

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 82 of 2015

BETWEEN : **KAMLESHAN SAMI MUDALIAR**
PLAINTIFF/APPLICANT

AND : **PUSHPA MUDALIAR aka PUSHPA WATI DEVI**
DEFENDANT/RESPONDENT

BEFORE : **Hon. Justice Kamal Kumar**

COUNSEL : **Mr S. Singh for the Plaintiff/Applicant**
: **Mr S. Sharma for the Defendant/Respondent**

DATE OF HEARING : **12 May 2015**

DATE OF JUDGMENT : **28 June 2016**

RULING

(Application for Extension of Caveat)

1.0 Introduction

1.1 On 5 February 2015, Plaintiff (hereinafter referred to as **“the Applicant”**) filed Writ of Summons with Indorsement and Summons seeking following Orders:-

“A. That the Caveat No. 763056 dated 16 April 2010 lodged by the Plaintiff against the title to the land comprised in Crown Lease No. 1777 being Lot 5 Wainibuku Subdivision with the Registrar of Titles, the land of the Defendant as to one half share and beneficially owned by the Defendant as to the other half share, be extended beyond the 21 day period mentioned in the Notice dated 12 January 2015 issued by the Registrar of Titles for the removal of the said Caveat and received by the Post Office on 22 January 2015.

B. Further or alternatively, for an interim injunction restraining the Defendant whether by her servants, agents or howsoever from dealing with the property comprised and described in Crown Lease No. 1777 being Lot 5 Wainibuku Subdivision until further orders of this Court.

C. The time for service of this Summons be abridged.

D. That the Defendant pays the costs of and occasioned by this Application.”
(“the Application”)

1.2 On 10 February 2015, being the returnable date of the Application, Interim Orders in respect to prayers A and B of the Application was made, and the Court directed that all documents be served on Defendant’s Attorney and also directed parties to file Affidavits. The Application was adjourned to 12 March 2015, for mention.

1.3 On 12 March 2015, parties were directed to file Submissions, Statement of Claim, Statement of Defence and Counter-claim and Reply to Defence and

Defence to Counter-claim and the Application was adjourned to 12 May 2015 at 2.30pm, for hearing.

1.4 Both parties filed Submissions and on 12 May 2015, made Oral Submissions. Counsel for the parties mostly relied on Submissions filed. After hearing Oral Submissions the Application was adjourned for Ruling on Notice.

1.5 Following Affidavits were filed by the parties:-

For Applicant

1. Affidavit in Support of Applicant sworn on 4 February 2015, and filed on 5 February 2015 ("**Applicant's 1st Affidavit**").
2. Affidavit in Reply of Plaintiff sworn and filed on 11 March 2015, ("**Plaintiff's 2nd Affidavit**").

For Respondent

Affidavit in Opposition of Respondent sworn on 1 March 2015 and filed on 2 March 2015 ("**Respondent's Affidavit**");

2.0 Background Facts

- 2.1 Late Muniamma was the registered lessee of all that property known as Lot 5 Wainibuku Subdivision in the Tikina of Suva Province of Rewa containing three (3) perches comprised and described in Crown Lease No. 1777 (hereinafter referred to as "**the subject property**").
- 2.2 The Applicant and Defendant's husband, the late Raman Sami Mudaliar were lawful children of Muniamma and Rama Sami Mudaliar.

- 2.3 In 1973, the subject property was mortgaged to Housing Authority.
- 2.4 On 22 January 1984, the Respondent married Raman Sami Mudaliar the youngest son of Rama Sami Mudaliar.
- 2.5 Until 1982 (as per Respondent's evidence) or 1986 (as per Applicant's evidence), the Applicant and his family resided on the subject property with Applicant's parents Respondent and her husband.
- 2.6 In or about 1982 or 1986, the Applicant moved out of the subject property with his family due to a family dispute.
- 2.7 In 1984, the said Rama Sami Mudaliar, Applicant's father and Respondent's father in law retired.
- 2.8 In 1991, the said Rama Sami Mudaliar and Muniamma migrated to Canada.
- 2.9 In 1996, the subject property was transferred to the Respondent by the said Muniamma for consideration sum of forty-five thousand dollars (\$45,000.00).
- 2.10 In 1996, the Respondent was an employee of Fiji National Provident Fund (**FNPF**) and obtained a loan of forty-five thousand dollars (\$45,000.00) to pay consideration sum for the transfer, which was repaid by direct deduction from Respondent's salary until February 1999.
- 2.11 The Respondent is the registered owner of motor vehicle Registration No. DF 542 which until 14 April 2010, had the benefit of Taxi Permit No. 384.
- 2.12 In 2007, Raman Sami Mudaliar, Respondent's husband became ill and on 30 March 2008, he passed away.
- 2.13 On 14 April 2010, the Defendant surrendered the Taxi Permit No. 384.

