

**IN THE HIGH COURT OF FIJI**

**AT SUVA**

**CIVIL JURISDICTION**

**Civil Action No HBC 351 of 2022**

**BETWEEN**

**HOME FINANCE COMPANY PTE LIMITED trading as HFC BANK a duly constituted  
company having its registered office at 371, Victoria Parade, Suva.**

**PLAINTIFF**

**AND**

**SEPETI TAGILALA and SEREANA LEDUA TAGILALA TOGETHER WITH OTHER  
OCCUPANTS AND/OR THEIR AGENTS AND/OR SERVANTS both of 6 Krishna Street,  
Tamavua Heights, Suva.**

**DEFENDANTS**

Counsel - Mr. N. Lajendra for Plaintiff  
Mr. G. O'Driscoll for Defendants  
Date of Hearing - 07<sup>th</sup> June 2023  
Judgment delivered - 19<sup>th</sup> July 2023

## JUDGMENT

- [1] The Plaintiff initiated this action pursuant to Order 88 of the **High Court Rules 1988** by way of Originating Summons seeking following orders.
- I. Delivery by the Defendants and/ or their servants and/or agents to the Plaintiff of vacant possession of property comprised and described in Certificate of Title No.32182 being Lot 6 on DP 8213 situated in the District of Naitasiri and Province of Vitilevu, having an area size of 1068sqm;
  - II. An injunction restraining the Defendants and/ or their servants and/or agents from interfering with the improvements on the said property in any way so as to deplete its value;
  - III. Costs of the application; and
  - IV. Such other relief the Court deems fit.
- [2] The Originating Summons was supported by an affidavit sworn by Jainendra Kumar Manager Asset Management Unit of the Plaintiff bank. He states that Jesoni Vitusagavulu and Silina Vitusagavulu are the registered proprietors of the property described in Certificate of Title No.32182 being Lot 6 on DP 8213 situated in the District of Naitasiri and Province of Vitilevu, having an area size of 1068sqm. The land has a single story concrete residential building.
- [3] On or around February 2004 the registered proprietors applied for a loan facility from the Plaintiff. Total funding of \$481,634 had been approved by the Plaintiff as \$216,634 of it was the existing balance of a loan which had been granted earlier and an additional loan of \$265,000.

- [4] The Plaintiff registered a mortgage over the property described in Certificate of Title No.32182. In June 2005 the registered proprietors received an additional loan of \$46,500 from the Plaintiff.
- [5] Plaintiff states that the registered proprietors allowed the Defendants to reside on the property on a personal arrangement unknown to the Plaintiff. The loan account fell in to arrears. Plaintiff notified the same to the registered proprietors. However there was no satisfactory arrangement made by them.
- [6] Plaintiff then sent a formal Demand Notice dated 19.08.2019 for a sum of \$228,629.38 under the mortgage. The arrears due on the date of the Demand Notice was \$13,749. Subsequent to the notice, the registered proprietors consented for the Plaintiff to exercise their mortgagee powers to sale. Plaintiff states they received offers.
- [7] Plaintiff then issued Eviction Notices to the two Defendants and served on both the Defendants in November 2022. The Defendants have not vacated the property and the Plaintiff states that they now interfere with the Plaintiff's rights.
- [8] The Defendants in their affidavit in opposition states that there had been discussions since 2007 for an agreement between them and the registered proprietors to purchase the property. As part of the agreement the Defendants state that they have paid the Plaintiff's loan installments since 2007 up to 2020. The Defendant states that since 01.07.2017 till 22.02.2018 they have paid \$404,231.90 which has been confirmed by the Plaintiff.
- [9] The Plaintiff in response states that does not change the status of the registered proprietors as the mortgagors. Since the Defendants have not purchased the property from the registered proprietors, the Plaintiff believes that it has a cause of action.
- [10] At the hearing Mr. O'Diriscoll argued that his clients have beneficial and equitable interest by virtue of the signed Sales and Purchase Agreement with the registered proprietors and by being the financial contributor to service the loan since 2007.
- [11] The Defendants prepared a Sales and Purchase Agreement with the registered proprietors in 2007 and the signatures were finally obtained in 2008. The Defendants state that signing the agreement is conferring a common interest between the registered proprietors and the Defendants which has given binding beneficial or equitable interest over the property. The agreement which later varied allowed the Defendants to take over the mortgage payments the registered proprietors had with the Plaintiff.

[12] Mr. Lajendra's view is that Order 88 Rule 1 (1) (d) gives Plaintiff the right to seek an order for delivery of possession by the mortgagor or by any other person who is or is alleged to be in possession of the property.

