

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 191 of 2022

IN THE MATTER of Mortgage No.818449 over
State Lease No. 19499 given by SEKOVE
VUNIYAYAWA NO. 2 in favour of HOME
FINANCE COMPANY PTE LIMITED trading as
HFC BANK

BETWEEN: HOME FINANCE COMPANY PTE LIMITED trading as HFC BANK a duly incorporated
company having its registered office at 371 Victoria Parade, Suva, Fiji

PLAINTIFF

AND: OSEA VEITALA TOGETHER WITH HIS RELATIVES AND OTHER OCCUPANTS
AND/OR THEIR AGENTS AND/OR SERVANTS of ATS Subdivision, Namaka, Nadi.

DEFENDANT

BEFORE: Hon. Justice Vishwa Datt Sharma

COUNSEL: Mr. Lajendra N for the Plaintiff
Mr Vananalagi R for the Defendant.

DATE OF JUDGMENT: Wednesday 01st February 2023 @ 9.30 am.

JUDGMENT

[Plaintiff's Originating Summons seeking Vacant Possession by Mortgagee pursuant to Order 88 Rule 1(1) (d) of the High Court Rules, 1988 and Defendant's Summons for Stay/Jurisdiction and Strike out pursuant to Order 2 Rule 2, Order 12 Rule 7, Order 15 Rule 7 and Order 18 Rule 18(1) (a) of the High Court Rules 1988]

Introduction

1. The Plaintiff filed an Originating Summons-[Expedited Form] and sought for the following orders:
 - i. Delivery by the Defendant together with his relatives and other occupants and/or their agents and/or servants to the Plaintiff of vacant possession of **ALL THAT** property comprised and described in:

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, having an area size of 1000m².
 - ii. An injunction restraining the Defendant together with his relatives and other occupants and/or their agents and/or servants from interfering with the improvements on the said property in any way so as to deplete its value.
 - iii. Costs of this application; and
 - iv. Such further and/or other orders the Honourable Court may deem just and appropriate in the circumstances.
2. On 29th July 2022, the Court granted the Defendant 21 days to file and serve his Affidavit in Opposition. The Defendant to date has not filed any Affidavit in Opposition..
3. However, the Defendant instead filed a Summon coupled with an Affidavit in Support on 18th August 2022 seeking an order for stay, disputing the jurisdiction of this court and for striking out of the Plaintiff's originating summons.
4. Subsequently, the plaintiff filed his Affidavit in Opposition to the Defendants Summon on 20th September 2022.
5. Both application were scheduled for hearing together on 04th October 2022.

Background

6. The late Mr. Sekove Vuiyayawa No. 2 is the registered proprietor of all that property comprised and described in:

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, having an area size of 1000m².
7. Erected on the said property is a double storey concrete dwelling.
8. Around April 2015, Mr. Sekove Vuniyayawa No. 2 applied for a loan with the Plaintiff. The loan application of Mr. Sekove Vuniyayawa No. 2 was approved by the Plaintiff for a term of 240 months at 8% per annum variable interest rate.

9. On 10th August 2015, Mr. Sekove Vuniyayawa No. 2 was granted a further loan in the sum of \$230,700.00.
10. In consideration for the loan facility, the Plaintiff amongst other things took the following security:

First Registered Mortgage over the residential property legally described as Lot 1 on SO 6902 as contained in State Lease No. 19499, situated at ATS Subdivision, Namaka, Nadi.
11. By inter-alia, **MORTGAGE REGISTRATION NO. 818449** dated 28 August 2015 made between the Plaintiff and Mr. Sekove Vuniyayawa No. 2, the said property was charged to secure repayment to the Plaintiff of all the loans, advances, charges, interest and other banking accommodation made by the Plaintiff to Mr. Sekove Vuniyayawa No. 2 from time to time and on terms and conditions as therein contained.
12. Subsequently, Mr. Sekove Vuniyayawa No. 2's loan account with the Plaintiff fell in arrears.
13. The Plaintiff then engaged the services of its solicitors, and issued an Eviction Notice on 11th December 2019 under the Mortgage requiring Mr. Sekove Vuniyayawa No. 2 and his agents and/or servants to vacate the premises within 30 days from receipt of the said Notice. The Eviction Notice was personally served on Mr. Sekove Vuniyayawa No. 2 on 13th December 2019.
14. Despite the said Eviction Notice, Mr. Sekove Vuniyayawa No. 2 failed to vacate the said property.
15. The Plaintiff then filed an eviction proceedings against Mr. Sekove Vuniyayawa No. 2 being Suva High Court Civil Action No. HBC 79 of 2020 and obtained an Eviction Order against him on 26th January 2021.
16. The Plaintiff then proceeded to advertise the said property under mortgagee sale.
17. Mr. Sekove Vuniyayawa No. 2 has now passed away and the subject property is currently occupied by the Defendant together with his relatives and other occupants.
18. Hence, the Plaintiff now seeks Court Orders for Vacant Possession of the said property and an injunction restraining the Defendant together with his relative and other occupants and/or their agents and/or servants from interfering with the improvements on the said property in a way so as to deplete its value.

