

**WAI HING LEE v LUM SUI FONG (CAV0006 of 2009)**

COURT OF APPEAL — CIVIL JURISDICTION

5 CALANCHINI AP, BASNAYAKE and KOTIGALAGE JJA

6, 28 September 2012

10 **Practice and procedure — judgments and orders — registration of judgment — delay — validity period — extension — whether judge erred in dismissing application to extend registration of judgment — death of judgment debtor — Land Transfer Act s 104, 105(2).**

15 The appellant, who obtained a judgment against the second defendant, duly registered the same. The registration was valid for six months. The plaintiff complained that she had insufficient time to sell the property as the registration was delayed due to no fault of hers. The plaintiff filed an application to extend the validity period of the registration by another six months. The High Court dismissed the plaintiff's application and the plaintiff appealed.

**Held –**

20 (1) The High Court overlooked the fact that the judgment was already registered. Further, the death of the registered proprietor does not halt the operation of s 104 of the Land Transfer Act. Section 104 is designed for the benefit of the judgment creditor seeking to execute his judgment against the land of the judgment debtor. The registrar is not required to look beyond the register to enquire if the registered proprietor is dead or alive before entering the judgment in the register.

25 (2) The judgment creditor does not have to wait for grant of administration in the estate of the deceased registered proprietor or for the transmissions by death to be registered.

*Massey-Harris Co v Whitehead* [1923] 4 DLR 408, applied.

30 Judgment set aside. Registration of judgment extended. Appeal allowed.

**Cases referred to**

*Gibbs v Messer* [1891] AC 248 (PC); *Hall v Richards* [1961] 108 CLR 84, cited.

*C.B. Young* for the Appellant

35 *P. Katia* for the Respondent

[1] **Calanchini AP.** I have had the opportunity of reading the judgment of Basnayake JA. I agree with his reasoning and conclusions.

40 [2] **Basnayake JA.** This is an appeal to set aside the interlocutory judgment (judgment) dated 6.5.2011 of the learned High Court Judge of Lautoka. By this judgment the learned Judge had dismissed the plaintiff's application to extend the registration of the judgment (against native lease No 9111). The plaintiff is also seeking an order to extend the registration of the judgment.

45 [3] All judgments for payment of money etc. should be registered with the Registrar of Lands, and such registration shall have the effect of a caveat. The registration is done on the receipt of a copy of the judgment by the Registrar. Section 104 of the Land Transfer Act is as follows:-

50 (1) No judgment, decree or order for the payment of money, the sale of land.....shall bind, charge or affect any estate.....**unless and until the Registrar has been served with a copy of such judgment**.....and accompanied by a statement signed by any party.....specifying –

- (a) The estate sought to be affected thereby;
  - (b) The name, address and description of the person by whom....the same is lodged;
- and
- (b) An address or place....at which notices....may be served.

5 [2] The Registrar, on being served with a copy of a judgment...shall **after making the time of service**, enter the name in the register; and **with effect from the time of service thereof** upon the Registrar of such judgment....subject to the provisions of subsection (2) of s 105, **have the effect of, and be deemed to be**  
10 **a caveat** lodged under the provisions of s 106.....

[3] Upon the estate or interest in respect of which a judgment,...has been registered....having being sold pursuant to such judgment....the Registrar shall, on receiving a transfer thereof....enter a memorial of such transfer in the register; and on such entry being made the purchaser shall become the transferee and be  
15 deemed to be the registered proprietor of such estate....(emphasis added).

& (5) Not reproduced.

