

DISSENTING OPINION OF ACOBA, J.,

The germane question decided on appeal is whether the circuit court (the court) had jurisdiction to order expungement of the lis pendens that was filed in this case. I do not agree with the majority's holding that: (1) the court had jurisdiction to order expungement of the lis pendens from the land court registration system; and (2) the majority's analysis that (a) TSA Int'l Ltd. v. Shimizu Corp., 92 Hawai'i 243, 990 P.2d 713 (1999) and Hawai'i Revised Statutes (HRS) §§ 501-151 (1993) and 501-152 (1993) support its holding, see majority opinion at 15, and (b) "the [Intermediate Court of Appeals (ICA) in GGs (HI), Inc. v. New York Diamond, Inc., 85 Hawai'i 398, 944 P.2d 1341 (App. 1997),] erred when it relied on HRS § 501-196[.]"¹ Majority opinion at 12.

I.

The majority misinterprets TSA Int'l in broadly concluding that that case held the circuit court has jurisdiction to expunge a lis pendens filed in the land court.² See majority opinion at 16-17. It is said that "[t]he analysis in TSA

¹ The majority's contention that "the ICA [in GGs] erred when it relied on HRS § 501-196 to support its holding," is a misstatement. Majority opinion at 12. The ICA did not cite solely to HRS § 501-196 for its holding. As the majority concedes, "for [its] conclusion, the ICA cited Iaea v. Iaea, 59 Haw. 648, 586 P.2d 1015 (1978) and HRS § 501-196 (1993)." Majority opinion at 10-11 (footnotes omitted).

² The majority concedes that, in TSA Int'l, "the more narrow issue, i.e., whether the circuit court had jurisdiction to expunge a lis pendens recorded in land court, was not addressed[.]" Majority opinion at 16.

International [would] lead[] logically to [a] holding in this case that the circuit court has jurisdiction to expunge a lis pendens originally recorded in the land court." Majority opinion at 16-17. With all due respect, this rationale is flawed.

This court in TSA Int'l held that the circuit court had jurisdiction to expunge the lis pendens only because it retained the power to enforce its own judgment:

[T]he circuit court's expungement of [plaintiffs-appellants'] *lis pendens* on the [disputed property] was an exercise of the circuit court's power to enforce its judgment, which was in favor of [defendants-appellees].

92 Hawai'i at 266, 990 P.2d at 736 (emphasis added). In that case, the defendants moved to expunge the lis pendens after prevailing on summary judgments as to all the claims. Hence, in expunging the lis pendens, the circuit court was merely "exercis[ing]. . . it's power to enforce its judgment." Id.

Here, Defendant-Appellee Robert Foote (Defendant)³ moved in a non-hearing motion to expunge the lis pendens. An order granting the non-hearing motion was entered on September 7, 1999. Plaintiff-Appellant Steven Alan Knauer (Plaintiff) appealed that order, claiming that "the First Circuit Court lacked jurisdiction to enter such an order." The appeal is brought pursuant to the collateral order doctrine. To date, final judgment has not been entered on Plaintiff's complaint. Thus, TSA Int'l is not authority for the court to expunge the lis pendens, inasmuch as expungement would not be "an exercise of the

³ Hereinafter, "Defendant" refers collectively to all the defendants.

circuit court's power to enforce its judgment[,]" no final judgment having been entered. Id.

II.

The majority also misapplies HRS §§ 501-151 and 501-152. See majority opinion at 15-17. It is claimed that, pursuant to HRS § 501-152, Defendant "w[as] entitled to register the court's disposition, [granting Defendant's motion to expunge] the lis pendens, in the land court." Majority opinion at 15. According to the majority, "[t]his action, by the terms of the statute, expunges the earlier recorded lis pendens." Majority opinion at 15.

A.

It is helpful to reiterate that there are two separate systems for establishing land title in Hawai'i.

