

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 168 of 2023

BETWEEN:

CARPENTERS PROPERTIES PTE LIMITED
PLAINTIFF

AND:

BEATA PASTORPIDE RELOS ZHU
DEFENDANT

BEFORE:

Acting Master L. K. Wickramasekara

COUNSELS:

Patel Sharma Lawyers for the Plaintiff
Parshotam Lawyers for the Defendant

Date of Hearing:

By way of Written Submissions

Date of Ruling:

25th March 2025

RULING

- 01.** The Plaintiff in this matter filed Originating Summons and an Affidavit in Support of the same on 02/06/2023. The Originating Summons is filed under Order 50 Rule 1 of the High Court Rules 1988 seeking the following orders,
1. **That** an order that a Charge be registered in absolute favour of the Plaintiff against the property of the Defendant comprised and described in Certificate of Title Number Register Vol. 48 Folio 4732,

2. **Cost** of this application on a solicitor/client indemnity basis,
3. **Such** other and further orders as the Honorable Court deems just in the circumstances.

02. The Supporting Affidavit deposed by a director of the Plaintiff's company, Daniel Kingston Whippy, claims that the High Court in HBC 231 of 2022 has entered a Default Judgment against the Defendant in the current matter who was named as the 2nd Defendant in HBC 231 of 2022 in the capacity of the Administratrix of the estate of Jian Hua Zhu and also named as the 3rd Defendant in HBC 231 of 2022 in her personal capacity.
03. It is also claimed that the Defendant has failed to pay any sum pursuant to the above Default Judgment till date to the Plaintiff and whereas the Plaintiff having conducted a search with the Registrar of Titles, discovered that the Defendant owns the property bearing Certificate of Title No. 4732.
04. Accordingly, the Plaintiff is moving this Court to register a charge pursuant to Order 50 Rule 1 as against the above property owned by the Defendant, in order to execute the Default Judgment in HBC 231 of 2022.
05. The Defendant has opposed the said application by the Plaintiff. At the outset, the Defendant filed an application to strike out the Originating Summons and due to non-compliance of Court orders, this application was struck out following a peremptory order of the Court on 15/03/2024.
06. The Defendant thereupon, filed an Affidavit in Response on 02/04/2024 with leave of the Court opposing the Originating Summons. In the said Affidavit, the Defendant has pointed out an error in the authority granted to the Plaintiff in deposing the Affidavit in Support of the Originating Summons. Accordingly, it is submitted that the authority given to one Daniel Whippy, as per the copy of the annexed authority, was given over a Magistrate Court action and not in the current matter. As such, the Defendant has contended that the deponent of the said Affidavit in Support had no knowledge of the issues raised in the said Affidavit.
07. The Defendant has further objected to the Originating Summons on the ground that the orders sought pursuant to the Originating Summons should have been made in the proceedings in HBC 231 of 2022, as the Default Judgment was entered in the said case. Defendant, therefore, opposed a fresh cause been initiated by the Plaintiff for execution of the Judgment in HBC 231 of 2022.

08. The Defendant has further alleged that the Affidavit in Support that was served on the Defendant was missing some pages and as such the Defendant was not in a position to fully respond to the same.
09. On 22/07/2024, this Court ordered the Plaintiff to re-serve the Defendant with a full and complete copy of the Supporting Affidavit of the Plaintiff and accordingly struck out the Defendant's Affidavit in Response and ordered *inter alia*, the Defendant to file a fresh Affidavit in Response upon being served with the full and complete Affidavit in Support of the Plaintiff.
10. The Plaintiff then filed the current summons on 03/09/2024 seeking leave of the Court to file a Supplementary Affidavit in Support of the Originating Summons filed on 02/06/2023. This summons is supported by an Affidavit in Support deposed by a solicitor employed by the Plaintiff's solicitors, Mohammed Firdouz Khalim.
11. The Defendant has raised concern over a solicitor for the Plaintiff deposing the above Affidavit on behalf of the Plaintiff. However, having considered the provisions under Order 41 Rule 5 and the recent decision by the Fiji Court of Appeal in **R B Patel Group Ltd v Central Board of Health; ABU032.2022 (30 November 2023)**, I do not find any issue in the fact that it been deposed by a solicitor for the Plaintiff.
12. In the said Affidavit by Mohammed Firdouz Khalim, it is averred that the Plaintiff's director, Daniel Whippy, that deposed the initial Affidavit in Support of the Originating Summons, has now seized to be a director for the Plaintiff. As such he is not able to depose any further or supplementary affidavits for the Plaintiff.
13. It is averred that a new director for the Plaintiff has been appointed, namely, Kunaseelan Sabaratnam and without leave of the Court to file a supplementary affidavit, the new director shall not be in a position to provide to the Court the authority letter to him by the Plaintiff and as well to correct a minor typographical error in the original Affidavit in Support of Daniel Whippy.
14. It is also submitted as the Defendant is yet to file its Affidavit in Response to the Originating Summons there shall be no prejudice caused to the Defendant if the Court allows this application to file a supplementary affidavit.
15. A copy of the proposed Supplementary Affidavit of Kunaseelan Sabaratnam has been annexed to the Affidavit of Mohammed Firdouz Khalim. As per the averments therein, Court notes that the original Affidavit in Support deposed by the former director, Daniel Whippy, annex the authority given by the Plaintiff which mistakenly states that the authority was given regarding a Magistrates Court proceeding. The Plaintiff wishes to correct this mistake in the proposed Supplementary Affidavit.

