

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

HBC 139 of 1996/L

BETWEEN: **AMBARAM NARSEY PROPERTIES LIMITED** a limited
liability company having its registered office at Lautoka
PLAINTIFF

A N D: **MOHAMMED YAKUB KHAN, MOHAMMED NASIR KHAN,**
MOHAMMED SABIR KHA, MOHAMMED IQAL KHAN,
MOHAMMED MUKTAR KHAN and **MOHAMMED AZAD**
KHAN all of Lautoka, Businessman.
FIRST DEFENDANTS

A N D: **LAUTOKA CITY COUNCIL** a body corporate duly constituted by
the Local Government Act 1972
SECOND DEFENDANT

Appearances: Mr. C. B. Young for the Plaintiff
 Ms. Ravuikadavu for the first Defendant
 Mr. S. Krishna for the second Defendant
Date of Hearing: 24.03.2021
Date of Ruling: 26.03.2021

R U L I N G

INTRODUCTION

1. This matter before me is about the enforcement of a money judgment entered in favour of the plaintiff ("**judgement creditor**") by Mr. Justice Gates (before His Lordship became the Chief Justice) on 20 December 2007.
2. The judgment is against the first and second defendants (first and second judgment debtor respectively). It is apportioned as follows:

First Respondents (Khans)	80%
Second Respondents (Lautoka City Council)	20%

3. The background to this case is set out in Ambaram Narsey Properties Ltd v Khan [2001] FJLawRp 71; [2001] 1 FLR 283 (16 August 2001); Ambaram Narsey Properties Ltd v Khan [2016] FJSC 13; CBV0003.2015 (22 April 2016); Ambaram Narsey Properties Limited v Khan [2000] FJLawRp 5; [2000] 2 FLR 69 (2 November 2000); Ambaram Narsey Properties Ltd v Lautoka City Council [2014] FJSC 18; CBV3.2014 (14 November 2014); Lautoka City Council v Ambaram Narsey Properties Ltd [2012] FJCA 26; ABU0031.08 (5 April 2012); Lautoka City Council v Ambaram Narsey Properties Ltd [2014] FJSC 20; CBV0010.2014 (26 November 2014); Lautoka City Council v Ambaram Narsey Properties Ltd [2012] FJLawRp 49; (2012) 1 FLR 410 (5 April 2012); Lautoka City Council v Ambaram Narsey Properties Ltd [2015] FJCA 75; ABU19.2012 (28 May 2015); Lautoka City Council v Ambaram Narsey Properties Ltd [2014] FJCA 5; ABU19.2012 (5 February 2014); Lautoka City Council v Ambaram Narsey Properties Ltd [2014] FJCA 25; ABU019.2012 (5 March 2014); Khan v Lautoka City Council [2014] FJSC 13; CBV05.2014 (14 November 2014).
4. Notably, Lautoka City Council did appeal against the judgment and the Fiji Court of Appeal dismissed the appeal. However, the FCA varied the High Court judgment by disallowing the costs of expert reports and photocopies amounting to \$61, 439.93.
5. Thereafter, the first respondents (“**first judgement debtors**”) filed a petition to seek special leave to appeal the decision but this was dismissed by the Supreme Court.

FIRST JUDGEMENT DEBTOR’S ATTITUDE

6. To anyone who cares to peruse the various judgments above, it would be patently clear that the first judgement debtors are adamant about avoiding having to settle

the judgment. This is also clear from the objection after objection which they have mounted against the current application now before this court.

7. This matter has gone right up to the Supreme Court and back. At the end of the day, the judgement debt remains unsettled, as the post-judgement interest escalates day by day – not to mention the taxation of the judgement creditor’s Bill of Costs which well in excess of FJD\$1 million, for which a hearing date later in the year has been assigned.

