

In the High Court of Fiji
At Suva
Civil Jurisdiction

Civil Action No. HBC 79 of 2020

Home Finance Company PTE Limited trading as HFC Bank

Plaintiff

v

Sekove Vuniyayawa No. 2

Defendant

Counsel: Mr N. Lajendra for the plaintiff
Mr I. Betakula for the defendant
Date of hearing: 19th November, 2020
Date of Judgment: 26th January, 2021

Judgment

1. The plaintiff seeks vacant possession of State Lease No. 19499 being Lot 1 on Plan No.(d) SO 6902 Waqadra (pt of) formerly (pt of) Bal Lot 3 SO 279(Lease) situated in the Province of Ba and District of Nadi having an area size of 1000m²; and, an injunction restraining the defendant and/or its servants and/or agents from interfering with the improvements on the Lease. The defendant is the registered proprietor of the Lease. The application is made under Or 88.

2. The Manager Asset Management. of the plaintiff in his affidavit in support states that:
 - a. The loans advanced by the plaintiff to the defendant are as follows:
 - i. On 29 April, 2015, credit of \$475,000.00 at 8 % per annum variable to construct a double storey house. The term of the loan was 240 months. The monthly repayment was \$3,973.09.
 - ii. On 10th August, 2015, a sum of \$230,700.00 at 12% per annum variable for the purchase of 3 Brand New Toyota Hilux. The term of the loan was 60 months. The monthly repayment was \$5,131.79.
 - b. In consideration for the loan facility, the plaintiff amongst others took a first registered mortgage over the Lease.
 - c. By Mortgage No. 818499 of 28 August, 2015, made between the parties, the property was charged to secure repayment of all loans, advances, charges, interest and other banking accommodation.
 - d. The defendant obtained further three loan facilities.
 - e. His loan account fell in arrears. The plaintiff sent arrear notices and demand letters. Eviction notice was also sent requiring the defendant to vacate the premises within 30 days of receipt of Notice of 11 December, 2019.

3. The defendant did not file affidavit in opposition. He was given adequate time and opportunity to present his defence as follows:
 - a. On 7th July, 2020, I fixed the hearing for 6th August, 2020. NOAH was issued to the defendant.
 - b. On 6th August, 2020, the defendant sought time to retain counsel, as he was in Prison hitherto. I granted his request.
 - c. On 14th September, 2020, the defendant informed Court that he has retained a solicitor. I directed the defendant to file affidavit in opposition on 5th October, 2020, and the plaintiff to reply on 12th October, 2020. The hearing was fixed for 20th November, 2020.
 - d. On 20th October, 2020, I re-fixed the hearing for 19th November, 2020, as there was a workshop on 20th November, 2020.

Mr S. Drole, counsel for the defendant on that occasion sought further time to file opposition on the ground that he had been instructed recently. I directed the defendant to file his affidavit on 6th November and the plaintiff to reply on 13th November, 2020.

- e. On 19th November, 2020, Mr Betakula, counsel for the defendant moved for an adjournment on the ground that he received the papers the day before. Mr Lajendra, counsel for the plaintiff objected to the application stating that the defendant had obtained several adjournments.

I declined the application for adjournment. I informed Mr Betakula that I would grant an adjournment till 2.30 pm for him to get ready. He did not agree. I noted that on 17th November, 2020, solicitors for the defendant had made an application to the Registry for copies of documents.

The determination

4. The plaintiff seeks vacant possession of the Lease in terms of Or 88.
5. Or 88, r 3 states that the affidavit in support of the summons must exhibit a true copy of the mortgage and the original mortgage, show the circumstances under which the right to possession arises, the state of account between the mortgagor and mortgagee with particulars of the amount of advance, periodic payments required to be made, interest or instalments in arrears at the date of the issue of the originating summons and affidavit, the amount remaining due under the mortgage and give particulars of persons in possession of the mortgaged property
6. Section 75 of the Property Law Act provides that:

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 distrain upon the occupier or tenant of the said land for the rent then due.

7. In *National Bank of Fiji v Hussein*, (Civil Action No.0331 of 1994) Fatiaki J(as he then was) cited Jayaratne J in *ANZ v Shantilal*, Civil Action 265 of 1990 as follows:

Order 88 of the High Court Rules .. gives mortgagees the right to claim possession without being the registered proprietor with or without foreclosures. To that extent Order 88 is available to him. Nothing can inhibit him from utilising Order 88.

8. Clause 5.2 of the Mortgage provides that if the defendant defaults in payment, the plaintiff may notify him. If the default continues for thirty days after service of notice, the plaintiff can make demand of all moneys secured and take possession of the Lease.
9. The supporting affidavit filed by the plaintiff of 27th February, 2020, states that arrear notices and demand letters were sent to the defendant. The plaintiff has sent the defendant an eviction notice on 11 December, 2019. An affidavit of service has been filed stating that the eviction notice was served on the defendant at the Lautoka Correction Centre and pasted on the front door of the Lease. The plaintiff states that the defendant has failed to vacate the Lease. As at 19th February, 2020, the defendant is in arrears of a sum of \$ 527,584.57 under Loan Account No. 679L10 and \$1,161,630.35 under Loan Account No. 6796L15 with interest accumulating on both accounts.
10. The defendant has not denied that he is in default. He has not presented any reason as to why the orders sought by the plaintiff should not be made.
11. On 18 February, 2020, the Director of Lands has granted the plaintiff consent to file an application to the High Court to obtain vacant possession of the State Lease No. 19499.
12. I find that the plaintiff has complied with the requirements of Or 88 (3) and clause 5.2 of the Mortgage.
13. In my judgment, the plaintiff is entitled to vacant possession of the Lease

14. The plaintiff also seeks an injunction to restrain the defendant from interfering with the improvements on the Lease.
15. The defendant has lost his right to occupy the Lease. The improvements on the Lease now belong to the plaintiff. As Wati J said in *National Bank of Fiji Ltd v Tabuya*, [2010] FJHC 264; HBC373.2009 (22 July 2010):

. I see no impediment to the rights of the defendants if an order is granted to secure the improvements on the property. The defendants no longer have any rights of occupation and as such they should not deplete the value of the assets. The assets now belong to the plaintiff and they have the rights to ask the court to preserve the status quo.

16. The defendant is restrained from interfering with the improvements on the Lease
17. **Orders**
- a. The defendant shall deliver vacant possession of State Lease No. 19499 being Lot 1 on Plan No.(d) SO 6902 Waqadra (pt of) formerly (pt of) Bal Lot 3 SO 279 situated in the Province of Ba and District of Nadi.
 - b. The execution of the orders for vacant possession is stayed for 30 days to allow the defendant time to relocate.
 - c. The defendant and/or its servants and/or agents are restrained from interfering with the improvements on the Lease.
 - d. The defendant shall pay the plaintiff costs summarily assessed in a sum of \$ 1000.



A.L.B. Brito-Mutunayagam

A.L.B. Brito-Mutunayagam
JUDGE
26th January, 2021