

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CIVIL JURISDICTION**

Civil Action No. HPP 94 of 2019

**IN THE MATTER** of Section 119 of the  
Property Law Act 1971.

**And**

**IN THE MATTER** of Section 5 of the  
Succession, Probate and Administration  
Act 1970.

**BETWEEN:**           **SHAIENDRA TIWARI** as the Administrator in the **Estate of late**  
**Awadh Ram Tiwari** of 228 Blacktown Road, Blacktown NSW 21 48,  
Courier Driver.

**PLAINTIFF**

**AND:**               **RAMESHWAR PRASAD TIWARI** as the sole executor and trustee in  
the **Estate of late Paras Ram** of 52 Kastelan Street, Blacktown NSW 21  
48.

**DEFENDANT**

**BEFORE:**           **Justice Vishwa Datt Sharma**

**COUNSEL:**       **Mr Sharma T.** for the Plaintiff/Respondent  
**Ms. Narayan P.** for the Defendant/Appellant

**Date of Judgment:** 24<sup>th</sup> September, 2024 @ 9.30am

**JUDGMENT**

[Summons for Leave to Appeal the Interlocutory Ruling of 05<sup>th</sup>  
December 2022]

## Introduction

- (1) The Defendant/Appellant, Rameshwar Prasad Tiwari as the Sole Executor and Trustee in the Estate of Paras Ram filed a Summons on 22<sup>nd</sup> December 2022:
  - (a) **For Leave to Appeal against the Interlocutory Ruling of Mr. Justice Yohan Liyanage** delivered on 05<sup>th</sup> December 2022; AND
  - (b) Costs of this application be costs in cause.
- (2) The Defendant/Appellant relied on the grounds deposed in the affidavit of Ashney Singh and was made pursuant to Section 12 (2) (i) of the Court of Appeal Act.
- (3) The Plaintiff/Respondent did not file any opposition to the Defendant/Appellants application for Leave to appeal the Decision of 5 December 2022.
- (4) Both parties to the proceedings. Instead were ordered to furnish court with their written submissions.

## Background

- (5) The Plaintiff/Respondent, Shailendra Tiwari is the administrator and beneficiary of the Deceased's Estate of Awadh Ram Tiwari who is the late brother of the Defendant/Appellant.
- (6) The Defendant/Appellant is the Executor and beneficiary of the Deceased's Estate of Paras Ram.
- (7) On 17<sup>th</sup> June 2022, the Plaintiff/Respondent placed a Caveat on the property in issue on Certificate of Title No. 6088 being Lot 6 on DP No. 784 situated in Navua belonging to the Deceased's Estate of Paras Ram.
- (8) A title search was done and the Defendant/Appellant became aware of the Caveat placed on the Title.
- (9) The Defendant/Appellant alleged that the Plaintiff/Respondent had deliberately used an inaccurate mailing address for the Defendant/Appellant to ensure that the Defendant/Appellant did not receive Notice of the Caveat.
- (10) The Defendant/Appellant filed an application for the Removal of the Caveat no. 919781 with the Registrar of Title which was registered on 06<sup>th</sup> October 2022 as recorded on the said Certificate of Title.
- (11) The Registrar of Title Office mailed the Notice of Removal of Caveat to the

Plaintiff/Respondent's solicitors on 19<sup>th</sup> October 2022.

### **Determination**

- (12) The substantive originating summons filed by the Plaintiff/Respondent on 27 February 2020 is impending its disposition in Court seeking for the Estate property in Certificate of Title No. 6088 on Lot 6 DP No. 784 at Naitata Navua to be sold and the net proceeds to be divided between Plaintiff and Defendant together with others orders.
- (13) However, the Plaintiff's/Respondent's interlocutory application seeking for extension of caveat on the Certificate of Title No. 6088 being Lot 6 on DP No. 784 was filed and subsequently served upon the Defendant's solicitors on 06<sup>th</sup> October 2022.
- (14) This was 28 days after the Notice of Removal was mailed to the Plaintiff/Respondent's mailing address.
- (15) The Plaintiff/Respondent in his affidavit of support of the extension of the Caveat stated at paragraphs 4 and 5 that:
- "4. The Notice of Removal dated 19<sup>th</sup> October 2022 was mailed to my solicitors M A Khan by the Registrar of Titles.
5. My Solicitors have received due notice of the same on 2<sup>nd</sup> November 2022 which I collected from Suva Post Office."
- (16) The Summons for Extension of Caveat was heard on 05<sup>th</sup> December 2022 before the presiding Mr. Justice Yohan Liyanage.
- (17) The Judge ruled that the Caveat lodged by the Plaintiff be extended until 21<sup>st</sup> February 2022 subject to the Registrar not having removed the Caveat earlier.
- (18) The Defendants Solicitors contention now is that the Extension granted was rather unreasonable and wrong in law.
- (19) Thus, prompted to file the current Interlocutory summons seeking for orders for leave to appeal against the decision delivered on 05<sup>th</sup> December 2022 and costs in the cause.

