

IN THE COURT OF APPEAL, FIJI

[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 096 OF 2020

[Lautoka Civil Action No. HBC 78 of 1995L]

BETWEEN : 1. **NIKO KIKI TIKOMAILEPANONI NADOLO**
2. **ILISEVA NASAU NADOLO**

Appellants

AND : 1. **UMESH CHAND AND PRASANJIT NARAYAN**
2. **CHANDRA DEO AND SURUJ WATI**

Respondents

Coram : **Prematilaka, RJA**
Morgan, JA
Dobson, JA

Counsel : **Mr. K. Patel for the Appellants**
Mr. D. S. Naidu for the 1st Respondents

Date of Hearing : **03 May 2024**

Date of Judgment : **30 May 2024**

JUDGMENT

Prematilaka, RJA

[1] I have read in draft the judgment of Morgan, JA. I agree with reasons and conclusions thereof.

Morgan, JA

Introduction and facts

[2] This is an appeal by the Appellants Niko Kiki Tikomailepanoni Nadolo and Iliseva Nasau Nadolo against the ruling of the Honourable M. H. Mohammed Ajmeer (“the Judge”) delivered in the High Court at Lautoka on 21st September 2020 in Civil Action No. HBC 78 of 1995/L (“the High Court Action”) where the Judge made the orders set out in paragraph [4] below on an application brought by the Plaintiffs in the High Court Action by way of Interparties Summons for Stay, as set out in the summons, pursuant to Order 29 Rule 13 of the High Court Rules 1988 and under the inherent jurisdiction of the Court.

Background

[3] The Judge set out the background to the matter in his ruling as follows:-

[7] Mr Umesh Chand, the third named defendant (“the third defendant” or “the defendant”) is the registered proprietor of Certificate of Title No. 17465 being Lot 22 on DP 2801 in the District of Ba on the island of Viti Levu containing an area of 18 acres 1 rood and 8 perches (the “property”).

[8] There was a default judgment entered against the first to fifth defendants (“the defendants”) by Justice Finnigan on 17 July 2008 for the sum of \$50,951.02.

[9] The defendants failed to pay the judgment sum. The plaintiffs then attempted to execute the judgment in its entirety against the third defendant. On 20 September 2017, the court, on the ex parte application of the plaintiffs, ordered (“the orders”):

- (a) There be a sale of the property*
- (b) A call for tender be made in the local dailies by the plaintiffs*
- (c) Tenders be closed within 4 (four) weeks from the date of the advertisement for the call of the tender.*
- (d) The plaintiffs be at liberty to accept the highest tender received.*
- (e) The Deputy Registrar of the Lautoka High Court of Fiji execute a transfer of property and every other document incidental to the said transfer on behalf of the third named*

defendant to enable registration of the transfer of the successful tender.

- (f) *The monies received from the sale be applied as follows:*
- (i) *Any mortgage or charge registration on the title be paid the sums owing to it at the date of settlement.*
 - (ii) *The plaintiffs be paid the judgment sum of \$50,951.02.*
 - (iii) *The stamping, Capital Gains Tax, plaintiffs legal costs and any incidental costs in relation to the transfer of the property be paid out of the sale proceeds.*
 - (iv) *The legal costs for the application by the plaintiffs for the recovery of the judgment sum of \$50,951.02 be paid on a full indemnity basis to the plaintiffs out of the sale proceeds.*
 - (v) *Any balance from the sale proceeds after the deductions to be made from (f) (i) through (f)/(iv) be paid into the Lautoka High Court registry.*

[10] *The orders directed the plaintiffs to call for tender in the local dailies and to close the tenders within 4 (four) weeks from the date of the advertisement for the call of tender.*

[11] *The tender was advertised in the Fiji Sun on 20 November 2017. The tenders closed on 15 December 2017.*

