IN THE HIGH COURT OF FIJI
(WESTERN DIVISION) AT LAUTOKA

Civil Action No. 193 of 2012

BETWEEN : **MAINA WATI** of New Zealand, Businesswoman as the Intended Beneficiary of the Estate of Ravindra Narayan.

PLAINTIFF

AND : **ANIL KUMAR RAO** of Malolo, Nadi, a Travel Agent.

FIRST DEFENDANT

AND : **DIRECTOR OF LANDS**, Government Buildings, Suva.

SECOND DEFENDANT

AND : **REGISTRAR OF TITLES**

THIRD DEFENDANT

AND : **ATTORNEY-GENERAL OF FIJI**, Attorney-General's Chambers, Suva.

FOURTH DEFENDANT

Counsel : Mr. Anil J Singh for the Plaintiff
Mr. Roopesh Singh for the 1st Defendant

RULING

INTRODUCTION

[1]. In this case, I had granted an injunction *ex-parte* in favour of the plaintiff, Ms Maina Wati (**"Wati"**), to restrain the 1st defendant, Anil Kumar Rao (**"Rao"**), from selling, assigning, transferring or in any way dealing with Crown Lease No. 15819 (**"property"**). Wati is one of two surviving issues of the late Ravindra Narayan (**"Narayan"**) and also the intended executrix and trustee of the estate of the said Narayan (I have issues with her purported locus in this regard which I discuss below). She lives and works in New Zealand. The other surviving issue is one Maya who is the elder of the two sisters but who is not involved in this action.

[2]. Rao is the husband of one Kajal aka Mala aka Monisha (**"Monisha"**) who is/was the stepdaughter of Narayan. Narayan died on 06 July 2011. Narayan was the original owner of the property in question.

[3]. I have to, now, determine, having heard both counsel *inter-partes*, whether to extend the *ex-parte* injunction granted earlier as an interim injunction. At this *inter-partes* stage, the onus is still on Wati to convince this Court that the injunction should continue (see Fiji Court of Appeal Ruling in **Westpac Banking Corporation v Prasad** [1999] FJCA 2; [1999] 45 FLR 1 (8 January 1999)[21]; **Whittaker v National Bank of Fiji Ltd** [2009] FJHC 275; HBC155.2009L (9 December 2009). To succeed in this regard, Wati must establish (i) that there are serious issues to be tried (ii) that damages would not be adequate and (iii) that the balance of convenience lies in favour of granting an interim injunction. The test is that which Lord Diplock formulated in **American Cyanamid** as follows:

> The Court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.
> So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.

[4]. I caution myself that I need not assess where the preponderance of evidence might lie from the affidavits before me, if there is a clash of evidence. All I need do is look at the whole case and have regard to the relative strength of the claim as well as the defence before deciding what is best done (as per Lord Denning at 396 in **Hubbard & Another v Vesper & Another** [1972] EWCA Civ 9; (1972) 2 WLR 389 cited in

<u>Vivrass Development Ltd v Fiji National Provident Fund</u> [2001] FJHC 303; [2001] 1 FLR 260 (10 August 2001).

<u>BACKGROUND</u>

[5]. On 7 October 2005, the said land was, purportedly transferred by Narayan to Rao, his step-son in law. It is alleged in the pleadings as well as in the affidavit of Rameshwar Dutt ("**Dutt**") filed for and on behalf of Wati that Rao had actually forged the signature of Narayan on the transfer document. To support that allegation, Dutt's affidavit makes the following further allegations:

(i) the property in question has a market value somewhere around the vicinity of $200,000-00 (two hundred thousand dollars). The land however was transferred without any money paid to Narayan (I note that there is no evidence before me of the said purported market value).

(ii) although, the transfer document states that the consideration price was $8,000, Rao actually did not pay a single cent to Narayan (Rao admits this in his affidavit, but says it was part of the arrangement that Narayan suggested).

(iii) Rao was able to carry out his fraudulent scheme after taking advantage of Narayan's poor health and frame of mind. From the year 2000, Narayan had deteriorated rapidly in health as a result of a combination of various conditions he was suffering such as diabetes, hypertension and arthritis.

