

IN THE HIGH COURT OF FIJI
AT SUVA

Civil Action No: HBC 413 of 2006

BETWEEN : PHULWATI aka FERROZA BIBI aka PHULMATI aka
FIROZA BIBI
Plaintiff

AND : BYEONG RAK KWON and EUI TAE KIM
First Defendants

: NAZIR HUSSAIN
Second Defendant

: ACTING REGISTRAR OF TITLES
Third Defendant

: ATTORNEY GENERAL OF FIJI
Fourth Defendant

Coram : The Hon. Mr Justice David Alfred

Counsel : Mr. P. Niubalavu for the Plaintiff
Mr. V. Singh for the First Defendants
Mr. J Sherani for the Third and Fourth Defendants

Dates of Hearing : 23 August 2016, 27 and 28 February 2017

Date of Judgment : 3 March 2017

JUDGMENT

1. The Plaintiff in her Amended Statement of Claim makes the following allegations. She is the registered proprietor of the property held under Certificate of Title No. 16922 (The property). Circa 27 March 2006, the second Defendant, the son of the Plaintiff obtained a Power of Attorney No. 45175 (PA) from the Plaintiff, which included the power to sell the property without the Plaintiff knowing the same.

2. Among the Particulars of Fraud alleged against the second Defendant are:
 - (1) The Plaintiff had appointed her daughter Shabnam Farnaz Suliman (Shabnam) as her attorney since 27 November 2001 by PA No. 38808.
 - (2) The second Defendant (Nazir Hussain) represented to the Plaintiff that he would maintain and collect the rent for the property for her.
 - (3) The Plaintiff believing him, executed a PA in favor of the second Defendant on 27 March 2006.
 - (4) The second Defendant purported to sell the property and executed all documents to the purchasers, the first Defendants.
 - (5) The second Defendant sold the property without instructions and at a gross undervalue for \$130,000 when the valuation was in excess of \$296,000.
 - (6) The second Defendant received the proceeds of the sale but failed to pay or account for the same to the Plaintiff.

3. The Plaintiff took action to revoke the PA by executing on 24 April 2006 a revocation of the PA. The PA was revoked on 2 May 2006 on which date it was lodged with the third Defendant.

4. On or about the 22 June 2006, the first and second Defendants attempted to register a transfer (the transfer) pursuant to the PA which had been revoked, but the third Defendant was advised not to proceed further with the registration.

5. The first and second Defendants conspired and acted fraudulently to defeat the Plaintiff's interest in the property and or the proceeds of the sale.
6. The allegations of fraud include, inter alia, the following:
 - (i) The first named first Defendant and the second Defendant were business partners and had become acquainted in 1990.
 - (ii) The first named first Defendant who knew the Plaintiff well, failed to pay the consideration to the Plaintiff and instead paid it to the second Defendant.
7. Wherefore the Plaintiff claims:
 - (1) A Restraining Order against all the Defendants not to register the transfer.
 - (2) A Declaration that the instrument of transfer executed by the second Defendant is null and void and or fraudulent.
 - (3) An Order that the proceeds of sale be paid to the Plaintiff or alternatively the first Defendants pay the Plaintiff the best market price of the property.
 - (4) The first Defendants pay the Plaintiff mesne profits of \$1,000 per month, till the determination of this action. (This was ruled out at the Summons for Directions).
8. The first Defendants in their Defence contend that the second Defendant obtained a valid PA No. 45175 (the PA) from the Plaintiff. They were not aware of any representation between the second Defendant and the Plaintiff prior to the sale of the property. They were sold the property by the second Defendant under the valid PA and paid \$130,000 as its purchase price. The transfer instrument was duly accepted by the third Defendant for registration. They were unaware of any revocation of the PA by the Plaintiff. They were acquainted with the second Defendant but had no intention to defraud the Plaintiff through such acquaintance.
9. The Minutes of the Pre – Trial Conference record, inter – alia, the following:

Agreed Facts

 - (1) The Property is a double storey house with 2 flats held under Certificate of Title No. 16922.

- (2) The son of the Plaintiff, Nazir Hussain, obtained a PA No. 45175 (the PA) on 27 March 2006 from the Plaintiff including the powers to sell the property.
- (3) MC Lawyers acted for Nazir Hussain, the second Defendant and the Plaintiff in the preparation and registration of the PA No. 45175.
- (4) Pursuant to the aforementioned PA, the second Defendant entered into a sale and purchase agreement (SPA) with the first Defendants for the sale of the property for \$130,000 on 28 April 2006.
- (5) The attorney, the second Defendant, executed the instrument of transfer from the Plaintiff to the first Defendants on 4 May 2006 and the transfer was stamped with duty and on 22 June 2006 lodged with the Registrar of Titles (ROT) for registration.
- (6) The transferees named on the transfer are the first named and the second named first Defendants and the purchase price was \$130,000.

