

THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 216 of 2016

BETWEEN : NITYA NAND SUNDAR

PLAINTIFF

AND : SHYAM VINOD CHANDRA and SUBHASH CHANDRA
and JITENDRA NAND

FIRST DEFENDANTS

AND : REGISTRAR OF TITLES

SECOND DEFENDANT

AND : ATTORNEY GENERAL OF FIJI

THIRD DEFENDANT

Coram : The Hon. Mr Justice David Alfred

Counsel : Mr S. Chandra for the Plaintiff
Mr A. Prakash for the Second and Third Defendants.

Dates of Hearing : 11 and 12 October 2018

Date of Decision : 22 October 2018

JUDGMENT

1. The Plaintiff in the Statement of Claim claims as follows:
 - (1) The Plaintiff and the three Defendants (sic, 3 First Defendants) currently are the registered proprietors since 17 September 2010 in equal shares of the lease.
 - (2) Before 17 September 2010, Shyam Sundar (deceased), the father of the Plaintiff and the 3 First Defendants was the sole registered proprietor of the lease.
 - (3) By his will dated 20 June 1995, the deceased bequeathed (sic, devised) the lease to 4 of his sons in equal shares being the Plaintiff and the 3 First Defendants.
 - (4) Circa 3 November 1995, Probate was granted by the High Court wherein the Plaintiff was appointed as the sole executor and trustee of the estate of the deceased.
 - (5) From February to May 2002, the Plaintiff entered into arrangements with the 3 First Defendants to execute 3 deeds of renunciation (deeds) by them in favour of the Plaintiff.
 - (6) The Plaintiff on receipt of all the 3 deeds instructed his solicitors G.P.Lala & Associates (solicitors) to register the lease in the Plaintiff's name alone.
 - (7) The solicitors sent the documents to the Plaintiff to execute on the basis that another transfer would follow to register the Plaintiff as sole lessee.
 - (8) The First Defendants also executed the documents prepared by the solicitors and the instrument of transfer was registered on 17 September 2010 in the name of the Plaintiff and the 3 First Defendants in equal shares in terms of the will of the deceased notwithstanding that the 3 First Defendants had

renounced all their rights and interest in the estate to the Plaintiff by the deeds.

- (9) The Plaintiff immediately after recognizing the mistake or non action by the solicitors gave further instructions to rectify the mistake but no action was taken until the Plaintiff changed solicitors to MC Lawyers (MCL) to register the Plaintiff as sole lessee.
- (10) The 3 First Defendants executed independently the 3 deeds and relinquished all their rights and interest in their father's estate to the Plaintiff.
- (11) On 28 July 2009, the Plaintiff instructed his solicitors to transfer the lease to the Plaintiff alone.
- (12) Circa 27 August 2009 the solicitors prepared an instrument of transfer in the names of all 4 beneficiaries and sent it to the First Defendants to execute in the United States, which they did.
- (13) The solicitors failed to attach a second transfer wherein the 3 First Defendants would transfer their rights in the lease to the Plaintiff.
- (14) The said solicitors by mistake failed to register an instrument of transfer by the First Defendants to the Plaintiff as instructed.
- (15) Circa 13 August 2013 the Plaintiff filed an Originating Summons (O.S.) vide Civil Action 118 of 2011 (sic, 2013) through MCL to remove the names of the 3 First Defendants from the lease. Corea J (the judge) dismissed the O.S. on the basis of the indefeasibility of title by the registration of the lease in the names of the 3 First Defendants.
- (16) Wherefore the Plaintiff claims the following Orders:
 - (a) That the First Defendants' names be expunged from the lease.
 - (b) That the Plaintiff be registered as the sole lessee by the Second Defendant.
 - (c) That the Plaintiff be reimbursed all expenses for maintaining and renovating the property.

