

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 191 of 2022

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/APPLICANT

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

BEFORE: **Hon. Mr. Justice Vishwa Datt Sharma**

COUNSEL: **Mr Lajendra N. for the Plaintiff/Applicant**
Ms. Devi S. o/i of MIQ Lawyers for the Defendant/Applicant

DATE OF DECISION: 28th March, 2024

DECISION

[Inter-Parte Summons for Stay pending Appeal and Injunction AND Ex-Parte Notice of Motion for Execution of Writ of Execution; Leave to file/serve Affidavit in Reply of 16/08/23 and 18/08/23]

INTRODUCTION

- (1) The Defendant, Osea Veitala together with his relatives filed the following applications coupled with an Affidavit in Support deposed by David Nainoka Veilawa and sought for the following orders:
- (i) There be a stay of the proceedings in this matter pending the appeal to the Fiji Court of Appeal.
 - (ii) There be an order restraining the Plaintiff whether by themselves their servants or agents otherwise and howsoever from interfering in anyway whatsoever with the Defendants' quiet use and occupation of the double storey concrete building built on Approval Notice - State Land without Title (Lot 14 NDSW 504 Waqadra part of) comprising an area of 4094m² by themselves their servants pending the hearing and determination of this Hearing and/or until further order of the Court of Appeal.
 - (iii) There be an order for the removal of the tape sealing part of the double storey concrete building pending the hearing and determination of this Hearing and/or until further order of the Court of Appeal.
- (2) Consequently, the Plaintiff, Home Finance Company [HFC] also filed:
- (i) Notice of motion for execution of Writ of Execution together with
 - (ii) Summons for leave to file /serve a Reply affidavit to 16th August 2023 and 18th August 2023 affidavits in opposition respectively.
- (3) The applications were made in support of affidavits deposed by, Abdul Hakim in his capacity as the Acting Manager Asset Management of Home Finance Company Pte Limited T/A HFC Bank.

The Law**Stay Pending Appeal**

- (4) The principal relating to the granting of stay pending appeals was enunciated in the case of **Natural Water of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd** [2005] FJCA 13; ABU0011.20045 (18 March 2005); in the following form;

"The principles to be applied on an application for stay pending appeal are conveniently summarized in the New Zealand text, McGechan on Procedure (2005):

On a stay application the Court's task is "carefully to weigh all of the factors in the balance between the right of a successful litigant to have the fruits of a judgment and the need to preserve the position in case the appeal is successful"; Duncan v Osborne Building Ltd (1992) 6 PRNZ 85 (CA), at p 87.

Determination

- (5) The Plaintiff HFC Bank filed an originating summons against the Defendant(s) and sought for an order for Vacant Possession pursuant to order 88 (1) (d) of the High Court Rules, 1988.
- (6) Mr. Sekove Vuniyayawa No.2 is the registered proprietor of all that property state lease no. 19499 being Lot 1 on plan no (d) SO6902, Waqadra (pt of) formerly (pt of) Bal Lot 3 SO279 situated in the Province of Ba and District of Nadi, having an area of 1000m².
- (7) Around April 2015, Mr. Sekove Vuniyayawa No. 2 applied for a loan facility which was approved and the Plaintiff took the First Registered Mortgage over the Residential property is described hereinabove.
- (8) His loan account fell into arrears and hence was issued with an Eviction Notice. However, he failed to vacate the property, HFC then proceeded with eviction proceedings in Suva High Court Civil Action No. HBC 79 of 2020 and obtained an eviction order against Mr. Sekove Vuniyayawa No. 2.
- (9) The Plaintiff then proceeded to advertise the said property under Mortgagee sale.
- (10) Mr. Sekove Vuniyayawa No. 2 took demise and the subject property is currently occupied by the Defendant together with his relatives and other occupiers.
- (11) The Plaintiff succeeded in obtaining an eviction order against the Defendant in this proceedings [HBC 191 of 2022] on 1st February 2023.
- (12) On 18th May 2023, this Court granted the Plaintiff an order for Leave to issue a Writ of Possession and the order was subsequently sealed on 26th May 2023 accordingly.
- (13) The Defendant being aggrieved by the Courts Judgment of 01st February 2023, prompted **the Defendant to file a Summons for Stay pending Appeal and Injunction on 22nd June 2023.**
- (14) **The Plaintiff filed an affidavit in opposition to the Defendant(s) stay pending appeal application.**
- (15) **Simultaneously, the Plaintiff filed a Motion on 22nd June 2023 and sought for the Execution of the Writ of Possession.**
- (16) Both applications were heard by this Court on 21st August 2023 and adjourned for delivering of Judgment/Decision on 25th October 2023.
- (17) On 02nd November 2023 whilst the two applications were on foot, heard and awaiting a Judgment of the Court to be delivered, **the Plaintiff in the Midst filed a further summons and sought for an order for leave to file an Affidavit in Reply to the two (2) affidavits in opposition filed by the Defendant on 16th August 2023 and 18th**

August 2023 accordingly.

- (18) However, the Court had already concluded the hearing on the two(2) impending applications;
- (i) Summons for stay pending Appeal and Injunction filed by the Defendant(s); AND
 - (ii) The Notice of Motion for Execution of Writ of possession by the Plaintiff.
- (19) The filing of the Plaintiff's subsequent application on 02nd November 2023 seeking for leave to file/ serve affidavit Reply to the opposition affidavits filed by the Defendant on 16th August 2023 and 18th August 2023 and bearing in mind the Courts busy schedule, however, forced this Court to further adjourn the Judgment/Decision on the two (2) applications already heard and to allow Court to hear and determine the Plaintiff's Leave to file and serve Reply affidavits to the two(2) applications.
- (20) The Plaintiff's abovementioned Summons was heard on 13th February 2024 and adjourned for a Decision to be delivered together with the Decision on the two(2) prior impending applications-
- (i) Stay of Proceedings and Injunction and
 - (ii) Execution of Writ of Possession accordingly.