Plaintiff's Case

19. The Application for Vacant Possession is made pursuant to Order 88 Rule (1) (d) of the High Court Rules 1988 for Vacant Possession.
20. The Defendant has not filed any Affidavit in Opposition, therefore, the Bank's application remains factually unchallenged.
21. However, it is noted that an application by way of Summons has been filed by one David Nainoka Veilwa seeking the following orders:
 - a) Stay of proceedings

- b) Transfer of the matter to Lautoka High Court;
 - c) Setting aside service or Originating Summons;
 - d) Declaring the Originating Summons has not been served on the estate of Sekove Vuniyayawa No. 2 and
 - e) Originating Summons be struck out.
22. One issue that the application filed on behalf of Mr. Veilawa raises that the property currently occupied by the Defendant together with his relatives and other occupants and/or their agents and/or servants is not on the property subject to these proceedings.
23. The double storey house is not built on Lot 14 only with the property description as *LD Reference No. 4/10/1403*. In fact, the double storey house is built in *both, LD Reference No. 4/10/5141 (State Lease No. 19499, Lot 1 on So 6092 Waqadra (pt of) which is subject to this court action and LD Reference No. 4/11/1403, Lot 14.*
24. The second issue that he raises is the pending issuance of grant of Letters of Administration in the Estate of Sekove Vuniyayawa No. 2.
25. Third issue raised in the summons is that the Bank should have served the eviction proceedings on the Sekove Vuniyayawa No.2's Estate.
26. Fourth issue is the Jurisdiction to commence proceedings and striking out of the Plaintiff's Originating Summons.

Defendant's Case

27. The Defendant in their Summons filed on 18th August 2022 is seeking amongst other things to strike out the Plaintiffs Originating Summons.
28. The Defendant raised the following issues in its Summons filed by one David Nainoka Veilawa.

Issue 1

- (i) That the property currently occupied by the Defendant together with his relatives and other occupants and/or their agents and/or servants is not on the property subject to these proceedings.

(ii) Issue 2

That it is conducted that the beneficiaries have a bearing and influence over the Bank's application for Vacant Possession under Order 88. This is based on some purported Estate Administration and Entitlements of the beneficiaries of the Estate of Sekove Vuniyayawa No. 2.

(iii) *Issue 3*

That the Bank should have served the eviction papers on the Estate of Sekove Vuniyayawa No. 2.

(iv) *Issue 4*

That Suva High Court is not the appropriate forum where this action should have been commenced.

(v) *Issue 5*

That the Plaintiff's Originating Summons be struck out.

29. The Defendant filed the following affidavits:

- (i) Affidavit of David Veilawa sworn on 18th August 2022, And
- (ii) Affidavit of David Veilawa in Reply sworn on 28th September 2022.

30. There is a single storey building built on the property.

31. There is also a double storey. However, Double storey is built on a piece of Land located at the back of the property on Approval notice, Lot 14 NOSW 504 Waqadra (Pt of), District Nadi, province of BA, Estimated area 4094m² [Annexure DNV-2 within David Nainoka Veilawa's Affidavit] and not on state lease no. 19499, Lot 1 on So 6902 Waqadra (Pt of) formerly (Pt of) Bal Lot3 of So 279 [Annexure 'B' of Jainendra Kumar's Affidavit in Support]

32. There is substantial dispute of fact on which land the double storey is built on, the purported survey report that supports the Plaintiff's Contention is questionable as to its validity, purpose and use.

33. The Plaintiff's Originating Summons does not comply with the mandatory requirements of order 7 Rule 2 (1)

34. Seek an order to Strike out the Plaintiff's Originating Summons accordingly.

Analysis and Determination

35. The Plaintiff herein seeks an order for Vacant Possession in terms of the order 88 of the High Court Rules 1988 of the *State Lease No. 19499* being Lot 1 of 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, having an area of 1000m².

36. The Plaintiff further sought for an injunction restraining the Defendant with his relatives and other occupants, and/or their agents and/or servants from interfering with the improvements on the said property in any way so as to deplete its value.

37. It is noted that the Defendant was granted ample time to file and serve their Affidavit in Opposition to the Plaintiff's Originating Summons. However, why the opposing affidavit was not filed and served is best known to the Defendant.

