



3. This application is an enforcement proceeding against the Defendants for failing to comply with Orders entered as a Consent Judgment. The Orders were as follows:
  - (1) The First and Second Defendants shall pay the Plaintiff a sum of \$242,179.00 together with interest at 30% per annum from 8<sup>th</sup> May 2020, until payment in full;
  - (2) That the First and Second Defendants shall the Plaintiff \$2000 as costs summarily assessed against the Plaintiff.
4. The Plaintiff is seeking Orders of the Court that a Charge entered be made absolute.

### **PART C: LAW AND ANALYSIS**

5. In the Judgment of my brother Judge Mutunayagam on 9<sup>th</sup> September 2022, he stated in paragraph 5:

“5. On 30<sup>th</sup> November 2022 and 25<sup>th</sup> February 2022 the plaintiff was represented by Mr Roopesh Singh and the defendants by Mr N.Nambiar. On 30<sup>th</sup> November 2022, both counsel stated that parties agreed to enter judgment on liability in terms of the interlocutory summons for summary judgment and the quantum to be assessed. 25<sup>th</sup> February 2022, I made Order as follows:

***Defendant agree that they are liable to the Plaintiff and the Quantum is to be determined.”***

#### **Orders**

- a. The first and second Defendants shall pay the plaintiff a sum of \$242,179.00 together with interest at 30% per annum from 8<sup>th</sup> May 2020 till payment in full.
  - b. The first and second defendants shall pay the plaintiff a sum of \$2000.00 as costs summarily assessed to the plaintiff.”
6. An Interlocutory Order was sealed after granting a Summons on 15<sup>th</sup> November 2022 as follows:
    1. “A charge to be imposed on the following properties:

- 1.1 Certificate of Title No 29788 land known as Burenicagi Lot 8 DP 3046 in the district of Rewa containing an area of One Rood and one perches.
  - 1.2 A charge to be imposed on the Defendant's shares in Aper Motors Pte Ltd, a limited liability company having its registered office at 204 Vuci South Rd, Nausori, Fiji (hereinafter referred to as the "Company 1"), and a charge to be imposed on the Defendants' shares in Aper Fashions Pte Ltd, a limited company having its registered office at Shop # 4, Hexagon Complex, Koronivia, Nausori, Fiji (hereinafter referred to as the "Company 2"), and the same be charged to answer the payment of the sum of \$425,813.25 (Four Hundred Twenty Five Thousand Eight Hundred Thirteen Dollars and Twenty Five Cents)."
7. The Defendants are now disputing the consent orders and have appealed the decision.
  8. They also object to the charge being made absolute as it is a charge against the company for which has no involvement in the proceedings. The monies owed are against the Defendants individually.
  9. Order 50 (6) of the High Court Rules provides that:
 

"On further consideration of the matter the Court shall, unless it appears that there is sufficient cause to the contrary, make the order absolute with or without modifications."
  10. The Court had found that liability was admitted. The damages were awarded to the Plaintiff. The Defendants have failed to enforce the Orders.
  11. Master Tuilevuka in the case of Kumar -v- Vijayanitmal [2010] FJHC 26; HBA 0005.2000(4 February 2010) cited Justice Shameem decision in the case of Public Employees Union -v- Lewenigila [2001] FJHC 78; HBC 0393y.1999s (11 October 2001):
 

"The making absolute a charging order nisi is purely a matter of discretion for the Courts. In exercising that discretion, the relevant factors to be considered as discussed by Shameem J in Public Employees Union v Lewenigila (supra) are as follows:

*"In England the Charging Orders Act 1979 provides that the High Court can make a charging order with or without conditions and provides, by virtue of*

section 1(5) of the Act, that in deciding whether to make a charging order the Court shall consider all the circumstances of the case as in particular the personal circumstances of the debtor and any prejudice to any other creditor. Although this Act does not apply directly to Fiji, the principles generally guiding the grant of a charging order after the passing of the 1979 Act, provide useful guidelines. These principles, stated by Lord Brandon in Roberts Petroleum Ltd. -v- Bernard Kenny Ltd. [1981] EWCA Civ 10; (1982) 1 WLR 301, are as follows:

1. *The question of whether a charging order nisi should be made absolute is a matter for the discretion of the Court;*
  2. *The burden of showing cause why the order nisi should not be made absolute is on the judgment debtor (my emphasis)*
  3. *The principles applicable to the exercise of the discretion are those relevant to the grant of a garnishee order nisi;*
  4. *The Court should consider all the circumstances of the case including those arising after the order nisi;*
  5. *The court should consider all the parties including the judgment creditor, the judgment debtor and other unsecured creditors.*
12. Taking these principles in consideration the Court considers the application before it.
  13. The Judgment debtor does not dispute that there is a debt owing. However he disputes that the Charge should not be attached against the company's shares as the debtors are shareholders of the company, a company which operates and has a separate legal entity.
  14. They argue therefore that there is no beneficial or legal interest established for which the Applicant/Plaintiff can make the Charge absolute and thereafter enforce it.
  15. The Court finds there are good reasons to make the charges absolute.

16. The Defendants are shareholders /Directors of the company and therefore are directly benefiting from the share dividends in the company.
17. The only basis for which the Court will not make the Charges absolute, if the circumstances of the Defendant show that it is just and equitable not to make the Charges absolute.
18. The Defendants have not been able to present any evidences before the Court to show to this Court that they can or have paid for the debt in order to satisfy the Plaintiff of the debt owing.
19. In Express Diesel Services Ltd -v- Vishal's Hoist Services Ltd [2017] FJHC 847; HBC 224;2014 (7 November 2017) Seneviratne J held that because the contract between the parties has not yet been completed, the garnishee nisi could not be made absolute. The judgment debtor was to supply and install three hydraulic hoist lamps and two have been supplied. The last one would only be supplied and installed once the location to install was confirmed and hence the monies would be only released then. The garnishee is entitled to recover the debt once the contract has been completed. The garnishee proceedings were dismissed.
20. In this instance, there is no evidence at all to show that there are changes in circumstances that warrant for the debtor not to seek for the charges to be made absolute i.e any payments being made to set off the claim.
21. The Charge is an equitable interest on the said property and is ranked according to its registration below a mortgage.
22. I will therefore grant the application for the Charges to be made Absolute.

**Orders of the Court:**

***(a) That the Charges in Decree Nisi be made absolute for the following:-***

- a. **Certificate of Title No 29788 land known as Burenicagi Lot 8 DP 3046 in the district of Rewa containing an area of One Rood and one perches;**
- b. **Defendant's shares in Aper Motors Pte Ltd, a limited liability company having its registered office at 204 Vuci South Rd, Nausori, Fiji (hereinafter referred to as the "Company 1");**

c. Defendants' shares in Aper Fashions Pte Ltd, a limited company having its registered office at Shop # 4, Hexagon Complex, Koronivia, Nausori, Fiji (hereinafter referred to as the "Company 2"); and

That the three properties in (a) (b) and (c) be charged to answer the payment of the sum of \$425,813.25 (Four Hundred Twenty Five Thousand Eight Hundred Thirteen Dollars and Twenty Five Cents)."

*(b) Costs of \$1000 awarded to the Plaintiff equally divided as costs against the Defendants.*



A handwritten signature in black ink, consisting of a large loop at the top and a long, sweeping tail that ends in a small hook.

Ms Senileba LTT Waqainabete- Levaci

Puisne Judge