

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 78 OF 1995/L

BETWEEN : **CHANDRA DEO** and **SURUJ WATI** both of Johnson Road, Lautoka,
Retired and Domestic Duties respectively.

PLAINTIFFS

A N D : **VIJAY KUMAR** President, **KAMLA PRASAD** Sirdar, **UMESH CHAND** Secretary, **BISUN DEO**, **PRASANJIT NARAYAN** Committee Members of Teidamu LT 31 Cane Harvesting Gang sued on behalf and as representing all members of the said gang except the Plaintiffs.

DEFENDANTS

A N D : **NIKO KIKI TIKOMAILEPANONI NADOLO** and **ILISEVA NASAU NADOLO** both of Lot 2 Mandarin Place, Razak Road, Lautoka, Fiji, Health Inspector/Farmer and Sole Trader respectively.

INTERESTED PARTY

Appearances : Mr D.S. Naidu for the third and fifth defendants/applicants
Mr N. Kumar for the plaintiffs/respondents
Mr K. Patel for the interested party

Date of Hearing : 23 July 2020

Date of Ruling : 21 September 2020

R U L I N G

[stay on sale of property]

Introduction

- [01] This is an application by the third and fifth defendants (*“the defendants”* or the *“applicants”*) seeking an interim stay of the transfer of property comprised in Certificate of Title No. 17465 to the interested party.
- [02] The defendants in this application seek the following orders through their supplemental affidavit:
- (a) The sale not proceed due to non-compliance of the orders dated 22 September 2017;
 - (b) Payment of the sum of \$87, 842.68 into this court or alternatively into the trust account of the solicitors for the plaintiffs, Messrs Krishna & Co for distribution as per the ex parte orders of the court dated 22 February 2019;
 - (c) The plaintiffs withdraw all caveats (judgment) and other charges/encumbrances against Certificate of Title No. 17465 being the third defendant’s title and Certificate of Title No. 17460 being the fifth defendant’s title.
 - (d) The parties enter into a terms of settlement in regard to the plaintiff’s claim.
- [03] Their application is based on the ground that there has been a fraud between the plaintiffs and the interested party.
- [04] The defendants rely on the following affidavits:
- (i) Affidavit of Umesh Chand filed on 8 July 2019 (*“Umesh ‘s affidavit”*);
 - (ii) Supplementary affidavit of Prasanjit Narayan filed on 12 August 2019 (*“Prasanjit’s first affidavit”*); and
 - (iii) Supplementary affidavit of Prasanjit Narayan filed on 11 October 2019 (*“Prasanjit’s second affidavit.”*)

[05] The interested party and the plaintiff have filed affidavit in opposition of Niko Kiki Tikomailepanoni Nadolo (“Niko’s affidavit”) and Chandra Deo (“Chandra’s affidavit”) respectively.

[06] At the hearing, the parties orally argued the matter and they have also filed their written submissions.

Background

[07] Mr Umesh Chand, the third named defendant (*“the third defendant”* or *“the defendant”*) is the registered proprietor of Certificate of Title No. 17465 being Lot 22 on DP 2801 in the District of Ba on the island of Viti Levu containing an area of 18 acres 1 rood and 8 perches (the *“property”*).

[08] There was a default judgment entered against the first to fifth defendants (*“the defendants”*) by Justice Finnigan on 17 July 2008 for the sum of \$50,951.02.

[09] The defendants failed to pay the judgment sum. The plaintiffs then attempted to execute the judgment in its entirety against the third defendant. On 20 September 2017, the court, on the *ex parte* application of the plaintiffs, ordered (*“the orders”*):

(a) There be a sale of the property.

(b) A call for tender be made in the local dailies by the plaintiffs.

(c) Tenders be closed within 4 (four) weeks from the date of the advertisement for the call of the tender.

(d) The plaintiffs be at liberty to accept the highest tender received.

(e) The Deputy Registrar of the Lautoka High Court of Fiji execute a transfer of property and every other document incidental to the said transfer on behalf of the third named defendant to enable registration of the transfer of the successful tender.

