant lived separately in the same house which was a dual occupancy dwelling.
36. The Plaintiff claims life tenancy based on constructive trust in the alternative to the first cause of action.

#### FOURTH CAUSE OF ACTION

37. In the alternative to the first and second cause of action, the Plaintiff claims the value of the property from the 1<sup>st</sup> Defendant being the amount she had been deprived by the 1<sup>st</sup> Defendants.

#### PARTICULARS

- i. The property consists of farmland and house and valued at about \$150,000.00
  - ii. At trial of the matter, the Plaintiff will produce a recent valuation of the property.
  - iii. That Plaintiff was entitled to interest in the property as per the testamentary disposition being the lawful wedded wife.
  - iv. The 1<sup>st</sup> Defendant deprived the Plaintiff of her rights and she is entitled to damages to value of the property and in any event she is entitled to damages to the value of the property and in any event in the sum of not less than \$150,000.00.
  - v. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants are nominal Defendants who are joined by virtue of the virtue of their position.
38. The Plaintiff also believes that the said Aripitri aka Hari Patri aka Hari Pathry had a further property, the details of which will be produced at Trial.

#### (2) WHEREFORE THE PLAINTIFF CLAIMS AGAINST THE DEFENDANTS

1. The Will dated 11<sup>th</sup> August, 2009 be declared invalid and Probate No. 52962 be cancelled, as it is a nullity.
2. The Plaintiff seeks an order that the 3<sup>rd</sup> Defendant removes the name of the 1<sup>st</sup> Defendant from the Registrar Book kept at the Titles office.
3. A declaration that the transfer number 738372 registered on 19<sup>th</sup> November, 2010 was a Nullity.

4. Declaration that the 1<sup>st</sup> Defendant was fraudulent and not an innocent purchase for value.

IN THE ALTERNATIVE

5. A declaration that Plaintiff has a life tenancy based on constructive trust.
6. Compensate the Plaintiff the true value of the Estate of Aripitri aka Hari Patri aka Hari Pathry.
7. Costs on an indemnity basis.

**(3) The First Defendant in his Statement of Defence says as follows:**

1. THAT the 1<sup>st</sup> Defendant (hereinafter referred to as the "Defendant") admits paragraphs 1, 2, 3, 4, 5, and 6 of the Plaintiff's Statement of Claim (hereinafter referred to as the "Claim").
2. THAT save as to admit that the Plaintiff was 12 years old in 1977 the rest of the contents in paragraph 7 of the Claim are denied.
3. THAT the Plaintiff did not accept the children of Aripitri's first marriage, including the Defendant and his four sisters, as her own. The Plaintiff:
  - [i] Never displayed any affection, endearments, love or acceptance towards the Defendant and his four sisters;
  - [ii] Treated her biological children differently/superior to the Defendant and his four sisters;
  - [iii] Through her words, actions, omissions and general conduct, created an environment conducive only to her biological children and disadvantageous to the Defendant and his four sisters;
  - [iv] Through her words, actions, omissions and general conduct, created an environment and home where the Defendant and his four sisters felt and/or were made to feel inferior to the Plaintiff's biological children;
  - [v] Through her words, actions and general conduct, created an environment of fear where the Defendant and his four sisters lived under the wishes, directives and command of the Plaintiff;
  - [vi] Through her words, actions and conduct, mentally and physically abused the Defendant and his four sisters.
4. THAT the Plaintiff, through her words, actions and general conduct and through her influence and control over Aripitri:
  - [i] Made it mandatory for the Defendant and his four sisters to work on the sugar cane plantation comprised in Crown Lease No. 17818;

- [ii] *Made it mandatory for the Defendant and his four sisters to attend to the livestock and vegetable farms comprised in Crown Lease No. 17818;*
  - [iii] *Made it mandatory for the Defendant and his four sisters to attend to household chores and hard labour;*
  - [iv] *Disallowed the Defendant and his four sisters from attending School and/or created an environment where the Defendant and his four sisters were unable to attend school due to heavy workload on the farm and at home.*
5. THAT as a result of matters pleaded in paragraph 3 and 4 herein:
- [i] *The Defendant's eldest sister left school permanently and worked on the farm and was forced to attend to domestic duties;*
  - [ii] *The Defendant had to endure hard labour on the farm to pay for the costs of his education.*
  - [iii] *The Defendant's second sister ran away from home to live with her maternal uncle at Vitogo, Lautoka;*
  - [iv] *The Defendant's third sister committed suicide by hanging herself.*
6. THAT the Defendant admits paragraph 8 of the Claim.
7. THAT the Defendant denies paragraph 9 of the Claim and says that:
- [i] *The Defendant's father was the sole breadwinner in the family and supported the family through income from sale of fish and cultivation of sugar cane;*
  - [ii] *The Plaintiff indulged in tailoring as a hobby and for leisure purposes only;*
  - [iii] *The household chores were allocated to the Defendant and his sisters.*
8. THAT the Defendant admits paragraph 10 of the Claim.
9. THAT save as to admit that Aripitri suffered a second stroke in 2006 the rest of the contents of paragraph 11 are denied.
10. THAT the Defendant denies paragraph 12 of the Claim and says that:
- [i] *The last Will and Testament of Aripitri is dated 11<sup>th</sup> August 2009 and filed in the High Court of Fiji Registry at Suva on 18<sup>th</sup> August 2009;*
  - [ii] *The said will dated 11<sup>th</sup> August 2009 has been proved and registered in the Probate Registry of the High Court of Fiji;*
  - [iii] *Probate No. 52962 has been granted on the said Will dated 11<sup>th</sup> August 2009.*
11. THAT the Defendant further says that:
- [i] *The Defendant is unaware of the existence of the purported Will dated 2<sup>nd</sup> October 2009;*



- [ii] *The Plaintiff has concocted the existence of the purported Will dated 2<sup>nd</sup> October 2009 and the said Will was not proved as the last Will of Ariphitri and/or not pleaded in opposition during the grant of Probate No. 52962.*
12. *THAT the Defendant denies paragraph 13 of the Claim and says that Ariphitri had regular medical assessments and remained stable until he passed away in March 2011.*
13. *THAT the Defendant denies paragraph 14 and repeats paragraphs 10 and 11 herein.*
14. *THAT save as to deny that Will dated 11<sup>th</sup> August 2009 was a prior Will the Defendant admits paragraph 15 of the Claim and says that the Will dated 11<sup>th</sup> August 2009 is the last Will and Testament of Ariphitri and the said Will was proved and registered in the Probate Registry of the High Court of Fiji.*
15. *THAT the Defendant denies paragraph 16 of the Claim and repeats paragraphs 10, 11 and 14 herein.*
16. *THAT the Defendant denies paragraph 17 of the Claim and says that:*
- [i] *Messers, Nacolawa & Co, Barristers & Solicitors of Lautoka acted for the Defendant in obtaining Grant of Probate No. 52962;*
- [ii] *The Defendant acted on the advice of Messers. Nacolawa & Co including the legal and tax aspect of the application;*
- [iii] *The Probate application was compiled, filed and the grant of Probate was uplifted by the Defendant's solicitors Messers. Nacolawa & Co.*
17. *THAT the Defendant denies paragraph 18 of the Claim and repeats paragraphs 10 and 11 herein.*
18. *THAT the Defendant denies paragraph 19 of the Claim and repeats paragraphs 10 and 11 herein.*
19. *THAT the Defendant denies paragraph 20 of the Claim and repeats paragraphs 10 and 11 therein.*
20. *THAT the Defendant further states that the allegations as set out in paragraph 18, 19 and 20 of the claim are imprecise, vague and general in nature without descending to particulars and as such are an embarrassment to the rules of pleadings and should be struck out.*
21. *THAT in response to paragraph 21 of the Claim the Defendant says that:*
- [i] *He is unaware of any visits to Ariphitri by Officials of the director of Lands;*

- [ii] Officials of the Director of Lands are not fraud investigators and without descending to particulars of a fraudulent transfer the said inquiry is ultra vires and illegal;
- [iii] The allegations as set out in paragraph 21 of the Claim are imprecise, vague and general in nature without descending to:
  - i. The particulars of the purported transfer that was being processed; and/or
  - ii. Particulars of a fraudulent transfer; and/or
  - iii. Observations of Aripitri's health;

And as such are an embarrassment to the rules of pleadings and should be struck out.

