

In the High Court of Fiji at Suva

Probate Jurisdiction

HPP no. 17 of 2011

Between: Lydia O'Neil Aka Sereima Lidia Mitchell

Plaintiff

And: Wainwright G Hill

First Defendant

And: Sunil Pal

Second Defendant

And: Yogendra R Sharma

Third Defendant

Appearances: Mr I. Fa for the plaintiff

The first, second and third defendants are absent and unrepresented

Date of hearing: 1st October, 2013

Judgment

1. In these proceedings, the plaintiff seeks to remove the first defendant, as administrator of the estate of the late Percy Mitchell (the estate). The plaintiff also seeks to set aside all transactions made of the property of the estate by the first, second and third defendants. It is alleged that the first defendant fraudulently obtained letters of administration and transferred the property to the second and third defendants, without the consent of the plaintiff. The plaintiff is a daughter of the late Percy Mitchell. The first defendant, his grandson. The claim is undefended.

2. The statement of claim

2.1. The plaintiff, in her statement of claim states that on 9 July, 2007, the first defendant had filed an ex-parte application for grant of letters of administration in the estate. The application was designed to seize the estate comprising CT 14086, lot 11, DP no 3663 in the province of Cakaudrove in the District of Qamea comprising 224 acrs, 2r 12p (the property) and deny the other beneficiaries of their rightful share.

- 2.2. In order to induce the court to grant letters of administration to the first defendant, the plaintiff, in an affidavit dated 15th June, 2007, filed in Court fraudulently made a representation that the plaintiff was deceased and no longer a beneficiary of the estate, when he knew the plaintiff was living and a beneficiary of the estate. The Court granted letters of administration de bonis non to the first defendant.
- 2.3. The statement of claim proceeds to state that in order to induce the sale of the property, the first defendant, in a statutory declaration, made a representation to the Registrar of Titles that there are no other persons or beneficiaries entitled to any shares or benefits from the sale.
- 2.4. The plaintiff alleges that the first defendant made these representations fraudulently, in the knowledge that it was false or reckless, not caring whether it was true or false.
- 2.5. It is further alleged that in consequence of fraudulently gaining transfer of the property, the first defendant transferred the property to the second defendant, on 11 February, 2010, without the consent of the plaintiff.
- 2.6. There followed on, a transfer on 2nd March 2010, by the first and second defendants to the third defendant, without the consent of the plaintiff.
- 2.7. On 18th May 2010, the third defendant registered a mortgage over the property, without the consent of the plaintiff.
- 2.8. The plaintiff concludes that her right to apply for letters of administration has been wrongfully denied by the actions of the first defendant. She has suffered loss of her share as a beneficiary of the estate, as it has been endangered by a “*series of fraudulent and un-consented transactions*” carried out by the first, second and third defendants.
- 2.9. The plaintiff seeks the removal of the first defendant, as administrator of the estate; the appointment of the plaintiff as administrator; the voiding of all transactions of the property by the first, second and third defendants, as transactions which have endangered the property; damages and costs.

3. *The hearing*

The plaintiff testified, in support of her claim. She said she was the daughter of Paul Mitchell. He owned a land in the district of Qamea comprising 224 acres. This was left to the plaintiff and her sister. Paul Mitchell died intestate in May, 1945.

She said that Walter Smith was appointed administrator of the estate of Paul Mitchell. He administered the estate and gave the property to the plaintiff and her sister. Walter Smith died 15 years ago. After he died, the estate was not being administered.

The plaintiff said that all her sisters are dead. She is the only surviving child of Paul Mitchell. In support, she produced her birth certificate. She said that she has a better claim to administer the estate than the first defendant.

The first defendant is her nephew, her sister's son. He had never met the deceased Paul Mitchell. He fraudulently obtained letters of administration by filing an affidavit (administration oath) on 15th June, 2007, stating that she had passed on. He knew that she was alive, because at that time, she had lunch and dinner with him and his partner and family.

The first defendant unlawfully sold the property to the second defendant on the declaration made to the Registrar of Titles that there were no other living beneficiaries. This was done with the intention that the Registrar act upon it and transfer the property. As a result of that statement, the first defendant sold the property to the second defendant on 11th February, 2011. The plaintiff did not consent to that transfer.

