

IN THE HIGH COURT AT SUVA CENTRAL DIVISION

CIVIL JURISDICTION

HBC 328 of 2023

BETWEEN:

AUSTRALIA NEW ZEALAND BANKING

PLAINTIFF/APPLICANT

AND:

**ANARE NADAGURA NAKAUNICINA AND ADI
LALABALAVU MEREANI LATIANARA**

DEFENDANT/RESPONDENT

Date of Hearing : 12 August 2024

For the Plaintiff/Applicant : Mr Kumar. E

For the Defendant/Respondent : Not Present

Date of Decision : 30 September 2024

Before : Waqainabete - Levaci, S.L.T.T, Puisne Judge

J U D G E M E N T

***(APPLICATION FOR MORTGAGEE POWER OF SALE UNDER ORDER 88 OF THE HIGH COURT
RULES)***

PART A - BACKGROUND

1. The Plaintiff are Bankers who entered into a loan agreement with the Defendants. In fulfilment of the loan agreement, the Defendants mortgaged the property (registered on 8 August 2018) described as Certificate of Title No. 21303 being Lot 37 on Deposited Plan No. 4987 in the District of Naitasiri, on the Island of Viti Levu known as 'Nakasi' having an area of 17.9 perches together with improvements thereof charged under the Mortgage No. 865232.
2. On default of payment, the Plaintiff's lawyers issued Demand Notice dated 17 November 2021 served on the Defendants seeking payment outstanding to On Hundred and Eighty Four Thousand, Eight Hundred and Sixty Eight Dollars Sixty Seven Cents (\$184, 868.67).
3. On 9 March 2023 a Notice to Vacate was issued to the Defendants in order for the Plaintiff to exercise their powers as Mortgagee to sell the property. However the Plaintiff was unable to serve as the address of the Defendants were unknown. However they were informed verbally over the telephone.
4. Thereafter the Plaintiff exercised their power of mortgagee sale and sold the property to Umeshwar Avikash Ram and Rajinita Ram for Two Hundred and Twenty Thousand Dollars (\$220,000.00).
5. The following Orders are sort by the Plaintiff:
 - a) Delivery by the Defendants, their families, agents or employees to the Plaintiff of vacant possession of all that piece or parcel of land comprised and described in Certificate of Title No. 21303 being being Lot 37 on Deposited Plan No. 4987 in the District of Naitasiri, on the Island of Viti Levu known as 'Nakasi' having an area of 17.9 perches together with improvements as charged by the Defendants to the Plaintiff by Mortgage No 865232 on 8 August 2018 to secure monies therein mentioned;
 - b) That the Defendants, their families, servants, agents and employees be restrained from in any way damaging, removing or interfering with the improvements on the said property in any way so as to diminish its value.
6. Despite all the original applications being served, there was no appearances by the Defendants in person nor did they instruct a Counsel to appear on their behalf.
7. The matter was therefore affixed for hearing in accordance with the requirements under Order 88 of the High Court Rules.

Part C: LAW AND ANALYSIS ON THE APPLICATION

8. The Plaintiff relies upon Order 88 Rules (1) and (3) of the High Court Rules. It stipulates as follows:
 1. (1) This Order applies to any action (whether begun by writ or originating summons) by a mortgagee or mortgagor or by any person having the right to foreclose or redeem any mortgage, being an action in which there is a claim for any of the following reliefs, namely –
 - (a).....
 - (d) delivery of possession (whether before or after foreclosure or without foreclosure) to the mortgagee by the mortgagor or by any other person who is or is to be in possession of the property.”
9. In Rule 3 Sub-Rule (2) and (3) of Order 88 of the High Court Rules reads:

“(2) The affidavit must exhibit a true copy of the mortgage and the original mortgage or, in the case of a registered charge, the charge certificate must be produced in the hearing of the summons.

(3) Where the Plaintiff claims delivery of possession the Affidavit must show the circumstances under which the right to possession arises and, except where the Court in any case or class otherwise directs, the state of the account between the mortgagor and mortgagee with particulars of –

(6) A copy of any exhibit to an affidavit need not accompany the copy of the affidavit served under para (2) or (4).

(7) Where the plaintiff gives notice to the defendant under Order 3, rule 5, of his intention to proceed, serve of the notice, and the manner in which it was effected, may be provide by a certificate signed as mentioned in paragraph (5).

