

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 256 of 2010

BETWEEN

WAKAYA LIMITED

Plaintiff

AND

MARSHA NUSBAUM

1st Defendant/ Counterclaim Plaintiff

KENNETH CHAMBERS

2nd Defendant/ Counterclaim Plaintiff

AND

DAVID H. GILMOUR

1st Counterclaim Defendant

MELIKI T. TUINAMUANA

2nd Counterclaim Defendant

RENEE D. S. LAL

3rd Counterclaim Defendant

DILIP K. JAMNADAS

4th Counterclaim Defendant

BEFORE

Hon. Justice Kamal Kumar

COUNSEL

Applicants in Person

Mr J. Apted and Mr K. Jamnadas for the Respondents

DATE OF HEARING

22 November 2016

DATE OF RULING

31 October 2017

RULING

(Application to Extend Caveat)

1.0 Introduction

- 1.1 On 25 August 2010, Wakaya Limited filed this action against Marsha Nusbaum (“**Nusbaum**”) and Kenneth Chambers (“**Chambers**”) claiming damages, costs and interest.
- 1.2 On the same day, Wakaya Limited filed for Interlocutory Injunction to restrain Nusbaum and Chambers from entering Wakaya Island and burying Chambers’ son, late Alexander Gerald Walsh-Wrightson Lynch-Chambers (“**Alexander**”).
- 1.3 On 25 August 2010, His Lordship Justice Hettiarachchi (as he then was) granted interim Order restraining Nusbaum and Chambers from entering and burying body of Alexander on Wakaya Island or Certificate of Title No. 27686.
- 1.4 On 30 August 2010, Chambers applied to have the interim injunction dissolved.
- 1.5 On 6 September 2010, Justice Hettiarachchi dismissed Chambers’ application to dissolve the injunction.
- 1.6 On 21 September 2010, Nusbaum and Chambers filed Appeal to Court of Appeal.
- 1.7 On 4 March 2011, the Appeal was heard and judgment was delivered on 15 March 2011, when Court of Appeal ordered as follows:-
 - (i) Interim Injunction granted on 25 August 2010, by Justice Hettiarachchi be dissolved and any other Orders of High Court be set aside;
 - (ii) Any Caveat lodged by Wakaya Limited to prevent registration of 50% interest in Lot 6 to Kenneth Chambers’ be removed by Wakaya Limited forthwith;
 - (iii) Matter be referred to Master for assessment of damages suffered by Nusbaum and Chambers as a result of interim injunction;
 - (iv) Wakaya Limited to pay Nusbaum and Chambers costs - \$3,000 for Appeal and \$3,000 for High Court.
- 1.8 On or about 26 April 2011, Wakaya Limited filed Petition in Supreme Court of Fiji seeking special leave to appeal judgment of Court of Appeal.

- 1.9 Petition to Supreme Court of Fiji was heard on 25 April 2012, and Judgment delivered on 12 May 2012, whereby the Court of Appeal Judgment was varied to the extent:-
- (i) Direction to refer matter to Master of the Court for assessment of damages was quashed;
 - (ii) Parties were directed to proceed to trial in High Court on substantive matters.
- 1.10 On 23 September 2010, Nusbaum and Chambers filed Statement of Defence and Counter-claim in High Court Action.
- 1.11 On 29 April 2011, Nusbaum and Chambers filed Application to join David Harrison Gilmour, Meliki Togavua Tuinamuana, Renee D.S. Lal, Dilip K. Jamnadas and Jamnadas & Associates as Counter-claim Defendants.
- 1.12 On 27 January 2012, the persons named in the preceding paragraph were joined as parties to High Court Action pursuant to Order of then Master of the Court.
- 1.13 On 23 May 2012, Nusbaum and Chambers filed Application to Strike Out Wakaya Limited's claim ("**Chambers Strike Out Application**").
- 1.14 Until 26 July 2012, this matter was being called before the then Master of the Court.
- 1.15 On 18 September 2012, this matter was called before Justice Kotigalage (as he then was) when he adjourned it to 5 November 2012, to verify the pending applications before the Court.
- 1.16 This matter was again called at 10.00am on the same day and when this matter was recalled, Mr K. Singh appearing for Wakaya Ltd and Other Counter-claim Defendants informed Court that:-
- (i) Wakaya is consenting to Chambers Strike Out Application subject to costs to be determined by Court;

- (ii) Nusbaum and Chambers' Application for further directions filed on 12 June 2012, be struck out because matters have been attended to;
 - (iii) Wakaya's Strike Out Application is listed to be heard on 20 November 2012;
 - (iv) Summons for Directions filed by Nusbaum and Chambers is wrong because it is filed prematurely.
- 1.17 Justice Kotigalage adjourned the matter to 13 March 2013, for parties to consider how the applications are to be dealt with.
- 1.18 On 5 November 2012, this matter was again called before Justice Kotigalage when Counsel for Wakaya informed Court that there is no proper pleadings before the Court and Nusbaum and Chambers counter-claim should be struck out with costs. The Court then directed parties intending to file any Amended Pleadings to do so by 30 November 2012, and adjourned this matter to 10 December 2012, for mention.
- 1.19 On 18 November 2012, Justice Kotigalage extended Caveat No. 786396 until further Order of the Court.
- 1.20 On 30 November 2012, Chambers filed fresh Application to strike out 1st, 2nd and 4th Defendants' Defence to Amended Counter-Claim.
- 1.21 On 30 November 2012, Wakaya Limited, Gilmour, Tuinamuana and Jamnadas filed Application to Strike Out, Nusbaum and Chambers Counter-Claim against them (**“Wakaya Strike Out Application”**).
- 1.22 On 13 March 2013, this matter was called before Justice Kotigalage when his Lordship directed parties to file Submissions and adjourned this matter to 14 May 2013, for Oral Submissions. On this day Counsel for Wakaya Limited made Oral Application for Leave to amend or withdraw or re-file fresh Application to Strike Out.
- 1.23 On 23 May 2013, it was Ordered by Consent that:-
- (i) Wakaya Ltd's claim be struck out;

