

IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0047 OF 2007S
(High Court Civil Action No. HBC 413 of 2006)

BETWEEN:

BYEONG BAK KWON AND
EUI TAE KIM

Appellants
(Original Defendant)

AND:

PHULWATI aka FERENZA BIBI aka
PHULMATI aka FIROZA BIBI

Respondent
(Original Plaintiff)

Coram:

Devendra Pathik, JA
Izaz Khan, JA
Andrew Bruce, JA

Hearing:

Wednesday, 25 June 2008, Suva

Counsel:

B Narayan for the Appellants
S Chandra for the Respondent

Date of Judgment: Thursday, 3rd July 2008, Suva

JUDGMENT OF THE COURT

1. Phulwati aka Feroza Bibi or Phulmati aka Firoza Bibi ("Bibi") is the registered proprietor of the whole of the land in Certificate of Title No 16922 being lot 21 in DP 4050 ("property").
2. On 27th March, 2006 Bibi gave to her son Nazir Hussein a power of attorney which included the power to sell the property.

3. Due to certain conduct of Nazir Hussein, such as the withdrawal of \$2500.00 from her account without her knowledge and consent, Bibi became suspicious of his intentions regarding the use of the power of attorney.
4. She revoked the power of attorney on 24th April, 2006 and notified Nazir Hussein accordingly.
5. The revocation of the power of attorney was lodged with the Acting Registrar of Titles on 2nd May, 2006.
6. Bibi discovered that her property had been sold by Nazir Hussein and a search of unregistered dealings revealed that a transfer had been lodged for registration with the Acting Registrar General on 22nd June, 2006.
7. The transferees named on the transfer are Byeong Bak Kwon and Eui Tae Kim and the consideration is noted to be \$130,000.00.
8. Bibi has not received any monies from this sale nor any accounting from Nazir Hussein.
9. Bibi believes that monies are being held in the trust account of Messrs Lateef and Lateef who acted as solicitors for the transferees.
10. Bibi alleges that the property was sold at a gross undervalue because according to her valuer the proper market value is \$296,000.00.
11. A caveat forbidding registration of dealing with the property was lodged with the Acting Registrar of Titles on 29th August, 2006.
12. The Acting Registrar of Titles was informed by Bibi's solicitors, by letter dated 8th September, 2006 of the fact that the transfer lodged on 22nd June, 2006 in respect of the property had been procured fraudulently and without her consent and ought not be registered.

13. A writ of Summons in Civil Action 413 was filed on behalf of Bibi on 15th September, 2006 wherein she is the plaintiff and Byeong Bak Kwon and Eui Tae Kim are the first defendants, Nazir Hussein is the second defendant, Acting Registrar of Titles is the third defendant, Haroon Lateef and Caesar Lateef t/as Lateef and Lateef are the fourth defendants and the Attorney General is the fifth defendant.
14. One of the orders it sought was an order restraining all the defendants from registering the transfer lodged on 22nd June, 2006 in respect of the property.
15. His Lordship Justice Jitoko heard an application made on behalf of Bibi for an interim restraining order against the Registrar of Titles in Civil Action 413 and granted an injunction to Bibi upon the basis that there were issues to be tried and the balance of convenience favoured her. The injunction was extended by His Lordship on 12th June, 2007 when His Lordship ordered that the matter was to take its normal course.
16. A Notice of Appeal was filed on behalf of the first defendants for *inter alia* an order that the decision delivered by Justice Jitoko on 21st May, 2007 be set aside.
17. There were only two parties in this appeal. The appellants were the first defendants and the respondent was the plaintiff. This seems rather odd as the parties before the hearing for an interim injunction were all the parties named in the Writ of Summons in Civil Action 413. One wonders how an order in this action could have applied to any of the parties in Civil Action 413 except for the plaintiff.
18. The appeal was heard on 25th June, 2008 at the hearing, Ms Narayan, counsel for the appellant submitted that the appellants became the new registered proprietors from the date the Registrar of Titles accepted the transfer for registration which in this case occurred on 22nd June, 2006 and for that reason the balance of convenience was in their favour.
19. When pressed for authority to support this assertion, she was unable to provide one and submitted that such a result was supported by the procedure of registration of

titles which requires some three months from the date of the lodgement of the transfer to the time the transferee's name appeared on the Certificate of Title.

