

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 253 of 2011

BETWEEN : **MATELITA ROKOVI** of Waila Subdivision, Nausori, Domestic Duties.

PLAINTIFF

AND : **RONESH KUMAR** (f/n Rabendra Kumar) of Lot 233, Tuirara Subdivision, Tovata, Laqere, Nasinu.

DEFENDANT

BEFORE : **Master Deepthi Amaratunga**

COUNSEL : **Qoro Legal** for the Plaintiff
Nawaikula Esquire for the Defendant

Date of Hearing : **30th November, 2011**

Date of Ruling : **7th February, 2012**

DECISION

A. INTRODUCTION

1. The main issue is whether the Defendant's allegation of fraud and or collusion of the Plaintiff as regard to the transfer of the property to her in 1998. The property was subject to a mortgage and also the Defendant's father when obtaining the divorce has been ordered by the court to allow the wife and the children to remain possession in the property for life and was ordered to pay the monthly payments for the loan. The property was transferred to the Plaintiff in 1998 and has settled the outstanding loan and has obtained a fresh mortgage under her name and continued payments for over 13 years. If the

Plaintiff colluded to obtain the property fraudulently, then there is no need to wait for such a long period to obtain the possession and could have evicted the Defendant earlier. There is no evidence of any pending action for cancellation and or for declaration of any fraud on the part of the Plaintiff. Under the Torrens system a mere allegation of fraud is not sufficient. Any breach of conditions in the divorce cannot by itself nullify a transfer that is registered. There was no caveat lodged and no notice of any impediment over the transfer of the property. The Defendant's allegation of fraud is unsubstantiated and based on conjecture.

B. FACTS

2. The Plaintiff is the last registered proprietor of the property. The Plaintiff has obtained the transfer of the property in 1998. The property is a native lease and the initial lease was granted to one Rabendra Kumar and he has granted a power of attorney to his brother Praveen Kumar and the property was transferred to the Plaintiff upon the said power of attorney by the said Praveen Kumar in 1998. When the property was transferred to the Plaintiff it was already subject to a mortgage to Housing Authority and the Plaintiff has also mortgaged it to the Housing Authority and continued its payments without a default. The Defendant is the son of previous proprietor Rabendra Kumar who obtained a divorce in 1991 and one of the conditions of the said divorce was to allow the estranged wife and the children to continue the occupation of the Matrimonial home, which is the subject matter in this action, for the life time of them. The Defendant states that since he is a child of the said Rabendra Kumar, he has a right to be in possession of the property despite the transfer in violation of the condition of the divorce between his parents and also alleges fraud in regard to the transfer by the power of attorney holder on behalf of the said Rabendrakumar and collusion.
3. Neither party filed written submissions or made any legal submissions on to the law relating to the issues before the court, though time was granted to do so.

C. THE ISSUES BEFORE THE COURT.

Preliminary issue

4. In the affidavit in opposition the Defendant state that he was served with the summons on 15th September, 2010 and he had just arrived in to Fiji on that morning and attended court on 21st September, 2010 and the time period allowed is in contravention of the Section 170 of Land Transfer Act and because of the failure to serve the summons as stipulated in the Act, the matter should be struck off.
5. This preliminary issue was not raised on that day of the summons, but it is raised in the affidavit in opposition as a preliminary issue.
6. Section 170 of the Land Transfer Act states as follows

170. The summons shall contain a description of the land *and* shall require the person summoned to appear at the court on a day **not earlier than sixteen** days after the service of the summons. (emphasis added)
7. In the interperetation of Seciton 170 one must not interpret it in isolation without referring to Seciton 171 of the Land Transfer Act

171. On the day appointed for the hearing of the summons, if the person summoned does not appear, then upon proof to the satisfaction of the judge of the due service of such summons and upon proof of the title by the proprietor or lessor and, if any consent is necessary, by the production and proof of such consent, the judge may order immediate possession to be given to the plaintiff, which order shall have

the effect of and may be enforced as a judgment in ejectment.
(emphasis added)

8. There is no requirement for the court to grant more time to file an affidavit in opposition, but the matter should be heard on the date of the summons and the requirement of at least 16 days to appear in court is understandable as on that day the summons are to be heard and the time is granted for that purpose.
9. When the matter was called on the first day the Defendant sought 21 days to file and serve an affidavit in opposition and this was granted and the hearing was fixed for 30th November, 2011. So, the Defendant had ample time to file an affidavit in opposition. Any shortfall on the service of summons was adequately compensated as the Defendant was granted 21 days from the date that appeared on the summons and no prejudice is caused by the non compliance with the requirement of at least 16 days as stipulated in the Section 170 of the Land Transfer Act.
10. Without prejudice to the above, in the Order 2 rule 2 it is stated as follows
 - ‘2(1) An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.
 - (2) An application under this rule may be made by summons or motion and the grounds of objection must be stated in the summons or notice of motion.’