- (ii) Nusbaum and Chambers Counter-claim to proceed.
- 1.24 On 11 November 2013, Applicants filed Ex-Parte Notice of Motion seeking Order for extension of Caveat No. 786396 lodged against Certificate of Title 42/4168 which was returnable on 18 November 2016.
- 1.25 On 18 November 2013, the Application to extend Caveat No. 786396 was dealt inter-parte by his Lordship Justice Kotigalage when the Caveat was extended until further Order of this Court.
- 1.26 On 22 November 2013, Justice Kotigalage delivered his ruling when Court dismissed the Striking Out Application filed by Gilmour, Tuinamuana and Jamnadas with costs and refused their Oral Application to amend, withdraw or file fresh Application.
- 1.27 On 23 January 2014, Nusbaum and Chambers filed Application to discontinue proceeding against Tuinamuana and Renee Lal and to join Edward David Nusbaum as 3rd Counter-claim Plaintiff and Acting Registrar of Titles and Attorney-General of Fiji as 3rd and 4th Counter-claim Defendants.
- 1.28 This matter was next called on 28 January 2014, before Justice Kotigalage and following Applications were listed:-
- (i) Application to Extend Caveat
- Parties were directed to file Affidavits
 - Caveator (Chambers) informed Court that he will file another Application for extension of caveat.
- (ii) Summons to Join Party (Order 15 Rule 6(2) of High Court Rules)
- (iii) Summons for Leave to file Third Amended Counter-claim
- (iv) Application for Leave to file Notice of Discontinuation
- 1.29 Parties were directed to file Affidavits and this matter was adjourned to 7 April 2014, to fix hearing date.

1.30 On 28 January 2014, Chambers filed Second Application for Extension of Caveat and declarations in following terms:-

- “1. *Declaring that the plaintiff’s application dated 16 October 2013, for removal of caveat 786396 is materially defective AND directing that the Registrar of Titles shall cancel registration of memorial 787018 on CT 42/4168.*
2. *Declaring that the 21 day prescribed notice for removal of caveat 787018 from CT 42/4168 has not been served on the caveators AND directing that the Registrar of Titles shall rescind the defective notice dated 7 November 2013.*
3. *That Caveat No. 786396 on CT 42/4168 shall be extended until further order of this Honourable Court.*
4. *That the plaintiff shall pay indemnity costs on this application.*
5. *For such further or other relief as this Honourable Court determines appropriate.”*

(“Caveat Application”)

1.31 On 29 January 2014, being returnable date of Caveat Application, Counsel appearing for Wakaya Ltd. sought time to file Affidavit in Opposition when Court granted him twenty-eight (28) days to file Affidavit in Opposition and for Chambers to file Response within seven (7) days.

1.32 This matter was adjourned to 7 April 2014, for mention.

1.33 On 7 April 2014, when this matter was called before Justice Kotigalage:-

(i) **Joinder Application:**

- (a) Counsel for Attorney-General of Fiji and Registrar of Titles informed Court that they have no objection to be joined as parties;
- (b) Mr Jamnadas appearing for Wakaya Ltd, 1st, 2nd and 4th Counter-claim Defendants stated that he objected to Joinder Application;

(ii) **Discontinuation of Action against Tuinamuana and Renee D S Lal:**

Chambers informed Court that they are discontinuing action against Tuinamuana and Renee Lal which was not objected except that Mr Jamnadas stated that costs for Tuinamuana be determined at trial.

- 1.34 Court adjourned Caveat Application, Joinder Application and Amendment Application to 12 May 2014, for hearing and directed parties to file Affidavits.
- 1.35 On 12 May 2014, all three Applications were heard by Justice Kotigalage and adjourned for ruling on notice.
- 1.36 On or about 27 June 2015, Justice Kotigalage departed Judicial Department without delivering the Ruling in respect to three pending Applications.
- 1.37 This matter was referred to me and was first called in this Court on 10 September 2015.
- 1.38 On 10 September 2015, parties informed Court they want all the Applications to be heard fresh by this Court. After reviewing what transpired on previous occasion this matter was adjourned to 2 October 2015, to fix hearing date.
- 1.39 On 25 September 2015, Chambers filed Application to Strike Out Defence to Amended Counter-claim.
- 1.40 On 28 September 2015, Chambers filed Application for Interlocutory Injunction.
- 1.41 On 2 October 2015, parties were directed to file Submissions in respect to Strike Out Application and Interlocutory Injunction Application and the Injunction Application was set down for hearing on 25 November 2015, at 2.30pm but was heard on 27 November 2015, because parties were given time to sort out the issue of access amongst themselves.
- 1.42 On 27 November 2015, parties made Submissions in respect to Injunction Application when the Injunction Application was adjourned for Ruling on Notice.