(4) Where the Plaintiff claims delivery of possession, the affidavit must give particulars of every person who to the best of the plaintiff’s knowledge is in possession of the mortgaged property.”
10. The High Court Rules provides stringent processes for a Mortgagor or Mortgagee seeking relief from the Court. The Rules puts the Plaintiff to proof. The burden on the Plaintiff is to prove the circumstances for which the right of possession arises.
11. There must be evidences of proper notifications being served for the reasons for possessions and notification to vacant premises failure for which court proceedings will follow.
12. Order 88 of the High Court Rules also requires the Plaintiff, by Affidavit, to show evidence of the existence of a registered mortgage against the said property for which they now seek possession of.

13. The statutory provisions to exercise Mortgagee power is provided for in sections 75, 76, 77, 78 and 79 of the Property Law Act by a Mortgagee.
14. The exercise of these powers is triggered by the default of the Mortgagor to make payments to his or her mortgage secured against the property, thereby falling into arrears. They are as follows:

Mortgagee may, after default, enter into possession

75. A mortgagee, upon default in payment of the mortgage money or any part thereof, may enter into possession of the mortgaged land by receiving the rents and profits thereof or may distrain upon the occupier or tenant of the said land for the rent then due.

Further powers of mortgagee as to receipt of rent, etc.

76. Whenever a mortgagee gives notice of his demand to receive the rents and profits of the mortgaged land to the tenant or occupier or other person liable to pay on account of the rents and profits thereof, all the powers and remedies of the mortgagor in regard to receipt and recovery of and giving discharges for such rents and profits shall be suspended and transferred to such mortgagee until such notice be withdrawn or the mortgage is satisfied and a discharge thereof duly registered, and in every such case the receipt in writing of the mortgagee shall be sufficient discharge for any rents and profits therein expressed to be received, and no person paying the same shall be bound to inquire concerning any default or other circumstance affecting the right of the person giving such notice beyond the fact of his being duly registered as mortgagee of the land:

Provided that nothing herein contained shall interfere with the effect of any rule, order or judgment of the court in regard to the payment of rent under the special circumstances of any case, nor shall prejudice any remedy of the mortgagor against the mortgagee for wrongful entry or for an account.

Mortgagor in default

77. If default is made in payment of the mortgage money or any part thereof, or in the performance or observance of any covenant expressed in any mortgage or in this Act declared to be implied in any mortgage, and such default is continued for one month or for such other period of time as is in such mortgage for that purpose expressly fixed, the mortgagee may serve on the mortgagor notice in writing to pay the mortgage money or to perform and observe the covenants therein expressed or implied, as the case may be.

Notice not required when money payable on demand

78. Where money secured by a mortgage is made payable on demand, a demand in writing pursuant to the provisions of the mortgage shall be deemed to be the notice in writing to pay the money owing provided for by section **77**, and no other notice shall be required to create the default in payment mentioned in section **79**.

Mortgagee may sell

79. -(1) If default in payment of the mortgage money or in the performance or observance of any covenant continues for one month after the service of the notice referred to in section **77**, the mortgagee may sell or concur with any other person in selling the mortgaged property, or any part thereof, either subject to prior leases, mortgages and encumbrances or otherwise, and either together or in lots, by public auction or by private contract, or partly by the one and partly by the other of those methods of sale, and subject to such condition as to title or evidence of title, time or method of payment of the purchase money or otherwise as the mortgagee thinks fit, with power to vary any contract for sale and to buy in at any auction or to vary or rescind any contract for sale and to resell without being answerable for any loss occasioned thereby, with power to make such roads, streets and passages and grant such easements of right of way or drainage over the same as the circumstances of the case require and the mortgagee thinks fit, and may make and sign such transfers and do such acts and things as are necessary for effectuating any such sale.

(2) No purchaser shall be bound to see or inquire whether default has been made or has happened, or has continued, or whether notice has been served, or otherwise into the propriety or regularity of any such sale.

