IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

HBC 69 of 2019

BETWEEN: **RAM KRISHNA** of Matanagata, Tavua, Cultivator.

PLAINTIFF

A N D : **AJNESH MUDLIAR** of Matanagata, Tavua, Cultivator.

DEFENDANT

Appearances: Ms. Kumari B. for the Plaintiff
Mr. Rueben J. for the Defendants

Date of Hearing: 30 October 2023

Date of Ruling: 25 March 2025

R U L I N G

INTRODUCTION

1. The plaintiff, Mr. Ram Krishna (**"Krishna"**) is the registered lessee of State Lease No. 746906. This lease has a total acreage of 4.8773 hectares.

2. Included in the 4.8773 hectares is a certain 2-acre section (**"two-acre plot"**) which is being occupied by the defendant, Mr. Ajnesh Mudliar (**"Ajnesh"**).

3. Erected on the said plot is a dwelling house. Krishna refers to the said dwelling house as **"the labourers'quarters"**.

4. Ajnesh and his family moved in to occupy the said labourers'quarters in June 2018. Krishna says that Ajnesh never sought his prior consent, nor has Krishna ever given any consent after they moved in.

5. Krishna claims that Ajnesh and his family started clearing the plot of trees that were growing thereon. They also installed a water tank and planted flowers and vegetables around the plot.

NOTICE TO VACATE

6. On 23 October 2018, the Legal Aid Commission served Ajnesh a Notice to Vacate on Krishna's instructions. However, Ajnesh has remained in occupation in complete disregard to the Notice to Vacate.

7. On 22 March 2019, the Legal Aid Commission filed an Originating Summons pursuant to section 169 of the Land Transfer Act 1971 seeking the following Orders:

   (i). the defendant, his relatives and occupants show cause why they should not immediately give up possession of the land comprised in the instrument of State Lease Number 746906 more particularly described as Kor No. 2 Subdivision being Lot 2 on DP 9379 having an area of 4.8773 Hectares in the province of Ba in the district of Tavua to the plaintiff.

   (ii). the defendant indemnify the plaintiff of all costs of this application; and;

   (iii). any other Orders deemed just and equitable in the circumstances.

8. The Originating Summons is supported by an Affidavit sworn by Krishna on 20 March 2019.

9. Krishna deposes and annexes documentation which confirm *inter alia* that he is the registered lessee of all that land comprised in State Lease No. 746906 described as Koro No. 2 Subdivision and that his lease term is thirty (30) years with effect from 01 January 2010.

ONUS

10. As per section 171 of the Land Transfer Act, Krishna is only required to prove:

   (i) due service of the Summons to the satisfaction of the court

   (ii) his title and,

   (iii) the consent of the Director of Lands to institute these proceedings.

11. Once Krishna establishes the above, the onus then shifts to Ajnesh to show cause why he should not give up possession to Krishna.

12. In **Morris Hedstrom Limited v Liaquat Ali** Action No.153 of 1987, the Supreme Court (now the High Court) stated:

> Under Section 172 the person summoned may show cause why he refuses to give possession of the land and if he proves to the satisfaction of the Judge a right to possession or can establish an arguable defence the application will be dismissed with costs in his favour. The defendants must show on affidavit evidence some right to possession which would preclude the granting of an order for possession under the Section 169 procedure.

That is not to say that final or incontrovertible proof of a right to remain in possession must be adduced. What is required is some tangible evidence establishing a right or supporting an arguable case for such a right, must be adduced.

HOW AJNESH JUSTIFIES A RIGHT TO REMAIN IN POSSESSION

13. On 29 March 2022, MY Law filed an affidavit in opposition of Ajnesh. This affidavit was sworn on 28 March 2022.

14. In his affidavit, Ajnesh attempts to show cause by asserting the following:

    (i) that he has a beneficial interest in the two-acre plot which he is occupying.

    (ii) his beneficial interest derives from the Last Will & Testament dated **19 February 2016** of his late mother, Meenakchi (she died on **02 September 2018**).