20. Counsel for the respondent, Mr Chandra submitted that the transferee did not become the registered proprietor on the lodgement and acceptance of the transfer by the Registrar of Titles. In his submissions registration only occurred when the transferee's name was endorsed on the memorial of the Certificate of Title.

21. A search of title to the property shows Bibi to be the registered proprietor and after that the only other recording of any dealing affecting the title is the caveat lodged on her behalf. Thus, the last two recordings in the memorial of the title are the name of the registered proprietor which is Bibi and the caveat.

22. If the appellant's submission were correct and they were to be regarded as the registered proprietors from the date of the Registrar's acceptance of the transfer, one may legitimately ask what would happen to the interest of the original registered proprietor, namely, Bibi.

23. Havoc would follow in the administration of titles in the Torrens system which is designed to protect the registered proprietor.

24. In the Torrens system of title, registration is the central plank upon which ownership of land is based. Section 21(1) of the *Land Transfer Act Cap 131* shows the importance of registration. It provides:

"21. – (1) Every instrument of title shall be deemed and taken to be registered under the provisions and for the purposes of this Act as soon as the same has been signed by the Registrar and marked with a serial number in the register, and every instrument purporting to transfer or in any way to affect land subject to the provisions of this Act, or any estate or interest therein, shall be deemed to be so registered as soon as a memorial thereof as herein described has been entered in the register upon the folium constituted by each existing instrument of title affected by such dealing."

25. In effect, s. 39 provides that the title of the registered proprietor is only subject to those matters recorded in the register or in the exceptions contained in paragraphs (a), (b) and (c). There are no contrary interests recorded on the register and the exceptions in paragraphs (a), (b) and (c) do not apply. Therefore, Bibi's title is unaffected by any other interest
26. Provisions such as s. 39 are regarded as giving the registered proprietor indefeasibility of title and are common in all jurisdictions where the Torrens system of title operates: for example, see s. 42(1) of the ***Real Property Act 1900 (NSW)***
27. That title is only created by registration is clear from the provisions of s. 37 which provides:
- “37. No instrument until registered in accordance with the provisions of this Act shall be effectual to create, vary, extinguish or pass any estate or interest or encumbrance in, on or over any land subject to the provisions of this Act, but upon registration the estate or interest or encumbrance shall be created, varied, extinguished or passed in the manner and subject to the covenants and conditions expressed or implied in the instrument.”***
28. If it were otherwise, the system of title administration would be thrown into utter chaos.
29. In the present case, the transfer which had been lodged for registration on 22nd June, 2006 was not signed by the registrar nor did it bear any serial number. It was not entered in the memorial.
30. At the time of the lodgement of the transfer the memorial of title to the property disclosed that the transfer by which Bibi became the registered proprietor was signed by the registrar and numbered 145035.
31. No grounds were submitted to the court upon which the appellants could impeach Bibi's registered title other than the fact that a transfer in favour of the appellants had

been lodged and accepted by the Registrar on 22nd June, 2006. This is not a valid ground upon which Bibi's title could be impugned.

32. It is unfortunate that the first defendants paid \$130,000.00 by reason of Nazir Hussein's fraud and are not able to enjoy ownership of the property. Regretably, there is invariably an innocent victim in a fraudulent scheme and in this case, they are the first defendants.

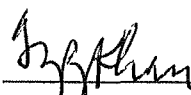
33. Be that as it may, we are of the view that Bibi's registered title enjoys the indefeasibility afforded to it by the fact of registration pursuant to the relevant provisions of the *Land Transfer Act Cap 131* and cannot be defeated by any equitable interest of the appellants arising from the unregistered transfer.

34. We dismiss the appeal and order that the appellants pay the respondent's costs.

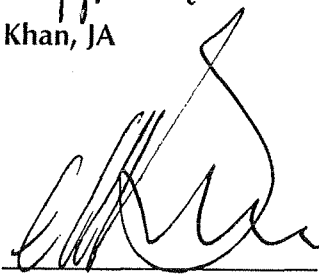


Pathik, JA





Khan, JA



Bruce, JA

Solicitors:

Lateef and Lateef, Suva for the Appellants
Maharaj Chandra and Associates, Suva for the Respondent