I note that there is no medical evidence before me that Narayan suffered any such condition. Rao, and Narayan's surviving spouse,

namely Kamla Wati (**"Kamla"**) both refute the allegation that Narayan was of poor health. They depose that Narayan continued to hold a job years after the transfer and even travelled alone to New Zealand some time after).

(iv) from the year 2002, Narayan's legs were swollen most of the time. Because of this, he could not walk properly and required assistance to get up and move about the house or to go to the bathroom. By 2004, Narayan's condition had worsened. His hands had gotten very weak and were often shaking. He experienced difficulty in executing any documents and progressively suffered a tremor. His vision was very poor.

These are all denied by Rao and Kamla. There is, exhibited to Rao's affidavit, an affidavit sworn by Kamla Wati. Kamla Wati denies that Narayan had suffered the medical conditions alleged by Wati or that Narayan's judgment was impaired in any way as hinted by Wati. Kamla Wati also deposes that Narayan had worked as security guard until 2008 and would walk to and from work. Kamla Wati deposes that it was hers and Narayan's decision that the property in question be transferred to Rao.

Rao also annexes to his affidavit a letter from Universal Production Company Limited confirming that Narayan had worked as a security guard from 2004 to 2008. He also states that in March 2008, Narayan had travelled alone to New Zealand and was fit and healthy at all material times.

(v) for some twenty (20) years or so, Narayan sought and took her advice in respect of his finances and also on business matters. She

supported Narayan during this time morally and financially and would send him $200 per month from New Zealand. At no time whatsoever, did Narayan ever consider selling the property. This, he had confirmed to her and to his younger brother, Ram Bahadur Singh, on several occasions. Narayan, in fact, did receive several offers to purchase the property. These offers were all above the sum of $200,000. But he would not sell as he always intended to develop the property.

On these, Rao deposes that he, his wife Monisha, and mother in law Kamla, all lived with Narayan in Fiji. Wati, on the other hand, lived her own life in New Zealand.

In his submissions, counsel for the defendant would argue that the above depositions are all made by Dutt in the first person as if he had first-hand knowledge of all that without stating his source(s). None of these depositions are made by Wati, nor is Wati stated to be the source of any such knowledge.

(vi) Rao had prepared the transfer document for a consideration of $8,000-00 (eight thousand dollars) and had forged the signature of Narayan on the transfer document. The document was witnessed by one M Y Khan, a Justice of the Peace. Wati alleges that no consideration was ever paid for the transfer.

I observe from the affidavits filed that the said MY Khan (JP) is now deceased. Furthermore, there is nothing to suggest that a complaint was ever lodged by Wati to the Police concerning the alleged forgery. Had one been made, and had an investigation been pending, that would, at the very least, have said something about

the seriousness with which Wati (or is it Dutt?) treats her (his?) own suspicions.

DISCUSSION

[6]. At *ex-parte* stage, it did seem to me at first glance that there was a serious issue of fraud to be tried. The theory behind the plaintiff's case has such emotive force (elderly, frail, invalid and sickly father – could not bequeath his biological daughters their rightful inheritance because of the fraudulent deeds of his wicked step-son in law who obviously colluded with the just-as-wicked step daughter). With the benefit of considered argument, I have a whole new perspective of the scheme of things.

[7]. Firstly, the transfer in question happened in the year 2005. Narayan died some six years later in 2011. The plaintiff tries to paint a picture depicting Narayan as sickly and frail and who lacked judgment by reason of his medical condition as well as his age. But there is evidence by the defendant that tends to show that Narayan was perfectly of sound mind and was in fact working up until the year 2008. He even travelled alone to New Zealand sometime after the transfer was made. Why the plaintiff would wait until the year 2012, a year after the death of Narayan, to question the transfer, is something I have asked myself repeatedly as I try to ponder the bona fides of the plaintiff's case. The fact that the JP who witnessed the transfer in question, is long deceased, does not work make it harder for Rao to disprove fraud. Rather, it makes it raises the bar even higher for Wati who bears the onus of proving it.

