

IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)
AT LAUTOKA

Civil Jurisdiction
Action No. 344 of 1979

PLAINTIFF: LINGAPPA s/o Viran Plaintiff
AND : CHANGAINIA d/o Kondaiya Defendant

Mr. Krishna, Counsel for the Plaintiff
Mr. G.P. Shankar, Counsel for the Defendant

R U L I N G

The plaintiff's writ alleges an oral agreement with the defendant under which the latter agreed to sell the plaintiff a piece of land. It seems that the plaintiff filed a caveat with the Registrar of Titles under the Land Transfer Act 1971 forbidding the registration of any change of title to the said land.

Accompanying the writ is an affidavit sworn by the plaintiff in support of a summons for an order to extend caveat 172819 over certificate of title 12662 until the determination of the action.

The writ, summons and affidavit were filed on 29.11.79.

In his affidavit the plaintiff alleges that the defendant on 26/6/79 orally agreed to sell him the land in certificate of title 12662 for \$6000 and that he paid \$235.58 to the defendant by way of deposit. The affidavit alleges that the \$235.58 was used by the plaintiff to obtain the release of the title to the land from the Public Trustee. Filing of such an affidavit is necessary because under S. 106 L.T. Act the caveator must claim a beneficial interest in the land.

That appears to be the only evidence the plaintiff can tender in support of his application to extend the caveat.

In her affidavit the defendant admits discussing a sale of the land with the plaintiff but denies that there was any concluded agreement for its sale. She agrees receiving the \$235.58 from the plaintiff but alleges that it was not a part payment but a loan. She says that the plaintiff offered \$6000 but the defendant wanted \$8000.

The defendant relies upon S.59(d) of The Indemnity Guarantee and Bailment Act, Cap. 208, which reads as follows:-

"59. No action shall be brought:-

- (d) Upon any contract or sale of lands tenements or hereditaments or any interest in or concerning them; unless the memorandum upon which such action is to be brought or some memorandum or note thereof is in writing and signed by the party to be charged therewith ----."

Neither the writ nor the plaintiff's affidavit makes any reference to a written agreement, note or memorandum. In fact they both rely upon an oral agreement. It is well established that in the absence of writing a contract for the sale of land is not enforceable at law but equity allows an action to be brought, where there has been some substantial act of part performance of the contract, even though there is no sufficient written evidence to support it at law.

The general rule as to what amounts to such an act of part performance is that the parties must by reason of the act relied upon, be in a position unequivocally different from that in which, according to their legal rights they would have been if there were no contract (Roscoe's Evidence in Civil Actions 12th Edn. p.271). The learned author also says at p.272 that the act or acts of part performance must be referable to that agreement alone.

No act of part performance is alleged by the plaintiff in his affidavit other than his payment of the \$235.58 to the defendant. However, money may pass from one person to another for a variety of reasons which have no relation to any agreement for the sale of land. As pointed out by the learned author (supra) at p.272 that if an act done in performance of a contract admits of an explanation which does not suppose the existence of a contract it will not usually be regarded as an act of part performance and he quotes as an example the payment of alleged purchase money.

Clearly the plaintiff's payment of \$235.58 cannot in itself be regarded as an act of part performance in the alleged purchase of a piece of land. This is not a matter of whether one believes the plaintiff's allegation of an oral contract for the sale of land; he has to adduce proof of an act of performance under the contract which is referable only to that contract and which shows that the

The plaintiff has shifted his position as a result of the act of part performance. No such allegations appear in the affidavit and it is not part of my duty to suppose that at the hearing of the action the plaintiff may present evidence of some other act of part performance. If such evidence exists it should have been brought to my notice and should appear in the affidavit.

One cannot allow a caveat to remain on the register and hinder the owner's dealings with his own land if the caveator cannot point to any interest which can be proved in court.

The plaintiff's application to extend his caveat is dismissed.

The plaintiff will pay the defendant's costs hereof.

MUTOKA,
30/1/80

(Sgd.) J.T. Williams
JUDGE.