

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

**Civil Action No HBC 104 of 2024**

**BETWEEN** : **MOHIT KUMAR GOSAI** of 2419 Ophir Street, Stockton CA  
94544. United States of America.

**PLAINTIFF**

**AND** : **SANGEETA DEVI REDDY** of Lot 12, Naitata Rd, Navua.

**DEFENDANT**

**Coram** : Banuve, J

**Counsels** : *Jackson Bale Lawyers* for the Plaintiff  
*Kumar Lawyers* for the Defendant.

**Date of Hearing** : 29<sup>th</sup> November 2024

**Date of Judgment** : 20<sup>th</sup> January 2025

# JUDGMENT

## A. Introduction

1. A Writ of Summons with an indorsed Statement of Claim was filed by the Plaintiff against the Defendant on 10<sup>th</sup> April 2024.
2. The Plaintiff seeks a refund of monies, with interest from the Defendant he alleges to have paid pursuant to a sale and purchase arrangement for the purchase of Lots 7 and 8 on Registered Development Plan No. 11542, situate at Naitata Road , Navua, but for which consideration has wholly failed, itemized as;
  - (a) *Judgment in the sum of USD\$80,000.00 being full refund of moneys paid to the Defendant by the Plaintiff;*
  - (b) *Pre-Judgment Interest at the rate of 8% per annum pursuant to section 3 of the Law Reform (Miscellaneous Provision)(Death and Interest) Act [Cap 27] on the Judgement sum and Damages from 6<sup>th</sup> October 2021 to the date of judgment.*
  - (c) *Post-judgment interest on the judgment sum at the rate of 4% per annum from the date of judgment till the date of full payment pursuant to section 4 of the Law Reform (Miscellaneous Provision) (Death and Interest) Act [Cap 27]*
  - (d) *Costs of this action on a solicitor-client indemnity basis.*
  - (e) *Any such further orders this Court deems just and convenient.*
3. Due to difficulty encountered with service the Plaintiff sought and was granted leave on 9<sup>th</sup> May 2024, to effect substituted service on the Defendant.
4. As No Intention to Defend was filed, Judgment by Default in the sum of USD\$80,000.00 plus interest and cost in the sum of \$389.75 was entered against the Defendant on 5<sup>th</sup> August 2024.
5. Section 32 of the High Court Act 1875 empowers the Court to make charging orders on the Judgment Debtor's property;

***Power to impose charge on land of judgment debtor***

1. *The Court may, for the purpose of enforcing any judgment or order for the payment of money, by order impose on any land, or any estate or interest therein, of the debtor as maybe specified in the order, a charge for securing the payment of any moneys due or become due under the judgement or order.*
2. *An order made under the provisions of subsection (1), may be made either absolutely or subject to such conditions as to notifying the debtor as to the time when the charge is to become enforceable or as to the other matter.*

6. Order 50 Rule 1 of the *High Court Rules 1988* states;

***Order imposing charge on land, etc (O.50, r.1)***

- 1-(1) *This rule shall apply to any order which by virtue of any enactment the Court is empowered to make, imposing a charge on any land or interest in land of a judgment debtor levying execution thereon.*
- (2) *Any such order shall in the first instance be an order to show cause specifying the time and place for further consideration of the matter and imposing the charge until that time in any event.*
- (3) *An application for an order to which this rule applies may be made ex parte.*
- (4) *There may be joined with an application for an order to which this rule applies an application for the appointment of a receiver to enforce the charge imposed by the Order.*

.....

- (7) *On the further consideration of the matter the Court shall unless it appears (whether on the representation of the debtor or otherwise) that there is sufficient cause to the contrary, make the order absolute with or without modification.*

(8) *Whether on further consideration of the matter it appears to the Court that the order should not be made absolute, it shall discharge the order.*

