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LA 3 of 2019

IN THE LAND COURT OF TONGA  
NUKU'ALOFA REGISTRY

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BETWEEN : ANZ BANKING GROUP LIMITED

- *PLAINTIFF*

AND : SIONE MANUPULE FALEAFA

- *DEFENDANT*

BEFORE HON. JUSTICE NIU AND ASSESSOR FUKOFUKA

Counsel : Mr. W. Edwards for the plaintiff.

Hearing : Formal proof in Court on 3 March 2020.

Ruling : 10 March 2020.

RULING ON FORMAL PROOF

[1] This is a formal proof hearing of the claim of the plaintiff against the defendant because the defendant has not filed any defence to the claim after it was served on him on 28 February 2019.

[2] Notice of this hearing was served upon the defendant by the Court service officer on 19 December 2019 but he did not attend.

**Evidence**

[3] Evidence was given by bank staff, Sosefo Halahingano, that the defendant and his wife were joint borrowers at the plaintiff bank and he produced 9 documents as exhibits which showed that

(a) 2007 - their total loan was \$111,982 and that they agreed to pay \$1,249.00 in every month, and that the defendant's town

allotment at Kolomotu'a plus the house and improvements thereon to be held by the plaintiff by way of mortgage as security for repayment of the said sum.

- (b) 2012 - their loan balance was \$85,283.41 and that they agreed to pay \$1,404 in every month.
- (c) 2013 - their loan balance was \$78,595.35 and that they agreed to pay \$1,200 in every month. That sum was entered and registered in the mortgage of the allotment on 18 April 2013.
- (d) 20 June 2014 - a letter of demand was issued to the couple to pay up to the plaintiff the whole of the balance of the loan which was then \$79,031.05 because of their default in repayment of the monthly installments.
- (e) 8 September 2014- notice was issued by the plaintiff to the couple that they were in default and that in pursuance of S.109 of Land Act the bank intended to take possession of the allotment and improvements thereon which were held as mortgage and security of the loan. That notice was stated to be copied to the Minister of Lands.
- (f) 9 September 2014- a letter of counsel for the plaintiff was forwarded to the Minister of Land describing and attaching the copy of the notice of 8 September 2014.
- (g) 22 February 2019- the claim of the plaintiff in the present action was filed in this Court and served on the defendant on 28 February 2019.

[4] Witness Halangingie Malupo gave evidence that she served the claim of the plaintiff upon the defendant at his home at Kolomotu'a, and that she had searched the records of this Court's registry and confirmed that no defence had been filed by the defendant as of April 2019.

**The claim of the plaintiff**

[5] In its statement of claim, the plaintiff says that the defendant has defaulted in his obligations to repay the monthly installments as well as the whole of the balance of

the loan, that notice has been issued to the defendant and to the Minister of Lands, as is required by S.109 (1) of the Land Act, and that it intends to take possession of the mortgaged land, namely, the town allotment of the defendant. It therefore prays for an order for possession of the land of the defendant's town allotment.

### The law

- [6] The relevant law is simply the provisions of S.109 of the Land Act. That is the provision of the Act which authorises the bank (the mortgagee) to take possession of the mortgaged land upon default of the mortgagor, **after** notice of intention to take possession has been given to the mortgagor and the Minister of Lands for 14 days. The full provision is as follows:

*“109. (1) In the event of the mortgagee wishing to take possession of the lands mortgaged following default by the mortgagor of any of the obligations to the mortgagee set out in the mortgage deed or in any other document lodged with the Minister in terms of the next succeeding section the mortgagee shall give notification both to the mortgagor and to the Minister of his intention to take possession of the lands mortgaged and may thereafter take possession at any time after the expiry of 14 days from the date of said notification.*

*(2) After a mortgagee has taken possession, in terms of subsection (1) of the land mortgaged, he may either retain possession for the unexpired term of the mortgage lease or he may sublease the lands for the unexpired term of the mortgage lease.”*

- [7] The requirement for the 14 days notice is mandatory because of the words: “... the mortgagee shall give notification ...” and of the words: “... and may thereafter take possession at any time after the expiry of 14 days from the date of notification”.

- [8] That may appear to support and to authorise the plaintiff to take possession of the mortgaged land and improvements thereon because there has been default and there has been a notice issued to the mortgagor defendant and to the Minister of Lands of the intention of the plaintiff to take possession. However, I pause to consider whether the notice given by the plaintiff in 2014 can still be acted on as a valid notice today nearly 6 years later.

[9] I am of the view that the Legislature clearly intended that notice be given to the defaulting mortgagor of the intention of the mortgagee to take possession of the mortgaged lands, at least 14 days before the mortgagee takes possession of it, and that the taking of possession be carried out reasonably soon after expiry of the 14 days.

[10] In this case, the plaintiff mortgagee bank gave that notice to the defaulting mortgagor some 5 years ago, and no evidence was given that the defendant was made aware that that notice was to remain effective and that the plaintiff bank could enter and take possession at any time without notice, at whatever time without limit, in the future. I asked counsel whether the defendant was aware that the plaintiff was seeking an order to evict him from the land and he said no.

[11] It is true that notice of this hearing was given to the defendant, as shown in the certificate of service, on 19 December 2019, but that notice only stated that the “formal proof hearing of the claim of the plaintiff against the defendant will be held in the Land Court at Nuku’alofa at 9:30 am, 3 March 2020”. And I also note that the defendant continued to make monthly payments to the plaintiff bank before and after he received that notice, just like he had been doing before and after the claim was served on him in February 2019. The bank statement produced in evidence (Exh. 9) shows the following payments by the defendant:

1.	15/2/19	-	\$ 141.00
2.	28/3/19	-	289.00
3.	5/4/19	-	800.00
4.	29/4/19	-	1,000.00
5.	13/5/19	-	1,000.00
6.	30/5/19	-	1,000.00
7.	17/6/19	-	1,000.00
8.	27/6/19	-	1,000.00
9.	16/7/19	-	1,000.00
10.	29/7/19	-	1,000.00
11.	16/8/19	-	800.00
12.	17/10/19	-	600.00
13.	28/10/19	-	800.00
14.	4/12/19	-	200.00
15.	11/12/19	-	200.00
16.	6/1/20	-	200.00
17.	24/2/20	-	150.00

[12] I consider that those payments show that the defendant does not appreciate the significance of the claim of the plaintiff and of the order that it seeks, namely, that it is based on a notice with which he had been served some five and a half years ago because he has continued to make payments as if no such notice had been served on him.

[13] And in law, I consider, that the notice which the plaintiff had served upon the defendant on 8 September 2014 has lapsed by passage of time and by failure of the plaintiff to enter and take possession of the lands reasonably soon after the 14 days from 8 September 2014 expired. Five and a half years afterwards is not reasonably soon and could not have been intended by the Legislature to be so, otherwise it would have expressly said so.

**Conclusion**

[14] A fresh notice ought to be issued. That is only just in the circumstances.

[15] Accordingly, I find and I hold that the plaintiff is unable to prove its claim against the defendant and I dismiss it with no order for costs.

NUKU'ALOFA: 11 March 2020.



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J U D G E