- iv. The remaining allegations as pleaded in paragraph 21 of the Claim are denied and the Plaintiff is put to proof of the same.

22. THAT in response to paragraph 22 of the Claim the Defendant says that:

- [i] The Defendant is unaware of the request made by the Officials of the Director of Lands;
- [ii] In any event Officials of the Director of Lands are not fraud investigators and without descending to particulars of a fraudulent transfer the said inquiry is ultra vires and illegal;
- [iii] The remaining allegations as pleaded in paragraph 22 of the Claim are denied and the Plaintiff is put to proof of the same.

23. THAT in response to paragraph 23 of the Claim the Defendant says that;

- [i] The Defendant is unaware of any visit to Aliphitri by the Plaintiff and/or any discussions between them;
- [ii] In any event the Plaintiff is not qualified to express the opinion pleaded in paragraph 23 of the Claim;
- [iii] The remaining allegations as pleaded in paragraph 23 of the Claim are denied and the Plaintiff is put to proof of the same.

24. THAT in response to paragraph 24 of the Claim the Defendant says that;

- [i] The Defendant is unaware of any discoveries by the Plaintiff and the said discoveries are a reference to the Plaintiff's observations/understanding and the Plaintiff is not required to plead to the same; and
- [ii] Admits the rest of paragraph 24 of the Claim.

25. THAT in response to paragraph 25 of the Claim the Defendant says that:

[i] The Transfer Instrument referred to paragraph 25 of the Claim was signed on 4<sup>th</sup> November 2010; and

[ii] The said Transfer Instrument was witnessed by Mr. Saimoni Nacolawa, a Barrister & Solicitor of the High Court of Fiji and the said witness signed the said Transfer Instrument upon reciting the following:

*“The signature by left thumb mark of “Hari Pathry” was made in my presence and I verily believe that such thumb print is of the person described as HARI PATHRY father’s name Raghwan of Saweni, Lautoka, Fisherman as the sole administrator of the Estate of Raghwan father’s name Subrail, the Transferor and I certify that I read over and explained the contents thereof to the Transferor in the English language and he appeared fully to understand the meaning and effect thereof”*

[iii] The remaining allegations as pleaded in paragraph 25 of the Claim are denied and the Plaintiff is put to proof of the same.

26. THAT in response to paragraph 26 of the Claim the Defendant says that:

[i] The Transfer Instrument was endorsed on Crown Lease No. 17818 on 19<sup>th</sup> November 2010;

[ii] He repeats paragraph 25 herein;

[iii] The remaining allegations as pleaded in paragraph 26 of the Claim are denied and the Plaintiff is put to proof of the same.

27. THAT the Defendant responds to the particulars as pleaded in paragraph 26 of the Claim as follows:

[i] In response to paragraph 26 i the Defendants:

i. Says that the Transfer Instrument was endorsed on Crown Lease No. 17818 prior to the death of Aripitri therefore the Will of the late Aripitri and/or the grant of Probate does not affect the same;

ii. Repeats paragraph 25 herein.

[ii] The Defendant admits paragraph 26 ii and says that there is no illegality and/or fraud in stamping a Transfer Instrument on the same date consent to transfer is granted.

[iii] Save as to admit that the Transfer was registered on 19<sup>th</sup> November 2010 the Defendant denies paragraph 26 iii and puts the Plaintiff to proof of the same;

[iv] The Defendant admits paragraph 26 iv and says that there is no illegality and/or fraud in certifying and lodging a Transfer Instrument in person. The Defendant

*further states that the Transfer Instrument was vetted and accepted in registrable form by the Registrar of Titles;*

[v] *The Defendant denies paragraph 26 v and repeats paragraph 25 herein;*

[vi] *The Defendant denies paragraph 26 vi and repeats paragraph 25 herein;*

[vii] *The Defendant admits paragraph 26 vii and says that:*

- i. *As a matter of common sense, logic and convenience all Transfer Instruments and documents are prepared and printed prior to execution and upon execution it is explained to the executor;*
- ii. *It would be inconvenient to prepare documents in the presences of the executor;*
- iii. *It would be inconvenient and a waste of solicitors time and costs to prepare documents before a solicitors prior to execution.*

[viii] *The Defendant denies paragraph 26 vii and says that the consideration sum is adequate in the circumstances as the transfer of the Crown Lease was based on of love and affection between a father and his son;*

[ix] *The Defendant denies paragraph 26 ix and repeats paragraph 27 [vii] herein;*

[x] *Alternatively, and without prejudice to paragraph 26 [ix] herein the Defendant says that if it is held that the Transfer was without consideration then:*

- i. *The same is grounds for an action to recover a debt from the Defendant by the Estate of Aripitri;*
- ii. *The Plaintiff has no locus standi to recover the said debt;*
- iii. *The same is not tantamount to fraud.*

[xi] *The Defendant denies paragraph 26 x and repeats paragraph 25 herein.*

[xii] *The Defendant denies paragraph 26 xi and repeats paragraph 25 herein.*

[xiii] *The Defendant denies paragraph 26 xii and repeats paragraphs 25, 26 and 27 herein.*

28. *THAT in response to paragraph 27 of the Claim the Defendant is unaware of any consent issued by fraud and/or fraudulent consent by the 2<sup>nd</sup> Defendant and puts the Plaintiff to proof of the same.*
29. *THAT alternatively, and without prejudice to paragraph 28 herein, the Defendant says that if the 2<sup>nd</sup> Defendant is found to have issued consent by fraud and/or fraudulent consent then the said consent by fraud and/or fraudulent consent is not grounds to defeat/impeach the Defendant's interest in Crown Lease No. 17818.*
30. *THAT the Defendant denies paragraph 28 of the Claim and repeats paragraphs 3, 4, and 5 herein.*

31. THAT the Defendant denies paragraph 29 and 30 of the Claim and repeats paragraphs 3, 4, 5 and 7 herein.
32. THAT the Defendant denies paragraph 31 of the Claim and says that:
  - [i] Crown Lease No. 17818 was disposed prior to Aripitri's death;
  - [ii] Crown Lease No. 17818 vested in the Defendant prior to Aripitri's death;
  - [iii] Therefore, Aripitri had no legal authority and/or locus standi to gift, devise and bequeath and/or promise to gift, devise and bequeath Crown Lease No. 17818 after the Transfer of the said Lease to the Defendant.
33. THAT the Defendant denies paragraph 32 of the Claim and repeats paragraph 32 herein.
34. THAT the Defendant admits paragraphs 33 and 34 of the Claim.
35. THAT the Defendant denies paragraph 35 and 36 of the Claim and puts the Plaintiff to proof of the same.
36. THAT the Defendant denies paragraph 37 of the Claim and repeats paragraph 32 herein.
37. THAT paragraph 38 of the Claim consists of the Plaintiff's speculation and the Defendant is not required to plead to the same.
38. THAT save as expressly admitted, the Defendant denies the Plaintiff's Claim in its totality and requires the Plaintiff to be put to proof on the entire claim and cross-examined thereto.
39. WHEREFORE the Defendant seeks that the Plaintiff's Statement of Claim be dismissed with costs in favour of the Defendant.

