

IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

Civil Action No HBC 230 of 2021

BETWEEN

BRED BANK a duly constituted banking corporation having its registered office at Level 5
Tappoo City, Suva.

PLAINTIFF

AND

RATNESH LAL JATTAN and MADHU LATA both of Lot 10, Palm Court, off Painapiu Street,
Nakasi.

DEFENDANTS

Counsel - Ms. E. Motokainava for Plaintiff
Ms. I. Sauduadua for Defendants
Date of Hearing - 04th April 2023
Judgment delivered - 15th August 2023

JUDGMENT

- [1] The Plaintiff brought this action pursuant to Order 88 of the **High Court Rules 1988** by way of an Originating Summons seeking following orders.
- I. The Defendants and/or their servants or agents forthwith give vacant possession to the Plaintiff of the residential property legally described as Certificate of Title No. 27555 comprised in Lot 10 on DP 5675 situated at Palm Court, Nakasi together with all improvements thereon;
 - II. The Defendants and/or their servants or agents be restrained from damaging or interfering with the improvements on the said property in anyway whatsoever so as to deplete its value;
 - III. Costs on indemnity basis;
 - IV. Such other relief the Court deems fit.
- [2] The Originating Summons was supported by an affidavit sworn by Niajula Nisha Irfaan Manager Asset Management Unit of the Plaintiff bank. She states that the Plaintiff has offered an advance of \$235,786 for a Basic Overdraft and Motor Vehicle Loan to Electro & Refer Service Limited (hereinafter refereed as 'company'). The two Defendants in their capacity as Directors of the Company accepted the offer in September 2016. Also they have signed an unlimited guarantee on account of the company.
- [3] One of the securities held by the Plaintiff is a second registered mortgage over a residential property being Certificate of title No. 27555 comprised in Lot 10 on DP 5675 situated at Palm Court, Nakasi (hereinafter referred as 'the property'). This security was provided by the Defendants.

- [4] On the same day the Defendants signed a Loan Contract for the Company's Commercial Loan Facility. In the said contract the Defendants declared that the credit provided by the Plaintiff would be used predominantly for business and investment purposes. Defendants also signed a guarantee and an indemnity agreement agreeing to be the guarantors for the loan contract.
- [5] According to the Plaintiff the company subsequently defaulted their payments. In January 2018 two Notices were sent in this regard by the Plaintiff to the company. As a result of the default Plaintiff issued a Demand Notice through their Solicitors on 07th March 2018. There had been several default notices issued by the Plaintiff thereafter. The Plaintiff states that they have given several opportunities from 2018 to 2020 to the company to remedy the default. However the debt remained unpaid. As a result the property was advertised for mortgagee sale and a Sale and Purchase Agreement had been executed by the parties on 22nd February 2021.
- [6] The agreement with the Purchaser under the Sale and Purchase is for vacant possession to be provided by the Plaintiff as the Mortgagee. Consequently the Plaintiff now requires vacant possession of the property, however the Defendants still residing on the property. An eviction notice has been issued and the Plaintiff states that the notice period has now expired.
- [7] In an Affidavit in Opposition the first named Defendant states that he had been authorised by the second named Defendant to swear the affidavit, however there hasn't been any letter of authority provided in support of this proposition. Therefore the Court will consider this as an affidavit sworn by the first named Defendant. The affidavit states that the first named Defendant was not advised to seek independent legal advice before signing the offer acceptance. The Defendant accepts that they are the registered owners of the property and the same is under a third party mortgage. The Defendant also agrees that there has been a receiving order issued against the company.
- [8] The Defendant states that the company paid any amounts in arrears whenever issued with notices by the Plaintiff. Particularly the Defendant states that they did not receive any notices in their capacity as guarantors.
- [9] The Plaintiff in their reply to the Affidavit in Opposition states that the Defendants signed the offer 7 days after receiving the same and that they had sufficient time to take legal advice if they wish to do so. Plaintiff with the leave of the Court filed a Supplementary Affidavit to include third party Mortgage provided by the Defendants to secure the advance.

- [10] At the hearing of the Originating Summons the Defendant's learned counsel stated that the Plaintiff has not complied with Order 88 Rule 2 (3) and 3 (2). Defendant's main contention is that the Plaintiff's affidavit does not carry an indorsement and has failed to provide a true copy of the mortgage. The supplementary affidavit provided by the Plaintiff submitted a true copy of the mortgage 834163 which is the subject matter of the action. I am of the view that the mandatory requirement to have an indorsement on the affidavit of the Plaintiff applies to the cases where the Defendant fails to acknowledge the service of the Originating Summons. In the present case the Defendant has entered into the action by filing an Affidavit in Opposition.
- [11] However I would like to address the requirements under Order 88 Rule 3 (3) in light of the affidavit evidence before me.
- [12] Order 88 Rule 3 (3) states 'Where the plaintiff claims delivery of possession the affidavit must show the circumstances under which the right to possession arises and except where the Court in any case or class otherwise directs, the state of the account between the mortgagor and mortgagee with particulars of -
- (a) the amount of the advance,
 - (b) the amount of the period payments required to be made,
 - (c) the amount of any interest or instalments in arrear at the date of issue of the originating summons and at the date of the affidavit, and
 - (d) the amount remaining due under the mortgage'
- [13] According to sub Rule 3 there are two mandatory requirements a Plaintiff needs to follow in the actions begun by Originating Summons. Firstly, the Affidavit in Support must show the circumstances under which the right to possession arises and secondly the state of account between the mortgagor and the mortgagee.
- [14] The Affidavit in Support and the subsequent affidavits filed by the Plaintiff refers to the cause of action as the default in payments due by the company relating to the overdraft facility and the vehicle loan provided by the Plaintiff. However the Court notes from Plaintiff's default notices and the borrower's detail letters that there has been another third account under the heading of Residential Loan. It appears to me that this loan was taken by the two Defendants in their personal capacity and not by the company. However the Plaintiff lumped all accounts to initiate mortgagee sale. The Affidavit of the Plaintiff does not provide any explanation on the residential loan. Therefore I am of the view that the

Plaintiff has not satisfactorily shown the circumstances on how it obtained the right to possession of the property.

- [15] At the hearing the learned counsel for Plaintiff informed Court that the loan accounts accrues interest, hence the mortgagee sale was done to protect the two Defendants from increasing debt. However I note that the accounts provided by the Plaintiff was prepared in August 2020. This Originating Summons has been filed in November 2021 and therefore not in compliance with Rule 3 (3) (c).
- [16] For the foregoing reasons the Court declines to hold in favour of the Plaintiff's Originating Summons.

ORDERS

1. Originating Summons filed on 09th November 2021 hereby dismissed.
2. Parties to bear cost.



Yohan Liyanage
JUDGE

At Suva on 15th August 2023