

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. 328 of 2012

BETWEEN : **FARZANA BI HUSSEIN** of Davuilevu Housing, Nausori, Domestic Duties.

PLAINTIFF

AND : **SHEIK ASRAF ALI** of Siberia, Labasa, Farmer as the Sole Executor and Trustee of the Estate of Hassan Raja aka Hasanraja deceased.

DEFENDANT

COUNSELS : **Ms M. Vasiti** for the Plaintiff
Mr J. Reddy for the Defendant

DATE OF HEARING : **9th May 2013**

DATE OF RULING : **7th June, 2013**

RULING

1.0 INTRODUCTION

1.1 On 13 December 2012 Plaintiff filed an Inter-Parte Originating Summons seeking following Orders:-

- (i) *Time for removing Caveat No. 764834 lodged by the Plaintiff against Methodist Church Lease No. 356592 be extended until further order of this Honourable Court;*

(ii) *Such further and other relief as this Honourable Court may deem just and expedient.*

1.2 Parties have filed the following Affidavits in respect to the said Application:-

(i) *Plaintiff's Affidavits in support sworn and filed on 13 December 2012;*

(ii) *Defendants Affidavit in Opposition sworn on 3 January 2013 and filed on 13 February 2013;*

(iii) *Defendant's Supplementary Affidavit sworn on 13 March 2013 and filed on 21 March 2013;*

(iv) *Plaintiff's Affidavit in Reply to Supplementary Affidavit filed on 2 April 2013.*

1.3 Defendant's counsel submitted written submission in addition to oral submission whereas Plaintiff's counsel only made oral submission and was given leave to file written submission within 7 days from date of hearing. Plaintiff failed to file written submission.

1.4 Caveat has been extended until this Ruling.

2.0 PRELIMINARY ISSUES

2.1 Before I deal with the Application, I wish to highlight certain defects in the Affidavits filed by the parties:

2.2 Plaintiff's Affidavit in Reply referred to in paragraph 1.2 (iv) hereof does not bear date on which it was sworn. The registry also should be more vigilant when issuing documents to ensure that documents filed are properly dated and pages are numbered although the responsibility lies with the Solicitors.

2.3 Order 41 Rule 9(2) provides as follows:

“Every Affidavit must be endorsed with a note showing on whose behalf it is filed and the date of swearing and file and an Affidavit which is not so indorsed may not be filed or used without the leave of the Court.”

2.4 In the matter of *Kim Industries Ltd.* (Unreported) Lautoka High Court Winding-Up Action No. HBF0036 of 1999L, his Lordship Justice Gates (as then he was) stated as follows:

“If any Affidavit bears an irregularity in its form such as the Omission of the indorsement note, leave must be obtained from the Court for it to be filed or used...” (page 3)

2.5 In *Jokapeci Koroi & Ors. v Commissioner of Inland Revenue & Anor.* (unreported) Lautoka High Court Action No. HBC179/2001L (24 August 2001) his Lordship Justice Gates (as then he was) removed two (2) Affidavits filed on behalf of the Defendants from the Court for failure to comply with the Order 41 r9(2) and ordered the Defendants file the said Affidavits with indorsement in compliance with Order 41 Rule 9(2) within 14 days. His Lordship at page 4 of the Judgement stated as follows:

“These mistakes are of little consequence to the actual litigation but since the setting of the format of an Affidavit, vehicle for the presentation of sufficient evidence to the Court, is a relatively simple exercise, these errors should no longer persist.”

2.6 Except for Plaintiff’s Affidavit in Support in paragraph 1.2(i) hereof which bears an **incomplete** indorsement, no other Affidavits filed complied with Order 41 Rule 9(2).

2.7 Also no leave has been sought by Counsels to use the Affidavits in these proceedings.

2.8 In order to avoid unnecessary delay and the fact that both parties had not complied, leave is granted for parties to rely on the Affidavits filed. However the litigants and their counsels should take note of the fact that failure to comply with Order 41 Rule 9(2) and failure to obtain Court’s leave to utilise these Affidavits could result in the Affidavits being removed from the court file which of course will be fatal to their client’s case.

