IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

HBC 21 of 2023

BETWEEN : **FIJI DEVELOPMENT BANK**

ORIGINAL PLAINTIFF/ RESPONDENT

A N D : **SAMSERUN NISHA TOGETHER WITH HER AGENTS AND / OR SERVANTS** of Saweni, Lautoka.

ORIGINAL DEFENDANT / APPELLANT

Appearances: Mr. Lajendra N. for the Plaintiff
Ms. Chand A. for the Defendants

Date of Hearing: 11 June 2024

Date of Ruling: 09 April 2025

R U L I N G

1. What is before me is a *Summons for Leave to Appeal* dated 26 August 2024 filed by Anishni Chand Lawyers. The Summons seeks the following Orders:

   (i). that the above-named Appellant be given Leave to Appeal the decision of the Master delivered herein on 05 March 2024;

   (ii). that the Appellant be granted an extension of time (if required) to file and serve this application for Leave;

   (iii). that the Appellant be given 21 days to file and serve the Notice and Grounds of Appeal from the date of the Order granting Leave;

   (iv). that there be a Stay of these proceedings pending the determination of the Appeal;

   (v). the costs of this application be costs in the cause;

   (vi). any other Orders this Court may deem just and equitable.

2. As one can see from the above, the impugned decision was handed down by the Learned Master on 05 March 2024. He ordered as follows:

   (a). the defendant and or her agent and or servant and or all her family members are to deliver the vacant possession of the subject property to the plaintiff immediately.

   (b). the defendant and or her agent and or servant and or all her family members are restrained from removing the improvements of the subject property in a way so as to deplete its value.

   (c). the police assistance is granted for execution of writ and for peaceful handing over of possession of the subject property to the plaintiff, and

   (d). the defendant should pay a summarily assessed cost in sum of $2,000 to the plaintiff within a month from today.

3. Before the Master was an *Originating Summons (Expedited Form) for Vacant of Possession by Mortgagee.* It was filed on 09 February 2023 pursuant to Order 88 Rule 1 (1) (d) of the High Court Rules 1988. The Summons was filed by Lajendra Lawyers for and on behalf of the Fiji Development Bank (**"FDB"**). It had sought the following orders:

   (i) delivery by the defendant to the plaintiff of vacant possession of **ALL THAT** property comprised and described in:

   i-TAUKEI LEASE No. 32804 *being Veibona Subdivision Lot 1 on SO 5720 situated in the Tikina of Vuda and Province of Ba, having an area size of 4432 square meters* (**"lease"**).

   (ii) an injunction to restrain the defendant from interfering with the improvements on the lease in any way so as to deplete its value.

   (iii) cost of the application; and

   (iv) such further orders the Court may deem just and appropriate.

4. The Summons was supported by an affidavit of one Mr. Ram Sewak Chand (**"Chand"**) sworn on 08 February 2023. Chand had deposed that the lease is registered in the name of the late Mr. Hasmat Ali who died on 07 December 2019. Ali had obtained a loan with FDB for the amount of $594,025.00 in 2006. The term was five years with an interest rate of 12% per annum - variable.

5. As security, Ali granted a mortgage dated 08 February 2007 to FDB (Mortgage Registration No: 836707).

6. After that first borrowing, Ali would obtain three other loans from FDB. He took these on 10 December 2007, 29 May 2015 and on 21 January 2016. At some point, Ali's loan accounts started to fall into arrears. This prompted FDB to send notices and demand letters to Ali's estate. However, the arrears remained unsettled for a long time. FDB then proceeded to advertise for mortgagee-sale.

7. According to Chand, FDB had already accepted an offer.

8. FDB then served Nisha an *Eviction Notice* on 22 December 2022. However, Nisha has stayed put on the lease.

9. Chand had stated before the Master that all three loans to Ali are secured by the mortgage which Ali gave. As at 31 July 2023, the total arrears on the three accounts were as follows:

Loan Account No: 16975	**Loan Account No: 151700**	**Loan Account No: 151411**
$166,803.34	$135,632.97	$536,749.65

10. The defendant, Ms. Samseerun Nisha (**"Nisha"**), by her affidavit in opposition which she swore an on 20 April 2023, said that Ali's estate is, yet, un-administered due to a caveat. She wishes to continue the business which Ali was running on the property to keep his legacy alive. She is willing to pay off the loan. However, the FDB would not listen.

