

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 280 of 2014

BETWEEN : MERCHANT FINANCE INVESTMENT COMPANY LIMITED
a limited liability company having its registered office in Suva, Fiji.

PLAINTIFF

AND : OSEA TEKEILOA of Lot 2, Davula Road, Nadera, Nasinu, Fiji.

1ST DEFENDANT

AND : VANI SEKITOA DLA LOA of Lot 2, Davula Road, Nadera,
Nasinu, Fiji.

2ND DEFENDANT

COUNSEL: Mr. A. Pal for the Plaintiff (Applicant).
: No appearance of both Defendants.

BEFORE: Acting Master Vishwa Datt Sharma

Date of Hearing: 5th March, 2015

Date of Ruling: 15th April, 2015

RULING

A. INTRODUCTION

1. This is an application for possession of the premises by the Plaintiff bank Merchant Finance Investment Company Limited pursuant to *Order 88 Rules [1], [2] and [3] of the High Court Rules (1988)*.
2. The Plaintiff is also seeking an injunctive or a restraining order against the Defendants but the Master of the High Court cannot exercise this particular power to grant injunction in terms of *Order 59 of the High Court Rules 1988*.

3. The application seeking the **injunctive** or the **restraining order** needs to be referred to a Judge of the High Court in terms of *Order 59 Rule 4 of the High Court Rules 1988* to determine the same accordingly.

B. ORIGINATING SUMMONS

4. The Plaintiff instituted this action by way of an **Originating Summons** coupled with an affidavit in support and sought for the following orders:

- (i) *An order for possession of the premises being occupied by the Defendants, their agents, servants or persons under control or instruction of the Defendant be granted to the Plaintiff where such premises is comprised in HA Sublease No. 193120 being Lot 2 on DP No. 4235, containing an area of 24.9 perches;*
- (ii) *An order that the Defendants, their servants, agents or persons under their control or instruction be restrained from interfering from the Plaintiff's right to possession of the premises;*
- (iii) *An order that the officers of the Nasinu Police Post render to the Plaintiff any necessary assistance in pursuance of the orders listed as (i) above;*
- (iv) *Costs of this application on a solicitor - client indemnity basis; and*
- (v) *Any other necessary orders that this court deems just and or necessary.*

(Underline is mine for emphasis)

5. The Originating Summons was filed with an affidavit in support of Meja Singh who works in his capacity as a Senior Administrative Officer in the Plaintiff Company.
6. This application was made pursuant to *Order 88 Rules [1], [2] and [3] of the High Court Rules 1988.*
7. The application was served onto the defendants on 08th October, 2014 and an affidavit of service was filed into court as prove of service of the application onto the defendant.
8. The defendant failed to file any acknowledgment of service, affidavit in opposition and or made any court appearances to counter the plaintiff's applications for the orders sought.

9. The application was heard on an undefended basis since the defendant failed to counter the orders sought by the plaintiff in terms of the law.
10. It is to be noted that the Order sought at paragraph (ii) hereinabove does not fall within the Master of the High Court's Jurisdiction and will be referred to the High Court Judge in terms of *Order 59 Rule 4 of the High Court Rules 1988*.

C. THE LAW

ORDER 88 - MORTGAGE ACTIONS

11. *Application and interpretation (O.88, r.1)*

1. (1) *This Order applies to any action (whether begun by writ or originating summons) by a mortgagee or mortgagor or by any person having the right to foreclose or redeem any mortgage, being an action in which there is a claim for any of the following reliefs namely-*

- (a) payment of moneys secured by the mortgage,
- (b) sale of the mortgaged property,
- (c) *foreclosure,*
- (d) delivery of possession (whether before or after foreclosure or without foreclosure) to the mortgagee by the mortgagor or by any other person who is or is alleged to be in possession of the property,
- (e) *redemption'*
- (f) *reconveyance of the property or its release from the security,*
- (g) delivery of possession by the mortgagee.

