

**IN THE HIGH COURT OF FIJI AT SUVA**

**APPELLATE JURISDICTION**

**Civil Appeal No. 39 of 2011**

(On an appeal from the ruling of Master Deepthi Amaratunga in Suva High Court Civil Action No.HBC 281 of 2010.

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**IN THE MATTER** OF THE LAND TRANSFER ACT

AND

**IN THE MATTER** OF AN APPLICATION PURSUANT TO SECTION 109 OF THE LAND TRANSFER ACT

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**BETWEEN**

**Eli Fong** Trustee of the Estate of Tom Nabong c/- Messrs R Patel Lawyers, Barristers and Solicitors, 5<sup>th</sup> Floor, Development Bank Centre, 360 Vctorial Parade Suva.

**APPELLANT**

**AND**

**SAVUSAVU AIRPORT HEIGHTS LIMITED** a duly incorporated limited liability company having its registered office in Nadi.

**RESPONDENT**

**Counsel** : Mr. D. Sharma for the Appellant  
Mr. R. Singh and Ms. L. Lagilevu for the Respondent

**Date of Hearing** : 29<sup>th</sup> May, 2017

**Date of Judgment** : 26<sup>th</sup> July, 2017

## **JUDGMENT**

[1] The respondent (the original plaintiff) filed originating summons dated 22<sup>nd</sup> September, 2010 seeking the following orders against the appellant (the original defendant):

1. That the defendant show cause why the caveat No. 710334 registered on 6<sup>th</sup> day of October 2008 against all the piece and parcel of land comprised in Certificate of Title No. 18863 known as "Nacekoro" (part of) having an area of 25 A 2R 21.5P being lot 1 on DP 4786 situated at Savusavu, Vanua Levu should not be removed.
2. An Order that the Caveat No. 710334 registered on the 6<sup>th</sup> day of October 2008 against all piece and parcel of land comprised in Certificate of Title No. 18863 known as "Nacekoro" (part of) having an area of 25A 2R 21.5P being lot 1 on DP 4786 situated at Savusavu, Vanua Levu be removed.
3. An order that the Defendant pay the costs of this application on an indemnity basis.
4. An order that the Defendant pay compensation to the Plaintiff.

[2] The learned Master on 03<sup>rd</sup> November, 2011 made order removing the caveat and also ordered the appellant to pay \$1000.00 as costs to the plaintiff.

[3] The appellant appealed against the said order on the following grounds;

1. The Master erred in law in holding that the onus was on the appellant to display the Caveat No. 710334 in his affidavit in opposition when in fact such caveat was already endorsed against CT 18863 and the onus was on the respondent to make such disclosure if it wanted the court to remove the said caveat.
2. The Master erred in law and in fact in penalizing the appellant for not filing the caveat in order to describe his caveatable interest in the land.
3. The Master erred in law and in fact in holding that the appellant did not describe his caveatable interest in the land in the affidavit in opposition.
4. The Master erred in law and in fact in holding that Mr. Edmund March's could not be imputed to Mr. Anirudh Kuver without examining in detail the terms and conditions of the sale and purchase agreement purportedly entered into between Kuver and Nabong in 1975.
5. The Master erred in law and in fact in holding that the only allegation of fraud was confined to non-payment of monies received by Mr. March.
6. The Master erred in law and in fact in not properly giving weight or to considering the appellant's submissions that the instrument of transfer and mortgage from Mr. Kuver to the respondent was not recorded in the presentation book held by the Registrar of Titles and thus could not be recorded against CT 18863.
7. The Master erred in law and in fact when he used the judgment delivered in Civil Action No. 127 of 1994 to say that the appellant's claim was only confined to titles that remained with Edmund March for the following reasons:

[1] The master failed to consider the fact that orders could not be made in Civil Action No. 127 of 1994 against third parties such as Anirudh Kuver because they were not parties to the said action.

[2] Fraud could not be imputed to third parties in that case unless and until the court declared that Edmund March had acted fraudulently.

[3] There was nothing to stop the appellant from imputing fraud on Kuver since he had acquired CT 18863 purportedly through a sales and purchase agreement directly from Tom Nabong when

in fact he had not entered into any such dealing with Tom Nabong and parts of the said agreement remained incomplete even until today.

8. The Master erred in law and in fact when he held that the appellant had not shown any entitlement to claim beneficial interest in CT 18863 pursuant to section 106 of the Land Transfer Act.
9. The Master erred in law and in fact when he held that under the Land Transfer Act a defendant had to show evidence of actual fraud on the part of the plaintiff in order to set aside his title.
10. The Master erred in law and in fact when he held that the appellant had failed to provide any evidence of fraud against the respondent.

[4] In the affidavit filed in support of the originating summons it is averred that the respondent purchased the property which is the subject matter of these proceedings from Mr. Anirudh Kuver, a solicitor, on or about 28<sup>th</sup> May, 2008 and he was the first registered proprietor of the land and he held it in his name without any charges and/or encumbrances being registered against the Certificate of Title for about thirty years before the respondent purchased it. It is also averred that the respondent is engaged in the process of subdividing the land and has secured a contract with a contractor to carry out certain development work in accordance with the survey plan approved by the Director of Town and Country Planning. It has been averred further that the respondent had advertised for sale the subdivided lots and number of potential purchasers have expressed their interest in purchasing the lots.

[5] In terms of section 106 of the Land Transfer Act 1971 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 provisions 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.

- [6] In **Cambridge Credit (Fiji) Limited v W.F.G Limited** [1975] FJ Law Rp 25; [1975] 21 FLR 182 (26 November 1975) the court of appeal with regard to the lodging of caveats made the following observations:

The respondent must however, bring itself within the provisions of Section 106 and in order to do this must satisfy the Court that the following are fulfilled.

