

IN THE HIGH COURT OF FIJI AT LAUTOKA

CIVIL JURISDICTION

Civil Action No. HBC 157 of 2020

BETWEEN

JOSEPH PRINCE and SUNEETA PRASAD of 8 Poona Place, Lautoka.

PLAINTIFFS

AND

**TAJMUL NISHA of Tuva, Lautoka, Domestic Duties, being the
Administratrix of the Estate of KASIM SABIR SAMAT.**

FIRST DEFENDANT

AND

HOME FINANCE COMPANY LIMITED Trading as HFC BANK

a limited liability company having its registered office at
371, Victoria Parade, Suva in the Republic of Fiji Islands
(hereinafter referred to as the "HFC").

SECOND DEFENDANT

Counsel : Mr. Zoyab M. for the Plaintiffs
Mr. Sing S. for the 1st Defendant
Mr. Lajendra N. for the 2nd Defendant

Date of Hearing : 17th January 2023

Date of Ruling : 08th February 2023

RULING

[1] The plaintiffs filed the originating summons seeking the following orders against the defendants:

- a) That the 1st defendant do execute all papers, notes, plans and memorandums to transfer the plaintiffs' interest in the estate of Kasim Sabir Samat pursuant to the Memorandum of Agreement dated 11th of September, 2017 comprised of 1 acre land in C.T. No. 34539, Lot 1 DP 9487 in the District of Ba, known as Teidamu.
- b) That the 1st defendant takes all actions that are required to transfer 1 acre of the freehold from C.T. No. 34539, Lot 1 DP 9487 in the District of Ba, known as Teidamu.
- c) That the 2nd defendant do grant and/or allow the 1st defendant to take all actions that are required to transfer 1 acre of freehold land in favour of the plaintiffs.
- d) That the costs of this action be on client solicitor basis.
- e) Any further or other orders as this Honourable Court may deem fit in the circumstances.

[2] The plaintiffs filed a notice of motion on 21st September 2022 seeking the following orders:

- a. That the application be expedited and abridged to 1 day due to the urgency in the matter.
- b. That the 2nd defendant be restrained by themselves, their servants or agents or whosoever from calling mortgage sale of residential property of Certificate of Title No. 34539 Freehold pursuant to transfer No. 517279 being the Crown Grant No. 1258, land known as TEIDAMU containing an area of Twenty Four Hectares Three Thousand One Hundred and Fifty square meters in the District of Ba, in the Island of Viti Levu being Lot 3 on DP 8497, until a further order of this Honourable Court.
- c. Alternatively, the 2nd defendant be restrained by themselves, their servants or agents or whosoever from calling mortgage sale of residential property of Certificate of Title No. 34539 Freehold pursuant to transfer No. 517279 being the Crown Grant No. 1258, land known as TEIDAMU containing an area of Twenty Four Hectares Three Thousand One Hundred and Fifty square meters in the District of Ba, in the Island of Viti Levu being Lot 3 on DP 8497, until a further order of this Honourable Court, until the Honourable Court deal with the Originating Summons being the substantive matter within this cause of action.
- d. That the costs of this action to be paid by the defendant.
- e. Any other orders that this Honourable Court may deem just and expedient.

[3] This application is for an interlocutory injunction against the plaintiffs until the final determination of the substantive matter. Before considering the facts and the background of the matter which led to the filing of this application I will consider in brief the law relating to interim injunctions. The following guidelines laid down in **American Cyanamid Co. v Ethicon Ltd** [1975] 2 W.L.R. 316, [1975] A.C. 396 by Lord Diplock, are often considered in granting or refusing an interim injunction:

- (i) Whether there is a serious question to be tried at the hearing of the substantive matter;

- (ii) Whether the party seeking an injunction will suffer irreparable harm if the injunction is denied, that is whether he could be adequately compensated by an award of damages as a result of the defendant continuing to do what was sought to be enjoined; and
- (iii) In whose favour the balance of convenience lie if the injunction is granted or refused.

[4] However, these guidelines cannot be considered as the substantive law of injunctions. Lord Diplock in his judgment also said:

[5] I would reiterate that, in addition to those to which I have referred, there may be many other special factors to be taken into consideration in the particular circumstances of individual cases.

[6] Kerr LJ in **Cambridge Nutrition Ltd v BBC** [1990] 3 All ER 523 at 534 said:

It is important to bear in mind that the American Cyanamid case contains no principle of universal application. The only such principle is the statutory power of the court to grant injunctions when it is just and convenient to do so. The American Cyanamid case is no more than a set of useful guidelines which apply in many cases. It must never be used as a rule of thumb, let alone as a straitjacket The American Cyanamid case provides an authoritative and most helpful approach to cases where the function of the court in relation to the grant or refusal of interim injunctions is to hold the balance as justly as possible in situations where the substantial issues between the parties can only be resolved by a trial.

In **Hubbard & Another v Vosper & Another** [1972] 2 Q.B. 84 Lord Denning in that case made the following observations:

In considering whether to grant an interlocutory injunction, the right course for a judge is to look at the whole case. He must have regard not only to the strength of the claim but also the strength of the defence, and then decide what is best to be done. Sometimes it is best to grant an injunction so as to

maintain the status quo until the trial. At other times it is best not to impose a restraint upon the defendant but leave him free to go ahead. The remedy by interlocutory injunction is so useful that it should be kept flexible and discretionary. It must not be made the subject of strict rules.

[7] For the court to consider whether there is a serious question to be tried at the hearing of the substantive matter there must be a cause of action disclosed against the party against whom the injunctive orders are sought.

[8] In this matter the only order sought against the 2nd defendant is;

That the second defendant do grant and / or allow the 1st defendant to take all action that is required to transfer 1 acre of freehold land in favour of the plaintiffs.

[9] There is no necessity for the court to maintain *status quo* because the order sought against the 2nd defendant is an order directing it to facilitate the plaintiffs to transfer the subject matter of this action to them. The learned counsel for the plaintiffs submitted that in deciding whether there is a substantive relief prayed for against the 2nd defendant the court can rely on the prayer (5) of the originating summons which reads as follows:

5. Any further or other orders as this Honourable Court may deem fit in the circumstances.

[10] This is not a prayer against a particular party. This is to facilitate the court to make orders in the interest of justice exercising its inherent powers. However, the court is not entitled to add a substantive relief that has not been pleaded.

[11] In this matter the mortgage over the Property had been registered in the year 2012 and the memorandum of agreement was entered into by the parties on 11th September 2017. It is therefore, clear that whatever the rights the plaintiffs have over the Property under the memorandum of agreement such rights are subject to the rights of the 2nd defendant under the mortgage.

[12] In *Kamal v Fiji Public Trustee Corporation Ltd* [2021] FJHC 44; HBC275.2019 (29 January 2021) a similar issue was heard by me in the High Court of Suva made the following observations which are relevant to the matter before this court;

... the mortgagee's rights under the mortgage take precedence over the rights of the plaintiffs under the sale and purchase agreement. The plaintiffs are not in a position to tell the 2nd defendant, the mortgagee, the manner in which it should recover the amount of money due under the mortgage.

[13] For the above reasons it is clear that the plaintiffs cannot restrain the 2nd defendant from exercising its rights under the mortgage.

ORDERS

1. Notice of Motion filed on 21st September 2022 is struck out and the orders sought therein are refused.
2. The plaintiffs are order to pay the 2nd defendant \$1000.00 as costs of this application.


Lyone Seneviratne

JUDGE



08th February 2023