(4) **The Second, Third and Fourth Defendants in their Statement of Defence say as follows;**

1. THAT 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants are not aware of paragraphs 1 to 7 of the claim and as such can neither admit nor deny the same.
2. AS to paragraph 8, the 2<sup>nd</sup>, 3<sup>rd</sup> and the 4<sup>th</sup> Defendants state that CL 17818 was registered in favour of Hary Pathry as the sole administrator of the estate of Raghwan and then transferred to the 1<sup>st</sup> Defendant but make no comments to the rest of the contents therein.
3. THE 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants are not aware of the contents of paragraph 9 to 17.
4. AS to paragraphs 18 to 20, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants state that it is an issue for determination by the Honourable Court and as such cannot comment on the same.

5. AS to paragraphs 21, the 2<sup>nd</sup> Defendant states that the officers from Lands Department visited the Plaintiff's husband on 13<sup>th</sup> May 2010 but denies the rest of the contents therein and puts the Plaintiff to strict proof of the allegation raised.
6. THAT 2<sup>nd</sup> and the 4<sup>th</sup> Defendant's deny the contents of paragraphs 22 and 23 of the claim and puts the Plaintiff to strict proof of the same.
7. AS to paragraph 24, the 2<sup>nd</sup>, 3<sup>rd</sup> and the 4<sup>th</sup> Defendants' agrees that the Consent to transfer was granted and transfer documents were stamped on the 18<sup>th</sup> of November 2010 after citing the said transfer instrument. The 3<sup>rd</sup> Defendant further states that the transfer dealing no. 738372 was lodged and registered in favour of the 1<sup>st</sup> Defendant on 19 November 2010.
8. The 2<sup>nd</sup> and the 4<sup>th</sup> Defendants' deny the contents of paragraph 25 and puts the Plaintiff to strict proof of the allegations raised.
9. THE 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants deny the contents of paragraph 26 and put the Plaintiff to strict proof of the allegations raised. The 2<sup>nd</sup>, 3<sup>rd</sup> and the 4<sup>th</sup> Defendants further state that they cannot comment on the issue of nullity as it is for the determination by the Honourable Court. That in response to the particulars pleaded in paragraph 26 of the Claim the 2<sup>nd</sup>, 3<sup>rd</sup> and the 4<sup>th</sup> Defendants' say as follows:-
  - i. Deny that the consent was fraudulently given and puts the Plaintiff to strict proof of the same, however make no comments on the rest of the contents of subparagraphs 26 (i).
  - ii. Agree with subparagraph 26 (ii) after citing the transfer documents.
  - iii. SAVE as to admit that the transfer was lodged and registered on 19<sup>th</sup> November 2010 the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants' make no comments on the rest of the contents in subparagraph 26 (iii).
  - iv. Admit subparagraph (iv) that transfer was certified by 1<sup>st</sup> Defendant himself.
  - v. Make no comments to subparagraph 26 (v) to (vii).
  - vi. SAVE as to admit that the consideration amount shown on the transfer document is \$10,000, the 2<sup>nd</sup>, 3<sup>rd</sup> and the 4<sup>th</sup> Defendants make no comments to the rest of the contents of subparagraph 26 (viii).
  - vii. AS to subparagraph (ix) of the Claim, the 2<sup>nd</sup>, 3<sup>rd</sup> and the 4<sup>th</sup> Defendants' repeat subparagraph 9 (vi) of our Defence.
  - viii. THE 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants make no comments to paragraph 26 subparagraphs (x) to (xi).
  - ix. THE 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants make no comments to paragraph 26 subparagraph (xii) as it is an issue for determination by the Honourable Court.
10. THE 2<sup>nd</sup>, 3<sup>rd</sup> and the 4<sup>th</sup> Defendants deny the contents of paragraph 27 and sub paragraphs (i) – (v) of the claim therein and puts the plaintiff to the strict proof of the allegation raised, claimed therein.

11. THE 2<sup>nd</sup>, 3<sup>rd</sup> and the 4<sup>th</sup> Defendants have no knowledge of paragraphs 28 to 36 therefore make no comments to the same.
12. THE 2<sup>nd</sup>, 3<sup>rd</sup> and the 4<sup>th</sup> Defendants are not aware of the contents of paragraph 37 and the particulars contained in subparagraph (i) to (iv). The 3<sup>rd</sup> and 4<sup>th</sup> Defendants agree with subparagraph (v) of paragraph 37.
13. WE make no comments to paragraph 38 of the claim.
14. FURTHER and/or in the alternative, the 2<sup>nd</sup>, 3<sup>rd</sup> and the 4<sup>th</sup> Defendants' say that the Claim against them should be wholly struck out and dismissed on the grounds that the Claim:
  - (a) Discloses no reasonable cause of action; and/or
  - (b) Is frivolous and / or vexatious; and / or
  - (c) Is otherwise an abuse of the process of the Court.
15. That the 2<sup>nd</sup>, 3<sup>rd</sup> and the 4<sup>th</sup> Defendant's pray to this Honourable Court that this action be dismissed with costs.

**(5) The Plaintiff's reply to the First Defendant's Statement of Defence is as follows:**

1. Save in so far as the same consists of Admissions, the Plaintiff joins issue with the First Defendant on his Defence.
2. The Plaintiff denies paragraph 3 of the Defence and further says; -
  - (a) The Plaintiff took very good care of the children, at all relevant times.
  - (b) The First Defendant was skipping school and would not study and was only interested in fishing in order to see that he attains good education. The Plaintiff arranged for First Defendant to live with her mother in Tavua and the First Defendant lived there for 4 years and completed his high school.
  - (c) I took care of the girls as long as they lived with me.
3. The Plaintiff denies paragraph 4 of the Defence and says:-
  - (a) When the children were schooling at Primary School, sugarcane was planted on CL No. 17818 by Ranga Sami Gounder.
  - (b) After Rangam Sami Gounder, the sugarcane was planted by Naresha my brother-in-law (husband's brother).
  - (c) After Naresha, we planted sugarcane only for one year and that year I did all the work.

- (d) *The allegation of abuse and child labour is a fabrication.*
4. *The Plaintiff denies paragraph 5 of the Defence and says:-*
- (a) *The eldest daughter completed Form 4 and left school on her own violation.*  
(b) *The second sister left school and worked for a school teacher then she stole from the teacher and First Defendant applied corporal punishment on her, and then she left for her uncle's house.*  
(c) *The Third sister had marital problems and after her separation she returned home and committed suicide within 6 months.*
5. *The Plaintiff denies paragraph 7 of the Defence and repeats paragraph 9 of the Claim.*
6. *The Plaintiff joins issue with the First Defendant as to paragraph 10 and says:-*
- (i) *The Last Will is dated 2<sup>nd</sup> October, 2009*  
(ii) *The grant of probate is a nullity as it was not the last Will of the testator.*
7. *As to paragraph 11 of the Plaintiff says:-*
- (i) *She will produce the last Will to the High Court.*  
(ii) *The allegation of concoction is denied.*
8. *The Plaintiff denies paragraph 12 and repeats paragraph 13 of the claim.*
9. *As to paragraph 14 of the Defence the Plaintiff says that last Will was dated 2<sup>nd</sup> October, 2009.*
10. *As to paragraph 16 the Plaintiff repeats that the estate was not valued at \$33,000.00, the property has a sea front, and large dwelling and there is second property consisting about 8 or 12 acres.*
11. *The Plaintiff denies paragraphs 20 to 21 and says the pleadings contain material facts.*
12. *As to paragraph 22 of the Defence, the Plaintiff repeats by May 2010 her husband did not have capacity to execute legal documents.*
13. *As to paragraph 23 of the Defence the Plaintiff repeats she visited the office of the Director of Lands.*
14. *As to paragraph 25 of the Defence the Plaintiff repeats in November, 2010 her husband did not have mental capacity to sign any documents including legal documents disposing his assets. He could not speak and he had no knowledge of the English language.*
15. *As to paragraph 26 of the Defence the Plaintiff repeats that a transfer document which*