(f) The monies received from the sale be applied as follows:

- i. Any mortgage or charge registration on the title be paid the sums owing to it at the date of settlement.
- ii. The plaintiffs be paid the judgment sum of \$50,951.02.
- iii. The stamping, Capital Gains Tax, plaintiffs legal costs and any incidental costs in relation to the transfer of the property be paid out of the sale proceeds.
- iv. The legal costs for the application by the plaintiffs for the recovery of the judgment sum of \$50,951.02 be paid on a full indemnity basis to the plaintiffs out of the sale proceeds.
- v. Any balance from the sale proceeds after the deductions to be made from (f) (i) through (f)/(iv) be paid into the Lautoka High Court registry.

[10] The orders directed the plaintiffs to call for tender in the local dailies and to close the tenders within 4 (four) weeks from the date of the advertisement for the call of tender.

[11] The tender was advertised in the Fiji Sun on 20 November 2017. The tenders closed on 15 December 2017.

[12] The defendant alleges that the tenders should have been addressed to the Deputy Registrar, Lautoka High Court and not vetted through by the plaintiffs and their solicitor; the market valuation report obtained by the plaintiffs in 2015 in the amount of \$110,000.00 is inherently flawed as the report fails to consider the value of the residential dwellings, the sugarcane production, the vegetable farm and the livestock farm located on the property as part of the valuation assessment; and in May 2016, exactly five months from the date of receipt of such flawed market valuation valuing the property at \$110,000.00 that Niko Kiki Tikomailepanoni Nadolo and Iliseva Nasau Nadolo (*"the interested party"*) wished to purchase the property from the plaintiffs in the exact amount of \$110,000.000, the price noted in the flawed market valuation report (the *"first offer"*), by sending a signed proposal to the plaintiffs' solicitor.

[13] The plaintiffs could not accept the first offer from the interested party as they were subsequently required to run a tender process pursuant to the court orders.

- [14] In 2017, the plaintiffs ran a tender process where the interested party's bid of \$110,000.00 was accepted by the plaintiff as the highest bid.
- [15] The plaintiffs and the interested party entered into an undated sale and purchase agreement (the "SPA").
- [16] In the current proceedings, the third defendant seeks to set aside the SPA entered into between the plaintiff and the third party.
- [17] In the meantime, on 18 October 2019, the third defendant had filed an amended writ of summons in civil action No. 189 of 2019 against the plaintiffs and the interested party praying for the following reliefs:
- (a) Stay of all proceedings as per the orders granted by this Court in Civil Action No. 78 of 1995L on 9 February 2017, 20 day of September 2017 and on 22 day of February, 2019 until further order of this Court.
 - (b) Setting aside of the orders made on 20 September, 2017 and on 22 of February 2019 or alternatively payment of the sum of \$87, 845.68 to the herein named plaintiffs.
 - (c) Recession of the undated Sale and Purchase Agreement between the Plaintiffs and the interested party.
 - (d) General damages for fraud, malfeasance and deception against the plaintiffs and the interested party.

The submissions

Third defendant

- [18] Mr Naidu on behalf of the third defendant submits on the factors that heavily cast suspicion on the fairness of the sale that call for the court to set the sale aside:
- i. That the market valuation report obtained by the plaintiffs in December 2015 was inherently flawed and did not provide a reflection of the true market price of the property.

- ii. That there were two significant deficiencies in the manner in which the plaintiffs carried out the tender process set out in the Orders of this Court which prejudiced the third defendant's interests including:
 - a. That the property was advertised only once in one of the daily newspapers namely the Fiji Sun on Monday the 20 November 2017 and not advertised in both dailies as required by the Orders; and
 - b. That the tender period was not open for the entire four week period as required by the Orders.
- iii. That the two deficiencies in the tender process held in 2017 effectively limited both the size of the potential tender pool and the quality of the bids received to the detriment and prejudice of the third defendant who stands to lose his family property and residence as a result of this sale.
- iv. That the Fiji Times arguably has a larger readership and wider circulation than the Fiji Sun, and also that the readership of the Fiji Times are of a different socio-economic background which may have resulted in obtaining more bids as well as bids at a higher price had the advertisement run also in the Fiji Times.
- v. That the plaintiffs ran the advertisement on a Monday in late November in the Fiji Sun, the day of the week when readership is arguably at its lowest.
- vi. That the plaintiffs purposefully waited two full months after receipt of this Court's Orders to run the advertisement in late-November with tender closing in early-December, a period shorter than required, so that the tender was open only during the holiday season when the public's interest in the sale would be at its lowest.