7. Subsequent to entering judgment in default against the Defendant on 5<sup>th</sup> August 2024, the Plaintiff sought to enforce the said judgment by filing an *Ex Parte Summons (Charging Order)* on 20<sup>th</sup> September 2024, pursuant to section 32 of the *High Court Act 1875* and Order 50, Rule 1 of the *High Court Rules 1988*, under the process outlined, earlier. The Summons was supported by an affidavit deposed by the Plaintiff.
8. In the Summons, the Plaintiff sought a charging order in the sum of USD \$80,000.00 (Eighty Thousand Dollars), or the Fijian Dollar equivalent, at the time of payment, plus interest and cost in the sum of \$389.75 due on the Judgement by Default and registered on the piece and parcel of land described as:

*“Certificate of Title No.34005 known as “Vuninokonoko (Part of)” being Lot 12 on Deposited Plan No.8513, in the District of Navua, in the island of Viti Levu containing an area of one hectare five thousand six hundred and seventy square metres and situated on lot 12 Naitata Road, Navua”*
9. On 9<sup>th</sup> October 2024, a Charging Order Nisi was granted to the Plaintiff pursuant to the Ex Parte Summons filed on 20<sup>th</sup> September 2024.
10. The matter was initially adjourned to the 31<sup>st</sup> of October 2024 for further consideration of the matter as to whether there was sufficient cause to make the ‘*order nisi*’ absolute.
11. The matter was set for hearing on 29<sup>th</sup> November 2024.
12. Unless the Default Judgment of 5<sup>th</sup> August 2024 was, for some reason set aside or its execution stayed, it would be difficult for the Court, on the facts of this case, to conceive of any cause sufficient to prevent the *order nisi* of 9<sup>th</sup> October 2024 being made *absolute* at the scheduled hearing.
13. On 21<sup>st</sup> November 2024, the Defendant who had hitherto not been heard from, filed a Summons ( For Stay of Execution and to Set Aside Default Judgment)

## **B. The Summons (For Stay of Execution and to set aside Default Judgment)**

14. The late filing of this Summons was intended to address the requirement prescribed by O.50, r. 1(7), as representation by the Defendant, to the contrary, that the order nisi granted on 9<sup>th</sup> October 2024, be not made absolute.
15. In the Summons filed on 21<sup>st</sup> November 2024, the Defendant sought the following orders;
  - (i) Time for service of the summons be abridged.
  - (ii) The default judgment entered herein on the 5<sup>th</sup> August 2024 in default of the Notice of Intention to Defend, be set aside and that the Defendant be at liberty to defend this action unconditionally.
  - (iii) There be a stay of execution pending the hearing of this application for setting aside.
  - (iv) The costs of an occasioned by this application be in the cause.
  - (v) Any other order deem just and equitable in the circumstance.
16. The Defendant filed 2 affidavits sworn on 21<sup>st</sup> November 2024 in support of its Summons.
17. Despite the late filing of the Summons (For Stay of Execution and to Set Aside Default Judgment) the Court decided that it would hear all applications together on 29<sup>th</sup> November 2024, bearing in mind the common thread of enforcement of the default judgement obtained by the Plaintiff on 5<sup>th</sup> August 2024, and to avoid delay.
18. The Court identified these issues as linking the applications
  - (i) Whether there was sufficient cause to make the order nisi obtained by the Plaintiff on 9<sup>th</sup> of October 2024, absolute?
  - (ii) Whether it appears to the Court that the cumulative representation made by the Defendant, pursuant to the Summons (For Stay of Execution and to Set

Aside Default Judgement), are sufficient to not make the order granted on 9<sup>th</sup> October 2024 absolute.<sup>1</sup>