*does not disclose a true valuation cannot be processed in one day by the Commissioner for stamp duties and it would be impounded an investigation as to value for revenue purposes has to conduct and the Plaintiff is the lawful executrix of last Will of her husband.*

16. *As to paragraph 29 of the Defence the Plaintiff says proof of fraud will amount to the dealing lacking consent of state and therefore it is illegal ab intio.*
17. *As to paragraph 32 of the Defence the Plaintiff says her husband an elderly and sick gentlemen did not dispose of his property in his life time and Frist Defendant conduct raise a strong presumption of suspicion and fraud.*

**(6) The Plaintiff's reply to the Second, Third and Fourth Defendant's Statement of Defence is as follows:**

1. *Save insofar as the same consists of Admissions, the Plaintiff joins issue with the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendant on his Defence.*
2. *The Defendant represents the Government of Fiji and their employees are civil servant and as such are required to assist the community.*
3. *The Defendants are aware of valuation of its property and required to assist the Court.*
4. *The Defendants are aware of the procedures in Stamp Duties Office regarding assessment of stamp duty, valuation and calculation as to amount to be paid to FRCA and therefore required to assist the court as to standard procedures and requirement for clearance of transfer documents.*

**(C) The Minutes of the Pre-Trial Conference reads, inter alia, the following:**

**AGREED FACTS**

1. *That the Plaintiff is the widow of Aripitri.*
2. *Aripitri is also known as Hari Patri and Hari Pathry (hereinafter referred to as Hari Patri.)*
3. *The First Defendant is the only son of Hari Pathri.*
4. *The Plaintiff began a relationship with Hari Patri in 1977 and this was formalized on the 4<sup>th</sup> of October 1977.*

5. *Hari Patri had been married twice before 1977 and had 5 children from his first marriage, 4 girls and 1 boy.*
6. *After the death of his first wife he remarried and had 2 other children from the second wife. The children were under the care of the maternal grandmother after their mother died.*
7. *The Plaintiff had two children of her own, a daughter born on the 29<sup>th</sup> of June 1978 and a son born on the 4<sup>th</sup> November 1980.*
8. *The First Defendant was in class 6 and 12 years old in 1977.*
9. *The Plaintiff and the Defendant lived together on a property known as Crown Lease No. 17817 being lot 15 ND 5003 Nakorokoro consisting of 1.6313 ha hereafter referred to as 'the Land'.*
10. *The Plaintiff was a homemaker as well as a tailor where she derived little income to assist the family and she also worked on the land and assisted on the farm.*
11. *In 2002 Hari Patri suffered a stroke in which he recovered but not fully. In 2006 he suffered a second stroke and a head injury which resulted in him being bed ridden or wheel chair bounded. His health continued to deteriorate.*
12. *Hari Patri executed his Last Will & Testament on the 2<sup>nd</sup> day of October 2009, nominating the Plaintiff as the trustee of the all his property which was prepared by his Solicitors Messer's Chandra Singh & Associates.*
13. *December 2009 Hari Patri's health was deteriorating, his speech and memory included by the end of December he could not speak nor recognize anyone.*
14. *The First Defendant had obtained Probate No, 52962 on a purported Will made on the 11<sup>th</sup> August, 2009 of the said deceased Hari Patri.*
15. *The Officers of the Director of Lands office staff visited Plaintiff's Husband, Mr. Hari Patri on the 13<sup>th</sup> of May 2010.*
16. *That Hari Patri dies on the 11<sup>th</sup> of March 2011.*
17. *That the Transfer of the property known as Crown Lease No. 17817 being Lot 15 ND 5003 Nakorokoro consisting of 1.6313 ha was stamped on 18<sup>th</sup> November 2010 and lodged and registered in favour of the First Defendant on the 19<sup>th</sup> November, 2010.*
18. *On the 27<sup>th</sup> of September 2011 the 1<sup>st</sup> Defendant through its Solicitor's gave the Plaintiff a Notice to Vacate.*

19. *The Plaintiff informed the Solicitors of the 1<sup>st</sup> Defendant that the transfer dealing was illegal and obtained by fraud and was being investigated by FICAC vide letter dated 20<sup>th</sup> September 2011.*

### ISSUES

1. *Was the Will made on the 11<sup>th</sup> August 2009, Valid?*
2. *Whether the value of the property shows as \$30,000 is false?*
3. *Whether Probate should be granted to the Plaintiff on the last will dated 2<sup>nd</sup> of October 2009?*
4. *Whether the second Defendant informed the Plaintiff on the 14<sup>th</sup> of May 2010 to write a letter to the 2<sup>nd</sup> Defendant to withdraw a fraudulent transfer of the land that was in process?*
5. *Whether the officials from the office of the 2<sup>nd</sup> Defendant had advised the Plaintiff that a letter must have the Thumbprint of Hari Patri?*
6. *Whether it was done?*
7. *Whether he understood the effect of such letter?*
8. *Whether the 2<sup>nd</sup> Defendant had assured the Plaintiff at their office in Lautoka that the said Land will not be transferred?*
9. *Whether the consent granted on the 18<sup>th</sup> of November, 2010 by the 2<sup>nd</sup> Defendant was fraudulently granted by an officer on the 2<sup>nd</sup> Defendant?*
10. *Whether stamp duties officer released the purported transfer on the 18<sup>th</sup> November 2010 without proper inquiry into the value of the property?*
11. *Whether the registration of the Stamp Duties on the 19<sup>th</sup> of November 2010 done fraudulently by the First Defendant?*
12. *Whether the transfer of land on the 19<sup>th</sup> of December, 2010 was a fraudulent transfer?*
13. *Whether the transfer was not prepared by a legal firm and the 1<sup>st</sup> Defendant certified this as correct amounts to fraud?*
14. *Whether the 1<sup>st</sup> Defendant had caused another person to place a thumb print to Hari Patri?*

15. *Whether the small cross (x) was placed at all points requiring signatures suggests that it was prepared documents not done by and upon the execution of the transfer?*
16. *Whether the consideration sum showed on the Transfer Document amounting to \$10,000.00 was paid by the 1<sup>st</sup> Defendant?*
17. *Does the non-payment amount to fraud?*
18. *Whether the estimated value of the property at the time of the transfer was about \$150,000.00?*
19. *Whether the 1<sup>st</sup> Defendant took advantage of the incapacity of Hari Patri and his lack of knowledge of the legal implications?*
20. *Whether the 2<sup>nd</sup> Defendant was aware of the health of the lessee Mr Hari Patri and that of his legal wife's interest?*
21. *Whether the 2<sup>nd</sup> Defendant acted fraudulently in giving consent to the transfer with the above information at hand?*
22. *Whether the 2<sup>nd</sup> Defendant through its officials on 4<sup>th</sup> April, 2012, had refused to give consent to the Plaintiff to institute legal proceedings and deprive the Plaintiff of her right to seek redress in Court?*