    (iii) the plot was bequeathed to Meenakchi by her father, the late Mariappan, in a Will dated **04 May 1998 ("1998 Will")**.

    (iv) Meenakchi, was Krishna's sister. Mariappan was their father.

DID MARIAPAN EVER OWN THE PLOT IN QUESTION? WHY BEQUEATH TO MEENAKCHI?

15. During his lifetime, Mariappan was the registered lessee over a section of state land. All this land was comprised in State Lease No. 337022. This lease had a total acreage of 16.2712 hectares.

16. State Lease No. 337022 was issued to Mariappan on 01 January 1965 for a period of twenty-five (25) years. The lease was extended for a further twenty (20) years with effect from 01 January 1990. **It expired on 01 January 2010**.

17. As stated, Mariappan bequeathed the two-acre plot in question to Meenakchi in his 1998 Will.

18. At the time Mariappan made this 1998 Will, the two-acre plot in question in this case – was, then, actually part of State Lease No. 337022.

MARIAPPAN MADE A SECOND WILL IN 2006

19. Notably, some four (4) years or so before Mariappan's State Lease No. 337022 expired, he made a second Will on 27 January 2006 (**"2006 Will"**).

20. Whereas Mariappan had named Meenakchi and Krishna as executors and trustees and made a particular bequest in favour of Meenakchi in the 1998 Will – it appears that Mariappan had a change of heart later.

21. In the 2006 Will, Mariappan would name Rajenesh Mudliar as his sole executor/trustee. Rajenesh is the brother of the Krishna and Meenakchi.

22. Furthermore, in the 2006 Will, Mariappan made no provision whatsoever to Meenakchi.

SUVA HIGH COURT DECLARES 1998 WILL "INVALID"

23. Mariappan passed away on 05 August 2008.

24. Apparently, with two Wills surfacing upon Mariappan's death, a case was brought before the Probate Court in Suva to sort out the conflict.

25. On 24 June 2011, the High Court in Suva ruled that the 1998 Will was invalid. Accordingly, the Probate which had been granted to Meenakshi and Krishna, was also revoked.

26. On 01 April 2014, Probate No. 55074 was granted in favour of one Rajenesh Mudliar pursuant to the 2006 Will. Rajenesh is the brother and Meenakchi. He became the sole executor/trustee over the estate of Mariappan.

27. It is to be noted that the declaration of the Suva High Court was made some fifteen months after Mariappan's lease had expired.

KRISHNA ACQUIRES LEASE WHICH INCLUDES THE TWO-ACRE PLOT

28. After Mariappan's State Lease No. 337022 expired on 01 January 2010, Krishna applied to the Director of Lands to lease a portion of the land. He was then granted Lease No. 746906.

29. State Lease No. 746906 comprises some 4.8773 of land. This was once part of the 16.2712 hectares which was comprised in the now-expired State Lease No. 337022.

30. Notably, included in this State Lease No. 746906, is the two-acre plot which is the subject matter of this case.

31. It is to be noted that Krishna acquired State Lease No. 746906 some fifteen months before the Suva High Court declared the 1998 Will invalid.

WHERE DOES THAT LEAVE MEENAKSHI'S INTEREST?

32. To reiterate, Meenkachi's purported interest over the two-acre plot derives from Mariappan's 1998 Will. That Will was declared invalid on 24 June 2011.

33. A Will is normally declared invalid if it fails to meet the formal requirements set out under the Wills Act during formation.

34. The declaration that the said Will was invalid, means that it has no testamentary effect. A gift or a "bequest" will fail if made under an invalid Will.

35. This means that, as of 24 June 2011, the “gift” in Mariappan’s 1998 will which favoured Meenakchi, could no longer take effect.

36. In addition to the above, at the time Meenakchi made her Will in 2016, the two-acre plot had long been part of Krishna’s State Lease No. 746906 (since 01 January 2010).