[13] In support of his argument Mr. Lajendra submitted **Australia and New Zealand Banking Group Ltd v. Kumar** [2003] HBC0307 of 2002 where Hon. Justice Singh held 'In addition the mortgagee has certain statutory powers under the Property Law Act Cap 130. Section 75 of that Act gives a mortgagee power to enter into possession by receiving rents or profits or to distress upon any tenant on the land if there is default in payment under the mortgage. Section 79 gives the mortgagee power to sell if there is default in payments or in performance of any covenant and such default continues for a period of thirty days after service of notice under Section 77. At common law the mortgagee had the right to possession of mortgaged property – see **Weston Bank Ltd v. Schindler** 1977 1 Ch. 1 where at page 20 Lord Goff said –

'It has for a very long time been established law that a mortgagee has a proprietary right at common law as owner of the legal estate to go into possession of the mortgaged property.'

Hence the mortgagee in the present case has its contractual powers under the mortgage to take proceedings for ejection, the statutory powers under the Property Law Act and its powers under common law to enter into possession. These powers have not been negated by the mortgage. The mortgagee therefore is entitled to the possession'.

[14] The Plaintiff relied on clause 5.2 of the mortgage agreement to take possession. The clause expressly giving powers to the Plaintiff to take possession of the property under mortgage.

[15] The Court notes from the email correspondence between the Plaintiff and the registered proprietors, there has been no objection by the Plaintiff to proceed with the mortgagee sale.

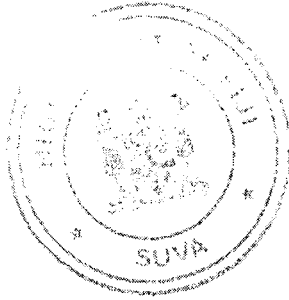
[16] The letter dated 07.03.2018 annexed to the affidavit in opposition provides clarity on the arrangements of the parties. The letter was sent by the Manager Assets and Debt Recovery to the Senior Manager Business Banking at Westpac Bank. Paragraph 3 of the letter states that the registered proprietors had an agreement with the 1<sup>st</sup> named Defendant to meet their loan repayments to Plaintiff bank till a certain date that the 1<sup>st</sup> named Defendant is able to secure a loan from a financial institution to purchase the property of the registered proprietors and to take over the debt.

- [17] This letter had been copied to the registered proprietors and the 1<sup>st</sup> named Defendant. Therefore it is clear that the Defendant's agreement was with the registered proprietors and not with the Plaintiff. On the other hand the Plaintiff at no point discharged the registered proprietors from their obligations under mortgage agreement or substituted them with Defendants. Any claim by the Defendants based on equity lies against the registered proprietors. In my view it would not hinder the rights of a mortgagee acting under mortgage instrument.
- [18] Hon. Justice Seneviratne in **Kamal v. Fiji Public Trustee Corporation Ltd** [2021] HBC275. of 2019 considered a situation where parties had a Sale and Purchase Agreement on a property under a mortgage and stated 'The plaintiffs entered into the sale and purchase agreement in respect of a property which was already under a mortgage and the plaintiff should have known that whatever rights under the sale and purchase agreement was subject to the mortgage already in existence. Therefore, the mortgagee's rights under the mortgage take precedence over the rights of the plaintiffs under the sale and purchase agreement. The plaintiffs are not in a position to tell the 2nd defendant, the mortgagee, the manner in which it should recover the amount of money due under the mortgage'.
- [19] The Court notes that in a parallel action pending before the High Court between the Defendants and the registered proprietors, the Defendant's application to join the Plaintiff as a party to seek injunctive relief against them to avoid mortgagee sale was dismissed by the learned Acting Master on 14.10.2022.
- [20] For the foregoing reasons I am of the view that the Defendants unable to claim beneficial or equitable interest against the Plaintiff on the Sale and Purchase Agreement provided in this action. Perhaps Defendant's remedy lies elsewhere.

### ORDERS

1. Defendants to vacate from property described in Certificate of Title No.32182 being Lot 6 on DP 8213 situated in the District of Naitasiri and Province of Vitilevu.
2. The Defendants must comply with order No.1 on or before 15.09.2023.
3. The Defendants and/or their servants and/or agents restraint from causing any damages to the land, building and its improvements on the property.

4. Defendants to jointly pay cost of \$1000 (one thousand dollars) to the Plaintiff within 14 days of this judgment.



A handwritten signature in black ink, appearing to be "Yohan Liyanage", written over a horizontal line.

Yohan Liyanage

JUDGE

At Suva on 19<sup>th</sup> July 2023