(2) *In this Order, "mortgage" includes a legal and an equitable mortgage and a legal and an equitable charge, and references to a mortgagor, a mortgagee and mortgaged property shall be construed accordingly.*

(3) *An action to which this Order applies is referred to in this Order as a mortgage action.*

(4) *These Rules apply to mortgage actions subject to the following provisions by this Order.*

Claim for possession; failure by a defendant to acknowledge service (O.88, r.2)

2. (1) *Where in a mortgage action begun by originating summons, being an action in which the plaintiff is the mortgagee and claims delivery of possession or payment of moneys secured by the mortgage or both, any defendant fails to acknowledge service of the originating*

summons, the following provisions of this rule shall apply, and references in those provisions to the defendant shall be construed as references to any such defendant.

This rule shall not be taken as affecting Order 28, rule 4, in so far as it requires any document to be served on, or notice given to, a defendant who has acknowledged service of the originating summons in the action.

- (2) Not less than 4 clear days before the day fixed for the first hearing of the originating summons the plaintiff must serve on the defendant a copy of the notice of appointment for the hearing and a copy of the affidavit in support of the summons.*
- (3) Where the plaintiff claims delivery of possession there must be indorsed on the outside fold of the copy of the affidavit served on the defendant a notice informing the defendant that the plaintiff intends at the hearing to apply for an order to the defendant to deliver up to the plaintiff possession of the mortgaged property and for such other relief (if any) claimed by the originating summons as the plaintiff intends to apply for at the hearing.*
- (4) Where the hearing is adjourned, then, subject to any directions given by the Court, the plaintiff must serve notice of the appointment for the adjourned hearing, together with a copy of any further affidavit intended to be used at that hearing, on the defendant not less than 2 clear days before the day fixed for the hearing.*

A copy of any affidavit served under this paragraph must be indorsed in accordance with paragraph (3).

- (5) Service under paragraph (2) or (4), and the manner in which it was effected, may be proved by a certificate signed by the plaintiff, if he sues in person, and otherwise by his barrister and solicitor. The certificate may be indorsed on the affidavit in support of the summons or, as the case may be, on any further affidavit intended to be used at an adjourned hearing.*

Action for possession or payment (O.88, r.3)

- 3. (1) The affidavit in support of the originating summons by which an action to which this rule applies is begun must comply with the following provisions of this rule.*

This rule applies to a mortgage action begun by originating summons in which the plaintiff is the mortgagor and claims delivery of possession or payment of moneys secured by the mortgage or both.

- (2) The affidavit must exhibit a true copy of the mortgage and the original mortgage or, in the case of a registered charge the charge certificate must be produced at the hearing of the summons.*
- (3) Where the plaintiff claims delivery of possession the affidavit must show the circumstances under which the right to possession arises and, except where the Court in*

any case or class otherwise directs, the state of the account between the mortgagor and mortgagee with particulars of.

- (a) the amount of the advance,*
 - (b) the amount of the periodic payments required to be made,*
 - (c) the amount of any interest or installments in arrear at the date of issue of the originating summons and at the date of the affidavit, and*
 - (d) the amount remaining due under the mortgage.*
- (4) Where the plaintiff claims delivery of possession, the affidavit must give particulars of every person who to the best of the plaintiff's knowledge is in possession of the mortgaged property.*
- (5) If the mortgage creates a tenancy other than a tenancy at will between the mortgagor and mortgagee, the affidavit must show how and when the tenancy was determined and if by service of notice when the notice was duly served.*
- (6) Where the plaintiff claims payment of moneys secured by the mortgage, the affidavit must prove that the money is due and payable and give the particulars mentioned in paragraph (3).*
- (7) Where the plaintiff's claim includes a claim for interest to judgment, the affidavit must state the amount of a day's interest.*

