

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CIVIL JURISDICTION**

Civil Action No.: HBC 382 of 2018

**BETWEEN** : **NAMUKA BAY RESORT LIMITED** a duly incorporate company  
having its registered office at Saiyad & Associates, 3 Tukani Street,  
Lautoka.

**PLAINTIFF**

**AND** : **FJI DEVELOPMENT BANK** a body corporate duly constituted under  
the Fiji Development Bank Act, Cap.214 having its registered office at  
360 Victoria Parade, Suva in Fiji.

**DEFENDANT**

**Counsel** : **Plaintiff: Mr Anand Singh**  
**Defendant: Mr D. Sharma and Mr. S. Dev.**

**Date of Hearing** : **16<sup>th</sup> January, 2019**

**Date of Judgment** : **17<sup>th</sup> January, 2019**

**JUDGEMENT**

**INTRODUCTION**

1. The Plaintiff had filed this action along with an application for interim injunction, seeking the Defendant who is the mortgagee and holder of debenture over properties of the Plaintiff, from taking possession and or entering two land parcels covered in the mortgages. At the hearing the Plaintiff abandoned restraining order in relation to Native Lease No 28681 which is registered mortgage No 714545. So the remaining issue is the restraining order in relation to Approval Notice iTLTB Reference 4/11/39403(The Land). There was a previous lease granted to the Plaintiff under Agricultural Landlord and

Tenant Act, 1966 which had expired. There was a mortgage to Defendant, for the said expired lease. Since the expiration of the said lease, the classification of the Land had changed to Tourism, and only an agreement to lease was obtained by the Plaintiff. A lease was yet to be executed between the Plaintiff and iTLTB. The Defendant had registered a Mortgage for the Agreement to Lease with Registrar of Deeds and this had been consented by iTLTB. In a previous action, between the same parties consent orders were made to take possession of the 'mortgaged property known as Namuka Bay Resort' for the failure to comply with the payments under said order. In terms of the said consent orders, the Defendant had already obtained the possession of the two land parcels mortgaged to the Defendant. The Plaintiff is now alleging that the Land is not mortgaged in law.

### ANALYSIS

2. It is an admitted fact that the Defendant had already taken possession of the Plaintiff's two land parcels and evicted occupants and staff in default of the consent orders.
3. So the orders sought by the Plaintiff are in the nature of Mandatory Injunction from continuing possession of the Land under Agreement to Lease.
4. The Plaintiff at the outset abandoned restraining order in relation to Native Lease No 28681 and confined to following order contained in the *inter partes* summons for injunction:

'An injunction restraining the Defendant from entering or continuing to enter or being present or taking possession of or trespassing on the Plaintiff's property represented by an Agreement to Lease Reference iTLTB 4/11/39403, NATOKA, MALOMALO, NAIDIRI COASTLINE, NADROGA being Lot 01 SO5440 Nayibuku, at Namuka Bay commonly known as Namuka Bay Resorts and further either by itself or themselves their servants or agents or workmen or contractors or howsoever be restrained from advertising or carrying out by any means whatsoever a purported mortgage sale of the Plaintiff's above referenced property or promoting a purported mortgage sale of the property by private treaty and or in any way whatsoever interfering with the business and or operations of the Resort until further order of the Court.'
5. The Plaintiff is seeking restraining orders against Defendant in relation to the Land comprised in Agreement to Lease TLTB Ref No 4/11/39403.
6. The Plaintiff in the affidavit in support state that Agreement to Lease is 'an unregistered document and does not show any encumbrances endorsed'.
7. The Defendant in the affidavit in opposition stated that they obtained a mortgage over the Land described in the Agreement to Lease TLTB Ref No 4/11/39403.

8. The Defendant had annexed the said Registered Mortgage with the Registrar of Deeds marked UL 5 to the affidavit in opposition and this had been consented by TLTB.
9. The Application for consent of the mortgage of said Land was granted on 17.5.2013 by iTLTB (successor to TLTB) the trustees of the said land.
10. So, there is a valid mortgage registered under the law for the said Land, and allegation that there was no mortgage for the Land due to failure to obtain consent of iTLTB, hence Defendant cannot enter such land and take possession of the Land cannot accept.
11. Plaintiff consented to give possession of the mortgaged property in default of the payment, and the Defendant had lawfully exercised its right to possession.
12. The Defendant also holds Debenture over *'all its undertaking and all its property stock in trade book and other debts whatsoever present and future including its uncalled capital with the benefit of the securities for the same.'* in terms of the said Debenture.
13. So, the Defendant is legally entitled to take possession of all the properties in the Land irrespective of that land is yet to be leased and existence of only an agreement to lease.
14. The Plaintiff had failed to show a serious question to be tried, that warrant interim injunction to restrain the Defendant from taking possession of the properties stated in the Debenture and also under mortgage of the Land.
15. Without prejudice to above, the Plaintiff who had defaulted payments of the repayment installments of loans and also defaulted the consent orders. It is not in a position to compensate the Defendant who had exercised its legal rights as debenture holder and also as mortgagee. The Plaintiff had only given the Land that is subject to Agreement to Lease as security and it is obvious, that such security cannot be accepted.
16. The balance of convenience also favours the Defendant who had already entered the premises and obtained the possession in terms consent orders entered by the Plaintiff and Defendant in 2017. The Plaintiff who is already evicted by the Defendant in terms of the consent orders, not comparatively inconvenienced by not granting this injunction.

## CONCLUSION

17. Application for injunctive relief stated in prayer 1 in the summons for injunction is refused the orders sought in prayer 2 was abandoned at the hearing and accordingly that is also stuck off. The cost of this application is summarily assessed at \$2,500.

**FINAL ORDERS**

- a. The summons for injunction filed on 28.12.2018 is struck off.
- b. The cost is summarily assessed at \$2,500.

Dated at Suva this 17<sup>th</sup> day of January, 2019.



*Deepthi Amaratunga*  
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Justice Deepthi Amaratunga  
High Court, Suva