2. The Statement of Defence of the Second Defendant (R.T.) and Third Defendant (A.G.) states as follows:
 - (1) The transfer was registered on 17 September 2010 to all 4 beneficiaries as per the will and that the Deeds were attached to the Transfer.
 - (2) The Defendants shall abide by any orders made by this Court.
3. The Minutes of the Pre-Trial Conference dated 12 January 2018 show, inter-alia, the following:

Agreed Facts

- (1) The Plaintiff and the 3 First Defendants were registered on 17 September 2010 as lessees and tenants in common. The Deeds of Renunciation were attached to the said transfer.
- (2) The Plaintiff's solicitors (MCL) by an O.S. dated 13 August 2013 unsuccessfully applied to remove or expunge the names of the 3 First Defendants from the lease, as Corea J on 6 March 2015 dismissed the O.S. on the basis of indefeasibility of title, by virtue of the registration of the lease in the names of the 3 First Defendants..

Issues for Determination

- (1) Whether the solicitors, G.P.Lala & Associates who prepared the conveyancing documents including the Deeds of Renunciation mistakenly registered the instrument of transfer in the names of the 3 First Defendants who had earlier executed deeds of renunciation in favour of the Plaintiff.
- (2) Whether the Plaintiff who executed the instrument of transfer was properly advised by his solicitors on the effect of the Transfer that the 3 First Defendants would also be registered on the said lease.

- (3) Whether the Court has power to remove the names of the 3 First Defendants from the memorial of the lease.
4. At the outset it has to be noted that the 3 First Defendants have never appeared nor taken any part in these proceedings. Mr Chandra informed the Court that he had the previous week applied for judgment against the 3 First Defendants for non-appearance.
5. At the commencement of the hearing, Mr Prakash informed the Court that he had a preliminary objection to make. It was that the cause of action had been adjudicated before by a competent Court of Law. The Plaintiff wants the other 3 names of the registered proprietors to be expunged from the memorial of the lease. Counsel said the Plaintiff is seeking in this statement of claim the same relief that Corea J had rejected. The RT's and AG's position is that this is res judicata by estoppel, because the same prayer is being sought in this present action and the same facts were pleaded today as in 2013 and the same Transfer is before this Court. The current status is all the 4 brothers are registered proprietors of the property with indefeasible title. Res judicata applies and the current action is an abuse of the Court process on the part of the Plaintiff. Corea J made final orders and now a second civil action on the same facts has been instituted by the same party against the same parties. The judge held the unnamed 3 brothers had an indefeasible title over the same lease. Counsel says that by operation of re judicata the judgment applies to the parties and their privies. What the judge decided carries on to this civil action and what he decided ought to be recognised by this Court. Essentially the defendants there are the defendants here. It is an abuse of process to relitigate the same issue

before a different judge. There was no appeal by the Plaintiff against the judge's judgment which were final orders. Fraud is not pleaded.

6. Mr Chandra then submitted. He said the O.S. before the Judge was against the RT and the AG. The Plaintiff sought to get the RT to rectify on the basis the Transfer had 4 names on it when 3 had renounced. The judge did not grant the order on the grounds that those 3 names were not parties to that action and had an indefeasible title. The current action is against the First Defendants rather than the RT and the AG. The Plaintiff is not seeking relief against the RT and AG. Counsel said there was no fraud. He said the RT was careless with regard to the attached deeds of renunciation. He repeated the RT was careless in allowing the memorandum of transfer to go through when there were deeds of renunciation. Res judicata does not apply because of the judge's decision. He said the Plaintiff has no cause of action against the RT and the AG. He finally said the Court can direct the RT under section 168 of the Land Transfer Act regarding changes of ownership.
7. Mr Prakash in his reply said he was infuriated that Mr Chandra had made allegations against an officer of state. He said there was nothing in the affidavit in support of the Plaintiff in the O.S. that the RT was careless. There was nothing in the judgment to say that the RT was careless. The Plaintiff acknowledges the 3 brothers are co-owners of the property with the Plaintiff. The relief claimed in the O.S. is for the 3 names to be extinguished and for the Plaintiff to be the sole proprietor. Both are the same relief claimed in today's action which directly affect the RT. The parties, the privies, the facts and the reliefs sought are the same. The final order was already made in the substantive civil matter. The judge heard the matter on the merits and on its merits, the judge held the

proprietors held an indefeasible title on the lease. Accordingly the Plaintiff's application was dismissed. Mr Prakash asked for the writ to be dismissed in it's entirety with costs to the RT and the AG. What Mr Chandra said was slander.

