

LIVAI NAKUTA v HOUSING AUTHORITY (ABU0036 of 2011L)

COURT OF APPEAL — CIVIL JURISDICTION

5 CALANCHINI AP, BASNAYAKE, HETTIARACHCHI JJA

21 May, 8 June 2012

10 **Mortgages and securities — default — order for vacant possession — notice of demand — failure to pay sum — notice to quit — property sold — law relating to application for possession — High Court Rules O 88; — Property Law Act ss 72, 75.**

15 The defendant was the owner of leasehold property which, by mortgage, was charged to secure all repayments to the plaintiff. The defendant fell into arrears and the plaintiff served a notice of demand. The defendant failed to pay the sum in the notice of demand, and the plaintiff sold the property. The plaintiff served a notice to quit on the defendant requesting vacant possession. The High Court ordered the defendant to hand over vacant possession of the property, and the defendant appealed.

Held –

20 The default was admitted by the defendant and no attempt was made to make any payment to the Court. Failing payment into Court of the whole sum owed under a mortgage, the Court will not restrain a mortgagee from exercising its powers under the mortgage. It is not disputed that this property had been sold. The plaintiff was entitled to require payment of the full amount which was due and secured by the mortgage and, failing that, to sell the property and to commence proceedings in ejectment.

25 *Inglis v Commonwealth Trading Bank of Australia* (1972) 126 CLR 161, cited.
Vere v NBF Assets Management Bank (2004) FJCA 50, followed.

Appeal dismissed.

30 **Cases referred to***Westpac Banking Corp Ltd v Adi Mahesh Prasad* [1999] 45 FLR 1, cited.*Property & Bloodstock Ltd v Emerton; Bush v Property and Bloodstock Ltd* [1968] Ch 94, considered.35 *G. O’Driscoll* for the Appellant.*D Gordon* for the Respondent.

40 **Calanchini AP.** I agree with the reasons and conclusion expressed by Basnayake JA

[1] **Basnayake JA.** This is an appeal by the defendant-appellant (defendant) from a judgment dated 17.5.2011 of the learned High Court Judge of Fiji at Lautoka. By this judgment the defendant was ordered to handover vacant possession of the property which is the subject matter of this action to the plaintiff-respondent (plaintiff) on or before 30.6.2011 with costs fixed at \$600 to be paid within seven days.

50 [2] The plaintiff is the Housing Authority which is a body corporate. The defendant had been the owner of the leasehold property in this case. By mortgage dated 20.2.1995 executed between the plaintiff and the defendant the leasehold property was charged to secure all repayments to the plaintiff. The defendant fell in to arrears of payment of the lease rentals. It was covenanted between the

parties by the Mortgage Bond No. 397636 that in the event of any default, for the mortgagee to recover the whole of the monies (clause 4) and to sell the property immediately and, upon the power of sale becoming exercisable, for the mortgagee to enter upon and take possession.

5 [3] The plaintiff served a notice of demand on 23.12.2005 claiming \$34,535.60 from the defendant. The sum was required to be paid within 30 days. If not the mortgage would be determined. Once the mortgage is determined, the defendant would be required to quit and hand over vacant possession.

10 [4] The defendant having failed and neglected to make the payments, the property was advertised by way of mortgage sale and sold by the plaintiff. The plaintiff, in order to obtain vacant possession served a notice to quit on the defendant on 19.2.2010 requesting to hand over vacant possession. The defendant having failed to hand over continued to be in possession.

15 **Originating summons**

[5] On 11.5.2010 the plaintiff originated summons in terms of O 88 of the High Court Rules supported by an affidavit claiming inter alia that the defendant deliver vacant possession of the mortgaged property.

20 **Affidavit of the defendant**

[6] The defendant filed a reply on 11.6.2010. In the reply filed by way of an affidavit the defendant admitted the following, namely:-

- The execution of the mortgage,
- 25 •Receipt of the notice demanding \$34,535.60
- Failure to pay the said sum
- Receipt of the notice to quit.

30 [7] The defendant stated in the affidavit that four years after purchasing the property, cracks started appearing on the walls and that the defendant informed the plaintiff on 24.10.2003 and 9.11.2004 about this condition. The defendant admitted that he stopped making payments (mortgage instalments) as the plaintiff had failed to assist him in the repair. The defendant stated that the plaintiff opted to assist the defendant by way of a repair loan. The defendant stated in the affidavit that he has a good defence and to dismiss the plaintiff's application.

35 **Judgment**

40 [8] The learned High Court Judge, after an inquiry, delivered order granting the relief prayed for by the plaintiff. The learned Judge had considered the admissions by the defendant with regard to the arrears of mortgage instalments, receipt of the notice of demand and the quit notice. The only defence placed before the learned Judge was that due to cracks appearing on the walls, the defendant stopped payment of the lease rentals. This the learned Judge has rejected as not being acceptable as a defence.

45 **Notice of Appeal**

[9] On 1.7.2011 the defendant filed a notice of appeal stating that he would be moving to appeal against the judgment dated 17.5.2011 of the learned High Court Judge at Lautoka and an order against the plaintiff for costs on the following grounds, namely:-

- 50 (a) *That the learned Judge has erred in law and in fact in not taking in to consideration that the defendant had raised triable issues and as such the learned*

Judge could not have made a decision on affidavit evidence only. However the defendant has failed to mention those triable issues in the notice or even thereafter.

