

**IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION**

CIVIL ACTION NO.: HBC 148 of 2019

**BETWEEN : SEPETI TAGILALA and SEREANA LEDUA
TAGILALA
PLAINTIFFS**

**AND : JESONI VITUSAGAVULU and SILINA
VITUSAGAVULU
DEFENDANTS**

**: HOME FINANCE COMPANY PTE LIMITED
trading as HFC BANK
NOMINAL PARTY**

APPEARANCES/REPRESENTATION

PLAINTIFFS : Ms. Qioniwasa [O'Driscoll & Co.]
DEFENDANTS : Mr. Vuloma [Siwatibau & Sloan]
NOMINAL PARTY : Mr. Lajendra [Lajendra Lawyers]
RULING BY : Acting Master Ms Vandhana Lal
DELIVERED ON : 14 October 2022

INTERLOCUTORY RULING

Introduction

The Interested Party's Application

1. On 22nd May 2019 an order was made extending a caveat lodged by the first named Plaintiff against Title Deed of the land situated in the district of Naitasiri Island of Viti Levu and comprised in Certificate of Title No. 32182, Lot 6 on Deposited Plan No. 8213 ("the property") to be extended and to remain in force until finalization of the application.

2. At the given time the Interested Party, Home Finance Company PTE Limited trading as HFC Bank (HFC) was not named as an interested party to the proceedings.
3. HFC was later on 22nd October 2020 joined/added as an interested party.
4. Subsequently HFC filed a summon to have the orders of 22nd May 2019 discharged, which application is opposed by the Plaintiffs.

The Plaintiffs' Application

5. On or about 19th March 2020, the Plaintiffs made an application pursuant to Order 15 Rule 4 and Order 29 Rules 1 and 2 of the High Court Rules seeking following orders:
 - (i) *An order that the HFC Bank Pte Limited be joined as a party to these proceedings as Second Defendant.*
 - (ii) *An order restraining the Second Defendant whether by itself and/or by its servants and/or agents and/or by its Solicitors and otherwise from selling or in any way dealing with the First Defendants' property comprised in Certificate of Title No. 32182 in the Province of Naitasiri and in the Island of Vitilevu until the final determination of the within action;*
 - (iii) *An order restraining the Second Defendant whether by itself and/or by its servants and/or agents and/or by its Solicitors and otherwise from further advertising for mortgagee sale of the First Defendants' property until the final determination of the within action.*
6. The Plaintiffs' application is opposed by HFC.

HFC's Grounds to Discharge Caveat and Opposition to the Plaintiff's Application.

7. According to HFC, the Defendants are customers of HFC as they had obtained loan fund purchase of a property on certificate of title no. 18272. The initial loan in 2004 was for \$210,000. This loan also refinanced an ANZ Home loan for certificate of title no.32182 and extension of the said property to accommodate a studio apartment.

Later on, 2005 the Defendants sought additional funding of \$46,500. The property [on certificate of title no. 32182] was continued to be held as security.

The Defendants had defaulted in loan repayments.

However, the Defendants informed HFC that the Plaintiffs were keen to purchase the property on certificate of title no. 32182 and required time to finalize the sale. The debt by the Defendants was to be paid off from the sale proceeds.

HFC allowed the Defendants time to sell the property. The Plaintiffs began making ad hoc payments into the Defendants' loan account as per the sale and purchase agreement between the Plaintiffs and Defendants. But these repayments were not regular.

Thus, HFC instructed its solicitors to issue demand notices under mortgage. One demand was issued dated 19th August 2019.

The Defendants informed HFC that the Plaintiffs were still keen on purchasing the property and are sorting their finance. HFC in good faith allowed Defendants further time.

The sale of property has been dragged for considerable years with the Defendants debt accruing.

HFC now wishes to proceed to exercise its mortgagee powers pursuant to mortgage no. 548572 registered on the title of the property since 2004.

The current proceeding deals with the said property and there exists a caveat until finalization of the matter.

The Plaintiffs' caveatable interest relates to a Sale and Purchase Agreement dated 02nd November 2017 between the Plaintiffs and the Defendants.

HFC is affected by the court order and unless the caveat is discharged HFC is restrained from and unable to exercise its mortgagee powers.

HFC's interest is ranked above the interest of the Plaintiffs interest by virtue of the registered mortgage on the title.

HFC maintains the Sale and Purchase agreement for certificate of title no. 32182 is a matter between the Plaintiffs and the Defendants and it was not involved in the arrangements between them.