**(D) ORAL AND DOCUMENTARY EVIDENCE**

- Oral Evidence

- Plaintiff's case:

- \*Plaintiff
- \*Torika Solicake Goneca  
Deputy Registrar of Titles
- \*Atlesh Ravin Lal  
Law Clerk
- \*Latchman Naicker  
Farmer
- \*Haroon Ali Shah
- \*Angela Devi

- Defendants case:

- \*First Defendant
- \*Saimoni Nacolawa – Barrister and Solicitor
- \*Laisenia Kidinaceva

Senior Lands Officer

• Documentary Evidence:

- PE - (1) - Marriage Certificate of Aripitri aka Hari Patri and Vimala Wati.
- PE - (2) - Death Certificate of Aripitri aka Hari Patri.
- PE - (3) - Medical Report from Lautoka Hospital dated 04<sup>th</sup> day of October, 2011.
- PE - (4) - Will dated 11<sup>th</sup> August, 2009.
- PE - (5) - Will dated 02<sup>nd</sup> October, 2009.
- PE - 6 (a) - Transfer No. 738372.
- PE - 6 (b) - Crown Lease No. 17818.
- DE - (1) - Probate No:- 52962.
- MF - (1) - Letter dated 17<sup>th</sup> May 2010.

**(E) Discussion**

- (1) Whilst most grateful for the benefit of written submissions and research of Counsel, I venture to say that I have given my mind to the written submissions and the judicial authorities referred to therein.
- (2) The Plaintiff is the widow of 'Aripitri aka Hari Patri (the testator). The First Defendant is the son of 'Aripitri aka Hari Patri' and the step son of the Plaintiff.
- (3) The testator died on 16<sup>th</sup> March 2011. The Plaintiff pleaded that she is the executrix and trustee of the will dated 02<sup>nd</sup> October 2009 being the last will and testament of the deceased. The will was dated one year and five months before the death of the testator.

- (4) In the Statement of Claim filed on 01<sup>st</sup> March 2014, the Plaintiff sought relief from this Court in the form of a pronouncement against the will purported to have been executed on 11<sup>th</sup> August 2009 (the former will) by Aripitri aka Hari Patri deceased (the testator). It is not expressly requested to pronounce for the will dated 02<sup>nd</sup> October 2009 (the later will).
- (5) As I understand the Plaintiff's pleadings, the Plaintiff has not challenged the will dated 11<sup>th</sup> August 2009 (the former will) propounded by the Defendant on the grounds that (1) the deceased's signature was forged, (2) that the will was manufactured after the death of the testator and (3) that the will was not executed in accordance with the provisions of the Wills Act, Cap 59. **The Plaintiff pleaded simply that the will dated 11<sup>th</sup> August 2009 (the former will) was not the last will and the testament of the deceased.** This finding is based on paragraph 16 of the Statement of Claim which pleads that the will dated 11<sup>th</sup> August 2009 was not the last will of the deceased. Moreover, paragraph 14 of the Statement of Claim pleads that the will dated 02<sup>nd</sup> October 2009 propounded by the Plaintiff was the last will of the deceased.
- (6) Had the Plaintiff put the **validity and the genuineness** of the will dated 11<sup>th</sup> August 2009, it would have been necessary for the First Defendant to prove due execution. In my judgment, the validity and the genuineness are not in issue. **The only issue is whether the will dated 11<sup>th</sup> August 2009 was the last will of the deceased?** As a result, it is not necessary for the Defendant to call either of the attesting witnesses to the will dated 11<sup>th</sup> August 2009 to establish due execution and hence validity and genuineness.
- (7) Now let me turn to the First Defendant's pleadings. **The First Defendant's Defence did dispute the validity and genuineness of the will dated 02<sup>nd</sup> October 2009 propounded by the Plaintiff.** In other words, the First Defendant's pleadings do put into issue the validity and genuineness of the will dated 02<sup>nd</sup> October 2009 propounded by the Plaintiff.

This finding is based on paragraph ten (10) and eleven (11) of the First Defendant's Statement of Defence which pleads that;

10. *THAT the Defendant denies paragraph 12 of the Claim and says that:*

- [i] The last Will and Testament of Aripitri is dated 11<sup>th</sup> August 2009 and filed in the High Court of Fiji Registry at Suva on 18<sup>th</sup> August 2009;*
- [ii] The said will dated 11<sup>th</sup> August 2009 has been proved and registered in the Probate Registry of the High Court of Fiji;*

[iii] Probate No. 52962 has been granted on the said Will dated 11<sup>th</sup> August 2009.

11. THAT the Defendant further says that:

[i] The Defendant is unaware of the existence of the purported Will dated 2<sup>nd</sup> October 2009;

[ii] The Plaintiff has concocted the existence of the purported Will dated 2<sup>nd</sup> October 2009 and the said Will was not proved as the last Will of Aripitri and/or not pleaded in opposition during the grant of Probate No. 52952.

[Emphasis Added]

- (8) As a result, the burden falls on the Plaintiff to establish the due execution of the impugned will dated 02<sup>nd</sup> October 2009 on a preponderance of evidence or on a balance of probability
- (9) It is necessary for the Plaintiff to call either of the attesting witnesses to the will dated 02<sup>nd</sup> October 2009 to establish due execution and hence validity.
- (10) Under those circumstances, the executrix and trustee (in this case the Plaintiff) of the will dated 02<sup>nd</sup> October 2009 is compelled to propound that will and to establish it by calling one or more of the attesting witnesses.

Whenever it is necessary for an executor to establish due execution of a will, he is required, at common law, to call one of the attesting witnesses, if any was available.

See; • **Belbin v Skeates**  
164 ER 669

• **Bowman v Hodgson**  
(1867) 1 L.R.P. and D 362

The burden imposed on a party who seeks to propound a will was stated clearly by Lord Hanworth MR in In the Estate of Lavinia Musgrove, Davis v Mayhew [1927] AC 264 at part 276.

*“It is clear first, that the onus of proving a will lies upon the party propounding it, and secondly, that he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator. To develop this rule a little further – he must show that*

*the testator knew and approved of the instrument as his testament and intended it to be such."*

*Parke B in the course of his judgment in Barry v Butlin (1) says:*

*The strict meaning of the term onus probandi is this, that if no evidence is given by the party on whom the burden is cast, the issue must be found against him. In all cases the onus is imposed on the party propounding a will, it is in general discharged by proof of capacity, and the fact of execution, from which the knowledge of and assent to the contents of the instrument are assumed."*

The Court will usually pronounce for a will if one of the attesting witnesses deposes to the due execution of the will. However the Court will not exclude further relevant evidence for the purpose of avoiding fraud. Vere – Wardale –v- Johnson and Others [1949] 2 ALL.E.R 250, at P 395 is authority for the proposition that *"the evidence of the attesting witness to a will is not necessarily conclusive, and the court is competent to receive evidence in rebuttal."* Willmer LJ at page 397 stated:

*It appears to me that the object of the legislature in imposing the strict formalities required by the Wills Act, 1837, was to prevent fraud. My duty here is to do all that I can see that no fraud is perpetuated; and if I exclude further evidence such a ruling can only assist the possibility of the perpetration of fraud.*

*In the circumstance it is my opinion that it would be quite wrong, and not in accordance with authority, to exclude such further evidence with regards to the attesting of this will as may be available."*

- (11) Before other evidence is admissible, it must be shown that all the attesting witnesses are dead, insane, beyond the jurisdiction or that none of them can be traced.

