

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 131 of 2005

IN THE MATTER of Mortgage No.
273827 over Certificate of Title No. 9360,
Lot 79, DP 2274 given by **TONU HAE and**
VAREA TONU in favour of **NBF ASSET**
MANAGEMENT BANK.

BETWEEN : **NBF ASSET MANAGEMENT BANK** a body corporate duly constituted
under the National Bank of Fiji Restructuring Act, 1996 and having its
registered office in Suva.

PLAINTIFF

AND : **TONU HAE** of 8 George Place, Milverton Road, Raiwaqa.

DEFENDANT

BEFORE : **Acting Master Thushara Rajasinghe**

COUNSEL : **Mr. Jamnadas K.** for the Plaintiff
Mr. Draunidalo R. T. for the Defendant

Date of Hearing : **20th February, 2014**

Date of Ruling : **4th April, 2014**

RULING

A. INTRODUCTION

1. This is the application made by the Defendant on 11th of October 2013 seeking following orders that;
 - i. That the Plaintiff's writ of possession issued by this Honourable court on 29 September 2013 be stayed until further orders,
 - ii. That the Defendant file its application for reinstatement of Civil Action Number 588 of 1998 within fourteen days,
 - iii. Costs to be cost in the cause and ,
 - iv. Any further orders deemed just and expedient by the Honourable court,

2. Having considered the oral submissions made by the learned counsel for the Defendant, the execution of the writ of possession was stayed until the determination of this application on the 15th of October 2013. The Plaintiff filed their affidavit in opposition upon being served with this application. This application was subsequently set down for hearing on the 20th of February 2014. The learned counsel for the Defendant and the Plaintiff made their oral arguments and submissions during the cause of the hearing. At the conclusion of the hearing both counsel were invited to file their respective written submissions which they filed accordingly. Having considered the application, respective affidavits and submissions of the parties, I now proceed to pronounce my ruling as follows.

B. BACKGROUND,

3. The Plaintiff instituted this action by way of Originating Summons filed on 30th of March 2005 seeking following orders inter alia that,
 - i. Delivery by the Defendant to the Plaintiff of vacant possession of all that property comprised and described on the certificate of title No 9360 Lot 79 on Deposit Plan No 2274 on the island of Viti Levu in the District of Suva and having an

areas of 1 rood 1.6 perches situated together with all improvements thereon under Order 88 of the High Court rules.

- ii. An injunction restraining the Defendant, his servants or agents from interfering with the improvements on the said property in any way so as to deplete its value.
4. A consent judgment was entered on 8th of March 2006 as follows, that,
- i. The Defendant deliver vacant possession of all that property comprised and described on the certificate of title No 9360 Lot 79 on Deposited Plan No 2274 on the Island of Viti Levu in the district of Suva and having an area of 1 rood, 1.6 perches situated together with all improvements thereon to the Plaintiff,
 - ii. This order is stayed pending the outcome of Civil Action No 588 of 1998 at the Suva High Court,
5. The Civil Action No 588 of 1998 was struck out with no order as to cost on 9th of September 2011. Subsequently this writ of possession was issued by the Plaintiff on 29th of September 2013 to enforce the judgment by consent entered in this action on 8th of March 2006.

C. ANALYSIS,

6. The learned counsel for the Defendant submitted that this application to stay of the execution of the writ of possession was made pursuant to order 29 rule 1 of the High Court rules and extensively elaborated the principles and the facts to be considered under the order 29 r 1. Order 29 r 1 states that;

“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 third party notice, as the case may be”.

7. In view of the Order 29 r 1, a party is only allowed to make an application for the grant of an injunction before or after the trial. However, in this instance case, the judgment has already being entered by consent and the Plaintiff has issued a writ of possession in order to enforce the judgment. Circumstance such does not fall within the definition of the period before or after trial. The issuance of the writ of possession is one of the judgment enforcement procedures, which could only be commenced subsequent to the judgment.
8. Order 45 of the High Court rules has provided procedures of enforcement of judgment based on the nature of the judgments. The nature of the consent judgment entered in this action is to deliver the vacant possession of a land. In such circumstances, the applicable procedure of enforcement of this judgment has stipulated under Order 45 r 2. The Plaintiff has issued this writ of possession pursuant to Order 45 r 2. The Plaintiff is not required to obtain the leave of the court as the judgment was entered in a mortgage action pursuant to order 88.
9. A party against whom a writ of possession has issued is allowed to make an application to stay of execution under Order 45 r 9, where it states that;

“Without prejudice to order 47, rule 1, a party against whom a judgment has been given or an order made may apply to the court for a stay of execution of the judgment or order or other relief on the ground of matters which have occurred since the date of the judgment or order, and the court may by order grant such relief, and on such terms, as it think just.

