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

CIVIL APPEAL NOs. ABU 077 of 2019 & ABU 0022 of 2020
(Civil Action NO. HBC 347 of 2018)

BETWEEN	**:**	**JOSATEKI TAGI and THERESA ELIZABETH FIONA TAGI** ***Plaintiffs/Appellants***
AND	**:**	**REGISTRAR OF TITLES** ***1st Defendant/1st Respondent***
	:	**ATTORNEY GENERAL** ***2nd Defendant/2nd Respondent***
	:	**VIRGINIA KWONG** ***3rd Defendant/3rd Respondent***
Coram	**:**	**Basnayake JA** **Lecamwasam JA** **Dayaratne JA**
Counsel	**:**	**Mr. S. Valenitabua for the Appellant** **Ms. M. Faktaufon for the 1st and 2nd Respondents** **Mr. N. Lajendra for the 3rd Respondent**
Date of Hearing	**:**	**3 November 2022**
Date of Judgment	**:**	**25 November 2022**

JUDGMENT

Basnayake JA

[1] This is an appeal filed by the Plaintiffs/Appellants (Plaintiffs) to have the judgment of the High Court dated 22 August 2019 set aside. By this judgment the summons of the Plaintiffs dated 3 July 2019 was declined with costs.

[2] The Plaintiffs on 23 November 2017 (pgs. 75-76 of the Record of the High Court (RHC)) has made an application to the 1st Defendant/1st Respondent (1st Defendant) for a vesting order. In that the Plaintiffs stated that the Plaintiffs purchased Certificate of Title (CT) 16966 in or around 1988 and have remained in possession of the same land. The Plaintiffs stated that the adjoining land is CT 16967 and they have been in possession of the same from 1988 to date.

[3] In that application the Plaintiffs state, *"5. That there are no documents or evidence of title affecting such land in our possession or under our control other than those included in the schedule herein; 6. That save as aforesaid we are not aware of any lease, mortgage or encumbrances effecting the said land or that any person other than ourselves has any Estate Interest therein".*

[4] The 1st Defendant has responded to the above application (pg.92) in an email notifying that, *"In order to lodge a vesting order application on any title, there should not be any dealings registered on the title within 20 years".* The dealings are a mortgage that was executed by the 3rd Defendant to Bank of Hawaii (pgs. 50-56 RHC) on 17 March 1999 and discharged in January 2018 (pg. 58).

[5] Thereafter the Plaintiffs filed originating summons on 20 November 2018 seeking:

1. Whether the Plaintiffs' application for vesting order is properly before the 1st Defendant and whether they have satisfied the three elements in section 78 of the Land Transfer Act (LTA) of Fiji in :-

    (a) Continuous possession for a period of not less than twenty years.
    (b) Is such that, the applicants for vesting order would have been entitled to estate in fee simple in the land on the ground of such possession and;
    (c) The applicants could tag-on the period of possession of his or her predecessor.

[6] The 1st and the 2nd Defendant/Respondents (hereinafter referred to as the 1st Defendant) in response (pgs. 46-48) stated that the last registered proprietor of CT 16966 is Epeli Nadriubalavu and the registered proprietor of CT 16967 is Virginia Kwong (3rd Defendant/Respondent). The 1st Defendant further stated that there have been dealings on CT 16967 during the last 20 years. No 16967 had a mortgage registered on 17th March 1999 which was discharged by the 3rd Defendant in February 2018. Therefore it was clear to the Registrar of Titles (1st Defendant) that the 3rd Defendant as the last registered proprietor had a legal interest over the said land. The Plaintiffs have failed to satisfy the Registrar of Titles that for all intents and purposes they were in continuous possession for not less than 20 years.

[7] The 3rd Defendant stated that the property CT 16967 is in a residential zoning area and not agricultural. The receipt issued to the 3rd Defendant by the Nasinu Town Council vouch for this. The 3rd defendant has also annexed rates paid to Nasinu Town Council from the year 2006 to 2018 (pgs. 29 to 30) marked *"c"*. The 3rd Defendant also filed a statement made to the police in respect of a construction of a drive way on this property. The 3rd Defendant stated that she has engaged a lawyer to remove a storage yard and lovo shed that has been illegally put up in the property.