19. The Plaintiff filed 2 submissions in Court, firstly, in support of the Charging Order it sought and secondly, in opposition to the Application by the Defendant to Set Aside the Default Judgment of 5<sup>th</sup> August 2024. The Defendant also filed submissions, in Court to support its Application to Set Aside the Default Judgment and against the Charging Order sought by the Plaintiff.  
The Court is grateful to the parties for the assistance rendered in their submissions.
20. The Plaintiff, submitted that it had regularly obtained judgment by Default on 5<sup>th</sup> August 2024, and had served the judgment personally, at the property in question, for which no response was received from the Defendant. The Plaintiff decided to enforce the Judgment in Default by registering a charging order against the Defendant's property pursuant to section 32 of the *High Court Act 1875* and Order 50 Rule 1 of the *High Court Rules 1988*.
21. The Defendant acknowledges that it has to show a merit-worthy defence with a real prospect of success<sup>2</sup> for its application to set aside, to succeed. The Defendant asserts that she has discharged this duty, whilst the Plaintiff disputes this.
22. The Defendant's focus is on an Agreement for the sale of Lots 7 and 8 (DP 11542-CT 34005), for a total price of FJD\$184, 000.00, which she states has to be paid in full before a transfer was lodged. The Sale and Purchase Agreement has not been signed, nor the full purchase amount paid by the Plaintiff, to allow the transfer to proceed. Confusing this issue, the Defendant also asserts that the title to the land was encumbered by a mortgage to the Bank of Baroda, which had not been discharged, thus restricting any transfer to the Plaintiff, in any event.
23. The Defendant further contends that she was not aware of the substituted service of the Writ of Summons on her, until she was served with the default judgement, which in any event, did not correctly encompass what has been pleaded in the Statement of Claim and will greatly prejudice and cause irreplaceable harm, if not set aside, as the Plaintiff will proceed to impose a charge on the Plaintiff's property and the Defendant will not be able to have the same subdivided and sold.

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<sup>1</sup> O.50, r.1(7)

<sup>2</sup> *Wearmart Textiles Ltd v General Machinery Hire Ltd & Anor*-Civil Appeal No ABU 0030/97S

24. In its Submissions in Opposition the Plaintiff asserts that the Defendant has not disclosed a Defence on merit, rather the defence it relies on, the subsistence of a Sale and Purchase Agreement, is absurd as its claim is not based on the terms of the unsigned Sale and Purchase Agreement, but on an action for money had and received. In this regard, the Plaintiff asserts that it has paid the Defendant the total sum of USD\$80,000.00, however no property has been transferred to the Plaintiff in total failure of consideration premised on the unsigned Agreement for Sale and Purchase.

### C. ANALYSIS

25. In *Roberts Petroleum Ltd v Bernard Kenny Ltd* [1981] EWCA Civ 10, 1 WLR 301, the House of Lords emphasized the discretionary nature of charging orders as summarized in these propositions<sup>3</sup>;
- (i) The question whether a charging order nisi (interim order) should be made absolute is one for the discretion of the Court.
  - (ii) The burden of showing cause why a charging order nisi should not be made absolute, is on the judgment debtor.
  - (iii) For the purpose of the exercise of the Court's discretion, there is in general, no material difference between the making absolute of charging order nisi on the one hand and a garnishee order on the other.
  - (iv) In exercising its discretion the Court has both the right and the duty to take into account all the circumstances of a particular case, whether such circumstances arose before or after the making of the order nisi.
  - (v) The Court should so exercise its discretion as to equity, so far as possible, to all the various parties involved, that is to say, the judgment creditor, the judgment debtor and all other unsecured creditors.
26. In recognition of the discretionary nature of this power, the Court has allowed the Defendant to file, late, a Summons (Setting Aside Default Judgment and Stay), to assist it in determining whether it constitutes adequate representation to not render the 'order nisi' granted on 9<sup>th</sup> October 2024, absolute.

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<sup>3</sup> Per Lord Bandon

27. The Court notes that the exercise of its discretion is not solely dependent on evidence deposed by the Defendant, but that both the terms of O.50, r.1 (7) (“whether on the representation of the judgment debtor or otherwise”) and common law authority recognize that it ought in the exercise its discretion as to equity, account for the interest of all parties involved.<sup>4</sup>
28. The Court notes the submissions made by the Defendant and its response is appended.

