

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No.: HBC 379 of 2019

BETWEEN : **TAKI MOHAMMED** of Nabitu, Sigatoka, Farmer.

PLAINTIFF

AND : **REGISTRAR OF TITLES**

FIRST DEFENDANT

AND : **ATTORNEY-GENERAL OF FIJI**

SECOND DEFENDANT

Counsel : **Plaintiff: Mr Chandra. S**
Defendant: Ms. Taukei. S and Ms. Naigulevu.G

Date of Hearing : **27.02.2020**

Date of Judgment : **28.02.2020**

JUDGEMENT

INTRODUCTION

1. This is an application by way of originating summons seeking partial transfer of a property without production of original of certificate of title. The application for partial transfer was made by the transferee's solicitors and had requested first Defendant to transfer the title and to proceed in terms of Section 26 of Land Transfer Act 1971(LTA). First Defendant in the affidavit in opposition stated that since the registered proprietor had not cooperated with Plaintiff, as regards to transfer dispensation of Certificate of Title was not an appropriate application to first Defendant. Further, it was stated that ID of the Plaintiff was also not provided when initial lodgment was made. Plaintiff was requested a court order to proceed with registration. In terms of proviso to Section 26 of LTA it is mandatory to

provide a statutory declaration that certificate of title was not deposited as lien or as a security for a loan or other liability. This mandatory provision was not complied and statutory declaration filed by Plaintiff's solicitors lacked the said requirement contained in proviso to Section 26 of LTA.

FACTS

2. In the affidavit in support Plaintiff stated that Plaintiff had entered a Deed of Trust on 30.8.2008 with his brother Shan Mohammed as trustee to purchase Lot 20 of DP 714 being part of CT No 4135 comprising areas of 4.986 ha at Nabitu, Singatoka from JP Bayly Trust for the purchase price of \$23,343.
3. Plaintiff further stated that he had paid survey fees for preparation of subdivision of said land.
4. Plaintiff stated that partial transfer of the said land was signed by Shan Mohammed as trustee in favour of beneficiary , Plaintiff
5. Plaintiff stated that when requested Shan Mohammed for release of CT No 41130 for registration of partial transfer he had informed that certificate of title was kept with his brother in law who is residing overseas, for safekeeping.
6. Plaintiff's solicitors had made several attempts through correspondence to obtain CT 41130 for registration without success.
7. Plaintiff's solicitors had made a request to the registrar of title to dispense with CT 41130 in terms of Section 26 of LTA.
8. First Defendant had refused that application and requested to obtain a court order.

ANALYSIS

9. According to the Plaintiff his brother Shan Mohammed had purchased a property under a deed of trust where Plaintiff was the beneficiary. This fact cannot be verified as trustee was not a party to this originating summons.
10. Shan Mohamed is not a party to this originating summons and there is no admission of that fact by the Defendant. This is not a fact that first Defendant was aware as said trust deed was not registered.
11. Plaintiff alleges that he and said Shan Mohammed had signed a partial transfer of CT 41130 for an area of 1.6453 ha, in terms of trust deed. In the partial transfer there was

nothing stated that he was transferring as trustee. It was partial transfer for a consideration of \$4,000 paid by Plaintiff.

12. So there are conflicting evidence presented to court by Plaintiff.
13. There was no proof of any payment in terms of said partial transfer marked 'C' to the affidavit in support.
14. CT 41130 is not delivered to Plaintiff and despite several reminders it was not provided.
15. There was no communication either from transferor of document marked 'C' and or his agent allegedly keeping certificate of title on request of said transferor.
16. Plaintiff is alleging that Shan Mohammed had informed him that he had given CT 41130 to his brother in law, who is living in overseas, for safekeeping. Plaintiff had included hearsay evidence in the affidavit in support. Plaintiff is alleging facts that cannot be verified by court, on available evidence.
17. Plaintiff's solicitors had made an application in terms of Section 26 of LTA to dispense with duplicate of the certificate of title.
18. Section 26 of LTA states

“Power of Registrar to dispense with the production of duplicate grant or other instrument

26. The Registrar may dispense with the production of the duplicate of any grant, certificate of title, or other instrument for the purpose of endorsing the memorial required by the provisions of section 25 to be endorsed thereon and, upon the registration of any instrument affecting the same, the Registrar shall state in the memorial entered in the register in respect thereof that no endorsement of such memorial has been made on the duplicate grant, certificate of title or other instrument, and the dealing effected thereby shall thereupon be as valid and effectual as if such memorial had been so entered:

*Provided that, before registering such instrument, the Registrar shall require **the party presenting the same for a registration to make a declaration** that such grant, certificate of title or other instrument has not been deposited by way of lien or as security for any loan or other liability, and shall give at least fourteen days' notice in the Gazette and in one newspaper published and circulating in Fiji of his intention to register such dealing.”(emphasis added)*

