

In the High Court of Fiji
At Labasa
Civil Jurisdiction
Civil Action No. HBC 28 of 2020

1. Manikam Pillay
 2. Padma Wati
 3. Latchmamma
 4. Ram Lingam
- First plaintiffs

Narsamma aka Narsamma Naidu
Second plaintiff

v.

Anita Wati
First defendant
Sok Lingam aka Soklingam
Second defendant

Director of Lands
Third defendant

Registrar of Titles
Fourth defendant

Counsel: Mr R. Dayal for the plaintiffs
Mr A. Nand for the first and second defendants
Ms M. Motofaga for the third and fourth defendants
Date of hearing: 22 and 23rd August, 2022
Date of Judgment: 28th February, 2023

Judgment

The statement of claim

1. The third of the first plaintiffs is the wife of Permal,(deceased). The rest of the first plaintiffs and the first and second defendants are children of the deceased. He died on 2nd July, 2016. In his Last Will of 18th August, 2014, he appointed the first of the first plaintiffs and the second defendant as executors and trustees. He was originally the registered proprietor of Crown Lease No.6009, which comprised of Lot 8, (a residential block comprising of 2 acres 1 rood and 13 perches) and Lot 12. The first and second defendants are currently the owners of Lot 8 (now No. 21772). The plaintiffs claim that the first and second defendants hold their lots on Lot 8 on trust for the first plaintiffs.
2. The statement of claim continues to state that the deceased advised all his beneficiaries that he retained Lot 8 for the benefit of his wife and his children. He instructed the first and second defendants to subdivide and allocate Lot 8 in terms of the prior arrangement and his Last Will. His children built their houses on Lot 8 during his lifetime with his consent and are occupying same.
3. The lease was transferred to the second plaintiff. In 2006, she mortgaged Lots 8 and 12 . The arrangement between the deceased and the second plaintiff was that she would alienate and re-transfer Lot 8 to the deceased, which did not eventuate. The deceased filed action against her in Labasa Civil Action No. 15 of 2008 . The first and second defendants filed action against the second plaintiff and third defendant in Labasa Civil Action No. 48 of 2017. In both cases, terms of settlement reached were made Orders of Court. In the first case, Order was made that Lot 8 be conveyed to first and second defendants. In Civil Action No. 48 of 2017, the Director of Lands was ordered to prepare a new lease for Lot 8 in the names of the first and second defendants. The plaintiffs state that both Orders omitted to state that the first and second defendants hold Lot 8 on trust for them. A new residential lease was issued in respect of Lot 8 in the names of the first and second defendant. The plaintiffs state that the first and second defendants failed to comply with the Order to subdivide Lot 8 and are in contempt of Court. The actions of the first defendant amounts to fraud. The particulars of fraud are pleaded.

The statement of defence of the first and second defendants

4. The first and second defendants state that in Civil Action No. 15 of 2008, the deceased gave Lot 8 to the first and second defendants during his lifetime for their use and benefit. They hold an indefeasible lease. No equitable right arises. The deceased was not the owner of Lot 8 in terms of the Orders of Court of 28th April, 2010. The action is statute barred as cause of action against the first and second defendants arose from 28th April 2010. He did not have power to bequeath a land he did not own. These defendants state that the fourth of the first plaintiffs has been residing on the property as a trespasser without their consent and counterclaim for vacant possession of the property from him.

The statement of defence of the third and fourth defendants

5. These defendants state that lot 1 of Lot 8 is prepared in the names the first and second defendants in accordance with the Order made on 12 April, 2018 in Civil Action No. HBC 48 of 2017. The first and second defendants have failed to comply with Orders 6 and 7 of 12 April, 2018, in HBC 48 of 2017.

The reply

6. The plaintiffs, in their reply to statement of defence of the first and second defendants state that the Orders of Court were made in good faith for the first and second defendants to hold Lot 8 in trust for all the beneficiaries, as the deceased had grown old. In 2016, when the deceased came to know of the fraudulent intention of the first and second defendants, he executed his Last Will to give effect to his intentions to distribute Lot 8 to his wife and all his children.

