

JUSEAK PARK v REGISTRAR OF TITLES OF SUVA AND ATTORNEY-GENERAL OF FIJI (HBC0150 of 2012L)

HIGH COURT — CIVIL JURISDICTION

5 TUILEVUKA M

4, 14 December 2012

10 **Deeds and other instruments — instruments — power of attorney — declaration that power of attorney void and of no effect — not registered — real property — High Court Rules O 8, r 3 — Land Transfer Act s 119; — Property Law Act; Registration Act ss 2, 3, 4.**

15 The plaintiff executed a power of attorney appointing a certain person as his attorney. Later, he sought the Court's declaration that the power of attorney was void and of no effect in Fiji because it was not registered.

Held –

20 If a power of attorney deals with real estate, it must be registered with the Registrar of Titles under the Land Transfer Act. Otherwise, if the Power of Attorney concerns any other matter or property apart from real estate, it will be covered under the Property Law Act and the Registration Act but there is no requirement that it be registered with the Registrar of Deeds. A Deed (and Power of Attorney) not dealing with land, may be registered for the purpose of “publication, for preservation and for execution, or for one or more or all of these objects” as per s 3 of the Registration Act.

25 **Case referred to**

Ram v Lok [2011] FJHC 798; HBC320.2007, not followed.

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INTRODUCTION

30 [1] On 08 June 2012 in Fiji, the plaintiff, Juseak Park, aka Tony Park of Lot 27 Aazmat Road, Namaka, Nadi executed a power of attorney appointing Kwangseok Kim of Hyojadong, Jeollabul-do, Jeju-city, South Korea as his Attorney.

35 [2] It is this same power of attorney which Park now seeks this court to declare **“void and of no effect in Fiji and cannot be enforced”** because it has not been registered. A Notice of Originating Motion under **Order 8 Rule 3** of the **High Court Rules 1988** was filed by the law firm of Koyas on 04 December 2012 for that purpose.

40 [3] The donee, the said Kwangseok Kim of Hyojadong is not named as a party. Rather, the plaintiff names the Registrar of Titles and the Office of the Attorney-General as nominal second respondents. The affidavit in support of the application is sworn by one Kyunghwa Lee who claims to be Park's spouse.

45 [4] The allegations as detailed in Lee's affidavit are that Park had signed the Power of Attorney in question under duress from Kwangseok Kim and one Mr Jong Su Lee. Upon obtaining the power of attorney, these men then took the instrument to Nauru and used it to dispose of assets of MK Steel Ltd Inc. This company was set up by Park.

50 [5] But the allegations of duress are immaterial to the application before me. All that the plaintiff wants is some judicial pronouncement that the power of attorney concerned is **“void and of no effect in Fiji and cannot be enforced”**

because it has not been registered. Why the plaintiff seeks such judicial pronouncement is, because, apparently, there is some court proceedings happening right now in Nauru where the issue of whether or not the Power of Attorney in question is valid or not has been raised by Park.

5 [6] An unsigned letter dated 30 November 2012 from the plaintiff to SM Koya chambers perhaps encapsulates the background:

10 After the P.O.A was signed and i came back to Nauru, Mr Kwangseok Kim and Mr Jong Su Lee had filed papers in the court of Nauru on the basis of the P.O.A. and took away from me My Company MK STEEL LTD INC along with all its Assets and Equipment's (sic).

As you would recall that during that time my wife had asked your office to conduct a search on the said P.O.A. After the search was conducted by your office you had than (sic) told my wife that the said P.O.A. was not registered in Fiji and therefore it cannot be revoked in Fiji.

15 However the Court of Nauru says that the P.O.A. is valid since I had signed the papers myself in the presence of Mr Kwangseok and Mr Dorsami Naidu (Notary Public).

20 Since the Plaintiffs Mr Kim and Mr Lee have now had (sic) taken over my company and have abused it for the last 6 months by selling all MK STEEL LTD INC assets and equipment's as well as sold 13 containers full of scrap metals. The total Value of all these are AUD\$350,000.00.