3.0 Application to Extend/Remove Caveat

3.1 Section 106 of the Land Transfer Act Cap 131 provides:

“Any person-

(a) claiming to be entitled or to be beneficially interested in any land subject to the provisions of this Act, or any estate or interest therein by virtue of any unregistered agreement or other instrument or transmission, or of any trust expressed or implied, or otherwise howsoever; or

(b) transferring any land subject to the provision of this Act, or any estate or interest therein, to any other person to be held in trust,

may at any time lodge with the Registrar a caveat in the prescribed form, forbidding the registration of any person as transferee or proprietor of and of any instrument affecting, such estate or interest either absolutely or unless such instrument be expressed to be subject to the claim of the caveator as may be required in such caveat.”

3.2 In Cambridge Credit (Fiji) Limited v. W.F.G Limited 21 FLR 182 Fiji Court of Appeal at page 184 sets out the requirements to be satisfied by a caveator to come within the provisions of Section 106 of Land Transfer Act Cap 131 as follows:-

“(1) That it is a person claiming to be entitled to or to be beneficially interested in any land estate or interest under the Act; and

(2) That is it so claiming by virtue of any unregistered agreement or other instrument or transmission or any trust expressed or implied or otherwise howsoever."

Court of Appeal in **Cambridge's** case also adopted with approval following comments of his Lordship Stout C.J. in **Staples & Co. v. Corby and District Land Registrar** [1901] 19 N.Z.L.R. 517 whilst dealing with provisions in Land Transfer Act (NZ) similar to s106.

"Before a person can caveat under this section he must be a person who claims to be entitled to the land, or any estate or interest in the land, or to be 'beneficially interested' in the land, or in any estate or interest in the land, and the person in either event must claim 'by virtue of any unregistered agreement, or other 'instrument or transmission' ('transmission' meaning acquirement by title or estate consequent on death, will, intestacy, bankruptcy, &c.), 'or of any trust expressed or implied, or otherwise howsoever.'"

3.3 The above principle was applied and adopted in **Hussein v. Ali** [2013] FJHC 285, Civil Action No. 328 of 2012 [7 June 2013]; **Savitri v. Veni** [2014] Civil Action No. HBM 106 of 2013.

3.4 It is therefore imperative that Plaintiffs should show some form of legal or beneficial interest in the subject land to be able to maintain the Caveat.

3.5 Applicant in his Affidavit in Support alleges that sometime in 1998, Respondent and her late husband approached Applicant and made following representations:-

"(a) They wanted me and my family to reside in the said property;

(b) They wanted me to pay off the FNPF loan;

- (c) *They owned a taxi business and wanted me to operate that as well;*
- (d) *I was to clear off the FNPF debt and they will assist me to do so when they could and when the property was clear of debt, the said property will be transferred to me.*
- (e) *I was to repair and maintain the property and pay all rent to the Director of Lands.*
- (f) *If my brother and the Defendant could not settle in USA, they would come back to Fiji to live with me."*

3.6 Applicant further states that he made payments to FNPF totaling more than fifty two thousand dollars (\$52,000.00) and invested all his life savings on the subject property.

3.7 The Respondent in the Affidavit in Opposition filed by her states as follows:-

- (i) The Applicant moved out of the subject property with his family in the year 1982;
- (ii) In 1984, she married Raman Sami Mudaliar the youngest son of Rama Sami Mudaliar and Muniamma;
- (iii) In 1984, her father in law Rama Sami Mudaliar was retired and her husband and her made loan repayments to Housing Authority from 1984;
- (iv) The Respondent was employed by FNPF until 1999;
- (v) In 1996, Muniamma (Respondent's mother-in-law) transferred the subject property to the Respondent for consideration sum of \$45,000.00 which sum Respondent borrowed from FNPF and was secured by mortgage over the subject property;
- (vi) The Respondent in 1993, purchased Taxi Registration No. DF542 with Taxi Permit No. T384 which Taxi had its base at Waimanu Road, Suva;

