

In the High Court of Fiji at Suva

Civil Jurisdiction

Civil Action No. 276/2007

Between: Vijay Nand Sharma  
Plaintiff

And: Suruj Kuar and  
Raj Mati

Defendants

Appearances : Ms S. Devan for the plaintiff

Mr Shelvin Singh for the first defendant

Date of hearing: 19<sup>th</sup> August, 2015

### Judgment

1. On 22<sup>nd</sup> April, 2014, I delivered judgment in this case and ordered that :
  - a) The plaintiff is entitled to specific performance of the sale and purchase agreement dated 29<sup>th</sup> April, 2004, upon the payment of the sum of \$ 391,500.
  - b) The first defendant shall pay the plaintiff costs summarily assessed in a sum of \$ 3000.
  
2. By notice of motion filed on 29<sup>th</sup> July, 2014, the plaintiff moved for the following orders:
  - (i) *.the Master or Chief Registrar of the High Court.. be appointed to convey to the name of the first named Defendant herein to the Plaintiff the property legally described as Lot 1 and 3 on Deposit Plan no.1312 in Certificate of Title No. 6739 and comprised in the Sale and Purchase Agreement...*
  - (ii) *the Plaintiff pay into High Court..to the credit of this action the balance sum of \$ 391,500-00..*
  - (iii) *The Registrar of Titles dispense with the requirement for the production of the duplicate instrument of title for the property .. for purposes of registering the instrument of transfer in the Register of Titles (under Section 168 of the Land Transfer Act of Fiji, Cap 131.*

- (iv) That a sum of \$3,000.00 being the amount of the plaintiff's assessed costs ..be deducted from the balance purchase price of \$39,500.00 and be paid to the plaintiff herein.
- (v) That any applicable 'capital gains tax' charges, or outgoings .. deducted from the balance purchase price of \$39,500.00 and be paid to the relevant authorities with the balance sum (if any) held by the High Court of Fiji for the benefit of the first named Defendant.

3. The plaintiff, in his affidavit in support states that the first defendant is no longer in Fiji and is residing in California. The second defendant is no longer trustee. It is not possible to file contempt or any enforcement proceedings against the first defendant. He therefore prays that Master or Chief Registrar of the High Court be appointed, to execute all documents to convey the property to the first defendant. He states that he has the ability to pay the balance purchase price, upon execution of the conveyance.
4. A legal executive of the solicitor for the first defendant has filed a scanned copy of an affidavit in opposition of the first defendant stating that her solicitor had passed away and she was unaware of the judgment. She has instructed her solicitors to file an application for leave to appeal out of time of my judgment and will file a supplementary affidavit "*in due course*" with her leave to appeal application and intended grounds of appeal. She also states that she is "*legally incapable*" of conveying the property, as there is a caveat on the subject property and the transfer in her name has not been endorsed by the Registrar of Titles.
5. The plaintiff, in his affidavit in reply states that he has not been served with any appeal documents. The defendants lodged and registered a "*transmission by death*" on 3<sup>rd</sup> October, 1995, which has been fully endorsed by the Registrar of Titles. The Chief Registrar may sign the transfer documents. The first defendant and other trustees are not inhibited from signing the transfer documents by reason of the caveat. He will be taking steps to have the caveat removed or withdrawn by the caveator, Sarab Jeet.

*The first defendants' summons for stay of execution*

6. On 31<sup>st</sup> December, 2014, the first defendant filed summons for stay of execution of my Judgment and any enforcement action taken by the plaintiff, pending the hearing and determination of the application for leave to appeal.
7. A legal executive of the solicitor for the first defendant has filed a scanned copy of an affidavit in support of the first defendant stating that she has made an application for extension of time to lodge her appeal on 9<sup>th</sup> December, 2014. The application has not been issued by the Court of Appeal Registry. She states that she has good grounds of appeal and if she is compelled to transfer the property, her application for leave to appeal and if leave is granted, her appeal will be rendered futile.
8. The plaintiff, in his affidavit in reply states that the affidavit of the first defendant is defective, as there is no date indicated as to when the first defendant deposed to and had the same sworn.
9. The first defendant did not plead that the High Court could not grant an order for specific performance on the basis that a third party had placed a caveat on the title. The caveat by was registered after the execution of the sale and purchase agreement.
10. The plaintiff states that he opposes the application, as he would be severely prejudiced if a stay is granted. The sale and purchase agreement was executed in 2004. The plaintiff had paid a deposit of \$43,500.00 and he has not been able to take possession of the land .

*The determination*

11. I will first deal with the application of the plaintiff for the Master or Chief Registrar to effect the transfer of the property comprised in the sale and purchase agreement from the first defendant to the plaintiff.
12. Mr Singh, counsel for the first defendant submits that the caveat registered on the title inhibits any transfer to be executed..
13. Ms Devan, counsel for the plaintiff submitted that the matter of the caveat on the title was not pleaded in the statement of defence nor taken up by the defence at the trial



14. The riposte of Mr Singh was that the defence was entitled to raise that matter of law at any stage.

15. Be that as it may, the fact is that there is a caveat on the title.

16. I refer to the following passage from the judgment of Fatiaki CJ in *Sir Sathi Narain v. Phyllis Kathleen Malley* 34 F.L.R. 118 on the effect of a caveat on a title :

*The scope and purpose of the section dealing with caveats has been generally and succinctly described by the Privy Council in the N.Z. case of Abigail v Lapin (1934) A.C. 491 at p.500:*

*“For the general protection of equitable interests or estates, the Act provides that a caveat may be lodged with the Registrar by any person claiming as cestui que trust, or under any unregistered instrument or any other estate or interest: **the effect of the caveat is that no instrument will be registered while the caveat is in force affecting the land, estate or interest until after a certain notice to the person lodging the caveat.** Thus, though the legal interest is in general determined by the registered transfer, mortgages or other changes, the register may bear on its face a notice of equitable claims, so as to warn persons dealing in respect of the land and to enable the equitable claimant to protect his claim by enabling him to bring an action if he claims is disputed”.(emphasis added)*

17. The excerpts I have highlighted provides a complete answer to the plaintiff's application.

18. I decline the application of the plaintiff .

19. The first defendant moves for a stay pending leave to appeal on the ground that she has filed an application for leave to appeal out of time.


20. Ms Devan quite correctly points out the first defendant has to obtain enlargement of time to appeal out of time, in the first instance before he can apply for a stay of my judgment.

21. I note that the first defendant's application for extension of time to appeal has not been issued. The first defendant states that she has good grounds of appeal, but no grounds have been filed.

22. In my judgment, the application for stay pending leave to appeal is misconceived and is declined.

**23. Orders**

- (a) The application of the plaintiff is declined.
- (b) The application of the first defendant for stay pending leave to appeal is declined.
- (c) I make no order as to costs.

  
A.L.B. Brito-Mutunayagam  
Judge  
30<sup>th</sup> June, 2016