16. Furthermore, the Court has noted that the proposed Supplementary Affidavit annexes a copy of a recent Title search done on the subject property of the Defendant, where the Plaintiff has registered a Memorandum of the Judgment as against the Defendant's property in question.
17. The Defendant in her Affidavit in Response filed on 30/09/2024, has objected to the Summons for Leave to file a Supplementary Affidavit. In opposition of the same, the Defendant claims that the Plaintiff is trying to introduce new evidence at this time of the proceedings and that the Affidavit of Mohammed Firdouz Khalim fails to duly identify the mentioned typographical error in the original Affidavit in Support.
18. An Affidavit in Reply was filed on behalf of the Plaintiff by Mohammed Firdouz Khalim on 18/11/2024. As per the said Affidavit, it is averred that the Plaintiff has duly identified the error in the original Supporting Affidavit of Daniel Whippy and that the new evidence proposed to be adduced through the Supplementary Affidavit shall have the effect of submitting all relevant information to the Court to arrive at a just and fair decision in this matter and that as the matter has not proceeded to a hearing there will not be any prejudice caused to the Defendant.
19. Comprehensive written submissions have been filed by both the parties to which this Court is thankful for. Having considered all available affidavit evidence before the Court and the submissions by the counsel, the Court proceeds to make its ruling as follows.
20. Originating Summons procedure is embodied in Order 28 of the High Court Rules 1988. Order 28 Rule 2 provides as follows,

Affidavit evidence (O.28, r.2)

2. (1) *In any cause or matter begun by originating summons (not being an ex parte summons) the plaintiff must, before the expiration of 14 days after the defendant has acknowledged service, or, if there are two or more defendants, at least one of them has acknowledged service, file with the Registry the affidavit evidence on which he intends to rely.*
- (2) *In the case of an ex parte summons the applicant must file his affidavit evidence not less than 4 clear days before the day fixed for the hearing.*
- (3) *Copies of the affidavit evidence filed in court under paragraph (1) must be served by the plaintiff on the defendant, or, if there are two or more defendants, on each defendant, before the expiration of 14 days after service has been acknowledged by that defendant.*

- (4) *Where a defendant who has acknowledged service wishes to adduce affidavit evidence he must within 28 days after service on him of copies of the plaintiff's affidavit evidence under paragraph (3) file his own affidavit evidence with the Registry and serve copies thereof on the plaintiff and on any other defendant who is affected thereby.*
 - (5) *A plaintiff on whom a copy of a defendant's affidavit evidence has been served under paragraph (4) may within 14 days of such service file with the Registry further affidavit evidence in reply and shall in that event serve copies thereof on that defendant.*
 - (6) ***No other affidavit shall be received in evidence without the leave of the Court.***
 - (7) *Where an affidavit is required to be served by one party on another party it shall be served without prior charge.*
 - (8) *The provisions of this rule apply subject to any direction by the Court to the contrary.*
 - (9) *In this rule references to affidavits and copies of affidavits include references to exhibits to affidavits and copies of such exhibits.*
- (Emphasis Added)**

