

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

HBC 305 of 2022

BETWEEN: **SHANTA KUMARI** of Momi, Nadroga.

PLAINTIFF

A N D: **SANGEETA DEVI** and **SEGRAN MURTI** of Momi, Nadroga.

DEFENDANTS

Appearances: Ms. Vuataki M. for the Plaintiff
 Ms. Sangeeta Devi & Mr. Segran Murti – In Person for the Defendants
 Mr. Rasiga M. for the Nominal Defendant

Date of Hearing: 03 July 2024

Date of Ruling: 17 June 2025

R U L I N G

INTRODUCTION

1. The defendants, Ms. Sangeeta **Devi** and Mr. Segran **Murti**, are husband and wife. On 30 May 2019, they signed an **agreement** with one Ms. **Deshamma** to purchase a piece of land comprised in Instrument of Tenancy Agreement No. 14063/2017, Nagasau (Part of) Lot 13 in the Tikina of Momi in Nadroga/Navosa (i-TLTB Ref 6/11/40794) ("**property**"). This property has a total acreage of 5.9152 hectares. The consideration was seventy-thousand dollars only (\$70,000 – 00).
2. Upon signing the agreement, Devi and Murti paid an initial deposit. They cleared the balance at settlement in exchange for the transfer instrument in registrable form signed by Deshamma.
3. Shanta Kumari was not privy to the agreement and did not sign it. However, Clause 26 (d) and (e) specifically name and identify her as a third-party beneficiary to the sale and purchase agreement between Deshamma and Devi/Murti. Clause 26 (d) and (e) state as follows:

- (d). The purchasers shall arrange with i-TLTB for agreements for Lease at their own costs for an area 1,000m² to be given to Shanta Kumari within four months from the date of settlement.
 - (e). After settlement if the purchasers intent (sic) to sell the property, they agree to subdivide 1000m² and transfer it under Shanta Kumari at their own cost.
4. Devi and Murti have not made any arrangement with i-TLTB, following settlement, to have the 1,000 square meters plot given to Shanta Kumari, at their own costs.

THE CLAIM

5. On 11 November 2022, Shanta Kumari filed a Writ of Summons and Statement of Claim seeking the following:
- (i) specific performance of the Agreement
 - (ii) damages for breach
 - (iii) interest
 - (iv) costs on an indemnity basis
 - (vi) any other order deemed just and expedient by the Court
6. On 19 January 2023, Shanta Kumari filed a Summons seeking specific performance. This application is not filed pursuant to any provision of the High Court Rules 1988 or any other law for that matter. I approach it in terms of Order 86. It is supported by an affidavit of sworn by Shanta on 18 January 2023. I summarize the key facts deposed in paragraph 11 (i) to (x) herein below.

JOINDER

7. I note here in passing for the record that the original writ and statement of claim filed on 11 November 2022 only named Shanta as the sole plaintiff, and Devi and Murti as the only two defendants.
8. Later, pursuant to a Motion filed on 26 October 2023 by Devi and Murti, the i-TLTB was joined as a nominal defendant.
9. Also, pursuant to a Summons filed on 30 January 2024 by Messrs. Law Naivalu and supported by an affidavit sworn by Deshamma on 19 January 2024, Deshamma was joined as the first plaintiff. Subsequently, on 14 June 2024, Messrs. Law Naivalu filed an Amended Statement of Claim.

ORDER 33 APPLICATION

10. On 11 October 2023, Devi and Murti filed an Amended Summons on Preliminary Issues (this amends their initial Summons filed on 11 September 2023). The question raised and for which they seek a determination is whether or not the i-TLTB had consented to clause 26 (d) and (e) and if not, whether or not these clauses are enforceable by Shanta.

