

IN THE HIGH COURT OF FIJI AT SUVA

CIVIL JURISDICTION

CASE NUMBER: HBC 158 OF 2021

BETWEEN: **KYRA MARGRET PETERSEN**

PLAINTIFF

AND: **HIRAM JOSEPH PETERSEN** as Executor and Trustee in the **Estate of Duncan Petersen**

1ST DEFENDANT

HIRAM JOSEPH PETERSEN

2ND DEFENDANT

SALOTE PEREZ a.k.a. **SALOTE TAUFUSI** as Administratrix in the **Estate of Ray Duncan Petersen**

3RD DEFENDANT

SALOTE PEREZ a.k.a **SALOTE TAUFUSI**

4TH DEFENDANT

REGISTRAR OF TITLES

NOMINAL DEFENDANT

Appearances:

Mr. M. Saneem for the Plaintiff.

Ms. Fong for the 1st and 2nd Defendants.

Ms. Cara. V for the 3rd and 4th Defendants.

Date/Place of Judgment:

Wednesday 16 April 2025 at Suva.

Coram:

Hon. Madam Justice Anjala Wati.

RULING

(Application for Leave to Appeal Interlocutory Decision)

A. Catchwords:

LEAVE TO APPEAL from Interlocutory decision –the factors to be considered are those outline by Murphy J in Niemann v. Electric Industries Limited (1978) VR 431- at 441 -442 - they are (i) whether the issue on the proposed grounds of appeal is one of general importance or whether it simply depends upon the facts of this particular case; (ii) whether there are involved in the case difficult questions of law, upon which different views have been expressed from time to time or as to one which the court is sorely troubled; (iii) whether the order made has the effect of altering substantive right of the parties or either of them; and (iv) as a general rule there is a strong presumption against granting leave to appeal from interlocutory orders or judgments which do not either directly or by their practical effect finally determine any substantive rights of either party.

B. Cases:

1. *Halsbury's Law of England, Volume 16, 4th Edition.*
 2. *Niemann v. Electric Industries Limited (1978) VR 431.*
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Application

1. This is an application for leave to appeal the decision of His Lordship Justice Seneviratne wherein his Lordship found that the 3rd defendant had not breached the orders of the court by entering into a sale and purchase agreement with a third party when she was restrained by the court from transferring, selling or alienating the said property. The leave to appeal application only concerns the plaintiff and the 3rd defendant who is also the 4th defendant in her personal capacity.

Background

2. The plaintiff's substantive claim is mounted against the last will of Duncan Petersen through which the 1st defendants Hiram Joseph Petersen and Ray Duncan Petersen obtained a grant in their favour as executors and trustees in the Estate of Duncan Petersen. Both the trustees are now deceased.
3. The 3rd defendant Salote Perez is the Administratrix in the Estate of Ray Duncan Petersen.
4. There is no grant issued in the Estate of Hiram Joseph Petersen. I have ordered the substantive proceedings to continue on the basis that no one on behalf of Hiram Joseph Petersen is interested in defending the claim of the plaintiff on the issue of the forged will of Duncan Petersen.
5. In the substantive claim, the plaintiff has sought the following reliefs:
 - (a) *A declaration that the last will and testament of Duncan Petersen dated 25th June 2009 is null and void with no legal effect.*

- (b) *An order that the grant of Probate No: 50368 with the will annexed be cancelled and revoked.*
 - (c) *An order that the last will and testament of Duncan Petersen executed on 18th January 2006 is the valid and genuine will.*
 - (d) *An order that the transfer of the estate properties being CT 14164 and CT 14165 to Ray Duncan Petersen be cancelled forthwith and the transmission by death endorsed on those certificates of title in the name of the 3rd defendant be cancelled.*
 - (e) *An order that the 1st Defendant be removed as executor and trustee in the estate of Duncan Petersen.*
 - (f) *An order that the plaintiff be appointed as the executor and trustee of the estate of Duncan Petersen pursuant to the last will and testament dated 18th January 2006 and to distribute the estate to the beneficiaries accordingly.*
 - (g) *An injunction against the 1st to 4th defendants, their servants or agents from interfering, dealing with, assigning, or transferring any properties forming part of the estate of Duncan Petersen and from interfering and obstructing the plaintiff from viewing and inspecting these properties.*
 - (h) *An order for the 3rd and 4th defendants to provide full and detailed financial accounts on the proceeds of sale/rental income and other income from the estate properties.*
6. On 21st July 2021, the Master, on the plaintiff's application, made ex-parte interim orders that the 1st to 4th defendants either by themselves or their servants and agents and whosoever be restrained from transferring, selling and or alienating all three properties described in Certificate of Title Nos. 14164, 14165 and 14711 situated on the Island of Taveuni.
7. Subsequent to the above orders, the 3rd defendant entered into a sale and purchase agreement with a third party by which agreement the third party got possession of the property upon execution of the agreement. The third party had also paid the consideration sum for the sale of the property.
8. The plaintiff filed committal proceedings against the 3rd defendant for entering into a sale and purchase agreement and thereby breaching the orders of the court.
9. At the hearing of the committal proceedings, the 3rd defendant was not present. The counsel appearing on behalf submitted that the plaintiff had failed to adduce any evidence of the transfer of the subject property by the 3rd defendant.
10. His Lordship Justice Seneviratne found that there was no evidence that the 3rd defendant had transferred the property as the Certificate of Title Nos. 14164, 14165 and 14711 did not show any transfers.

