

[3] My understanding of this matter is as follows:

- (a) That the Plaintiff and Defendant are biological brother and sister respectively;
- (b) That the Plaintiff alleges that on or about 12 April 2001, the Defendant acquired a property (Certificate of Title No.33518 being Lot 2 on Deposited Plan No.8410 in Suva) from the parties' biological father, **LALLU GOPI CHAND**;
- (c) That the Plaintiff further alleges that the said property was transferred from their said father to the Defendant in consideration of \$10.00 and natural love and affection AND by misinforming their said father that the Plaintiff had informed the Defendant of his decision to waive his entitlement to the said property which included a signed letter to that effect allegedly signed by the Plaintiff;
- (d) That the Plaintiff only became recently aware of this transfer from 2001 and on or about 23 January 2009 lodged a formal complaint at the Lami Police Station for alleged forgery on the transfer document;
- (e) That the Plaintiff also only became recently aware that the Defendant has obtained a visa to travel and settle in New Zealand.

[4] My concerns with this Application as I explained to Counsel for the Plaintiff were as follows:

- (a) That there was no mention in the Statement of Claim as to the substantive action, that is, apart from seeking orders restraining the Defendant from departing Fiji for New Zealand, there was no final order or orders sought in relation to the disputed property, indeed the Statement of Claim seemed to be a "rehash" of the orders sought in the Ex-parte Notice of Motion;
- (b) That if the crux of the Plaintiff's Ex-parte Notice of Motion was to ensure that the disputed house and land was not sold pending final hearing of the Plaintiff's claim as to his entitlement to that said property, then surely he needed to seek orders in relation to the non-disposal of the said property rather than by some draconian measure seeking to restrain the other party from leaving the jurisdiction;
- (c) That there was no material before the Court as to how and why this matter suddenly came to the Plaintiff's attention and what action the Police have taken, if any, in relation to the Plaintiff's lodgement of his complaint with them;
- (d) That despite the plaintiff stating in paragraph 9 of his Affidavit "*I give the usual undertaking as to damages and hence able to meet an award of damages*", there was no

supporting material before the Court (annexed to his Affidavit) as to the Plaintiff's capacity to meet any award of damages.

[5] I then took Counsel to the law noting as follows:

(a) That Section 34 of the *Constitution* in relation to the Freedom of Movement states at 34(3) –

“Every citizen, and every other person lawfully in Fiji, has the right to move freely throughout Fiji and the right to leave Fiji”;

(b) That the test as laid out in ***American Cyanamid Co v Ethicon Ltd*** [1975] AC 396 for the granting of an Interlocutory Injunction -

- (i) Whether there is a serious issue to be tried that must be established by the Plaintiff;
- (ii) Whether damages would be inadequate to compensate the Plaintiff;
- (iii) Whether the balance of convenience favours the Court exercising its discretion in favour of the Plaintiff.

[6] My understanding of Counsel's response/position was as follows:

(a) That the *Constitution* can be read subject to certain restrictions – she did not, however, provide further details;

(b) That this is a matter involving an allegation of fraud and thus there is a serious issue to be tried;

(b) That damages would not be an adequate compensation – she did not, however, provide further details (other than the property would be dispersed), nor was there, as noted above, any supporting material before the Court as to the Plaintiff's capacity to meet any award of damages.

(c) That in terms of the balance of convenience, the argument of Counsel for the plaintiff was that once the Defendant was out of the jurisdiction it would be much harder for the Plaintiff to pursue his claim. This was a submission which I questioned as surely it would be upon the Defendant to have to either return or obtain legal representation to defend the Plaintiff's claim?

[7] Upon reviewing the above, I advised Counsel for the Plaintiff that I was refusing her Ex-parte Notice of Motion for the following reasons:

1. That the substantive claim for which the Plaintiff seeks final orders (that is, transfer of the said property to him) is not set out as such in the Statement of Claim in its present form;
2. That I have noted Section 34 of the *Constitution* and no adequate reasons have been provided as to why that provision should not be upheld; and
3. That the Plaintiff has failed to satisfy the test as laid out in *American Cyanamid Co* (supra) for the granting of an Interlocutory Injunction, in particular, (ii) whether damages would be inadequate to compensate the Plaintiff and (iii) whether the balance of convenience favours the Court exercising its discretion in favour of the Plaintiff. Indeed, the balance of convenience appears to lie with the Defendant such that the proper course would be for the Court to not make the orders sought in the ex-parte Notice of Motion. It will then be upon the Plaintiff to file an Amended Statement of Claim clarifying the substantive claim as well as any further interlocutory application seeking to protect sale of the property and/or disposal of proceeds from any sale.

[9] **The Court makes the following Orders:**

- (a) **That the Orders sought in the Ex-Parte Notice of Motion filed and heard on 30 January 2008 be refused;**
- (b) **That the cost of this Notice of Motion be paid by the Plaintiff.**

Thomas V Hickie

Judge

Solicitor:

M.A. Khan Esq, Barristers & Solicitors for the Plaintiff