APPLICATION BEFORE THIS COURT

8. What I am dealing with now is an application filed on 09 July 2014 seeking the following Orders:
 - (1). That the judgment of the Plaintiff against the First Defendants registered on First Defendant’s Crown Lease 26321 (“the property”) on 20 January 2014 be extended for further period of six (6) months or for such other period as the Court thinks fit upon the grounds set forth in the Affidavit of Arun Kumar Narsey filed in support of this application.
 - (2). That the Plaintiff be empowered to sell the property pursuant to the said registered judgment by calling tenders through ‘Property for Sale’ advertisement published twice in each of the Fiji Sun and the Fiji Times and that:
 - (a). The Plaintiff be authorized to accept the highest unconditional cash tender, if considered appropriate by the Plaintiff.
 - (b). The Plaintiff as registered judgment holder be authorized to sign the Sale and Purchase Agreement, the Transfer and all other documents as may be required and to do all things necessary to give full effect to the sale consummated by the acceptance of the tender including vesting of the property in the purchaser.
 - (c). The sale proceeds be applied as follows:
 - (i). First, in payment of the expenses of an incidental to the sale consequent on the default;
 - (ii). Secondly, in payment of prior charges or encumbrances, if any, in the order of the respective priorities; and;

- (iii). Thirdly, in payment of the moneys including all interest and costs which are due or owing under the judgment as varied by the Court of Appeal;
 - (iv). Fourthly, in payment of subsequent charges or encumbrances, if any, in the order of their respective priorities; and
 - (v). Fifthly, the surplus, if any, to be paid to the First Defendants.
- (3). That seven (7) prior to acceptance of any tender for the sale of the property the Plaintiff to serve copies of all tenders received on the First Defendants solicitors, if any, and file a copy of the same in Court in this action.
- (4). That the cost of this application be part of the costs of sale and be recovered by the Plaintiff accordingly.
- (5). That liberty be reserved to the Plaintiff to apply generally in respect of any matter or issue arising in the course of exercising any of the powers authorized by the Court.

AFFIDAVITS FILED

- 9. At the outset, let me just say here that the Lautoka City Council (“**second judgement debtor**”) used to oppose the application for judicial sale. This was at a time when it was represented by Mishra Prakash & Associates. Why they did so is hard to fathom. Krishna & Company now acts for the second judgement debtor. They have no objection to any order for judicial sale.
- 10. The first judgement debtors oppose the application for judicial sale. Mohammed Muktar Khan’s first affidavit was filed on 01 September 2014, the second on 22 October 2014, and the third one on 16 December 2014. Two further affidavits of Mohammed Nasir Khan were filed on 09 March 2021 and 17 March 2021.
- 11. I gather that the affidavits raise objections on the following grounds:
 - (i) lack of consent of the Director of Lands
 - (ii) that on 24 January 2015, the judgement had lapsed without any order for extension of registration.
 - (iii) the property in question is valued much more than the judgement debt.

12. In all their affidavits, the first judgement debtors end with the standard plea to the court to strike out the judgement creditor's application.
13. The plaintiff filed the following affidavits in response to the issues raised by the first judgement debtors:
 - (i) an affidavit of Arun Kumar Narsey sworn on 03 September 2014.
 - (ii) an affidavit of Arun Kumar Narsey sworn on 29 October 2014.
 - (iii) an affidavit of Usha Kumar sworn on 16 December 2014.

DIRECTOR OF LANDS' CONSENT

14. I am mindful that the property in question is a Crown Lease. I am also mindful that section 13(1) of the State Lands Act mandates that the prior consent of the Director of Lands is required before any dealing in a protected state lease is entered into.
15. I also mindful that the Fiji Courts have consistently followed the authority of **Mohammed Rasul v Jeet Singh and Hazra Singh** [1964] 10 FLR 16 as per Hammett ACJ that:

*There is nothing in the express wording of section 15(1) of the Crown Lands Ordinance which makes it necessary to obtain the consent of the Director of Lands before an action concerning a protected lease is initiated. The **consent can be obtained at any time before the land is actually dealt with by the court**, which is not the case until an Order has been made or judgment of court delivered.*