If none of the attesting witnesses can be called for the reasons indicated in the previous paragraph, steps must be taken to prove at least one of them. This constitutes secondary evidence of attestation.

See; • **In the Will of Hutchins**  
(1893) 14 ALT 223

- **In the Will of Hobbs**



(1931) 48 WN (NSW) 166.

If evidence of handwriting is unobtainable, evidence of those who saw the will executed, or any other evidence from which an inference of due execution can be drawn becomes admissible, but it seems that every effort first be made prove the handwriting of one of the attesting witnesses.

See; **Clarke v Clarke**  
(1879) 5 LR Ir 47.

- (12) The will dated 02<sup>nd</sup> October 2009 (the later will) was not prepared by a legal practitioner. It was prepared by '**Atlesh Ravin Lal**', the law clerk in the employ of 'Chandra Singh Associates'. He is also one of the two attesting witnesses to the signature of the deceased, the testator. He was called by the Plaintiff to establish due execution of the impugned will. The Plaintiff did not call the other attesting witness namely "**Vinita Kumari**", to establish the due execution.
- (13) "**Atlesh Ravin Lal**" deposed in examination in chief that; (Page 41-43 of the transcript of evidence).

Q: *Mr Atlesh, do you remember a man by the name of Hari Patri?*

A: *Yes.*

Q: *Do you remember lady by the name of Vimla Wati?*

A: *Yes.*

Q: *Can you please point her out to the Court if she's present in Court?*

A: *Vimla Wati is sitting there.*

Q: *Mr Atlesh, can you tell the Court when was the 1<sup>st</sup> time you met both Vimla Wati and her late husband?*

A: *She came to our Office with her Sister Anamma to prepare the Will for the husband in .*

Q: *What year was this?*

A: *In 2009.*

Q: *On this particular day, you stated that she came with her sister. Was her late husband also present on that day?*

A: *The husband was at the sister's place because he was bedridden and can't come to our office, so only the sister Anamma and Vimla came to the office.*

Q: *So, upon Vimla Wati and the sister approaching your office, what then happened?*

A: *Then we went, myself and my other staff, Vinita Kumari, went to Anamma's place to take instructions for the Will from Hari Patri.*

Q: *Can you please tell the Court what was instructions you obtained from Hari Patri that be?*

A: *Hari Patri instructed us to prepare the Will and to appoint Vimla Wati as the Trustee and all his shares in the Estate of Raghwan, he was giving all his shares to his wife Vimla Wati.*

Q: *Can you please tell the Court what was his condition then?*

A: *He was bedridden but he could talk and he was in sound mind.*

Q: *So, after he gave you instructions what then, what steps did you then take?*

A: *On the same day, we went to the Office, prepare the Will and with my staff Vinita Kumari, we went back to Anamma's place for execution of the Will.*

Q: *And if I could refer the Witness to document number 8 of Bundle. Mr Atlesh, if we could have a look at that document in front of you, can you please tell the Court what document is that?*

A: *This is the last Will of Hari Patri dated 2<sup>nd</sup> October, 2009.*

Q: *Can you confirm if your signature is there as a Witnessing*

A: *I am one his first Witness*

Q: *Can you just point it out to the Court which signature is yours?*

Crt: *Left-hand side signature?*

A: *Yes Sir.*

Crt: *Left-hand side?*

PC: *Yes, left-hand side Sir.*

Q: *Now, Mr Atlesh, do you confirm that you had witnessed that particular Will on that particular day?*

A: *Yes, yes.*

Q: *Can you explain the circumstances in which that particular Will was explained to the Testator?*

A: *Yeah, we explained the Testator Mr Hari Patri Will in the Hindustani Language and he read the same and after that he put his left thumb mark.*

Q: *Can you just repeat your answer again.*

A: *We explained to him in the Hindustani language and he read the contents of the Will and then he executed the Will by putting his thumb mark.*

Q: *Which thumb print he used to put in that document?*

A: *Left thumb mark.*

Crt: *Sorry, which?*

A: *Left thumb mark.*

Crt: *Left thumb mark.*

Q: *Now Mr Atlesh, what was Hari Patri demeanor on that day? When you had explained to him the contents of that Will?*

A: *He was bedridden but he can understand, and he was in sound mind.*

Q: *Did he understand the contents, each and every paragraph you had explained to him?*

A: *Yes.*

Q: *How did he relate this to you?*

A: *He shook his hands and sometimes he said in Hindi, he said ha, right he, right he in Hindi, he said like that.*

Q: *Okay Mr Atlesh, if you could have a look at that document, the paragraph right at the bottom. If you could just read through and notice that somewhere in that paragraph instead of yes,*

A: *Singed by the said Hari Patri, the abovenamed Testator as and for his last Will and in the presence of each other hereto subscribed our names as Attesting Witnesses and we certify that before execution of the foregoing Will, it was carefully read over and explained to her in the Hindustani Language and he appeared fully to understand the meaning and of the same and made a signature thereto in our presence. ....*

Q: *Now, do you notice that it that paragraph Hari Patri has been referred to as her. Can you explain about that?*

A: *I think it's a typing error on only.*

- (14) '**Atlesh Ravin Lal**' was narrating events that occurred on the day of signing and witnessing the will.

I have some reservations about the circumstances surrounding the preparation and execution of the will.

He did not say to Court who typed the will. He did not say who asked him to witness the will. He did not say he knew the testator and executrix before.

The name and address of the attesting witnesses were not printed in the will under their signature. The name of the testator and the executrix was incorrectly spelt.

- (15) However, there is another aspect of the evidence adduced by '**Atlesh Ravin**', the attesting witnesses which is of some concern to the Court. He said he explained the contents of the will to the deceased who appeared to understand what he said and **the deceased executed the will by placing his (deceased's) left thumb impression in his presence in the will.** He was shown the document marked PE-5 being a copy of the will dated 02<sup>nd</sup> October 2009. He recognized the thumb impression above the name of the testator. But the paragraph which appears below the name of the testator says that **the testator signed the will.** This **conflict of testimony** and **inconsistency** relates to an essential detail forming part of the Plaintiff's attempt to propound the will dated 02<sup>nd</sup> October 2009. This is sufficient to overthrow the will. I see no ground for holding the will to be valid.

All the evidence I have considered above leads me to the point of not accepting the due execution of the will dated 02<sup>nd</sup> October 2009. **The Plaintiff has not established, on the balance of probabilities that the will dated 02<sup>nd</sup> October, 2009 was the last will and testament of the deceased.** I therefore hold that the Plaintiff has not discharged the burden placed on her by law to prove the due execution of the impugned will dated 02<sup>nd</sup> October, 2009.

**In conclusion, I pronounce against the will dated 02<sup>nd</sup> October 2009.**

- (16) Next, the Plaintiff seeks to have the Transfer No. 738372, registered on 19<sup>th</sup> November, 2010 declared void and of no legal effect and/or a declaration that the First Defendant was not a bona fide purchaser for value.