Hawai'i has two systems for recording title to real property. HRS [c]hapter 502 establishes a bureau of conveyances for recordation of interests in land. HRS [c]hapter 501 . . . establishes a land court registration system based upon the Torrens system of land title registration. "Registered land or property" refers to property which has had its title determined and certificate of title issued by the land court. The purpose of the registration system is to conclusively establish title to land through the issuance of a certificate of title[.] . . . Thus, the fundamental difference between a certificate of title issued by the land court and a recordation of title at the bureau of conveyances is that a land court certificate of title is "conclusive and unimpeachable" with regard to "all matters contained therein." [*In re Bishop Trust Co.*, 35 Haw. 816, 825 (1941)].

GGs, 85 Hawai'i at 405, 944 P.2d at 1348 (footnote omitted).

Inasmuch as HRS §§ 501-1, 501-151, and 501-152 are laws in pari materia, they must be construed with reference to each

other. "Laws in pari materia, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called in aid to explain what is doubtful in another." HRS § 1-16. Doing so, it is clear that the order expunging the lis pendens is within the jurisdiction of the land court, not the circuit court.

HRS chapter 501 (1993 & Supp. 2001) is titled "Land Court Registration" and relates to land court matters. Under HRS § 501-1, the land court has exclusive jurisdiction over all applications for registration of title to land, authority to determine all questions arising from such applications, and jurisdiction over other questions that may come before the land court under HRS chapter 501.

A court is established, called the land court, which shall have exclusive original jurisdiction of all applications for the registration of title to land and easements or rights in land held and possessed in fee simple within the State, with power to hear and determine all questions arising upon such applications, and also have jurisdiction over such other questions as may come before it under this chapter, subject to the rights of appeal under this chapter. The proceedings upon the applications shall be proceedings in rem against the land, and the decrees shall operate directly on the land and vest and establish title thereto.

HRS § 501-1 (1993) (emphases added). Plainly, HRS § 501-1 unequivocally grants the foregoing powers to the land court, not the circuit court. Under HRS § 501-151, a lis pendens filed in the land court must be in the form of a "full memorandum" identifying the registered land involved:

No writ of entry, action for partition, or any action affecting the title to real property or the use and occupation thereof or the buildings thereon, and no judgment, nor any appeal or other proceeding to vacate or reverse any judgment, shall have any effect upon registered land as against persons other than the parties thereto,

unless a full memorandum thereof, containing also a reference to the number of certificate of title of the land affected is filed or recorded and registered.

(Emphases added). Section 501-152 explains that a certificate reflecting the disposition of any case, i.e., an expungement order, may be registered if the memorandum described in HRS § 501-152, such as a lis pendens, has been recorded in the land court:

At any time after final judgment in favor of the defendant, or other disposition of any case in which a memorandum has been registered as provided in section 501-151, a certificate of the clerk stating the manner of the disposal thereof shall be entitled to registration.

(Emphasis added.)

B.

In this statutory framework, although “[t]he circuit court ha[s] jurisdiction over [a dispute] concern[ing] . . . registered land[,]” Iaea v. Iaea, 59 Haw. 648, 651, 586 P.2d 1015, 1017 (1978), the circuit court does not have jurisdiction to expunge or order expungement of a memorandum, i.e., a lis pendens, from the files and records of the land court. See id. HRS §§ 501-151 and 501-152 were apparently in effect when Iaea was decided.

In Iaea, the plaintiff brought an action in the circuit court to set aside a deed registered in the land court on the ground of forgery. See id. The circuit court ruled in favor of the plaintiff and issued a “judgment providing that ‘the Assistant Registrar is hereby directed to expunge said deed from the files and records of the Land Court[.]’” Id. This court

held that that "portion of the judgment . . . is unenforceable by the circuit court and is set aside." Id. (emphasis added).

Thus, this court in Iaea expressly determined, with apparent knowledge of HRS § 501-1, the specific jurisdiction of the land court and circuit court over matters related to registered land:

The circuit court had jurisdiction over the subject matter, despite the fact that it concerned registered land. See HRS § 603-21.7(a)(3). Cf. HRS ss 501-151, 501-153, 501-155. However, that portion of the judgment providing that "the Assistant Registrar is hereby directed to expunge said deed from the files and records of the Land Court of Hawaii together with any transfer certificate or certificates of title which may have been issued by the Land Court of Hawaii pursuant to the filing of said Document No. 539838," is unenforceable by the circuit court and is set aside.