8. At the conclusion of the arguments I informed I would take time for consideration. Having done so I shall now deliver my decision.
9. I start by referring to the Land Transfer Act 1971 (Act). Section 44(1) of the Act lays down that a transfer shall refer to the land and shall contain a precise statement of the estate or interest intended to be transferred.
10. So I turn to the memorandum of transfer which states that the whole of the lease is transferred by the Plaintiff as the Administrator to the Plaintiff, the 1st, the 2nd and the 3rd First Defendants. This was registered on 17 September 2010 and was lodged by G.P.Lala & Associates, Solicitors.
11. I note there is no other memorandum of transfer in the Agreed Bundle of Documents.
12. I must therefore conclude the only transfer before this Court is the above which transfers the entire lease to the Plaintiff and the 3 First Defendants. There is nothing on it to indicate to the RT that some other estate or interest is intended to be transferred. Consequently by subsection (3) of section 44, the estate and interest of the transferor passed to the 4 transferees and the 4 transferees thereupon became the proprietor thereof.
13. By section 39(1) the registered proprietor of the land holds a paramount estate with a guaranteed title except in the case of fraud. The Statement of Claim make

No mention of any fraud whatsoever and Mr Chandra in his oral submission emphatically stated there was No fraud. Consequently it must follow as the night the day that the Plaintiff and the 3 First Defendants hold an indefeasible title.

14. Further by section 38, the instrument of title cannot be impeached or defeasible by reason of or on account of any document previous to the registration of the instrument of title. In this case this would be the deeds of renunciation respectively dated 22 February 2007, 22 February 2007, and 5 May 2009, which are all previous to 17 September 2010 – the date of registration
15. I turn now to the principle of res judicata estoppel. In Spencer Bower, Turner and Handley – The Doctrine of Res Judicata – 3rd edition, pages 9-10, it is thus stated. “Where a final judicial decision has been pronounced on the merits by anjudicial tribunal with jurisdiction over the parties and the subject matter, any party to such litigation, as against any other party..... is estopped in any subsequent litigation from disputing such decision on the merits, whether it be used as the foundation of an action or as a bar to any claim....., provided the party entitled raises the point at the proper time”.
16. I find here that Mr Prakash has raised the point at the proper time which was at the commencement of this proceeding. He has also satisfied the requirements viz:
 - (1) Corea J’s judgment was a final decision against which there was no appeal.
 - (2) It was pronounced on the merits by the High Court which had jurisdiction over the Plaintiff, the Registrar of Titles and the Attorney General of Fiji and the subject matter was the lease in Fiji.

17. Consequently the Plaintiff is estopped in this current action from disputing the judgment as he is attempting to do here. As far as the Plaintiff and the RT are concerned, the 3 First Defendants are registered proprietors of the land together with the Plaintiff.

18. If I may say so with respect, Mr Chandra should have prepared another memorandum of transfer right at the beginning in November 2010, whereby the 3 First Defendants would transfer their rights in the lease to the Plaintiff thus resulting in the Plaintiff becoming the sole proprietor of the lease. This Mr Chandra failed to do. Instead he filed the O.S. and when that was dismissed he filed this action. At the end of the day the Plaintiff's claims against the RT and AG fail. There was nothing the Plaintiff could have done by way of oral testimony to overcome the omissions of his solicitors. The Plaintiff's claim cannot succeed on the law. And it also could not have succeeded because of the operation of res judicata estoppel.

19. In the result the Plaintiff's claims against the Second and Third Defendants are dismissed and the Plaintiff shall pay the Second and Third Defendants the costs of this action summarily assessed at \$1,000.

Delivered at Suva this 22nd day of October 2018.



David Alfred

JUDGE

High Court of Fiji