

IN THE SUPREME COURT OF FIJI
CIVIL APPELLATE JURISDICTION

CIVIL PETITION CBV 0005 OF 2016
(Court of Appeal No: ABU 0034 of 2014)

BETWEEN: APIMELEKI KUNAVULA
SAVENACA WAINICAGI
ISAIA GONEWAI (Senior)
PITA KEWA NACUVA

Petitioners

AND: RUKSHANA BIBI KHAN

Respondent

Coram: The Hon. Mr Justice Marsoof, Judge of the Supreme Court
The Hon Madam Justice Ekanayake, Judge of the Supreme Court
The Hon Mr Justice Calanchini, Judge of the Supreme Court

Counsel: Mr V Singh for the Petitioners
Mr N Tuifagalele for the Respondent

Date of Hearing: 5 July 2017

Date of Judgment: 21 July 2017

JUDGMENT

Marsoof J

[1] I have perused in draft the judgment of Calanchini J and agree with his reasoning and conclusions.

Ekanayake J

[2] I also agree with the conclusions and reasoning of Calanchini J.

Calanchini J

[3] The petitioners seek leave to appeal from a judgment of the Court of Appeal delivered on 27 May 2016. As is the practice of the Court, in the event that leave is granted the appeal will be determined in this judgment.

[4] The petitioners as trustees of the Mataqali Naboka commenced proceedings by originating summons in the High Court claiming vacant possession of the property comprised in Certificates of Title 7317 and 7358. They also claimed damages, mesne profits and costs. The petitioners had acquired the titles by transfers from the Director of Lands. The transfers were registered on 5 March 2003. Prior to that date the Director of Lands had granted a crown lease (No.503051) to Baravi Handicrafts Limited which lease was registered against the titles on 30 November 2001. Baravi Handicraft Limited subsequently transferred the lease to the Respondent, Rukshana Bibi Khan. The Director of Lands had consented to the transfer of the lease on 12 August 2002 and the transfer was registered against the lease on 19 September 2002. There was no issue as to the rights of the respondent under the lease when the petitioners, who had acquired the rights and obligations of the lessor, became registered proprietors.

[5] The trial judge in a judgment delivered on 24 April 2014 held that the petitioners were entitled to vacant possession of the land as the registered proprietors of the property comprised in the Certificates of Title numbered 7317 and 7358. The trial judge also awarded special damages in the sum of \$7,000.00 for unpaid rent and mesne profits in the sum of \$25,800.00 per annum for the period 1 January 2009 till the date of delivery of vacant possession to the petitioners. The respondent was also ordered to pay general

damages to be assessed by the Master and costs on an indemnity basis both of which were to be assessed by the Master.

[6] The Court of Appeal set aside the orders of the High Court and allowed the respondent's appeal. They held that a letter dated 12 January 2011 from the Director of Lands gave rise to a genuine dispute that could not have been properly resolved by way of the originating summons procedure relying on affidavits only. The Court of Appeal was of the view that the genuine dispute could only be determined by the trial judge converting the action into a writ action with pleadings, discovery and evidence from witnesses.

[7] The challenge by the petitioners to that judgment is based on a number of grounds that can be conveniently summarized as raising two issues for this Court's consideration. The first issue is whether on the evidence before the trial judge there was a genuine dispute. The second issue is whether the Court of Appeal has given proper consideration to the effect of the concept of title by registration under the Land Transfer Act and what is known as the Torrens system of land registration.

[8] It is at this point necessary to refer to section 7(3) of the Supreme Court Act 1998 which provides that:

"in relation to a civil matter (including a matter involving a constitutional question) the Supreme Court must not grant leave to appeal unless the case raises:-

- (a) a far-searching question of law;*
- (b) a matter of great general or public importance;*
- (c) a matter that is otherwise of substantial general interest to the administration of civil justice."*

[9] When considering this provision in **Star Amusement Ltd –v- Prasad** [2013] FJSC 8; CBV 5 of 2012, 23 August 2013 this Court observed at paragraph 15:

*“These criteria have been examined and applied by the Supreme Court of Fiji in decisions such as **Bulu –v- Housing Authority** [2005] FJSC 1; CBV 11 of 2004 (8 April 2005); **Dr Ganesh Chand –v- Fiji Times Ltd**, (31 March 2011) and **Praveen’s BP Service Station Ltd –v- Fiji Gas Ltd** (6 April 2011), and it is clear from these decisions that special leave to appeal is not granted unless the case is one of gravity involving a matter of public interest, or some important question of law, or affecting property of considerable amount or where the case is otherwise of some public importance or of a very substantial character.”*