HFC has issued a letter to Westpac informing of repayments made towards the Defendants' loan account as the Plaintiffs were securing loan to purchase the property. However, the Plaintiffs' loan application was not successful.

HFC has advertised the property for mortgagee sale and a demand notice under the mortgage has been issued.

HFC maintains that it was not obliged to advise the Plaintiffs of the default status of the Defendants' loan account.

It further states that the Plaintiffs do not have a cause of action against HFC.

Furthermore, the Plaintiffs will not be able to satisfy any award of damages as the undertaking provided by them is insufficient.

The certificate of title no. 9619 has a mortgage by Fiji Development Bank and as at 08th February 2017 the first Plaintiff has a tax liability of \$19,723.73.

Furthermore, HFC alleges that Fiji Inland Revenue Customs Authority has placed a charge over certificate of title no. 9619.

Substantial rates are owed to Suva City Council and it has also placed a charge over certificate no. 9619.

Plaintiffs' Argument why the caveat ought to remain with injunctive orders be made against HFC and why HFC should be joined as a party to the proceedings

8. According to the Plaintiffs, the Defendants were having difficulty in serving the loan with HFC and they agreed to purchase the property and take over the loan repayments.

A Sale and Purchase Agreement was signed in January 2008 for consideration sum of \$320,000 in relation to certificate of title 32182.

The Plaintiffs paid a deposit of \$16,000 and moved into the property in July 2007.

The Sale and Purchase Agreement was varied to extend the time and the Plaintiffs taking over the loan repayments.

Plaintiffs have been making payments since 2007 till 2019. Total payments made between January 2008 and August 2017 was in sum of \$361,046. It was understood that \$2,500 per month would be allocated as rental.

The Plaintiffs have also paid additional \$43,701 for repairs and maintenance.

The rental of \$2,500/month till August 2017 was \$290,000 when in fact the actual rental should have been \$1,500 per month. An excess payment was made amounting to \$160,747.00.

According to the Plaintiffs, they will be affected if the caveat is removed before determination of the matter.

As at August 2017 the property was valued at \$460,000.

A caveat was lodged on the property on certificate of title 32182 in order to protect his interest in the property since he has paid around \$650,000 for the purpose of purchasing the property.

The Plaintiffs claim they have full history of transactions between themselves and the first Defendant as well as with HFC.

Until to-date the Defendants have not terminated the Sale and Purchase Agreement.

As at 07th March 2018 the Plaintiffs give an acknowledgment letter to Westpac stating that from 01st July 2007 till 22nd February 2018 the Plaintiffs have paid \$404,231.90 against the mortgage account. As per the statement of account with HFC between 01st January 2016 and 19th March 2019 payments were made by the Plaintiffs.

HFC being aware of the situation between the Plaintiffs and the Defendants, should have notified the Plaintiffs regarding the arrears and prior to advertising the property for sale.

The First Plaintiff gives undertaking as to damages being equity in certificate of title no. 9619 which is valued at \$416,000 as at February 2018.

The First Plaintiff also states he has balance of \$33,931.83 outstanding with Fiji Development Bank. His outstanding arrears with Fiji Inland Revenue Customs Authority is \$19,723.73 and Suva City Council is \$18,762.73. His equity thus stands at \$343,581.

Determination

Joinder of HFC as a Defendant to the proceeding.

9. The Plaintiffs rely on Order 15 rule 4 of the High Court Rules which reads:

(1) Subject to Rule 5 (1), 2 or more persons may be joined together in one action as Plaintiffs or Defendants with the leave of the court or where –

(a) If separate actions were brought by or against each of them, as the case may be, some common question of law or fact would arise in all the actions; and

(b) All rights to relief claimed in the action (whether they are joint, several or alternative) are in respect of or arise out of the same transactions or series of transaction.

10. The Plaintiffs in their affidavit in support have not identified the cause of action it has against HFC and what relief if any it seeks against HFC.

11. The Sale and Purchase agreement signed on 27th January 2008 is between the Plaintiffs and Defendants and has no relation to HFC.

12. Hence, I refuse to exercise my discretion in allowing HFC be joined as a Defendant to the proceedings.

Injunctive orders against HFC

13. Order 29 Rules 1 and 2 provides:

1. (1) An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in

that party's writ, originating summons, counterclaim or their party notice, as the case may be.

(2) Where the applicant is the plaintiff and the case is one of urgency such application may be made ex parte on affidavit but. Except as aforesaid, such application must be made by motion or summons.