11. The court found that by the order of the court, the 1st to 4th defendants were restrained from transferring, selling or alienating the subject properties. Since the properties had not been transferred, the 3rd defendant did not breach the order by entering into the sale and purchase agreement with a third party.

Law and Analysis

12. As a general rule there is a strong presumption against granting leave to appeal from interlocutory orders or judgments which does not either directly or by their practical effect finally determine any substantive rights of either party. In determining whether leave to appeal ought to be granted from an interlocutory decision, normally the following factors are considered:

1. *whether the issue on the proposed grounds of appeal is one of general importance;*
2. *whether there are involved in the case difficult questions of law, upon which different views have been expressed from time to time or as to one which the court is sorely troubled; and*
3. *whether the order made has the effect of altering substantive rights of the parties or either of them;*

Per Murphy J in Niemann v. Electric Industries Limited (1978) VR 431- at 441 -442.

13. The main issue on the proposed grounds of appeal is whether the court erred in law in arriving at a finding that the sale and purchase agreement for Lot 9 on CT 14165 entered into by the 3rd defendant, which land was protected by an order for injunction against transfer, sale and alienation, did not breach the orders as the legal interest had not passed onto the purchaser.
14. The plaintiff's affidavit in support filed on 16 December 2022 had a sale and purchase agreement attached to it. The sale and purchase agreement was between the 3rd defendant and one Jotika Devi Kumar for a sum of \$11,000.
15. I find the issue on appeal one that troubles this court. His Lordship was of the view that an order against transfer, sale and alienation only convers transfer, sale and alienation of legal interest and seems to exclude equitable interests.
16. If equitable interest are excluded then there is no purpose of an injunctive relief. A bonafide purchaser can always sue on the contract for sale and get an order for specific performance. This will deprive the

party who was protected by an order for injunction of his rights if he is successful in his substantive claim. The affected party's substantive rights will be directly affected.

17. Halsbury's Law of England, Volume 16, 4th Edition at para 786 states:

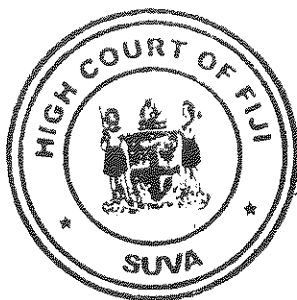
"Upon signing of a contract for the sale of land a change takes place in the equitable, but not the legal, interest in land. At law the purchaser has no right to the land, nor the vendor to the money, until the conveyance is executed. In equity, however, if the contract is one of which specific performance would be ordered, the beneficial interest passes to the purchaser immediately on the signing of the contract, and thereupon the vendor, in regard to his legal ownership and possession of the land, becomes constructively a trustee for the purchaser. This is said to be an application of the maxim that in the eyes of equity that which ought to have been done is to be treated as having been done..."

18. There is a contrary legal view to that of Seneviratne, J which is that a sale and purchase agreement amounts to a dealing in the land. Given the different view expressed by his Lordship, the appellate court needs to determine the issue and give directions on what may become of the sale and purchase agreement if the plaintiff were to be successful in her substantive claim. It is only justified that leave to appeal be granted in this case for the appellate court to determine the question of general importance.

Orders

19. I grant the plaintiff leave to appeal the decision of his Lordship Justice Seneviratne of 27 March 2024.

20. The plaintiff shall have costs of this application for leave to appeal in the sum of \$1,500 to be paid by the 3rd and 4th defendant within 21 days.



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Hon. Madam Justice Anjala Wati

Judge

16.04.2025

To:

1. Saneem Lawyers for the Plaintiff.
2. Nand Lawyers for the 3rd and 4th Defendants.
3. File: Lautoka HBC 158 of 2021.