(a) Stay of Proceedings Pending Appeal and Injunction

- (21) The Defendant filed its appeal to the Court of Appeal and sought for a Stay of proceedings before this court pending the determination of his Appeal by the Court of Appeal and also an order restraining the Plaintiff whether by themselves, their servants or agents otherwise and howsoever, from interfering in anyway with the Defendants quiet use and occupation of the double storey concrete building and an order for the removal of the tape sealing on Lot 14 NDSW 504 Waqadra part of, pending the hearing and determination of this hearing and/or until further order of the Court of Appeal.
- (22) The Defendant relied on the affidavit in opposition deposed by David Nainoka Veilawa to support his current aforementioned application seeking for those orders therein.
- (23) The Defendants grounds of Appeal centres around on alleged forged re-definition survey plan the Court relied on in order to award judgment.
- (24) The Defendant's contention in the affidavit of David Nainoka Veilawa at paragraph 3.7 is that

"Mr. Vanalagi had also indicated to the court that we do not have any objection to the property being given to the Plaintiff who were rightly entitled to it by virtue of the mortgage agreement, however, the Plaintiff cannot claim for the double storey which was on the double storey lease as it was not part of the mortgage."

And at paragraph 3.8

'I am informed by our solicitor that the Court was of the view in paragraph 53 of the Judgment under issue 1(a) that:

"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)".

(25) I refer to the paragraphs 53 and 54 of my Judgment delivered on 01st February 2023 which is paraphrased herein below;

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 double 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 Bank's 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 the 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. **(53, 54 -56 - below)**

(26) 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.

(27) 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.

(28) 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 accordingly.

(29) Having considered all above, the Defendant would not suffer any prejudice. My Judgment found that 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 is empowered and can now proceed to exercise its rights over the said property in terms of Order 88 of the High Court Rules, 1988 accordingly.

(30) The question now is "**whether a stay should be granted?**"

(31) Two (2) of the important factors that are taken into consideration by the Courts are:

- (i) Whether the Appeal will be rendered nugatory, if the stay is not granted, and
- (ii) Whether the Balance of Convenience and the competing rights currently of the parties point to the granting of a stay?

(32) The Appeal will not be rendered Nugatory, if a stay is not granted. The Defendants

continue to occupy the said mortgaged property and is awaiting for its pending Appeal to be heard and determined. The competing interest of the parties will be protected by an order that neither party shall attempt to alienate the said mortgaged property or encumber the title till the pending Appeal is determined by the Court of Appeal accordingly.

- (33) Therefore, the Balance of Convenience does not favour the granting of stay pending Appeal as sought for by the Defendant.
- (34) By way of a Preliminary Assessment, I have some doubt as to whether the Appellant/Defendant has any arguable case to raise in his pending appeal to retrain either party from dealing with the property pending the determination of the Appeal before the Court of Appeal.
- (35) For all the above rational, I am inclined to refuse the **stay pending Appeal order** coupled with the injunction to retrain the Plaintiff and its servant and agents from interfering I anyway whatsoever with the Defendants quiet use and occupation of the double storey building as sought for in the Defendant/Appellants Summons of 22nd June 2023.

(b) Execution of Writ of Possession

- (36) After this Court granted the Plaintiff an eviction order, pursuant to its Judgment delivered on 01st February 2023, subsequently, the Plaintiff filed and sought for an order for Writ of possession which was accordingly granted.
- (37) However, the Plaintiff is now making a second application filed on 22nd June 2023 seeking for the Execution of the Writ of Possession already granted on 18th May 2023.
- (38) This Court finds that the Plaintiff's subsequent application seeking for the writ of possession boils down to seeking a duplicity of the order for the 'Execution of Writ of Possession.'
- (39) Therefore, I decline to grant the order seeking for the duplicity of the Execution for the Writ of Possession accordingly.

Summons to file Affidavit Reply

- (40) The Summons seeking to file Affidavit Reply to two (2) of the oppositions affidavits dated 16th August 2023 and 18th August 2023 respectively was filed after the two (2) prior Interlocutory application-
- (i) For stay pending Appeal and Injunction and
 - (ii) Execution of Writ of Possession, were already coupled, heard and adjourned for delivery of a Decision.
- (41) However, the Plaintiff's Summons to file Affidavits Reply was heard and likewise, I decline to accede and grant the order since it would tentamount to duplicity of orders for

the Writ of Execution accordingly.

Costs

- (42) Both Parties to the proceedings filed one (1) application each and were heard in consolidation. Therefore, the parties will bear their own cost of the proceedings.
- (43) However, the Plaintiff's Summons seeking to file Affidavit Reply was scheduled for Hearing and the other party (the Defendant/counsel) did not appear. The Court notes the Plaintiff's application was filed after the Hearing was completed on two (2) prior Interlocutory applications and adjourned for Decision. It is only just and fair that the Plaintiff bears its own costs of the application accordingly.

Orders

- (i) The Defendant's Interlocutory Inter Parte Summons seeking for stay pending Appeal and injunction is dismissed in its entirety.
- (ii) The Plaintiff's summons seeking to file/ serve affidavit Reply is likewise in its entirety dismissed.
- (iii) Each party to the proceedings to bear its own costs accordingly.
- (iv) The file now stands closed.

Dated at Suva this 28th day of March, 2024.



Vishwa Datt Sharma
PUISNE JUDGE

CC: MIQ LAWYERS, LAUCALA BEACH ESTATE, SUVA
LAJENDRA LAWYERS, SUVA