10. **The Disputed Facts include the following:**

- (1) The PA was revoked on 24 April 2006, and lodged for registration with the ROT on 22 May 2006.
- (2) The final settlement of the property took place at the ROT office on 22 June 2006.
- (3) The Plaintiff has not received any monies from the sale of the property or received any accounting from Nazir Hussain.
- (4) That circa March 2006 the Plaintiff and the second Defendant met with the first Defendants to discuss the sale and purchase of the Property to the first Defendants for \$130,000.

The Issues for Determination included the following:

- (1) Was the PA revoked or valid at the time of the final settlement of the property?
- (2) Was the property sold at a gross undervalue?
- (3) Whether the stamped transfer lodged on 22 June 2006 at the ROT registry is a valid instrument of transfer or not?
- (4) Whether the Plaintiff is bound to perform the SPA entered into by Nazir Hussain (Nazir) and the first Defendants on 28 April 2006.

11. The hearing commenced with the Plaintiff (PW1) giving evidence. She said Nazir her eldest son had sold the property to Kwon (1st named first Defendants). She had first given a PA to Shabnam before giving the second PA to Nazir, as Shabnam could not take care of the house. When she came to know that Nazir had sold the house, she revoked the PA. She did not get any money from the sale of the house, then she revoked the PA.
12. Under cross – examination by first Defendants’ Counsel, PW1 said in 2006, she and Nazir went to see Kwon in his office in Garden City. She gave a PA to Nazir. She identified her thumbprint affixed to the PA (Exhibit D1) in the presence of Mr. Suresh Chandra (Chandra). He explained the contents to her in the Hindi language. It might be that Mr. Chandra had told her the PA was to give Nazir the power to sell the property. She did not know MC Lawyers were acting for Nazir. If Mr. Chandra had told her this document gives the right to Nazir to sell the property she would not have affixed her thumbprint. She confirmed it is her thumbprint. When she heard that Nazir was selling the property, she told her lawyer to give notice to Nazir to revoke the PA.
13. At this juncture, the Court advised Mr. Chandra regarding his position as Counsel, but he stated he was going to continue as Counsel, although he is a witness to the PA. However, when the Court resumed after the luncheon break, Mr. Chandra said there is a conflict of interest and he wished to withdraw as Counsel for the Plaintiff. Both other Counsel had no comment as this did not concern their respective clients.
14. The Plaintiff stated she consented to Mr. Chandra withdrawing as her Counsel and asked for another date in December 2016 to retain another lawyer.
15. I ordered Mr. Chandra to file an application for leave to withdraw as Counsel and to pay costs of \$1500 to the first Defendants only, as the State was not asking for costs.
16. On the mention date of 25 October 2016, the new Counsel for the Plaintiff informed the Court that his client would be coming to Fiji from New Zealand in February 2017. Accordingly the case was fixed for continued hearing on 27 and 28 February 2017.

17. At the continued hearing, the cross – examination of the Plaintiff by the first Defendants' Counsel continued. She said she signed the revocation of the PA in New Zealand. This was Exhibit D2. She did not recall it coming back to her for alteration or amendment. Nazir is her son but she did not know if her lawyer wrote to him. Nazir must have received the sum but he never mentioned it to her. If something is sold, obviously cash is received. He sold the property. She is asking the court to make a decision as she did not receive anything for her property. She confirmed it is her thumbprint affixed in Mr. Chandra's office in Suva. It was witnessed in New Zealand.
18. The next witness was Ms. Torika Goneca (PW2), the Deputy Registrar of Titles. In Exhibit P1 (the Certificate of Title) (the CT) the Plaintiff is the owner of the property there. Exhibit P3 is the latest copy of the CT showing a caveat lodged by 2 children of Mohammed Hanif.
19. When cross – examined by Counsel for the first Defendants, she said there were differences between the contents of Exhibit D2 and Exhibit P4 (the 1st and 2nd copies of the Revocation of the PA). In Exhibit D2, the date 4 April 2006 and the number of the PA were missing and the "Correct For Purpose" was not signed off by the solicitor, Mr. Chandra. It is her, PW2's duty to check but she did not do so here. Exhibit D2 was presented on 2 May 2006. The same person should have amended it. It should be sent back to New Zealand for the person to correct it. She did not know when the corrected version (with the 4 omissions filled in) was lodged. Exhibit D10, the transfer has been accepted in the Registry on 22 June 2006. Settlement occurs when the parties came to the Registry. The owner lodges the transfer at the ROT registry through their Solicitors.
20. When cross examined by State Counsel, PW 2 said the endorsement clerk checks if everything is in order and then passes the original title to the Registrar to sign. If the clerk sees it is not in order, he enters the items which are not correct in the corrections book and returns it to the party who lodged it for correction. Exhibit D2 does not require the signature of the Registrar as it is an unregistered document. Three (3) years previously they put in place a system to ascertain if there were 2 PAs in existence.