Hence my Lawyer has advised me that since the P.O.A. was signed in Fiji but not registered, can the Court of Fiji give me a letter stating that the P.O.A JUSEAK PARK to KWANGSEOK KIM has been cancelled a letter from the court stating that Mr Kim has no right to take over since the P.O.A. is not registered in Fiji (sic.)

25 [7] The Office of the Attorney-General has filed an affidavit sworn by the Registrar of Titles on 07 December 2012 which deposes that the office has no record of the Power of Attorney in question.

REGISTRAR OF TITLES/REGISTRAR OF DEEDS

30 [8] The Office of the Registrar of Titles in Fiji also functions as the Registrar of Deeds pursuant to s 2 of the Registration Act (Cap 224).

[9] Section 2 of the Registration Act states as follows:

Registration of Deeds. Definition

35 All deeds made within Fiji, whether deeds *inter partes* or deed poll may be registered in the office of the Registrar of Titles who, for the purposes of the Act, shall be the Registrar of Deeds.....

[10] Section 3 of the Act states:

40 Object of Registration

Deeds may be registered for publication, for preservation and for execution, or for one or more or all of these objects.

[11] Section 4 of the Act states as follows:

45 All deeds forming titles to land which are provided for by the Land Transfer Act are registered under the provisions of that Act for preservation and publication, and no deed or title so registered requires to be again registered under the provisions of this Act.

POWER OF ATTORNEY IS A DEED

50 [12] **Halsbury's Laws of England; Fourth Edition, Page 438** defines a Power of Attorney as:

5 *An instrument conferring authority by deed is termed a power of attorney. The person conferring the authority is termed the donor of the power, and the recipient of the authority, the donee. A power of attorney is construed strictly by the courts, according to well recognized rules, regard first being had to any recitals which, showing the general object, control the general terms in the operative part of the deed.*

10 *General words used in conferring the power are construed as limited by reference to the special powers conferred, but incidental powers necessary for carrying out the authority will be implied. Thus, a power granted to the donee to manage certain property followed by general words giving him full power to do all lawful acts relating to the donor's business and affairs... does not necessarily include authority to indorse bills, for the general words are construed as having reference to managing the donors property for which indorsing bills may not be incidental or necessary...*

15 **[13]** In *Ram v Lok* [2011] FJHC 798; HBC320.2007 (9 December 2011), Mr Justice Nawana P of the Lautoka High Court cited the following from **Powers of Attorney: F Bower Alcock; London Sir Isaac Pitman & Sons, Ltd; 1935 Pg 1 and 22 respectively**

20 *'All attorneys are, in fact, agents, but all agents are not necessarily attorneys in fact. ... By attorneys, in fact, are meant persons who are acting under special power created by a deed...*

Powers of Attorney are strictly construed. This rule applies not only to the interpretation to be placed upon each individual power conferred by the instrument; it applies with equal force to the purpose which the instrument is construed to subserve from a general reading of it as a whole' (At page 22).

25 **LAND TRANSFER ACT**

[14] In Fiji, Part XVIII of the Land Transfer Act (Cap 131) deals with Power of Attorney.

PART XVIII-POWERS OF ATTORNEY *Registered proprietor may deal by attorney*

30 **118.** The registered proprietor of any land subject to the provisions of this Act, or of any estate or interest therein, may by power of attorney in the prescribed form or such other form as may be approved by the Registrar, and either in general terms or specially, authorise and appoint any person on his behalf to execute transfers of, or other dealings with, such land, estate or interest, or to sign any consent or other document required under the provisions of this Act, or to make any application to the Registrar or to any court or judge in relation thereto.

Powers of attorney to be deposited and registered

40 **119.** Every power of attorney intended to be used under the provisions of this Act, or a duplicate or certified copy thereof, verified to the satisfaction of the Registrar, shall be deposited with the Registrar who shall register the same by entering in the register to be known as the "Powers of Attorney Register" a memorandum of the particulars therein contained and of the date and hour of its deposit with him.