[8]. Wati's claim is also premised on the allegation that the late Narayan never intended to sell that land to anyone but to secure it on the benefit of his

children. The only person who can shed light conclusively on the issue is the now deceased Narayan. If Narayan had wished to secure the property solely for the benefit of his two surviving biological children, of which Wati is one, he would have had to devise the property to them by a Last Will and Testament. The fact that he left no Last Will and Testament means that his surviving widow, Kamla Wati, would stand to inherit the greatest portion from the estate. But not only that, if there was no Will (which I believe is the case since there is no mention of it in any of the affidavits filed or in any pleading) Kamla Wati, as the surviving lawful spouse, would have priority above any other in her entitlement to apply for Letters of Administration.

[9]. **Section 6(1)(c)** of the Succession Act as amended by section 3 of the **Succession, Probate and Administration (Amendment) Act 2004**[2] provides as follows:

> **6.**-(1) Subject to the provisions of Part II[3], the administrator on intestacy ..... shall hold the property as to which a person dies intestate ...... on trust to distribute the same as follows:
> (a) if the intestate leaves a wife, or husband, without issue, the surviving wife or husband shall take the whole of the estate absolutely, and-
> (b) ....
> (c) if the intestate leaves issue, the surviving wife or husband shall, take the prescribed amount and the personal chattels and one third only of the residuary estate absolutely, and the issue shall take per stripes and not per capita the remaining two-thirds of the residuary estate absolutely; (my emphasis)
> (d) if the intestate leaves issue, but no wife or husband, the issue of the intestate shall take *per stirpes* and not *per capita* the whole estate of the intestate absolutely;
> (e) ....
> (f) if the intestate leaves no issue, but one parent only then, subject to the interests of a surviving wife or husband, the surviving father or mother shall take the residuary estate of the intestate absolutely;
> (g) ....
> (h) if the intestate leaves no husband or wife and no issue or parents, then the brothers and sisters of the whole blood, and the children of deceased brothers and sisters of the whole blood of the intestate shall take the whole estate of the intestate absolutely in equal shares, such children taking *per stirpes* and not *per capita*;

[10]. The **"prescribed amount"** in terms of **section 6(1) (c)** as amended by section 3(c) of the Succession, Probate and Administration (Amendment) Act (No. 11 of 2004) is $20,000. Hence, applying the above, and supposing the property was valued at $200,000 as Wati alleges, Kamla Wati would stand to inherit much more than Wati. But if the value of the property is $20,000 or below, Kamla Wati would stand to inherit all of it anyway as it would be within the "prescribed amount. The point is, that Kamla Wati, who has substantive interest in the Narayan estate, is supportive of Rao's case. *Yes!*, it is arguable that Kamla Wati could be driven by the desire to deprive Narayan's biological daughters of any share in the estate (even if they are smaller than hers), hence, the transfer to Rao, but that is irrelevant, as the issue is essentially about whether Narayan did or did not transfer the property to Rao, which, as stated above, will be hard to prove. If Kamla Wati persuaded Narayan it does not prove fraud.

[11]. Secondly, and flowing from the above, I have doubts about whether or not Wati really does have locus to be bringing this case to Court in the purported capacity of **"intended executrix/trustee"**. True, it is perfectly all right for a litigant to sue as intended executor/trustee before probate of his testator's Will is granted. After all, unlike an administrator who derives his title to sue from the grant of letters of administration, the executor derives his legal title to sue from his testator's will (**Ingall v Moran** [1944] 1 AER 97) and not from the grant of probate, hence, the right to sue accruing upon the death of the testator. In this case, as I have stated above, nowhere in the pleadings or in any affidavit is a Last Will

and Testament mentioned. Accordingly, I have serious misgivings about how Wati could possibly derive any locus to sue in the purported capacity of **"intended executrix/trustee"**.

[12]. Thirdly, Rao had deposed in paragraph 14.11 of his affidavit that **"the deponent** (i.e. Dutt) **has personal issues with me, in 2006 when we first started to build and renovate the dwelling on the said land, came to the said land was aware of the improvements being carried out by my father in law and I. He was also aware that my father in law had transferred the said land to me at that time"**.