SHANTA'S POSITION

11. Shanta's position might be summarized as follows:

- (i) the predecessors in title to the property were one Parandama Pillay ("**Pillay**" - Kumari's late husband) and one Saga Devan Pillay ("**Devan**") - Deshamma's late husband). They were brothers.
- (ii) Pillay and Devan have long deceased. After Pillay died, probate No. 47390 was granted to Shanta. After Devan died, probate over his estate was granted to Deshamma.
- (iii) for some years, Shanta and Deshamma held a joint-beneficial interest over the property as personal representatives of their respective husband's estate.
- (iv) however, the tenancy over the property expired sometime in 2016 or 2017.
- (v) at some point in the short time approaching the expiry of the tenancy, Shanta and Deshamma had a talk about applying to the i-TLTB to extend or renew the tenancy. They reached an understanding that it was in both their interest to seek a joint-renewal of the instrument of tenancy from the i-TLTB.
- (vii) however, Shanta lacked funds. She was not in a position to contribute to the plan to renew the tenancy. Deshamma on the other hand, had the means. She lives in Canada.
- (viii) accordingly, Shanta and Deshamma agreed:
 - (a) that Deshamma would apply for renewal in her name only, and
 - (b) that Shanta would have 1,000 square meters to her name.
- (ix) however, as it turned out, Deshamma would sell the property to Devi and Murti.
- (x) Shanta did confront Deshamma about their arrangement and understanding. Deshamma assured her that this would all be "included" in the sale and purchase agreement so that Devi and Murti are aware of it.
- (xi) that was the backstory as to how clause 26 came to be included in the sale and purchase agreement.
- (x) Devi and Murti have an obligation to honor clause 26. They have failed to do so.

12. In support of the above, Ms. Vuataki submits as follows in Court:

- (i) what Deshamma and the defendants had was a conditional sale.
- (ii) at the time of the sale and purchase agreement, there were two houses existing on the property. One was a four-bedroom house. The other was a three-bedroom house.
- (iii) the subject-matter of the agreement, as stated in the preamble, was the whole land, less the 1,000 square meters in question and the three-bedroom house erected on it.

- (iv) the property was sold subject to the conditions in clause 26 (d).
- (v) consent was not required at the signing of the sale and purchase agreement because clause 26 clearly states that the agreement is subject to the consent of the i-TLTB.
- (vi) i-TLTB consent is only required for a dealing (e.g. transfer, mortgage or sublease) or an alienation (surrendering of a portion).
- (vii) the sale and purchase agreement is merely an agreement to deal. The actual dealing is the transfer.
- (viii) there were two separate “transactions” envisaged by the sale and purchase agreement:
 - (a) the dealing between Deshamma and the defendants which saw the transfer of the entire lease from the former to the latter.
 - (b) the alienation of the 1,000 meters in favor of Shanta.
- (ix) each of the above two transactions requires the separate consent of the i-TLTB.
- (x) consent for the transfer from Deshamma to the defendants was required before their settlement.
- (xi) under clause 26 (b), (d) and (e), the defendants were obligated to facilitate the alienation of the 1,000 square meters in question four (4) months from the date of settlement. This would entail:
 - (a) the defendants surrendering their lease to i-TLTB
 - (b) the defendants requesting i-TLTB

DESHAMMA’S POSITION

13. Deshamma’s position is set out in her affidavit supporting her joinder application. At paragraphs 4 to 21, she deposes as follows:

- 4. in 2018 I decided to sell the subject property and had my son post it online. I got several calls enquiring about the land one of which was Segran Murti the 2nd named Defendant in the within matter.
- 5. Segran called a number of times to enquire about the land. He spoke to my son who passed me the phone and I explained to him that I was selling the land for \$100,000.00 (One hundred thousand dollars). I also told him that I had lived on the land for more than 40 years with my sister-in-law Shanta who is the Plaintiff in this matter.
- 6. I then advised him that if I was to subdivide 1000m² where Shanta's house is then the price would remain as is. However, if he was willing to subdivide it at his cost then I would reduce the price to \$70,000.00.
- 7. over 6 months had passed when he called in 2019 just before I left for Canada. He said he wanted to buy the land for \$70,000.00 and he agreed to give Shanta the 1000m² for her house.

