

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 148 of 2019

BETWEEN: **SEPETI TAGILALA** and **SEREANA LEDUA TAGILALA** both of 6 Krishna Street, Tamavua Heights, Suva, both business consultants.

APPELLANTS/ PLAINTIFFS

AND: **JESONI VITUSAGAVULU** and **SILINA VITUSAGAVULU** both of 1502 November Circle, Silver Spring, Maryland USA, business consultant and homemaker respectively.

RESPONDENTS/DEFENDANTS

AND: **HOME FINANCE COMPANY PTE LIMITED** trading as **HFC BANK** a duty incorporated company having its registered office at 371 Victoria Parade, Suva, Fiji.

RESPONDENT/INTERESTED PARTY

BEFORE : **Hon. Justice Vishwa Datt Sharma**

COUNSEL: **Ms. Qioniwasa D. for the Appellant/ Plaintiff**

Mr. Vuluano A. for the 1st and 2nd Defendants

Mr. Lajendra N. for the Interested Party.

DATE OF DECISION: **25th of April, 2024**

DECISION

[Leave to Appeal the Interlocutory Ruling of Master of 14th October 2022 out of time, file and serve Notice and Grounds of Appeal and Stay of substantive proceedings]

Introduction

1. This is an application by summons coupled with an affidavit in support by the Plaintiffs seeking for the following orders:
 1. Leave be granted to the Plaintiffs to appeal the interlocutory Ruling of the Master of the High Court delivered on 14th October 2022 out of time;
 2. Leave be granted to file and serve Notice and Grounds of Appeal accordingly within 7 days from the grant of Order 1;
 3. Stay be granted both in the interim and until determination of this application and thereafter the Appeal on the Orders made in the Interlocutory Ruling of the Master delivered on 14th October 2022;
 4. Costs if this application be costs in cause; and
 5. Any other Orders that this Court deems just and expedient.
2. Learned Masters Decision delivered on 14th October 2022, had allowed HFC Bank's application for the Removal of the Plaintiff's caveat No. 872107 over certificate of title no. 32182 paving the way for HFC Bank to proceed with its mortgagee sale and in the same decision the Learned Master had disallowed the Applicant/Plaintiff's application to join HFC Bank as a Defendant in the within proceedings.
3. The application is made pursuant to ***Order 59 Rules 8, 9, 10, 11 and 16 of the High Court Rules 1988.***
4. The Defendants/Respondents did not file/serve any opposition affidavit. However, they made oral submissions at the hearing and opposed the Appellant's/Plaintiff's application.
5. The Interested Party filed an affidavit in opposition together with its written submissions and made oral submissions strongly opposing the Appellants/ Plaintiff's application seeking for the orders therein accordingly.

Material Facts

6. For the purposes of clarity and understanding, it is essential that I outline the material facts hereunder;

- The Defendants in 2004 obtained a loan of \$210,000 from HFC Bank to purchase Certificate of Title No. 18272, refinance ANZ home loan in respect of Certificate of Title No. 32182 and Extension of the said property [CT No. 32182].
 - In 2005 the Defendants sought additional loan of \$46,500 in the Existing loan with the HFC Bank and the Certificate of Title No. 32182 continued to be held as a Mortgage security against the additional loan of \$46,500. The Defendants defaulted the loan repayments and remained in arrears.
7. The Defendants informed the HFC Bank that the Plaintiffs were interested in purchasing their property Certificate No. 32182 and sought for some time.
 8. The HFC Bank allowed the Defendants time to sell Certificate No. 32182 and utilize the sale proceeds to pay off their debt with the HFC Bank.
 9. A demand notice under the mortgage dated 19/8/2019 was issued to the Defendants.
 10. The potential sale of the property of the Certificate of Title No. 32182 by the Plaintiff's to the Defendant's dragged over a considerable years and the Defendants outstanding debt with HFC Bank continued to accrue.
 11. HFC Bank Contemplated exercising its Mortgagee powers and rights in order to recover the outstanding debt from the Defendants. The Caveat on Certificate of Title No. 32182 on HFC Bank's application was removed by the Court Order. However, whilst contemplating to proceed its mortgagee powers to sell the said property, the Plaintiff's continued to resist by not giving Vacant Possession.
 12. On HFC Bank's application to Court seeking for Vacant Possession pursuant **to order 88 of the High Court Rules 1988**, the Court delivered its Judgment on 19th July 2023 acceding and granting an order for Vacant Possession against the Defendants.
 13. Subsequently, a writ of possession was issued and executed to vacate Certificate of Title No. 32182.
 14. The Caveat removed by the Court Order showed that the caveatable interest of the Plaintiff's related to a Sale and Purchase Agreement of 02nd November 2017 between the Plaintiff's and the Defendants. HFC Banks Mortgage No. 548572 was registered on the Certificate of Title No. 32182 since 13th August 2004. What this registration indicated was that HFC Bank's interest of 13th August 2004 ranked above the purported interests of the Plaintiffs of 02nd

