

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

**CIVIL ACTION NO.: HBC 147 of 2023**

**BETWEEN : KONTIKI FINANCE LIMITED  
PLAINTIFF**

**AND : JONATHAN ASHRAF AMHAZ  
FIRST DEFENDANT**

**: HOME FINANCE COMPANY PTE LIMITED  
SECOND DEFENDANT**

**: REGISTRAR OF TITLES  
THIRD DEFENDANT**

**: ATTORNEY-GENERAL OF FIJI  
FOURTH DEFENDANT**

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**APPEARANCES/REPRESENTATION**

**PLAINTIFF : Mr. K Goundar [Kumar Goundar Lawyers]**

**FIRST DEFENDANT : Not Served**

**SECOND DEFENDANT : Mr. N. Lajendra [Lajendra Lawyers]**

**THIRD & FOURTH  
DEFENDANTS : Ms. N Narayan [Attorney-General's Chambers]**

**RULING BY : Master Ms Vandhana Lal**

**DELIVERED ON : 16 May 2023**

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**RULING  
[EXTENSION OF CAVEAT]**

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### **Application**

1. The Plaintiff seeks orders for an extension of caveat number 868153 registered on the First Defendant's property described as iTaukei lease no. 31131, Tacirua East Subdivision, Stage 3A (Part of) Lot 21 on SO 6622, until determination of its substantive claim.
2. The said caveat was lodged on 22<sup>nd</sup> November 2018 by the Plaintiff and the address for service on the caveator on the caveat is as follows:

Kontiki Finance Limited  
GPO Box 12508  
Suva.
3. Interest claimed on caveat is *"estate or interest as mortgagee under and by virtue of a mortgage in the form annexed hereto made between the caveator as mortgagee and the registered proprietor or mortgagor"*.

### **Other Parties' Interests**

4. On the said lease is registered a mortgage by Home Finance Company Limited, the second named Defendant. This was registered in 2015.
5. In clause 3.2 of mortgage document, the mortgagor undertakes that *"without consent of Home Finance Company he will not give or allow another security over the property"*. And if Home Finance Company gives its consent *"a priority agreement was to be signed by the other party"*.

### **The Plaintiff's Contention**

6. According to the Plaintiff, in March 2023 the Second Defendant sought the removal of the caveat. Accordingly, the Registrar of Title via a notice of removal dated 24<sup>th</sup> March 2023 informed the Plaintiff of the service.
7. The notice was posted on 14<sup>th</sup> April 2023.

8. As per update from the Post Fiji (Annexure J) the envelope was uplifted on 19<sup>th</sup> April 2023 around 1.21pm by one Joseva Velavela.

The Addressee Details are:

Kontiki Finance Limited  
PO Box 12508.

**Relevant Provision of Law under the Land Transfer Act**

9. Section 106 of the Act allows 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;*
- (b) .....

*to lodge with the Registrar of Titles a Caveat 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 a caveat.*

10. Section 107 of the Act requires the caveat to state “*with sufficient certainty the nature of the estate or interest claimed and how such estate or interest is derived*”.
11. Pursuant to Section 110 of the Act application in writing to “*the Registrar can be made to remove the caveat and thereupon the Registrar shall give 21 days’ notice in writing to caveator requiring that the caveat be withdrawn and after the lapse of 21 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 or she has been previously served with an order of the court extending the time as therein provided”.*

12. Pursuant to Section 110(3) of the Act summons filed for extension of caveat is to be served “*on caveatee and the court upon proof the caveatee has been duly served and upon such evidence the court may require may make such order in the premises either ex-parte or otherwise as the court thinks fit*”.

**When was the Removal of Caveat Notice Deemed to be served?**

13. The Plaintiff’s counsel submitted that service deemed to take effect on 20<sup>th</sup> April 2023 when “the necessary manager Mr Grey Williamson” recorded the envelope.
14. In **Raghwan Construction Company Limited v Endeavor Youth Investment Cooperative Society**, a Suva High Court Civil Action No. HBC 322 of 2005 (delivered on 18<sup>th</sup> August 2005) Singh J. stated that:  
*“The Registrar can only remove a caveat on expiry of 21 days after service of the notice and not from the date of notice”.*

He further held that “*the 21 days start to run from the day next after service and not from the actioned day of service*”.

15. In **Attorney General of Fiji and Others v Ram Kumari and Others**, Fiji Court of Appeal Civil Appeal No. ABU 065 of 2012 it was held “*service will be deemed to have been effected at the time at which the envelope would be delivered in the ordinary course of post in absence of any proof to the contrary*”.
16. In the said case the envelope was uplifted from the Post Office on 19<sup>th</sup> April 2023.
17. I find that service is deemed to take effect when the envelope was uplifted from the Post Office on 19<sup>th</sup> April 2023 at 1.21pm.

