

**IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION**

CIVIL ACTION NO. HBC 299 OF 2022

BETWEEN : **KAPIL DEO** aka **KAPIL DEO SHARMA** as the sole executor and trustee of the **Estate of Chandra Wati** as Probate Jurisdiction No. 26275 of Varoko, Ba
PLAINTIFF

AND : **THE REGISTRAR OF TITLES** having its registered office at Level 1, Civic Tower Building, Victoria Parade, Suva
DEFENDANT

BEFORE : Hon. Mr. Justice Mohamed Mackie

APPEARANCES : Mr A. Dayal, for the Plaintiff
Mr J. Mainavolau, for the Defendant

WRITTEN SUBMISSIONS: Filed on 19th July 2023 by both parties.

DATE OF HEARING : 19th July, 2023

DATE OF JUDGMENT : 15th September, 2023

JUDGMENT

A. INTRODUCTION:

1. The Plaintiff commenced this action on 09th November 2022 by filing his Originating Summons, supported by the Affidavit sworn by him on 2nd November 2022, seeking the following reliefs against the Defendant.
 1. *That the registrar of Titles is to process / facilitate the Transfer of State Lease 23689 from Kapil Deo as the Executor and Trustee of the Estate of Chandra Wati to Kusum Lata.*
 2. *That there be abridgment of time in calling this application.*
 3. *Any other orders that the Court may deem just and equitable.*
2. The Affidavit in support accompanies annexures marked as "KD-1" to "KD-10" in order to substantiate his claim.
3. The Originating summons states that it is made pursuant to Orders 7,10, 28 32 and Order 85 rule (2) , (3) and (4) of the High Court rules and the inherent jurisdiction of this Court.
4. On behalf of the Defendant, Hon. Attorney General's Office, having filed the acknowledgement of service on 30th November 2022, filed the Affidavit in opposition on 13th March 2023, which was sworn by Adi Kalera Kididromo, on 8th March 2023,

being the Acting Deputy Registrar of Title. The Plaintiff's Counsel on 21st March 2023 informed the Court that no Affidavit in reply will be filed.

5. At the hearing held on 19th July 2023, learned counsel for both the parties, having filed their respective written submissions, argued the matter orally as well.

B. RELEVANT LAW:

6. The Originating summons refers to the Orders and Rules of the High Court Rules 1988 that stipulate the procedures to be followed in making the Application, and does not specify the Law and provisions under which the relief is sought. However, in the written submissions filed and the Oral submissions made at the hearing, I find that the learned counsel for both the parties have referred to the relevant Laws and the provisions that come into play, which are reproduced bellow.

Succession Probate Administration Act

7. Section 11 (3) of the Succession Probate Administration Act has the following provision.

(3) An executor to whom probate has been granted, or administrator, may, for the purposes of administration, sell or lease such real estate, or mortgage the same, with or without a power of sale, and assure the same to a purchaser or mortgagee in as full and effectual a manner as the deceased could have done in his lifetime.

Trustee Act:

8. The provisions of the Trustee Act that matters are as follows.

*PART IV-GENERAL POWERS OF TRUSTEES
Powers to sell, exchange, partition, postpone, lease, etc.*

23.-(1) Subject to the provisions of this section, every trustee, in respect of any property for the time being vested in him, may-

(a) Sell the property;

(b) Dispose of the property

(2).....

(3).....

(4) Where the property subject to a trust includes land, the trustee shall exercise the power conferred by the provisions of this section to sell the land, if so required in writing by the person or all of the persons at the time beneficially entitled to an interest in possession under the trust of the land. (Emphasis mine)

Land Transfer Act

9. The following sections of the Land transfer Act are also referred to in the submissions;

Consent to dealing, how given

125. Where in this Act the consent of any person is required for the registration of any instrument, such consent shall be endorsed on the instrument or annexed thereto and the signature of the person giving such consent shall

be attested in the manner prescribed for the verification of instruments under this Part or to the satisfaction of the Registrar. (Emphasis mine)