19. The proviso to Section 26 of LTA obliged Registrar to obtain a statutory declaration and such declaration must state that certificate of title has not been deposited by way of lien or as security for any loan or other liability.
20. The dispensation of production of certificate of title for registration of the transfer, was a discretion left to registrar. When Plaintiff's solicitors had not complied with mandatory requirements registrar cannot exercise discretion to dispense with certificate of title in terms of Section 26 of LTA.
21. Though Plaintiff had submitted a statutory declaration annexed as 'M' to the affidavit in support this lacks the requirements of the proviso to Section 26 of LTA. So the application for dispense with the duplicate was irregular and rejection of that by registrar was proper exercise of discretion by registrar.
22. So, this originating summons needs to be dismissed *in limine* due to want of mandatory requirement contained in proviso to Section 26 of LTA.
23. No order of court can compel registrar to dispense with the duplicate when Plaintiff's solicitors had not complied with mandatory requirement.
24. **The statutory declaration marked 'M' does not state that the certificate of title was not deposited as a lien or security for loan or other liability.** This is mandatory for registrar to proceed with the dispensation of duplicate of certificate of registration. Even if that was provided, registrar can exercise discretion properly and refuse to dispense with the certificate of title.
25. In the exercise of discretion of registrar can also reject hearsay evidence, depending on the circumstances of case. Under Torrens system indefeasibility, of title is paramount, hence registrar can exercise the discretion granted under LTA in order to safeguard interest of the registered proprietor and also third parties. This is the reason to for obtaining a statutory declaration in terms of proviso to Section 26 of LTA.
26. Without prejudice to what is stated above, I consider merits of this application. As stated even if Plaintiff complied with requirements contained in Section 26 of LTA, registrar may refuse to dispense with CT 411130, depending on the material submitted for such dispensation.
27. Counsel for first Defendant contends that section 26 of LTA needs to be read with Section 45 of LTA. Counsel contends that transferor is obliged to deliver certificate of title of the land to the registrar. I accept that. Section 45 of LTA states;

“Procedure in case of transfer of land

*45. If a transfer purports to transfer the whole or part of the land mentioned in any grant or certificate of title, **the transferor shall deliver up the duplicate grant or certificate of title of the land**, and the Registrar shall, when registering the transfer, enter in the register and on the duplicate grant or certificate of title a memorial cancelling the same as to the whole, or partially according as the transfer purports to transfer the whole, or part, of the land mentioned in such grant or certificate of title:*

Provided that-

(a) if the whole of the land mentioned in any grant or certificate of title is transferred, the Registrar may, instead of cancelling such grant or certificate, enter in the register and on the duplicate grant of or certificate of title a memorial of such transfer and deliver the duplicate to the transferee;

(b) in the case of a transfer to tenants in common, the Registrar may, and shall if the transferees so desire, issue separate certificates of title in favour of each of the transferees for their respective shares, or may issue one certificate of title for the whole of their interests, or the Registrar may enter in the register a memorial of such transfer and deliver the duplicate certificate of title or grant to the transferees;

(c) in the case of a cancellation of a tenancy in common by transfer from tenants in common holding separate titles for their respective shares, the Registrar shall cancel the said certificates of title and issue a fresh certificate of title in favour of the transferee.”(emphasis is mine)

28. Section 45 of LTA makes it obligatory for transferor to deliver certificate of title for transfer by registrar.
29. In this instance transferor had not delivered certificate of title and I agree with contention that Section 26 of LTA has to be read with Section 45 of LTA. Considering circumstances of this case I cannot see anything wrong in rejecting Plaintiff’s solicitor’s application by first Defendant as the request to dispense was not made by the party who was obliged to provide certificate of title under Section 45 of LTA.
30. First Defendant as the person who is exercising discretion, can formulate reasonable measures in order to safeguard interest of registered proprietor as well as third parties.
31. I cannot see any impropriety as to the exercise of discretion of registrar when dispensation of original certificate of title was made by transferee instead of transferor.
32. It is logical not to administratively dispense with certificate of title when transferor is not delivering the title or taking any step to deliver it. Transferor had not made any application

to dispense with title and there was no evidence of the position certificate of title except hearsay evidence.

