

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

Civil Action No. HBC 179 of 2019

BETWEEN : **FIJI DEVELOPMENT BANK** a body corporate having its Head Office at 360 Victoria Parade, Suva, Fiji.

PLAINTIFF

AND : **AZAM HUSSAIN KHAN** formerly of Waivuka, Ba. Businessman.

DEFENDANT

Appearance : (Ms) Emele Marama Wakowako for the plaintiff.

Date of hearing : Tuesday, 23rd July, 2019.

Date of ruling : Wednesday, 24th July, 2019.

RULING

INTRODUCTION

- (01) The plaintiff instituted these proceedings to recover \$794,261.62 from the defendant with interest and costs.
- (02) On 19th July, 2019, the plaintiff filed an ex-parte notice of motion, supported by an affidavit of (Ms) Litia Lomalagi, the Team Leader of the Asset Management Unit of Fiji Development Bank, seeking the following orders;
- (1) *An injunction restraining the Defendant from leaving the jurisdiction of this Honourable Court until the determination of within proceedings.*
 - (2) *An injunction from selling and/or disposing of and/or dealing with and/or removing from the jurisdiction of this Honourable Court any and or all assets and monies of the Defendant until further order of this court.*
 - (3) *That the Defendant to file a full statement of his assets wherever located within this Honourable Court within fourteen (14) days of the service of the order.*

- (4) *That a Writ of Ne Exeat Civitate shall be issued forthwith with commanding and conveying the Defendant forthwith before a judge of this Honourable Court unless the Defendant shall deposit a sum deemed appropriate by the court or surrender his passport or travelling documents and/or give to the Plaintiff a bond executed by the Defendant for security satisfactory to the Plaintiff that the Defendant will not leave the jurisdiction without notice to this Honourable Court.*
- (5) *Any other or further orders that this Honourable Court deems just.*
- (6) *That costs of this application shall be paid by the Defendant.*

THE FACTUAL BACKGROUND

(03) The affidavit of 'Litia Lomalagi' is reproduced below in full.

1. *I am the Team Leader of the Asset Management Unit of Fiji Development Bank the Plaintiff in this action and I am duly authorized by the Bank to swear this Affidavit.*
2. *THAT I depose to the facts herein as within my own knowledge except where stated to be on information and belief and where so stated I believe to be true.*
3. *THAT pursuant to loan offer letter dated 12th December 2013 the Plaintiff (Bank) lent and advanced loan facilities to the Defendant amounting to \$87,500.00 for purchase of stock, fencing materials, labour and transportation costs.*
4. *THE Defendant had agreed to repay the loan by monthly installments of \$1000.00 for a term of 10 years with variable interest rate of 5% per annum for first 5 years and normal interest of 9.65% per annum thereafter. A copy of the loan offer letter dated 12th December 2013 is annexed hereto and marked as annexure "L1".*
5. *THE Defendant was later advanced further loan of \$163,500.00 on account No. 201274 pursuant to loan offer letter dated 2nd March 2015 for purchase of a farm, purchase of livestock, purchase of fencing materials, meet Legal costs and labour costs. A copy of the offer letter dated 2nd March 2015 is annexed hereto and marked as annexure "L2".*
6. *THE total loan balance thereafter increased to \$255,101.29 which the Defendant agreed to repay at \$1900.00 per month for the first 6 months commencing from 1st January 2016 and \$2900.00 per month thereafter with variable interest at the rate*

of 5% per annum for the first 5 years and variable interest at the rate of 10.7% per annum thereafter.

7. *ON or about 30th December 2015, the Defendant was lent and advanced a separate loan of \$481,000.00 on account No. 201440 for purchase of sheep stock, fencing material Farm Vehicle etc pursuant to loan offer letter dated 30th December 2015 which the Defendant agreed to pay at \$18,905.00 per quarter with variable interest at the rate of 11.25% per month. A copy of the loan offer letter dated 30th December 2015 is annexed hereto and marked as annexure "L3".*

8. *THE Defendant granted the following securities to secure the loans and advances made to him on both the accounts.*

(i) 1st registered mortgages over iTLTB lands described as;

(a) TL 30879 being TLTB ref: 4/1/40096,

(b) Instrument of Tenancy No: 12578 being TLTB ref: 4/1/40198,

(c) Instrument of Tenancy No: 12711 being TLTB ref: 4/1/40197,

(d) Instrument of Tenancy No: 8803 being TLTB ref: 4/1/3249,

(e) Instrument of Tenancy No: 5755 being TLTB ref: 4/1/4767,

(f) Instrument of Tenancy No: 1331 being TLTB ref: 4/1/40745,

(g) Instrument of Tenancy No: 5878, TLTB ref: 4/1/1246,

(h) Instrument of Tenancy No. 7845 being TLTB ref: 4/1/2740,

(ii) Bill of Sale No: 2016/1378 over Motor Vehicle No: EH 152.

Copies of the 1st and signing pages of the said security documents are annexed hereto and marked as annexure "L4".

9. *AS at 30th June 2017, the Defendant was in arrears in the sum of \$18,000.00 for account No. 201274 and \$5,795.50 for account No: 201440 and the Bank therefore issued and served arrears letter dated 4th July 2017 to clear the arrears within 14 days. A*

copy of the arrears letter dated 4th July 2017 are marked hereto and marked collectively as annexure "L5".