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.*

C. ANALYSIS:

10. The Plaintiff in his Affidavit, *inter alia*, states that he, being the sole Executer & Trustee of the Estate of Chandra Wati, and the registered owner of the State Lease No. 23689 under the Estate, entered into a sale and purchase Agreement with one ***Kusum Lata*** to sell the said lease land. Thereafter, having proceeded with the Transfer and settlement, when he tendered it for Registration at the Title office, it was returned by the Defendant requiring the consent from the beneficiaries.
11. Counsel for the Plaintiff as per his written and oral submissions relies on the section 11 (3) of the Succession Probate Administration Act for the reliefs sought.
12. In the Affidavit in opposition, the Defendant has admitted the Plaintiff's Trusteeship and the registered ownership of the relevant State Lease. The Defendant also admits the transaction that the Plaintiff claim to have gone through to sell the subject land and the fact that the Deed was returned by the Defendant requiring the consent of the beneficiaries.
13. In paragraph 10 of the Affidavit , the Defendant states further that, as per the Defendant's Policy , which is derived from Law and in accordance with the power invested by statue on the Defendant, it requires the consent of the beneficiaries before it can accept any document for the purpose registration.
14. It is further averred that the orders sought by the plaintiff are improper and non-maintainable by reason that there is no cause of action against the Defendant, thus the Defendant cannot be implicated for performing its statutory function. Accordingly, the Defendant moves to dismiss the action.
15. Counsel for the Plaintiff argues that there is no statutory requirement or obligation on the part of the Plaintiff Executer to obtain the consent from the beneficiaries or anyone before he could sell or transfer the property as the defendant requires. Counsel relies on in the decision of ***Singh v Devi [2015] FJHC; HBC 319.2014 (10 November 2015)***.
16. Counsel for the Defendant argues that the Defendant under the powers invested in its office requires the consent of all the beneficiaries before it can accept any document for registration of the transfer of an Estate or trust held property.
17. Undoubtedly, the Section 11(3) of the Succession Probate and Administration Act 1979 and the Section 23 (1) of the Trustee Act confer the power and authority to the Executer / Trustee to sell, mortgage and dispose the Trust property. But if the subject

matter happens to be a land, and when it comes to the requirement of registration, which is a must that fulfils the title and ownership, I find that under the Laws described above, the Registrar has the invested power to call for the consent of all beneficiaries before proceeding to register.

18. Section 125 of the Land Transfer Act speaks about the consent for dealing and how the consent could be given. The consent can be given either by an endorsement in the very Deed or Instrument, or by annexing thereto in the form of a separate instrument with the signature of the person giving such consent being attested in the manner for the verification of instruments under this part to the satisfaction of the Registrar, which the Registrar under Section 129 (1) can require from the proprietor or any other person interested in any land or any estate or interest therein. The consent of the beneficiaries can come forth in a separate instrument as provided by the section, and the Plaintiff being the person, who may have it in his possession / control can make it available.
19. The beneficiaries of the subject matter Land and the Estate of the deceased in this matter are said to be staying in overseas (vide paragraph (6) of the Affidavit). They, admittedly, have the beneficial interest in the subject matter land being sold. The sale or Mortgage or any other form of disposition may be performed pursuant to Section 11(3) of the Succession, Probate and Administration Act as the Counsel for the Plaintiff argues, or under the Section 23(1) of the Trustees Act, however subject to consent of beneficiaries, if the Registrar deems it necessary.
20. But, Section 23 (4) of the Trustee Act states that "Where the property subject to a trust includes land, the trustee shall exercise the power conferred by the provisions of this section to sell the land, if **so required in writing by the person or all of the persons at the time beneficially entitled** to an interest in possession under the trust of the land". This provision also shows that the Registrar can be justified in requiring the consent of the beneficiaries for her to proceed with the registration.
21. In my view, the requirement of the consent is as a "safety net" that provides guard against any possible fraud or foul play and may prevent any adversities to the proprietor and/ or to the beneficiaries. Why I am saying this is, that the Land being sold in this matter is in an extent of 1001 m² situated in the District or Town of BA. The Deed of Transfer marked and tendered as "KD-3" states the sale price as **\$2,000.00**, while the Sale and Purchase Agreement marked and tendered as "KD-2" states the sale price in figures as **\$2,000.00** and in words as **Fifty Five Thousand Fijian Dollars**.
22. The above discrepancy in sale price raises a serious doubt about the role being played by the Plaintiff in this process as the Executor and Trustee of the subject Land. This may be one of the reason why the consent from the beneficiaries is required. This requirement not only ensures the transparency in the dealing, which may be of paramount important for the beneficiaries, but also looks after the interest of the State as far as the revenues in the form of Stamp duty and Taxes are concerned.
23. The above provisions give the Registrar the discretionary power to require the consent of the beneficiaries. The powers of the Executor/ Trustee to dispose the land under section 23 (1) of the Trustee Act and/ or under section 11(3) of the

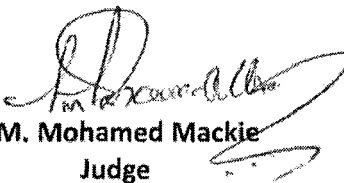
"Succession Probate & Administration Act" are not absolute and it may be subject to the consent, when it is required, before the registration of the relevant instrument of sale, mortgage or disposal of the Estate property.

24. The Plaintiff hereof is not without any remedy. He being a person, who may have the instrument of consent from the beneficiaries in his possession or within his control affecting the subject land can fulfil the requirement of consent in order to have the Deed of Transfer registered.

D. FINAL OUTCOME.

1. The Plaintiff's claim fails.
2. The Originating Summons filed by the Plaintiff on 9th November 2022 is hereby dismissed.
3. The Plaintiff shall pay the Defendant \$750, 00 within 28 days being the summarily assessed costs.




A.M. Mohamed Mackie
Judge

At the High Court of Lautoka on this 15th day of September, 2023.

SOLICITORS:

For the Plaintiff:

Dayal Lawyers, Barristers & Solicitors

For the Defendant:

Attorney General's Chambers