11. The Defendant has not only appeared on the date stated in the summons without making the objection for the failure to serve summons at least 16 days prior to the date stated in the summons but also has sought 21 days from the date of summons and has also filled an affidavit in opposition clearly indicating that the Defendant has taken fresh steps after he become aware of the irrregularity. The procedure stipulate in the High Court Rules of 1988 has also not been followed to make any application to set aside for irregularity as stipulated in Order 2 rule 2(2), as it is raised in the affidavit, without summons.
12. For the above mentioned reasons, the preliminary objection is overruled and I would proceed to the determination of the merits.
13. The issues on the merits are as follows.
 - a. Has the Plaintiff established the title to the *property* and if so;
 - b. Has the Defendant established a right to possession upon the condition contained in the divorce of his father.
 - c. Can the transaction of the property be considered as a fraudulent transaction to deprive the indefeasibility of the title as contained in Section 38 of the Land Transfer Act.
14. The Plaintiff has filled the certificate of the title and from the memorials on the title it is evident that the last registered proprietor is the Plaintiff. There is no evidence in contrary to it. There was no caveat lodged on the property and there is none even now and despite the court order the property was transferable subject to the mortgagee's right and that condition of the property is prevalent even now.

15. The Defendant state that he has a right to possession of the property, since he alleges fraud and collusion between the Plaintiff and the brother of his father who obtained the power of attorney for his father to transfer the property.

16. Section 38 of the Land Transfer Act, provides that the registered instrument to be conclusive evidence of title, subject to fraud. The registration is conclusive and it overrides any other right. The right the Defendant and his mother had over the property was based on the condition of the divorce decree and since neither the Defendant nor his mother registered a caveat on the property, there was no notice of the condition imposed on the property by the court. The said condition was imposed on the Defendant's father and since there was no caveat filled there was no notice of the said condition and the parties have not taken steps to notify the future dealings on the property of the condition imposed to the registered proprietor of the property at that time. So, no right to possession derived from the condition of the divorce decree over the present registered owner unless on the fraud. Section 38 of the Land Transfer Act is conclusive on this issue

“No instrument of title registered under the provisions of this Act shall be impeached or defeasible by reason of or on account of any informality or in any application or document or in any proceedings previous to the registration of the instrument of title”.

17. In Prasad v Mohammed [2005] FJHC 124; HBC0272J.1999L (3 June 2005) Justice Gates(as he was then) dealt the issue of fraud in an application for eviction in terms of Section 169 of the Land Transfer Act and I cannot do better in succinctly defining the exception of 'Fraud' in relation to Land Transfer Act and quote it in full below.

“Fraud

[13] **In Fiji under the Torrens system of land registration, the register is everything:** Subaramani & Ano v Dharam

Sheela & 3 Others [1982] 28 Fiji LR 82. Except in the case of fraud the title to land is that as registered with the Registrar of Titles under the Land Transfer Act [see sections 39, 40, 41, and 42]: Fels v Knowles (1906) 26 NZLR 604; Assets Co Ltd v Mere Roihi [1905] AC 176, PC. In Frazer v Walker [1967] AC 569 at p.580 Lord Wilberforce delivering the judgment of the Board said:

"It is to be noticed that each of these sections excepts the case of fraud, section 62 employing the words "except in case of fraud." And section 63 using the words "as against the person registered as proprietor of that land through fraud." The uncertain ambit of these expressions has been limited by judicial decision to **actual fraud by the registered proprietor or his agent**: Assets Co Ltd v Mere Roihi.

It is these sections which, together with those next referred to, confer upon the registered proprietor what has come to be called "indefeasibility of title. **“The expression, not used in the Act itself, is a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys. This conception is central in the system of registration.”**

[14] Actual fraud or moral turpitude must therefore be shown on the part of the plaintiff as registered proprietor or of his agents Wicks v. Bennett [1921]30 CLR 80; Butler v Fairclough [1917] HCA 9; [1917] 23 CLR 78 at p.97.