37. Yet, on 19 February 2016, five (5) years after the 1998 Will was declared invalid by the Suva High Court, and six (6) years after Krishna had acquired a State Lease over a section of land which includes the two-acre plot, Meenakshi would execute a Will by which she purported to bequeath Ajnesh the very same two-acre plot.

38. Clearly, at the time Meenakchi made her Will in 2016, she had no claim whatsoever over the two-acre plot. The fundamental common law principle which finds expression in the latin maxim ***nemo dat quod non habet*** applies also in relation to Wills. Put simply, one cannot pass title to property one does not own.

39. For the above reason, Ajnesh cannot claim a beneficial entitlement to the 2-acre plot on the basis of the testamentary bequest under the 2016 Will of Meenakchi. At the time Meenakchi made her Will in 2016, the two acre-plot was no longer part of the Mariappan estate.

IS THERE ANY OTHER BASIS ON/BY WHICH MEENAKSHI MIGHT HAVE HAD AN EQUITABLE CLAIM ON THE TWO-ACRE PLOT IN QUESTION?

40. It appears to be not in dispute that Meenakchi had grown up on the land since childhood. She was raised on the land by her father Mariappan together with her siblings – including Krishna.

41. Later, in her adult life, she then went into occupation of the 2-acre plot. Ajnesh alleges that Mariappan had encouraged Meenakchi to do so on the promise that he would bequeath the land to her – which he did in his 1998 Will.

42. From her viewpoint, her position over the 2-acre plot in question was solidified by the testamentary bequest in her father’s 1998 Will.

43. However, as stated, this Will has been declared invalid.

44. Ajnesh acknowledges this in his own affidavit. He also acknowledges the 2006 Will.

45. In his Affidavit, Ajnesh questions the propriety of the Suva High Court’s decision in 2011 to declare the 1998 Will invalid and to revoke the Probate which had been granted thereon. He

appears to suggest that the 1998 Will and the 2006b Will are both valid because they deal with different testamentary bequests.

46. I am not inclined to entertain that question. The Suva High Court's decision is final and the matter is *res judicata*. His mother ought to have appealed it during her lifetime.

47. The only other remotely plausible way by which Meenakshi could have claimed an interest over the 2-acre plot is by a case theory formulated along an equitable estopple – for example – that she did build the house or spent money on it, in reliance on promises uttered by Mariappan that **"all this will be yours one-day"**.

48. But there is no assertion to that effect in his affidavit. In any event, any alleged arrangement between two persons who are now long deceased would be hard (not impossible) to prove. It would require a careful scrutiny of the evidence (see **Weeks v Hrubala** [2008] NSWSC 162 at [20] where Young CJ said:

> In a case of a person suing a deceased estate the court normally looks for some sort of corroboration: see Re Hodgson [1885] UKLawRpCh 249; (1886) 31 Ch D 177 even though, as a matter of law, corroboration is not absolutely necessary. Experience, however, shows that when plaintiffs are making a claim against a deceased estate the court is wise to look for corroboration.

49. In **Plunkett v Bull** [1915] HCA 14; (1915) 19 CLR 544, Isaacs J said:

> ..... and undoubtedly it is established that in cases of this sort the Court scrutinizes very carefully a claim against the estate of a deceased person. It is not that the Court looks on the plaintiff's case with suspicion and as primâ facie fraudulent, but it scrutinizes the evidence very carefully to see whether it is true or untrue.

CONCLUSION

50. The defendant has not shown to the satisfaction of this Court a right to remain in possession of the two-acre plot in question. I grant order in terms of the plaintiff's Originating Summons. The defendant is hereby ordered to give vacant possession of the property within four weeks of the date of this Ruling. Costs against the defendant in favour of the plaintiff which I summarily assess at $1,000 – 00 (one thousand dollars only).

HIGH COURT OF FIJI
LAUTOKA

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Anare Tuilevuka
JUDGE

25 March 2025