The Plaintiff's principal challenge to the transfer registered on 19<sup>th</sup> November, 2010 has based on the **allegation of fraud** in that the thumbprint of the testator was forged. It was alleged that the testator had not executed the transfer. In sub paragraph six (06) of paragraph twenty six (26) of the Statement of Claim, the Plaintiff pleads;

vi. ***The 1<sup>st</sup> Defendant caused some other person to place the thump prints on the Transfer on 04<sup>th</sup> November, 2010 because Aripitri aka Hari Patri aka Hari Pathry did not leave his home on the said date as it was his son's birthday who came from New Zealand for the occasion.***

(Emphasis added)

**Therefore, the issue to be determined is whether the thumbprint on the transfer registered on 19<sup>th</sup> November, 2010 was the thumbprint of the testator?**

**The First Defendant says it is the thumb impression of the testator, whereas the Plaintiff contends that it is forged.**

- (17) The burden falls on the Plaintiff to establish that fraud was involved in the sense that the thumbprint on the transfer registered on 19<sup>th</sup> November 2010 was not the thumbprint of the testator and had been forged and the execution of the transfer no. 738372 was tainted with fraud.

In a Civil Case involving fraud the applicable standard of proof is higher. Denning, L.J said in '**Hornal v Neuberger Products Ltd' (1957) 1 Q.B at page 258** "*the more serious the allegation the higher the degree of probability that is required.*"

The degree of proof depends on the subject matter, and as Denning L.J. observed in ***Bater v Bater [1950] 2 ALL.E.R 458***

*"A civil court when considering a charge of fraud will naturally require for itself a higher degree of probability than that which it would require when asking itself if negligence is established. It does not expect so high a degree as a criminal court even when it is considering a charge of a criminal nature; but it still does require a degree of probability which is commensurate with the occasion."*

- (18) The only foolproof way to challenge the authenticity of a thumbprint is to juxtapose it with a sample of a genuine one. A forensic expert will require a specimen of the genuine print as a reference point against which to test the disputed one.

- (19) The Plaintiff is not a forensic expert. She did not examine a forensic expert to prove that the impugned thumb impression was not her late husband, the testator and the transferor. The Plaintiff should have been in possession of a genuine specimen of the testators' or the transferors' thumbprint. The Plaintiff did not say that she was in possession.

It was necessary for the Plaintiff to call a forensic expert to establish that the thumbprint of the testator was forged and therefore the testator had not executed the transfer. The Plaintiff did not examine a forensic expert. Besides, If the story that '*Ariphitri aka Hari Patri aka Hari Pathry did not leave his home on the said date as it was his son's birthday who came from New Zealand for the occasion*' had been true, the Plaintiff could have easily examined her family members to support her version. On the record, there is no such evidence.

**Thus, Plaintiff has not discharged her burden to show that the thumbprint of the testator was forged and the execution of the transfer no. 738372 was tainted with fraud.**

The Plaintiff further alleged that "*the consideration sum showed on the transfer document states that the property was sold for only \$10,000.00 and was a fraud as the same was never paid by the First Defendant and the estimated value of the said property is about \$150,000.00*".

In a case such as this, where the question is whether the execution of the impugned transfer was tainted with fraud, proof of payment of the amount stated as consideration for the execution of the transfer is relevant.

The First Defendant is definitely an important witness to answer the said issue. It is relevant to note that both these issues were not put to the First Defendant in cross-examination and he was not questioned specifically regarding the said two issues.

Moreover, the Plaintiff did not prove by evidence that the value of the property was about \$150,000.00. The Plaintiff did not seek to prove the value of the property by examining an assessor. The Plaintiff did not produce a report showing the value of the property. If the value of the subject property is true (viz, \$150,000.00), the Plaintiff could have easily examined an assessor to support her version.

The Plaintiff concludes by alleging that "a small cross (x) placed at all points requiring signature of the transferor and transferee suggest that it is pre-prepared document and not done by and upon the execution of the transfer".

I am not impressed by this criticism. This fact cannot be said to be a suspicious circumstance. I reject it without any hesitation.

Besides, the First Defendant called Mr Saimoni Nacolawa, the Barrister and Solicitor who attested the execution of the transfer. Mr Nacolawa categorically stated that the executor of the impugned transfer placed his thumb impression on the transfer document in his presence. Mr Nacolawa deposed that all transfer instruments and documents are prepared and printed prior to execution and upon execution it is explained to the executor.

**I therefore hold that the Plaintiff has failed to discharge the burden placed on her by law to establish that the transfer no. 738372 was executed fraudulently.**

- (20) In the relief claimed by the Plaintiff, the Court is requested to pronounce a declaration that the transfer No. 738372 registered on 19<sup>th</sup> November, 2010 was a nullity. The consent to the transfer granted by the Director of Lands was challenged on that ground.
- (21) The transfer No. 738372 (Crown Lease No. 17818) propounded by the First Defendant was executed four months (4) before the testator/transferor died.
- (22) In the transfer No. 738372 propounded by the First Defendant the two essential paragraphs state;

TRANSFER

I, HARI PATHRY father's name Raghwan of Saweni, Lautoka, Fisherman as the sole administrator of the Estate of Raghwan father's name Subrail, (hereinafter called "the Transferor") being the proprietors, subject however to such Leases, Mortgages and other Encumbrances as are notified by Memorandum endorsed hereon of the following land:-

Title	Number	Description	Province or Island	District or Town	Area A R P
Crown	17818	Lot 15 15 ND 5003 Nakorokoro & Kasotu (pt of)	Ba	Lautoka	1.6313ha (whole)

**IN CONSIDERATION of \$10,000.00 (TEN THOUSAND DOLLARS) the Transferor DOTH HEREBY TRANSFER unto the Transferee ASUDA DEWAN**

*father's name Hari Pathry of Saweni, Lautoka, Fisherman, (hereinafter called "the Transferee") all the rights powers title and interest in the land described above absolutely.*

[Emphasis Added]

- (23) The dispute before this court is concerned with a piece of land measuring some 1.6313 hectares in extent, being crown lease No:- 17818 under the **State Lands Act, No 15 of 1945**. It is expressly declared that this lease is a protected lease under the provisions of the State Lands Act.
- (24) At this stage it will be convenient to set out Section 13 (1) of the State Lands Act, No 15 of 1945.

**[SL 13] Protected leases**

*13 (1) Whenever in any lease under this Act there has been inserted the following clause-*

*"This lease is a protected lease under the provisions of the State Lands Act" (hereinafter called a protected lease) it shall not be lawful for the lessee thereof to alienate or deal with the land comprised in the lease of any part thereof, whether by sale, transfer or sublease or in any other 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 written 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, nor, without such consent as aforesaid, shall the Registrar of Titles register any caveat affecting such lease.*

*Any sale, transfer, sublease, assignment, mortgage or other alienation or dealing effected without such consent shall be null and void.*

[Emphasis Added]

- (25) The transfer No:- 738372 was executed on 04<sup>th</sup> November, 2010. The consent of the Director of Lands was endorsed on the transfer on 18<sup>th</sup> November 2010 (*viz* 14 days after the execution of the transfer).
- (26) The transaction of sale constitutes an alienation or dealing in the land comprised in the Crown Lease No:-17818. This lease is a protected lease under the provisions of the State Lands Act, 1945. The transaction of sale comes within the ambit of Section 13 (1) of the State Lands Act, 1945. The transfer No. 738372 is a document constituting a dealing in protected lease. The deceased Hari Pathry



(the testator) had formally transferred unto the First Defendant all his rights, powers, title and interest in the Crown lease. The consideration for the transfer was settled at \$10,000.00. The deceased (the testator) has parted with his interest in the leasehold land on 04/11/2010. All the rights, powers, title and interest in the leasehold land is completely parted with to the transferee (First Defendant) on 04<sup>th</sup> November 2010. This was done before the written consent of the Director of Lands is obtained. This is a breach of Section 13 (1).

