

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 377 of 2015

BETWEEN : REDBACK RETREADING (FIJI) LIMITED

Plaintiff

AND : THE REGISTRAR OF TITLES

First Defendant

AND : I-TAUKEI LAND TRUST BOARD

Second Defendant

Coram : The Hon. Mr Justice David Alfred

Counsel : Ms D. Gandhi for the Plaintiff
Mr A. Prakash, Ms L. Ramoce with him, for the First Defendant
Ms E. Raitamata for the Second Defendant

Date of Hearing : 18 July 2016
Date of Judgment : 17 November 2017

JUDGMENT

1. This is the Plaintiff's application by way of Originating Summons (O.S.) for the following orders:

(1) A Declaration that the Court Order dated 2 March 2015 (the court order) is endorsed in error on Native Lease No 16223.

(2) An Order under s.168 of the Land Transfer Act (Act) that the (First) Defendant cancel the registration of the court order in the register of titles

(3) An Order under s.168 of the Act that the (First) Defendant register the instrument of transfer dated 5 November 2014 between Mohammed Azim and Shazma Seema Azim and the Plaintiff.

(4) An Order under s.168, s. 21(1) and s.24 of the Act that the (First) Defendant make all memorials of the transfer and the discharge of mortgage and endorse them on the special duplicate instrument of title of the said Native Lease.

(5) That the Second Defendant grant the necessary consent in respect of the said transfer.

2. The O.S. is supported by the affidavit of Aiyaz Mohammed Musa Umarji, a director of the Plaintiff. He deposes that on 6 July 2014, the Plaintiff entered into a sale and purchase agreement with the said Shazma and Mohammed to purchase a property on the said native lease for \$180,000. On 22 January 2015 the Plaintiff lodged a transfer dated 5 November 2014 with the Registrar of Titles (ROT), together with a discharge of mortgage and withdrawal of charge.

3. All these instruments were accepted by the ROT and marked with a serial number in the register (sic) pursuant to s.21 of the Act. On 5 July 2015 an officer of the ROT called the clerk of the Plaintiff's solicitors and returned all the said documents, the reason being that the court order (judgment caveat) dated 25 February 2015 had been registered against the title on 4 March 2015 and as such the said documents could not be accepted.
4. The First Defendant's affidavit in response is sworn by Torika Goneca, the Acting Deputy Registrar of Titles. She deposes that the practice of the office of the ROT is that registration of caveats, judgments etc are prioritized and are to be done within 2 weeks of lodgment while normal registration applications are done within 2 or 3 months of lodgment. Thus, the registration of the court order was completed well before the registration of the 3 documents could be completed and consequently their registration was discontinued and the 3 documents returned to the Plaintiff's solicitors.
5. The ROT has followed its standard practice and prays the Court will clarify the procedures the ROT may take so as to give full effect to any order of the Court and to grant such relief as the Court may deem just.
6. At the hearing of the application, the Counsel for the Plaintiff submitted that the transfer had been lodged with the ROT on 22 January 2015 while the court order dated 2 March 2015 was lodged on 4 March 2015. Under s.105 (2) of the Act the judgment caveat ceased to have effect at the end of 6 months. It did not apply for consent from the Second Defendant, as she submitted, it was not needed. The ROT erred in not giving priority to the transfer before the judgment caveat. The judgment caveat did not have effect until lodged and the transfer had been

presented earlier. They did not claim compensation from the ROT or the Attorney General.

7. Counsel for the First Defendant in his submission said registration is only effective after the ROT signs the memorial. While the Plaintiff's application for transfer was being processed, the court order arrived and the ROT gave it priority as was proper. The ROT after the lapse of the court order is waiting for the Plaintiff to re-present the transfer for registration which to date they have yet to do. Counsel submitted it was wrong to say the ROT could reject a court order which it had to register.
8. Counsel for the Second Defendant then submitted. She said they had granted consent, there was no irregularity and they would facilitate a fresh application from the Plaintiff for consent as it was now outside the 3 months.
9. Counsel for the Plaintiff replied the transfer appeared at the Registry before the court order.
10. At the conclusion of the arguments, I said I would take time for consideration. I now deliver my judgment.
11. The pivotal issue here is whether the transfer instrument takes precedence over the court order. To resolve this, requires the Court's interpretation of certain sections of the Act. I shall start with s.21 (1) which provides that every instrument of title shall be deemed and taken to be registered as soon as the same has been signed by the Registrar and marked with a serial number in the register.