- vii. That the actions taken by the plaintiffs during the 2017 tender process were in order to ensure that the successful bidders would be the interested party who had wished to purchase the property from the plaintiffs in 2016.
- viii. That the actions taken by the plaintiffs in fact resulted in the interested party being the successful bidders upon completion of the tender process.
- ix. That the interested party signed a Sales & Purchase Agreement with the plaintiffs in 2018 for \$110,000.00 which was the same amount the interested party had offered the plaintiffs in 2016, and happens to be the same amount listed in the plaintiffs flawed market valuation report obtained in 2015.
- x. That the facts of this case indicate that plaintiffs and interested party colluded to sell the property to the interested party for much lower than market value, and to punish the first defendant with whom the plaintiffs have been in litigation for many years.
- xi. That the tenders should have been addressed to an independent third party like the Deputy Registrar, Lautoka High Court as is the case in most other jurisdictions. Instead, the tenders were vetted by the plaintiffs and their solicitors who were interested parties in this litigation. As a result, the process was tainted from beginning to end and biased against the plaintiffs.
- xii. That the Orders of this Court were not so onerous or numerous so that it could not be followed by the plaintiffs and their solicitors.
- xiii. That the resulting unfairness of the sales will cause the third defendant lose his family home, and the inadequacy of the sale price

will leave the third defendant without any funds following settlement of the Orders.

Plaintiff

- [19] The plaintiffs have based their submission on the principles of stay of execution and judgment. They through their counsel, Mr Kumar submits that the court has discretionary powers to grant stay as it think just; the stay of the execution and judgments rarely succeed, in this case the judgment was entered on 17 July 2008 and it has been nearly 11 years the defendants had not complied with the court orders neither they appealed or set aside the orders; if the court allowed the third defendant's application, it would be to compound a deplorable situation, inflict an injustice on the plaintiffs and undermine the authority of the court.

Interested party

- [20] Mr Patel appearing for the interested party contended that the plaintiffs' selection of the interested party's tender was in compliance with the court orders; and the third defendant cannot exercise his right to redemption of the property when there is a binding sale and purchase agreement in place with the issue being akin to a mortgagee sale and the mortgagor's right of redemption.

Discussion

- [21] The issue in this proceeding was turned out to be whether the defendants have right to redeem the charged property while a sale and purchase agreement entered into between the plaintiffs and the interested party exists ("*the SPA*"). The court ordered the charged property (which belongs to the third defendant) to be sold in execution of the monetary judgment obtained by the plaintiffs against the defendants.
- [22] The third defendant's application was to seek an interim stay on the sale and the transfer of the property to the interested party pending the determination of the civil action (HBC No. 189/19) filed by the defendants against the plaintiffs and the interested party. That action is based on fraud on the part of the plaintiffs and the interested party. However, the stay application was turned out to be an

application to redeem the property which was under sale in execution of the judgment.

- [23] Upon obtaining the judgment, the plaintiffs charged the third defendant's property only as other defendants had no property.
- [24] The charging order against the judgment debtor's land and subsequent sale of the charged property is equivalent to a mortgage and mortgagee sale, because the Land Transfer Act ("LTA"), section 2(1), states that: "*Mortgage*" means any charge on land, or any estate or interest therein, created under the provisions of this Act for securing (a) the repayment of loan or satisfaction of an existing debt."
- [25] The charging order was for the satisfaction of the judgment (existing debt) and upon registration against the debtor's land is deemed to be a mortgage. Since the charge against the debtor's land is deemed to be a mortgage the rule of equity including a Mortgagor's right of redemption would also apply to the judgment creditor sale of the charged property.
- [26] The question then arises whether the third defendant as a mortgagor is entitled to exercise the right of redemption in the circumstances where there is a sale and purchase agreement between the plaintiffs and the interested party.
- [27] It was contended on behalf of the interested party that the third defendant (mortgagor) is not entitled to redeem the charged property because there is a sale and purchase agreement afoot between the plaintiffs and the interested party. The parties to the transfer of the property are ready to settle; and all necessary steps for the conveyance of the property have been completed save for lodgement of documents at the Registrar of Titles.
- [28] It is to be noted that the charged property has not been actually transferred to the interested party. The settlement is yet to take place.
- [29] The third defendant has deposited the entire judgment sum into court in order to exercise his right of redemption.
- [30] The Property Law Act, Section 72 (1) provides:

“Repayment of mortgages

A mortgagor is entitled to redeem the mortgaged property at any time before the same has been actually sold by the mortgagee under his or her power of sale, on payment of all moneys due and owing under the mortgage at the time of payment.” [Underlining supplied]

- [31] In *Vere v NBF Asset Management Bank* [2004] FJCA 50; ABU0069.2003S (11 November 2004), the Fiji Court of Appeal quoted Sachs L.J.’s observance in *Lord Waring v London and Manchester Assurance Co. Ltd.* (1935) 1 Ch 310:

“It was, however, observed by Sachs L.J. that there was common ground between the parties that, upon the mortgagee entering into the contract, under the power of sale, “the mortgagor’s right of redemption is suspended, not cancelled – for it would revive if the contract went off.”

- [32] The SPA between the plaintiffs and the interested party appears to be conditional. It is an undated agreement. It will be noted that the parties to the SPA are still in agreement to complete the purchase. This means that the charged property has not been actually sold by the plaintiffs under their power of sale in execution of the judgment.
- [33] Section 72 (1) of the Property Law Act says that a mortgagor could redeem, the mortgaged property at any time before the same has been actually sold by the mortgagee on payment of all moneys due and owing under the mortgage at the time of payment.
- [34] The charged property has not been actually sold by the plaintiffs in execution of the judgment to the interested party. The defendant had deposited all moneys due and owing under the judgment into court. In the circumstances, I would hold that the third defendant is entitled to redeem the property.

The challenge to the SPA

- [35] The defendants challenge the SPA between the plaintiffs and the interested party on the following grounds:
- a) That the plaintiffs did not comply with the orders of the court with respect to the tender process.

- b) That no binding SPA exists between the plaintiffs and the interested party which would extinguish the third defendant's right of redemption.

[36] The tender was advertised only in the Fiji Sun whereas the court ordered that it should be published in the dailies. Moreover, the plaintiffs did not keep the tender until after expiration of 28 days as required by the order. The plaintiffs had closed the tender earlier than 28 days.

[37] As regards the selection process, the section was vetted by the plaintiffs and their solicitors without any independent supervision. The tenders should have been opened and the highest tenderer should have been selected before the Deputy Registrar of the Court.

[38] The SPA has not been dated. It appears that the plaintiffs and the interested party had intended to keep it open without a date. As the SPA is undated, it casts suspicion as to whether the same was executed after the tender process.

[39] Further, the plaintiffs obtained the market valuation of the property in the sum of \$110,000.00 in 2015. The tender proceeded in 2017, without the current market valuation. Since the tender was in 2017, the plaintiffs were under a duty to get a current market valuation. Instead, they had relied on the 2015 valuation report. The interested party had offered the exact amount of the valuation (\$110,000.00). This creates a doubt that the interested party had prior knowledge of the valuation figure.

[40] The above-mentioned factors are, in my opinion, sufficient to make the SPA invalid.

Conclusion

[41] For the reasons given, I conclude that the third defendant is entitled to redeem the charged property. This conclusion, in combination with the other factors enunciated above, effectively invalidates the SPA between the plaintiffs and the interested party.

The result

1. The third defendant is entitled to redeem the property.

2. The undated sale and purchase agreement between the plaintiffs and the interested party is rescinded.
3. The judgment sum is to be satisfied with the sum of \$87,842.68 deposited by the third defendant into court.
4. The money deposited by the third defendant (\$87,842.68) is to be released to the plaintiffs in satisfaction of the judgment.
5. The plaintiffs and the interested party shall pay summarily assessed costs of \$850.00 each, totalling \$1,700.00 to the third defendant.

M. H. Mohamed Ajmeer
21/9/20

M. H. Mohamed Ajmeer

JUDGE



At Lautoka

21 September 2020

Solicitors:

Krishna & Company, Barristers & Solicitors for the plaintiffs

Pillai Naidu & Associates, Barristers & Solicitors for the third and fifth defendants

Krishnil Patel Lawyers, Barristers & Solicitors for the interested party