[8] The learned Judge in his judgment (pgs. 6-9) states that the Plaintiffs have not established the precondition laid down in section 78 of LTA and that the assertions in the affidavit of the Plaintiff are unsubstantiated. Further it was stated that, the alleged period of possession was not continuous as a mortgage was registered on the land on 17 March 1999. In **Bechani Golay v North End Property Development Ltd** [1989] FJCA 5[1989] 35 FLR 89 the court said that, "In order to constitute title by adverse possession the possession relied on must be for the full period. Also in **Daya Wati v Registrar of Titles** [2017] FJCA 99 (14 September 2017) it was held that the Plaintiff is required to establish adverse possession as per section 78. Hence the learned Judge held that the Plaintiff's application was rejected correctly by the 1st Defendant and declined the summons with costs.

[9] *Grounds of Appeal:*

1. *The Learned Judge erred in law and in fact in failing to hold that Section 78 of the Land Transfer Act is the correct procedure in determining whether the vesting order application should have been accepted.*

2. *The Learned Judge erred in law and in fact in failing to hold that the Plaintiff/Appellant have had uninterrupted actual control with intention to use the said land for 28 years now, without any objection from the 3rd Defendant.*

3. *The Learned Judge erred in law and in fact in holding that the Appellants' vesting order application cannot succeed because there is a recent dealing in the title and such dealing or mortgage interrupts the Appellants' continuous possession.*

4. *The Learned Judge erred in law and in fact in failing to hold that the Registrar of Titles had no legal grounds or right to refuse the Appellants' joint application for vesting order under section 78 of the Land Transfer Act.*

5. *The Learned Judge erred in law and in fact in failing to consider the Fiji Court of Appeal authority in **Hari Prasad v Mira Sami & Others** Civil Appeal No. ABU 118 of 2017 that what is required of the Appellants to show the Registrar of Titles is some tangible evidence of continuous possession for more than 20 years.*

6. *The Learned Judge erred in law and in fact in failing to consider that the Appellants' vesting order application must be considered first pursuant to the express requirements under section 78 of the Land Transfer Act which excludes dealing in the title.*

7. *The Learned Judge erred in law and in fact in failing to consider that if the Appellant's succeed in their vesting order application then the Registrar of Titles issues them with a new title ignoring all dealings in the title.*

Submission by the learned counsel for Plaintiffs

[10] The learned counsel submitted that the Plaintiffs' application for a vesting order was as per S. 78 of the LTA which require:

i. Continuous possession for a period not less than 20 years
ii. On the ground of such possession applicant would have been entitled to an estate fee simple
iii. The applicant could tag-on the period of possession of his predecessor.

[11] The learned counsel submitted that the 1st Defendant was in error in refusing to accept the Plaintiffs' application for a vesting order on the ground that there was a dealing registered on the title for the past 20 years. The learned counsel relied on the judgment of **Wati v Registrar of Titles** (ABU 6 of 2016) (14 September 2017) and **Prasad v Sami & Others [2019]** FJCA 100 (7 June 2019). However I find that the facts in these two cases are different. In both these cases there were no dealings with the land unlike in the present case where a mortgage has been registered and discharged. It was this mortgage and the discharge that the 1st defendant has referred to as dealings and considered as an interruption. The Plaintiffs claim possession from 1988. However a mortgage has been registered with the 1st Defendant in 1999. That was with Bank of Hawaii. Later the business of Bank of Hawaii was taken over by the Australian and New Zealand Bank (ANZ) who discharged the mortgage in 2018. The Plaintiff does not show any adverse claim against the Bank.

Submission of the learned counsel for the 3rd Defendant

[12] The learned counsel submitted that although the learned counsel for the Plaintiffs submitted that the existence of a mortgage is immaterial, the Plaintiffs state in the application for a vesting order (pgs. 75-76) in paragraphs 5 and 6 that, *"there are no documents or evidence of title affecting such land in our possession or under our control other than those included in the schedule herein and that save as aforesaid we are not*

aware of any lease, mortgage or encumbrance affecting the said land or that any person other than ourselves has any Estate interest therein" (emphasis added).

