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IN THE COURT OF APPEAL, FIJI ISLANDS
ON AN APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0018 OF 2010
[High Court Action No: HBC 19 of 2010L]

BETWEEN: FIJI DEVELOPMENT BANK

Appellant

AND: RATU TEVITA RAIVALITA KOMAISAVAI aka
TEVITA KOMAISAVAI

Respondent

Coram: Hon. Justice Izaz Khan, Justice of Appeal
Hon. Justice Kankani T. Chitrasiri, Justice of Appeal
Hon. Justice Priyantha Fernando, Justice of Appeal

Counsel: Mr N Lajendra for the Appellant
Mr K Qoro and Mrs T Rigsby for the Respondent

Date of Hearing: Wednesday, 3rd November, 2010

Date of Judgment: Monday, 22nd November, 2010

JUDGMENT OF THE COURT

Introduction

1. This is an appeal filed by the Appellant (Plaintiff in the action filed in the High Court) seeking to set aside the judgment of his Lordship Justice Sosefo Inoke delivered on 09/04/10. By that decision, His Lordship dismissed the action filed by the Appellant in terms of the Rule 1 of the Order 88 of the High Court rules 1988 and has stated that the

referred to in Clause 3 of the affidavit dated 01/02/10 sworn to by Paula Rakai filed with the summons.

2. Accordingly, appellant namely Fiji Development Bank was prevented from obtaining possession of the land mortgaged by the Respondent even though he namely the Respondent Komaisavai (Defendant in the action filed in the High Court) was in breach of the terms contained in the mortgage bond. Having aggrieved by the said judgment of Justice Inoke, appellant filed Notice of Appeal containing six grounds of appeal. Consequently the matter was argued before this Bench.

Background

3. The Respondent having entered into an agreement with the Appellant Bank obtained a loan from the said bank amounting to a sum of \$23,391.00. This facility was released to the Respondent upon securing his property referred to in Paragraph 3 of the statement of claim filed by the Appellant. In terms of the mortgage bond, respondent had agreed to repay his loan in \$225.00 monthly installments having kept the said property as security being the registered proprietor of the property.
4. Having failed to service the loan in terms of the mortgaged bond, Respondent fell into arrears amounting to \$674.00. The outstanding was amounted to \$30,394.55 and it was a much higher amount than he had obtained initially.
5. Consequently, the appellant made two demands from the Respondent requesting him to pay the monies due to it. Since there was no response to those demands, Appellant filed this action in the High Court of Lautoka by way of originating summons. Thereafter on the application of the appellant, court issued notice on the respondent, returnable on 25/3/10. Inadvertently, court has called the matter on 23/03/10, two days before the date given on the summons but the learned High Court judge correctly decided to have the case called again on 25/05/10 which was the date appearing on the summons as the returnable date. However, the respondent was not present even on that being the date

mentioned in the summons on which date the respondent is required to be present in Court.

6. However, the matter was considered by the learned High Court Judge on the strength of the evidence contained in the affidavit filed by the Appellant in the absence of any material filed on behalf of the respondent. Consequently, learned judge delivered his judgment on 09/04/10 dismissing the application of the Appellant and thereby prevented the Bank obtaining possession of the property mortgaged by the respondent.
7. Having dissatisfied with this decision of the learned Judge, a notice of appeal was filed by the Appellant. In that notice of appeal, following grounds of appeal has been raised by Lajendra Law who appeared for the Appellant. In that Notice of Appeal, following had been mentioned as the grounds of appeal.
 1. **THAT** the learned trial judge erred in law and fact in holding that a mortgagee cannot apply under Order 88 Rule 1(1) of the high Court Rules, 1988 for vacant possession unless it has acquired the right to foreclose.
 2. **THAT** the learned trial judge erred in law and fact in applying section 73 of the Land transfer Act, Cap 131 to the application filed by the Appellant for delivery of vacant possession pursuant to Order 88, Rule 1(1) (d) of the High Court Rules, 1988.
 3. **THAT** the learned trial judge erred in law and fact in holding that the Appellant has failed to prove that default has occurred.
 4. **THAT** the learned trial judge erred in law and fact in holding that default must continue for a period of 6 months before the Appellant is entitled to delivery of vacant possession.
 5. **THAT** the learned trial judge erred in law and fact in holding that there is requirement to sell by public auction before the Appellant is entitled to delivery of vacant possession.
 6. **THAT** the learned trial judge erred in law and fact in holding that the affidavit does not comply with the requirements of Order 88 of the High Rules, 1988.