[13]. That he had been aware in 2006 of the said transfer, is not denied by Dutt. Instead, Dutt merely re-asserts that Narayan had no intention of selling the land. By that response, it can safely be assumed Dutt was always aware of the transfer. The failure of Wati to file an affidavit of her own to clarify her knowledge (or lack of it) at all material times, is unfortunate for her. In fact, I am beginning to wonder whether Wati or Dutt is really driving this case!

[14]. Fourthly, Wati describes herself in the intituling of her Writ as **"the intended Executrix and Trustee of the Estate of Ravindra Narayan".** However, in the documents filed for and on her behalf after I had granted the *ex-parte* injunction, she describes herself as **"the intended beneficiary".** This, she does without having obtained leave to amend the initituling and/or explain to this court why she is changing her locus and capacity as such. As stated above, I imagine that, if Narayan did leave a Will naming Wati as executor/trustee thereof, and if the said Will does make provisions therein as to how the property in question is to

be devised, then, undoubtedly, Wati would be referring to the said Will (and provision) in her claim and in the affidavits filed. She makes no such reference. The writ, I am of the view, would be bad *ab initio* if there was no such Will. And I find Wati's (or is it Dutt's) conduct rather underhanded. In fact, I was misled by it. And I am not inclined to give her the benefit of that doubt in the circumstances of this case.

[15]. Fifthly, Dutt's affidavit filed in support of Wati's application seems to contain a lot of hearsay evidence. I agree with the submissions of Mr. Roopesh Singh that the affidavit offends most of the rules applicable under the High Court Rules 1988. That no consideration was ever paid to Narayan is confirmed by Rao. Rao however deposes in his affidavit that the transfer to him was actually insisted upon by Narayan himself. Narayan was the one who took him to the JP in question to witness the execution of signature on the transfer document. According to Rao, Narayan was the one who had insisted on putting the sum of $8,000 as purported consideration on the transfer document so as "to make things easier", even though, he (Narayan) was gifting the said land to Rao.

[16]. Sixthly, it appears that there is a mortgage on the land in question to the ANZ Bank. The injunctive Orders in place only affects Anil Kumar Rao. The Bank was not a party to this matter and the injunctive Orders does not affect its rights as mortgagee, and I assume that the Bank is a bona fide mortgagee. But having said that, it is not clear to me whether Rao did obtain the mortgage on the property before or after the injunctive Orders were put in place. If he did so after the injunctive Orders were put in place, then his actions may well be contemptuous. But that, is a separate

issue which, in no way, prejudices the bank's position as a *bona fide* mortgagee nor does it add strength to Wati's case.

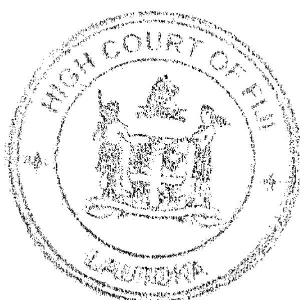
[17]. Seventhly, no undertaking as to damages is at all given by Wati. In **Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd ABU 11 of 2004**, the Fiji Court of Appeal reiterated that applicants for interim injunctions who offer an undertaking as to damages should always proffer sufficient evidence of their financial position. In this case, an undertaking is given in this case by Dutt who purports to have the authority of Wati to swear the affidavits filed in this case for and on behalf of the plaintiff.

[18]. Eighthly, the authority that Dutt has from Wati is dubious. It is a letter dated 30 December 2011 (9 months prior to the action instituted) and includes a general statement purporting to give Dutt an authority to fight for the deceased's estate. Whether Maina Wati has that authority to give is questionable. There is no evidence before me that she is the personal representative of the Narayan estate.

CONCLUSION

[19]. For all the above reasons, I refuse to extend the injunction.

[20]. I summarily assess costs in favour of the first defendant in the sum of $1,000-00 (one thousand dollars) only. Matter to take normal course.



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Anare Tuilevuka
JUDGE
30 June 2014