

IN THE HIGH COURT OF FIJI AT SUVA  
CIVIL JURISDICTION

Civil Action No. HBC 225 of 2015

BETWEEN : PARVEEN PRAKASH  
*Plaintiff*

AND : HOME FINANCE COMPANY LIMITED  
*First Defendant*

AND : AZIZ MOHAMMED  
*Second Defendant*

AND : THE REGISTRAR OF TITLES  
*Third Defendant*

AND : THE ATTORNEY GENERAL OF FIJI  
*Fourth Defendant*

Coram : The Hon. Mr Justice David Alfred

Counsel :

Date of Judgment : 1 December 2016

JUDGMENT

1. This is the Plaintiff's Originating Summons seeking the following relief:
  - (1) An order that the registration of Judgment No. 781375 (the Judgment) be extended until the final determination of this action.

- (2) A declaration that the Second Defendant has taken his interest in the property (land) comprised in Certificate of Title No. 14869 subject to the Plaintiff's interest secured by the Judgment.
- (3) That the Defendants pay the Plaintiff jointly or severally the sum secured by the Judgment.
2. The affidavit in support of the Plaintiff states, in essence, that the Judgment has been registered against the title to the land concerned and therefore when it was transferred to the 2<sup>nd</sup> Defendant, he acquired his interest in the land subject to the Plaintiff's interest pursuant to the Judgment.
3. The 1<sup>st</sup> Defendant in its affidavit in opposition affirmed by its General Manager Credit says the registration of a transfer by Mortgagee Sale cannot be forbidden by an encumbrance registered subsequent to the mortgage. In any event there was no surplus after the sale.
4. The 2<sup>nd</sup> Defendant in his affidavit in opposition states the land had been transferred to him and registered free from all encumbrances.
5. The affidavit in response of the Registrar of Titles on behalf of the 3<sup>rd</sup> and 4<sup>th</sup> Defendants states that a transfer by mortgagee sale was registered on the title of the property and the prior mortgage and 2 charges were discharged on the same day. The property was transferred free of encumbrances to its current proprietor. In accepting and registering the Transfer by Mortgagee, the 3<sup>rd</sup> Defendant complied with the order of court made on 13 October 2014, and registered as a court order on the title of the property, that the 3<sup>rd</sup> Defendant register any change of proprietorship of or any transfer made pursuant to the said mortgage. The said mortgage was registered prior to the registration of the Judgment.

6. The Master in his Ruling of 1 November 2013 stated section 104 (2) of the Land Transfer Act (LTA) provides a procedure to protect the interest of the judgment creditor ahead of any subsequent registration of estate or interest.
7. The Plaintiff's Counsel in his written submission contends that because the Judgment was registered against the title when the land was transferred to the 2<sup>nd</sup> Defendant, he acquired the land subject to the Plaintiff's interest under the Judgment. Counsel said the court could grant the necessary declaration pursuant to section 168 of the LTA.
8. The Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in his written submission avers that the Judgment registration is no longer in force as the property has been transferred and registered in the new owners (2<sup>nd</sup> Defendant) name free from any encumbrances and the Plaintiff had not appealed against the aforesaid ruling of the Master whereby he had ordered the Registrar of Titles to enter in the register any changes in the proprietorship or transfer made pursuant to the mortgage.
9. The written submission of the 3<sup>rd</sup> and 4<sup>th</sup> Defendants states that the Registrar of Titles was obliged to accept and register the transfer by mortgagee sale. Thereafter by virtue of the provisions of section 72 of the LTA, the property vested in the 2<sup>nd</sup> Defendant, freed and discharged from all liability, on account of the 1<sup>st</sup> Defendant's mortgage. The Registrar is not obliged to ensure that the proceeds of the mortgagee sale are applied properly because of the provisions of section 71 of the LTA.
10. The Plaintiff in his Response to the submissions of the Defendants submitted as follows:
  - (1) The Judgment No. 781375 was one regarding a payment of money.
  - (2) The Mortgagee (1<sup>st</sup> Defendant) was obligated under Section 81(c) of the Property Law Act to clear any encumbrances subsequent to the mortgage concerned. The Judgment was such an encumbrance.

- (3) The 1<sup>st</sup> Defendant was not restrained from selling the property but it was obliged to settle the encumbrance (the Judgment) otherwise the 2<sup>nd</sup> Defendant would have acquired an encumbered title.
11. By a Joint Memorandum of Counsel filed on 4 November 2016, Counsel for the Plaintiff, Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and Counsel for the 3<sup>rd</sup> and 4<sup>th</sup> Defendants, enclosed a photocopy of the sealed judgment of Mr Justice Brito – Mutunayagam dated 18 October 2016 in Civil Action No. 305 of 2012 wherein the present Plaintiff was the Plaintiff and the original joint owner/mortgagor of the property was the Defendant. The learned Judge held the Master had erred in dismissing the Plaintiff's summons for a sale of the property and allowed the Plaintiff's appeal. I take this to mean the Master should have ordered a sale of the property. The effect of this judgment is to reinstate the summons that was dismissed by the Master. However the Plaintiff has not explained why he took no steps to stay the Master's Ruling pending the hearing of the appeal, nor has he explained why it was necessary to file this separate Originating Summons.
12. In my opinion it is now no longer possible to the Plaintiff, nor is it open to this Court to grant an extension of the registration of the Judgment when it is known to the Court that the property has been sold/transferred to the 2<sup>nd</sup> Defendant. In any event this is redundant because Mr Justice Brito – Mutunayagam had on 10 December 2013 ordered the registration of the Judgment to be extended until further order of the Court. Since I have not been advised that any further order has been made, this means the registration is still on foot. Therefore the order sought in A. is not granted.
13. With regard to the relief B., the Plaintiff has not shown on what legal basis it can be said the 2<sup>nd</sup> Defendant has taken his ownership of the property subject to the Plaintiff's interest. In the first place the Plaintiff has only registered the Judgment against "one undivided half share" of the property (see annexure SC2, to the Affidavit in Response of the acting Registrar of Titles). In the second place Annexure SC1 thereto is a copy of the

title of the property which shows the registration on 26 February 2015 of the 2<sup>nd</sup> Defendant's name only with no notation

14. Section 39 of the LTA provides that the registered proprietor of any land holds the same absolutely free from all encumbrances. The exceptions of fraud, interest of a proprietor under a prior instrument of title and reservations etc contained in the original grant are not applicable. Therefore the Declaration sought in B. cannot be granted.
15. Finally the order in C. that the Defendants pay the Plaintiff the sum secured by the Judgment is obscure to say the least. The sale was not under the Judgment but under the mortgagee sale . The Plaintiff has not shown how and under what law he is entitled to ask the Court to order the Defendants to pay the Judgment sum. There is no provision under section 168 of the LTA to provide for this. All that section provides for is for the court to order the Registrar to cancel, correct etc. any instrument of title to give effect to the judgment or decree or order of such court. This is not what the Plaintiff is praying for. I therefore decline to grant the order sought.
16. In fine I dismiss the Originating Summons with costs which I summarily assess and order the Plaintiff to pay \$500.00 to each Defendant making a total of \$2,000.00.

Delivered at Suva this 1<sup>st</sup> day of December 2016.



David Alfred  
JUDGE  
High Court of Fiji