21. After the luncheon recess, PW2 returned to the witness box and produced Exhibit P5. This showed the document was collected by the lawyers on 6 September 2006 but she did not know on what date the lawyers returned the corrected version to the ROT registry.
22. On being cross examined by Counsel for the first Defendants, PW2 said it was returned after 6 September 2006. The 2nd May 2006 is not the correct date of registration. The correct date of registration is a date after 6 September 2006.
23. When cross examined by State Counsel, PW2 said she did not know why 2 May 2006 was not corrected.
24. When re – examined by Plaintiff’s Counsel, PW2 said the new date of re – lodgment was to be recorded but it is not recorded on this document.
25. In answer to the Court PW2 said she did not know the date of the actual registration of the revocation.
26. The next witness was Sanjay Salend Kirpal (PW3), a registered valuer. He prepared the valuation report on the property, Exhibit P6, in 2006. Its value then was \$296,000 and its current value would be more than \$500,000.
27. When cross examined by Counsel for the first Defendants, PW3 said he was instructed by Shabnam Suliman, the daughter of the Plaintiff, to obtain the fair market value of the property.
28. The penultimate witness was Mr. Suresh Chandra (Chandra) PW4. He has been called to give evidence on the PA prepared by their office. This PA is given by the Plaintiff to the second Defendant (Nazir). Exhibit D1, the PA, has been revoked by the donor, the Plaintiff, through their firm which is now called MC Lawyers. Exhibit P4 was prepared by their office on the instructions of the Plaintiff. They then sent it to Auckland for execution by the Plaintiff in the presence of a qualified witness. This revocation of PA was signed in Auckland in 2006 and they lodged it for registration on 2 May 2006. He said Exhibit P4 has the certificate signed by him while Exhibit D2 was not signed by him

at lodgment. After it was returned, he signed Exhibit P4 after the correction. There was no necessity to return the document to the Plaintiff. He prepared the PA to Nazir and told the Plaintiff that the PA gave Nazir the power to sell the property.

29. During cross examination by the first Defendants' Counsel, PW4 sold he was acting for the Plaintiff and not acting for Nazir. He himself prepared Exhibit D4.
30. In re – examination, PW4 said he saw no need to send the document to the Plaintiff in New Zealand, as he already had the details to fill in.
31. The final witness was Ms. Shabnam Farnaz Suliman (Shabnam) (PW5), the daughter of the Plaintiff. She said the Plaintiff gave authority to Nazir by affixing her thumbprint to the PA, Exhibit D1, to give authority to access the property to Nazir. The Plaintiff informed Mr. Chandra that she did not want to sell the house.
32. During cross – examination by Counsel for the first Defendants, PW5 said she had not spoken nor seen Nazir since April 2006. At that time he was in Sydney. The Plaintiff, who was with her in Auckland, wanted to know why Nazir did what he did, as she knew he had sold the house. PW5 said she did not accept the Plaintiff had a need for medical funds and had to sell the house.
33. With that the Plaintiff closed her case and the first Defendants began theirs.
34. The first witness was Byeong Bak Kwon (DW1). He has known the Plaintiff since 2 April 1990. Nazir came on 26 April 2006 and asked him to buy the house as they were in urgent need of money. They agreed on a price of \$130,000 and Nazir asked for a deposit of \$40,000. On 28 April 2006 Nazir and him made a SPA in the office of Lateef & Lateef. He identified his signature on Exhibit D11, the SPA. As stated in clause 1 of the SPA, he paid \$40,000 in cash to Nazir. He paid the stamp duty of \$2,600 (Exhibit D10). On 19 May 2006 he paid the balance of \$90,000 via Electronic Fund transfer from South Korea to Nazir's account in Australia.

35. Under cross examination by Plaintiff's Counsel, DW1 said the Plaintiff was in urgent need of money. Mr. Caesar Lateef prepared the SPA and witnessed the signatures. Nazir's Statutory Declaration is a more valid evidence of payment. The Plaintiff came to him crying of her heart problem. Nazir had a PA.
36. With the first Defendants closed their case.
37. State Counsel informed the Court he had no witness to call. I therefore asked all Counsel to submit.
38. The Plaintiff's Counsel submitted that Nazir had acted against the spirit of the PA. Judgment in default of defence had been obtained against him on 1 February 2007. He said the PA had been revoked by the Plaintiff before Kwon and Nazir entered into the SPA and before the transfer was signed. When the revocation of the PA was received by the ROT on 2 May 2006, it was sufficient notice to the ROT that the PA had been revoked. The 2nd May 2006 is a priority date though the correction came later. There was no evidence before the Court whereby Kwon can impeach the title of the Plaintiff. Counsel submitted there was a conspiracy between Nazir and Kwon. The Plaintiff is only asking for the property to remain in her ownership and a declaration that the transfer by Nazir is null and void.
39. Counsel for the first Defendants then submitted. He said the Agreed Facts were in the Pre - Trial Minutes. Exhibit D2 was incomplete as 4 items were missing. The Deputy Registrar of Titles had confirmed the date of revocation is wrong. So the correct date would be after 6 September 2006. The transfer was executed before 6 September 2006 and was valid. There was no evidence of conspiracy or fraud on the part of Kwon. He asked the Court to order the ROT to register the transfer to Kwon.
40. State Counsel stated the ROT and the Attorney- General would abide by the Court Order.
41. Plaintiff's Counsel in his reply said the ROT did not require the revocation of the PA to be withdrawn.