Revocation of power of attorney

45 **120.**-(1) The grantee of any revocable power of attorney may by notice to the Registrar in the prescribed form revoke the power of attorney either wholly or as to the land, estate or interest specified in the notice, and upon receipt of such notice the Registrar shall enter a memorial thereof in the Powers of Attorney Register and endorse a like memorial on the original, duplicate or certified copy of such power of attorney filed in his office.

50 (2) No power of attorney shall be deemed to have been revoked by reason only of a subsequent power of attorney being deposited without express notice of revocation given under the provisions of subsection (1), nor shall any such revocation take effect as to instruments executed prior to receipt of such notice by the Registrar.

(3) No power of attorney shall be deemed to have been cancelled or revoked by the bankruptcy of the grantee or by the marriage of a female grantee.

Cancellation of power of attorney

5 **121.** When the authority of the grantee of a power of attorney is determined otherwise than by notice of revocation by the grantor, the Registrar may, upon production of satisfactory evidence to that effect, enter a memorial thereof in the Powers of Attorney Register and endorse a like memorial on the original, or duplicate or certified copy of the power of attorney filed in his office.

10 **[15]** Section 119 clearly states that “(e)very power of attorney intended to be used under the provisions of this Act” shall be deposited with the Registrar “who shall register the same...”

[16] The Land Transfer Act, according to the long title, is:

15 **“AN ACT TO AMEND THE LAW RELATING TO THE TRANSFER OF LAND AND TO THE REGISTRATION OF TITLE TO LAND”**

[17] What I gather from all the above is that any Power of Attorney pertaining to the Transfer of Land and to the Registration of Title to Land must be registered.

20 **PROPERTY LAW ACT**

[18] The Property Law Act (Part XII) of Fiji also deals with Powers of Attorney. The long title to this Act simply states as follows:

25 **“AN ACT TO CONSOLIDATE AND AMEND THE LAW RELATING TO PROPERTY AND FOR INCIDENTAL AND OTHER PURPOSES”**

[19] **Part XII** states as follows:

PART XII - POWERS OF ATTORNEY

Execution by attorney in his own name

30 **114.** -(1) The donee of a power of attorney may execute or do any assurance, instrument or thing in and with his own name and signature and his own seal (where sealing is required) by the authority of the donor of the power; and every assurance, instrument and thing so executed and done shall be as effectual in law to all intents as if it had been executed or done by the donee of the power in the name and with the signature and seal of the donor thereof.

35 (2) This section shall apply to powers of attorney created by instruments executed either before or after the commencement of this Act.

Continuance until notice of death or revocation received

40 **115.**-(1) Subject to any stipulation to the contrary contained in the instrument creating a power of attorney, the power shall, so far as concerns any act or thing done or suffered thereunder in good faith, operate and continue in force until notice of the death of the donor of the power or until notice of other revocation thereof has been received by the donee of the power.

45 (2) Every act or thing within the scope of the power done or suffered in good faith by the donee of the power after such death or other revocation as aforesaid, and before notice thereof has been received by him, shall be as effectual in all respects as if that death or other revocation had not happened or been made.

50 (3) A certificate by any such attorney, to the effect that he has not received any notice or information of the revocation of the power of attorney shall, if made immediately before or if made after any such act as aforesaid, be taken to be conclusive proof of the non-revocation at the time when the act was done or suffered in favour of all persons dealing with the donee of the power in good faith and for valuable consideration without notice of such revocation.

(4) Where the donee of the power is a corporation, the certificate shall be sufficient if made by any director, manager or secretary of the corporation or by any officer thereof discharging the functions usually appertaining to any of those offices or by any officer of the corporation appointed for that purpose either generally or in the particular instance by the board of directors, council or other governing body by resolution or otherwise, and if it is to the effect that to the best of the knowledge and belief of the person making the same neither the attorney nor any servant or agent of the attorney has received any such notice or information as is mentioned in subsection (3), and where the certificate contains a statement that the person making the same is a director, manager or secretary of the corporation or is an officer of the corporation discharging the functions usually appertaining to any of those offices or is an officer of the corporation appointed for the purpose of making the certificate, that statement shall be conclusive evidence in favour of the persons mentioned in that subsection.