[12] *The defendant alleges that the tenders should have been addressed to the Deputy Registrar, Lautoka High Court and not vetted through by the plaintiffs and their solicitor; the market valuation report obtained by the plaintiffs in 2015 in the amount of \$110,000.00 is inherently flawed as the report fails to consider the value of the residential dwellings, the sugarcane production, the vegetable farm and the livestock farm located on the property as part of the valuation assessment; and in May 2016, exactly five months from the date of receipt of such flawed market valuation valuing the property at \$110,000.00 that Niko Kiki Tikomailepanoni Nadolo and Iliseva Nasau Nadolo (“the interested party”) wished to purchase the property from the plaintiffs in the exact amount of \$110,000.000, the price noted in the flawed market valuation report (the “first offer”), by sending a signed proposal to the plaintiffs’ solicitor.*

[13] *The plaintiffs could not accept the first offer from the interested party as they were subsequently required to run a tender process pursuant to the court orders.*

[14] *In 2017, the plaintiffs ran a tender process where the interested party's bid of \$110,000.00 was accepted by the plaintiff as the highest bid.*

[15] *The plaintiffs and the interested party entered into an undated sale and purchase agreement (the "SPA").*

[16] *In the current proceedings, the third defendant seeks to set aside the SPA entered into between the plaintiff and the third party.*

[17] *In the meantime, on 18 October 2019, the third defendant had filed an amended writ of summons in civil action No. 189 of 2019 against the plaintiffs and the interested party praying for the following reliefs:*

(a) Stay of all proceedings as per the orders granted by this Court in Civil Action No. 78 of 1995L on 9 February 2017, 20 day of September 2017 and on 22 day of February, 2019 until further order of this Court.

(b) Setting aside of the orders made on 20 September, 2017 and on 22 of February 2019 or alternatively payment of the sum of \$87,845.68 to the herein named plaintiffs.

(c) Recession of the undated Sale and Purchase Agreement between the Plaintiffs and the interested party.

(d) General damages for fraud, malfeasance and deception against the plaintiffs and the interested party."

[4] After hearing the parties the Judge made the following orders:

- 1. The third defendant is entitled to redeem the property.*
- 2. The undated sale and purchase agreement between the plaintiffs and the interested party is rescinded.*
- 3. The judgment sum is to be satisfied with the sum of \$87,842.68 deposited by the third defendant into court.*
- 4. The money deposited by the third defendant (\$87,842.68) is to be released to the plaintiffs in satisfaction of the judgment.*
- 5. The plaintiffs and the interested party shall pay summarily assessed costs of \$850.00 each, totalling \$1,700.00 to the third defendant.*

[5] Being dissatisfied with the decision the Appellants have appealed to this Court on the following grounds: -

1. *The decision by the Learned Judge is perverse and wrong in law because the Learned Judge gravely erred in law in respect of the following:*

- (a) *The Learned Judge failed to understand and appreciate that the application by the 3rd and 5th Defendants before him was for an interim stay on the sale and transfer of the property pending determination of Civil Action No. 189/19 and not for redemption of the property under sale in execution of the Judgment and this misconception ultimately led him to make the erroneous decision.*
- (b) *The Learned Judge failed to appreciate that Prasanjit Narayan, the 5th Defendant had no locus to bring the interim stay application as there was no execution of Judgment by the Plaintiffs against him and/or his property and accordingly the Learned Judge should have expunged his supplementary affidavits filed on 12 August 2019 and 11 October 2019 in support of the stay application.*
- (c) *The Learned Judge failed to hold that the final orders sought by 5th Defendant in his supplementary affidavit filed on 12 August 2019 in favour of the 3rd Defendant was procedurally wrong, in breach of the High Court Rules and against the accepted practice and norm of seeking orders in the Summons.*
- (d) *The Learned Judge erroneously granted substantive and final orders instead of interim orders as sought by the 3rd and 5th Defendant which effectively determined the Interested Party's final rights pending the determination of Civil Action No. 189/19 instituted by the 3rd Defendant for fraud against the Plaintiffs and the Interested Party.*
- (e) *The Learned Judge failed to appreciate that the orders for the sale of the property had to be set aside before orders for rescission could be granted and the same had not been sought by the 3rd and 5th Defendants.*
- (f) *The Learned Judge acted ultra vires of his powers and jurisdiction in making orders for rescission of the sale and purchase agreement between the Plaintiffs and the Interested Parties when the Learned Judge was fully aware that orders for rescission of the sale and purchase agreement were sought as final reliefs by the 3rd Defendant in Civil Action No. 189/19 and could only be made on a finding of fraud against the Plaintiffs and the Interested Party in that action.*
- (g) *The Learned Judge incorrectly applied section 72(1) of the Property Law Act and the principle of right of redemption as*