- (vii) The Taxi was driven by driver on contract and her net income was \$200.00 per week;
- (viii) In early 1998, Respondent and her late husband received migration visa to USA;
- (ix) In 1999, the Respondent and her late husband decided to migrate and at her late husband's request they decided to let the Applicant occupy the subject property free of rental and operate their taxi business on the condition that:-
 - (a) Applicant make loan repayment of \$400.00 per month to FNPF from taxi income of \$800.00 per month;
 - (b) Applicant pay all outgoings, town rates and lease rental and maintain the subject property from balance taxi income of \$400.00 per month.
- (x) Respondent and her late husband informed Applicant that if they decide to return to Fiji and reside on the subject property or sell it they would give Applicant reasonable notice to vacate the subject property;
- (xi) Respondent and her late husband sent money to Applicant to pay for outgoings and make loan repayments to FNPF as requested by Applicant;
- (xii) Respondent's husband passed away on 30 March 2008;
- (xiii) In early 2010, Respondent was informed by FNPF that her loan repayments were not being made to her loan account and it would sell the subject property under its Mortgage;
- (xiv) In April 2010, she came to Fiji with money from her personal savings in USA and paid off balance loan of \$22,425.90 to FNPF;
- (xv) Respondent then told Applicant that she wanted to sell the subject property, and she was informed by the Applicant that he would think about it and revert back;
- (xvi) On 16 April 2010, whilst Respondent was living at the subject property Applicant:-
 - (a) handed her a Sale and Purchase Agreement in respect to the subject property between Applicant and Respondent; which had purchase price of \$150,000.00 with an acknowledgement of deposit of \$50,000.00;

- (b) The Respondent after receiving the Agreement refused to sign;
 - (c) The Applicant then informed Respondent that he will only pay her \$80,000.00 and that the purchase price of \$150,000.00 was in the Agreement for Applicant to obtain loan from the Bank;
 - (d) The Respondent informed Applicant, that she will not sign the Agreement, and if Applicant wanted to purchase the subject property then she would sell to him for \$300,000.00 which was near the estimated market value.
- (xvii) After the above incident the Respondent and her Attorney were refused entry on the subject property by the Applicant.

3.8 The Applicant in Applicant's 2nd Affidavit states that the taxi income was not \$200.00 net per week and that he paid for repairs and maintenance to the building on the subject property and fitness charges for the taxi from his own income.

3.9 In respect to what Respondent stated about the Sale and Purchase Agreement, Applicant denied what is stated by the Respondent and had "put her on strict proof."

3.10 Before I proceed any further I must state in very clear terms that in a civil proceeding the standard of proof is on balance of probabilities and not strict proof.

3.11 Legal practitioners and parties should take note of this as part of pleadings may be struck out if parties continue to generally deny the allegations and put the other party to strict proof. Such denial may be struck out for abuse of court process.

3.12 Respondent by her Counsel, submitted that the Applicant failed to comply with section 107 of the Land Transfer Act Cap 131 ("**LTA**") by failing to "**state with sufficient certainty the nature of the estate or interest claimed and how estate or interest is derived**".

3.13 Section 107 of LTA provides as follows:-

“107. Every caveat shall state the name, address and description of the person by whom or on whose behalf the same is lodged and, except in the case of a caveat lodged by order of the court or by the Registrar, shall be signed by the caveator or his agent and attested by a qualified witness and shall state with sufficient certainty the nature of the estate or interest claimed and how such estate or interest is derived.”

3.14 In ***New Zealand Mortgage Guarantee Co. Ltd v. Pye*** [1979] 2 NZLR 188 His Lordship Justice Vautier stated as follows:-

“A perusal of the Australian decisions to which I have referred shows that there are a substantial number to be found to support the view that a caveator who fails to comply fully with the statutory requirements and fails to state accurately the nature of the interest which he claims by his caveat will not succeed in securing the assistance of the Court to maintain such a caveat. An early case of this kind is *Palmer v Wiley* (1906) 23 WN (NSW) 90. The Real Property Act 1900, s 72, required a caveator to state “the nature of the estate or interest claimed and the facts upon which the claim is founded”. The caveat claimed “estate or interest by reason of and under and by virtue of a memorandum of agreement made between” S J Palmer and the caveator and another person in the land described. S J Palmer was the registered proprietor of the land. it was held that the caveat was defective in not specifying the estate or interest which the caveator claimed and the facts upon which the claim was founded and an application to extend the caveat was dismissed.”