8. When this matter was taken up for argument on 03/11/10, Mr. N. Lajendra who appeared for the Appellant submitted that even though six grounds of appeal had been raised on behalf of the appellant, all those grounds would depend on the answer given to the very first ground and if that is answered in favour of the appellant, Court need not consider the matters raised in the other grounds of appeal. Learned Counsel Mr. Kemueli Qoro who appeared for the Respondent also was in agreement with the said contention of the learned Counsel for the appellant. Thereafter, counsel for both parties addressed Court on the law that is applicable particularly in respect of the first ground of appeal.

The point of law raised on behalf of the Appellant

9. The issue in this appeal is whether a mortgagee is entitled to make an application under *Rule 1(1)* of the Order 88 of 1988 to obtain possession of a mortgaged land when the mortgagor has defaulted to repay the money under the mortgage bond, ***without acquiring the right to foreclose*** referred to in the Land Transfer Act. (Chapter 131)
10. In this instance, learned trial judge, Justice Inoke has examined whether the Appellant has acquired the right to foreclose of the property that was mortgaged in terms of the Land Transfer Act. In doing so, he has further examined whether the appellant had acted under the provisions especially *Sec. 73, 74 and 75* of the Land Transfer Act. (*Chapter 131*) Having considered those facts, His Lordship has found that no such right under the Land Transfer Act had been acquired by the mortgagee and had come to the conclusion that the appellant is not empowered to make an application for possession of the mortgaged property under *Rule 1(1)* of the Order 88 of the High Court Rules 1988.
11. Hence, the issue at hand is whether a mortgagee who has the right to obtain possession under *Rule 1(1)* of the Order 88 of the High Court Rules 1988 should necessarily make an application under *Sec.73* of the Land Transfer Act, as a pre-requisite before making the said application under *Rule 1(1)* of the Order 88.

Application and Interpretation of the Law

12. At the outset it is pertinent to mention that the Counsel appearing for both parties have mentioned to Court that they could not find a single authority that would deal directly with the point at hand. However, learned Counsel for the Appellant has furnished two High Court decisions, namely;

- Fiji Development Bank V. Endeavour Youth Investment Co-operative Society and another [High Court of Fiji HBC 337 Of 1997]
- Australia and New Zealand Banking Group Limited V. Amit Kumar and Sandhya Laxmi [High Court of Fiji HBC 0307 Of 2002]

pronounced in relation to applications made under Rule 1 of the Order 88 of 1988. In both these cases, learned Judges had allowed the mortgagees to obtain possession of the mortgaged property even though the plaintiffs in those matters had not proceeded to have the foreclosure registered under the Land Transfer Act.

Rule 1(1) of the aforesaid Order reads thus;

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.
13. I will now examine the way in which Justice Inoke has interpreted the aforesaid Rule. His Lordship referring to Subsection 1 of Rule 1 of the Order 88 has stated;
- "[12] I interpret the phrase "the right to foreclose" in O. 88, r 1(1) as applying to both a "mortgagee" and "any other person". I think this is evident from the use of the phrase "mortgagee claiming possession" in the other provisions of O.88, for example, in r. (2) (1). If I am correct then a mortgagee cannot apply under this Order unless it has acquired "the right to foreclose". When does the mortgagee acquire that right?"*
14. Apparently, he seems to have taken the view that no mortgagee can move court to obtain possession of a mortgaged land in terms of the aforesaid Rule 1, unless the mortgagee has acquired the right to foreclose by registering as the proprietor of the mortgaged property in terms of the Land Transfer Act. In that event, every mortgagee should comply with the procedure referred to in Sec.73 of the Land Transfer Act (Chapter 131) before making an application to obtain possession under Order 88 of the High Court Rules 1988.

The said Sec.73 of the Land Transfer Act is re-produced herein below for convenience.

73.-(1) whenever default has been made in payment of the mortgage money and such default continues for six months after the time for payment specified in the mortgage, the mortgagee may make application in writing to the Registrar for an order for foreclosure.

- (2) *the application referred to in subsection (1) shall state-*
- (a) *that default has been made and has been continued for a period of not less than six months;*
 - (b) *that the land, or estate or interest therein, the subject of the mortgage has been offered for sale at public auction in compliance with the provisions of section 79 of the Property Law Act, by an auctioneer licensed under the provisions of the Business Licensing Act; (Cap.130, Cap 201)*
 - (c) *that amount of the highest bid at the sale referred to in paragraph (b) was insufficient to satisfy the mortgage money together with the expenses of such sale;*
 - (d) *that notice in writing of the intension of the mortgagee to make application for foreclosure has been served on the mortgagor, and on every other person appearing by the register to have any right, estate or interest in the mortgaged land, or estate or interest therein, subsequent to the mortgage, by-*
 - (i) *being delivered to him personally; or*
 - (ii) *in the case of the mortgagor, by being left on the mortgaged land; or*
 - (iii) *being sent by registered post addressed to him at the address for service appearing in the register.*
- (3) *Any application for foreclosure made under the provisions of this section shall be accompanied by a certificate of the auctioneer by whom the land, or estate or interest therein, was put up for sale, and by such other proof as the Registrar may require testifying to the correctness of the statements made in the application and such application shall be effected by a qualified witness.*

15. As mentioned herein before, according to His Lordship Justice Inoke, a mortgagee who has the right to obtain possession on the basis of non-payment of dues of a loan granted

subject to a mortgage should first make an application under the aforesaid Sec.73 of the Land Transfer Act for foreclosure before seeking a remedy in terms of Order 88 of the High Court Rules 1988.