[4] 4. In terms of s 105 (2) of the Land Transfer Act judgment shall cease to  
20 bind any estate, unless a transfer upon a sale of such land be presented to the Registrar for registration within six months. In terms of this section the validity period of registration of judgment is six months. The winning party should execute the judgment during the validity period of the registration. The validity period is subject to extensions by court. Section 105 (2) is as follows:-

25 *very judgment, decree or order shall cease to bind...any estate....in respect of which it is registered unless a transfer upon a sale under such judgment.....shall be presented to the Registrar for registration within six months, or such extended period as the court by order made on application to it.....*

[5] 5. On 27th August 2010 judgment proper in this case was given in favour  
30 of the plaintiff against the 2nd defendant respondent for NZ\$487421.00 and interest at NZ\$67.40 per day from 23rd April 2010 to the date of payment. The judgment was lodged by the plaintiff for registration on 12th November 2010 and was registered on 4th April 2011. The date of registration reverts back to the date of lodging the application, that is 12th November, 2010. The period of validity  
35 of the registration being six months, the registration was due to expire on 12th May 2011. The plaintiff complained that she had insufficient time to sell the property as the registration was delayed due to no fault of her own. As the judgment remained unsatisfied and the property was still in the name of the 2nd defendant (now deceased), the plaintiff filed this application in the High Court of  
40 Lautoka supported by an affidavit to extend the validity period of the registration by another six months.

#### High Court Judgment of 6.5.2011

[6] 6. The learned High Court Judge stated that “*had the plaintiff lodged her*  
45 *application to register the judgment before the 2nd defendant died, the Registrar would have had the power to register it and I do not see any difficulty in granting the further six months...I have some difficulty in accepting that the Registrar has the power to register judgment once the registered proprietor dies*”. The learned Judge states thus, “*I am not convinced that sections 104 and 105 were intended*  
50 *to give priority by registration to a judgment creditor over all other creditors of the estate of a deceased registered proprietor*”.

[7] 7. The learned Judge further held that “*it is true that sub sections 3 and 4 of s 104 give priority to the judgment creditor over all other persons having unregistered estates or interests in the land, but I think it is open to argument that in the absence of any express reference to the deceased proprietors estate in those*  
5 *provisions, they do not apply once the registered proprietor dies. The judgment would have to be enforced against the estate of the deceased judgment debtor if the judgment survives.....The land is still in the deceased’s name....Therefore I think it would not be right to allow the judgment to be registered now whilst the land remains registered in the name of the deceased”.*

10 [8] 8. The learned Judge also referred to Order 15 rule 8 of the High Court Rules 1988 and said that the application should be made to join the representatives of the estate of the 2nd defendant before the judgment could be lodged for registration. The learned Judge stated that “*the Registrar had no power to register the judgment due to the demise of the judgment debtor. If the*  
15 *Registrar had no power to register the land, there would be nothing for this Court to extend”.*

[9] 9. It appears however that the learned Judge had overlooked the fact that the judgment was already registered (on 4th April 2011). This application was filed to extend the registration as the plaintiff did not have sufficient time to sell the  
20 land due to the delay in the registration.

#### **Submissions of the learned counsel for the plaintiff**

[10] The learned counsel submitted that the judgment was registered on 4th April 2011 and was valid only up to 12th May 2011. Thus plaintiff did not have  
25 enough time to sell the land. The learned counsel submitted that:

Section 104 and s 105 do not require the judgment debtor to be living at the date of registration of the judgment or at the date of its extension;

Judgment can be registered against the estate or interest of a deceased judgment debtor so long as the deceased is the registered proprietor and the requirements of  
30 s 104(1) are complied with;

Upon registration, the judgment has the effect of, and is deemed to be, a caveat lodged under the provisions of s 106 subject to any prior registered mortgage or charge;

Section 104 (4) gives statutory priority to a registered judgment over all unregistered instruments, documents or writing;

35 Registration protects the priority of the judgment pending an order for sale and transfer of the registered proprietor’s estate or interest pursuant to the judgment;

Registration can be extended under s 105 (2) for good reasons.....;

[11] The learned counsel complained that the learned Judge has taken into account irrelevant matters in reaching his decision to dismiss the plaintiff’s  
40 application. In his submissions the learned counsel mentioned the case of *Gibbs v Messer* [1891] AC 248 (PC) at 254 where Lord Watson observed that “*the main object of the Act, and the legislative scheme for the attainment of that object, appears....to be equally plain. The object is to save persons dealing with a registered proprietor from the trouble and expense of going behind the register, in order to investigate the history of their author’s title and to satisfy themselves*  
45 *of its validity”.*