16. I adopt the above approach and my directions for the sale (see below) are being made with the above in mind.

EXTENSION(s) OF REGISTRATION OF JUDGEMENT

17. Notably, ever since first registration, an extension has been granted every six months by this court pursuant to section 105(2) of the Land Transfer Act.
18. The judgement creditor has always applied on time before the lapsing of the preceding six-month period, in order to comply with the requirements of section 105(2). There was an occasion in 2015 when the judgement creditor's solicitors lodged the application on time and asked for an order for extension, but did not obtain that order immediately through no fault of theirs.
19. The background to this is explained succinctly in the affidavit of Usha Kumar sworn on 19 February 2015 wherein she deposes as follows:
 - (1). I am the legal secretary to Mr. C. B. Young of Young & Associates and am duly authorized by him to make this affidavit on behalf of the Plaintiff.
 - (2). Young & Associates solicitors of Lautoka, are acting for the Plaintiff in this matter.
 - (3). Mr. C. B. Young is currently in New Zealand and is not expected to return to Fiji until 10th March, 2015.
 - (4). I am informed by Mr. Young and verily believe:
 - a) On 11th November 2014 this matter was called before Justice Tuilevuka when Mr. Young appeared for the Plaintiff and Ms. Khan appeared for the First Defendants.
 - b) The Plaintiff's application for order for sale was heard that day by Counsel making oral submissions. Mr. Young also handed his written submission to His Lordship and gave a copy to Ms. Khan. Paragraphs 47 and 48 of the Plaintiff's submissions read:

"Order for further extension of registration of judgment

47. *The current registration of judgment will expire on 20th January 2015. It will not be possible to carry out and complete the sale before that date, even if an Order is given soon.*

48. *In the circumstances, the Plaintiff asks for an Order today for a further extension of the registration for 6 months from the expiry date of 20 January 2015."*

- c) At the end of the hearing Mr. Young asked the Court for an extension of the registration of the judgment which was expiring on 20th January 2015 but at Ms. Khan's suggestion the issue was left for 12th December 2014 when His Lordship was to deliver his Ruling on the Plaintiff's application for order for sale.
 - d) The matter was adjourned to 12th December 2014 for Ruling.
 - e) On 12th December 2014 the Ruling was not ready and the Court advised that it will send a notice for adjourned hearing when the Ruling was ready for delivery.
 - f) Mr. Young left for New Zealand on 14th December 2014 and briefly returned to Fiji on 24th January 2015. The registration of the judgment expired on 20th January 2015.
 - g) Mr. Young overlooked to get the registration extended before that date and the omission was discovered yesterday.
- (5). The Plaintiff humbly seeks an order extending the registration of Judgment No. 791927 on Crown Lease 26321 effective from 20th January 2015.

20. I accept the above account. I do not think it would be right to hold that slight oversight against the judgement creditor who has a money judgement in his favour.

21. Section 105 has been interpreted to mean that any application for extension of registration has to be made before the expiry of the preceding 6 month period.

Satisfaction, etc. of registered judgment

105.-(1) Upon production to the Registrar, by way of application, of sufficient evidence of the satisfaction of any judgment, decree or order registered under the provisions of section 104, he shall direct an entry to be made in the register of a

memorial to that effect, and on such entry having been made, such judgment, decree or order shall be deemed to be satisfied.

(2) Every judgment, decree or order shall cease to bind, charge or affect any estate or interest in land in respect of which it is registered unless a transfer upon a sale under such judgment, decree or order shall be presented to the Registrar for registration within six months, or such extended period as the court by order made on application to it upon summons shall determine, from the day on which the copy of such judgment, order or decree was served.

22. The argument was made that, since that fresh application was made after the preceding six month registration period had lapsed, this court had no jurisdiction to entertain the application under section 105(2). Ms. Khan however was prepared to consent to the application if a fresh one were to be made under section 104 of the Land Transfer Act.

23. The word "shall" is commonly used to mean to convey a mandatory obligation. Section 105(2) is accordingly, often interpreted as being a mandatory requirement.

24. However, there are occasions, when the word "shall" has been used and interpreted as a mere directive rather than as conveying a mandatory obligation.

25. Denman J. also observed in Caldow v Pixell (1877) 2 CPD 562-566

"In the absence of an express provision the intention of the legislature is to be ascertained by weighing the consequences of holding a statute to be directory or imperative".