8. he then followed up again by phone and said he agreed to buy the land on condition of giving Shanta's 1000m². He asked why we hadn't made the Sales and Purchase Agreement and said I needed to do it quickly.
9. before I went to my lawyer, I discussed with Shanta how I would sell the land and told her that I would be separating the 1000m² for her.
10. my son and I then went to my lawyer Babu Singh to make the agreement. After instructing him he prepared the Agreement with the conditions and explained it clearly to me.
11. everything concerning the sale was handled by my lawyer while I was in Canada. The documents were sent to me for signing in Canada. I never met with Segrán and had only spoken to him on the phone. I have been advised that the Sales and Purchase Agreement states that he also had a lawyer.
12. the subject property initially belonged to our father-in-law and passed down to both our husbands who have since passed away.
13. when the lease expired, we both went to Native Land Trust Board and agreed that since I had the money to pay, I was to take the land and Shanta would stay with me. We had lived together for over 40 years since we married into the same family.
14. I was in Canada when my lawyer Babu Singh sent me the Deed. I then took the Deed with my son Sundressan Pillay to the lawyer in Canada for signing and the Deed was explained to me.
15. at all times it was understood between all of us including the Defendants that Shanta would receive the 1000m² and that the process would start within 4 months of settlement. This arrangement was a condition of my sale to the Defendants.
16. I even allowed Segrán to shift in before settlement and Shanta told me they were on good terms until his name was registered on the lease.
17. I came back to Fiji in 2022 and enquired with TLTB regarding Shanta's problems with the Defendant and they told me that as a sitting tenant no one can remove her from there.
18. TLTB even came to inspect the land and she was present and they confirmed the same.
19. I have now been informed by Shanta that Segrán is trying to evict her from the land and is not willing to uphold our Agreement to subdivide her 1000m².
20. if I am not added as a party to this dispute then the Defendants might avoid the issue of whether or not they were supposed to give the Plaintiff the 1000m² as agreed to as a condition of the Sale between us.
21. it hurts me to see the Plaintiff going through such hardship after 40 plus years of living together and if I had known that the first named Defendant would be like this, I would never have sold the land to him.

14. In paragraphs 5 to 7 of Deshamma's affidavit, she asserts that in her negotiations with Devi and Murti prior to the execution of the sale and purchase agreement and the subsequent transfer, she did make it clear to them that the sale was to be subject to Shanta being given 1,000 square meters and that Devi and Murti had agreed.
15. In paragraph 15, Deshamma deposes that her arrangement with Shanta was a condition of her sale to the defendants. She even deposes in paragraph 17 that the i-TLTB was aware in 2022 of Shanta's issues with Devi and Murti and that the i-TLTB had assured that Shanta was a "*sitting tenant*" and that "*no one can remove her from there*".

MORTGAGE

16. Apparently, there is a mortgage on the property. Neither the plaintiffs nor the defendants have sought to join the mortgagee as a party.
17. Section 62 (b) of Land Transfer Act [1971] provides:

Whenever any lease registered under the provisions of this Act is intended to be surrendered in whole or in part, and the surrender thereof is effected otherwise than by operation of law or under the provisions of any relating to bankruptcy, the parties may execute a form of surrender, or partial surrender, as the case may be, and upon such form being presented to the Registrar he or she shall enter a memorial of the surrender in the register, and thereupon the estate or interest of the lessee in such land shall vest in the lessor or in the person in whom, having regard to intervening circumstances, if any, the land would have vested if no such lease had been executed, provided that-

(a)

(b) no lease subject to any mortgage or sublease or other encumbrance shall be surrendered in whole or in part without the consent of the mortgagee, sublessee or encumbrance, as the case may be, of the lease or part thereof intended to be so surrendered, and the Registrar shall endorse on the original and duplicate instruments of such mortgage, sublease or encumbrance the fact of such surrender, and such consent shall operate as a discharge or cancellation of such mortgage, sublease or encumbrance as to the lease or part thereof surrendered, and the Registrar shall enter a memorial of such discharge or cancellation on the instruments of title affected.

THE i-TLTB's POSITION

18. The i-TLTB's position, which I surmise from Mr. Rasiga's submissions in Court, is as follows:
 - (i) clause 26 (b) of the agreement states:

This agreement is subject to consent to this agreement and transfer by i Taukei Lands Trust Board

- (ii) the i-TLTB consent was not sought for the sale and purchase agreement. However, i-TLTB consent was only sought for the transfer. This was well after the sale and purchase agreement was signed by the parties.
- (iii) since the i-TLTB had not granted consent to the agreement, it (i-TLTB) could not have consented to the purported arrangement in clause 26 (d).
- (iv) to bring effect to the clause 26 (d) arrangement, the onus is on the defendants to:
 - (a) surrender (or partial surrender) of the lease to i-TLTB, and
 - (b) then seek i-TLTB consent to carve 1,000 square meters out of the lease to Shanta.
- (v) carving out the 1,000 square meters would entail:
 - (a) applying for subdivision, and
 - (b) for the issuance of a lease over that area to Shanti, OR, for a transfer of the lease over that area to Shanti.
 - (c) for the issuance of a new lease over the balance to the defendants
- (vi) the costs involved in the process of carving out the 1,000 square meters would be made up as follows:
 - (a) surrender of lease (costs)
 - (b) applying for subdivision (costs for i-TLTB and Director of Town & country Planning, surveyor, legal)
 - (c) application for a new lease for Shanti OR transfer to Shanti.
 - (d) application for a new lease over the balance to the defendants.
- (vi) that consent is yet to be sought by the defendants.
- (vii) clause 26 (d) is, therefore, unenforceable as yet, because it is, as of today, yet to be consented to by the i-TLTB.