5 *(b) That the learned Judge has erred in law and in fact in not taking into any consideration the defendant's claim that the plaintiff had misled the defendant when he purchased the property from the plaintiff.*

10 *(c) That the plaintiff did not bring to the attention of the learned Judge at Lautoka High Court the existence of civil action No 107 of 2010 between the defendant as plaintiff and the plaintiff as the defendant, which is still pending. The defendant complained that this is a material non disclosure.*

10 **Submission of the learned counsel for the defendant**

[10] The learned counsel for the defendant submitted that the employees of the plaintiff have misled the defendant in to believing that the house structures were built properly with steel rods to bind the building roof and walls together. The learned counsel submitted that the defendant issued writ of summons against the plaintiff seeking damages and this matter is pending in the High Court at Lautoka under reference Civil Action No107 of 2010. Whilst the defendant's action for damages against the plaintiff was pending the plaintiff has gone ahead and got an order of vacant possession against the defendant. The learned counsel submitted that during the inquiry with regard to vacant possession the plaintiff's Solicitors have failed to disclose to court the existence of another action (107/2010) claiming damages against the plaintiff by the defendant.

25 **Submissions of counsel for the plaintiff**

[11] The learned counsel for the plaintiff submitted that the defendant without providing any triable issues is finding fault with the learned Judge for not identifying triable issues. The learned counsel submitted that the only triable issue in an O 88 action would be for the defendant to show that he has a right to remain in the property. The learned counsel submitted that it is the defendant who could have brought to the notice of the Judge the existence of another action. At least the defendant could have made an application for a consolidation of the two actions. This was not done.

35 [12] The learned counsel submitted that the claims involving these two actions cannot be set off. If at all the defendant may be able to claim damages. The argument for the defendant has been that the plaintiff as the seller had a duty to provide a house that would last. Failure to do so would entitle the defendant to claim damages from the plaintiff. This is a mortgage action filed by the plaintiff. These are two distinct actions involving two separate bundles of rights which are not interchangeable. The learned counsel submitted that the defendant waited until the plaintiff filed this action, namely, HBC 096 of 2010, to file the action for damages under reference No107 of 2010. The learned counsel submitted that this is a frivolous appeal to delay the handing over of the property to the plaintiff.

45 **Law relating to application for possession**

[13] Provision has been made by O 88 of the High Court Rules for a mortgagee to file action for delivery of possession by the mortgagor. The Rule is as follows.

- 50 *(i) Order 88 1-(1) This order applies to any actionby a mortgagee.....being an action in which there is a claim for any of the following reliefs, namely-*
- ii) (a), (b) & (c) not reproduced.*
 - iii) (d) Delivery of possession...to the mortgagee by the mortgagor...*

[14] Court has no general jurisdiction to stand an application for possession over, whether in terms of making payments or paying arrears. An adjustment may be ordered for a short time to afford the mortgagor for a chance of paying off the mortgage in full (Halsbury 4th edition 834, *Westpac Banking Corp Ltd v Adi Mahesh Prasad* [1999] 45 FLR 1). A mortgagee is entitled to enter in to possession of mortgaged land where there is default in payment of mortgage money or any part thereof (S. 75, Property Law Act (Cap 130).

[15] A mortgagor is entitled to redeem the mortgaged property at any time before the same has been actually sold by the mortgagee under his power of sale, on payment of all monies due and owing under the mortgage at the time of payment (s 72 (1) of the Property Act). A mortgagor's right to redeem is extinguished once a contract of sale has been entered in to by the mortgagee. As the property is sold there is nothing left to redeem (*Property & Bloodstock Ltd v Emerton; Bush v Property and Bloodstock Ltd* [1968] Ch 94 (emphasis added).

[16] In this case (*Lavai Nakuta v Housing Authority*) the default had been admitted by the defendant and no attempt was made to make any payment to court. Failing payment in to court of the whole sum owed under a mortgage, the court will not restrain a mortgagee from exercising its powers under the mortgage (*Vere v NBF Assets Management Bank* (2004) FJCA 50 citing *Westpac Banking Corp Ltd v Adi Mahesh Prasad* [1999] 45 FLR 1, *Inglis v Commonwealth Trading Bank of Australia* (1972) 126 CLR 161.

[17] It is not disputed that this property had been sold. It was held in an appeal from an order of possession that the bank was entitled to require payment of the full amount which was due and secured by the mortgage, and failing that, to sell the property and to commence proceedings in ejectment (*Vere v NBF Assets Management Bank* (2004) FJCA 50). It was held that "*the (bank's) powers were properly exercised; a contract of sale was lawfully executed. It remains on foot, and the Respondent (Bank) was entitled to the orders which were made, particularly in circumstances where the debt was continuing to grow as further interest instalments fell due*".

[18] For the above reasons I am of the view that this appeal fails. Therefore the appeal is dismissed with costs fixed at \$2000.00.

Hettiarchchi JA. I too agree with the reasons and conclusion expressed by Basnayake JA

The Orders of the court are:-

40 Appeal dismissed.
Costs to be paid to the plaintiff in a sum of \$2000.

Appeal dismissed.

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