- (1) That he 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 he is so claiming by virtue of any unregistered agreement or other instrument or transmission or any trust expressed or implied or other-wise howsoever.

- [7] In the same decision the Court of Appeal also held that Section 106 of the Fiji Act is designed to protect unregistered instruments in land. For instance an agreement for sale and purchase, an unregistered mortgage, an agreement to give a mortgage or an option to purchase land are just a few examples of unregistered instruments which are capable of being protected by the lodging of a caveat.

- [8] The initial question for determination in this appeal is whether the learned Master was correct in holding that the appellant did not have caveatable interest in the property in question to lodge a caveat. The grounds of appeal are based on this issue.

- [9] If the appellant is successful in establishing that a fraud has been perpetrated in executing the transfer of this property to the respondent the court can arrive at a reasonable conclusion that the caveator had a caveatable interest to lodge the caveat, which is the subject matter of these proceedings.

- [10] Eli Fong filed civil action No. 0127 of 1994 against Edmund March, the holder of power of attorney for Tom Nabong. The judgment in the said case was delivered on 12<sup>th</sup> May 2006. Edmund March acting as the attorney for Tom Nabong transferred this property to Anirudh Kuver who sold it to the respondent.

- [11] The learned counsel for the appellant submitted that the respondent's claim of being a bona-fide purchaser for value is questionable since the respondent acquired the title to the land after the judgment of the High Court which put everyone on notice about the March's fraud. It is correct to say that the defendant in this matter is not bound by the decision in Civil Action No. 127 of 1994 because he was not a party to the said action.
- [12] The civil action No. 127 of 1994 was instituted in the year 1994 and Anirudh Kuver became the registered proprietor of the land which is the subject matter of this action on 27<sup>th</sup> August 1979.
- [13] In that action Tom Nabong did not seek to recover the title to lands which had already been sold. He sought *inter alia*, to recover the portions of land remained unsold and an order directing the defendant (Edmund March) to transfer title to the remaining portion of the land to the plaintiff.
- [14] In his judgment Coventry J. made the following observations;
- The plaintiff has been practical and realistic in this matter. In opening to the court counsel made it clear that the plaintiff had, regrettably, realized that it would be futile to try to pursue the return of the lands now registered in the names of persons other than the defendant.
- [15] It appears therefore, that respondent, Eli Fong, the testator, did not intend to have the lands, the title of which had already been transferred, returned to him. Eli Fong the original defendant is being sued in this matter in representative capacity as the trustee of the estate of Tom Nabong. He has lodged the caveat in question on behalf of the estate of Tom Nabong and not on his own behalf. It is correct to say that Anirudh Kuver is not bound by the decision in the civil action No. 127 of 1994 because he was not a party to it but the plaintiff in that case has expressly given up his rights over the properties which had already been sold by Edmund March.
- [16] For these reasons, especially the fact that the testator never intended to recover the title to the lands which had already been sold it cannot be said that the respondent had a caveatable interest in the property which is the subject matter of this action.

- [17] The learned counsel for the appellant however, submitted that since there had been a fraud perpetrated in transferring the property to the respondent the appellant has caveatable interest.
- [18] According to the respondent it became the registered proprietor of the land in question on 25<sup>th</sup> August 2008. The memorial is numbered as 702012A. This document is tendered along with the affidavit in response of Eli Fong marked as "A". On the same day the transfer document was executed, a mortgage has been executed in favour of the vendor, Anirudh Kuver and the memorial is numbered as 702013A, copy of which was tendered along with the affidavit in response of Eli Fong.
- [19] The transfer in favour of the respondent has been executed on 1<sup>st</sup> April, 2008 and registered on 28<sup>th</sup> May, 2008. The mortgage in favour of Anirudh Kuver has been executed on 13<sup>th</sup> May, 2008 and registered on 28<sup>th</sup> May, 2008. These documents were handed over for registration to the Office of the Registrar of Lands by entering them in the "Presentation Book" maintained at the office of the Registrar of Lands. The respondent has failed to tender any evidence that these documents were in fact handed over for registration. The numbers given to these documents are 702012A and 702013A. The appellant has tendered a copy of the relevant page of the Presentation Book. Under 702012 and 702013 two surrenders of native land had been presented for registration. How these unusual numbers 702012A and 702013A were allocated to the transfer and the mortgage was within the exclusive knowledge of the respondent and Anirudh Kuver but the respondent has failed to explain how these numbers were allocated to these documents. This could have been easily established by tendering a copy of the relevant page if any, of the Presentation Book. From the above facts it appears that the entire transaction has been done under suspicious circumstances.
- [20] However, the alleged fraud on Tom Nabong was perpetrated by Edmund March and not by Anirudh Kuver. As I said earlier Tom Nabong did not seek to obtain the title back from the purchasers of Edmund March. That matter has once been adjudicated upon and the right to sue on the same cause of action does not arise for the owner or for the administrator or trustee of his estate. Hence, the issue of fraud does not arise for consideration here.
- [21] The learned Master also held that the onus of tendering the caveat to the court was on the appellant. It is the respondent who made the application to the court


for the removal of the caveat. The onus of bringing the caveat to the court was therefore on the respondent and not on the appellant. However, since the decision of the Master is not solely based on this ground no injustice was caused to any of the parties. Therefore, the ruling cannot be overturned on this ground alone.

[22] For the reasons aforementioned I see no reason to interfere with the findings of the learned Master and the court accordingly, makes the following orders.

[23] Orders of the court:

- (1) The appeal of the appellant is dismissed.
- (2) The appellant shall pay the respondent \$2000.00 as costs of this appeal.



  
Lyone Seneviratne

**JUDGE**

26<sup>th</sup> July, 2017