10. *THE Defendant failed to clear the arrears and continued to make default resulting in the arrears on both the accounts to increase and despite the Bank serving further letters to the Defendant to update the arrears, the Defendant failed to adhere to the same. Copies of the arrears letter are annexed hereto and marked as annexure "L6".*
11. *DURING loan enquiry stage, the Defendant had informed the Bank that he had been residing in United States of America for almost 20 years and has come to Fiji for investment in dairy and sheep farming.*
12. *HOWEVER it was noted that after grant of the 3rd loan, the loan account began to fall into arrears and upon enquiry it was discovered that the Defendant had moved to reside in United States of America and left the Farm with a Farm Manager.*
13. *THE Defendant however returned to Fiji in September 2017 but failed to manage the farm properly resulting in the loan account drifting into further arrears and despite the Bank following up via several letters to the Defendant to update the arrears, the Defendant neglected and failed to do so.*
14. *IN February 2018, the Bank discovered that the Defendant has again left the country to United State of America and handed the Farm to the Farm Manager.*
15. *ON or about 12th May, 2018 the Bank called up the loan and served Demand Notice on the Defendant via registered mail demanding total payment of \$728,850.91 being \$242,735.59 on account No: 201274 and the sum of \$486,115.32 on account No: 201440 owing as at 30th April, 2018 with interest accruing at the rate of 5% pa on account No: 201274 and 11.5% per annum on Account No: 201440 with effect from 1st May, 2018. Copies of the Demand Notices are annexed hereto and marked as annexure "L7".*
16. *THE Bank also exercised its right to seize the motor Vehicle secured under the Bill of Sale but was unsuccessful as the whereabouts of the vehicle could not be traced.*
17. *THE Bank then exercised its rights by advertising in the newspapers the Mortgaged properties for sale on various dates in October and November 2018 and in February and March 2019 but could not secure any successful offer.*

18. *THE Mortgaged properties was also placed on private sale for offers to be received from general public but the properties have remained unsold.*
19. *AS at 31st May, 2019, the Defendant had owed the total sum of \$794,261.62 (Seven Hundred Ninety Four Thousand Two Hundred Sixty One Dollars and Sixty Two Cents) to the Bank as follows: \$251,743.69 (Two Hundred Fifty One Thousand Seven Hundred Forty Three Dollars and Sixty Nine Cents) on account No: 201274 and \$542,517.93 (Five Hundred Forty Two Thousand Five hundred Seventeen Dollars and Ninety Three Cents) on account No: 201440 with interest accruing at the rate of 5% per annum on account No: 201274 and 11.5% per annum on account No: 201440.*
20. *THE Bank has since filed a Writ and Statement of Claim against the Defendant on 13th June, 2019 seeking for judgment for the sum of \$794,261.62.*
21. *THE Bank while making enquires to serve the Writ has been reliably been informed that the Defendant is back in the Country and it is highly probable that the Defendant may leave the Country soon unless he is restrained from leaving Fiji.*
22. *I am advised and believe that in the absence of the Defendant from Fiji it would materially prejudice the Bank in the prosecution of its claim and recovery of the substantial monies advanced to the Defendant which has remained unpaid.*
23. *THE Bank hereby gives undertaking to damages if any that may awarded by this Court.*
24. *THE Bank believe that it has a good cause of action against the Defendant as per the Writ and Statement of Claim filed in this action and therefore it seeks for the Orders as prayed in the Motion filed herein.*

CONSIDERATION

Writ of Ne Exeat Civitate

(04) The history of the Writ and the circumstances of its availability are explained in ;

(a) **Glover and Another**

v

Walters
80 CLR 172

(b) Felton and Another

v

Callis
(1969) 11 QBD 200

- (05) The plaintiff to obtain the Writ must show in the first place that it has an equitable claim (the debt must be equitable); and in the second place the equitable debt is due; and in the third place it should be an equitable debt in respect of which the court can see its way to direct what sum shall be marked upon it.
- (06) The foundation of the present suit is a claim that the defendant was lent and advanced loan facilities by the plaintiff amounting to \$794,261.62 and the defendant had failed to repay the loan. The debt is a legal debt and not an equitable debt and the writ will never granted for a legal debt, but only for an equitable debt. The liability in the present case arose out of the contractual obligations under the loan agreement executed by the parties, and was not a mere equitable obligation such as the liability of a trustee to his beneficiary. In the case before me, the defendant's obligation is an obligation at law. His liability is in contract; and there is nothing equitable about that. The writ applies to cases within the exclusive jurisdiction of equity. The plaintiff has not satisfied the precondition, i.e, an equitable foundation and I need say no more about that.
- (07) The authorities show that the writ is not to be issued except with care and where real ground appears for believing that the defendant is seeking to avoid the jurisdiction or for apprehending that if the defendant is allowed to depart the plaintiff will lose his debt or be prejudiced in his remedy.
- (08) There is no evidence before me that the defendant's absence from Fiji would materially prejudice the plaintiff in the prosecution of its action against him. In my view, the defendant's presence is not necessary for the plaintiff to obtain judgment against him. The issue of the writ is discretionary and the standard of proof required is such as to convince the court. In all the circumstances before me I conclude that it is not a proper exercise of my discretion to grant the writ.

Mareva Injunction

- (09) There remained the question of "Mareva Injunction". In my view, without the issuance of the writ the purpose of the Mareva Injunction would be vitiated. In issuing a writ coupled with a Mareva Injunction the aim of the court is to require a defendant to provide the plaintiff with a full statement of assets and to preserve those assets before the defendant departs from the jurisdiction. As the cases reveal the discretion of the court to make such orders will not be lightly exercised. I am not incline to grant a Mareva Injunction because this is not a proper case for the issue of Writ.

Conclusion


- (10) In all the circumstances of the case before me, I conclude that it is not a proper exercise of my discretion to grant the injunction and the prerogative Writ Ne Exeat Civitate.

Order

The application to grant the injunction and the prerogative Writ Ne Exeat Civitate is declined.



At Lautoka
Wednesday, 24th July 2019


.....24/07/2019.....
Jude Nanayakkara
Judge