

IN THE HIGH COURT OF FIJI AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBC 88 of 2015

BETWEEN

KRISHNA NAIR of 310 Larkspur Dr. E Palo Alto
CA 94303, USA, Retired Chef

PLAINTIFF

AND

MADHU SUDHAN of Nasaun Nadi, Farmer

DEFENDANT

Counsel : Ms. Radhia for the Plaintiff
Ms. Prasad P. for the Defendant

Date of Hearing : 22nd August 2022

Date of Ruling : 30th September 2022

RULING

(On Preliminary Issues)

[1] The plaintiff instituted these proceedings against the defendant seeking the following orders:

- i) Specific performance of the sale and purchase agreement entered in to between the plaintiff and the defendant on 22nd June, 2011.
- ii) Damages for breach of contract in lieu of or in addition to specific performance.
- iii) Alternatively judgment in the sum of \$52,430.80 together with accrued interest at the rate of 13.5% per annum until final determination of this action.
- iv) Interest on the judgment sum at the rate of 5% per annum from the date of the issuance of writ of summons until full payment.
- v) Alternatively the defendant be ordered to complete the transaction and apply for new certificate of title of the said lot of two acres comprised in CT 20162.
- vi) Costs of this action on solicitor client indemnity basis.
- vii) Such further and/or other reliefs as this Honourable Court may deem just and expedient.

[2] The defendant filed summons, which was subsequently amended, pursuant to Order 33 rule 3 of the High Court Rules 1988 seeking to have the following preliminary issues determined before the trial:

- a. Is the sale and purchase agreement legally binding?
- b. Is the plaintiff entitled to make a claim under specific performance?
- c. Can the plaintiff make a claim on the money deposited?

[3] At the pre-trial conference parties admitted the following facts:

1. The plaintiff is a Retired Chef and resides in USA.
2. The defendant is the owner of CT No. 20162 known as Nasau (part of Lot 3 on DP 4968 on the Island of Viti Levu in the District of Nadi containing more or less and area of 15 acres 1 rood 30 perches.

3. By an agreement in writing dated 22nd June, 2011, the defendant agreed to sell two (2) acres of land out of the CT No. 20162 at a price of FJD\$60,000.00 (Sixty Thousand Dollars) to the plaintiff.
4. The plaintiff paid a total sum \$52,430.80 (Fifty Two thousand Four Hundred Thirty Dollars and Eighty Cents) to the defendant instalment of which acknowledge of receipt has been signed by the defendant and leaving a balance the sum of \$7,569.20 (Seven Thousand Five hundred Sixty Nine Dollars and Twenty Cents) to be paid upon completion of title.

[4] The property which is the subject matter of the sale and purchase agreement in question is a portion of the land being part of Certificate of Title No. 20162 Lot 3 DP 4968 and containing an area of 15 acres 1 rood 30 perches and situated at Nasau, Nadi.

[5] It is a fact admitted by the parties that the plaintiff is not citizen of Fiji and he is a resident of the United States of America.

[6] Section 4 of the Subdivision of Lands Act 1937 provides:

Notwithstanding the provisions of any other law for the time being in force no land to which this Act applies shall be subdivided without the prior approval of the Director to be obtained in the manner hereinafter prescribed:

Provided that it shall be lawful to subdivide such land without such approval

(a) no part of the land is situated in any town or within three miles of the boundaries of a town; and

(b) and is subdivided in such a manner that no lot is less than five acres in area.

("Director" means the Director of Town and Country Planning for the time being appointed under the provisions of section 3 of the Town Planning Act.)

[7] In this matter it is not disputed that before entering into the sale and purchase agreement prior approval of the Director of Town and Country Planning was not obtained.

[8] Section 6(1) of the Land Sales Act 1974 provides:

No non-resident or any person acting as his agent shall without the prior consent in writing of the Minister responsible for land matters make any contract to purchase or to take on lease any land:

Provided that nothing contained in this subsection shall operate to require such consent or prevent a non-resident from making any such contract if the land together with any other land in Fiji of such non-resident does not exceed in the aggregate an area of one acre.

[9] In **Gonzalez v Akhtar** [2004] FJSC 2; CBV00011.2002S (21 May 2004) the Supreme Court Held:

In our opinion, the words of the subsection are clear and unambiguous. No non-resident shall, without the prior consent in writing by the Minister, make any contract to purchase land. Those words mean precisely what they say.

If making or performing a particular contract is expressly prohibited by statute, the contract is illegal unless the statute itself indicates that a prohibited contract shall nevertheless be enforceable. In the absence of any such indication, a contract the formation or performance of which is expressly prohibited by statute is illegal.

[10] It is absolutely clear from the above that the sale and purchase agreement entered into between the plaintiff and the defendant is illegal and unenforceable in law. Therefore, the plaintiff does not have the right to make a claim for specific performance.

[11] The next question is whether the plaintiff entitled to claim the money deposited. The learned counsel for the defendant submits that equity and law of fairness demands that the defendant be compensated for his loss and the sale and purchase agreement clause 2.1 required a deposit of \$20,000.00. The learned counsel submits further that the plaintiff breached the contract since he failed to obtain consent and therefore, plaintiff should forfeit \$20,000.00.

[12] Since the sale and purchase agreement is void *ab initio* none of the parties can rely on any of the clauses of the agreement.

- [13] The learned counsel cited the judgement in **One Stop Warehouse (Fiji) Ltd v Mataqali CU Development Deed of Trust** [2020] FJHC 17; HBC 119 of 2017 (30 January 2020). In the said decision Stuart J. cite the following paragraph from **Soper v Arnold** (1889) 14 App Cas 429, 435;

Everybody knows what a deposit is. ... The deposit serves two purposes – if the purchase is carried out it goes against the purchase money – but its primary purpose is this, it is a guarantee that the purchaser means business; and if there is a case in which a deposit is rightly and properly forfeited it is, I think, when a man enters into a contract to buy real property without taking the trouble to consider whether he can pay for it or not.


- [14] The facts of **One Stop Warehouse (Fiji) Ltd v Mataqali CU Development Deed of Trust** (*supra*) are different from the matter before this court. In that case there was a valid agreement between the parties whereas in this matter, as I have stated above there had been no legally enforceable agreement between the parties. Hence, the decision in **One Stop Warehouse (Fiji) Ltd v Mataqali CU Development Deed of Trust** (*supra*) cannot have any bearing on the matter presently before this court.
- [15] For the above reasons the court is of the view that the defendant is entitled to make a claim on the money deposited by the plaintiff.

Answers to the Preliminary Issues

1. The sale and purchase agreement is not legally binding.
2. The plaintiff is not entitled to make a claim under specific performance.
3. The plaintiff can make a claim on the money deposited.



30th September 2022


Lyone Seneviratne

JUDGE