- (27) The leasehold land is actually disposed of on 04<sup>th</sup> November 2010. The consideration had passed. What is more, the First Defendant as transferee did obtain proprietorial interest in the land upon the execution of the transfer. Certainly, the First Defendant assumed proprietorial privileges on the date of execution of the transfer. This constitutes an alienation of land. In **Gaskell v Walters (1906) 2 Ch.D, p1**. Cozens – Hardy, L.J says at page 10 “*Alienation implies a transaction by which property is given to another person*”. I feel compelled to add that **nowhere in the Transfer No- 738372 parties have expressly stipulated that ‘this Transfer shall neither be nor become a transaction for either acquisition or disposition of land unless and until it has the prior consent in writing of the Director of Lands’**. The transaction of sale touching this leasehold land became a dealing requiring prior written consent of the Director of Lands. Subsequent consent is insufficient. It shall not be lawful to deal without the **written consent first had and obtained**. There is, therefore, a dealing which, in the absence of the consent of Director of Lands first had and obtained, was unlawfully entered into, and was null and void. The transfer was null and void and of no effect, in that it contravened Section 13 (1) of the State Lands Act. The transfer was void, illegal and of no effect by reason of the fact that at the point of time at which the dealing took place (*viz*, 04<sup>th</sup> November 2010) no written consent has been obtained to the transaction. Any transaction which comes within the ambit of Section 13 is declared unlawful unless the **written consent of Director of Lands first had and obtained**.

It is a necessary preliminary in obtaining the essential written consent before that land is actually disposed of on 04<sup>th</sup> November 2010.

The transaction was unlawful, by virtue of Section 13 (1); the transfer was carried out in a manner forbidden by the State Lands Act, and is in this sense illegal.

- (28) Section 13(1) of the State Lands Act is akin to Section 12 of the Native Land Trust Act. A consent given by the Director of Lands after breach of Section 13 (1) of the

State Lands Act, is not a consent under that Section. The latter consent was not a consent 'first had and obtained'.

I take comfort in the oft-quoted words of Henry J from the decision of Phalad v Sukh Raj (1978) 24 FLR 170

*"The words "alienate" and "deal with" as elaborated in section 12, are absolute and do not permit conditional acts in contravention. **If before consent, acts are done pending the granting of consent, which come within the prohibited transactions, then the section has been breached and later consent cannot make lawful that which was earlier unlawful and null and void.** This does not cut across the cases already cited which deal with the formation of the contract as contrasted with an immediately operative agreement and substantive act in performance thereof.*

***In this case it has been clearly proved that the acts of the parties, in entering into and implementing an agreement for sale and purchase before the granting of consent, were done in contravention of section 12 and the said agreement was at all times null and void.** The making of the agreement conditional upon consent being granted does not assist appellant because section 12 does not permit the conditional doing of the acts prohibited by section 12. The time factor is plain and mandatory. The acts proved come clearly within the prohibited acts. In *Chalmers v. Pardoe* (supra) Sir Terence Donovan said at p.557:*

*"In the present case, however, there was not merely agreement, but, on one side, full performance; and the Board found itself with six more buildings on the land without having the opportunity of considering beforehand whether this was desirable. It would seem to their lordships that this is one of the things that s.12 was designed to prevent. True it is that, confronted with the new buildings, the Board as lessor extracted additional rent from Mr Pardoe: but whatever effect this might have on the remedies the Board would otherwise have against Mr Pardoe under the lease, it cannot make lawful that which the ordinance declares to be unlawful."*

(Emphasis added)

- (29) I have come to the clear conclusion that the transfer No. 738372 is a complete nullity from the time it was executed. The granting of the consent by the Director of Lands 14 days after the execution of the transfer cannot convert what had been an invalid transfer into a valid transfer because it cannot cure pre-existing defects. If such consent were to be held to be retrospectively effective the whole purpose of the legislation would be defeated.

(30) In this action the Plaintiff has further alleged that the consent to transfer the property to the First Defendant was given by a "corrupt" officer employed by the Second Defendant, the Director of Lands. In paragraph 27 of the Statement of Claim, the Plaintiff pleads, *inter alia*, that;

27. *The act of the 2<sup>nd</sup> Defendant's official who gave consent was fraudulent as they were aware of the health of the lessor and his lawful wife's interest.*

PARTICULARS

- i. *The 2<sup>nd</sup> Defendant visited the property.*
- ii. *They saw who was bed ridden and lacking in capacity to give legal instructions.*
- iii. *They had written notice from the Plaintiff not to deal in the 'Land'.*
- iv. *The corrupt official refused to give consent to the Plaintiff to institute legal proceedings and deprived the Plaintiff of her right to seek redress in court of law.*
- v. *Whereof the Plaintiff claim that Transfer No, 738372 be declared a nullity and be removed from the Registrar of Titles Records.*

(31) As I understand the Plaintiff's pleadings, the facts upon which the allegation of fraud against the Second Defendant rest are; (Facts pointing to the fraud)

- ❖ The Second Defendant was aware of the particular state of the bodily ill health of the deceased, Aripitri aka Hari Pathry (the testator) at the time of the execution of the transfer No:- 738372.
- ❖ The Second Defendant was aware of the testators' lawful wife's interest in the leasehold land.

(32) The sentiments of Wills J in **"Re Companies Acts, Exp Warson" (1888), 21 ABD 255 at 309** appears to be relevant here, the learned Judge said; *"Fraud in my opinion, is a term that should be reserved for something dishonest and morally wrong, and much unnecessary pain inflicted by its use where 'illegality' and 'illegal' are the really appropriate expressions."*

(33) The fact that the Second Defendant was aware of the testators' lawful wife's interest in the leasehold land is not particulars of fraud. In **'Hardeo Prasad v Director of Lands and Abdul Hamid' HBC 89/94** it was held; *"the mere alleged knowledge*

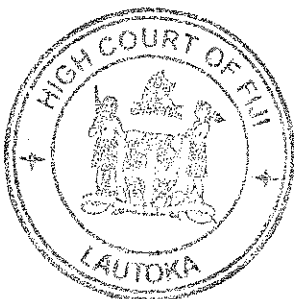
*of the Appellant's interest was insufficient and incapable on its own to impute fraud."*

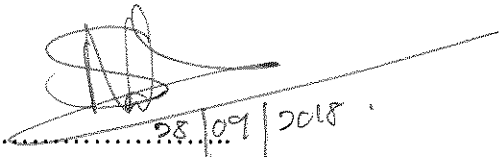
Besides, Section 40 of the Land Transfer Act provides that knowledge of the existence of any trust or unregistered interest is not, of itself, to be imputed as fraud.

- (34) Further, the fact that "*the Second Defendant was aware of the particular state of the bodily ill health of the deceased, Aripitri aka Hari Pathry (the testator) at the time of the execution of the transfer No:- 738372*" does not constitute fraud. The said fact is really insufficient to show a conspiracy between the First Defendant and the Director of Lands to bring into existence a false and forged document.

**(F) ORDERS**

1. I pronounce against the will dated 02<sup>nd</sup> October 2009.
2. I pronounce against the Transfer No- 738372 registered on 19<sup>th</sup> November 2010.
3. I declare that the Transfer No- 738372 registered on 19<sup>th</sup> November 2010 is null and void *ab initio*, invalid and illegal. In order to give effect to the judgment of the Court, I invoke Section 168 of the Land Transfer Act and direct the Registrar of Title to cancel the registration of Transfer No- 738372.
4. I order that the First Defendant pay the Plaintiffs' costs of these proceedings which are fixed summarily in the sum of \$1500.00



  
28/09/2018  
**Jude Nanayakkara**  
Judge

At Lautoka  
Friday, 28<sup>th</sup> September, 2018