

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 216 of 2010

BETWEEN : FIJI DEVELOPMENT BANK of 360 Victoria Parade, Suva.
PLAINTIFF

**AND : ASENACA NATAGANE NAWAQALEVU aka ASENACA
NAWAQALEVU of 74 Domain Road, Suva, City Planner.**
DEFENDANT

BEFORE : Master Thushara Rajasinghe

COUNSEL : Mr. Nand M. for the Plaintiff
Mr. Hiware W. for the Defendant

Date of Hearing : 3rd September, 2014

Date of Ruling : 24th October, 2014

RULING

A. INTRODUCTION

1. This is the Summons filed by the Defendant pursuant to Order 20 rule 5 of the High Court Rules seeking following orders inter alia;
 - i. That the Defendant be granted leave to amend her amended statement of defence dated 24th of September 2010,
 - ii. That the cost of this application to cost in cause,

2. The Defendant filed an affidavit in support of this Summons, where he stated that he was advised by his present solicitor that the particulars of forced mortgage have to specifically plead. Alternatively the Defendant wanted to introduce the plea of set off the claim of the Plaintiff on the ground of alleged forced mortgage. He further deposed that the issue of forced mortgage is a new legal principle in Fiji and this proceedings will set a precedents on this issue of forced mortgage.
3. The Plaintiff filed an affidavit of Litia Lomalagi, the Acting Manager of the Asset Management Unit of Fiji Development Bank in opposition of this Summons. The Plaintiff's opposition is mainly founded on the issue of delay as this matter has now reached to the stage of trial. Mr. Lomalagi stated that the Defendant was previously represented by a reputed solicitor and had sufficient time to make necessary amendments if needed. Moreover, the Plaintiff deposed that the issue of forced mortgage has already pleaded in the statement of defense and has included as an issue to be determined in the minutes of pre-trial conference.
4. Subsequent to the filing of respective affidavits of the parties, the Summons was set down for hearing on 3rd of September 2014. The learned counsel for the Plaintiff and the Defendant made their respective oral arguments and submissions during the cause of the hearing. The learned counsel for the Defendant filed his written submissions at the conclusion of the hearing. Having considered the respective affidavits and submissions of the parties, I now proceed to pronounce my ruling as follows.

B. THE LAW AND ANALYSIS,

5. Order 20 rules 5 of the High Court rules has given the court a discretionary power to allow the Plaintiff or any other party to the proceedings to amend their pleadings at any stage of proceedings on such terms as to cost or otherwise as may be just and in such manner as it may direct.

6. Lord Keith of Kinkel in **Ketteman and others v Hansel Properties Ltd** (1988) 1 All ER 38 has discussed the principles of amendment of pleading in an inclusive manner, where his lordship has observed that

*“whether or not a proposed amendment should be allowed is a matter within the discretion of the judge dealing with the application, but the discretion is one that falls to be exercised in accordance with well-settled principles. In his interlocutory judgment of 10 December 1982, allowing the proposed amendment, Judge Hayman set out and quoted at some length from the classical authorities on this topic. The rule is that amendment should be allowed if necessary to enable the true issues in controversy between the parties to be resolved, and if allowance would not result in injustice to the other party not capable of being compensated by an award of costs. In **Clarapade & Co v Commercial Union** (1883) 32 WR 262 a 263 Brett MR said;*

The rule of conduct of the court in such a case is that, however negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by cost; but if the amendment will put them into such a position that they must be injured it ought not to be made”.

7. Having discussed the principles of amendment of pleadings, Lord Keith further elaborated the test of injury to the other side, where his lordship found that;

“the sort of injury which is here in contemplation is something which places the other party in a worse position from the point of view of presentation of his case that he would have been in if his opponent had pleaded the subject matter of the proposed amendment at proper time. If he would suffer no prejudice from the point of view, then an award of cost is sufficient to prevent him from suffering injury and the amendment should be allowed. It is not a relevant type of prejudice that allowance of the amendment will or may deprive him of a success which he would achieved if the amendment were not to be allowed”.

8. The legal principles of amendment of pleadings have discussed in **Reddy Construction Company Ltd v Pacific Gas Company Ltd** (1980) FJCA 9; (1980) 26 FLR 121(27 June 1980), where the Fiji Court of Appeal held that

“the primary rule is that leave may be granted at any time to amend on terms if it can be done without injustice to the other side. The general practice to be gleaned from reported cases is to allow an amendment so that the real issue may be tried, no matter that the initial steps may have failed to delineate matters. Litigation should not only be conclusive once commenced, but it should deal with the whole contest between the parties, even if it takes some time and some amendment for the crux of the matter to be distilled. The proviso, however that amendment will not be allowed which will work an injustice is also always looked at with care. So in many reported cases we see refusal to amend at a late stage particularly where a defence has been developed and it would be unfair to allow a ground to be changed”.

9. Justice Pathik while determining an application made under order 20 r 7 for amendment of other documents, which is also founded on the same legal principles as of this application held in **Fiji Electrical Authority v Suva City Council** (1994) FJHC2; Hbc0901d.84s (5 August 1994) that

“the guiding principle of cardinal importance, namely, that all such amendment ought to be made for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings”.

10. It appears from the above discussed judicial precedents, that the judicial approach in exercising its discretionary power on the issue of amendment of pleadings is founded on a wider objective liberal consideration of facilitating the parties to bring the real issues in controversy. As Lord Keith held in **Ketteman and others v Hansel Properties Ltd** (supra) the test of injustice to the other party is that to consider whether they are in a worse position in respect of presenting their case than they would have been in if their opponent had pleaded the proposed amendment at the proper time.

11. Turing in to this instance case, I have considered the Plaintiff's contention that the issue of forced mortgage has already been pleaded in the statement of defense. It has included as an issue to be determine in the minutes of pre-trial conference. In fact, the Defendant has pleaded that the Plaintiff failed to properly exercise its power of sale as the mortgagee; however, what she pleaded in paragraph 6 of the statement of defense is not precise. Moreover, it appears that plea of set off the claim of the Plaintiff on the ground of alleged forced mortgage has not pleaded in the filed statement of defense.
12. Having carefully considered the filed statement of defense, I find the defense has not properly presented as it is not precise, clear or particularized the defense. Hence, this proposed amendment would bring more clarity and preciseness to the defense of the Defendant, which certainly allows the parties to properly present their real questions in dispute more effectively.
13. Having determined the proposed amendment is required to properly determine the real issues in the dispute between the parties, I now turn to determine whether the allowance of this proposed amendment could cause injustice to the Plaintiff.
14. It is the main objection of the Plaintiff that this proposed amendment of force mortgage sale has already been pleaded and included as a disputed fact in the pre-trial conference minutes. Moreover, the Plaintiff contended that the delay of bringing this proposed amendment, though it does not specifically stated how such delay prejudicially affects the Plaintiff. Hence it is my conclusion that this proposed amendment does not place the Plaintiff in a difficult position from presenting its case than they would have been in if the Defendant had pleaded this proposed amendment at the proper time. Accordingly I hold that the Plaintiff could be compensated with a reasonable cost for the delay of presenting this proposed amendment.
15. In my conclusion, I make following orders that;
 - i. The Defendant is hereby granted leave to amend the statement of defense filed on 24th of September 2010,

- ii. The Defendant is ordered to file this proposed amended statement of defense in 14 days of this order,
- iii. The Plaintiff is awarded cost of \$1,000 assessed summarily,

Dated at **Suva** this **24th** day of **October, 2014**.



A handwritten signature in blue ink, consisting of stylized, overlapping loops and lines.

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R.D.R. Thushara Rajasinghe
Master of High Court, Suva