1.43 On 20 April 2016, Ruling in respect to Injunction Application was delivered when it was ordered that:-

- (i) *Registrar of Titles do register Easement Certificate No. 333585 against Certificate of Title No. 42/4168 forthwith;*
- (ii) *Until such time Plaintiff/Respondent constructs access road from jetty and airfield to property comprised in Certificate of Title No. 27687 and certified by civil (road) engineer that such access road is suitable for use by vehicle and construction machineries at Respondent's cost, or until further order of the Court, the Respondent/Plaintiff, 1st and 4th Counterclaim Defendants whether by themselves, and/or their servants, and/or agents, or howsoever, is restrained from preventing, hindering or in any way restricting the Applicant/2nd Defendant/2nd Counterclaim Plaintiff and/or his invitees, and workers from passing over, crossing and/or re-crossing, at any time of the day or night on foot or on horseback, over the residue land in Certificate of Title 42/4168 for access to or egress from Lot 6 on Deposited Plan 4648 in Certificate of Title No. 27687 on Wakaya Island;*
- (iii) *That the Plaintiff and Counterclaim Defendants by themselves, and/or through their servants, and/or agents, or howsoever, be restrained from preventing, hindering or in any way restricting the 2nd counterclaim plaintiff and/or his invitees, agents or employees from compliance with the statutory obligation in section 7A of the Land Sales Act (Cap 137) until further order of the Court on the condition that Applicant/2nd Defendant/2nd Counterclaim Plaintiff complies with terms and conditions of Restrictive Covenant No. 333584'A' registered against Certificate of Title No. 27687;*
- (iv) *Parties are at liberty to apply within seven (7) days notice;*
- (v) *Each party bear their own cost of Application for Interlocutory Injunction filed on 28 September 2015.*

1.44 On application by Counsel for Wakaya Ltd, 1st, 2nd, 4th Counter-claim Defendants time for filing of Submissions in respect to Strike Out Application was extended to 11 May 2016, and Reply to Submission to 1 June 2016.

- 1.45 Remaining four (4) Applications were adjourned to 25 August 2016, for hearing with matter to be called on 20 June 2016, to ensure that all documents are in order for hearing.
- 1.46 The Applications were next called on 8 July 2016, when Counsel for Wakaya, 1st and 4th Counter-claim Defendants sought time to file Supplementary Affidavit in respect to Caveat Application when Leave was granted for them to file Supplementary Affidavit with right of Reply given to Chambers.
- 1.47 On 25 August 2016, Counsel appearing for Wakaya Ltd, 1st and 4th Counter-claim Defendants sought time to file fresh Submissions in respect to Caveat Application in view of Injunction Ruling.
- 1.48 Hearing date was vacated and parties were directed to file Submissions on 16 September 2016. Wakaya Ltd, 1st and 4th Counter-claim Defendants were ordered to pay Chambers cost for the day and all four Applications were adjourned to 22 November 2016, for hearing.
- 1.49 On 22 November 2016, Joinder Application, Striking Out Application and Caveat Application was heard and adjourned for Ruling on Notice. The Amendment Application was adjourned to 7 December 2016, for mention due to shortage of time.
- 1.50 On 7 December 2016, this matter was adjourned to 15 December 2016, as Nusbaum just instructed Counsel.
- 1.51 On 15 December 2016, the Application to Amend Counter-claim for third time was adjourned to 24 January 2017, for hearing.
- 1.52 On 24 January 2017, Application for Leave to file Third Amended Counter-claim was heard when Counsel for parties made Oral Submissions and the Application for Leave to file Third Amended Counter-claim was adjourned for Ruling on Notice.
- 1.53 This Ruling in respect to Caveat Application (paragraph 1.30 of this Ruling).
- 1.54 Following Affidavits were relied on and filed by the parties:-

For Applicant:-

- (i) Affidavit of Kenneth Chambers sworn on 11 November 2013 (**“Chambers 1st Affidavit”**);
- (ii) Affidavit of Gavin O’Driscoll sworn on 17 January 2014 and filed on 23 January 2014 (**“O’Driscolls Affidavit”**);
- (iii) Affidavit of Kenneth Chambers sworn and filed on 17 February 2014 (**“Chambers 2nd Affidavit”**);
- (iv) Affidavit of Edward Daniel Nusbaum sworn and filed on 21 January 2014 (**“Edward Nusbaum’s 1st Affidavit”**);
- (v) Affidavit of Trevor Clinton Joyce sworn on 14 February 2014 and filed on 4 March 2014 (**“Joyce’s Affidavit”**);
- (vi) Affidavit of Edward Daniel Nusbaum sworn on 3 March 2014 and filed on 4 March 2014 (**“Edward Nusbaum’s 2nd Affidavit”**);
- (vii) Affidavit of Marsha Nusbaum sworn on 3 March 2014 and filed on 4 March 2014 (**“Marsha Nusbaum’s Affidavit”**);
- (viii) Affidavit of Kenneth Chambers in Reply sworn on 3 March 2014 and filed on 4 March 2014 (**“Chambers 3rd Affidavit”**);
- (ix) Affidavit of Kenneth Chambers in Reply sworn and filed on 28 April 2014;
- (x) Affidavit of Viliame Navoka sworn and filed on 7 May 2014 (**“Navoka’s Affidavit”**);
- (xi) Affidavit of Kenneth Chambers in Reply to Russel Thornley sworn and filed on 27 July 2014 (**“Chambers 4th Affidavit”**);
- (xii) Second Affidavit of Kenneth Chambers in Reply to Russel Thornley sworn on 18 November 2016 and filed on 22 November 2016 (**“Chambers 5th Affidavit”**).