The Court refused to extend the Caveat on the grounds that the interest of Caveator intended to protect was not properly described.

3.15 In **Bahadur Ali v. Fiji Development Bank** [2005] ABU 57 of 2004 Caveat (18 March 2005) the Caveator stated his interest in the Caveat as follows:-

“an interest or estate as equitable owner by virtue of making contributions towards Valebasoga Tropikboards Limited through buildings and improvements in the land.”

However, when the Respondent (Fiji Development Bank) applied to remove caveat lodged by the Applicant, he claimed interest under Deed of Family Arrangement signed by him, the Respondent and his family members.”

The Court of Appeal stated as follows:-

“.....we have no doubt a caveator cannot be allowed to chop and change as to the nature of the estate claimed and how it was derived.”

3.16 The Applicant at paragraph (h) of Applicant’s 2nd Affidavit stated as follows:-

“(h) I used my own income to pay the FNPF loan and at times had to borrow monies from my mother to meet the repayment.”

3.17 Applicant did not state why he inserted the word **“tenant”** before the word beneficiary.

3.18 From this it is evidently clear that the Applicant was protecting his beneficial interest as tenant and not as a purchaser or future transferee.

3.19 If Applicant was protecting his interest as purchaser or future transferee then he should have stated that in the Caveat.

- 3.20 If Applicant knew what a caveat means and what is the consequence of lodging a Caveat then he should have known what does tenant mean.
- 3.21 I therefore hold that Applicant intended to protect his interest as tenant and not transferee of the subject property.
- 3.22 Applicant claims that the Respondent holds the subject property in trust for the Applicant and as such the Respondent is estopped from evicting him from the subject property.
- 3.23 The principle in respect to promissory estoppel was stated in Walton Stores (Interstate) Limited v. Maher & Anor. (1988) 64 CLR 387. His Honour Justice Brennan at page 428 - 429 stated as follows:-

“In my opinion, to establish an equitable estoppel, it is necessary for a plaintiff to prove that (1) the plaintiff assumed that a particular legal relationship then existed between the plaintiff and the defendant or expected that a particular legal relationship would exist between them and, in the latter case, that the defendant would not be free to withdraw from the expected legal relationship; (2) the defendant has induced the plaintiff to adopt that assumption or expectations; (3) the plaintiff acts or abstains from acting in reliance on the assumption or expectations; (4) the defendant knew or intended him to do so; (5) the plaintiff’s action or inaction will occasion detriment if the assumption or expectation is not fulfilled; and (6) the defendant has failed to act to avoid that detriment whether by fulfilling the assumption or expectation or otherwise.”

- 3.24 The above principle has been followed by Courts in Fiji.
- 3.25 His Lordship Justice Calanchini, the current President of Fiji Court of Appeal in Sami v. Wati [2010] Civil Action No. HBC 35 of 2005 (7 June 2010) stated in very clear and succinct way how the principle is to be applied. His Lordship stated as follows:-

“Where there is no express declaration of a trust, it is necessary to determine whether there existed a common intention of the parties concerning the equitable ownership of the land. In a case such as the present where the legal title was held in the deceased’s name alone, the presumption is that the deceased was the sole owner of the equitable interest.

However that presumption may be rebutted. For instance, if the evidence established that there was an agreement, arrangement or understanding between the Plaintiff and the deceased as to the beneficial ownership of the land, then the Court would give effect to that common intention by means of a constructive trust or by means of a proprietary estoppel if the Plaintiff had suffered detriment.

Furthermore in the event that the Plaintiff had contributed to the purchase price of the land and/or to the improvements or any other financial contribution, effect would be given to the common intention of the parties by way of a constructive trust or proprietary estoppel.

Proprietary estoppel enables an equitable interest to be granted to a person who has been induced to suffer detriment upon reliance on a representation that the Plaintiff would acquire ownership of the land as a result. Under the remedy the court may award one of a number of rights ranging from freehold title through to merely equitable compensation in money.

A recent development in the law that applies to cases such as the present is an approach based on avoiding unconscionability if the First Defendant were permitted to deny the Plaintiff an equitable interest in the land. This approach looks for an agreement between the parties and then examines the entire course of dealings between the parties. The aim is to reach a fair result and to supply the parties with a common

intention if that is necessary. (See Equity and Trusts supra at pages 631 - 632)."