propounded in Vere v NBF Asset Management Bank [2004] FJCA 50; ABU 0069.2003S (11 November 2004) to the facts before him by holding that the property was not sold despite the existence of a valid and binding sale and purchase agreement between the Plaintiffs and the Interested Party.

2. *The Learned Judge erred in law and fact in holding that since the sale and purchase agreement was undated, it was conditional, when in fact the sale and purchase agreement was witnessed by the Deputy Registrar on the 22nd June 2018 which was the date of the sale and purchase agreement.*
3. *The Learned Judge erred in law and fact in holding that the tender and the selection process should have been supervised by the Deputy Registrar when no such orders were made by the Learned Judge when the Plaintiffs had obtained the sale orders.*
4. *The Learned Judge erred in law and fact in holding that the Plaintiffs and the Interested Party had intentionally kept the sale and purchase agreement undated and that it casts suspicion as to whether the same was executed after the tender process when there was evidence before the Learned Judge that the sale and purchase agreement was executed before the Deputy Registrar on the 22nd June 2018 which was the date of the sale and purchase agreement and after the call of the tender.*
5. *The Learned Judge erred in law and fact in arriving at conclusions or determining the matter based on suspicions and doubts when such conclusions could only be made at a trial proper.*

[6] Although the Interparties Application before the Court was for an interim stay of proceedings it was clear from the affidavits filed on behalf of the First Respondents that the original judgment sum as per the order of Finnigan, J of the 17th July 2008 interest and costs as per the order of Ajmeer, J of the 22nd February 2019 totalling \$87,842.68 had been paid to the First Respondents Solicitors and that the First Respondents were willing to pay this sum into Court or to the Second Respondents Solicitors in full satisfaction of the judgment sum interest and costs.

[7] As the Judge pointed out in paragraphs 21 and 22 of his Ruling the issue before the Court transpired to be whether the First Respondents had the right to redeem the charged property in the circumstances of the case. Paragraphs 21 and 22 read:

“[21] The issue in this proceeding was turned out to be whether the defendants have right to redeem the charged property while a

sale and purchase agreement entered into between the plaintiffs and the interested party exists (“the SPA”). The court ordered the charged property (which belongs to the third defendant) to be sold in execution of the monetary judgment obtained by the plaintiffs against the defendants.

[22] *The third defendant’s application was to seek an interim stay on the sale and the transfer of the property to the interested party pending the determination of the civil action (HBC No. 189/19) filed by the defendants against the plaintiffs and the interested party. That action is based on fraud on the part of the plaintiffs and the interested party. However, the stay application was turned out to be an application to redeem the property which was under sale in execution of the judgment.”*

[8] The Judge then made the following pronouncements:

[24] *The charging order against the judgment debtor’s land and subsequent sale of the charged property is equivalent to a mortgage and mortgagee sale, because the [Land Transfer Act](#) (“LTA”), section 2(1), states that: “Mortgage” means any charge on land, or any estate or interest therein, created under the provisions of this Act for securing (a) the repayment of loan or satisfaction of an existing debt.”*

[25] *The charging order was for the satisfaction of the judgment (existing debt) and upon registration against the debtor’s land is deemed to be a mortgage. Since the charge against the debtor’s land is deemed to a mortgage the rule of equity including a Mortgagor’s right of redemption would also apply to the judgment creditor sale of the charged property.*

[26] *The question then arises whether the third defendant as a mortgagor is entitled to exercise the right of redemption in the circumstances where there is a sale and purchase agreement between the plaintiffs and the interested party.*

[9] For the purposes of this appeal and in the circumstances of this case I consider the Judge’s pronouncements above relating to the registration of the Judgment having the

effect of a charge or mortgage against the title to the property and that the rule of equity including the Mortgagors right of redemption applies to a judgment creditor sale of the property to be a correct statement of the law in Fiji.