11. By an affidavit in reply sworn on 02 May 2023, Chand said that the arrears and interest on the three loans has escalated due to the continuing default. The entire loan is now payable on demand. FDB is entitled as such to pursue a mortgagee-sale in order to manage its credit and/or debt exposure.

12. Nisha swore an affidavit on 28 April 2023. At paragraphs 3 to 8, she had deposed as follows:

(i) that after her husband died, FDB advised her about the loan and arrears. She then started to make the loan repayments.

(ii) while FDB claims to have accepted an offer to purchase the property following its advertisements, it has not annexed any sale and purchase agreement with the purported successful tenderer.

(iii) her son is operating his own business on the property. His business assets exceeds $250,000.00.

(iv) when her son attempted to remove his business assets from the premises, he was stopped by FDB's Security Officers.

(v) she has lived on the property for the past thirteen years with her four children. They have sufficient interest on the property and are there lawfully.

(vi) she has applied for probate over Ali's estate. The application is currently being processed.

(vii) she has been making the loan repayments and she intends to continue the business. **She prays to be given some time to pay off the remaining loan balance.**

(viii) she pleads to be allowed to operate the business so she can pay off the loan. This was Ali's dream. Together, she and Ali had built it from scratch.

13. All the above provide context to the Master's decision of 05 March 2024.

14. In every intended appeal from the Master's Court, the first point to consider at the outset is whether the impugned decision was final or an interlocutory one. This is because there is a slight difference between the two in terms of the procedural requirements for appeal.

15. In my view, the Master's decision was a final one. I say this based on the *application approach* which the Fiji Supreme Court affirms in **Jivaratnam v Prasad** [2023] FJSC 11; CBV0005.2020 (28 April 2023) which finally endorses the approach in **Goundar v Minister for Health** [2008] FJCA 40[i].

16. I agree with Mr. Lajendra's submission that the leave of the Court is not required to appeal a final decision of the Master. In other words, there is a right of appeal of a final decision of the Master. This is stipulated by Order 59 Rule 8 (1) which provides:

> An appeal shall lie from a final order or judgment of the Master to a single Judge of the High Court.

17. Order 59 Rule 9 (a) then stipulates that an appeal shall be filed and served within:

> 21 days from the date of the delivery of an order or judgment

18. The Master's decision was delivered on 05 March 2024. To comply with Order 59 Rule 9 (a), the appeal ought to have been filed and served by 26 March 2024. In this case, the application for leave was filed on 26 March 2024. However, it was served two days out of time on 28 March 2024.

19. Where an intended appellant is out of time or anticipates that he will run out of time in filing and serving his appeal, he may apply under Order 59 Rule 10 (1) to seek an extension.

> 10 (1) An application to enlarge the time period for filing and serving a notice of appeal or cross-appeal may be made to the Master before the expiration of that period and to a single Judge after the expiration of that period.

20. In **Extreme Business Solution Fiji Ltd v Formscaff Fiji Ltd** [2019] FJSC 9; CBV0009.2018 (26 April 2019), the Fiji Supreme Court (Chandra JSC dissenting) the Master had made a winding up order. The company then applied before a Judge for leave to file and serve a notice of appeal out of time. Leave was granted. In due course, the notice of appeal was filed within time. However, it was served three days out of time.

21. I re-emphasize that **Extreme Business** was concerned about a meritorious appeal which had been filed on time though was served three-days out of time[ii]. The Supreme Court said that the Judge ought to have exercised the discretion under Order 3 Rule 4 to extend the time.