18. I say so for following reason:

- Section 107 of the Act requires for address of the person who lodges the caveat;
- In the caveat the address for service is:  
*Kontiki Finance Limited*  
*GPO Box 12508*  
*Suva*
- The envelope containing the notice of removal was addressed to:  
*Kontiki Finance Limited*  
*Level 4 Tappoo City*  
*PO Box 12508*  
*Suva*
- The envelope was delivered to the said address and uplifted from the Post Office from said address.

19. With service of notice of Removal deemed to take effect on 19<sup>th</sup> April 2023, the 21 days starts to run from 20<sup>th</sup> April 2023 and expired on 10<sup>th</sup> May 2023.

20. With the caveat expiring on 10<sup>th</sup> May 2023 this court has no powers to extend the same thereafter.

**Nature of the estate or interest claimed and how is the estate or interest is derived?**

21. The caveat reads that Kontiki Finance Limited is “*claiming an estate or interest as mortgagee under and by virtue of a mortgage in the form annexed hereto made between the caveator as Mortgagee and the registered proprietor as mortgagor*”.

22. However, no mortgage document is annexed to the said caveat (see annexure G to Plaintiff’s affidavit in support).

23. In the affidavit in support, the Plaintiff relies on following documents for loans advanced to the First Defendant:

- Pre-contractual disclosure statement and letter of offer dated 22<sup>nd</sup> October 2018 which states seriously provided is a caveat over the subject property. This was for a loan facility of \$80,000.
- Pre-contractual disclosure statement and letter of offer dated 28<sup>th</sup> December 2018 which listed caveat over the subject property as once of the security. This was for a loan facility of \$65,000.
- Pre-contractual disclosure statement and letter of offer dated 20<sup>th</sup> January 2019 which listed a caveat over the subject property as a security for the loan. This was for a loan facility of \$70,000.
- Pre-contractual disclosure statement and letter of offer dated 10<sup>th</sup> February 2019m which listed a caveat over the subject property as one of the securities.

24. In none of the above-mentioned document was it agreed between the Plaintiff and the First Defendant that the Plaintiff will have a mortgage over the subject property for loans advanced.

**Can the Plaintiff say to have an equitable mortgage?**

25. My findings are it cannot for following reasons:

- The First Defendant<sub>1</sub> did not have the power to allow the caveat to be registered or any other interest or charge by the Plaintiff over the property as he had mortgaged the said property to Home Finance Company and pursuant to the mortgage document with Home Finance Company, the First Defendant<sub>1</sub> was required to obtain a consent first from Home Finance Company and when a consent

was obtained a priority agreement was to be executed by Kontiki Finance Limited.

There is no evidence that the First Defendant had the consent of the Second Defendant to allow said property to be used as a security by Kontiki Finance Limited.

- The subject land is a native land with head lessor being iTaukei Land Trust Board and Section 12 of the iTaukei Land Trust Board Act requires for prior consent of the board before any dealing with the said property.

There is no evidence that consent of the iTaukei Land Trust Board was obtained before submitting the land as a security to Kontiki Finance Limited. The only consent the First Defendant had was for mortgaging the said lease to the Second Defendant.

26. Accordingly, I find the Plaintiff has failed to establish any caveatable interest it has over the said property.

**Balance of convenience**

27. There is registered since 2015 a mortgage by the Second Defendant whose consent was not obtained before allowing the subject land to have a caveat over it by the Plaintiff. There is no evidence of fraud in the said registration of the mortgage by the Second Defendant.
28. A caveat on the subject land, will forbid the registered mortgagor from exercising its right over the said land.
29. If the caveat is extended, the Second Defendant would be required to make necessary application to the court for its removal in order to exercise its right as a mortgagor, adding cost to the Second Defendant.

### Findings

30. Accordingly, I find that since service was deemed to take effect on 19<sup>th</sup> April 2023 the 21 days expired on 10<sup>th</sup> May 2023 hence this court has no powers to extend the caveat after 10<sup>th</sup> May 2023.
  
31. And if service was even deemed to take effect on 20<sup>th</sup> April 2023, the Plaintiff has failed to show it has equitable mortgage over the land as there is no consent of the iTLTB pursuant to Section 12 of the iTLTB Act to deal with the property by the Plaintiff and the First Defendant did not have consent of the Second Defendant to allow the Plaintiff to register a caveat over the property. Furthermore, the balance of convenience does not require the caveat to be extended.

### Orders

32. The Plaintiff's application dated 09<sup>th</sup> May 2023 is dismissed and orders of 11<sup>th</sup> May 2023 is vacated.
  
33. The Plaintiff to pay cost to the Second Defendant summarily assessed at \$1,000 and to be paid by 12 noon 31<sup>st</sup> May 2023.



Vandhana Lal [Ms]  
Master of the High Court  
At Suva.

16 May 2023

### TO:

1. Suva High Court Civil File No. HBC 147 of 2023;
2. Kumar Goundar Lawyers, Solicitors for the Plaintiff;
3. Lajendra Lawyers, Solicitors for the Second Defendant;
4. Attorney-General's Chambers, Solicitors for the Third & Fourth Defendant.