(3) Where a transfer is made in purported exercise of the power of sale conferred by this Act, the title of the transferee shall not be impeachable on the ground that no cause had arisen to authorize the sale or that due notice was not given or that the power was otherwise improperly or irregularly exercised, but any person damnified by any unauthorized or improper or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

15. This reaffirms the common law rights of possession as stated in Western Bank Ltd –v- Schindler 1 [1971] CH pg 1-26 Buckley JJ stated:

“It was common ground before him, as it has been to this court, that a legal mortgagee, which the plaintiffs has a right to possession at any time, irrespective of default on the Mortgagors part, unless the parties agree otherwise: see *Four-Maids Ltd –v- Dudley Marshall (Properties) Ltd [1957] Ch, 317.*

A legal mortgagee’s right to possession is a common law right which is an incident of his estate in the land. It should not, in my opinion, be lightly treated as abrogated or restricted. Although it is perhaps most commonly exercised as a preliminary step to an exercise of the mortgagees power of sale, so that the sale may be made with vacant possession, that is not its only value to the mortgagee. The mortgagee may wish to protect his security: see *Ex parte Wickens [1898] 1 Q.B 543, 547 and 549.* If for instance, the mortgagor were to vacate the property, the mortgagee might wish to take possession to protect the place from vandalism. He might wish to take possession for the purpose of carrying out repairs or to prevent the waste. Where the contractual payment date for repayment is unusually long delayed as it was in this case, a power of this nature to protect the security might well be regarded as of particular value to the mortgagee.

Taking possession may be tantamount to demand payment in the context of the question whether the mortgagee can therefore insists notice to redeem which was the question in *Bovill –v- Endle [1896] 1 C 648.* It would be an obvious inequity if the mortgagor could be turned out without an immediate right to resist this or recover possession by redemption. By way of contrast, for reasons already indicated, a right to possession does not seem to me to be inconsistent with a postponed redemptive date, particularly when the date is long postponed, and I seen no equitable grounds for thinking that such a right would bear unfairly on the mortgagor if, as is in this case, possession cannot be used as a mere stepping stone to a sale with the vacant possession unless and until some event has occurred which makes the power of sale available to the mortgagee. Until such event occurs, the right to possession can only be exercised to protect security, not as a means of enforcing it. As soon as a power of sale is available to him, the mortgagee certainly be free to exercise his right to possession unless he has most clearly bound himself not to do so.”

16. The essence of the common law right of possession is to ensure that the property is secured. The common law right of possession enables the mortgagor the right of redemption by enabling the Court to also grant a long postponed date to exercise the right of possession.
17. This does not tantamount to enabling a sale immediately thereafter unless the redemptive rights have not been exercised. However the common law does not specify the time period in which to delay sale by the Mortgagee in liue of the redemptive rights.
18. The Property Law Act of Fiji enables the mortgagee to sell the property on default of payments.
19. Therefore in Housing Authority -v- Inoke Tutuivalu HBC 26 of 2010 Wati J granted the application for mortgagees right of possession after having provided evidence of arrears of payment.

20. Having considered the Affidavit, which deposes the arrears owing by the Mortgagor, the notifications duly served or annexed on the front door of the property and appends copies of the originals of the Mortgage Document and the Certificate of Title containing the endorsements, the court is satisfied.
21. The Mortgagor has failed to make payments at all nor attempted to appear in Court despite being duly served with notification.
22. There is proven circumstances for which the Mortgagee should exercise their powers of possession and the Court will grant accordingly.
23. Given the circumstances in which the matter has now reached the Court, the Court will award costs summarily assessed to the Plaintiff.

PART D: Orders of the Court:

24. The Court orders as follows:

- (a) **Delivery by the Defendants, their families, agents or employees to the Plaintiff of vacant possession of all that piece or parcel of land comprised and described in Certificate of Title No. 21303 being Lot 37 on Deposited Plan No. 4987 in the District of Naitasiri, on the Island of Viti Levu known as 'Nakasi' having an area of 17.9 perches together with improvements as charged by the Defendants to the Plaintiff by Mortgage No 865232 on 8 August 2018 to secure the monies therein mentioned;**
- (b) **That the Defendants, their families, servants, agents and employees be restrained from in any way damaging, removing or interfering with the improvements on the said property in any way so as to diminish its value.**
- (c) **Costs to the Plaintiff for the sum of \$800.**




Justice Senileba Waqainabete-Levaci
Pusine Judge
30th September 2024