- 3.26 Applicant claims that he made loan repayments to FNPF from his monies and carried out improvements to the subject property from his life savings.
- 3.27 No evidence has been provided by the Applicant:
- (i) As to how much he spent towards maintenance and renovation of the subject property;
 - (ii) How much of his life savings he used towards maintaining the subject property;
 - (iii) How much of his own monies he used to repay Respondent's loan with FNPF;
 - (iv) If, the next tax income was not \$200.00 in 1999 from a taxi base located at Waimanu Road in Suva City then what was the net income that he received from the taxi driver until late 2007 or 10 April 2010.
- 3.28 Applicant only made bare allegations and assertion in his Affidavits in respect to matters stated in the preceding paragraph without any documentary evidence in the form of bank statements or invoices.
- 3.29 If the Applicant was making the loan repayment from his own income then why he stopped making repayments after 28 October 2009?
- 3.30 It is also surprising to note that the Applicant did not move the Court for a declaration that Respondent holds the subject property in trust for the Applicant until such time the Respondent file Application for vacant possession.
- 3.31 I accept Respondent's evidence that:-
- (i) her late husband and her assister her in-laws to pay Housing Authority debt and she purchased the subject property from her mother-in-law;

(ii) That her late husband and her agreed for Applicant to reside on the subject property with his family free of rental until such time Respondent and her late husband returned to Fiji or decided to sell the subject property.

3.32 The fact Muniamma (Respondent's mother-in-law) instructed Messrs. G. P. Lala & Associates to release the consideration sum for the transfer to Respondent is a matter between the said Muniamma and the Respondent and as such is not relevant to the Application before the Court.

3.33 I find that there was no common intention of the part of the Applicant and Respondent and Respondent's late husband that Respondent and her late husband would hold the subject property in trust for the Applicant.

3.34 Applicant from 1999, stayed on the subject property free of rental, had benefit of the taxi income being operated from taxi base in Waimanu Road, Suva for almost nine (9) years.

3.35 Applicant has failed to provide any evidence of any detriment suffered by him.

3.36 The Applicant was served Notice to Vacate on or about 16 June 2010, and except for not permitting Respondent to enter the subject property, has not moved the Court to seek any remedy in respect to the subject property.

3.37 Applicant only instituted this proceedings when Respondent instituted proceedings pursuant to Section 169 of LTA.

3.38 It appears the claim for constructive trust by the Applicant was an afterthought.

- 3.39 Even if Applicant's contention is true that he used some of his money to repay Respondent's loan and paid for maintenance of the subject property then he can be compensated for such expenses.
- 3.40 Based on what I stated hereinbefore, I find that balance of convenience favours removal of caveat.
- 3.41 Since, the Respondent is residing in USA it will be extremely difficult and expensive for Applicant to enforce any judgment that he may obtain against the Respondent.
- 3.42 Therefore, I think it is only fair and just that if the Respondent sells the subject property then part of the net sale proceedings be held in Court until final determination of this action or until this action is discontinued or struck out by the Court.

3.0 Costs

- 3.1 I take into consideration that parties filed Affidavits and Submissions and mostly referred to Submissions filed when making Oral Submissions and the nature of parties relationship.

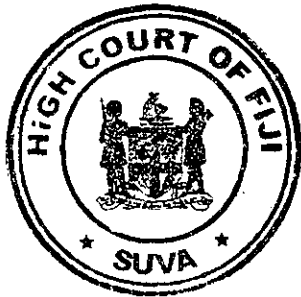
4.0 Orders

- 4.1 I make following Orders:-

- (i) Caveat No. 763056 and dated 16 April 2010, lodged against land known as Lot 5 Wainibuku Subdivision in the Tikina of Suva Province of Rewa containing three (3) perches comprised and described in Crown Lease No. 1777 be removed forthwith;
- (ii) If the Defendant/Respondent sells the property known as Lot 5 Wainibuku Subdivision in the Tikina of Suva Province of Rewa

containing three (3) perches comprised and described in Crown Lease No. 1777 then she deposit one third of the net sale proceeds into High Court, Civil Registry which said sum is to be held in an interest bearing account until final determination of this action or until this action is discontinued by the parties or struck out by the Court;

(iii) Each party bear their own costs of the Application.



K. Kumar
JUDGE

At Suva

28 June 2016

Shelvin Singh Lawyers for the Applicant/Plaintiff
Patel Sharma Lawyers for the Respondent/Defendant