3.0 **APPLICATION TO EXTEND CAVEAT**

3.1 Section 106 of the Land Transfer Act Cap 131 provides:

“Any person –

(a) claiming to be entitled or to be beneficially interested in any land subject to the provisions of this Act, or any estate or interest therein by virtue of any unregistered agreement or other instrument or transmission, or of any trust expressed or implied, or otherwise howsoever; or

(b) transferring any land subject to the provisions of this Act, or any estate or interest therein, to any other person to be held in trust,

may at any time lodge with the Registrar a caveat in the prescribed form, forbidding the registration of any person as transferee or proprietor of and of any instrument affecting, such estate or interest

either absolutely or unless such instrument be expressed to be subject to the claim of the caveator as may be required in such caveat.”

3.2 In *Cambridge Credit (Fiji) Limited v W.F.G Limited* 21 FLR 182 Fiji Court of Appeal at page 184 sets out the requirements to be satisfied by a caveator to come within the provisions of Section 106 of Land Transfer Act Cap 131 as follows:

“(1) That it is a person claiming to be entitled to or to be beneficially interested in any land estate or interest under the Act; and

(2) That is it so claiming by virtue of any unregistered agreement or other instrument or transmission or any trust expressed or implied or otherwise howsoever.”

3.3 Court of Appeal in *Cambridge’s* case also adopted with approval following comments of his Lordship Stout C.J. in *Staples & Co. v Corby and District Land Registrar* [1990] 19 N.Z.L.R. 517 whilst dealing with provision in Land Transfer Act (NZ) similar to s106.

“Before a person can caveat under this section he must be a person who claims to be entitled to the land, or any estate or interest in the land, or to be ‘beneficially interested’ in the land, or in any estate or interest in the land , and the person in either even must claim ‘by virtue of any unregistered agreement, or other ‘instrument or transmission’ (‘transmission’ meaning acquirement by title or estate consequent on death, will, intestacy, bankruptcy, &c.), ‘or of any trust expressed or implied, ‘or otherwise howsoever.”

3.4 Both counsels relied on *Cambridge’s* case in their written and oral submissions.

3.5 It is therefore imperative for the Plaintiff to show that she has had some form of interest either legal or beneficial in the property subject to Methodist Church Lease No. 356592.

3.6 The Plaintiff in her Affidavit in support referred to in paragraph 1.2(i) hereof deposes that:-

- (i) *She is the daughter of Amina Bi;*
- (ii) *Amina Bibi was married to Hassan Raja aka Hasanraja;*
- (iii) *Plaintiff is the daughter of Amina Bi from her first marriage;*
- (iv) *Hassan Raja and Amina Bibi had three other siblings from their marriage;*
- (v) *Hassan Raja had two other children from his earlier marriage;*
- (vi) *Hassan Raja died on 8 November 2011;*
- (vii) *On 20 December 2011, almost six weeks after Hassan Raja’s death Amina Bi also died;*

- (viii) *Hassan Raja at the time of his death owned the property comprised in Methodist Church Lease No. 356592 (hereafter referred to as the subject property);*
- (ix) *Plaintiff has been residing on the subject property from the time it was bought until 30 January 2012 (15 days after her mother's funeral) when she was served with Domestic Violence Restraining Order;*
- (x) *Plaintiff attempted to apply for Letters of Administration in respect to Estate of Hassan Raja but was advised to obtain Letter of Administration in respect to her mother's estate first;*
- (xi) *Subsequently she became aware that according to last Will and Testament of Hassan Raja purportedly made on October 2011 he, the deceased appointed her mother and the Defendant as Executors and Trustees of his Estate and bequeathed his property to said Amina Bi for her lifetime and upon her death to the Defendant.*

3.7 On 13 July 2012, Probate in the Estate of Hassan Raja was granted in favour of the Defendant as the surviving Executor and Trustee of the Estate of Hassan Raja.