(cited with authority in Hunter Resources Limited v. Melville & Anor (1988) 164 CLR 234 18 February 1988)

26. In Dharendra Krishna v. Nihar AIR 1943 Cal 266 (F) Pal J. said as follows :

".....No universal rule can be laid down for the construction of statutes as to whether any enactment shall be considered directory only or obligatory, with an implied

nullification for disobedience. It is the duty of the Court to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed: -- '(1860). 2 De GF & J 502 at p. 507 (B)', per Lord Campbell L. C. In each case the subject-matter is to be looked to and the importance of the provision in question in relation to the general object intended to be secured by the Act, is to be taken into consideration in order to see whether the matter is compulsive or merely directory..."

27. I am of the view that, in the circumstances of this case, where the judgement creditor had applied on time, and should have obtained the order within time, and the indications are that they intended to lodge it with the Registrar of Titles within time, and where the other party had contributed to the oversight, this Court should step in to preserve the integrity of the execution processes which the judgment creditor has set in motion in execution of the substantial judgment which he has obtained from this court. I also rely on the principle of *nunc pro tunc* ("an act done retrospectively so as not to prejudice a party- what should have been done then could be done now by court") – with all the necessary time adjustments (**Southwick v State** [1997] FJCA 5; Aau0020u.96s (14 February 1997).
28. So, while I will leave the question as to whether section 105(2) is mandatory or merely directive for another day for the Fiji Court of Appeal, and given Ms. Khan's concession that she would accept an application made under section 104, and in balancing the interests of justice and the consequences that would potentially flow from striking out the application for extension of time on account of the delay, and given all I have said above and all that Usha Kumar deposes in her affidavit, I am of the view that I can at least deem the application for extension of the registration of judgement as a fresh one made under section 104, and I do so accordingly.

COMMENTS

29. I have taken note of all the objections raised over the years whilst the matter was pending in the Fiji Court of Appeal and in the Supreme Court and throughout the time when the judgment creditor was applying for extension of registration of judgment on the property. While the objections are made on good arguable

points of law, it is patently clear that they are made to frustrate the judgment creditors attempt to realise his judgment.

30. I see no reason why the Order for Judicial Sale should not be made now. If the property is really worth much more than the judgement debt, then the first judgement debtor could have used it as security for finance to settle the judgement debt and costs. Instead, they have allowed the settlement of this debt to lapse all these years with an ever mounting post judgement interest.
31. However, mindful that there is a dispute as to how the judgment sum is to be apportioned, and of all the issues raised above, I make the following Orders.

ORDERS

32. That the property, Crown Lease 26321, be sold pursuant to the said registered judgment by calling tenders through 'Property for Sale' advertisement published in the Fiji Sun and the Fiji Times on three consecutive Saturdays and that:
 - (a). the Deputy Registrar is to supervise all the processes, including the advertisements, leading up to the sale.
 - (b). at the close of the tender, the Deputy Registrar is to compile a Report of all tenders received and the amount of each tender.
 - (c). the Deputy Registrar is then to circulate a copy of the Report to the following parties within seven (7) days of the close of tender:
 - (i) the solicitor for the plaintiff/judgement creditor
 - (ii) the solicitor for the first respondent/judgement debtor 1
 - (iii) the solicitor for the second respondent/judgement debtor 2
 - (iv) the Office of the Attorney-General for and on behalf of the Director of Lands

- (d). within 14 days of receiving the Deputy Registrar's Report, the solicitor for the plaintiff/judgement creditor must obtain from the Director of Lands his consent for the sale of the property to the highest unconditional cash tender, and upon receipt of that consent, must notify the Deputy Registrar accordingly by letter ("**letter of notification**") with the original copy of the consent attached.
- (e). upon receipt of the letter of notification, the Deputy Registrar shall then accept the highest unconditional cash tender and shall be authorized to:
- (i) sign the Sale and Purchase Agreement,
 - (ii) the Transfer
 - (iii) all other documents as may be required and to do all things necessary to give full effect to the sale consummated by the acceptance of the tender including vesting of the property in the purchaser.
- (f). the sale proceeds are to be paid into court to await further application for payments from the judgement creditor.



Anare Tuilevuka
JUDGE
Lautoka

26 March 2021