November 2017. This was the very reason and rational on which the Court allowed for the removal of the Caveat on Certificate of Title No. 32182.

15. The Court also held that there was no basis for any cause of action identified and pursued by the Plaintiff's against the HFC Bank.
16. Further, the relief was not identified that was being sought by the Plaintiff's therein and had no basis or any rational to join HFC Bank as a party to this proceedings.
17. Therefore, the Court dismissed the application for HFC Bank to be joined as a Defendant to the current proceedings.

Analysis and Determination

18. It is noted from the Court Records that the Learned Master's Decision delivered on 14th October 2022 dealt and determined with the following two (2) application:

Plaintiff's application

- (i) **Notice of Motion filed by the Plaintiff's** on 02nd October 2020 wherein the Plaintiff's sought to join **HFC Bank Pte Limited** as the **2nd Defendant to this proceedings**, and further orders to restrain the proposed 2nd Defendant from selling or in any way dealing with the 1st Defendant's property Certificate No. 32182 and restraining it further from advertising for mortgagee sale until the final determination of the within substantive matter; AND

Interested Party's Application

- (ii) **Interested Party's Application, HFC Bank Pte Limited summons for discharge of Caveat dated 29th October 2020. Interested Party, HFC Bank sought for discharge of the Court Order made on 22nd May 2019, extending the caveat no. 872107 on Certificate of Title No. 32182, Lot 6 on Deposited Plan No. 8213.**
- (iii) The Plaintiffs/Applicants Summons of 16th November 2022 is filed pursuant to **Order 59 Rules 8, 9, 10, 11 and 12 of the High Court Rules 1988.**
- (iv) **Order 59, Rule 8 (2) provides:**

'No appeal shall lie from any, Interlocutory Order or Judgment of the Master to a single Judge of the High Court without the leave of a single Judge of the High Court which may be granted or refused upon the papers filed.'

The Plaintiff/ Appellant seeks for grant of leave to appeal the Interlocutory Ruling of the Master delivered on 14th October 2022, out of time.

- (v) Order 59, Rule 9 (6) deals with time for Appealing an Interlocutory Order or judgement within 7 days from the date of the granting of Leave to Appeal.

The Plaintiffs/Applicants admitted that their Summons was filed 10 days late.

- (vi) **Order 59, Rule 10 deals with Extension of time for enlargement of time period may be made to the Master before the expiration of that period and to a single Judge after the expiration of that period**

- It is noted that there was no application or Inter-parte Summons filed before the Learned Master seeking for Enlargement and/or Extension of time pursuant to Order 3 Rule 4(1) of the High Court Rules, 1988.

- Order 3 Rule 4(1) provides-
4(1) The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these rules, or by any judgment, order or direction, to do any act in any proceedings.

- (vii) **Order 59, Rule 11** deals with Application for Leave to Appeal.

The application to be made by Summons, filed and served within 14 days of the delivery of order or judgment.

- (viii) **Order 59 Rule 16** deals with Stay of proceedings or Execution.

- (ix) It can clearly be ascertained that neither **Order 59, Rule 8 (1) nor Order 59, Rule 10(1) of the High Court Rules, 1988** allows the High Court to grant the Extension of time for Leave to Appeal against an interlocutory decision. However, Order 59 Rule 11 deals with the Leave to appeal and there is no Mention of enlargement of time regarding such application for enlargement of time [out of time].