D. ANALYSIS and DETERMINATION

12. The defendants are the legal proprietors of the property comprised in HA Sublease No. 193120 being on Lot 2 on DP No. 4235, containing an area of 24.9 perches, in the province of Naitasiri, situated in Naitasiri. A certified copy of the said lease marked as 'A' is annexed to the affidavit in support of Meja Singh.
13. The affidavit of Meja Singh in support of the Originating Summons deposes as follows-
 - *The Plaintiff and the First Defendant entered into a loan contract on or around 15th April, 2010.*
 - *The loan was for the business needs of the First Defendants business. (A copy of the Loan Contract is annexed in his affidavit marked as 'B').*
 - *That the Defendants offered the Property as security for the loan that the First Defendant obtained from the Plaintiff.*
 - *That the Defendant executed the Mortgage on 16th April, 2010.*

- That consequently, the Plaintiff registered the Mortgage over the property and a Mortgage was duly registered on 20th April, 2010. (A copy of the said Mortgage is annexed and marked as 'C').
 - That the Defendants defaulted in their loan repayment and as at 30th April, 2013 the defaulted sum was FJD \$16,778.43.
 - That the Solicitors for the Plaintiff issued a default notice to the Defendants on 4th May, 2012 requiring the Defendants to rectify the default in payment within 30 days. (A copy of this notice is annexed marked as 'D').
 - The Defendants failed to comply with the notice and the defaulted sum remained unpaid.
 - The Plaintiff consequently exercised its mortgagee rights under the mortgagee and sought to sell the property by way of mortgagee sale. This was done by way of a Tender.
 - The Plaintiff advertised the property for sale in the Fiji Times of 11th December, 2010, 17th, 22nd, 24th and 29th August, 2013. (Copies of the advertisements are annexed and marked as 'E 1-5').
 - Subsequent to the advertisements, the First Defendant wrote to the Plaintiff's Solicitors on 30th August, 2013 requesting for additional time to pay the defaulted sum and mortgage sale to be held up. (Copy letter is annexed and marked as 'F').
 - The First Defendant again wrote a letter on 21st October, 2013 seeking further time to settle the debt. (A copy is annexed and marked as "G").
 - The Plaintiff has now secured a purchaser for the property but before the Plaintiff proceeds with the sale and in light of the notice to vacate was issued by the Plaintiff and served on the Defendants which has expired on 02nd August, 2014, the Defendants have failed to give up vacant possession. (Copy of notice is annexed marked as 'H').
 - The Plaintiff is now seeking for vacant possession of the property to enable them proceeds with the mortgagee sale.
 - The property is leased to the Housing Authority and the consent was not required because this action is dealing with the Plaintiff's exercising his rights secured in terms of the Mortgage that was consented to by the Housing Authority.
 - Further, the property is secured to Bank of the South Pacific by way of First registered mortgage. (A copy of the letter of consent is annexed and marked as 'I').
 - Seeking costs on indemnity basis for continuous occupation of property by the Defendants.
14. Reference is made to the case of *Fiji Development Bank v Duvuloco* [2002] FJHC 243 and *ANZ v Amit Kumar* [2003] FJHC 326 wherein the court can order the defendant to give immediate vacant possession of the mortgaged property with costs to plaintiff.
15. It is noted in this case that the Defendants never appeared in court or filed any affidavit in opposition to oppose the Plaintiff's application.
16. In *National Bank of Fiji v. Hussain* [1995] FJHC 29 Fatiaki J explained the mortgagee's right to possession of the mortgaged property by referring to the following dictum of Goff L.J in *Western Bank Ltd. v. Schindler* (1977) 1 Ch.1

"It has for a very long time been established law that a mortgagee has a proprietary right at common law as owner of the legal estate to go into possession of the mortgaged property. This right has been unequivocally recognized in a number of modern cases: see, for example, Four Maids Ltd. v. Dudley Marshall (Properties Ltd. (1957) Ch.317... It has nothing to do with default: see Harman J in the Four Maids case where he said at p 320:

"The mortgagee may go into possession before the ink is dry on the mortgage unless there is something in the contract, express or by implication, whereby he has contracted out of that right."