38. The Defendant relied on its written and oral submissions and the summons filed on 18th April 2022.
39. In absence of any Affidavit in opposition the Plaintiff HFC Bank's application factually remains unchallenged.
40. *Order 88 rule 3 [O.88, r.3] deals with Action for possession of payments.*

(2) "The Affidavit of the Plaintiff must exhibit a true copy of the mortgage and that the original mortgage or, in that case of a registered charge, the charge certificate must be produced at the hearing of the Summons.

(3) Where the Plaintiff claims delivery of possession the affidavit must show the circumstances under which the right to possession arises, the state of accounts between the Mortgagor and mortgagee with particulars of the amount of advance periodic payments required to be made, interest/or installments 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 possession as..... in possession of the Mortgaged property."

41. Section 75 of the Property Law Act provides that:
"A mortgage, upon default in the payment of the mortgage money at 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."
42. 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 Shanti Lal*, Civil Action 265 of 1990.

"Order 88 of the High Court Rules 1988 give mortgagee the rights to claim possession without being the right and proprietor with or without foreclosures to that extent order 88 is available to him, nothing can inhibit him from utilizing order 88.

43. The mortgage document Registration No. 818449 dated 28th August 2015 at Annexure E of Jainendra Kumar's Affidavit confirms being executed between the Plaintiff and Mr. Sekove Vuniyayawa No. 2, the said property was changed to secure repayment to the Plaintiff of all the loans, advances, charges, interest and other Banking accommodations made by the Plaintiff to Mr. Sekove Vuniyayawa No. 2 from time to time and on terms and conditions stipulated therein.
44. **Clause 5.2** empowers the Plaintiff HFC Bank to exercise its mortgage rights if the Defendant default in payments, and may notify him. If the default continues for thirty days after service of notice, the Plaintiff can make demand of all money secured and take possession of the lease.
45. The Plaintiff's supporting Affidavit deposed by Jainendra Kumar clearly states the loan advanced, the status of arrears, notices and demands letters sent to the Mr. Sekove Vuniyayawa No. 2 the eviction proceedings against Mr. Sekove Vuniyayawa No. 2 was filed and vide High Court Case Action No. HBC 79 of 2020 and an order for Eviction was made against him.
46. The Plaintiff as the Mortgagee utilized its statutory powers under the Property Law Act and the Common Law and proceeded to advertise the said mortgaged property for sale and received the offers.
47. However, Mr. Sekove Vuniyayawa No. 2 took demise thereafter and the subject property is now occupied by the Defendant Osea Veitala together with his relatives and other occupiers.

48. Subsequent to Mr. Sekove Vuniyayawa No. 2's demise, an Eviction Notice was issued and served out the Defendants under the mortgage requiring the Defendant together with his relatives and other occupants and/or the agents and/or servant to vacate the subject property on State Lease N. 19499.
49. Despite the service of the Eviction Notice, the Defendant together with his relatives and other occupier and/or the agents and/or servants refused to vacate the said premises and continues to be in unlawful occupant of the property.
50. The nephew of the deceased Sekove Vuniyayawa No. 2 - David Nainoka Veilawa as one of the occupants (occupiers) of the said property in his Affidavit in Reply filed on 28th September 2022 admits at paragraph 7-

"That the Bank has the right to only take possession of the property that was secured under the Mortgage as indicated in annexure "C" of the Plaintiff's Affidavit sworn on 7th June 2022 and not to convolute the story to include the double story as part of the property when it is not."

51. However, I reiterate that the Plaintiff is seeking for an order for Vacant Possession of the State Lease No, 19499 being Lot 1 on Plan no. (d) SO 6902 Waqadra situated in the Province of Ba and District of Nadi having an area of 1000m², [Annexure "C"], within the Plaintiff's Affidavit in Support, to the Plaintiff's HFC Bank.
52. Further, the same State Lease No. 19499 being Waqadra (Pt of) formerly (Pt of) Bal Lot 3 SO 279, has been secured under the mortgage to the Plaintiff's HFC Bank on 02nd September 2015, (Annexure E within the affidavit of Jainendra Kumar refers).
53. In terms of the issues 1, 2, 3, 4 and 5 inclusive raised by the Defendant at paragraph 28 (i)-(v) inclusive hereinabove of my judgement.