19. It is the general provision contained in **Order 3 Rule 4 of the High Court Rules 1988** that should be relied upon for the summons filed on 16th November 2022 by the Plaintiffs/Appellants that is seeking Appeal out of time against the Master's Ruling of 14th October 2022.
20. One of the substantial relief sought by the Plaintiffs/ Appellants in their Summons of 16th November 2022 are;
 - (i) **Leave to appeal the Interlocutory Ruling** of the Master delivered on 14 October 2022 **out of time** [In other words to Extend the time to allow Leave to appeal the Interlocutory Decision].
21. The Appellants application by Summons filed on 16th November 2022 should have been filed in terms of **Order 3 Rule 4 of the High Court Rules 1988** and not under **Order 59 Rule 8, 9, 10, 11 and 16 of the High Court Rules 1988** as is the case in the current proceedings.
22. Further, the law in this area is well settled wherein certain factors needs to be applied and taken into consideration in exercising Courts discretion '**whether to grant Leave for enlargement of time to appeal or not.**'
23. The onus rests on the Appellants/ Plaintiffs to satisfy the Court that in all circumstances the justice of the case requires that he be given an opportunity to appeal out of time against the Decision he wishes to Appeal.
24. In **Ist Deo Maharaj v Burns Philip (South Sea) Company Ltd**, Civil Appeal No. ABU 0051 of 1994S citing the Judgment of **Norwich and Peterborough Building Society v steed** (199) 2 All ER880 CA it was said -
 - 'The Court has unfettered discretions in the grant on refusal of Leaves. The factors which are normally taken into account in deciding whether to grant an extension of time are:
 - [a] Length of delay;
 - [b] The Reason for delay;
 - [c] Whether there is any merit in the proposed grounds of Appeal; AND
 - [d] Whether the other party will be prejudiced unfairly if time is enlarged.
25. I have considered both the oral and the written submissions before this Court. I intend to deal with this application in terms of the following factors:

The Reason and length of Delay.

26. Learned Masters Decision was delivered in the following two (2) interlocutory applications on 14th October 2022.
- (a) Ex-Parte Notice of Motion of 02nd October 2020 seeking for HFC Bank to be joined as an Interested Party; AND
 - (b) Summons of 30th October 2020 seeking for the Discharge of the Caveat order made on 22nd May 2019 extending Caveat No. 872107 on Certificate of Title No, 32182.
27. The Appellant Plaintiff's filed their Summons for Leave to appeal the Interlocutory Decision of 14th October 2022 on 16th November 2022, after approximately one (1) month and two (2) days out of appeal timeframe.
28. The Counsel representing the Appellant/ Plaintiff's in her oral submissions admitted that the summons was seeking for Leave to Appeal out of time. According to the Interested Party, HFC Bank, the length of the delay in this case is 6 months.
29. The Appellant/Plaintiff's affidavit in support deposed the reasons for delay that they were seeking legal advise from other counsel whether it was worthwhile to proceed with the appeal and then got back to their own counsel making a decision to file the current leave to appeal out of time, summons against the Master's Decision.
30. I find that the delay in making a decision to Appeal the Interlocutory Decision of the Master or not in terms of the High Court Rules was rather inordinate and inexcusable. Further, the rational to seek legal advice from another Counsel rather than his current counsel is not acceptable to this Court since he had already engaged a counsel to represent him in the current proceedings in Court.

Merits of the Appeal

31. There is no draft of the Amended Statement of Claim proposing its intended cause of action against the HFC Bank and to be joined as a party to the current proceedings enclosed or annexed in support of the Appellants/Plaintiff's summons for leave to appeal out of time. Further, reference in the like is made to Learned Master's Decision at paragraph 10 wherein she said:-

'The Plaintiff's in their Affidavit in Support have not identified the Cause of Action it has against HFC Bank and what relief, if any, it seeks against HFC Bank.'