17. The defendants are still in possession of the property. The total amount due under the mortgage has been accumulating and the defendant has not made any genuine attempt to settle the outstanding balance on the account.
18. The First Defendant wrote to the Plaintiff twice seeking further time to pay the outstanding sum. On one occasion he went to personally see the Plaintiff's Solicitors where he was told that the Plaintiff will proceed with the court proceedings.
19. The plaintiff has given the defendants enough time to pay off the outstanding amount but the defendant failed to honour his obligations under the mortgage.
20. The plaintiff has fully complied with the provisions of the Order 88 r.3 pertaining to mortgage actions and claim for possession.
21. Furthermore, *Clauses 8 and 9 (a) of the Mortgage* respectively and *expressly empowers the plaintiff to enter upon and take possession of the mortgaged property when the mortgagor has defaulted on his payment obligations under the mortgage* as follows:
 1. *That the power of sale and all other powers conferred on a mortgagee by the Property Law Act 1971 may be fully exercised by the mortgagee immediately upon or at any time after default in payment of any of the moneys hereby secured or in the performance or observance of the any of the covenants or agreements on the part of the mortgagor herein contained or implied and such default continues for the space of one calendar month after the mortgagee shall have given notice to the mortgagor to pay the money then due or owing hereunder or to perform or observe the covenants or agreements herein contained or implied.*
 2. *That upon the power of sale becoming exercisable hereunder it shall be lawful for the mortgagee at any time and from time to time without giving to the mortgagor any notice to do all or any of the following:-*
 - (a) *To enter upon and take possession and/or enter into receipt of the rents and profits of all or any of the said land and to manage the same and to pull down, rebuild, alter and add to any than existing building or improvements thereon and to do all such things as the mortgagee may deem necessary to manage and efficiently carry on the said land or to*

obtain income thereon and for any of such purposes to employ managers workmen and others and otherwise to act in all respects as the mortgagee in its absolute discretion may think fit."

22. These contractual rights are further reinforced by the terms of *Section 75 of the Property Law Act* which provides:

"A mortgagee, upon default in payment of the mortgage money or any part thereof, may enter into possession of the mortgaged land by receiving the rents and profits thereof or may restrain upon the occupier or tenant of the said land for the rent then due."

23. Considering the above facts, I hold that the plaintiff bank/ mortgagee is entitled to have the possession of the mortgaged premises comprised in HA Sublease No. 193120 being Lot 2 on DP No. 4235.

24. However, considering the residential nature of the mortgaged property, I stay the execution of the order for three weeks from the date of service of the order on the defendants.

25. I therefore make the following orders in terms of the originating summons-

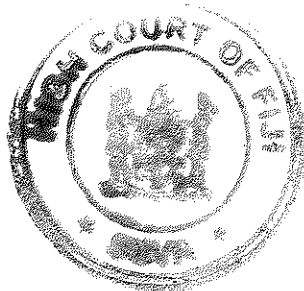
(a) An order for possession is hereby granted to the Plaintiff of the premises comprised in *HA Sublease No. 193120 being Lot 2 on DP No. 4235, containing an area of 24.9 perches* which is occupied by the Defendants, their agents, servants or persons under control or instruction of the Defendant .

(b) An order that the officers of the Nasinu Police Post render to the Plaintiff any necessary assistance in pursuance of the order listed as (a) hereinabove.

(c) The case is referred to the Hon Judge of the High Court to determine the order sought at paragraph B- 4 (ii) hereinabove. (*Order 59 rule 4 refers*).

(d) Cost is summarily assessed at \$500 against the Defendants.

Dated at Suva this 15th Day of April, 2015



.....
MR VISHWA DATT SHARMA
Acting Master of the High Court
Suva