Id. (emphases added).

It is apparent that, in Iaea, this court viewed the land court and not the circuit court as having jurisdiction over documents filed in the land court.⁴ The majority's determination thus conflicts directly with Iaea and the construction to be given HRS §§ 501-1, 501-151, and 501-152.

HRS § 501-1 was apparently in effect at the time Iaea was decided. Hence, consistent with the statute and Iaea, the lis pendens affecting the certificate of title registered in the

⁴ The majority maintains that "Iaea stands for the narrow proposition that the circuit court had jurisdiction to hear the subject matter of the dispute, . . . but that it did not have the jurisdiction to order the land court to expunge the deed upon a finding that the signature was forged." Majority opinion at 11 (citing Iaea, 59 Haw. at 649-50, 586 P.2d at 1016) (emphasis added). As the foregoing quote indicates, the circuit court order in Iaea is like that in the instant case. In the instant case, the court ordered that "Plaintiff's Notice of Pendency of Action filed on April 21, 1999 and recorded with the Office of Assistant Registrar of the Land Court, State of Hawaii, as Document No. 2537470 (affecting Transfer Certificate of Title No. 510,455) is hereby RELEASED." (Capitalization and underscoring in original.)

land court may be expunged by a petition to the land court. Plainly, that course best satisfies the separate jurisdiction of the land court and its obligation under HRS chapter 501 to uniformly administer land court registration procedures and records.

III.

A.

Contrary to the majority's position, GGG was correctly decided based on Iaea. In GGG, the appellees filed a breach of contract suit against the appellant's predecessor-in-interest. See 85 Hawai'i at 401, 944 P.2d at 1344. After serving their complaint, the appellees recorded a lis pendens in the land court against the property in dispute. See id. Subsequently, the property was conveyed to the appellant, but it was not recorded until almost five months later. See id. Thereafter, the appellees recorded a supplemental lis pendens in the land court. See id. After the circuit court entered a "stipulated judgment" and order in the breach of contract action, the appellees recorded the stipulated judgment in the land court. See id. Later, the parties in the breach of contract action filed a stipulation which dismissed all of the remaining claims in the lawsuit. See id.

About six months later, the appellant filed motions in the breach of contract action to vacate the lis pendens, supplemental lis pendens, and stipulated judgment and order and

to expunge them from its land court certificate of title to the disputed property. See id. The ICA, relying on Iaea, concluded that “the circuit court did not have jurisdiction to order that the lis pendens, supplemental lis pendens, or stipulated judgment and order be expunged.” Id. at 406, 944 P.2d at 1349. GGG thus held that “the circuit court does not have jurisdiction to expunge matters from a certificate of title or to order the land court to do so.” Id. (citing Iaea, 59 Haw. at 651, 586 P.2d at 1017). The foregoing proposition from Iaea bound the ICA in GGG.

B.

The majority also maintains that, “the ICA [in GGG] erred when it relied on HRS § 501-196 to support its holding . . . that only the land court can expunge a lis pendens[.]” Majority opinion at 12. However, what the ICA referred to in GGG in stating that “HRS § 501-196 sets forth the procedure for amending or altering a certificate of title[,]” 85 Hawai‘i at 406, 944 P.2d at 1349, was that portion of the section allowing a petition to the land court in the event “any error, omission, or mistake was made in entering a certificate or any memorandum thereon.” Id. at 405, 944 P.2d at 1348 (quoting HRS § 501-196). That is because the broad language of HRS § 501-196 (Supp. 2001)⁵

⁵ HRS § 501-196, in full text, states that

[n]o erasure, alteration, or amendment shall be made upon the registration book after the entry of a certificate of title or of a memorandum thereon, and the approval of the same by the registrar or an assistant registrar except by
(continued...)

allows for expungement of a lis pendens by petition to the land court, providing in part that

[a]ny registered owner or other person in interest may at any time apply by petition to the [land] court, upon the ground that registered interests of any description, whether vested, contingent, expectant, or inchoate have terminated and ceased; . . . or that any error, omission, or mistake was made in entering a certificate or any memorandum thereon[.]