[10] It was common ground that all monies due under the judgment were available for payment to the Second Respondents (mortgagees). The Second Respondents did not take part in the appeal no doubt because all monies due to them under the Judgment debt had been tendered for payment to them.

[11] It was also common ground that a transfer of the property had not been registered at the Registrar of Titles Office pursuant to the Order of Ajmeer J of the 20th September 2017.

[12] With respect to ground 1(a) above the Judge clearly understood that the application before him was for an interim stay of the sale and transfer of the property. He states so in the first paragraph of the introduction in his Ruling. Once he became aware however of the fact that the First Respondent had in hand the full judgment debt, interest and costs and that they were ready and willing to pay this sum into Court or to the Second Respondent's Solicitors Trust Account the judge was correct if not obliged to consider whether the First Respondents had the right to redeem the property which had been raised before him.

[13] Ground 1(b) above has no merit simply because the Affidavits referred to in that ground were made for and on behalf of and with the authority of the First Respondent Umesh Chand (hereafter the "First Respondent") who was the registered proprietor of the property. A deponent seeking to support the First Respondent did not have to be vulnerable to Court Orders personally, in order to be a competent witness in relation to matters within his knowledge.

[14] This being the case the only issue that this Court needs to consider is whether the Judge was correct in finding that the First Respondent was entitled to redeem the property. This issue is contained within the Appellants Ground 1(g) above.

[15] Section 72(1) of the Property Law Act provides:-

'A mortgagor is entitled to redeem the mortgaged property at any time before the same has been actually sold by the mortgagee under his power of sale, on payment of all monies due and owing under the mortgage at the time of payment.'

(the underlining is mine)

[16] The issue therefore in this case was whether the property had been actually sold.

Discussion

[17] The Appellant contended in his written submissions and orally before this Court that the Appellant held a valid and unconditional Sale and Purchase Agreement for the purchase of the property and as such the property had been actually sold in terms of Section 72(1) of the Property Law Act and that therefore the First Respondent had lost his right of redemption.

[18] The First Respondent on the other hand submitted that the property was not actually sold as a transfer of the property had not been registered at the Registrar of Titles Office and that therefore the First Respondent had not lost his right to redeem the property and that the Judge's Ruling in this respect was correct.

[19] The Appellant relied on a decision of this Court in **Vere v. NBF Asset Management Bank 2004 FJCA 50; ABU 069.2003S.** That case does not assist the Appellant however in respect of the issues before this Court as the case does no more than note the observation of Sachs LJ in **Property and Bloodstock Limited v Emerton (1968) 1 CH 94** that there was common ground between the parties in that case that upon the Mortgagee entering into a contract under the power of sale "the mortgagors right of redemption is suspended not cancelled – for it would survive if the contract went off."

[20] Furthermore in the case before this Court unlike *Vere* the First Respondent (mortgagor) has tendered the full judgment sum.

[21] Counsel for the First Respondent referred this Court to the High Court decision of Fatiaki.J in **Khan v. Fiji Development Bank (2000) Fiji Law Reports 17; (2000) 1 FLR 11 (14 January 2000)** where the Judge held that a mortgagor retains his statutory

right to redeem the mortgaged land under Section 72(1) of the Property Law Act until such time as a transfer of the mortgaged land has been registered.

[22] After considering the case law the Judge in that case stated:-

“I have thus far covered as much of the case law as I desire for the purposes of this case and I turn to consider in more detail the statutory entitlement of a mortgagor to redeem the mortgaged property under Section 72 of the Property Law Act (Cap. 170).