#### **D. Meritorious Defence**

29. On the issue of whether there is a meritorious defence, the Defendant’s primary defence that the Plaintiff has not paid the full purchase price to justify transfer to him of the title to Lots 7 and 8 (DP 11542-CT34005), is directly contradicted by the terms of the unsigned Sales and Purchase Agreements, relied on by the Defendant.<sup>5</sup> Paragraphs 2.0 of the Agreements are entitled ‘**Purchase price and deposit**’ and stipulate;

#### **2.0 Purchase price and deposit**

2.01.1 The full purchase price for the said property shall be the sum of FJD\$92,000.00 (Ninety Two Thousand Dollars). The said purchase price shall be paid by the Purchaser to the Vendor on the **Settlement date**.<sup>6</sup>

2.01.2 A deposit of \$32,000.00 is to be paid to the following account  
Sangeeta D. Reddy  
WESTPAC  
BSB: 039001  
ACCOUNT NUMBER: 9801318032  
SWIFT CODE: WPACFJFXXX

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<sup>4</sup> *Roberts Petroleum Ltd v Bernard Kenny Ltd* [1981] EWCA Civ 10; [1982] 1 WLR 301

<sup>5</sup> **Annexure A –Affidavit in Support [Setting Aside Default Judgement]** filed on 21<sup>st</sup> November 2024

<sup>6</sup> Highlight for emphasis



30. The settlement date is not clearly defined in the Agreement that was drawn up for Lot 7, however clause 3.0 of the Agreement covering Lot 8 entitled 'Settlement Date' stipulates;
- 3.01 The settlement date shall be within thirty (30) days from the date of execution hereof or such other date as may be mutually agreed in writing between the parties.
31. Clause 2.0 entitled **Purchase price and deposit** of the Agreements for Sale and Purchase governing Lots 7 and 8, are exactly the same in terms and do not support the "defence" proffered that the purchase price of the subject lots had to be paid in full before transfers of title could be processed.<sup>7</sup>
32. On the terms of the unsigned Agreements relied on by the Defendant, the transfer process for the titles in Lots 7 and 8 (DP 11542-CT 34005) would not just be processed or initiated at the Settlement date, as the Defendant deposes, but rather, the process would be completed on that date, in accord with conveyancing practice; the full purchase price paid off, (if not already done), and all documents delivered or lodged to ensure that the Plaintiff receive the property, free of encumbrance.
33. The Court finds rather, that no settlement date has been reached as indicated in clause 2.0 of the unsigned Agreements, (or alternatively, agreed to), when all outstanding purchase money, (if any), would be paid, because of the inability of the Defendant to discharge the mortgage placed on her property by the Bank of Baroda, leading to an inability to deliver on her promise to process the transfer of titles in Lots 7 and 8 (DP 11542-CT 34005), in exchange for monies received from the Plaintiff. In short, the Court cannot attribute any fault to the Plaintiff for the failure to process the transfer in titles due to incomplete payment, (as alleged by the Defendant) rather, the delay was solely caused by the Defendant's inability to discharge a mortgage encumbrance lodged by the Bank, which the Defendant was accountable for, and did not involve the Plaintiff.

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<sup>7</sup> Clause 7.0 entitled **Transactions on settlement** states ;

7.01 On the settlement date, the following shall take place;

- (a) All documents necessary to be delivered or lodged to ensure that the Purchaser receive the property on the settlement date free of encumbrances;
- (b) That the land transfer documents to be signed by the purchaser, ready to be lodged to the Lands Department. A stamped copy of all documents to be given to the purchaser as evidence that a transfer has been lodged

34. The Court does not find any merit in the Defence of the Defendant, nor is it proffered with any degree of conviction – *Alpine Bulk Transport Co. Inc v. Saudi Eagle Shipping Co.*, [1986] 2 Lloyd’s Rep. 22.<sup>8</sup>

*“ (a) It is not sufficient to show a merely “arguable defence” that would justify leave*

*to defend under Order 14; it must both have “a real prospect of success” and “carry some degree of conviction”. Thus the court must form a provisional view of the probable outcome of the action.”*

35. Further, there is no attempt to address the plaint of the Plaintiff that its primary cause of action is not based on the terms of the Sale and Purchase Agreement, but on money paid and received.