22. In this case before me, the delay is only in the service of the appeal. It is a slight delay by only two days.

23. However, unlike **Extreme Business** - where the Judge whose decision was being appealed, had expressed the view that there was a lot of merit in the grounds of appeal filed, but had refused to extend time for service - I am of the view that there is not much, if at all there is some, in terms of merit, on the facts before me in this case. In other words, I am of the view that the Master was correct in his decision of 05 March 2024.

24. As I have set out above, it is clear from the material that was before the Master that the loan accounts in question have remained in arrears for several years with an interest which continues to escalate to this day. It is also clear that Nisha's only proposed action plan to redeem the mortgaged property is to be allowed to continue the business to generate income to pay off the arrears.

25. Section 72 (l) of the Property Law Act Cap. 130 provides:

> A mortgagor is entitled to redeem the mortgaged property at any time before the same has been actually sold by the mortgagee under his power of sale, **on payment of all moneys due and owing under the mortgage at the time of payment**.
> (emphasis added)

26. The law books are abound with case authorities that say that a mortgaged property is considered "sold" in this context once the mortgagee enters into a contract to that effect. In this regard, the conditional or unconditional acceptance of a tender has been said to give rise to such a contract.

27. Once a mortgagee has entered into such a contract, the mortgagor's equity of redemption is then *suspended*. The equity is suspended (not totally extinguished) because it would revive if the contract went off (see discussion of relevant caselaw in the Fiji Court of Appeal's decision in **Vere v NBF Asset Management Bank** [2004] FJCA 50; ABU0069.2003S (11 November 2004).

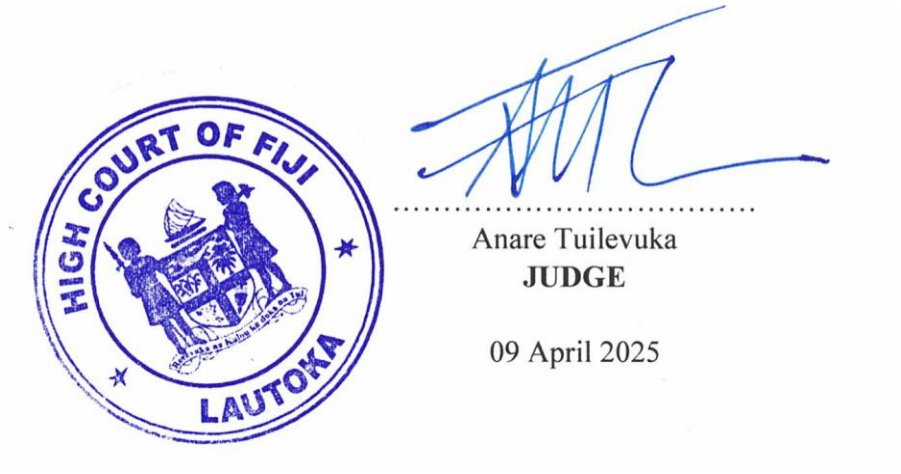
28. In **Alam v Colonial National Bank** [2017] FJSC 32; CBV6.2017 (15 December 2017), Callanchini JSC referred to the Court of Appeal judgment in **Strategic Nominees Limited (in receivership) -v- Gulf Investments Fiji Limited** (ABU 39 of 2009; 10 March 2011) as:

> … authority for the proposition that a Court will not restrain a mortgagee from its remedy of sale pending litigation that may or may not provide additional funds to a mortgagor. The only way that a mortgagor "*can buy time*" is by immediately paying to the mortgagee the full amount owing under the mortgage or by at the very least demonstrating that he is immediately able to pay the full amount claimed by the mortgagee. That was never the position in this case.

29. Applying all the above, I say that Nisha may redeem the mortgaged property in her capacity as purported trustee of Ali's estate so long as FDB has not sold the property under its mortgagee power of sale.

30. As stated above, Nisha had highlighted to the Master that the affidavit filed by FDB did not annex any clear evidence that the FDB had accepted any tender, or, that FDB had entered into a sale and purchaser agreement with a purchaser. Technically, the argument is that Nisha may still redeem the mortgaged property. If the argument were to be accepted, it would then fall on Nisha to act swiftly. As Callanchini JSC had said in **Alam** (supra), the only way by which she may do this is by immediately paying to FDB the full amount owing under the mortgage or by showing some evidence that the estate is immediately able to pay the full amount claimed by FDB. There is no such evidence in Nisha's affidavit.