(Emphases added.) See GGS, 85 Hawai'i at 405, 944 P.2d at 1348

("A certificate of title, however, may be amended by the land court when 'any error, omission, or mistake was made in entering a certificate or a memorandum thereon.'" (Citing HRS § 501-196

⁵(...continued)

order of the court recorded with the assistant registrar, provided that the registrar or assistant registrar may correct any clerical error made by personnel of the registrar's or assistant registrar's office. Any registered owner or other person in interest may at any time apply by petition to the court, upon the ground that registered interests of any description, whether vested, contingent, expectant, or inchoate have terminated and ceased; or that new interests have arisen or been created which do not appear upon the certificate; or that any error, omission, or mistake was made in entering a certificate or any memorandum thereon; or that the name of any person on the certificate has been changed; or that the registered owner has been married, or if registered as married that the marriage has been terminated; or that a corporation which owned registered land and has been dissolved has not conveyed the same within three years after its dissolution, or upon any other reasonable ground. The court shall have jurisdiction to hear and determine the petition after notice to all parties in interest and may order the entry of a new certificate, the entry or cancellation of a memorandum upon a certificate, or grant any other relief upon such terms and conditions, requiring security if necessary, as it may deem proper. This section shall not be construed to give the court authority to open the original decree of registration, and nothing shall be done or ordered by the court which impairs the title or other interest of a purchaser holding a certificate for value and in good faith, or the purchaser's heirs or assigns, without the purchaser's or their written consent.

Any petition filed under this section and all petitions and motions filed under this chapter after original registration shall be filed and entitled in the original case in which the decree of registration was entered.

(Emphases added).

and In re Matson Nav. Co., 76 Hawai'i 56, 897 P.2d 938 (App. 1995))).

Plainly, "the practical effect of a recorded lis pendens is to render a defendant's property unmarketable and unusable as security for a loan." S. Utsunomiya Enters., Inc. v. Moomuku Country Club, 75 Haw. 480, 502-03, 866 P.2d 951, 963 (emphases added), reconsideration denied, 75 Haw. 480, 866 P.2d 951 (1994). The recordation of an improper lis pendens affects the marketability and useability of the property as collateral. Thus, HRS § 501-196 would allow a procedure for remedying the "error . . . or mistake . . . in entering . . . [a] memorandum [of lis pendens]" affecting the certificate of title.

In that regard the lis pendens in GGG was determined to be invalid. See GGS, 85 Hawai'i at 408, 944 P.2d at 1351. Consequently, the ICA decided that the appellant was entitled, in accordance with HRS § 501-196, to "petition the [land] court, upon the ground that . . . an[] error . . . or mistake was made in entering" the lis pendens and supplemental lis pendens. HRS § 501-196.

Bound by HRS § 501-196 and Iaea, the ICA in GGG was required to apply them, as it did. See Tamashiro v. Control Specialist, Inc., 97 Hawai'i 86, 94, 34 P.3d 16, 24 (2001) (Acoba, J., concurring) (stating that the ICA cannot be faulted for applying the then-existing precedent to which the ICA was bound). The majority, then, is incorrect in its characterization of GGG, in light of the controlling authority.

IV.

In passing, the majority "not[ed] that the ICA's opinion in GGG is perplexing because, while" the circuit court is permitted to hear the merits of a "motion to expunge a lis pendens and to determine its validity," the circuit court does not have jurisdiction to expunge the lis pendens. Majority opinion at 13. The majority's statement misstates the facts. As recounted supra, at the time GGG was decided, Iaea was controlling authority. Bound by Iaea, GGG applied it. See discussion supra, Part III. Hence, GGG related to the state of the law as to the recordation of invalid instruments under the land court registration system. Further, the distinction between the jurisdiction of the circuit court and the land court with respect to expungement rests in the dual but separate systems for establishing title to land in this state.

V.

In sum, I do not agree with the majority in its reliance on TSA Int'l and HRS §§ 501-151 and 501-152 and its analysis of GGG.