42. At the conclusion of the arguments, I informed I would take time to consider my decision. Having done so I will now deliver my judgment.
43. When the case is stripped of all the verbiage and prolixity, what remains is the nub of the matter and it is this. Was a PA given to Nazir by the Plaintiff to sell the property and if so was it validly and effectively revoked before Nazir sold and transferred the property to the first Defendants. I shall cut to the case and consider the PA. The first thing I note is that the Plaintiff has appointed Nazir as her "true and lawful attorney for the purpose and with the powers hereinafter expressed that is to say -
- (1) "To sell for cash as my attorney shall think proper all or any lands which now belong to me as the registered proprietor thereof".
44. The donor (Plaintiff) goes on to "Further Declare that this Power of Attorney remain in full force and effect until due notice of our death or other revocation shall be actually received by my attorney and that no person or persons or corporation or corporations dealing with my attorney shall be concerned to see or enquire as to the propriety or expediency of any act deed matter or thing which my attorney may do execute or perform or purport to do execute or perform or agree to do execute or perform in my name be virtue of the presents".
45. Lastly she agrees to rectify and confirm whatsoever her "attorney shall lawfully do in or about the premises by virtue of these presents.....".
46. A solicitor, Mr. Chandra has confirmed the mark of the Plaintiff was made to the PA in his presence and she appeared fully to understand the meaning and effect thereof. Mr. Chandra also confirmed the PA is correct for the purpose of the Land Transfer Act, Cap 131.
47. It is crystal clear that unless and until due notice of its revocation shall be actually received (my underlining) by the attorney the PA remains legally valid and effective to enable the attorney to legally and effectively transfer (by sale) the Plaintiff's property. No

evidence of Nazir having actually received any notice of any purported revocation of the PA was provided to the Court.

48. Further, Exhibit D5 confirms that as late as 8 September 2006 Nazir had still not actually received any notice of the purported revocation of the PA. This is the letter to the ROT signed by Mr. Chandra, stating that they are unable to directly communicate with Nazir. Thus the Court can come to no other conclusion on the evidence, than that the PA is still valid and effective at that and all material times.
49. If I may say so, it is surprising that Mr. Chandra is informing the ROT that the PA that he prepared and which was marked by the Plaintiff in his presence after he explained its contents and she understood the same, is now a fraudulently obtained PA.
50. Whatever it is, it does not impinge upon Nazir's right to transfer the property to the first Defendants, and for them to be the transferees, as the PA expressly provides "that no person or persons or corporation or corporations dealing with my attorney shall be concerned to see or enquire as to the propriety or expediency of any act deed matter or thing which my attorney may do execute or perform or purport to do execute or perform or agree to do execute or perform in my name be virtue of the presents".
51. At the end of the day, I find and I so hold the PA given to Nazir is validly and properly granted to him; that as the attorney of the Plaintiff, he has validly and effectively conveyed the property to the first Defendants who having paid the full consideration as shown by the SPA and Nazir's statutory declaration are entitled to have the ROT to register them as the proprietor of the property free of all encumbrances.
52. In the light of my decision, I have found it inexpedient to refer to the various other issues raised, which to my mind would tend to preclude an incisive conclusion of this protracted litigation.

53. In the result, I find no evidence of fraud with regard to the obtaining of the Power of Attorney No. 45175 and no evidence of any conspiracy or fraud between the First Defendants and the Second Defendant.
54. I therefore dismiss all the Plaintiff's claims against the First Defendants and the Third Defendant and the Fourth Defendant.
55. I decline to grant the Restraining Order, the Declaration, the Order and the Claim for mesne profits, sought in the Plaintiff's claims.
56. I enter judgment for the First Defendants and the Third and Fourth Defendants against the Plaintiff with costs which I summarily assess at \$500 to be paid to the First Defendants.

Delivered at Suva this 3rd day of March, 2017.



David Alfred

JUDGE of the High Court of Fiji.