The determination

7. *Agreed Facts*

1. *The 1st Plaintiffs and the 1st and 2nd Defendants are the lawful children of Permal late of Wailevu, Labasa, Deceased (hereinafter referred to as the "said deceased") except the 3rd named 1st Plaintiffs namely Latchamma who is the lawful wife of the said deceased.*
2. *The said deceased died on the 2nd July, 2016, at Labasa Hospital and Probate No. 60872 was granted to Sok Lingam, the 2nd Defendant and Manikam Pillay 1st named Plaintiffs who are joint executors and trustees of the Estate of Permal.*

3. The 2nd Plaintiff was the registered proprietor of Crown Lease No. 6009 pursuant to Transfer dealing No. 526675 registered on 13th June, 2003.
4. The 3rd Defendant is the custodian of all State land in the Republic of Fiji Islands and is responsible for the effective and efficient management and administration thereof.
5. The 4th Defendant is a nominal defendant.
6. That Crown Lease No. 6009 comprises of two different properties being Lot 8 (now CL No. 21772) and Lot 12 (now CL No. 20233). Lot 8 (now CL No. 21772) is a residential block comprising of 8428m² whereas Lot 12 (now CL No. 20233) is an Agricultural block comprising of 6.6090 ha.

Issues

7. Whether the said deceased was the proprietor of all the land comprised in Crown Lease No. 6009 being Lot 8 on Plan M 2698 Rara and Lot 12 on Plan M 2796 Part of Wailevu situate in the Province of Macuata and comprising an area of 16 acres 1 rood and 13 perches?
8. Whether the said deceased sold Lot 12 (now CL 20233) from Crown Lease No. 6009 to the 2nd Plaintiff retaining Lot 8 (now CL 21772) pursuant to Transfer Dealing No. 526675 registered on 13th June, 2003?
9. Whether the 2nd Plaintiff was required to transfer Lot 8 (now CL 21772) back to the said deceased within a reasonable time but the 2nd Plaintiff failed to do so?
10. Whether in the year 2008 (some 5 years later), the said deceased instituted legal action against the 2nd Plaintiff (being Civil Action No. 15 of 2008) to transfer Lot 8 back to him within his lifetime?
11. Whether Civil Action No. 15 of 2008 was then referred for mediation before the Master of the High Court and a settlement was reached whereby Lot 8 on Plan M 2698 (now CL 21772) was to be conveyed by Court Order dated 28 April, 2008 to the 1st and 2nd Defendants?
12. Whether Lot 1 from Lot 8 be allocated to the 1st named 1st Plaintiffs by virtue of the Orders made on 28 April, 2010 and 12 April, 2018?
13. Whether CL 6009 expired on 31st December, 2015 and the Court Order was endorsed in the memorial of CL 6009 on 9th August, 2017 at 12.14pm when the said CL 6009 had already expired.
14. Whether the 1st Plaintiffs and the 1st and 2nd Defendants are the lawful beneficiaries of the Estate of Permal as per the deceased's Last Will and Testament dated 18th August, 2014?
15. Whether the said deceased had decided to subdivide residential block, Lot 8 so that he could distribute the residential lots to the Plaintiffs and 1st and 2nd Defendants prior instituting Civil Action No. 15 of 2008 against the 2nd Plaintiff?
16. Whether the said deceased instituted Civil Action No. 15 of 2008 in order to expedite the transfer of Lot 8 back to him so that he could distribute his estate amongst his wife and children as soon as possible and in his lifetime?