For Respondents:-

- (i) Affidavit of Dalip Kumar Jamnadas sworn and filed on 22 April 2014 (**“Jamnadas’ Affidavit”**);
- (ii) Affidavit of Meliki Togavua Tuinamuana sworn and filed on 25 February 2014 (**“Tuinamuana’s Affidavit”**);
- (iii) Supplementary Affidavit of Russel Thornley sworn and filed on 13 July 2016 (**“Thornley’s Affidavit”**).

2.0 Background Facts

- 2.1 On or about 28 May 1969, property comprised and described in Certificate of Title No. 42/4168 was transferred to the Plaintiff.
- 2.2 On or about 29 May 1973, property comprised and described in Certificate of Title No. 42/4168 was transferred to Pacific Hotels Development Limited (**“PHDL”**).
- 2.3 Subsequently PHDL subdivided the property comprised in Certificate of Title No. 42/4168 in stages and sold some lots.
- 2.4 On 10 February 1983, Certificate of Title No. 42/4168 (excluding lots sold) was transferred to Plaintiff.
- 2.5 On or about 5 July 1985, Wakaya Limited as Vendor entered into a Sale and Purchase Agreement with one Edward Daniel Nusbaum, for sale of lot known as Lot 94 at that time and subject to proposal plan approved by Director of Town and Country Planning on 18 April 1974.
- 2.6 On 10 February 1993, lot known as Lot 6 on Deposited Plan No. 4648 (formerly Lot 94) (hereinafter known as **“Lot 6”**) was transferred to Edward Daniel Nusbaum.

- 2.7 Subsequently Certificate of Title No. 27687 was issued over Lot 6 in favour of Edward Daniel Nusbaum.
- 2.8 On or about 19 September 2007, Edward Daniel Nusbaum transferred Lot 6 on Deposited Plan No. 4648, Island of Wakaya, District of Wakaya containing 1 acre 3 roods and 5 perches comprised and described in Certificate of Title No. 27687 (hereinafter referred to as “**CT 27687**”) to Marsha June Ferre Nusbaum, the 1st Defendant/1stCounterclaim Plaintiff pursuant to terms of Marriage Settlement filed in the Cass Country Superior Court in the State of Indiana, USA on 3 April 1998.
- 2.9 On 14 June 2013, Marsha June Ferre Nusbaum transferred one undivided half share in CT 27687 to the Applicant subject to the following:-
- (i) Registered Mortgage No. 748851;
 - (ii) Easement Certificate No. 162746;
 - (iii) Restrictive Covenant No. 333584 ‘A’;
 - (iv) Right of Way Easement No. 333585;
 - (v) Easement Certificate No. 333586.

3.0 Application to Extend/Remove Caveat

3.1 Section 106 of the Land Transfer Act Cap 131 provides:

“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 provision 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.”

3.2 In **Cambridge Credit (Fiji) Limited v. W.F.G Limited** (19...) 21 FLR 182 Court of Appeal at page 184 sets out the requirements to be satisfied by a caveator to come within the provisions of Section 106 of Land Transfer Act Cap 131 as follows:-

- “(1) That it 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 is it so claiming by virtue of any unregistered agreement or other instrument or transmission or any trust expressed or implied or otherwise howsoever.”*

Court of Appeal in **Cambridge’s** case also adopted with approval following comments of his Lordship Stout C.J. in **Staples & Co. v. Corby and District Land Registrar** [1901] 19 N.Z.L.R. 517 whilst dealing with provision in Land Transfer Act (NZ) similar to s106.

“Before a person can caveat under this section he must be a person who claims to be entitled to the land, or any estate or interest in the land, or to be ‘beneficially interested’ in the land, or in any estate or interest in the land, and the person in either event must claim ‘by virtue of any unregistered agreement, or other ‘instrument or transmission’ (‘transmission’ meaning acquirement by title or estate consequent on death, will, intestacy, bankruptcy, &c.), ‘or of any trust expressed or implied, or otherwise howsoever.’”

3.3 The above principle was applied and adopted in **Hussein v. Ali** [2013] FJHC 285, Civil Action No. 328 of 2012 [7 June 2013].

3.4 It is therefore imperative that Plaintiff should show some form of legal or beneficial interest in the subject land to be able to maintain the Caveat.

3.5 On 1 October 2013, the Applicants as Caveators caused to be registered Caveat No. 786396 against Certificate of Title No. 42/4168 *“as registered proprietors of the dominant tenement in Lot 6, DP 4648 on certificate of title 27687 claiming an equitable easement interest in the servient tenement as delineated in Plan No. 180/2001 dated 13th May 1980 annexed to the Memorandum of Easement and Instrument 333585 in favour of the caveators and their servants, agents and invitees: firstly for right of way access over the roading network; and secondly for access and recreation in the common land.*

By virtue of:

- 1. An unregistered memorandum of easement in Instrument 333585 dated January 1993;*
- 2. An assignment of the benefit of the interest of Edward Daniel Nusbaum as purchaser in an agreement for Sale and Purchase dated 2 July 1985, wherein Wakaya Limited is registered proprietor of the servient tenement; and*
- 3. Subdivision consent conditions imposed for the benefit of the caveators’ by the Director of Town & Country Planning on 2 April 1974, on subdivision application 1/29/4”*

(hereinafter referred to as **“the Caveat”**)

3.6 At paragraph 13 of Chambers’ 1st Affidavit he states as follows:-

“13. The defendant’s seek an order extending the caveat in exhibit A until further order of this Honourable Court to allow proper ventilation of substantive issues at trial as directed by the Supreme Court on 9 May 2012, with indemnity costs.”

