

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

HBC 21 OF 2023

IN THE MATTER of Mortgage No. 836707
over iTaukei Lease No. 32804 given by
HASMAT ALI in favour of **FIJI**
DEVELOPMENT BANK

BETWEEN: **Fiji Development Bank** a Corporate Duly Constituted Under the Fiji
Development Bank Act Cap 214 having its Principal Office at 360
Victoria Parade, Suva.

ORIGINAL PLAINTIFF / RESPONDENT

A N D: **Samserun Nisha together with all her Agents and/or Servants** of
Saweni, Lautoka.

ORIGINAL DEFENDANT / APPELLANT

Appearances: Ms. Chand A. for the Original Defendant/ Appellant
Mr. Lajendra N. for the Original Plaintiff / Respondent
Date of Hearing: 21 August 2025
Date of Ruling: 11 November 2025

R U L I N G

1. The background to this case is set out in the following two Rulings:
 - (a) Fiji Development Bank v Nisha [2024] FJHC 147; HBC21.2023 (5 March 2024)
 - (b) Fiji Development Bank v Nisha [2025] FJHC 199; HBC21.2023 (9 April 2025)
2. Ms. Samserun Nisha (“**Nisha**”) has filed an application before me seeking leave to extend the time to appeal my decision of 09 April 2025.

3. The decision of 09 April 2025 related to an appeal of the Master’s decision of 05 March 2024.
4. By way of background, the Fiji Development Bank advanced some monies to the late Hasmat Ali (“**Ali**”).
5. To secure these loans, Ali gave to FDB a mortgage over his property which is all comprised in i-Taukei Lease Number 32804 being Veibona Subdivision Lot 1 on SO 5720 situated in the Tikina of Vuda. This property is 4431 square meters in size (“**the lease**”).
6. Ali in fact had three loan accounts (namely Account Number 16975, 151700 and 151411). When Ali died on 07 December 2019, his loan accounts were already in arrears.
7. FDB then filed an *Originating Summons (Expedited Form) for Vacant of Possession by Mortgagee* on 09 February 2023 pursuant to Order 88 Rule 1 (1) (d) of the High Court Rules 1988. The Summons was filed by Lajendra Lawyers. It sought an Order that Nisha do deliver to FDB vacant possession of the lease.
8. The Master did grant Order in Terms of the Originating Summons. However, he only did so after having given the defendant some two months or so to settle the mortgage debt, which she did not.
9. It is important to note that in granting Order in Terms, the Master took the following into account:

- (i) that as at 31 July 2023, the total arrears on the three accounts were as follows:

Loan Account No. 16975	:	\$166,803.34
Loan Account No. 151700	:	\$135,632.97
Loan Account No. 151411	:	\$536,749.65

- (ii) the fact that Nisha did not dispute the arrears. She only wanted time to pay off the arrears.

- (iii) that a mortgagee has a right to go into possession of a mortgaged property upon any default of the mortgagor (as per section 75 of the Property Law Act¹).
 - (iv) that the Fiji Development Bank had advertised for the sale of the property and had accepted a tender.
- 10. At the hearing of the appeal before me, a preliminary question was raised as to whether or not the application seeking leave to appeal the decision of the Master was regular. This turned on the question as to whether or not the decision was an interlocutory decision or a final decision.
- 11. I did rule that the decision was a final decision based on the application approach which the Fiji Supreme Court affirms in **Jivaratnam v Prasad** [2023] FJSC 11; CBV0005.2020 (28 April 2023) which finally endorses the approach in **Goundar v Minister for Health** [2008] FJCA 40.
- 12. Based on the above, Nisha's application in seeking leave to appeal was erroneous as it was premised on the assumption that the Master's order was an interlocutory order.
- 13. Rather than seeking leave to appeal, what she ought to have done was to just exercise her right to appeal the final order. This was available to her under Order 59 Rule 8 (1) of the High Court Rules. This would mean that she ought to have complied with the timelines stipulated under Order 59 Rule 9 (a).
- 14. Since the Master's decision was delivered on 05 March 2024, Nisha ought to have filed and served her appeal by 26 March 2024 in order to comply with Order 59 Rule 9 (a). In this case, her application for leave (leave was not required) was filed on 26 March 2024. However, it was served two days out of time on 28 March 2024.
- 15. I did note in my Ruling that - where an intended appellant is out of time or anticipates that he will run out of time in filing and serving his appeal, he may apply under Order 59 Rule 10 (1) to seek an extension.