17. *Whether the parties in Civil Action No. 15 of 2008 agreed to mediation in order to enable settlement of the matter and prompt conveyance of Lot 8 to the 1st and 2nd Defendants so that they could later distribute the respective lots as per the proposed subdivision plan?*
18. *Whether the lease of Lot 1 from Lot 8 was held on trust for the beneficiaries of the Estate of Permal or was it given to the 1st and 2nd Defendants for their own use and benefit absolutely?*
19. *Are the 1st and 2nd Defendants holding the properties on trust for the Estate of Permal?*
20. *Are the Plaintiffs entitled to an Order directing the 1st and 2nd Defendants to apply to the 3rd Defendant for the rezoning and subdivision of Lot 8 (CL 21772).*
21. *Are the Plaintiffs entitled to an Order directing the 3rd Defendant to subdivide the residential blocks as per the proposed subdivision plan and the Last Will and Testament of the said deceased?*
22. *Are the Plaintiffs entitled to an Order directing the 3rd Defendants to within 3 months process and prepare new leases of all the respective lots as per the proposed subdivision plan and the Last Will and Testament of the said deceased directly in the name of the 1st and 2nd Plaintiffs and 1st and 2nd Defendants?*
23. *Have the 1st and 2nd Defendants committed fraud by failing to subdivide and transfer the lots in CL 21772 (previously Lot 8 on CL 6009) to the respective beneficiaries and/or proposed owners of the lots?*
24. *Have the 1st and 2nd Defendants committed fraud by depriving the wife and children of the said deceased and the 2nd Plaintiffs of their legitimate share in CL 21772?*
25. *Have the Plaintiffs suffered damages by reasons of the conduct of the 1st and 2nd Defendants?*
26. *Whether the Plaintiffs are entitled to cost on an indemnity basis against the 1st and 2nd Defendant?*
27. *Are the Plaintiffs entitled to interest? If so, what is the quantum thereof?*
28. *Whether the 4th named 1st Plaintiffs has been residing from his birth on the property with the consent of the said deceased or is he a trespasser and should an Order for Eviction be made against him?*
29. *Whether the time of making his Last Will and Testament give away the land to the 1st and 2nd Defendants?*
30. *Whether the 1st and 2nd Defendants were registered lessees of CL 6009 or CL 21227 at the time the said deceased executed his Last Will and Testament?*
31. *Do the Plaintiffs have a locus to institute the action on behalf of the Estate of Permal or on their own behalf?*
32. *Whether the Order made on the 28th day of April, 2010 in High Court Civil Action No. 15 of 2008 confirmed that the deceased is no longer the owner of the land known as Lot 8 in CL 6009?*

33. *Whether Order made on the 28th day of April, 2008 and 12th April, 2018 has any bearings on the deceased in disposing of the property which he doesn't own?*
34. *Whether the said deceased forfeited all his interest in Lot 8 in favour of the 1st and 2nd Defendants or did the said deceased retained equitable interest in the property?*
35. *Whether the endorsement of Transfer No. 847473 dated 9th August, 2017 on CL 6009 was legal when the lease had already expired on 31st December, 2015?*
36. *Whether the said deceased had the intention to subdivide and allocate the residential lots to all the beneficiaries at the time the lots were conveyed to the 1st and 2nd Defendants?*
37. *Whether the conveyance of Lot 8 to the 1st and 2nd Defendants via Court Order dated 28th day of April, 2008 was to be held on trust for the Plaintiffs and 1st and 2nd Defendants by the 1st and 2nd Defendants or was it a gift to 1st and 2nd Defendants?*

8. Mr Nand raised the following preliminary issue at the commencement of the hearing:

- a. *Can the Solicitors for the Plaintiff institute an action contesting the same issues which has been decided in Civil Action No. 15 of 2008 & 48 of 2017?*
- b. *Can the Deceased Pernal who died on or around 2016 devise and will something which has been disposed off by him in Civil Action No. 15 of 2008?*

9. Mr Nand submitted that the deceased agreed in Civil Action No. 15 of 2008 to give Lot 8 to the first and second defendants. In Civil Action No 48 of 2017, the Director of Lands was ordered to prepare a new lease for Lot 8 in the names of the first and second defendants. The matter is res judicata until a separate action is filed to set aside both Orders.