The plaintiff further testified that on 2nd March 2010, the first and second defendants transferred this property to the third defendant. She did not consent to that transfer nor to the registration of a mortgage by the third defendant on 18th May, 2010.

The first defendant, Mr Hill became the administrator of the estate, as a result of the false misrepresentation made by him. The first defendant unlawfully transferred the property of the estate to the second and third defendants. The plaintiff said that she has suffered a loss, as she has been deprived of her entitlement. She seeks orders that (a) the first defendant be removed as administrator of the estate and she be appointed instead; (b) the transactions of the first defendant, in unlawfully transferring the property of the estate to the second and third defendants be set aside and declared void and, (c) damages and costs.

The following documents were produced as formal proof:

- i) The order of the Master of 25th July, 2007, granting letters of administration to the first defendant.
- ii) Administration oath of the first defendant dated 15th June, 2007.
- iii) Affidavit of justification of sureties
- iv) Certificate of death of Percy Mitchell
- v) Birth certificate of the first defendant
- vi) C T No. 14086.

- vii) Transmission by death(the application to be registered as administrator) dated 20th February, 2008.
- viii) Landowners'(the first defendant) Letter of Intent of 5th November, 2009.
- ix) Deed between the first and second defendant dated 3rd February, 2010.
- x) Statutory declaration made by the first defendant dated 7th February, 2010,
- xi) Transfer of land in Fee Simple of CT 14086 from the first to the second defendant dated 9th February, 2010, for a sum of \$ 20,000.

4. *The determination*

- 4.1. The first question that I have to determine is whether the first defendant obtained letters of administration fraudulently, as alleged by the plaintiff.
- 4.2. The affidavit(Administration oath) of the first defendant states that the plaintiff and seven other beneficiaries of the estate are dead, while another Lorna Mitchell, aged 85 years had consented to the first defendant applying for letters of administration. The plaintiff produced her birth certificate.
- 4.3. It is evident that the first defendant obtained letters of administration by making a fraudulent representation that the plaintiff is dead. It follows that the grant of letters of administration to the first defendant was fraudulently obtained and must be revoked. In my judgment, the plaintiff, as a surviving daughter of the deceased Paul Mitchell, does have a better claim to be the administrator of the estate than the first defendant.
- 4.4. The plaintiff next seeks the voiding of all transactions of the property by the first, second and third defendants.
- 4.5. The statement of claim pleads that the following transactions were effected, without the consent of the plaintiff,
 - a) the first defendant transferred the property to the second defendant, in consequence of fraudulently gaining transfer of the property.
 - b) *“On 2 March, 2010, the 1st Defendant and 2nd Defendant transferred the property to the 3rd Defendant”.*
 - c) On 18 May, 2010, the third defendant registered a mortgage over the property.
- 4.6. I have examined the memorials noted on certificate of title 14086. The memorials confirm the transactions in a) and c) of the preceding paragraph. The memorial of 2 March, 2010, provides that a transfer was made to the first defendant and the plaintiff. I find paragraph 20 of the statement of claim and the plaintiff's evidence that the first

and second defendants transferred the property to the third defendant inconsistent with the memorial of 2 March,2010.

4.7. In my judgment, an earlier memorial of 20 February,2008, on CT 14086 titled “*TRANSMISSION BY DEATH*”,whereby the property devolved on the first defendant, as administrator cannot stand, in the light of my finding that the letters of administration was fraudulently obtained by the first defendant.

4.8. I will now deal with the transfer to the second defendant on 11th February, 2010.

4.9. Under the Torrens system of title, registration of title confers upon the registered owner “*indefeasibility of title*”, as laid down in section 40 of the Land Transfer Act.

4.10. In *Fels v Knowles*,(1907) 26 NZLR 604 at page 620 the Privy Council stated:

The cardinal principle of the statute is that the register is everything, and that, except in cases of actual fraud on the part of the person dealing with the resisted proprietor, such person, upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against all the world. ...Everything which can be registered gives, in the absence of fraud, an indefeasible title to the estate or interest registered, ..(emphasis added).