¹ Section 75 provides:

A mortgagee, upon default in payment of the mortgage money or any part thereof, may enter into possession of the mortgaged land by receiving the rents and profits thereof or may distrain upon the occupier or tenant of the said land for the rent then due.

16. I did refuse to grant an extension because in my view, the appeal would lack merit. With the benefit of hindsight, there was no need for me to have gone that far and offer a comment on merit. All I could have done was dismiss the application for leave to appeal because it was filed, in my opinion, on the wrong premise that the Master's decision was an interlocutory one.
17. In any event, the discussion on "merit" in my Ruling was made on the assumption that the application before me had been a regular one made under Order 59 Rule 8 (1) and Order 59 Rule 9 (a).
18. In other words, assuming Nisha's application before me was a regular one (which in my view, it was not based on my reading of Jivaratnam v Prasad [2023] (supra)), I still would have refused it because it lacked merit.
19. Before me now, Nisha applies seeking leave to appeal out of time my decision of 05 March 2024.
20. I do note here for the record that Mr. Lajendra argues as a preliminary point that an application seeking leave to appeal out of time a decision of the High Court ought to have been filed at the Fiji Court of Appeal.
21. As neither Counsel has drawn my attention to any specific Practice Direction to the contrary, I exercise jurisdiction over this application based on Rule 26 (3) and Rule 27 of the Fiji Court of Appeal Rules.
22. At the hearing, Ms. Chand raises the following points:
 - (i) that the mortgage instrument was actually executed years earlier. However, Loan Account No. 151700 was executed only in 2019. This happened years after the mortgage was signed. The mortgage therefore could not apply to that account.
 - (ii) that there is no evidence that i-TLTB had consented to the 2019-Account being tied to the mortgage in question. The consent to mortgage the property was granted on 29 November 2016 and would have expired on 28 February 2017. Therefore, the consent could not have covered the 2019 Loan Account No.151700.
 - (iii) the *i*-TLTB 2016 consent was not a blanket cover for all subsequent mortgages.

- (iv) hence, for i-TLTB to assert before the Master and before this Court that mortgage No. 836707 covers all three accounts (see above) is simply not correct because at the time the mortgage was executed, Loan Account No. 151700 did not yet exist.
 - (v) this means that the founding affidavit which the FDB had filed before the Master was all wrong. In purporting to comply with Order 88 Rule 3, that Affidavit had set out:
 - (a) the amount of the advance;
 - (b) the amount of the periodic payments required to be made;
 - (c) the amount of any interest or instalments in arrears at the date of issue of the originating summons and at the date of the affidavit; and
 - (d) the amount remaining due under that mortgage;
23. Mr. Lajendra submits that the application for leave to appeal is now just an academic question because:
- (i) Nisha has, since my Ruling of 09 April 2025, given vacant possession of the lease; and
 - (ii) the FDB has since sold the property to a successful tenderer.
24. Ms. Chand submits that her client is not interested in getting the lease back. What she desires is a declaratory relief which, if granted would then propel her client to file a separate civil claim for damages against the FDB.
25. Ms. Chand also submits that as the mortgagor had died, and since there was no personal representative appointed over his estate, the application before the Master ought to have been served on the Public Trustee pursuant to section 8 of the Succession, Probate & Administration Act 1970.
26. Ms. Chand said that Nisha was a third party who had no knowledge of the loan facilities or the FDB claim. Because of the non-joinder of the estate of Hasmat Ali (mortgagor), the mortgagor or his estate was deprived of his right to be heard. This was an error which went to the root of jurisdiction and procedural fairness.
27. Mr. Lajendra emphasises that the application before the Master was for vacant possession. He said that Ms. Chand's argument about the debt was not before the Master. The simple question which the Master had to decide was whether or not to grant an Order for vacant possession. He did grant an Order for vacant

possession after considering *inter alia* that Nisha did acknowledge the debt and that she simply wanted time to pay it off – to which request the Learned Master did give her two months.