3.7 In Chambers’ 1st Affidavit filed in Support of the Application to extend the Caveat he annexed letters of complaint against Mr Dilip Jamnadas and Statement given by Edward Daniel Nusbaum to Police without saying how these complaints and

statement show that the Applicants have caveatable interest and he also does not state the outcome of Police Investigation.

- 3.8 Even though hearsay evidence can be given in Affidavits filed in Court I agree with submission of Respondents Counsel that this Court cannot give any weight to the Statement.

Preliminary Objection

- 3.9 Respondents submitted that the Applications also adopted the wrong procedure by filing an Interlocutory Application in this action rather than filing the Originating Summons for removal of caveat.
- 3.10 Defendants relied on the case of **NBF Asset Management Bank v. Taveuni Estate Ltd.** [2009] HBC 245 of 2008 (13 January 2009).
- 3.11 In **NBF Asset Management** case whilst the Court agreed that the Originating Summons should have been filed for removal of caveat it did not strike out the Interlocutory Application on the ground that Order 2 of the High Court Rule does not make the Application a nullity and that the Caveator was not prejudiced in any way by the Interlocutory Application.
- 3.12 For the same reason this Court will deal with Application for Removal of Caveat in this matter.

Declarations: Caveatee's Application dated 16 October 2013 for Removal of Caveat is defective and that the twenty-one (21) days prescribed notice has not been served on the Caveator and directing Registrar of Titles to cancel registration of Memorial 78018 and to rescind the notice dated 7 November 2013.

- 3.13 Applicants submit that since the Address on the Application to Removal of Caveat and Notice of Caveat is not that address of Caveatee on the Caveat, Removal of Caveat was not served on the Applicant the notice for removal of caveat is defective and the Memorial No. 782018 endorsed against Certificate of Title No. 42/4168 be removed.

3.14 Section 110 of Land Transfer Act 1978 provides as follows:-

“Removal of Caveat

110.*-(1) Except in the case of a caveat lodged by the Registrar the caveatee or his agent may make application in writing to the Registrar to remove the caveat, and thereupon the Registrar shall give twenty-one days' notice in writing to the caveator requiring that the caveat be withdrawn and, after the lapse of twenty-one days from the date of the service of such notice at the address mentioned in the caveat, the Registrar shall remove the caveat from the register by entering a memorandum that the same is discharged unless he has been previously served with an order of the court extending the time as herein provided.*

(2) Every such application shall contain an address in Fiji at which notices and proceedings may be served.

(3) The caveator may either before or after receiving notice from the Registrar apply by summons to the court for an order to extend the time beyond the twenty-one days mentioned in such notice, and the summons may be served at the address given in the application of the caveatee, and the court, upon proof that the caveatee has been duly served and upon such evidence as the court may require, may make such order in the premises either ex parte or otherwise as the court thinks fit.”

3.15 Section 176(1) to (4) of Land Transfer Act provides as follows:-

“176.*-(1) Any notice required by or under the provisions of this Act to be served or given to any person may be served or given by being sent by registered post to that person at his address for service.*

(2) The address of any person as entered in the register shall, until amended or altered, be his address for service.

(3) The address or place in Fiji appointed in a caveat as the address or place at which notices relating to the caveat maybe served shall be the address for service of the caveator for the purposes of this section.

(4) The Registrar shall cause a copy of each notice so sent to be filed with a memorandum of the same having been sent and such memorandum shall be sufficient proof that the notice was duly sent.”

- 3.16 Applicants do submit the Application for Removal of Caveat dated 16 October 2013, is defective on the ground that Caveator's postal address is different from that on the Caveat.
- 3.17 There is no prescribed form for Removal of Caveat and the fact Registrar of Titles has accepted the Removal of Caveat in the format it was lodged means the Form is approved by Registrar and Section 177(c) of Land Transfer Act 197 (Regulation 17(2) - Land Transfer Regulation).
- 3.18 The Notice for Removal of Caveat which is Annexure P of Kenneth Chambers Affidavit sworn on 23 January 2014, in Support of Application to file Third Amended Counterclaim is as follows:-
- Caveatee (Wakaya Limited)
P.O. Box 15424, Suva
Caveator (Kenneth Chambers and Marsha Chambers)
c/- O'Driscoll & Co., Lawyers,
P.O. Box 15424, Suva
- 3.19 The Post Office Box number for both Caveator and Caveatee is same.
- 3.20 It is undisputed fact that:-
- (i) The Caveat has caveators (Kenneth Chambers and Marsha Nusbaum) address as c/- O'Driscoll & Co., P.O. Box 17526 Suva (Annexure A - Chambers' 1st Affidavit);
 - (ii) The Caveators Post Office Box number in Notice of Removal of Caveat is wrong and is the Post office Box number of the Caveatee, Wakaya Ltd.;
 - (iii) Registrar of Titles posted the Notice of Removal of Caveat at Caveatee's postal address as was stated in Application for Removal of Caveat.
- 3.21 On 11 November 2013, Applicants filed Ex-parte Notice of Motion seeking to extend Caveat No. 786396 and on 18 November 2013, Court extended the Caveat until further order of the Court.