(5) Every certificate made under the provisions of either of subsections (3) or (4) shall be attested by a qualified witness and shall have the same force and effect as a statutory declaration and every person who knowingly and wilfully in any such certificate makes a statement false in any material particular shall be guilty of an offence and liable to imprisonment for a period not exceeding two years or to a fine not exceeding two hundred dollars or to both such fine and imprisonment.

(6) In this section the expression "qualified witness" has the same meaning as in subsection (1) of section 2 of the Land Transfer Act.
(*Cap 131.*)

(7) This section shall apply to powers of attorney created by instruments executed in or out of Fiji and whether executed before or after the commencement of this Act.
Irrevocable power of attorney for value

116.-(1) Where a power of attorney given for valuable consideration (whether executed in or out of Fiji) is in the instrument creating the power expressed to be irrevocable, then, in favour of a purchaser –

(a) the power shall not be revoked at any time, either by anything done by the donor of the power without the concurrence of the donee, or by the death, unsoundness of mind or bankruptcy of the donor; and

(b) any act done at any time by the donee of the power in pursuance of the power shall be as valid as if anything done by the donor without the concurrence of the donee, or the death, unsoundness of mind or bankruptcy of the donor, had not been done or had not happened; and

(c) neither the donee of the power nor the purchaser shall at any time be prejudicially affected by notice of anything done by the donor without the concurrence of the donee, or of the death, unsoundness of mind or bankruptcy of the donor.

(2) This section shall apply only to powers of attorney created by instruments executed either before or after the commencement of this Act.

Power of attorney made irrevocable for fixed time

117. -(1) Where a power of attorney (whether executed in or out of Fiji, and whether given for valuable consideration or not) is in the instrument creating the power expressed to be irrevocable for a fixed time therein specified, not exceeding two years from the date of the instrument, then, in favour of a purchaser –

(a) the power shall not be revoked for and during that fixed time, either by anything done by the donor of the power without the concurrence of the donee, or by the death, unsoundness of mind or bankruptcy of the donor; and

(b) any act done within that fixed time by the donee of the power in pursuance of the power shall be as valid as if anything done by the donor without the concurrence of the donee, or the death, unsoundness of mind or bankruptcy of the donor had not been done or had not happened; and

(c) neither the donee of the power nor the purchaser shall at any time be prejudicially affected by notice, either during or after that fixed time, of anything done by the donor during that fixed time without the concurrence of the donee, or of the death, unsoundness of mind or bankruptcy of the donor within that fixed time.

(2) This section shall apply only to powers of attorney created by instruments executed after the commencement of this Act.

Application to corporations

5 **118.** -(1) The provisions of this Part shall apply with the necessary modifications with respect to any power of attorney executed by any corporation to the same extent as if the corporation were a person and the dissolution of the corporation (however occurring) were the death of a person within the meaning of this Part.

(2) The provisions of subsection (1) shall not apply to a corporation which is dissolved before the commencement of this Act, but shall apply to powers of attorney created by instruments executed either before or after its commencement.

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SUMMARY

[20] A Power of Attorney is an instrument conferring authority by deed. If a Power of Attorney deals with any real estate, it must be registered with the Registrar of Titles under the provisions of the Land Transfer Act (see paras [14] to [17] above).

[21] Otherwise, if the Power of Attorney concerns any other matter or property apart from real estate, it will be covered under the Property Law Act and the Registration Act but there is no requirement that it be registered with the Registrar of Deeds. A Deed (and Power of Attorney) not dealing with land, may be registered for the purpose of **“publication, for preservation and for execution, or for one or more or all of these objects”** as per s 3 of the Registration Act (see paragraph [10] above).

[22] The above is consistent with the law in most common law jurisdictions.

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