(3) The plaintiff may not make such an application before the issue of the writ or originating summons by which the cause or matter is to be begun except where the case is one of urgency, and in that case the injunction applied for may be granted on terms providing for the issue of the writ of summons and such other terms, if any, as the Court thinks fit.

2. *(1) On the application of any party to a cause or matter the Court may make an order for the detention, custody or preservation of any property which is the subject matter of the cause or matter, or as to which any question may arise therein, or for the inspection of any such property in the possession of a party to the cause or matter.*

(2) For the purpose of enabling any order under paragraph (1) to be carried out the Court may by the order authorize any person to enter upon any land or building in the possession of any party to the cause or matter.

(3) Where the right of any party to a specific fund is in dispute in a cause or matter, the Court may, on the application of a party to the cause or matter, order the fund to be paid into court or otherwise secured.

(4) An order under this rule may be made on such terms, if any, as the Court thinks just.

(5) An application for an order under this rule must be made by summons or by notice under Order 25 rule 7.

(6) Unless the Court otherwise directs, an application by a defendant for such an order may not be made before he acknowledges service of the writ or originating summons by which the cause or matter was begun.

14. Are there sufficient evidence to show that HFC cannot exercise its power of sale under the mortgage?
15. The Plaintiffs claim they have between 01st July 2007 till 22nd February 2018 paid some \$404,231.90 against the mortgage account.
16. Annexure "F" to the Plaintiffs' affidavit in support of their application for joinder and injunctive orders (which affidavit was sworn on 19th March 2020), is a letter by HFC to Westpac Banking Corporation dated 07th March 2018.

The loan statement account attached to the letter shows that as at 19th March 2019 a sum of \$217,634.62 was outstanding under the loan account.

And between 11th January 2016 till 19th August 2019 only approximately \$131,000 was paid into the loan account.

17. Annexure "D" to HFC's affidavit sworn by Jainendra Kumar on 04th December 2020 and filed on 07th December 2020 in opposition to the Plaintiff's application, is a Mortgage Demand Notice.

As per the said notice, there is an outstanding debt of \$228,529.38 as at 19th August 2019.

18. The Plaintiffs have failed to show that there is no default to the repayment of installments.
19. As per annexure "C" to the affidavit filed by HFC on 07th December 2020 repayment with effect from 30th June 2005 was \$4,850 for 03 years and \$5,214 thereafter. The loan period was for 15 years.
20. If repayments were up to date as at 19th August 2019 the total repayment towards the loan would have been approximately \$174,600 for first 03 years and approximately \$688,248 for remaining 11 years. Leaving a balance of approximately \$62,568 for the final year.
21. Evidence shown only suggests that the mortgage account was in arrears and the payments towards to the account never satisfied the installment which had become due and with no default.
22. With loan not fully satisfied the account is still incurring debt in term of loan admin fee and arrears fee.
23. In the circumstances I refuse to make orders in terms of the Plaintiff's application for injunction orders against HFC as such order will deprive HFC the benefit of its security.

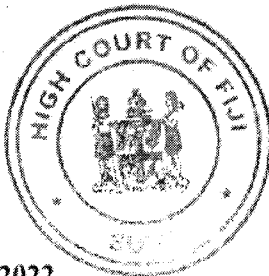
Removable of Caveat

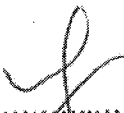
24. I rely on my finding above in paragraphs 15-23.
25. HFC's interest on the property is registered compared to the Plaintiffs who hold equitable interest against the Defendants and not HFC.
26. Neither the mortgagor or the Plaintiffs have given undertaking of paying loan outstanding into court.

27. The Plaintiffs' interest on the property cannot prevail that of HFC under the registered mortgage.
28. For these reasons, caveat no 872107 on certificate of title no 32182 is to be removed forthwith.

Orders

29. The Plaintiffs application dated 18th March 2020 is dismissed.
30. On the application by HFC dated 29th October 2020, caveat number 872107 on property comprised and described in certificate of title no. 32182 Lot 6 on Deposit Plan no. 8213 is to be removed forthwith.
31. The Plaintiffs are to pay HFC cost summarily assessed at \$1,000 and to be paid within 14 days from to-date.




Vandhana Lal [Ms]
Acting Master
At Suva.

14 October 2022

TO:

1. Suva High Court Civil Action No. HBC 148 of 2019;
2. O'Driscoll & Co., Solicitors for the Plaintiffs;
3. Siwatibau & Sloan, Solicitors for the Defendants;
4. Lajendra Lawyers, Solicitors for the Nominal Party.