[15] Fraud for the purposes of the Transfer Act has been defined by the Privy Council in Assets Company Ltd v Mere Roihi [1905] AC 176 at p.210 where it was said:

"...by fraud in these Acts is meant actual fraud, i.e. dishonesty of some sort, not what is called constructive or equitable fraud – an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud. Further, it appears to their Lordships that the fraud which must be proved in order to invalidate the title of a registered purchaser for value, whether he buys from a prior registered owner or from a person claiming under a title certified under the Native Land Acts, must be brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out fraud if he had been more vigilant, and had made further inquiries which he omitted to make, does not of itself prove fraud on his part. But if it be shown that his suspicions were aroused, and that he abstained from making inquiries for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him. A person who presents for registration a document which is forged or has been fraudulently or improperly obtained is not guilty of fraud if he honestly believes it to be a genuine document which can be properly acted upon."

Fraud: Sufficiency of evidence

[16] In Sigatoka Builders Ltd v Pushpa Ram &Ano. (unreported) Lautoka High Court Civil Action No. HBC182.01L, 22 April 2002 I had occasion to say:

"Though evidence of fraud and collusion is often difficult to obtain, the evidence here falls a good way short of a standard

requiring the court's further investigation. In Darshan Singh v Puran Singh [1987] 33 Fiji LR 63 at p.67 it was said:

"There must, in our view, be some evidence in support of the allegation indicating the need for fuller investigation which would make section 169 procedure unsatisfactory. In the present case the appellant merely asserted that he had paid the money for the purchase of the property. This was denied by both PrasinKuar and the respondent. There was nothing whatsoever before the learned judge to suggest the existence of any evidence, documentary or oral, that might possibly assist the appellant in treating the case as falling within the scope of section 169 of the Land Transfer Act and making an order for possession in favour of the respondent."

In that case it was also held that a **bare allegation of fraud did not amount by itself to a complicated question of fact, making the summary procedure of section 169 inappropriate** see too Ram Devi v Satya Nand Sharma & Anor. [1985] 31 Fiji LR 130 at p.135A. **A threshold of evidence must be reached by the Defendant before the Plaintiff can be denied his summary remedy.** In Wallingford v Mutual Society [1880] 5 AC 685 at p.697 Lord Selbourne LC said:

"With regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice. And here I find nothing but perfectly general and vague allegations of fraud. No single material fact is condescended upon, in a manner which would enable any Court to understand what it was that was alleged to be fraudulent."

18. The Defendant's father when obtaining the decree nisi for the divorce was further ordered to fulfill certain conditions contained in the said order of the court, why he did not adhere to one or more of the said conditions is a matter that should be left to the court and to the said person to explain if called for, in an appropriate proceedings and cannot by itself impute fraud. There is no evidence that said Praveen Kumar, who was an uncle of the Defendant has acted to the contrary to the instructions he received from Rabendra Kumar.
19. The Defendant in paragraph 7 of the affidavit in opposition admitted the Plaintiff's name in the title to the property, but state that the Plaintiff had acquired the same by collusion with Praveen Kumar and their actions amount to fraudulent acquisition of the property and both were unjustly enriched by it.
20. Further, the Defendant state that the Plaintiff's name should be removed from the title of the property, but obviously that is outside the scope of this action and so for not only has the Defendant failed to seek such a relief from court but also has failed to proceed with such an action and I do not have any evidence of such an attempt and the said allegation is only confined to this action and cannot be taken seriously considering the previous behaviour. There is no evidence of any pending action for cancellation of the title to the Plaintiff. The said allegation of cancellation of title is only confined to the affidavit in opposition and the reason for such a contention is self explanatory considering the indefeasibility of the title under the Torrens syem of law.
21. The Defendant alleges that Plaintiff has colluded with the Plaintiff to deprive the property to him. If that was the intention the Plaintiff could have easily evicted the Defendant in 1998 and would not have waited all this time till 2011 for more than 13 years to obtain the vacant possession, as she has also obtained a

mortgage to purchase the property and has continued to pay the mortgage without any default after settling the mortgage of the previous proprietor.