21. The Plaintiff in this matter has duly sought leave of the Court to file a 'Supplementary Affidavit' pursuant to Order 28 Rule 2 (6) of the High Court Rules. The affidavit evidence before this Court duly submits to the Court the reasons for filing of a supplementary affidavit.
22. It appears that there's certain new information that the Plaintiff proposes to be submitted through this supplementary affidavit. Having carefully considered this new information as per the annexed draft supplementary affidavit of Kunaseelan Sabaratnam, the Court finds that such information relates to and/or further clarifies the already submitted information as per the original Affidavit in Support by Daniel Whippy and is not completely new evidence.
23. Since the Plaintiff's director has been changed and the authority to attend to this matter being now given to the new director, Kunaseelan Sabaratnam, the Plaintiff is in Court's considered view justified in its Summons for Leave to File a Supplementary Affidavit in the matter.
24. Having comprehensively considered the Affidavit in Response of the Defendant and the written submissions on behalf of the Defendant, I do not find that by allowing the summons of the Plaintiff for Leave to File a Supplementary Affidavit, there is a risk of the Defendant being unfairly prejudiced in these proceedings. Technically, the Defendant is yet to file its Affidavit in Response to the Originating Summons of the Plaintiff and the matter is yet to be fixed for a hearing.

25. In contrast, if this summons is to be refused, I find that the Plaintiff shall be at risk of being unfairly prejudiced against, as it would prevent the Plaintiff from submitting to the Court all relevant material with regard to his substantive application, for the Court to arrive at a just and fair decision. In Court's view, refusal of the Summons for Leave to File a Supplementary Affidavit shall not be in the interest of justice.
26. The fair trial is fundamental to the rule of law and to democracy itself. The right to fair trial applies to both criminal and civil cases, and it is absolute which cannot be limited. It requires a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.
27. In the case of **Bred Bank v Jattan; HBC230.2021 (28 October 2022)**, as relied upon by both counsel in their respective written submissions, the High Court has ruled on the factors to be considered in exercising the Courts discretion in granting leave to file a supplementary affidavit under Order 28 Rule 2 (6) of the High Court Rules. It was held in this matter,

“Order 28 Rule 2(6)

[8] *The rule refers to the procedure relating to filing and serving of affidavits in the matters initiated by Originating Summons.*

[9] *After the filing of initial affidavits in the action, Order 28 Rule 2(6) states ‘No other affidavit shall be received in evidence without leave of the Court’.*

[10] *It is evident that the Rule has given discretionary powers to the Court whether to allow any additional filing of affidavits.*

[11] *His Lordship Amaratunga J in **Ramesh Chand & Another v Rajesh Rishi Ram HBC 61 of 2019** discussed the following factors which needs consideration by the Court in applications made under the rule.*

- i. Nature of the action,*
- ii. Contents of the proposed supplementary affidavit,*
- iii. Relevance of the evidence to the action,*
- iv. Reason for seeking supplementary affidavit,*
- v. Delay,*
- vi. Prejudice to the other party,*
- vii. Effect of filing the supplementary affidavit.”*

28. In duly considering the Plaintiff's application for Leave to File a Supplementary Affidavit in view of all the above factors (as listed in the case of **Ramesh Chand & Another v Rajesh Rishi Ram**) (Supra), I find that the Plaintiffs application for leave to file a supplementary affidavit is justified to be granted under each of the factors.

29. Accordingly, it is the conclusion of this Court that the Plaintiff's Summons for Leave to File a Supplementary Affidavit in these proceedings is successful and accordingly allowed.
30. In consequence, the Court makes the following orders,
1. The Summons for Leave to File Supplementary Affidavit as filed on 03/09/2024 is hereby allowed subject to the following orders of the Court,
 2. The Plaintiff shall, within 07 days from today (That is by 03/04/2025), file and serve the Supplementary Affidavit of Kunaseelan Sabaratnam, as per the draft of such Affidavit as annexed with the Affidavit of Mohammed Firdouz Khalim filed on 03/09/2024.
 3. The Defendant shall, 14 days thereafter, file and serve an Affidavit in Response to the Originating Summons filed on 02/06/2023. (That is by 17/04/2025).
 4. The Plaintiff may (if the need be), 07 days after, file and serve an Affidavit in Reply (That is by 28/04/2025).
 5. Both parties shall, 14 days thereafter, file and serve simultaneously, written submissions regarding the Originating Summons (That is by 12/05/2025)
 6. In failure to comply with orders no. 2, 3 and 5 above, the defaulting party shall pay a cost of \$ 3000.00 to the other party as summarily assessed by the Court.
 7. This matter shall be mentioned before this Court on the next date to fix the hearing of the Originating Summons before a Judge of the High Court.
 8. The cost of this application shall be in the cause.



At Suva,
25/03/2025.


L. K. Wickramasekara,
Acting Master of the High Court.