

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 88 of 2016

BETWEEN

AKBAR ALI of Davuilevu, Nasinu, Fiji, Taxi driver as the Administrator *Pendente lite* of the
Estate of **NABIHAN**.

PLAINTIFF

AND

NASINU LAND PURCHASE & HOUSING CO-OPERATIVE SOCIETY LIMITED

a co-operative duly registered under the Co-operative Societies Act and
having its registered office at Suva Street, Suva.

FIRST DEFENDANT

AND

VIJENDRA PRASAD of Lot 8, Kishore Bhindi, Laucala Beach Estate,
Suva, Driver.

SECOND DEFENDANT

AND

THE REGISTRAR OF TITLES of Civic Towers Building, Suva.

THIRD DEFENDANT

AND

THE ATTORNEY GENERAL OF FIJI of Suvavou House, Suva.

FOURTH DEFENDANT

Counsel : Ms. Lutu I. for the Plaintiff
Ms. Devan S for the 1st Defendant
Mr. Narayan E. for the 2nd Defendant
Ms. Ali S. for the 3rd & 4th Defendants

Date of Hearing : 22nd February 2021

Date of Judgment : 26th March 2021

JUDGMENT

- [1] The plaintiff instituted these proceedings seeking the following orders against the defendants:
- (a) A declaration that the transfer dated 27 March 2015 between the 1st and 2nd defendants of the property comprised in Certificate of title No. 42252 being Lot 7 on Deposited Plan No. 10581 is null and void.
 - (b) An order that Caveat No. 813809 be reinstated.
 - (c) An order that the defendants pay damages to the plaintiff.
 - (d) An order that the 1st and 2nd defendants pay exemplary damages to the plaintiff.
 - (e) An order that the costs of the proceedings be paid by the defendants to the plaintiff on a full indemnity basis.
- [2] The plaintiff's case is, the estate of Nabihan (the Estate) was entitled to the property comprised in Certificate of title No. 42252 being Lot 7 on Deposited Plan No. 10581 pursuant to a settlement agreement reached between the previous administrator of the Estate and the 1st defendant on 23rd June 2011.
- [3] The plaintiff also states in the statement of claim that he was ready and willing to complete the transaction and instituted the Civil Action No. 218 of 2015 to compel the 1st defendant to transfer the property to him.
- [4] The first cause of action is the wrongful removal of the caveat No. 813809 lodged on 27th May 2015. It is averred in the statement of claim that the 1st defendant lodged a removal of caveat application with the 3rd defendant and the 3rd defendant wrongfully forwarded the notice of removal of the caveat to the solicitors of the 1st and 2nd defendants and the solicitors of the 1st and 2nd defendants fraudulently left the caveat to lapse the statutory 21 days' time.
- [5] The particulars of fraud as pleaded in the statement of claim are as follows:
- (a) The notice was actually received by the 1st defendant's solicitor, Neel Shivam Lawyers.

- (b) The said notice was kept by Neel Shivam Lawyers for 18 days from the date of receipt.
- (c) The said notice was returned to the post office by Neel Shivam Lawyers on 17th August 2015.
- (d) Thereafter, knowing that the plaintiff or his lawyers had no knowledge of the removal of caveat, the 1st and 2nd defendants lodged a transfer dated 28th May 2015 for registration against the said land.

[6] The 2nd cause of action is that the 3rd defendant on 3rd February 2016 undertook to cancel the registration of the transfer in the name of the 2nd defendant and to reinstate the caveat but failed to take steps for cancellation and for reinstatement of the caveat.

[7] At the pre-trial conference the parties admitted the following facts:

1. The plaintiff is the *administrator de bonis none* of the estate of Nabihan.
2. The 1st defendant is a limited liability company having its registered office at Suva and was at all material times, the registered proprietor of the land comprised in Certificate of Title No. 42252 being Lot 7 on Deposited Plan No. 10581.
3. The 2nd defendant is the new owner and purchaser of the land comprised in Certificate of Title No. 42252 being Lot 7 on Deposited Plan No. 10581.
4. The 3rd defendant is the Registrar of Titles.
5. The 4th defendant is the Honourable Attorney General's Office who is joined pursuant to the Crown proceedings Act.
6. On 27th May 2015, the estate lodged a caveat No. 813809 on the said property.
7. On 25th June 2015, the 1st defendant lodged a removal of caveat application with the 3rd defendant.
8. The 1st defendant registered a transfer of the said property to the 2nd defendant on 25th august 2015.

[8] At the hearing of the mater only the plaintiff testified. The defendants informed court that they would not adduce any evidence.

[9] At the conclusion of the hearing the learned counsel made an application from the bar table that she wished to call the 4th defendant, the Registrar of Titles as a witness and

moved for an adjournment which was objected to by the learned counsel for the 3rd and 4th defendants. The court declined the application and informed the parties that I would give reasons in this judgment. A party to a court proceedings does not have the right to compel another party to testify. If the plaintiff intended to call an officer from the office of the 3rd defendant he should have subpoenaed in advanced and not after the defendants closed their respective cases.

[10] The plaintiff came to court on the basis that the 1st defendant and the plaintiff's mother entered into an agreement whereby the 1st defendant agreed to transfer the property comprised in Certificate of title No. 42252 being Lot 7 on Deposited Plan No. 10581 to the plaintiff's mother. The plaintiff in his evidence said his mother signed a document and again he said there is no agreement but he needs Lot 7. It is not clear from the evidence of the plaintiff, the only witness, whether there was, in fact, an agreement between his mother and the 1st defendant. The property has now been transferred to the 2nd defendant. The plaintiff has failed to adduce sufficient evidence to establish that his mother's estate has an entitlement to the property in question.

[11] The next issue is whether the plaintiff is entitled to have the caveat No. 813809 reinstated on the ground of fraud. The fact that the first defendant lodged a removal of Caveat application and it was served on the solicitors of the 1st and 2nd defendant is challenged by the 3rd defendant. In fact this fact has been admitted by the 3rd defendant in her letter dated 3rd February 2016 (P2). Paragraph 2 of the said letter reads as follows:

As discussed, please note that we admit the Notice of Removal of Caveat was not sent to Caveatee's Address (copy attached for your perusal).

[12] The plaintiff alleges fraud on the part of the 3rd defendant but there is no evidence of fraud. The burden of proving fraud is on the party who alleges fraud. One must not make allegations of this nature unless he has sufficient grounds to justify such allegations. From the letter written by the 3rd defendant it appears that this is an inadvertent mistake on the part of the 3rd defendant.

[13] The question then arises whether any purpose would be served by reinstating the caveat. The property has now been transferred to the 2nd defendant. As I have stated above the plaintiff as the *administrator de bonis non*, has failed to show any right over

this property. Therefore, the first relief prayed for in the statement for a declaration that the transfer in favour of the 2nd defendant is null and void, must fail and no purpose would be served by reinstating the caveat.

[14] For the above reasons the court makes the following orders

ORDERS

1. The statement of claim is struck out and the action is dismissed.
2. The plaintiff is ordered to pay the defendants \$4000.00 (\$1000.00 to each defendant) as costs (summarily assessed) of this action within 30 days from today.




Lyone Seneviratne

JUDGE

26th March 2021