22. The Defendant states that his father was unhappy about the transfer of the title, but there is no affidavit evidence or documentary proof of such dissatisfaction. If he did not intend to transfer the title in contravention of the condition imposed in the divorce decree he could have easily lodged a caveat on the property to safeguard it and also could have filled an action based on fraud. There is no evidence of Defendant's father paying mortgage payments even till 1998 after he obtained the divorce in 1991. Not only the said payments but also no electricity and water charges have been paid as ordered by the court and I have no evidence before me of any compliance with the other conditions stated in the decree nisi entered in 1991.

23. There is no affidavit of said Rabendra Kumar, to substantiate fraud or collusion as alleged by the Defendant. The Defendant stated that his father, Rabendra Kumar was not happy with the transfer of property to the Plaintiff upon the power of attorney granted to Praveen Kumar, but the Defendant could have easily obtained an affidavit if that was so, from his father to that effect. It again is nothing but a mere allegation unsubstantiated by evidence in the analysis of the evidence before me.

24. The Defendant also alleges that the Plaintiff is now married to the said Praveen Kumar, who was the power of attorney holder of the father of the Defendant. According to him the said Praveen Kumar is the younger brother of his father and has colluded to obtain the property fraudulently. If that was the intention he and the Plaintiff could have evicted the Defendant in 1998 without waiting for 13 long years, till the Defendant got married and also obtained employment. No person who acts in collusion in a fraudulent manner would wait such a long time, and one should also be mindful that at that time the Defendant would have been much younger and perhaps would have been evicted without much

resistance! So, in the analysis of the evidence the fact of Plaintiff and Praveen Kumar getting married cannot by itself impute any collusion or fraud and the Defendants allegations are based on mere conjecture without any acceptable evidence to show collusion and or fraud to deprive the Plaintiff the fruits of her rights derived as the last registered proprietor.

D. CONCLUSION

25. The Plaintiff has established the title to the property. The Defendant also accepts it, but alleges that the name in the certificate of title should be removed. This is not possible on mere allegation as the name in the title in **'Fiji under the Torrens system of land registration, the register is everything: Subaramani & Ano v Dharam Sheela & 3 Others** [1982] 28 Fiji LR 82. Except in the case of fraud the title to land is that as registered with the Registrar of Titles under the Land Transfer Act [see sections 39, 40, 41, and 42]: Fels v Knowles (1906) 26 NZLR 604; Assets Co Ltd v Mere Roihi [1905] AC 176, PC. In Frazer v Walker [1967] AC 569 'as stated in the judgement of his lordship the Chief Justice Gates (now Chief Justice) in Prasad v Mohammed [2005] FJHC 124; HBC0272J.1999L (3 June 2005). Neither Defendant nor his mother lodged any caveat over the property, and in such circumstances the property could be transferred to any person, inspite of the conditions contained in the decree nisi of the divorce. If a condition is violated the issue is not to cancel the transaction, and in any event there is no evidence of any action filled seeking to nullify the transfer. It should be noted that mere fact of instituting an action, is not sufficient to prevent the possession of the property in terms of the Section 169 of the Land Transfer Act. This is a trite law and I need not labour more on this, as the Defendant has not sought such an order from court based on fraud. In the circumstances, the Plaintiff's title is indefeasible and in the analysis of the evidence it is clear that the alleged collusion and fraud are unsubstantiated and can be considered as mere conjecture. In the absence of caveat on the property it is clear that the objections are only confined to this application and cannot be considered as serious objections. A violation of a condition in divorce

by itself would not nullify the indefeasibility of the title, if any condition is violated that has to be dealt separately. A reasonable person who seeks cancellation of the title on fraud would not act in the way the Defendant is acting. The Plaintiff is granted possession, but considering the circumstances of the case I would grant the Defendant six months from today (7th February, 2012) to vacate the premises and to find a suitable premises for occupation. The affidavit in opposition state that Defendant was abroad and the affidavit of service of the summons was served to the wife of the Defendant. The Defendant is also employed for considerable time, as stated in the affidavit in opposition and he has not alleged any improvements to the property or paid any money though he has lived in the property for a considerable time after getting an employment and also getting married. Considering the circumstance in the case I have grnted 6 months for the Defendant to vacate the premises. I will not order any cost considering the circustances of this case.

E. FINAL ORDERS

- a. The Plaintiff is granted possession of the property, stayed for 6 months from today.
- b. The Defendant is ordered to vacate the premises on or before 6th August, 2012 and the premises should be handed over to the Plaintiff in the same condition as it is now.
- c. No cost

Dated at **Suva** this **7th day** of **February, 2012**.

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Mr. Deepthi Amaratunga
Master of the High Court
Suva