- 3.22 The Applicants state that they did not receive Notice of Removal of Caveat until after they filed the Ex-parte Motion for Extension of Caveat.
- 3.23 It is undoubted that the Notice of Removal of Caveat was not posted at Caveator's postal address but Caveator got notice of the Application for Removal of Caveat sometime after the expiry of twenty-one (21) day period.
- 3.24 At paragraph 2.13 to 2.17 of Respondents Submission dated and filed on 1st September 2016, Respondents submit as follows:-

“2.13 The Caveat gave the Caveators’ solicitor’s post office box as their address for service.

2.14 On or about 16 October 2013, WIL as Caveatee, purported to issue a request under section 110(1) of the Land Transfer Act (“LTA”) to the Registrar of Titles (“Registrar”) seeking the removal of the Caveat. The request wrongly stated the Caveators’ address for service and instead gave Caveatee’s address i.e. WIL’s post box address.

2.15 By a notice dated 7 November 2013, but which appears to have been sent on 13 November 2013, the Registrar purported to give notice to the Caveators under section 110(3) of the LTA, that the caveat would be removed “after lapse of 21 days from the date of service of this Notice unless an Order from the High Court to the contrary has been served upon me”. This notice was, however, addressed to WIL’s post office box. It is not in dispute that as a result, the notice was never served on the Caveators at their solicitor’s postal address stated in the Caveat.

2.16 On about 11 November 2013, the Caveators, who had not yet received the Registrar’s notice made an anticipatory ex parte application to the High Court under section 110(3) of the LTA for an order extending the Caveat. This was granted.

2.17 This summons commencing an inter-partes application was filed on 28 January 2014. The supporting affidavit of Kenneth Chambers filed on 23 January 2014, shows that by that date, the Caveators had received copies

of WIL's request for the removal of the Caveat dated 7 November 2013, and the Registrar's Notice dated 7 November 2013, as they are annexures P and Q to that affidavit. There is therefore no doubt that they have received the Registrar's notice and are receiving the fullest opportunity to be heard on their Caveat."

- 3.25 Section 176(3) of LTA makes it very clear that any notice (including notice of removal of caveat) in relation to a caveat be served at the address given in the Caveat.
- 3.26 Section 176(3) is a mandatory provision and must be followed by the Registrar of Titles and it is the Registrar of Titles duty to check the address of the Caveator in the Application to Remove Caveat against the Caveat to ensure that both addresses are same.
- 3.27 In this instance it is clear that the address of the Caveator and Application for Removal of Caveat was not the same and the Registrar of Titles issued Notice of Removal of Caveat at the wrong address stated in the Application.
- 3.28 Respondents relied on **Attorney-General of Fiji v. Kumari** [2015] FJCA 139; ABU065.2012 (2 October 2015) which case dealt with date of service of the Notice for Removal of Caveat and as to when notice is deemed to be served on the Caveator.
- 3.29 The **Kumari** case can be easily distinguished from facts of this case on the ground that in **Kumari's** case the address on notice of removal of caveat was the address of Caveator stated in the Caveat whereas in this instance, address on Notice for removal of caveat and caveator are different.
- 3.30 In this instance the Applicant (Caveator) exercised his right under section 110(3) which provide as follows:-

s110(3): *"The caveator may either before or after receiving notice from the Registrar apply by summons to the court for an order to extend the time beyond the twenty-one days mentioned in such notice, and the summons may be served at the address given in the application of the caveatee, and the court, upon proof that the*

caveatee has been duly served and upon such evidence as the court may require, may make such order in the premises either ex parte or otherwise as the court thinks fit.”

- 3.31 Having filed Application to extend Caveat No. 786596 pursuant to section 110(3) it then became irrelevant as to whether notice of removal was served on the Caveator (Applicant) or not.
- 3.32 Therefore it is not for this Court to determine the issue of service of notice on the Applicants as to do so will be a wasted exercise.
- 3.33 Caveatee (Plaintiff) claims that the wrong Post office Box number for Caveator (Applicant) was a mistake whereas Applicants (Caveators) claim that it is a conveyancing fraud on part of Caveatee and/or Solicitors and Registrar of Titles.
- 3.34 This Court will need to hear evidence via oral testimony to determine whether there was fraudulent conduct as alleged by the Applicants.
- 3.35 Therefore, this Court has no alternative but to refuse to make the declaration on an Interlocutory Application as sought by the Applicants.

Whether Caveat No. 786396 should be extended further?

- 3.36 The grounds for lodging Caveat No. 786396 appears at paragraph 1.30 of this Ruling and in short the Applicants claim that they have caveatable interest because of the right way of easement and the right granted under the condition dated 2 April 1974, in respect to Subdivision Plan No. 1/29/4.
- 3.37 When this Court delivered its Ruling on 20 April 2016, in respect to Application for Interlocutory Injunction it outlined the following background facts:-
- “2.1 On or about 28 May 1969, property comprised and described in Certificate of Title No. 42/4168 was transferred to the Plaintiff.
- 2.2 On or about 29 May 1973, property comprised and described in Certificate of Title No. 42/4168 was transferred to Pacific Hotels Development Limited (“**PHDL**”).