33. In terms of Section 26 registrar of title has a discretion to dispense with the certificate of title for registration. This is a discretion vested with the registrar, subject to the proviso in the same section.
34. There is no power granted under Section 26 of LTA for court to order dispensation of certificate of title when registrar refuses to do so.
35. The court can order dispensation of certificate in a proceeding in order to give effect to orders or judgment of the court in that proceeding in terms of Section 168 of LTA, which is discussed later in this judgment.
36. Section 129 of LTA empowers registrar to call for documents through summons and it states

“Power to call for documents

129.-(1) The Registrar may require the proprietor of or any other person interested in any land or any estate or interest therein in respect of which any instrument is about to be registered under this Act to produce any grant, certificate of title, mortgage, lease, or other instrument in his possession or within his control affecting such land, estate or interest or the title thereto.

(2) The Registrar may summon any such person to appear and give any explanation respecting such land, estate or interest, or the instruments affecting the title thereto.

(3) If, upon requisition in writing made by the Registrar, such person refuses or wilfully neglects to produce any such instrument or refuses or wilfully neglects to give any information or explanation which he is required to give, or knowingly misleads or deceives any person authorised to demand any such explanation or information, he shall be guilty of an offence and liable to a fine not exceeding two hundred dollars and the Registrar, if the information or explanation so withheld appears to him material, shall not be bound to proceed with the registration of the instrument sought to be registered.

(4) Every summons issued by the Registrar under the provisions of this section shall be in the prescribed form, and may be enforced by him in like manner and by the like proceeding as provided in sections 166 and 167 for the case of any instrument issued in error or wrongfully retained.”

37. This is a provision registrar can exercise in order to ascertain truth about any document including certificate of title. If certificate of title No 411130 was given to brother in law of

Shan Mohammed, for safe keeping, he should be able to request the same and first Defendant can request from the registered proprietor or transferor to produce the same.

38. This is again a discretion granted to registrar and it should be exercised reasonably. There is no provision that allows court to make order in relation to such exercise of discretion under said provision of LTA. There is no such order sought in this originating summons.
39. Plaintiff's counsel argues that court can direct registrar to dispense with certificate in terms of section 168 of LTA. This can be done in a proceeding to give effect to a judgment or order of court.
40. Section 168 of LTA states;

*"168. In any proceedings respecting any land subject to the provisions of this Act, or any estate or interest therein, or in respect of any transaction relating thereto, or in respect of any instrument, memorial or other entry or endorsement affecting any such land, estate or interest, the court may by decree or order **direct the Registrar to cancel, correct, substitute or issue any instrument of title or make any memorial or entry in the register or any endorsement or otherwise to do such acts as may be necessary to give effect to the judgment or decree or order of such court.**"*(emphasis added)
41. The above provision is wide but this is a provision that is used in a proceeding where such direction is needed to give effect to the judgment or order of the court. So this section can be used to give effect to a judgment or order of court.
42. In this originating summons Plaintiff had only made registrar a party and requesting registrar to dispense with certificate of title 411130 in terms of Section 168 of LTA. The registered proprietor of that certificate of title is not a party to this action. Without making registered proprietor a party an order affecting his rights cannot be made solely on the affidavit in support made by Plaintiff.
43. Plaintiff had not indicated any reason why he had not made registered proprietor a party. Plaintiff is seeking to register a partial transfer of land where Plaintiff is the alleged beneficiary in terms of a trust deed made on 30.8.2008. These facts can only be affirmed or denied by said Shan Mohammed who was the alleged trustee.
44. CT 411130 was registered in the name of said Shan Mohammed on 30.12.2012. In order to make any order affecting his rights he should be made a party to the action. Without hearing him no order can be made against him or his rights to the property.

45. In a proceeding where Plaintiff is seeking certain relief relating to a land in order to give effect to such orders court can give directions to registrar in terms of Section 168 of LTA. Such proceeding can be instituted by way of originating summons or writ of summons, but all necessary parties to such action needs to be made parties, to make an order or judgment against such parties and to apply section 168 of LTA to give effect to such order or judgment.
46. In this originating summons Shan Mohammed is not a party so no order cannot be given against him hence application of section 168 of LTA to give directives to registrar, will not arise.

CONCLUSION

47. This application needs to be dismissed *in limine* as Plaintiff's solicitors had not complied with mandatory requirement contained in proviso to Section 26 of LTA. Plaintiff's application before first Defendant was irregular, hence no direction can be made to accept the irregular application. Without prejudice to that, Plaintiff had not made registered proprietor a party to this action and no order affecting his rights can be made without him being a party. Without making necessary parties to an action. Plaintiff cannot rely under Section 168 of LTA. It is an enabling provision for a court to make directions to registrar in any proceeding, but this is not to substitute discretion of registrar. Originating summons struck off. No cost ordered, considering circumstances of case.

FINAL ORDERS

- a. Originating summons struck off
- b. Each party to bear their costs.

Dated at Suva this 28th day of February, 2020.



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Justice Deepthi Amaratunga
High Court, Suva