- [10] In my judgment the second issue raised by the petitioners is an appropriate issue for which leave should be granted. That issue is whether the Court of Appeal has failed to apply the principle that under the Torrens system, title by registration is indefensible except in the case of fraud on the part of the registered proprietor. In my view an issue that relates to the application of that principle is a serious question of law that should be considered by this Court.
- [11] In the High Court the Respondent’s position was that the petitioners were not the registered proprietors of the land and that the Director of Lands was her landlord. There was in her affidavit a statement to the effect that the Lands Department had conducted an investigation into the transfer of the land to the petitioners by the Director of Lands and had issued a notice to the Registrar of Titles, the High Court in Lautoka and the parties not to proceed with any transaction in relation to the property until the investigation was completed. In her affidavit the respondent also made an allegation of fraud in respect of the said transfer by the Director of Lands to the petitioners. There was no evidence in the affidavit material to support that allegation.
- [12] The letter that appeared to cause the Court of Appeal so much concern was exhibited to the respondent’s affidavit opposing the petitioners’ claim for vacant possession. It is a letter from the Ministry of Lands and Mineral Resources addressed to the Registrar of Titles with cc copies to a number of relevant addresses. It is dated 12 January 2011 but it is apparent that the date should read 12 January 2012 as the opening paragraph refers to discussions on 10 January 2012 and earlier correspondence dated 2 November 2011. One of the matters that was raised by Counsel for the respondent at the hearing before this

Court is noted in that letter. It would appear that DP 5715, an amalgamation survey of CT 7317 and CT 7358 was approved on 6 September 1984. There then follows in that letter a notation to the effect that cancellation of CT 7317 and CT 7358 should have been entertained after approval of DP 5715. However the letter goes on to confirm that the lease to Baravi Handicraft Ltd was endorsed on both CT 7317 and 7358 as lease 503051 on 30 November 2001. The letter confirms that the lease was transferred to the Respondent and registered on 19 September 2002. Finally the letter confirms that the transfer of the two titles to the petitioners was registered on 5 March 2003. As a result, once registered and in the absence of fraud on the part of the petitioners their title became indefensible or “*conclusive and absolute*”; see **Star Amusement Ltd –v- Prasad** (supra).

[13] Whatever may have been meant by the notation concerning entertainment of the cancellation of the two certificates of title, it is quite apparent that after 6 September 1984 the Registrar of Titles continued at least for 19 years thereafter to enter in the Register and endorse on the certificates dealings in respect of both the lease numbered 503051 and CT 7317 and CT 7358. Furthermore even if DP 5517, once approved, does constitute a deemed cancellation of CT 7317 and CT 7358, the cancellation had not been registered on the titles. Under section 12 of the Land Transfer Act the Registrar is required in the case of a cancelled certificate to endorse thereon a memorandum of the reasons for such cancellation and a reference to the new certificate of title issued in place thereof. Furthermore, the Registrar of Titles has not corrected any “*error*” on the certificates of title under section 131(2) of the Land Transfer Act.

[14] In my opinion there was no material before the High Court that could have amounted to a genuine dispute. There was no material before the Court of Appeal that could have allowed the Court of Appeal to conclude otherwise than that the petitioners were the registered proprietors of the land described in the two certificate of title. There was no evidence in the affidavit material filed by the respondent that would allow the Court of Appeal to conclude that the petitioners had become registered proprietors as a result of

fraud on their part. As a result the petitioners have been the lessors under the lease since 5 March 2003.

[15] Therefore I would grant leave to appeal and allow the appeal. I would set aside the orders of the Court of Appeal, order the re-instatement of the orders of the High Court and order that the respondent pay costs in the Court of Appeal fixed at \$3,000.00 and costs in this Court fixed at \$5,000.00.

Orders:

1. *Leave to appeal is granted.*
2. *Appeal allowed and the orders of the Court of Appeal are set aside.*
3. *Orders of the High Court are re-instated.*
4. *Respondent to pay the costs in the Court of Appeal fixed at \$3,000.00 and the costs in this Court fixed at \$5,000.00.*



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Hon Mr Justice Marsoof
Justice of the Supreme Court

A handwritten signature in blue ink, appearing to be "W. Ekanayake", written over a dotted line.

Hon Madam Justice Ekanayake
Justice of the Supreme Court

A handwritten signature in blue ink, appearing to be "W. Calanchini", written over a dotted line.

Hon Mr Justice Calanchini
Justice of Supreme Court