

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 335 of 2012

IN THE MATTER of an application under **Section 169 of Part XXIV of the Land Transfer Act, Cap 131** for an **Order** for **immediate vacant possession**.

BETWEEN : **SHAINAZ BIBI** of 509 Ratu Mara Road, Nabua, Domestic Duties.

Plaintiff

AND : **MUKESH NAIDU** and **VARSHA PRIYA YANKTESH** both of 119 Sawau Road, Bayview Heights, Suva, Businessman and Domestic Duties respectively.

Defendants

Appearances : **Mr Pillay W** for Instructions of **Mr O'Driscoll and Co.** for the **Plaintiff**
Mr Toganivalu D for the **Defendants**

Date of Hearing: **6th May 2013**

ORDER

1. Summons for Ejectment was filed by the Plaintiff on 21st December 2012 against the Defendants to obtain an Order for vacation of the property situated at 119 Sawau Road, Bayview Heights in Suva under Section 169 of Part XXIV of the Land Transfer Act Cap 131.

2. When the matter came up before the Learned Master on 15/2/2013, the Defendants were granted 7 days to file their affidavits in oppose and one day was granted to the Plaintiff to file a reply and the hearing was fixed for 26th February 2013.
3. When the hearing was taken up by the Learned Master on 26th February 2013 at 2.pm, the Defendants have failed to file their Affidavit and not present in courts and unrepresented Order was issued as per summons.
4. On 26th of March 2013, Notice of Motion was filed by the Defendants to set aside Default Judgment and for Stay of Execution and sought the following Orders:
 - (i) *That the Default Judgment or Order that was pronounced on the 26th day of February 2013 and sealed on 5th day of March 2013 be set aside and the Defendant's be at liberty to defend the action on the grounds that the Defendants has a defence on the merits;*
 - (ii) *That execution of the said Judgment or Order be stayed;*
 - (iii) *Any other Order the court deems fit.*
5. The Affidavit in support dated 26th March 2013 was filed together with motion by the First named Defendant Mukesh Naidu on behalf of both Defendants.

Background

6. The Defendants stated prior to the hearing date of the Ejectment case that the Defendants lawyers TOGANIVALU LAW, contacted the lawyers for the Plaintiff and tried to negotiate the payment or settlement of the balance of the purchase price and under the belief the Defendants would settle the amount prior to the date of hearing and paid certain amount of money and failed to settle in full.
7. It was stated the Defendants live on the subject property which is described as Lot 14 on DP 7807 on CT 30526 and in 2010 Defendants have entered into a verbal agreement with the Plaintiff that they would purchase her property.
8. The Defendants stated the BSP Bank statement of accounts (addressed to the Plaintiff was annexed to the Affidavit in support marked "MNI ") indicates a sum of \$186,130.79 was due from the Plaintiff as at 14th September 2010 and further interest will accrue at the rate of \$36.90 on daily basis plus any other charges.

9. The Defendants have admitted that the Agreement was to pay the BSP Bank loan and also to pay the Plaintiff further monies to purchase the property.
10. It was stated that the Defendants had begun to make payments to the Plaintiff from 2010 and a formal agreement was entered between the parties on 12th October 2011 (Annexure “MN2” to the Affidavit of the Defendants and Annexure “C” to the Affidavit dated 20th December 2012 filed by the Plaintiff). This agreement is not in dispute.
11. In terms of the agreement dated 12th October 2011, the 2nd named Defendant had agreed with the Plaintiff:
 - (a) *To purchase the property for \$305,000.00 and \$60,000.00 to be paid as a deposit;*
 - (b) *The Defendants had paid the said \$60,000.00 on 12th October 2011 for the purchase of the subject property which was acknowledged by the Plaintiff on 12th October 2011;*
 - (c) *Payment of the balance of \$245,000.00 within 60 days from the date of the said agreement;*
 - (d) *The Defendants had failed to fulfill the obligations as per the agreement and defaulted the payment of \$245,000.00;*
 - (e) *It was stated in the agreement, the said agreement is upon approval of loan if not approved then the agreement is rescinded;*
 - (f) *The Defendants by the Affidavit in support dated 26th March 2013 admitted the full amount was not settled in terms of the said Agreement dated 12th October 2011 marked as “C” to the Affidavit filed by the Plaintiff for Ejectment. As such this agreement was defaulted by the Defendants and the agreement stand terminated;*
 - (g) *Deed of Acknowledgement was signed on 24th January 2012 the Defendant was granted further time to comply with the Terms of the Agreement to purchase inter alia the Defendant agreed:*

