

IN THE HIGH COURT OF FIJI AT SUVA  
CIVIL JURISDICTION

Civil Action No. HBC 230 of 2021

BETWEEN

BRED BANK a duly constituted banking corporation having its registered office at  
Level 5, Tappoo City, Suva

PLAINTIFF

AND

RATNESH LAL JATTAN and MADHU LATA  
of Lot 10, Palm Court, off Painapiu Street, Nakasi

DEFENDANTS

Counsel : Ms. S. Saumatua for the Plaintiff  
Ms. Seduadua for the Defendants

Date of Hearing : 05<sup>th</sup> October 2022

Date of Ruling : 28<sup>th</sup> October 2022

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## RULING

*(Leave to file Supplementary Affidavit)*

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- [1] The Plaintiff filed this interlocutory application on 27<sup>th</sup> July 2022 by way of a Notice of Motion supported by an Affidavit pursuant to Order 28 Rule 2(6) of the High Court Rules 1988 and the inherent jurisdiction of the Court seeking leave to file a Supplementary Affidavit.
- [2] The Defendants object to this application by their Affidavit in Opposition dated 13<sup>th</sup> September 2022.
- [3] The Plaintiff thereafter replied through affidavit of Niajul Nisha Irfaan on 21<sup>st</sup> September 2022.

### Background

- [4] The Plaintiff filed an Application on 09<sup>th</sup> November 2021 by way of Originating Summons and supporting Affidavit of Niajul Nisha Irfaan pursuant to Order 88 of the High Court Rules 1988 seeking following orders,
- a. The Defendants and or their servants or agents forthwith given vacant possession to the Plaintiff of the residential property legally described as Certificate of title No. 27555 comprised in Lot 10 on DP 5675 situated at Palm Court, Nakasi, together with all improvements thereon;
  - b. The Defendants and/ or their servants or agents be restrained from damaging or interfering with improvements on the said property in anyway whatsoever so to deplete it value;

c. Costs on an indemnity basis.

- [5] The Defendants filed their response and Affidavit in Opposition on 11<sup>th</sup> January 2022. Plaintiff's Affidavit in Reply was filed on 27<sup>th</sup> January 2022.
- [6] On or about 14<sup>th</sup> June 2022 on Court's directions both parties filed their written submissions and the matter was set for Hearing on 05<sup>th</sup> October 2022.
- [7] On or about 19<sup>th</sup> July 2022 the counsel for the Plaintiff wrote to the Defendant's counsel enclosing a copy of a third party mortgage which they refused to accept. Hence the current Application before the Court.

**Order 28 Rule 2(6)**

- [8] The rule refers to the procedure relating to filing and serving of affidavits in the matters initiated by Originating Summons.
- [9] After the filing of initial affidavits in the action, Order 28 Rule 2(6) states 'No other affidavit shall be received in evidence without leave of the Court'.
- [10] It is evident that the Rule has given discretionary powers to the Court whether to allow any additional filing of affidavits.
- [11] His Lordship Amaratunga J in **Ramesh Chand & Another v Rajesh Rishi Ram HBC** 61 of 2019 discussed the following factors which needs consideration by the Court in applications made under the rule.
- i. Nature of the action,
  - ii. Contents of the proposed supplementary affidavit,
  - iii. Relevance of the evidence to the action,
  - iv. Reason for seeking supplementary affidavit,
  - v. Delay,
  - vi. Prejudice to the other party,
  - vii. Effect of filing the supplementary affidavit.

### Proposed Supplementary Affidavit

- [12] The Affidavit of Niajula Nisha Irfaan avers that there are two mortgages registered on the residential property bearing the Certificate of Title No. 27555 which has been accepted by the Plaintiff bank as a security. The Plaintiff has annexed the Mortgage No. 826382 to their Affidavit in Support of the Originating Summons. However due to an oversight of the Plaintiff, the second mortgage has not been attached to the initial affidavit.

### Analysis

- [13] The Defendant states that the substantive application that has been made under Order 88 of the High Court Rules 1988 and that there are mandatory requirements as stipulated in Order 88 Rule 2(3) and Rule 3(2) which have not been complied by the Plaintiff.
- [14] Order 88 Rule 2(1) states that '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'.
- [15] Having noted the Affidavit of Service filed on 17<sup>th</sup> December 2021 and the Affidavit in Opposition filed by the Defendants, I am of the view that the originating summons has been duly served on the Defendants and therefore Order 88 Rule 2 provisions have no application to this matter.
- [16] Order 88 Rule 3(2) requires the affidavit in support of the Originating Summons to 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. The Court notes that annexure B1 of the Affidavit in Support filed by Niajula Nisha Irfaan has been certified by the Registrar of Titles. That is all Court needs to look at this stage. The original is expected to be produced on the hearing of the summons. Therefore allowing the Supplementary Affidavit would not become an added advantage to rectify any errors made by the Plaintiff in their initial supporting affidavit.

- [17] The Plaintiff states that the third party mortgage which has been registered on the same property is relevant to the case as the mortgage was given by the Defendants to the Bank pursuant to the offer given to the company, Electro & Refer Service Limited, dated 15<sup>th</sup> September 2016 of which the Defendants were Directors. The third party mortgage was registered on the Defendant's title on 06<sup>th</sup> October 2016.
- [18] The Defendants in their Affidavit in Opposition to the Notice of Motion admits the existence of this third party mortgage. However they object for the Plaintiff to include that in the action.
- [19] The practice and the procedure in Originating Summons is well settled. Where there is no dispute of facts and only questions relating to question of law and construction of acts, usually parties proceed by way of Originating Summons. However if a matter has any disputed facts that needs oral examination of witnesses, then it should proceed by way of Writ of Summons.
- [20] Therefore parties need to disclose respective positions fully in their affidavit evidence without holding on to any, in order for the Court to make its determination.
- [21] Having noted the areas of consideration as per in *Ramesh Chand & Another* the Court is of the view that it must consider every legal instrument registered on the main subject matter of these proceedings.

[22] The intention of the Notice of Motion is not to cause any delay. The Plaintiff will not gain any advantage from a delay. Further there will be no prejudice to either party as they both admit the existence of the third party mortgage.

[23] For the reasons above mentioned the Court makes following orders.

### ORDERS

1. Leave granted for the Plaintiff to file and serve the Supplementary Affidavit within 14 days of this order.
2. No orders for costs.



Yohan Liyanage

JUDGE

At Suva on 28<sup>th</sup> October 2022