31. The Summons for Leave to Appeal is dismissed. Costs to the Respondent which I summarily assess at $2,000 – 00 (two thousand dollars only).



[i] Below I reproduce the relevant part of the Supreme Court's judgment:

> [37] A useful analysis of the approach to be taken by the Court in deciding whether an Order is interlocutory or final is to be found in Kumar J's Ruling in **Mohammed Wahid Khan v Mohammed Yasad Ali** CA No. HBC 21 of 2013, in which he canvassed the Fiji case law as well as English precedents.
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> [38] In **Suresh Charan v S. M. Shah & Ors** (1995) 41 FLR65, the Fiji Court of Appeal expressed its opinion on whether the matter before it, the refusal of the High Court to grant leave for judicial review, was an interlocutory order or a final order. Unlike the position in England where under its amended Order 59 r.1A of October 1988, the Orders are identified as interlocutory or final. Fiji Courts may continue to rely on the task of "identification by reference to the general principles underlying the common law." Under it, the English Courts found two possible alternative approaches namely the "order approach" and the "application approach." The Court went on to say, at p.67:
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> > "The "order approach" required the classification of an order as interlocutory or final by reference to its effect. If it brought the proceedings to an end, it was a final order, if it did not, it was an interlocutory order. The "application approach" looked to the application rather than the order actually made as giving identity to the order. The order was treated as final only if the entire cause or matter would be finally determined whichever way the Court decided the application."
>
> [39] The Court in the **Suresh Charan** case noted that whilst the Fiji Courts are not bound by the decisions of the English Courts, it is generally useful to follow the English Courts decisions for the orderly development of the law in Fiji, unless there are strong reasons for not doing so. The Court decided in **Suresh Charan** case, to adopt the "application approach" and that the refusal of the High Court to grant leave for judicial review was an interlocutory order, and the applicants required leave to appeal against it.
>
> [40] This Court notes the Court of Appeal in subsequent cases have favoured "the order approach" as in **Jetpatcher Works (Fiji) Ltd v. The Permanent Secretary for Works & Energy & Ors** [2004] Vol 1 Fiji CA213 or ambivalent as in

Woodstock Homes (Fiji) Ltd v Rajesh [2008] FJCA 104 or went back to the "application approach" as in **Goundar v Minister for Health** [2008] FJCA 40.

[41] In the absence of any statutory assistance to aid the courts in Fiji, this Court is of the view that the "application approach" should be adopted unless there are strong reasons in any particular case for not doing so. As a general guide and rule of thumb, when and where there is doubt if the Order is final or interlocutory, leave should be sought.

[42] Using the "application approach", I am persuaded by the conclusion of the Court of Appeal that the Master's Orders of 27 July 2015 for Specific Performance under the Agreement for Sale and Purchase and as well as the subsequent Order of 19 July 2016 dismissing the Respondent's Motion to set aside the earlier Order, were final Orders. There was therefore no requirement for leave to appeal.

[43] On the other hand, the High Court Judge's Orders of 14 October, 2016 in which leave to appeal the Master's Orders were refused, are interlocutory. In any case, the Respondent had correctly filed his application for leave to appeal under O 59 r 7 (2). I am equally of the view that the requirements of leave have been met.