[12] The learned counsel submitted that s 104 provides means for a judgment creditor to register the judgment in the Land Transfer Office against the land of a judgment debtor. By such registration the judgment creditor ‘*binds*’ such land  
50 and gives the public notice of his interest. The public must be able to rely on those registry records to determine the current status of a person’s title to land and

act prudently to protect their particular interest if proposing to engage in any transaction in respect of the land in question. The registration is for a limited time period (6 months) but the judgment creditor can, upon good reasons, seek to extend the registration if he has been unable to sell the land during that period:  
5 s 105 (2). A judgment creditor who fails to extend the registration may not be able to register the judgment a second time. There is no provision in the Act for a second registration.

[13] The learned counsel submitted that the question of whether the registered proprietor is living or dead is not material to the process of registration of the  
10 judgment. The death of the registered proprietor does not halt the operation of s 104. The section is designed for the benefit of the judgment creditor seeking to execute his judgment against the land of the judgment debtor. By the registration of his judgment, legislation permits the judgment creditor to improve his position vis a vis other unsecured creditors of the judgment debtor and to preserve his  
15 priority against subsequently registered charges on the debtor's title. The learned counsel submitted that s 104 (1) does not require any details of the judgment debtor beyond those in the register. The Registrar is not required to look beyond the register to enquire if the registered proprietor is dead or alive before entering the judgment in the register.

20 [14] The learned counsel submitted that the following matters also point to the fact that it is not necessary to go outside the register:

A sale under the judgment does not require the judgment debtor to produce his duplicate title [s 104 (5)].

25 The application to transfer the judgment is to be published and the Registrar is not required to give notice to the registered proprietor: s 104 (5) proviso.

The transfer on sale can be signed by the judgment creditor or by the Registrar of the High court as may be directed by Order for sale: s 104 (3).

Registered land of the deceased registered proprietor can be sold under the judgment: *Massey-Harris Co v Whitehead* (1923) 4 DLR 408.

30 Statutory priority is determined by the registration appearing in the register and such priority is not affected by the death of the registered proprietor: s 23.

[15] The learned counsel referred to the case of *Hall v Richards* (1961) 108 CLR 84 where Kitto J stated "*thus s 22 of the 1886 Act, while recognizing that*  
35 *a judgment creditor has not, as such, any estate or interest in the judgment debtor's land, enables the creditor effectually to forbid any disposition by the debtor which would remove the debtor's estate or interest in the land from the reach of a fi. Fa. to enforce the judgment. In this sense the caveat may be said to "bind" the land to answer a future execution*".

40 [16] The learned counsel submitted that the judgment was properly registered in accordance with s 104 of the Land Transfer Act and the extension of the registration applied for under s 105 (2) should have been granted for the good reasons shown.

45 [17] In addition to the prayer to set aside the judgment, the plaintiff is seeking to extend the registration of the judgment from 12th May 2011 to 31st December 2012, to preserve the judgment creditor's priority and to allow the judgment creditor sufficient time to obtain an order of the High Court to sell the land pursuant to the judgment. The learned counsel submitted that the judgment creditor does not have to wait for grant of administration in the estate of the  
50 deceased registered proprietor or for the transmissions by death to be registered: *Massey-Harris Co v Whitehead* (supra).

[18] The learned counsel for the defendant too was in agreement with the submissions of the learned counsel for the plaintiff. Considering the exhaustive submissions of the learned counsel for the plaintiff with whom I totally concur, I am of the view that the learned Judge has erred in dismissing the plaintiff's application. Considering the scheme of the Act, it appears that an application could be made ex-parte to register the judgment. The victor must be allowed to reap the fruits of his case. Thus I set aside the judgment dated 6th May 2011.

[19] I further order to extend the registration in terms of s 105 (2) of the Land Transfer Act up to 31.12.2012.

10 [20] **Kotigalage JA.** I agree with the reasoning and conclusions of Basnayake JA

**The orders of the Court are**

- 15 (1) Appeal allowed.  
(2) The registration of the judgment is extended up to 31.12.2012.  
(3) No costs.

*Appeal allowed.*

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