At the outset the Section provides that the entitlement to redeem may occur ‘...at any time before (the mortgaged property) has been actually sold’. It should be noted that the words are not ‘sells’ but rather ‘has been actually sold’. On the basis that every word in a section ought to bear some meaning I am driven to the view that ‘actually’ when used in conjunction with ‘sold’ means that the sale in the exercise of the mortgagee’s ‘power of sale’ has been ‘effectuated’ by a registered transfer of the mortgaged property such as to raise in the purchaser’s favour, the protective provisions of Section 79(3).

As was said by Walsh J. IN Forsyth v. Blundell op.cit at p.498:

‘The mortgagor’s interest was, of course, prior in time to any interest acquired by the purchaser. The right of the mortgagor was not merely an equity of redemption. The mortgages did not operate as transfers of his title to the land: See the ordinance S.93 [which is identical to Section 63 of our Land Transfer Act (Cap. 131)]. His title could be divested by a transfer in pursuance of a contract of sale made by the mortgagee in the exercise of the power of sale. But until that occurred, he retained a legal interest in the land.’

[23] The Judge then held:-

In light of the view expressed above as to the meaning and effect of Section 72(1) of the Property Law Act (Cap. 130), I would answer the question earlier posed at p.3: ‘Yes, the plaintiff retains his statutory right to redeem the mortgaged land until such time as a transfer of the mortgaged land has been registered by the defendant bank pursuant to the exercise of its power of sale.’

- [24] This Court accepts and agrees with the Judge's analysis of the case law and statutes in Khan's case and affirms the conclusion reached that in Fiji a mortgagor retains his statutory right to redeem the mortgaged land under Section 72(1) of the Property Law Act until such time as a transfer of the mortgaged land has been registered at the Registrar of Titles Office pursuant to the exercise of a mortgagee's power of sale.
- [25] This conclusion reflects the general rule that in interpreting statutory provisions such as Section 72(1) of the Property Law Act courts will be influenced by the long standing equitable principle that high priority will be given to a Mortgagor's right to redeem the mortgaged property.
- [26] This is particularly so where, as in this case, the Mortgagor (Judgment Debtor) has made available for payment to the Mortgagee (Judgment Creditor) the full judgment debt, interest and costs.

Conclusion

- [27] For the reasons set out above I find that the Judge was correct, in reaching the conclusion on the facts before him that the Defendant was entitled to redeem the property.
- [28] This being the case it was not necessary for the Judge to consider whether the Sale and Purchase Agreement was valid and to make the order that he made that it was invalid.
- [29] I consider however that the Judge erred in law in reaching the conclusion that he did with respect to the Sale and Purchase Agreement and the process of sale without a full hearing of the issues which would have occurred had Civil Action No. 189 of 2019 proceeded.
- [30] In view of the above it is not necessary to consider the remaining grounds of appeal.

Dobson, JA

- [31] I agree with the reasons and orders proposed in Morgan, JA's judgment. Where a party contracts to buy a property where the vendor is being forced to sell by exercise


of powers vested in mortgagees (or creditors in an equivalent position) they should be taken to appreciate that the process may be disrupted by the vendor exercising legal rights to resist the forced sale, until the transaction is complete in all respects.

Orders of the Court

For the reasons set out above I make the following orders:-

1. *The appeal is partly allowed to the extent that order 2; that the undated Sale and Purchase Agreement between the plaintiffs and the interested party is rescinded, is set aside.*
2. *The remaining orders 1 and 3 to 5 inclusive of the Ruling are affirmed.*
3. *Parties to bear their own costs of this Appeal.*






Hon. Justice Chandana Prematilaka
RESIDENT JUSTICE OF APPEAL



Hon. Justice Walton Morgan
JUSTICE OF APPEAL



Hon. Justice Robert Dobson
JUSTICE OF APPEAL

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