10. Justice Winter in **Ratu Solomone Naga & others v The Fiji Electricity Authority** (Civil Action No HBC0237 of 2002) while referring the observation made by Justice Gates (as he then was) in **Atul Kumar Ambalal Patel v Krishna Murti** (HBC0225.99L) held that *“The principle for stay are well established. In **Atul Kumar Ambalal Patel v Krishna Murti** (HBC0225.99L) a ruling on stay, my brother Justice Gates said ;*

“Once successful, the litigant should not lightly be deprived to the fruits for successful litigation...the power of the court to grant a stay is discretionary.....and it is an

unfettered discretion.....the applicant must show that special circumstances exist as to why a stay should now be imposed and the successful litigant in effect held back from his remedy”

In essence the principles are;

- i. A successfully litigant should not lightly be deprived of the fruits of his litigation,*
- ii. The power to grant a stay is discretionary,*
- iii. The power is unfettered,*
- iv. The applicant need to show special circumstances,*

11. Accordingly, the Applicant is required to make the application for stay of execution of the judgment on the grounds which have occurred since the date of the judgment. The Applicant must satisfy the court that those grounds for stay application are founded on special circumstances which warrant to stay the execution of the judgment.
12. Despite of stating that he was shocked when he was told that the action No 588 of 1998 was struck out on the ground of none appearance, the Defendant did not provide any special circumstances which have occurred subsequent to the judgment was entered in this action. The submissions of the learned counsel is mainly founded on the legal principles and arguments which are applicable for injunction pursuant to order 29 r 1 which in my opinion are misconceived and have no relevancy to this application, wherefore, I am compelled to disregard the submissions made by the learned counsel for the Defendant.
13. I now turn to the preliminary objection raised by the learned counsel for the Plaintiff under section 43 (1) of the Banking Act. The learned counsel submitted that the Plaintiff bank is under controllership of the Reserve Bank of Fiji pursuant to the gazette notification issued by the Governor of the Reserve Bank under section 30 (2)(c) (i) of the Banking Act. A copy of the said gazette notification was tendered as an annexure to the affidavit in opposition for my perusal and consideration.
14. Section 43 (1) (a) of the Banking Act states that

“where a licensed financial institution is declared to be subject to controllership, no person shall –

(a) Commence or continue any action or other proceedings, including proceedings by way of counterclaim, against that licensed financial institution;”

15. Section 43 (2) of the Banking Act states that

“notwithstanding subsection (1) of this section, an action or proceeding may be commenced or continue against a licensed financial institution for the purpose of determining whether any right or liability exists if the leave of the controller or the High Court is first obtained”.

16. Accordingly, no person could commence or continue any action or proceedings without the leave of the controller or the High Court under the moratorium imposed pursuant to section 43 of the Banking Act.

17. The Defendant failed to disclose whether he had obtained the leave of the controller or of High Court to continue the proceeding in this action after the Plaintiff bank was taken under the controllership of the Reserve Bank in 2007. In absence of such leave, the Defendant is barred to continue this proceedings pursuant to section 43 (1) (a) of the Banking Act.

18. In view of the reasons discussed above, I am satisfied that the Defendant is barred to continue this proceedings without the leave of the Controller or of the High Court pursuant to section 43 of the Banking Act. Despite of this preliminary objection, I further hold that the Defendant has failed to establish the requirements stipulated under Order 45 r 10 in order to stay the execution of this judgment entered on 8th of March 2006. I accordingly make following orders that ;

i. The Ex –Parte application made by the Defendant on 11th of October 2013 is refused and dismissed,

- ii. The interim stay order made by this court to stay the execution of the Writ of Possession until the determination of this application on the 15th of October 2013 is vacated,

- iii. The Plaintiff is awarded with cost of \$ 750, assessed by summarily.

Dated at Suva this 4th day of April, 2014.

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R.D.R. Thushara Rajasinghe
Acting Master of High Court, Suva