### **Summons for Extension of Caveat at No. 919781 on Certificate of Title No. 6088, Lot 6 on DP No. 784**

- (20) The issue this Court needs to deal with is whether the Court had jurisdiction to extend the Caveat No. 919781 after it had lapsed?
- (21) The relevant statutory provision in the Land Transfer Act, in particular those under chapters on **Removal of Caveat and service of notice and in order to extend the**

**caveat** refers.

- (22) **Section 110 (c) of the Land Transfer Act** mandates the Registration to remove the Caveat after a lapse of 21 days from the date of service of the notice unless before the expiry of the 21 days he has been served with an order extending the time period.
- (23) However, **Section 110(3)** permits the Caveator either before or after the receipt of such notice to apply by summons to the court for an order to **extend the caveat**.
- (24) Reference is made to the case **In Peng Yu v Krishna** [2013] FJHC 417; HBC 211.2013.

"The Caveat had lapsed, that is 21 days after the Removal of the Caveat had been posted to the Caveator's address. His Lordship directed the Plaintiff to satisfy the Court of 'whether the Court had jurisdiction to extend a lapsed Caveat? No Cases to hand were provided and/or furnished to support the application seeking the extension of the Caveat and the application was struck out.
- (25) Legislature allows a mandatory period of 21 days to the Caveator to take steps under Section 110 (3) of the Land Transfer Act to have the time extended for the reasons that any failure to do so would compulsory result in the removal of the caveat.
- (26) There is no further extension of 21 days' time frame except by way of Court order. The Caveator must work expeditiously within these 21 days provided for by the legislature. That is the reason as to why Section 110 (3) of the Land Transfer Act that allows for the application of extension to be made before receiving the notice from the Caveatee.
- (27) However, the Court is empowered under Section 110 (3) of the Land Transfer Act to make an order in the premise either Ex-Parte and/or otherwise as the Court thinks fit. This part of the Law is in conjunction with the Caveator making an extension application before receiving the notice of removal.
- (28) The Caveator merely must show proof that the Summons for Extension has been duly served and an Affidavit of Service filed into Court for Concrete Evidence of Service.
- (29) An Ex-Parte can be granted without the presence of the Caveatee.
- (30) It must be remembered that the law does not empower the Court to Extend the Caveat once it had lapsed. What this means is that there is no caveat on foot to be dealt with.
- (31) Hon Mr. Justice Liyanage was somewhat misguided in the interlocutory matter which came before him for determination.
- (32) It is evident that his Lordship understood that the Caveat No. 919781 affecting the Land on Certificate of Title No. 6088 on Lot 6 on DP No. 784 had lapsed, at the time the Plaintiff made the application seeking for further extension for the Caveat to remain registered on the said title until further orders of this Court.

- (33) Caveat application are time barred and an order for removal would have been more apt rather than an Extension when it had already lapsed.
- (34) However, the Court extended the Caveat No. 919781 further until 21<sup>st</sup> February 2022 subject to the Registrar not having removed the Caveat any earlier. This was done 48 days after the removal notice was posted to the Plaintiff's Solicitors.
- (35) The Law is time barred to 21 days' time period and the Court has no jurisdiction whatsoever and/or even discretion to extend an expired and/or lapsed Caveat. The reason being that there is no Caveat on foot or in place to be dealt with in accordance to the Law.
- (36) The Registrar of Titles must ensure that it endorses the cancellation strictly upon the expiry of the 21 days' timeframe and not at its discretion. The Registrar must strictly adhere to the law as set out in the Land Transfer Act accordingly.

### **In Conclusion**

- (37) I find that the Court erred in Law when it failed to apply and consider the main statutory provisions relevant to the issue herein in terms of Section 110 of the Land Transfer Act.
- (38) The Caveat in place had lapsed by a total of 31 days when the matter was first called into Court.
- (39) This matter should have been dealt with on the First call saving time and costs on filing responses and submissions.
- (40) There is no written law and/or authority that allows any party to obtain an order for extension of the caveat, after the 21 days' time period had lapsed.
- (41) May be, if the application was appropriately and with good intentions and clean hands filed into the Court and sought for the extension then the Counsel representing the Defendant/ Appellant would have appraised the court of the appropriate applicable law that the Caveat in fact had expired and/or lapsed and therefore, it cannot be extended any further.
- (42) On the above rational and premise, I have no alternative but proceed to grant the Defendant/Appellants summons for Leave to Appeal the Ruling delivered on 05<sup>th</sup> December 2022 extremely the Caveat No. 919781 until 12<sup>th</sup> February 2022.

### **Cost in Cause**

- (43) However, before this Court could hand down the Decision on Leave to Appeal Summons although written and ready for delivery, the Plaintiff's Counsel made an application to Court to withdraw the substantive matter in its entirety and be allowed time to discuss on costs issue with the defence counsel instead.