#### **E. Lack of Forthrightness**

36. The Court notes the dismissive attitude displayed by the Defendant, in general, towards the subsistence of this proceeding (Civil Action HBC 104 of 2024), for which she is the sole Defendant, and for which she, at the outset of proceedings, refused personal service of the Writ of Summons, necessitating that an order for substituted service be taken out on 29<sup>th</sup> May 2024, for which no response was filed, leading to the default judgement entered on 5<sup>th</sup> August 2024, and the initiation of Enforcement Proceedings against her property, on 20<sup>th</sup> September 2024. The Defendant must be taken to have been aware of the risk that she was taking in ignoring proceedings initiated against her, as a consequence of accepting payment of substantial sums of money without honoring the concomitant obligation placed on her, to transfer the title of the property in Lots 7 and 8 (DP 11542-CT 34005), to the Plaintiff. The deplorable attitude displayed by the Defendant against the subsistence of this proceeding has been taken into account by the Court. As stated by the English Court of Appeal in the ‘*The Saudi Eagle Case*’;

*“ (b) If proceedings are deliberately ignored this conduct, although not amounting to an estoppel at law, must be considered “injustice” before exercising the court’s discretion to set aside.”*

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<sup>8</sup> as cited in *Wearmart Textiles Ltd v General Machinery Hire Ltd* [1998] FJCA 26; ABU 0030u.97s (29 May 1998)

The Court does not find the reasons advanced by Defendant that she was not aware of the subsistence of the Writ and the Default Judgement as acceptable and consider them disingenuous.

37. In addition, the Court finds the concern raised by the Defendant that the refusal to set aside the Judgement in Default would lead to the land being the subject of an order for sale causing serious prejudice and irreparable harm, as misleading. As pointed out earlier, the subject property was already the subject of a prior mortgage charge placed by the Bank of Baroda, which the Defendant was unable to discharge, and restricted her ability to register and transfer titles, (although this did not prevent her from advertising for offers) over Lots 7 and 8. The prejudice and harm, (if any), were caused by a propensity of the Defendant, to not honor financial obligations, in a timely manner. As deposed in paragraph 14 of the Affidavit in Support [Setting Aside Default Judgment], filed on 21<sup>st</sup> November 2024;

“14. The Plaintiff, at no point in the Claim states that he had paid the full price of Lots 7 and 8. The Plaintiff knew that the full price was not paid however he wanted the said lots to be transferred to him. **The subdivision and the transfer did not eventuate due to the title not being discharged by Bank of Baroda. I had advised the Plaintiff of this and that I had to liaise with the Bank of Baroda to have the title discharged** (note emphasis)

38. The Court has one additional concern on this issue about the effect of any charging order placed against the subject property which is already subject to a mortgage encumbrance placed by the Bank of Baroda. It is something which the Plaintiff will have to address separately.

39. The Court, finds that the Defendant, in general, has not disclosed a merit worthy defence to justify setting aside the default judgement entered on 5<sup>th</sup> August 2024.

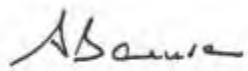
40. It also finds that sufficient cause has not been established by the Defendant to prevent the *order nisi* granted on 9<sup>th</sup> October 2024 being rendered, *absolute*.

## ORDERS

1. The Summons (For Stay of Execution and to Set Aside Default Judgment) filed by the Defendant on 21<sup>st</sup> November 2024 is dismissed.
2. The *order nisi* granted on 9<sup>th</sup> October 2024 be rendered *absolute* on the terms outlined in paragraph 1 of the Ex Parte Summons (Charging Order) filed by the Plaintiff on 20<sup>th</sup> September 2024;
  - (i) That a Charging Order in the sum of USD\$80,000.00 (Eighty Thousand USD Dollars) or the Fijian Dollar equivalent at the time of payment, plus interest and costs of the action in the sum of \$389.75 (Three Hundred Eighty Nine Dollars and Seventy Five Cents) due on a Judgement by Default on 5<sup>th</sup> August 2024 be registered against the Defendant's property comprised on the piece and parcel of land described as:

"Certificate of Title No. 34005 known as 'Vuninokonoko (Part of) being Lot 12 on Deposited Plan No. 8513, in the District of Navua, in the island of Viti Levu containing an area of one hectare five thousand six hundred and seventy three square meters and situated at Lot 12 Naitata Road, Navua"
3. Costs summarily assessed at \$1,000.00 to be paid to the Plaintiff within 14 days of this judgement.



  
Savenaca Banuve  
Judge

At Suva  
20<sup>th</sup> January, 2025.