[13] The learned counsel for the 3rd Defendant submitted that the Plaintiffs have omitted paragraph 3 of Form 13 for the application for a vesting order. Section 3 of Form 13 states, that, *"there are no leases, mortgages or encumbrances registered on the abovementioned title save and except the following (set out short particulars and state whether these leases, mortgages and encumbrances have been extinguished or ceased to affect the land and, if so, how"*.) The learned counsel submitted that at the bottom of the Plaintiff's application for a Vesting Order inviting information for any *"MEMORANDUM OF PRIOR LEASES, MORTGAGAES AND ENCUMBRANCES REFERRED TO*:" has been left blank. The Plaintiffs avoided answering and decided to leave it blank. The Plaintiffs did not deny the existence of such mortgages or encumbrances.

[14] As against this the 1st Defendant found a mortgage registered in the Register in the year 1999, which mortgage was discharged in 2018. Therefore on their own declaration the Plaintiffs cannot maintain this application. When the 1st Defendant was told that there is no mortgage registered against this land and when the 1st Defendant found such registration what could the 1st Defendant as Registrar of Titles do other than rejecting such dubious application? The learned counsel also submitted that the Plaintiffs made no effort in court to produce evidence of possession. If the Plaintiffs claimed that this land was possessed through cultivation then the question would have been how it could be done being a residential property where rates have been paid to Nasinu Town Council by the 3rd Defendant.

Adverse Possession

[15] As per the facts of this case it becomes clear that the Plaintiffs have been claiming title to the adjoining land registered under the name of the 3rd Defendant. The Plaintiffs claim that, they got title to CT 16966 in 1988 and ever since that they have been in possession

of the adjoining land, which is CT 16967. The plaintiffs state that the possession was through cultivation of cassava and vegetation, and having a lovo pit on the earth of this property. The Plaintiffs also said that they were holding weddings and parties in the land in order to claim title under section 78 of the LT Act. However the 1st Defendant who is the Registrar of Title found that this land is registered in the name of the 3rd Defendant who has mortgaged this land in 1999 to Hawaii Bank and that there is no continuous possession. The learned Judge relied on the principle of adverse possession and having declared that the Plaintiffs failed to prove adverse possession declined the reliefs claimed by the Plaintiff.

[16] I would like to mention some authorities from the Supreme Court of Sri Lanka which may give some guidance. In ***De Silva vs. Commissioner General of Inland Revenue*** ***(80 New Law Reports (NLR) 292)*** Sharvananda J. held that where a person who bases his title in adverse possession must show by clear and unequivocal evidence that his possession **was hostile to the real owner and amounted to a denial of his title to the property claimed**. In ***Kiri Hamy Muhandirama vs. Dingiri Appu*** ***(6 NLR 197)*** Moncrieff J. decided that in order that a person may avail himself of section 3 of the Prescription Ordinance No. 22 of 1871, the possession must be shown from which a right in another person cannot be fairly or naturally inferred.

Don Peter Ranasinghe vs. Nandasekera ***(SC Appeal 33/ 2010 (Supreme Court Appeal No. 33 of 2010)).***

To activate the provision of law… demonstration of an overt act is fundamental."

[17] In this case the Plaintiffs claim in their application before the 1st Defendant that they were not aware of the existence of a mortgage. The existence of a mortgage is found in the register maintained by the 1st Defendant. The Plaintiffs did not have a permanent cultivation or structure built to challenge the ownership of the true owner the 3rd Defendant. 20 years continuous possession should be possession adverse to the ownership of the true owner. A secret intention to possess cannot be considered as amounting to adverse possession and is insufficient to satisfy the ingredients required by law.

[18] Considering the above authorities I am of the view that the Plaintiffs/Appellants cannot succeed and the appeal shall be dismissed with costs in a sum of $7500.00 payable to the 1st, 2nd and 3rd Defendants/Respondents in equal amounts ($2,500.00 each) within a period of 28 days from the date of this judgment. The grounds of appeal are answered cumulatively in the negative.

Lecamwasam, JA

[19] I agree with reasons given and conclusions arrived at by Basnayake, JA.

Dayaratne, JA

[20] Having read the judgment in draft of Basnayake JA, I agree with the reasons and conclusions.

Orders of Court:

1. *The appeal is dismissed.*
2. *Costs in a sum of $7500.00 payable to the 1st, 2nd and 3rd Respondents in equal share ($2500 x 3) within 28 days from the date of this judgment.*

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Hon. Justice Eric Basnayake
JUSTICE OF APPEAL

COURT OF APPEAL FIJI

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Hon. Justice S. Lecamwasam
JUSTICE OF APPEAL

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Hon. Justice V. Dayaratne
JUSTICE OF APPEAL