[ii] At paragraphs [62] to [71] the Supreme Court said:

[62] …the three-day delay beyond the time limit for serving the notice of appeal. Assuming for the moment that there is a discretion for extending time there appears to me to be no good reason why that slight delay should trump the objective which surely is the hearing of an appeal which the judge decided had apparent or prima facie merit. It is difficult to see how [the Respondent] could sensibly be said to be prejudiced by the extension of time.
[63] The necessary discretion is to be found in Order 3 rule 4 which reads, in so far as is presently relevant, as follows

……
[64] ……
[65] I accept that there was in this case a failure to comply with a court order as to time but it is to be noted that the discretion to extend time, conferred by order 3 rule 4, contemplates that such breaches are not of themselves necessarily fatal, although one might observe that the position would be different in the case of an "unless" order. Nonetheless, what this all amounts to in this particular case is the refusal to extend time for service of a notice of appeal where service was a mere three days out of time, where the notice of appeal was filed in the time stipulated, where the judge had held that, prima facie, the prospective appeal had merit and where it is impossible to discern that Formscaff could have been in the least prejudiced by an extension. To refuse in these circumstances a three day extension of time seems to me to permit minor breach to trump merit and that must, I respectfully suggest, be inimical to the objective of the Rules.
[66] The guiding principle is this:

> "The object of the rule is to give the court a discretion to extend time with a view to avoidance of injustice to the parties. . 'When an irreparable mischief would be done by acceding to a tardy application, it being a departure from the ordinary practice, the person who has failed to act within the proper time ought to be the sufferer, but in other cases the objection of lateness ought not to be listened to and any injury caused by delay may be compensated for by the payment of costs.'"

[67] The principles are more fully canvassed in **Finnegan v Parkside Health Authority** [[1997] EWCA Civ 2774; 1998] 1 All E R 595 ….. [W]hilst the rules are devised to promote expedition and are requirements to be met, procedural default should not stand in the way of judgment on the merits unless the default causes prejudice which cannot be compensated by an award of costs. That said, an eye must be trained on the particular circumstances so as, for example, not to allow a wealthy plaintiff to flout the rules knowing that he has a deep pocket to meet such costs orders as might be made. "A rigid mechanistic approach is inappropriate."[i] No doubt the length of the delay will be a relevant factor but generally the question is what the overall justice of the case requires.
[68] Whilst the instant case is one of not complying with a court stipulated time frame rather than with one stipulated by the rules, the same general approach seems to me to be apt, which is not to say that a court order is to be treated lightly. It is important to recognise that Order 3 rule 4 itself contemplates extensions of time to comply with such orders, even where the application is made after expiry of the time stipulated. Applying this approach to the instant case, it seems to me to be clear that time should have been extended.
[69] I do not, with respect, agree with the analysis in the judgment of Chandra J as to the effect of Order 59 rule 10. Order 59 rule 10 does not cut across Order 3 rule 4. It merely stipulates the body before whom an application must be made and the form in which it is to be made. Furthermore, the suggestion that Order 3 rule 4 is only relevant where there is no specific provision under a particular order – by which I assume is meant a court order –

for extension of time does not, in my respectful opinion, sit comfortably with the very provisions of order 3 rule 4 (1) which confers discretion to extend time where that time has been prescribed by the Rules "or by any judgment, order or direction".

[70] The fact that no summons was issued under Order 59 rule 10 mattered not in the circumstances of the case. An application for extension of time had obviously been made and if the absence of a summons was thought to be problematic, the order extending time could have been made on an undertaking by ESB to file the requisite form within a stipulated time. At the end of the day one is talking of a mere three day default with no consequential prejudice to the other party and it seems to me that the refusal to extend time does not accord with the principles underlying Order 3 rule 4.

[71] On the question whether this Court has jurisdiction to grant leave, I agree that the grounds as formulated are too fact specific readily to fit into one of the grounds warranting leave under section 7 (3) of the Supreme Court Act but the reality is that there is implicit in them and in the arguments raised an issue which is of substantial general interest to the administration of civil justice, namely, the proper approach to Rule 3 rule 4 of the Rules of the High Court.

Conclusion

[72] For the reasons I have provided, I would grant leave to appeal, treat the hearing of the application as the appeal, allow the appeal, set aside the order of the judge by which he refused an extension of time in which to serve the notice appeal, set aside the orders of the Court of Appeal dismissing the appeal, as well as the costs orders of the judge and the Court of Appeal and I would allow the application to extend time for service and award ESB the costs of this appeal, of the application to the judge and of the appeal to the Court of Appeal.