- (i) The Defendant acknowledged that she defaulted the terms of the Sale and Purchase Agreement dated 12th October 2011;
- (ii) Extension was granted to the Defendant to fulfill her obligations on the following conditions:
 - (a) out of the Balance sum of \$50,000.00, \$25,000 to be paid within 21 days;
 - (b) the remaining \$25,000 within 21 days from the date of payment in para (a);
 - (c) the loan amount with the Bank to be settled within 60 days from the date of the payment in para (b);
 - (d) Default of the above payments will result, the Vendor taking the possession of the property and all monies paid to the Plaintiff by the Defendant shall be forfeited;
 - (e) The Defendant had admitted in his Affidavit that out of the payment of \$50,000.00 [in para (a) and (b)] only \$10,000.00 being paid and the balance remains unpaid. **The loan payments to BSP as claimed by the Defendant cannot be taken into consideration since the Agreement was to repay the loan in full.**

12. In terms of the Deed of Acknowledgement dated 24th January 2012, the completion of the obligation of settlement should have been:

- (a) \$25,000.00 on 14th February 2012;
- (b) \$25,000.00 on 7th March 2012;
- (c) Settlement of the Bank loan should have been before 7th May 2012.

13. It is noted that the Defendants had defaulted the payment since 24th January 2012 and the Defendants admitted only \$10,000 being paid on the Deed of Acknowledgement. In the circumstances, **I conclude, the Defendants have defaulted the payments from the date of the execution of the Deed of Acknowledgement and had defaulted the terms from the inception of the Sales and Purchase Agreement, dated 12th October 2011.**
14. Having concluded that the agreement was defaulted since 12th October 2011, the Plaintiff's solicitor had served Notice of Termination and Notice to Quit by the letter dated 19th November 2012 and default Judgment was delivered on 26th February 2013 to eject the occupants.
15. The matters raised by the Defendants with regard to monthly repayments to the Bank was not in the agreement. Further the letters written by the Solicitor for the Plaintiff dated 19th March 2013 is without prejudice and does not create any extension of the agreement between the parties. I also find, although the default judgment obtained on 26th February 2013 it was not enforced until 19th March 2013 and the Defendant had ample time to settle the amounts due to the Plaintiff since 12th October 2011.
16. The said letter dated 19th March 2013 stated the agreement stand terminated and eviction proceedings shall be enforced. The matters raised in the reply by the Defendant's Solicitor dated 22nd March 2013 does not warrant any consideration by this court since both the agreements stand terminated.
17. The submissions made by the Defendant's counsel that the Title is still with the Plaintiff and no prejudice will be caused to the Plaintiff cannot be considered as a ground for stay. Already prejudice being caused to the Plaintiff by the conduct of the Defendants who occupies the property without any legal right and the Learned Master's Order for eviction was justified.
18. The failure to file the affidavit in reply by the Defendant in the ejectment case and non appearance was not justified and does not warrant the Defendant to seek the Orders to set aside the default judgment.
19. The repayment of the loan installments on the mortgage is not subject to both agreements and need not consider in this case.
20. In the circumstance, I conclude that the Defendants had not established any meritorious grounds for the reliefs sought.

21. Accordingly, **Orders sought in the Notice of Motion filed on 26th March 2013 are refused and dismissed. I award summarily assessed costs of \$1,000.00 to the Plaintiff.**

Delivered at Suva this 13th Day of May, 2013.

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C. KOTIGALAGE
JUDGE