COMMENTS

- 19. I bear in mind that what is before me are two applications. The first is an application by the plaintiffs for specific performance under Order 86 of the High Court Rules 1988. The second is an application under Order 33 to determine whether or not the i -TLTB did in fact consent to clause 26 (d) and (e) and if not, whether or not these provisions are enforceable?
- 20. It is now common ground between the parties that the i-TLTB did not consent to the sale and purchase agreement between Deshamma and Devi/Murti. The i-TLTB only consented to the instrument of transfer which was sought shortly before settlement.
- 21. Does it follow then that clause 26 (d) is illegal and therefore unenforceable?
- 22. Section 12 of the i -Taukei Land Trust Act 1940 provides:

Except as may be otherwise provided by regulations made hereunder, it shall not be lawful for any lessee under this Act to alienate or deal with the land comprised in his or her lease or any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever without the consent of the Board as lessor or head lessor first had and obtained. The granting or withholding of consent shall be in the absolute discretion of the Board, and any sale, transfer, sublease or other unlawful alienation or dealing affected without such consent shall be null and void, provided that nothing in this section shall make it unlawful for the lessee of a residential or commercial lease granted before 29 September 1948 to mortgage such lease.

23. I agree with Mr. Rasiga's and Ms. Vuataki's submissions. The agreement is an agreement to deal. It is made "subject to i-TLTB consent" (see Clause 26 (b)). It is therefore, strictly, not a dealing in the land in terms of section 12.
24. Two questions then arise. The first is, does Shanta therefore have a valid interest or right under the agreement? If so, the second question then arises – at what point did that right or interest begin to vest in Shanti? In other words, when did it accrue or come into existence?
25. The condition precedent as stated in clause 26 (d) is that, four months from the date of settlement, Devi and Murti shall arrange with the i-TLTB for an Agreement for Lease over an area 1,000m² in favour of Shanta Kumari within four months from the date of settlement. This shall be done at Devi's and Murti's costs.
26. The condition under Clause 26 (e) is that, if Devi and Murti intend to sell the property after acquiring it, they shall subdivide it and carve out 1,000 square meters in favour of Shanta – at their own costs.
27. Shanta's rights under clause 26 (d) actually vested in her four months from the date of settlement. This is the situation in this case.
28. Shanta's alternative rights under clause 26 (e) would vest in her in the event that Devi and Murti should decide to sell the property. This is not the situation in this case.
29. The question I ask at this time is -what exactly is this interest which has now vested in Shanta?
 - Q: Is it a fully-fledged proprietary interest over the 1,000 square meters in question?
 - Q: Is it merely a right in personam arising from clause 26 (e) which entitles Shanta only to sue to compel Devi and Murti to seek the consent of i TLTB in the proposed carving out of the 1,000 square meters in question out of their lease in favour of Shanta?
 - Q: Is it, yet, an expectancy interest or an equitable interest over the property which is contingent upon the i-TLTB exercising its discretion to consent in favour of the arrangement?
30. Is Shanta's vested interest subject also to the consent of the mortgagee under section 62 (b) of the Land Transfer Act [1971]? Devi and Murti are contractually bound to initiate the process of effecting clause 26 (b).

CONCLUSION

31. The submissions of counsel and of the defendants have not addressed the issues raised above. In addition, because the mortgagee has not been added as a party, and not heard on the two applications, it would be most inappropriate for this court to try to answer any of the above questions.
32. Accordingly, the two applications are both dismissed.
33. The defendants are urged to file an application to join the mortgagee as a nominal defendant. The matter is to take its normal course. It is adjourned to the Master's Court for mention on 20 June 2025.



Anare Tuilevuka
JUDGE

17 June 2025