3.8 Defendant is brother of Amina Bi.

3.9 At this point it is to be noted that Plaintiff did not file any action claiming any substantial relief in respect to the subject property at the time of filing of the Application herein. On 15 January 2013 almost one month after filing of this proceeding, Plaintiff filed Writ of Summons in Civil Action No. 2 of 2013 seeking substantive relief.

3.10 Plaintiff's Counsel only brought the existence of Civil Action No. 2 of 2013 in which Plaintiff is claiming the substantive relief in respect to the subject property to Court's attention during her oral submissions, on the date of hearing. At the Court's request Plaintiff's Counsel handed a copy of the Writ of Summons in the said Action.

3.11 Even though the Writ of Summons in Civil Action No. 2 of 2013 was not annexed to any Affidavit or its existence not mentioned in the Plaintiff's Affidavit this Court can take judicial notice of the said action.

Rajendra Prasad Brothers Ltd v Fai Insurances (Fiji) Ltd [2002]
FJHC 213; HBC0205d.2001s (7 May 2002)

3.12 Plaintiff's counsel submits that if the caveat is removed then any decision that may be given in favour of the Plaintiff in Civil Action No. 2 of 2013 will be a nugatory.

3.13 It is the Plaintiff's case that she has contributed to the well-being of the deceased and his family and Plaintiff's husband contributed towards other expense of renovation/maintenance of the subject property with late Hassan Raja. I note that even though Plaintiff had alleged contributions made in the Statement of Claim filed in Action No. 2 of 2013, she has not sought declaration for constructive trust in her prayer.

- 3.14 The Plaintiff also challenges the last Will and Testament of Hassan Raja made on 14 October 2011. Plaintiff in Action No. 2 of 2013 is seeking to set aside the Probate and the Will.
- 3.15 The Defendant alleges that Plaintiff does not have any interest in the subject property by virtue of being a beneficiary in her mother Amina Bibi's estate on the ground that Amina Bibi only had a life interest in the subject property and upon her death the subject property passed to the Defendant.
- 3.16 In *Eng Mee Young & Ors v Letchumanan s/o Velauyutham* [1980] Ac 331 the Privy Council stated as follows:-
- “...where an application to the court under [section110] for the removal of a caveat was by the registered proprietor of the land, the caveator had to satisfy the court that there was a serious issue to be tried and, having done so, to show that on a balance of convenience, the status quo should be maintained until trialalthough on such application a conflict of evidence usually indicated that there was a serious issue to be tried and it was normally inappropriate to resolve that conflict on affidavit, the judge was entitled to consider whether the plausibility of the evidence merited further investigation...”**
- 3.17 The above principle was adopted with approval in *Dearnaley v Kumar* [2012] FJHC; HBC54.2012 (16 July 2012)
- 3.18 In *Sir Sathi Narain v. Phyllis Kathleen Malley* 34 FLR 118 his Lordship Justice Fatiaki (as then he was) stated as follows:
- “it is inappropriate for this court at this stage to determine the rights of the parties to this action in a summary manner particularly where there are conflicting affidavits or where the question of a caveatable interest is a distinctly arguable one”.**
- 3.19 In my view tests in *Mee Young's* case and *Sethi Narain's* case will not produce any different results.
- 3.20 As stated earlier, Plaintiff is claiming constructive trust in respect to the subject property on basis of contributions made by her and her husband towards the maintenance of the family including the deceased, for maintenance and renovation to the subject property and alleged promise made by the deceased to Plaintiff to give share in the subject property to the Plaintiff.
- 3.21 In *Nisha v Munif* 45 FLR 246 her Ladyship Madam Justice Shameem adopted the following passage from Privy Council's decision in *Sheila Maharaj v Jai Chand* [1986] IAC898:

“The authority now classic is the speech of Lord Diplock in *Gissing v. Gissing* [1971] AC 886, 902-911, and later reviewed in the judgments of the Court of Appeal in *Grant v. Edward* [1986] 2 All ER 426, which concerned an unmarried couple. In such cases a contract or an express trust as at the time of the acquisition may not be established, because of lack of certainty or consideration or non-compliance with statutory requirements of writing; but a constructive trust may be established by an inferred common intention subsequently acted upon by the making of contributions or other action to the detriment of the claimant party. And it has been held that, in the absence of evidence to the contrary, the right inference is that the claimant acted in the belief that she (or he) would have an interest in the house and not merely out of love and affection.”