- 2.3 *Subsequently PHDL subdivided the property comprised in Certificate of Title No. 42/4168 in stages and sold some lots.*
- 2.4 *On 10 February 1983, Certificate of Title No. 42/4168 (excluding lots sold) was transferred to Plaintiff.*
- 2.5 *On or about 5 July 1985, Wakaya Limited as Vendor entered into a Sale and Purchase Agreement with one Edward Daniel Nusbaum, for sale of lot known as Lot 94 at that time and subject to proposal plan approved by Director of Town and Country Planning on 18 April 1974 (Annexure “D” of “Applicant’s 1st Affidavit and Annexure “PV1” of Vatu’s 1st Affidavit).*
- 2.6 *On 10 February 1993, lot known as Lot 6 on Deposited Plan No. 4648 (formerly Lot 94) (hereinafter known as “**Lot 6**”) was transferred to Edward Daniel Nusbaum.*
- 2.7 *Subsequently Certificate of Title No. 27687 was issued over Lot 6 in favour of Edward Daniel Nusbaum.*
- 2.8 *On or about 19 September 2007, Edward Daniel Nusbaum transferred Lot 6 on Deposited Plan No. 4648, Island of Wakaya, District of Wakaya containing 1 acre 3 roods and 5 perches comprised and described in Certificate of Title No. 27687 (hereinafter referred to as “**CT 27687**”) to Marsha June Ferre Nusbaum, the 1st Defendant/1stCounterclaim Plaintiff pursuant to terms of Marriage Settlement filed in the Cass Country Superior Court in the State of Indiana, USA on 3 April 1998.*
- 2.9 *On 14 June 2013, Marsha June Ferre Nusbaum transferred one undivided half share in CT 27687 to the Applicant subject to the following:-*
- (i) Registered Mortgage No. 748851;*
 - (ii) Easement Certificate No. 162746;*
 - (iii) Restrictive Covenant No. 333584 ‘A’;*
 - (iv) Right of Way Easement No. 333585;*
 - (v) Easement Certificate No. 333586.”*

- 3.38 Applicants claim that the Registered Right of Way Easement No. 333585 was not endorsed on Certificate of Title No. 42/4168.
- 3.39 Easement was endorsed on Certificate of Title No 27687 of which Applicants now are registered owners.
- 3.40 Applicants claim that Mr Dilip Jamnadas fraudulently certified the Easement as caveat for the purpose of Land Transfer Act when he had no authority from Dr. Edward Daniel Nusbaum, the grantee and the then owner of Lot 6 on Deposited Plan No. 4648.
- 3.41 Applicants claim that Dr. Nusbaum assigned the Agreement and benefit of the Condition to the Applicants.
- 3.42 At paragraph 7 of Chambers 1st Affidavit he stated as follows:-
- “7. The plaintiff admits at paragraph 3 of its Defence to Counterclaim that the 1st defendant as registered proprietor of c/t 27687 is the assignee of Edward Daniel Nusbaum. The 2nd defendant is now joint registered proprietor of c/t 27687 and a sub-assignee. Annexed marked “E” is certified copy of c/t/ 27687.”*
- 3.43 At paragraph 3 of the Applicant’s Second Counter-claim it is pleaded as follows:-
- “3. The defendants are bona fide purchasers for valuable consideration, and they are assignees by operation of law of the benefit of an agreement dated 5 July 1985 (“the agreement”) between Edward Daniel Nusbaum and the plaintiff, incorporating subdivision consent conditions dated 2 April 1974 accepted by the plaintiff’s predecessor in title.”*
- 3.44 Respondents at paragraph 3 of Statement of Defence to Counter-claim pleaded as follows:-
- “3. The parties deny paragraph 3 of the Counter-Claim and they further say that the 2nd Defendant is not, nor has he ever been an owner of Lot 6 of DP 4648 on CT. No 27687 under the laws of Fiji. The parties admit that the 1st Defendant is an assignee of Edward Daniel Nusbaum.”*

- 3.45 No evidence has been produced in any of the Affidavits that Dr. Nusbaum has assigned the Agreement or the benefits of the Condition to Marsha Nusbaum or that Marsha Nusbaum has sub-assigned those benefits to Kenneth Chambers.
- 3.46 No evidence of any notice of assignment to Plaintiff (or of Respondents) has been produced in Court.
- 3.47 As stated from paragraphs 2.8 and 2.9 of this Ruling Dr. Edward Nusbaum transferred Lot 6 on Deposited Plan No. 4648 to Marsha Nusbaum pursuant to property settlement and Marsha Nusbaum subsequently transferred her half share in the Lot to Kenneth Chambers.
- 3.48 It is noted that the condition was valid for four (4) years and no evidence of any extension of the condition has been produced in Court which means it expired on sometimes in April 1978, which is well before the Applicants became owner of Lot 6 on Deposited Plan No. 4648 comprised and described in Certificate of Title No. 27687.
- 3.49 Applicants handed to Court the decision of High Court of New Zealand in **Olo Limited v. KA No.3 Trustee Ltd** CIV 2014-404-532 [2014] NZHC 1075 (22 May 2014) (Lang J) in which the Court held that an equitable easement gives caveatable interest.
- 3.50 Brief facts of **Olo's** case is as follows:-
- (i) In mid-2010 Olo Limited's directors/shareholders got interested in purchasing property at 34 Matapana Road on Waiheke Island from KA No. 4 Trustee Limited ("**KA4**");
 - (ii) KA4 was connected to KA3 which owned adjoining property at 46A Matapana Road;
 - (iii) Olo and Agent never drew any distinction between KA4 and KA3 during negotiation;
 - (iv) On 6 September 2010, Sales and Purchase Agreement was entered between Mr Casper (Director/Shareholder of Olo Limited) and/or his nominee and KA4 with clause 15 of the Agreement providing as follows:-

