

**IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION**

CIVIL ACTION NO.: HBC 169 of 2017

BETWEEN : **FREDRICK NOEL CHARLES DOUGLAS** **PLAINTIFF**

AND : **BRENT BENJAMIN STOWERS and ZAC JOHN STOWERS**
as Executors of the **ESTATE OF BENJAMIN ELIJAH**
STOWERS a.k.a BENJAMIN STOWERS

DEFENDANTS

APPEARANCES/REPRESENTATION

PLAINTIFF : Mr S. Lateef [Lateef & Lateef Lawyers]

DEFENDANT : Ms M. Chan [M Chan Law]

RULING OF : Acting Master Ms Vandhana Lal

DELIVERED ON : *07th February 2019*

INTERLOCUTORY RULING

[Striking Out – Order 18 rule (1)]

1. On 24 November the Defendant filed its summons to strike out Plaintiff's originating summons on the ground that it discloses no reasonable cause of action against the Defendant and is an abuse of process. Alternative orders sought are for the originating summon to be converted to a writ action.

Said application is made pursuant to Order 18 rule 18(1)(9) and (d) and Order 28 rule 9.

2. Via its originating summons the Plaintiff seeks orders that:
- i. The Defendant specifically perform the agreement dated 27 June 2007 between the Plaintiff and the late Benjamin Elijah Stowers and grant a lease to the Plaintiff in respect of the property described in CT No. 40924 being Lot 3 on DP No. 10104 to the Plaintiff.
 - ii. General Damages for breach Agreement dated 27 June 2007.

Grounds for making this application is summarised in the affidavit of Fredrick Noel Charles Douglas as follows:

- Late Benjamin Stowers was personally known to the Plaintiff as a friend.
- Jack Michael Doughty (who died on 28 September 1993) with one Harry Archibald Doughty were owners of the piece of land on CT 7014 being Lot 1 on DP 1428.
- Mr Stowers informed the Plaintiff that Mr Stowers and one Otto Raymond Doughty were the beneficiaries in the Estate of Jack Michael Doughty but due to a legal dispute between the two beneficiaries his share of land was yet to be transferred to him.
- Mr Stowers asked the Plaintiff for assistance in obtaining the land. It was agreed between the two that Plaintiff would pay for all legal costs and when Mr Doughty's share of the property is subdivided between the beneficiary (Otto and Mr Stowers), the Plaintiff will pay subdivision cost and in return Mr Stowers would lease his share of the land to the Plaintiff.
- The legal matter between Otto and Mr Stowers was resolved out of court via an Agreement dated 10 August 2007 signed between the two beneficiaries. It was agreed that CT 7014 would be subdivided into three parts;
 - a. One undivided half share to Estate of Harry Archibald Doughty;
 - b. Remaining undivided half share into equal shared between;
 - i. Otto Raymond Doughty
 - ii. Benjamin Elijah Stowers
- The Plaintiff claims to have financially assisted Mr Stowers when he had a dispute with his family concerning his share of the property- including subdivision cost. Via an agreement executed on 27 June 2007 it was agreed that when Mr Stower's received his share of land he would lease the land to Plaintiff on mutual agreed terms and conditions.
- Upon subdivision of the land Mr Stowers become owner of land on CT 40924 Lot 3 on DP No. 10104.

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- The main condition precedent required to be met as per the agreement of 26 June 2007 was obtaining the consent of Director of Town and Country Planning for the subdivision of CT No 7014 and transfer of Mr Stower's share of the property to his name.
- All condition precedent was satisfied and the agreement dated 27 June 2007 was enforceable.
- Despite numerous requests, Mr Stowers kept deferring to honour the agreement.
- Mr Stower's passed away on 13 December 2011 and upon his death his sons Brent Benjamin Stowers and Zac John Stowers were appointed as Executors of his Estate.
- The Plaintiff tried to liaise with the Defendants to honour the agreement who have refused to discuss and cooperate. Hence he had caveat placed.

3. The Defendants who are opposing the originating summon have filed following affidavits:
- Affidavit of Zelda May Stowers sworn on 20 November 2017;
 - Affidavit of Martine Anne Pokoina sworn on 3 October 2017;
 - Affidavit of Zac John Stowers sworn on 3 October 2017.

4. According to Zelda May Stowers wife of Deceased Benjamin Elijah Stowers; the Deceased never sighted the CT for the Tavewa land in his name.

She had personally collected the title in July/August 2012. Upon receiving the title she instructed Rams Law to process the transmission by Death according to resale of Probate.