Her Ladyship also quoted the following passage of Lord Denning MR in **Hussey v Palmer** [1972] 1 WR 1286 on the doctrine of constructive trust:

“It is a liberal process, founded upon large principles of equity, to be applied in cases where the legal owner cannot conscientiously keep the property for himself alone, but ought to allow another to have the property or the benefit of it or a share in it. The trust may arise at the outset when the property is acquired or later on as the circumstances may require. It is an equitable remedy by which the court can enable an aggrieved party to obtain restitution.”

3.22 Her Ladyship Madam Justice Shameem at page 250 stated that:

“The purpose of the equitable doctrine of constructive trust is to prevent the person with the legal interest in that property from behaving unconscionably.”

3.23 In *Nisha’s* case a constructive trust was declared in favour of mother in respect to half share of a leasehold property registered in son’s name after the finding that mother contributed financially towards improvements to the property and contributed towards upkeep of the property and the family.

3.24 Plaintiff also challenges the validity of the last Will and Testament of the deceased made on 14 October 2011 and seeking to set aside the Probate.

3.25 It is for the Defendant to prove that the deceased as the testator knew and approved the contents of the will.

In *Bidesi v Public Trustees of Fiji* 21 FLR 65 his Lordship Justice McMullin (as then he was) adopted the following from Williams & Mortimer, Executors, Administrators and Probate:

“A party who puts forward a document as being the true last will of the deceased must establish that the testator knew and approved of its contents at the time when he executed it. The testator’s knowledge and approval of the contents of the will are part of the burden of proof assumed by everyone who propounds a testamentary document.”

His Lordship further went on to quote the following passage from the same text:

“It is not essential to prove that a will originated with the testator and, therefore, proof of instructions may be dispensed with provided that is proved that the testator completely understood, adopted and sanctioned the disposition proposed to him, and that the instrument itself embodied that disposition.”

- 3.26 The claim for constructive trust and validity of the will are matters that require oral evidence during a trial proper in Civil Action No. 2 of 2013. In the said action, the Plaintiff had sought:
- (a) *a Declaration that Will dated 14th October 2011 is a forged instrument and is deemed to be null and void and be set aside;*
 - (b) *that the grant of Probate No. 520585 issued by the Suva High Court on 13th July 2012 be revoked and set aside;*
 - (c) *that the Plaintiff be given to apply for grant of Letter of Administration of the Estate of the deceased; or*
 - (d) *in the alternative, an order that the Plaintiff has an equitable interest in the property be distributed amongst all the beneficiaries of the estate of the deceased and the estate of Amina;*
 - (e) *damages.*
- 3.27 If the trial of Action No. 2 of 2013 the Court determines that part of the subject property was subject to constructive trust in favour of the Plaintiff then she will come within the two (2) limbs stated in Cambridge’s case.
- 3.28 Furthermore if the Plaintiff is able to have the deceased’s last Will and Testament invalidated then the Plaintiff by virtue of being Amina Bibi’s (deceased’s spouse)

daughter will be entitled to share in the subject property under law of intestacy being provisions of Sections 5 and 6 (1)(d) of Succession Probate and Administrative Act Cap 60 and satisfy the requirements in *Cambridge's* case.

3.29 I also drew my attention to paragraph 8, 12 and 16 of the Reply to Supplementary Affidavit filed by the Plaintiff and conclude addition to the reasons set out in the preceding paragraphs of this Ruling there are serious issues to be tried in this matter and extension of the Caveat is justified.

4.0 ORDERS

4.1 **Accordingly, I order that Caveat No. 764834 registered on 8th day of March 2012 against Methodist Church Lease No. 356592 be extended until final determination of Civil Action No. 2 of 2013 or further Order of this Court.**

4.2 **There will be no order as to costs of this proceeding.**

Delivered at Suva this 7th Day of June, 2013.

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C. KOTIGALAGE
JUDGE