“15.0 Access

The vendor will allow the purchaser:

- a) *Vehicle access over the Adjoining Land to the property for a three day period sometime within the month following settlement to allow the purchaser to move furniture into the property; and*
 - b) *The Vendor grants the purchaser, the purchaser’s agents, contractors and invitees access from the road through the vendor’s neighbouring property situated at 46a Matapana Road and which is adjacent to the land referred to in this Agreement for a period not exceeding six months. Access via the road to this property will be available from the date of confirmation of this Agreement and must be completed within 36 months from settlement date. Access will not be available on weekends, public holidays or between 24th December & 3rd January. It is acknowledged by the parties that the access is required to assist the Purchaser in the removal of the existing dwelling from the property and the building of a replacement dwelling. The Vendor warrants and undertakes to take all steps necessary to ensure that the Purchaser will continue to receive the benefit of this Agreement from any subsequent registered proprietor of its neighbouring land at 46a Matapana Road.”*
- (v) After settlement Olo used the driveway to 46A Matapana Road as access to take items to 34 Matapana Road.
 - (vi) On 27 March 2013, (about five months prior to expiry of access easement) KA3 sought certain consent from Olo;
 - (vii) Olo agreed to consent subject to KA3 extending the access right for further two (2) years;
 - (viii) KA3 agreed to extend the access right to further two (2) years;
 - (ix) Dispute arose between Olo and KA3;
 - (x) KA3 did not dispute that Olo had access right under Clause 15(b) of the Agreement.

- 3.51 The central issue in Olo’s case was whether the right of access contained within clause 15.0(b) arguably created an equitable easement.
- 3.52 The Court after analysing the facts of the case and the principles held that “right granted under 15.0(b) arguably constitute an equitable easement sufficient to support a caveat”.
- 3.53 In relation to caveat his Honour Justice Lang stated the principles as follows:-
- “(a) The onus is on Olo to demonstrate that it holds an interest in KA 3’s land that is sufficient to support the caveat.*
- (b) Olo must put forward a reasonably arguable case to support the interest that it claims.*
- (c) An order for the removal of the caveat will only be made if it is clear that there was either no valid ground for lodging it in the first place or, alternatively, that such ground as then existed has now ceased to exist.*
- (d) The present proceeding is wholly unsuitable for the determination of disputed questions of fact.”*
- 3.54 This Court agrees with Chambers Submission that the provision of Land Transfer Act 1971 (Fiji) and Land Transfer Act 1952 (NZ) are identical and such the principles stated in **Olo’s** case equally apply to Caveat lodged in Fiji.
- 3.55 The facts of the **Olo** and this action is not exactly the same.
- 3.56 In **Olo’s** case there was no legal easement or right of way and that is the reason Olo lodged caveat to protect its right of access which was not subject to any Easement Certificate that was registered against 46A Matapana property.
- 3.57 In this instant the Applicants intended to protect their interest when they discovered that Right of Way Easement No. 333585 was not endorsed on Certificate of Title No. 42/4168 which grounds ceased to exist when on 20 April 2016, ordered that Right of Way Easement be endorsed on Certificate of Title No. 42/4168.

3.58 This Court cannot extend the Caveat any further because of following reasons:-

- (i) No evidence of any assignment of Agreement or Conditions by Dr. Nusbaum to the Applicants has been produced to Court;
- (ii) Even if the condition was assigned no evidence has been produced to show that it had been extended beyond the four (4) year period;
- (iii) The property subject to Certificate of Title No. 27687 which is owned by the Applicants is subject to following easement and covenants:-

“(i) Registered Mortgage No. 748851;

(ii) Easement Certificate No. 162746;

(iii) Restrictive Covenant No. 333584 ‘A’;

(iv) Right of Way Easement No. 333585;

(v) Easement Certificate No. 333586.”

- (iv) The ground that Right of Way Easement No. 333585 was not endorsed on Certificate of Title No. 42/168 ceased to exist when Court delivered Ruling in respect to Interlocutory Injunction Application on 20 April 2016.

4.0 Costs

4.1 The Applicants attempted to protect their right of way by lodging Caveat when they found out that Right of Way Easement was not registered against Certificate of Title No. 42/4168.

4.2 Accordingly, it is just and fair that parties bear their own costs in respect to Application to extend Caveat No. 786396.

5.0 Miscellaneous

5.1 In Chambers’ 5th Affidavit Applicants refer to Fisheries (Wakaya Marine Reserve) Regulation 15 and alleges that the coastal zone in the regulation affects their lot

and they believe that the Regulation was instigated by Mr Thornley for the Caveatee.

5.2 This is not a ground or an issue in respect to Application to extend Caveat.

5.3 If Applicants feel aggrieved by the Regulations then they should raise with appropriate authorities and seek legal advise if they desire to do so and act accordingly.

6.0 Orders

6.1 I make following Orders:-

- (i) Application for Court to make Interlocutory Declarations is dismissed;
- (ii) Caveat No. 786396 registered against Certificate of Title No. 42/4168 be removed forthwith;
- (iii) Each party to bear their own costs for Application to Extend Caveat No. 786396 and Declaration.




K. Kumar
JUDGE

At Suva

31 October 2017

Applicants in Person

Jamnadas & Associates for the Respondents