- (44) The Defence Counsel agreed on the withdrawal of the substantive matter. However, the Defence Counsel sought for \$10,000 costs instead.
- (45) The Decision of the Court was then adjourned for deliberation on the subject matter of costs on 11 June 2024 at 9.30am.
- (46) However, the Counsel representing the Plaintiff did not appear in Court on the above date. Hence, instructed another Counsel to appear and seek a further date with no instructions and decision on costs issue.
- (47) The matter was then adjourned for Decision on the Summons for Leave to Appeal the decision of 05<sup>th</sup> December 2022 and what orders ought to be made on the withdrawal of the substantive action together with costs on both Summons for Leave to Appeal the Decision and the withdrawal of the substantive action to the 10<sup>th</sup> September 2024 at 9.30am.
- (48) Since the substantive matter was withdrawn by the counsel representing the Plaintiff/Respondent on 30<sup>th</sup> May 2024 in its entirety, then it follows that the Defendant/Appellant's Summons seeking for Leave to Appeal the Decision of 05<sup>th</sup> December 2022 need not be proceeded with any further and that the property in question before this Court had been dealt with and sold to a third party instead.
- (49) Therefore, I will proceed to grant the withdrawal of the substantive matter in its entirety and accordingly dismissed the same.
- (50) The Defendant/Appellant's summons for leave to appeal although succeeded but need not be proceed with any further in light of the subsequent development in the matter.
- (51) I now need to deal with costs in two(2) limbs-
- (i) since the Summons for leave to Appeal proceeded to a full hearing and a written decision was ready for delivery when the Counsel Representing Plaintiff/Respondent
  - (ii) withdrew the substantive action in its entirety and the Decision had to be parked awaiting parties to deal with costs issue.
- (52) The substantive action was filed in 2019 and called in Court on a number of occasions only had to be adjourned from time to time unnecessarily and with no Concrete causes of action being completed rather delaying the substantive matter unnecessarily.
- (53) It came as a surprise to the Defendants/Appellant's Counsel after carrying out a search at the Registrar of Titles office that the property in question within the substantive matter Certificate of Title No. 6088 being Lot 6 on DP No. 784 situated at Navua belonging to the deceased's estate of Paras Ram had a Caveat No. 919781 placed on it on 06<sup>th</sup> October 2022.

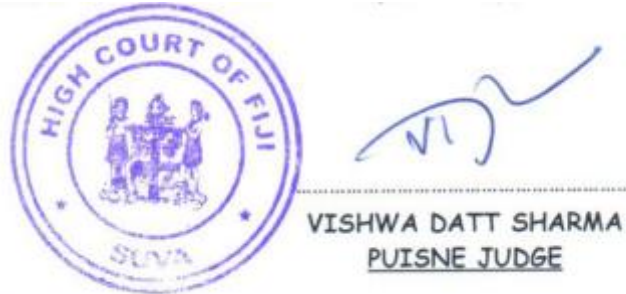
- (54) This caveat came to the attention of the Defendant on the day of settlement when title search was conducted.
- (55) On 19<sup>th</sup> October 2022 notice of removal of caveat was posted to the Plaintiff's Solicitors.
- (56) On 15<sup>th</sup> November 2022 the Plaintiff's solicitors then filed a summons for extension of Caveat which was heard on 05<sup>th</sup> December 2022 and orders to extend the Caveat 48 days after the notice of removal of Caveat was posted to the Plaintiff's Solicitors.
- (57) In **Hans v Deo** [2020] FJHC 491; HBC 186.2017 (3 July 2020) [Tab 2] the Court held the following at paragraph 46:
- "46. The primary purpose of awarding cos is to compensate a successful party, and therefore, it is nether punishment nor reward. Further the cost awards are also a check on unmeritorious litigation and to encourage litigants to consider cost-effective alternatives to court litigation. However, an award of costs should not prevent litigants from access to justice and seeking to enforce their rights through the courts."
- (58) Taking all above into consideration, it is only just and fair that I grant the Defendant/Appellant a sum of \$3,000 as summarily assessed costs for the withdrawal of the substantive action and a summarily assessed cost of \$2,500 to the Defendant/Appellant for the full hearing and filing of written submission and oral submission and adjournment for the Summons for Leave to Appeal the decision of 05<sup>th</sup> December 2022 accordingly.
- (59) A total sum of \$5,500 summarily assessed costs to be paid to the Defendant/Appellant with 14 days' time frame.

### Orders

- (i) Leave to Appeal against the Decision delivered on 05 December 2022 succeeds and is hereby granted accordingly.
- (ii) A sum of \$2,500 as summarily assessed costs is granted on 'Leave to Appeal application' of the Defendant/Appellant to be paid within 14 days timeframe.
- (iii) The Plaintiff's/Respondent's substantive originating summons is withdrawn and dismissed in its entirety forthwith.
- (iv) A sum of \$3,000 as summarily assessed costs is granted against the Plaintiff/Respondent, Shailendra Tiwari to be paid to the Defendant/Appellant, Rameshwar Prasad Tiwari, within a time frame of 14 days.
- (v) Orders accordingly.

(vi) File is closed.

Dated at **Suva** this **24<sup>th</sup>** day of **September** ,2024.



cc: Tirath Sharma Lawyers, Nausori  
Prem Narayan, Legal Practitioner, Suva.