On 6 October 2017, Rams Law was advised of a caveat when they attempted to lodge Transmission by Death and transfer of title.

5. Martine Anne Pokoina is one of the Deceased Benjamin's children Zac John Stowers (the 2nd name Defendant) is her brother.
6. Zac John Stowers is the 2nd named Defendant informs he first met the Plaintiff in late 2009 when his father needed company to drink grog at Fred Douglas house.

He cannot recall his father telling him that he made any deal with the Plaintiff regarding lease or sale or option.

He has never seen this option to lease before.

His father never saw the title to the land at all in his lifetime as the title is dated 13 October 2010 but was not issues until 12 September 2011. Hence his father could not make a lease

with anybody and any option his father would have wanted to bestow on anything to lease or sell died with him.

Further any option should have been exercised before 27 June 2017 the date when it expired.

He cannot recall of being approached to by the Plaintiff concerning granting of a lease.

The option to lease states his further was entitled to certain land in CT 7014, however this was before any subdivision and that his father did not own the title 7014 outright.

The invoice from Yash Law for the option to lease was sent to Peter Olsen and not Benjamin.

An income for memorandum of understanding was finalised on 12 August 2006 but the parties signed it on 12 June 2007.

7. The original title CT 7014 had Harry Doughty and Jack Michael as the registered owners.
8. Via transmission by death Otto was the administrator for one undivided half share for Estate of Harry Doughty and executor for one undivided half share for Estate of Jack Michael.
9. A partial transfer was done to Benjamin on 13 October 2010 being Lot 3 DP 10104 for which a CT 40924 was issued on 13 October 2010.
10. The Memorandum of Agreement dated 27 June 2007 is between Benjamin as proprietor and Fred Douglas as intended lessee.

As per the agreement vendor is beneficial of all piece of land on CT 7014.

Option to lease is for 5 acres of land.

The agreement further states Benjamin is a beneficiary in the Estate of Jack Michael Doughty and Benjamin is entitled to 5 acres one and half rods and 8 perches part of CT 7014.

The condition precedent in clause 2 are:

- Consent of Director Town and Country Planning;
- Lesser of cost of the lessee provisions in all aspect;
- Propriety being transferred onto the lesser;
- Other relevant government and local government consent.

The term of lease was to be for 50 years.

As consideration for option to lease the lessee was to pay \$250 upon execution of the lease.

The option to lease was valid for a period of 10 years and/or other time mutually agreed between the parties in writing.

The lease shall be terminated if a breach of condition to above occurs or in the event that the lessee becomes bankrupt. The lessee can terminate the agreement in the event that the lesser is not able to enter a lease within two month of a notice in writing been served on him and sue him for specific performance.

11. The Plaintiff also annexed an application for approval of plan for subdivision.

According to this the Applicant is Otto Raymond Doughty and the survey was to distribute the Estate of Jack Michael and Harry and more specifically to effect the agreement in the Memorandum of Understanding between Otto and Benjamin. The application is dated 17 December 2007.

12. The Memorandum of Understanding (exhibit 2) between Benjamin and Otto is dated 10 August 2007.

It was agreed that CT 7014 be divided giving Estate of Harry Doughty one undivided half share of title on north eastern boundary of CT.

The balance of CT 7014 is to be subdivided in equal half ensuring both Otto and Benjamin receives equal shares of the beach front.

13. An approval by Department of Town and Country Planning for subdivision as above was granted [annexure FD6(B)].
14. Fredrick Douglas has brought this action asking orders for specific performance within the 10 years option period available since the period expired on 27 June 2017.
15. The Memorandum of Agreement relied by Plaintiff is dated 27 June 2007. It was condition precedent that the property be transferred to lesser amongst other condition.

The property transferred to Benjamin on 13 October 2010 via CT 40924.

16. The Plaintiff alleges to paying bills for the Deceased which is denied by the Defendants.

These are issues to be tried at trial and also to make finding if this allowed the option open for the time period.

17. My findings are that there is a cause of action and hence the Defendants application for striking out shall fail.
18. However I find that Originating Summons is not the proper course and that the matter should be converted into a writ action.

19. Accordingly I direct the Plaintiff to file and serve its statement of claim within 14 days.

Unless the Plaintiff files and serves its statement of claim in 14 days [on or before 4pm on 21 February 2019] the matter shall stand struck out.

20. The Plaintiff is further ordered to pay costs assessed at \$1,000. Cost to be paid on or before 4 pm on 21 February 2019.



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Vandhana Lal [Ms]
Acting Master
At Suva.