28. Mr. Lajendra further submits that what Nisha is doing at appeal level is introducing new evidence and raising new arguments which were not placed before the Master.
29. On the point about the alleged lack of FDB consent on Loan Account No. 151700, a loan agreement and/or a mortgage may contain a special clause to tie an existing mortgage to future advances by the same lender to the same borrower.
30. Mr. Lajendra appears to argue that in such cases, there will be no need to create a new mortgage every time more money is borrowed in future, nor will there be a need to seek a fresh i-TLTB consent. To protect the value of the property and keep things fair for other creditors, the mortgage will usually set a maximum amount to secure.
31. Mr. Lajendra points out that the i-TLTB had consented to the maximum advance of \$628,508.15. The total amount of borrowings by Ali was around \$594,000 -00. So long as the total borrowings is below that cap of \$628,508.15, the mortgage would be perfectly valid.
32. While Ms. Chand insists that i-TLTB consent cannot apply retrospectively, Mr. Lajendra appears to assert that a *future advances clause* is not retrospective but prospective in effect because it ties all future advances to the original mortgage.
33. On the question of whether or not FDB ought to have served the Fiji Public Trustee under section 8 of the Succession Probate and Administration Act, Mr. Lajendra submits that an application for vacant possession under Order 88 need only be served on the mortgagor and/or the occupants of the lease.
34. If I may offer this observation at this juncture, it is unclear to me as to the basis on which Nisha feels she has a right to pursue this appeal.
35. Where is her locus to challenge FDB's action under the mortgage contract when:
 - (i) she was not privy to the contract; and/or

- (ii) when she does not hold letters of administration or probate over the estate of Ali.
36. Indeed, she has consistently maintained before this Court that she is a third party with no knowledge of any dealings between Ali and the FDB.
37. I further recall that, at one stage, Nisha, through her legal Counsel, expressly denied being the personal representative of the estate as if to conveniently distance her from any obligations or disclosures attached to that role.
38. Having considered all, I find as follows:
- (i) Nisha is not the personal representative of the estate of Ali.
 - (ii) accordingly, she does not have locus to even pursue the intended line of appeal which her counsel has argued in this Court.
 - (iii) in any event, even if she had locus, that line of appeal raises new legal arguments which were not placed before the Learned Master or before this Court.
 - (iv) while I agree that new pure points of law may be raised on appeal (**Notting Hill Finance Limited v Sheikh** [2019] EWCA Civ 1337); **Pittalis v Grant** [1989] QB 605; **Charan v Shah** [1995] FJCA 39; ABU0029.1994 (19 May 1995)), the Court must balance this against the public interest of finality and that of the other party.
 - (v) accordingly, before allowing a new point to be raised on appeal, the Court will look at the nature of the proceedings, the nature of the new point and the prejudice to the other party that will be caused by the new point being raised:
 - (i) has the other party had ample opportunity to deal with the point,
 - (ii) has he acted to his detriment on the omission to raise the point, and
 - (iii) can he be adequately protected in costs.
- (see **Pittalis v Grant** [1989] QB 605)
- (vi) had the point been raised before the Learned Master, or before me, we undoubtedly, would have dealt with it.

(vii) at the end of the day, Nisha has since given vacant possession of the lease and the FDB has sold it.

(viii) rather than pursue this academic appeal, Nisha would be best advised to file a separate civil claim against the FDB based on the allegations of impropriety in FDB's handling of the accounts. However, she would have to first obtain Letters of Administration or Probate.

39. In the final, I refuse the application for leave to appeal out of time. Costs to the Respondent which I summarily assess at \$1,000 -00 (one thousand dollars only).



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Anare Tuilevuka
JUDGE

11 November 2025