32. The Appellant/ Plaintiff's failure to show any cause of action against the HFC Bank as the proposed party to the proceedings and/or what relief it seeks from the party it intends to join. Therefore, the current proceedings tantamount to be fatal in the circumstances.
33. I have perused the formulated draft grounds of the Appellant/Plaintiffs Appeal. None of the grounds stated therein stands out and/or shows and/or raises any meritorious point that allow me to accede to the Appellant/Plaintiff's summons seeking for Leave to Appeal Learned Master's Decision of 14th October 2022 out of time.
34. During the Appeal hearing, I gathered that the property, Certificate of Title No. 32182 has now been sold after the Court granted the order for the Discharge and Removal of the Caveat from the property.
35. This Court ascertained from the Caveat No. 872107 over Certificate of Title No. 32182 that the Appellants/Plaintiffs caveatable interest in the property related to a sale and purchase Agreement dated 02nd November 2017 between the Plaintiff's and the Defendants.
36. HFC Banks mortgage no. 548572 was registered on the Certificate of Title No. 32182 on 13th August 2004.
37. Therefore, HFC Bank was affected by the Court Order that had extended the Caveat registered over that property Certificate of Title No. 32182 and rightfully applied for its removal and the Court accordingly grant the removal and/or discharge of the Caveat.
38. Accordingly, the Learned Master found that there was no Amended Statement of Claim raising any Cause of Action and/or what relief was being sought by the Appellants/Plaintiffs from the interested party HFC Bank, therefore, the Learned Master had no alternative but proceeded to dismiss the application for HFC Bank to be joined as a Defendant to the current substantive proceedings.
39. The Appellant/Plaintiff's remedy does not lie against the HFC Bank nor does the Appellants/Plaintiffs have any contractual relationship with HFC Bank. If any, it is with the Defendants since the Appellants/Plaintiffs and the Defendants entered into a Sale and Purchase Agreement of the said property knowing that the said property Certificate of Title No. 32182 was already under mortgage to HFC Bank and that the Plaintiffs were in substantial debt to the HFC Bank. Therefore, HFC Bank's mortgage rights under the said mortgage no. 548572 will take precedent over any rights of the Appellant/Plaintiff's under the Sale and Purchase Agreement executed therein.
40. In the circumstance, the draft grounds of Appeal filed herein which is formulated as a basis to seek an order for leave to Appeal out of time is doom to fail.

41. I do not find any meritorious grounds of Appeal in order to accede to the Appellant/Plaintiff's Summons seeking for orders therein.

Prejudice to the Bank

42. HFC Bank as the Mortgagee of the Certificate of Title No. 32182 will suffer substantial prejudice in the form of costs due to this protracted litigation brought by the Petitioners/Plaintiffs. So far HFC has already suffered significant costs in applications seeking to be joined as an Interested Party to this proceedings, seek an order for discharge of the Extension of the Caveat on the said property and the petitioners/Plaintiffs refusal to give vacant possession of the said property.
43. All these applications filed was vigorously contested by the Appellants/Plaintiffs which caused significant costs to HFC Bank and now the costs is being further exacerbated by the Petitioners/Plaintiff's summons before this court seeking for Leave to Appeal the Interlocutory Decision out of time and stay of proceedings accordingly.
44. I find the prejudice factor against the interested party, HFC Bank.

In Conclusion

45. The Petitioners/Plaintiffs application (Summons) seeking for extension of time is devoid of any merit for the reason stated hereinabove.
46. Accordingly, I find no merit in the Petitioners/Plaintiffs draft grounds of Appeal and hence to accede and/or grant the Petitioners/Plaintiffs application seeking for Extension of time for Leave to Appeal the Interlocutory Decision of the Learned Master.
47. Therefore, the Petitioners/ Plaintiffs Summons on 16th November 2022, seeking for the Orders therein in its entirety is accordingly dismissed.

Costs

48. The Summons seeking for Leave to Appeal out of time and stay of proceedings rather proceeded to full hearing and parties filing and furnishing Court with their respective written submissions and oral arguments.
49. The Petitioners/Plaintiffs to pay the Interested Party HFC Bank, a total summarily assessed cost of \$2,000 within 14 days' time frame.


50. For the aforesaid reasons, following are the final orders of this court:

Orders

- (i) Leave to Appeal out of time of the Interlocutory Decision of Learned Masters Decision of 14th October 2022 in its entirety is dismissed.
- (ii) Petitioners/Plaintiffs to pay the Interested Party HFC Bank, a summarily assessed costs of \$2,000 within 14 days' time frame.

Dated at Suva this 25th day of April, 2024.




Vishwa Datt Sharma
PUISNE JUDGE

**CC: MESSRS O'DRISCOLL & COMPANY, SUVA
LAJENDRA LAWYERS, SUVA
SIWATIBAU & SLOAN LAWYERS, SUVA**