

IN THE HIGH COURT OF FIJI

AT SUVA

Civil Action No. 123 of 2010

BETWEEN : **DR. LISING PAGENSTECHER** of Dachauer Strasse 173, 80636 Munich, Germany as the Executrix of the **ESTATE OF JOSEF SEVERIN OTTO-HEINRICH AHLMANN** late of Styl-OST Morsum, Germany, Retired Company Director by virtue of Re-Seal Grant No. 48108 dated 4 November 2008.

PLAINTIFF

AND : **ESTATE MANAGEMENT SERVICES LIMITED** a duly incorporate company having it registered office at c/- G H Whiteside & Co, Chartered Accountant, 211 Ratu Sukuna Road, Suva.

DEFENDANT

AND : **MINAMI TAIHEIYO KAIHATSU KABUSHIKI KAISHAS** a company registered in Fiji and having a place of business in Fiji at Pacific Harbour.

THIRD PARTY

BEFORE : **Justice Deepthi Amaratunga**

COUNSEL : **Mr. Ngamoki C.** for the Defendant-Applicant

Date of Hearing : **24 February 2014**

Date of Decision : **20 March 2014**

DECISION

INTRODUCTION

1. The Defendant is seeking for an order for sale of properties outside the subject matter of this action, owned by the third party in pursuant to Order 31 of High Court Rules 1988 and Sections 104(3)&(5) and 105(1)&(2) of the Land Transfer Act.

FACTS AND ANALYSIS

2. This action was filed by the Plaintiff against the Defendant for recovery of money paid by late Josef Severin Otto-Heinrich Ahlmann. The Defendant issued third party notice, but no acknowledgment of service for the third party. The Plaintiff obtained the summary judgment against the Defendant. The Defendant obtained default judgment against the third party for the sum ordered against them in the summary judgment. Now the Defendant is seeking to sell properties allegedly owned by the third party which were not the subject matter of this action.

3. Order 31 of High Court Rules of 1988. The Supreme Court Practice (UK) (1988) p 505 31/1/1 deals with the scope of the Order 31 and states as follows

‘Scope of Order - The Order relates to sale of land including any interest in or right over land, orders for sale or other property being made under O29.r4. It is designed to make the procedure more flexible and so enable the Court to retain as much or as little control over a sale as it thinks necessary in the particular case.’

4. The Order 29 rule 4 deals with ‘sale of perishable property’, and this includes the land which is subject matter of a case. So in order to invoke jurisdiction for sale under Order 31 of the High Court Rules the sale should be confined to the subject matter of the action and the court should be satisfied that the said property is perishable or likely to deteriorate if kept or other good reason to sell. So the Order 31 has no application to present matter as there is no such evidence and the summons relate to properties allegedly owned by the third party.

5. The Defendant cannot resort to Order 31 to sell lands allegedly owned by the third party, which are not the subject matter of this case.

6. The Defendant also relied on Section 104 and 105 of the Land Transfer Act. The provisions are;

“104.-(1) No judgment, decree or order for the payment of money, the sale of land or a sale in pursuance of an execution under any such judgment, decree or order issued prior to or after the commencement of this Act shall bind, charge or affect any estate or interest in land subject to the provisions of this

Act unless and until the Registrar has been served with a copy of such judgment, decree or order certified by the court and accompanied by a statement signed by any party interested or his barrister and solicitor or agent specifying-

(a) the estate or interest sought to be affected thereby;

(b) the name, address and description of the person by whom or on whose behalf the same is lodged; and

(c) an address or place within Fiji at which notices and proceedings relating thereto may be served.

(2) The Registrar, on being served with a copy of a judgment, decree or order under the provisions of subsection (1) shall, after marking upon such copy the time of service, enter the same in the register; and with effect from the time of service thereof upon the Registrar such judgment, decree or order shall, subject to the provisions of subsection (2) of section **105**, have the effect of, and be deemed to be, a caveat lodged under the provisions of section **106**, subject to any prior registered mortgage or charge forbidding the registration of any person as transferee or proprietor of and of any interest affecting, the estate or interest affected by such judgment, decree or order other than in pursuance of such judgment, decree or order.

(3) Upon the estate or interest in respect of which a judgment, decree or order has been registered under the provisions of subsection (2) having been sold pursuant to such judgment, decree or order, the Registrar shall, on receiving a transfer thereof in the prescribed form (which transfer shall have the same effect as if made by the proprietor) enter a memorial of such transfer in the register; and on such entry being made the purchaser shall become the transferee and be deemed to be the registered proprietor of such estate or interest.

(4) After the commencement of this Act, no unregistered instrument, document or writing and no equitable mortgage by deposit or otherwise without writing affecting any estate or interest in land shall prevail against a sale under the authority of a judgment, decree or order unless a caveat in respect of such unregistered instrument, document or writing or equitable mortgage shall have been lodged with the Registrar in pursuance of the provisions of section **106** before the service of the copy of the said judgment, decree or order on the Registrar but, in the absence of a caveat, all of the estate and interest of the judgment debtor as well as of any unregistered purchaser, transferee, mortgagee or other person claiming through or under him shall be extinguished and shall pass to the purchaser by virtue of a transfer under the provisions of this section.

(5) The Registrar may register a transfer under the authority of a judgment,

decree or order without requiring the production of the duplicate instrument of title:

Provided that the Registrar shall give such notice of intention to register the transfer, at the cost of the transferee, and cause the same to be published, as in the case of the production of a duplicate certificate being dispensed with under the provisions of section 26.

Satisfaction, etc. of registered judgment

105.-(1) Upon production to the Registrar, by way of application, of sufficient evidence of the satisfaction of any judgment, decree or order registered under the provisions of section 104, he shall direct an entry to be made in the register of a memorial to that effect, and on such entry having been made, such judgment, decree or order shall be deemed to be satisfied.

(2) Every judgment, decree or order shall cease to bind, charge or affect any estate or interest in land in respect of which it is registered unless a transfer upon a sale under such judgment, decree or order shall be presented to the Registrar for registration within six months, or such extended period as the court by order made on application to it upon summons shall determine, from the day on which the copy of such judgment, order or decree was served.”

7. The above provisions in the Land Transfer Act do not empower the court to sell the properties which were not the subject matter of the court. They only provide the procedural aspects and does not allow the court to sell properties belonging to a party for the satisfaction of judgment.
8. In the circumstances the motion seeking sale of properties allegedly owned by the third party stated in the motion is refused as neither Order 31 of High Court Rules 1988 nor Section 104 & 105 of Land Transfer Act sanction the court to sell properties allegedly owned by the 3rd party in this summons. No cost ordered.

THE FINAL ORDER

- a. The summons dated 19th April, 2013 is struck off.
- b. No costs.

Dated at **Suva** this **20th** day of **March, 2014**.

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Justice Deepthi Amaratunga
High Court, Suva