

In the High Court of Fiji  
At Suva  
Civil Jurisdiction

Civil Action No. HBC 205 of 2018

Solomone Dalo

Ulamila Dalo

Plaintiff

v.

Varanisese Karisitiana

Defendant

Counsel: Mr V. Faktaufon with Ms M. Chowdhury for the plaintiffs  
The defendant absent and unrepresented

Date of hearing: 11<sup>th</sup> October,2022

Date of Judgment: 15<sup>th</sup> March,2023

**Judgment**

1. The plaintiffs reside on CT No. 29079, Lot 6 on DP 7477, a property of the late Inoke Dakai Maraiwai, (deceased). He passed away on 8<sup>th</sup> February,2011. The defendant is his widow. The plaintiffs state that the defendant promised to transfer the property to them once they pay the mortgage debt on the property to ANZ Bank. The defendant agreed to the contents of an unsigned letter of agreement drafted by the plaintiffs, but the agreement was not executed. The statement of claim continues to state that the plaintiffs have paid the mortgage debt to the Bank in a sum of \$94,713.02 inclusive of interest. The plaintiffs maintain the property and have incurred costs of \$21,000. The defendant has refused to transfer the property.

2. The plaintiffs seek specific performance of the agreement and judgment in the sum of \$115,713.02 comprising their loan repayment to the Bank of \$94,713.02 and costs incurred in maintaining the property in a sum of \$21,000.00.
3. The defendant, in her amended statement of defence and counterclaim states that the plaintiffs have lived rent free on the property from 8 February, 2011, to the financial detriment of the defendant in the sum of approximately \$187,500.00. There was no memorandum of agreement in writing signed by the defendant in terms of section 59 of the Indemnity Bailment and Guarantee Act nor part performance. The defendant counterclaims for a sum of \$ 92,786.68 as rental for the property at \$25,000 per annum.
4. The plaintiffs in their reply deny the counterclaim as it is unfair to pay \$25,000.00 per annum in addition to the mortgage repayments made.

#### ***The hearing***

5. PW1, (*the second plaintiff*) in evidence in chief said that the defendant was the wife of her elder brother (the deceased). He was the owner of the property. He passed away in February, 2011. The plaintiffs paid the deceased's mortgage debt \$ 68,905.54 to ANZ when she took over the debt and made several payments thereafter to ANZ. The parties agreed that once the mortgage was paid, the title would be transferred to the plaintiffs. She produced an unsigned agreement between the parties and copies of the mortgage document and ANZ statement of account of the defendant and the deceased.

#### ***The determination***

6. *Agreed Facts*
  - a) *The Plaintiffs were the in-law of the Defendant.*
  - b) *The property at issue is a freehold on CT 29079 being Lot 6 on DP 7477.*
  - c) *That the property was mortgaged to ANZ Bank on Instrument No. 564350.*
  - d) *That the letter of Agreement prepared by the Plaintiff was never signed.*
  - e) *The Plaintiffs lived rent free in the property and maintained it from the date the Defendant's husband died in 2012.*
  - f) *That the Plaintiffs gave notices to the Defendant on 21 May and 02 July 2018.*
  - g) *Titilia Marawai is the niece of the Plaintiffs and daughter of the Defendant.*

*Issues to be determined by the Court*

- i. Was there an agreement between the Plaintiff and the Defendant?*
- ii. Was there a memorandum of the agreement in writing signed by the Defendant which complied with section 59 Indemnity Bailment and Guarantee Act?*
- iii. If there was no memorandum which complied with section 59, was there part performance by the Plaintiff which was wholly attributable to the agreement?*

***The determination***

7. The plaintiffs contend that the defendant promised to transfer the property to them once they pay the mortgage debt of the deceased to ANZ Bank.
8. There is no agreement executed by the parties before Court in support of the contention of the plaintiffs with respect to the transfer of the property.
9. PW1 testified that the plaintiffs paid \$68,905.54 to the ANZ account of the defendant when they took over the mortgage debt. Thereafter they made several payments to the defendant's account as reflected in the ANZ statement of account of the defendant and the deceased.
10. The plaintiffs state that a total sum of \$94,713.02, inclusive of interest was paid as the mortgage debt of the defendant to ANZ.
11. The defendant's contention in her statement of defence that the sum of \$94,713.02 comprises rent due to the defendant from 8 February, 2011, to-date is contrary to the agreed fact that the plaintiffs lived rent free in the property and maintained it from the date the deceased passed on.
12. I would also note that in claiming unjust enrichment, paragraph 10 of the statement of defence deducts "*Mortgage payments (of) \$94,713.02*" from the value of property and rent the defendant claims is payable.
13. There is no evidence of a rental agreement before Court.

14. In my view, the defendant's claim for rental is an afterthought. It appears to me that the plaintiffs were allowed to reside in the property on the condition they maintain it.
15. I am satisfied that the plaintiffs have paid \$94,713.02 as mortgage payments on behalf of the deceased and not on account of rentals. This sum is recoverable by the plaintiffs from the defendant.
16. There is no evidence that the plaintiffs incurred maintenance on the property in a sum of \$21,000.00. The claim is declined.
17. The defendant's claim for rentals is declined.
18. **Orders**
  - a. The defendant shall pay the plaintiffs the sum of \$94,713.02
  - b. The claim of the plaintiff for specific performance of the transfer of the property is declined.
  - c. The claim of the plaintiff for \$21,000.00 is declined.
  - d. The defendant's counterclaim is declined.
  - e. The defendant shall pay the plaintiffs costs summarily assessed in a sum of \$ 1500.



*A.L.B. Brito-Mutunayagam*

**A.L.B. Brito-Mutunayagam**

**JUDGE**

**15<sup>th</sup> March, 2023**