

**HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION**

CIVIL ACTION No. 34 OF 2022

BETWEEN : **BANK OF BARODA** a body corporate duly incorporated in India, having its Head Office at Mandvi, Baroda, India and duly registered in Fiji under the Companies Act 2015 and having its registered office at 86-88 Marks Street, Suva, Fiji.

PLAINTIFF

AND : **ROSALIA CHUTE** of Lots 2 and 3 Matamakita Subdivision, Isa Lei Road, Lami, Businesswoman.

DEFENDANT

Representation : **Ms. K. Singh** (Neel Shivam) for the Plaintiff.
Ms. L. Jackson (Jackson Bale Lawyers) for the Defendant.

Date of Hearing : 1st February 2024.

Judgement

Introduction

- [1] The Plaintiff on 21st January 2022 filed Originating Summons (Expedited Form) pursuant to Order 88 of the High Court Rules 1988 seeking vacant possession of the property comprised and described in Native Lease No. 16044 Lots 2 and 3 Matamakita Subdivision, Lami, having an area of 2 roods and 29.7 perches (hereafter referred to as "the property"). It was filed with an affidavit in support of Mr Vinod Kamal, the Manager Credit of the Plaintiff Bank.
- [2] An affidavit in opposition was filed by the Defendant on 16th March 2022. A supplementary affidavit of Ms Kusum Lata Chand (for the Plaintiff) was filed on 18th October 2022. On 8th November 2022 the Defendant filed a response to the supplementary affidavit of Ms. Kusum Lata Chand.

Analysis

- [3] The application before me is pursuant to Order 88 of the High Court Rules 1988. Order 88 of the High Court Rules provides as follows:

“1.-(1) This Order applies to any action (whether begun by writ or originating summons) by a mortgagee or mortgagor or by any person having the right to foreclose or redeem any mortgage, being an action in which there is a claim for any of the following reliefs, namely—

(a) payment of moneys secured by the mortgage[;]

(b) sale of the mortgaged property[;]

(c) foreclosure[;]

(d) delivery of possession (whether before or after foreclosure or without foreclosure) to the mortgagee by the mortgagor or by any other person who is or is alleged to be in possession of the property[;]

(e) redemption[;]

(f) reconveyance of the property or its release from the security[;]

(g) delivery of possession by the mortgagee.

(2) In this Order, “mortgage” includes a legal and an equitable mortgage and a legal and an equitable charge, and references to a mortgagor, a mortgagee and mortgaged property shall be construed accordingly.

(3) An action to which this Order applies is referred to in this Order as a mortgage action.

(4) These Rules apply to mortgage actions subject to the following provisions by this Order.”

- [4] The Mortgagor in this matter is Organic Earth (Fiji) Limited. This is stated in the affidavit of Mr Vinod Kamal. A certified copy of Native Lease No. 16044 is annexed as VK-2. This lease shows the endorsements of the transfer to Organic Earth (Fiji) Limited and Mortgage to Bank of Baroda. VK-3 is stated to contain a true copy of mortgage; however, it is not so. It is some other mortgage document. A copy of the mortgage was later annexed as annexure “B” in the supplementary affidavit of Ms Kusum Lata Chand. What is contained is not a certified copy of the mortgage. Order 88 rule 3 (2) provides that *“The affidavit **must** exhibit a true copy of the mortgage and the original mortgage or, in the case of a registered charge, the charge certificate must be produced at the hearing of the summons.”* (My highlighting and underlining). The original mortgage was produced at the hearing. I find that the Plaintiff did not comply with Order 88 rule 3 (2). Order 88 rule 3 (2) is a mandatory provision it must be complied with as to both the aspects. Which is annexing a certified copy in the affidavit and producing the original at the hearing. Partial compliance is not good enough.

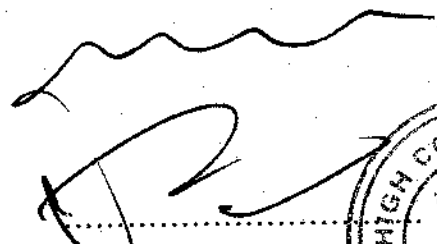
- [5] The Defendant in this matter is not the Mortgagor. She is supposedly in possession of the property. In **NBF Asset Management Bank v. United Marine Ltd [2000] FJHC104;**

HBC 0234j.2000s (27th September 2000), Justice Scott stated *“In the case where a mortgagor is no longer in possession of the mortgaged property and there is a possibility of the mortgagor’s interests being adversely affected by the possession proceedings the mortgagor should be made a party (see: Temperance Permanent Benefit Building Society v. Nevitt [1940] 3 All ER 237; Martins Bank v. Kavanagh [1948] 2 All ER 448 and Alliance Building Society v. Shave [1952] 1 Ch.581)”*. In this proceeding, the mortgagor, Organic Earth (Fiji) Limited should have been included as a party. Unless and until the mortgagor is served and included as a party the Court would not be in a position to ascertain the position of the mortgagor. The Defendant is not in a position to challenge the mortgage. She did not take the loan from the Plaintiff. Organic Earth (Fiji) Limited would be in a position to respond to the claim by the Plaintiff of the advances made to it, the payments due and the interest as a party to the proceedings. Any proceedings that is initiated that affects a party must include that party. They must be given a chance to put their case forward and respond to any claim or allegation. The non-inclusion of mortgagor, Organic Earth (Fiji) Limited in this proceedings as a party is fatal. The originating summons is defective for want of a party.

- [6] All the requirements under an Order 88 application should be complied with. The other important part components of Order 88 are contained in Rules 2 and 3. Where the Rules mandate a particular requirement or compliance the parties are required to comply with it. The Rules are for a purpose. It needs to be complied with. The Plaintiff has not complied with the Order 88 High Court Rules. The Originating Summons is therefore struck out. Costs are in issue and the Plaintiff is to pay the Defendant \$2000.00 as costs. The costs have been summarily assessed.

Court Orders:

- (a) The Originating Summons is struck out.
- (b) The Plaintiff is to pay the Defendant as costs which is summarily assessed at \$2000.00. It is to be paid within 30 days.


Chaitanya Lakshman
Acting Puisne Judge
6th March 2024