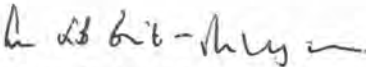
10. Mr Dayal, counsel for the plaintiffs replied that the first and second defendants held Lot 8 in trust for the first plaintiffs and they failed to comply with the Orders .

11. I informed counsel that I would decide the preliminary issues in my Judgment.

12. At the hearing, Mr Nand agreed to the following documents produced by PW1, (first of the first plaintiffs):the Lease instruments, Probate, Orders of Court and the proposed subdivision plan.

13. In Civil Action No. 15 of 2008 filed by the deceased against the second plaintiff(in this case), the Orders of Court of 28th April, 2010 are inter alia as follows: the second plaintiff transfer Lot 8 to the first defendant and second defendant; "*there now exists a proposed subdivision prepared by the Plaintiffs, copy of which is attached...*"
14. The first and second defendants filed action against the second plaintiff and third defendant in Civil Action No. 48 of 2017. On 12th April, 2018, the following terms of settlement were entered: the Director of Lands was ordered to prepare a new lease for Lot 8 in the names of the first and second defendants, who were ordered to subdivide Lot 8 and transfer Lot 7 of Lot 8 to the first defendant.
15. In my view, the case for the first plaintiffs is that the first and second defendants hold their lots on Lot 8 on trust for them. The statement of claim states that the first and second defendants are currently the owners of Lot 8. The issue of res judicata does not arise.
16. I note that the proposed subdivision plan contains a division of Lot 8 to several lots. And the deceased in his Will bequeathed lots 1 to 8 of Lot 8 to the first plaintiffs and the first and second defendants.
17. PW1, in evidence in chief said that his house was on Lot 8. In cross examination, he said that the second defendant's house was on lot 8 of Lot 8 and the house of PW2,(the fourth of the first plaintiffs) was on lot 2 of Lot 8. PW2 confirmed same in his evidence. It transpired that the second of the first plaintiffs dismantled her house.
18. DW2,(*Mr Ami Kohli, Solicitor*) said that he filed Civil Action No. 15 of 2008 on behalf of the deceased. The deceased did not raise a concern that the land was to be given to his other children apart from the first and second defendants. In cross examination, he said that the sub division was part of the terms of settlement in Civil Action No. 15 of 2008 .

19. In my view, the proposed subdivision plan and the Last Will indicate the intention of the deceased that he wanted the land sub-divided and distributed as reinforced by the evidence that three children of the deceased built their houses on lots corresponding to the lots bequeathed to them.
20. Moreover, DW2, (*the first defendant*) categorically stated in cross examination that she knew of the sub-division plan and “*it was Sok Lingam and my responsibility to sub divide the land and give- and give it to them...we did not do because the lease was not registered under mine and Sok Lingam name*”. In re-examination, she explained that she did not attend to the sub-division after the lease was granted in her name, as the present action was filed.
21. In my judgment, the evidence of the first defendant fortifies the case for the plaintiffs that Lot 8 was held in trust for them by the first and second defendants.
22. The action of the plaintiffs succeeds.
23. In my judgment, the fourth of the first plaintiffs is entitled to remain on Lot 8.
24. The counterclaim of the first and second defendants for vacant possession against the fourth of the first plaintiffs is declined.
25. **Orders**
- a. I grant the plaintiffs a declaration that the first and second defendants hold Lot 8 (CL 21772) on trust for the first plaintiffs and themselves.
 - b. The first of the first plaintiffs and the second defendant, as executors and trustees of the deceased shall apply to the third defendant for the rezoning and subdivision of Lot 8 (CL 21772).
 - c. The counterclaim of the first and second defendants is declined.
 - d. The first and second defendants shall pay the first plaintiffs costs summarily assessed in a sum of \$ 1500.00.


A.L.B. Brito-Mutunayagam
JUDGE
28th February, 2023