a) Issue 1

- The double story house is not built on Lot 14 only with the property description as LD Reference no. 4/10/1406. In fact the double storey house is built on both LD Reference No. 4/10/5141 (in the Lease No. 19499, Lot 1 on S.O 6092 Waqadra (Pt of) which is subject to this Court proceedings and LD Reference No.4/11/1403, Lot 14.
- This is substantiated by the Bank's Letter dated 05th September 2019 coupled with the Redefinition Survey Plan confirming that the double storey house which the Defendant admits that they have moved into sits both on LD Reference No. 4/10/5141 and LD Reference No. 4/11/1403 Respectively. The photograph of the property marked.
- Annexure C of the Affidavit in Opposition of Jainendra Kumar filed on 20th September 2022 shows the single and double storey buildings. The Defendant have admitted that they have moved from the single storey to the back of the property that of the doubles storey which is the subject to this court action
- It is one complete continuous house that sits on both the parcels of land and impossible to be demarcated as two separate structures. The Defendant is occupying a portion of the house with a

structure that is partially on the Bank's mortgaged property that cannot be physically separated from the neighboring Lot (LD Reference no. 4/11/1403).

b) *Issue 2*

- The issue is based on same purported estate administration and entitlements of the beneficiaries of the estate of Sekove Vuniyayawa No. 2. It is the Defendant's contention that the beneficiaries have a bearing and influence within the Banks application for Vacant possession under Order 88.
 - The affidavit in Support of the Plaintiff sets out all the relevant details and proves the default position of the loan Account of Mr. Sekove Vuniyayawa No. 2. The loan outstanding is significant in excess of \$1,000,000.
 - The Bank has a registered mortgage with the State Lease No, 19499 has a first right of claim in respect of the subject property. Pursuant to mortgage, the Bank holds he power in the event of default [as it has been disputed herein] to sell the mortgage property. However, the bank has to seek an order for the possession of property first before it could carry out with the sale proceedings.
54. In my Judgment, for the aforesaid Rational, I find that the Defendant Osea Veitala together with his relatives and other occupants and/or their agents and/or servants have been in unlawful occupation of the said property on the **State Lease No. 19499** as described hereinabove at paragraph 1(i) and are interfering with the Plaintiff's right as Mortgagee.
55. Accordingly, I am satisfied that the Plaintiff's Bank HFC is entitled to a Vacant Possession order of the **State Lease No. 19499** being Lot 1 on Plan no. (d) SO 6902 Waqadra situated in the Province of Ba and District of Nadi having an area of 1000m2 against the Defendant Osea Veitala together with his relatives and other occupants and/or their agents and/or servants.
56. The Plaintiff also filed for an Injunction restraining the Defendant together with other occupants and/or the agents and/or servants from interfering with the improvements on the said property.
57. The improvements on the said lease now belongs to the Plaintiff as of the mortgaged property. The Mortgagee is now possessed with the statutory powers under the Property Law Act and the Common Law. The Mortgagee can now proceed to exercise its right over the said property in terms of *Order 88 of the High Court Rules 1988* accordingly.
58. Hon. Wati J said in the case of *National Bank of Fiji Ltd v Tabuya [2010] FJHC 264, HBC 373.2009 (22 July 2010)*
- "I see no impediment to the rights of the Defendants to the improvements on the property, the Defendants no longer have the 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.*
59. Being above in mind, the Defendant together with other occupants and/or the agents and/or servants no longer have the right of occupation [since they were in unlawful occupation of the property] ,are restrained from interfering with the improvements on the said State Lease No.19499.

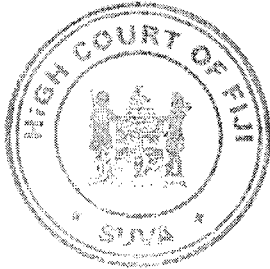
Costs

60. The matter proceeded to hearing, it is only appropriate that I grant a summarily assessed costs against the Defendant in the sum of \$1,000.00

ORDERS

- [1]. The Defendants together with his relatives and other occupants and/or their agents and/or servants to the Plaintiff of vacant possession of ALL THAT property comprised and described in is hereby ordered to deliver Vacant Possession of the 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.
- [2]. The execution of the order for Vacant Possession is stayed and suspended for 30 days to allow the Defendant together with Relatives, Agents, Servants' and Occupiers time to relocate.
- [3]. The Defendants together with the Relatives, Agents, Servants and Occupiers are restrained from interfering with the improvements on the State Lease No. 19499.
- [4]. The Defendants summons filed on September 2022 is accordingly dismissed.
- [5]. The Defendants shall pay the Plaintiff's HFC Bank costs summarily assessed at \$1,000.00.

Dated at Suva this 01st day of February, 2023.



Vishwa Datt Sharma
JUDGE

CC: LAJENDRA LAWYERS, SUVA
R VANANALAGI & ASSOCIATES, SUVA