At page 623, it was stated:

The mere fact that a person dealing with a registered proprietor knows that such is a trustee under a will certainly does not make it necessary to make inquiry as to his powers, unless there is something in the nature of his dealings with the trust property to give notice of the fact that he is fraudulently dealing with it. (emphasis added).

4.11. The concept of indefeasibility of title is designed to protect “*any bona fide registered proprietor or registered mortgagee (such as the defendant) all the benefits, rights and interests consequent upon registration, irrespective of any irregularity or error leading to the registration of the instrument, falling short of fraud on the part of the person seeking registration.*”-*Church of Samoa Trust Board v Broadcast Finance Ltd*,(1984) 2 NZLR 704 at 712 as cited by the FCA in *AG v Kumar*,(1985) 31 FLR 23.

- 4.12. In the recent judgment of *Wati v Charan*, (2013)FJCA 132 Lecamwasam JA said:

Indefeasibility of Title in relation to the Land Transfer Act grants impunity to the title of the land upon the registration of the instruments recognized in the Land Transfer Act. Upon the registration of an instrument under the Land Transfer Act, it attracts the sanctity of indefeasibility subject to certain exceptions such as fraud, mistake or error in terms of sections 40 and 41 of the Land Transfer Act. Hence to defeat the title of the defendants it is incumbent on the plaintiff respondent to prove one of the grounds stated above.

Lecamwasam JA referred to *Assets Company Ltd v Mere Roihi*, (1905) AC 176 where Lord Lindley trenchantly stated at pg 210:

..by fraud in these Acts is meant actual fraud, i.e. dishonesty of some sort, not what is called constructive or equitable fraud – an unfortunate expression and one very apt to mislead by often used, for want of a better term, to denote transaction having consequences in equity similar to those which flow from fraud. Further, it appears to their Lordships that the fraud which must be proved in order to invalidate the title of a registered proprietor for value, whether he buys from a prior registered owner or from a person claiming under a title certified under the Native Land Acts, must be brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out fraud if he had been more vigilant, and had made further inquiries which he omitted to make, does not in itself prove fraud on his part (emphasis added).

- 4.13. It is clear that under the principle of indefeasibility of title as laid down in the Land Transfer Act and the cases I have examined, a plaintiff has to show evidence of actual fraud on the part of a defendant, in order to set aside his registered title.
- 4.14. In the present case, the plaintiff has not given any evidence that suggests the second defendant had any actual knowledge of the interest of the plaintiff, as beneficiary. The plaintiff's evidence was that the first defendant transferred the property to the second defendant, without her consent. There was no evidence that the second defendant was aware of this irregularity. I would note that the transfer

document of 7 February,2010, provides that the property was transferred from the first to the second defendant for \$ 20,000.

4.15. In my judgment, in the absence of establishing fraud on the part of the second defendant, the second defendant's registered title cannot be set aside.

4.16. I have dealt with the inconsistency in the plaintiff's claim, as regards the transfer to the third defendant earlier in this judgment.

4.17. Finally, the plaintiff also claims damages on the ground that she suffered loss in that she has been deprived of her entitlement. No evidence was given by the plaintiff in support of her alleged loss. The claim is declined.

5. In my judgment, the plaintiff is entitled to be appointed as administrator of the estate of Percy Mitchell, in place of the first defendant.

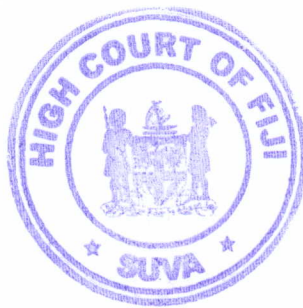
6. Orders

A. I make orders as follows:

- i) The first defendant is removed as administrator of the estate of Percy Mitchell.
- ii) The plaintiff is appointed as administrator of the estate of Percy Mitchell.
- iii) The memorial titled "*TRANSMISSION BY DEATH*" of 20 February,2008, on CT14086 , whereby the property devolved on the first defendant is cancelled.
- iv) The first defendant shall pay the plaintiff costs summarily assessed in a sum of \$ 1500.

B. I decline the plaintiff's claim for damages and voiding of all transactions of the property by the first, second and third defendants.

30th April, 2014



A.L.B. Brito-Mutunayagam

A.L.B. Brito-Mutunayagam

Judge