12. Here the Plaintiff's affidavit at para 8 states the 3 documents were marked with a serial number in the register pursuant to s.21. My close inspection of the annexures discloses no register entry but does however disclose a lodgment slip. This is clearly no more than an acknowledgment of documents presented for registration. It is not the register. Further it does not bear the signature of the Registrar. Thus the Plaintiff cannot rely on the provisions of s.21 to advance its claim.
13. Then I shall turn to s.168. It provides that in any proceedings respecting any land or any instrument respecting such land, the court may by order direct the Registrar to cancel, correct etc any instrument of title or make any memorial or entry in the register to give effect to the order of the court.
14. It is therefore incumbent on the Plaintiff to first convince me that the court order should not have been registered before the Plaintiff can obtain an order of this court directing the Registrar to cancel that court order.
15. According to the copy of the title annexed to the Plaintiff's affidavit the court order was registered on 4 March 2015. This means the judgment caveat thereunder would have ceased to bind or affect the land on 4 September 2015 by virtue of the provisions of s.105 (2), as I am not advised any application was made for the extension of the period (of 6 months) by the court.
16. Therefore there was no legal impediment to the Plaintiff re-presenting the documents for registration by the ROT at any time after 3 September 2015. It also follows that when the Plaintiff filed its O.S. on 9 December 2015 there was no extant court order whose registration had to be cancelled.

17. This should dispose of the entire O.S. If it be necessary to me to state the obvious, I shall do so now. There are now no documents at the ROT awaiting registration by order of this court as they have been returned to the Plaintiff. This court will not grant any order which will be an exercise in futility.
18. If there is any impediment now, it does not concern the First Defendant. It only concerns the Plaintiff and the Second Defendant. This is because I note from the Application For Consent To Assign that the Second Defendant's consent is dated 29 October 2014 and expressly states it is to be valid only for a period of "Three Calendar Months" from that date and if the assignment (transfer) is not registered by the ROT on or before 28 January 2015 then the consent will become "Void And Of No Effect". This is a further reason why the orders sought cannot be granted as the consent had become void before the court order (judgment caveat) had been registered at the ROT.
19. At this juncture the court opines the Plaintiff would have been well advised to take the correct, necessary and available steps expeditiously to achieve its objective of getting the transfer registered, instead of embarking on this litigation. But all does not appear lost as the door has been kept open by the First Defendant and the Second Defendant as stated in their Counsels' oral submissions.
20. There is however one final matter for me to consider before I deliver my judgment. It is this. Much has been made by Counsel for the Plaintiff that the ROT was in error in not giving priority to the transfer before the court order (judgment caveat). For this argument to hold water the Plaintiff's Counsel

needed to show this court that the ROT had signed the instrument of title and had given it a serial number in the register, which Counsel was unable to do.

21. I shall pronounce my opinion on this issue. S.23 of the Act, which section is titled "Priority of registration to give priority of title" lays down that every instrument presented for registration, unless it is a State grant, shall be registered in the order of time in which the same is presented for that purpose. I construe "shall" here as mandatory which means "conveying, a command; compulsory, obligatory" according to the Oxford Advanced Dictionary of Current English. It is therefore quite clear that the intention of Parliament was that the ROT was obliged to register an instrument of title as it is presented and there is no statutory warrant for what is stated to be the standard practice at the office of the ROT viz that it registers the court order ahead of the application for registration of a document.
22. If I may say so with respect, s.103 of the Act upon which the ROT is ostensibly relying on as justification for its practice does not provide for a court order to be registered ahead of or in priority to any other instrument. All it lays down is that upon the judgment etc being served on the Registrar, the Registrar shall enter a memorial thereof in the register and shall state therein, inter-alia, the date and hour of its production to him or her. This is my opinion, ties in neatly with s.23. The legislative intention is clearly that priority is given to the time of presentation for registration of a document and not to the nature or character of a document.
23. Consequently the standard practice of the ROT in this regard can no longer be implemented in light of my decision which is prospective in effect. The guiding

principle for the Registrar of Titles, henceforth, has to be compliance with the legislative intention evinced in the sections I have referred to above.

24. This however does not assist the Plaintiff in the particular circumstances of this matter because the consent of the Second Defendant had already become void before the court order had been served on the ROT.
25. In the upshot, as the Originating Summons lacks both law and merit, it is hereby dismissed with costs to be paid by the Plaintiff to the Second Defendant only, which costs are summarily assessed at \$500.

Delivered at Suva this 17th day of November 2017.



David Alfred

JUDGE

High Court of Fiji