16. However, we do not find a clear and specific provision in law requiring a mortgagee who intends to seek relief under Order 88, as a prerequisite, to make an application in terms of Sec.73 of the Land Transfer Act. Sections 73,74 and 75 of the Land Transfer Act (application for foreclosure, how and when made) are found in Part 11 of the Land Transfer Act and those provisions deal with the law in respect of the mortgages registered under the said Land Transfer Act. Basically, those provisions refer to:
 - the effects of mortgages registered under the law;
 - the way that the mortgages should be discharged; and
 - the manner of foreclosure of the mortgaged property when the mortgagor has defaulted payment.
17. However, on a perusal of Sec.73,74 and 75 of the Land Transfer Act, it is clear that those sections envisage the way in which a mortgagee could become the proprietor of the land that had been mortgaged.
18. On the other hand, the rules referred to in Order 88 of the High Court Rules 1988 do not have any provision to obtain proprietorship of the mortgaged property. Provisions in the Order 88 contemplate the way in which the possession of the mortgaged property could be obtained.
19. Such an exercise is only a temporary measure till the registration of foreclosure is completed under the Land Transfer Act. Probably, it may be for the purpose of preventing a defaulter enjoying the property that had been mortgaged for which he is not entitled to, after the payments that were due been defaulted. Therefore it is seen that the procedure referred to in Order 88 of the High Court Rules does facilitate to cover an area that has not been covered by another Statute.

20. In the circumstances, it is our considered view that the provisions contained in the Order 88 of the High Court Rules 1988 should stand independent of the provisions contained in the Land Transaction Act. Furthermore, it is evident that there is no specific procedure is found in the Land Transaction Act, for such a remedial measure as well as to prevent the defaulters enjoying the property for which they are not rightly entitled to. In the event the mortgagee is to make an application for foreclosure before moving for an order under Rule 88, as Justice Inoke has determined, a mortgagor who had defaulted payments in terms of the agreement, would have an opportunity to enjoy the fruits of the property. In such a situation, the defaulter may continue to enjoy the property even though he/she is at fault. Such a proposition may not meet out the justice.
21. However, the terminology found in Rule 1(1) of the High Court Rules reads that ".....any person having the right to foreclose.....". Plain reading of this phrase denotes that mere right to foreclosure of the person, who is to make the application under Rule 88, would be sufficient to make an application under Rule 88. It does not mean that the persons referred to in the said Rule should have necessarily completed the registration of foreclosure according to law. In making an application under Rule 88, that person who makes the application should establish the position namely, "having the right" by adducing evidence by way of an affidavit. Therefore, it is clear that even the plain reading of the Section does not require the person who makes an application under Rule 88 to have that right enforced under the Land Transfer Act before making such an application.

Determination

22. In the circumstances, it is our considered view that the Appellant in this instance has the right to obtain possession of the mortgaged property in terms of Rule 1(1) of the Order 88 of the High Court Rules 1988. Hence, the Appellant need not take steps for foreclosure under the Land Transfer Act before making the application under the aforesaid Rule 1. However, this does not mean that a mortgagee who is making an

application under Rule 88 does not have the right to foreclose under the Land Transfer Act.

The Order

23. For the aforesaid reasons we;

1. set aside the judgment of the learned High Court Judge of Lautoka dated 09/04/10.
2. order that the Defendant and/or his servants and/or agents deliver to the Plaintiff of vacant possession of ALL THAT property comprised and described in Native Lease No. 25336 being Lot 91 aka Lot 17 on S.O. 1436 in the Island of Ba and District of Vitogo, having an area of 462sqm situated at Lot 9 Kaunitoni Street, Waiyavi Subdivision, Stage 4, Lautoka together with the improvements thereon.
3. issue an injunction restraining the Defendant and/or his servants and/or agents from interfering with the improvements on the said property in any way so as to deplete its value.
4. make no order as to the costs in this Court considering the circumstances of the case.
5. order that the costs of the application before His Lordship Justice Inoke in the High Court be paid to the appellant by the respondent.



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Hon. Justice Izaz Khan
Judge of Appeal

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Hon. Justice Kankani T. Chitrasiri
Judge of Appeal

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Hon. Justice Priyantha Fernando
Judge of Appeal