

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 1 of 2013

BETWEEN : **KUAR PRASAD** of Lot 10, Dilkusha Road, Nausori, retired farmer/market vendor.

APPLICANT

AND : **SALENDRA PRASAD**, of Lot 10, Dilkusha Road, Nausori, Aluminum Joinery worker.

DEFENDANT

BEFORE : **Justice Deepthi Amaratunga**

COUNSEL : Mr. S. Kumar for the Plaintiff
Defendant in Person

Date of Hearing : **24th April, 2013**

Date of Judgment : **30th April, 2013**

JUDGMENT

A. INTRODUCTON

1. The Plaintiff had filed this action seeking eviction of his son, who is claiming equitable relief. The Defendant was not successful in obtaining equitable relief in the action he had filed in 2007 which was decided in 2012, and it was dismissed, but the court had not granted eviction of the Defendant since there was no such relief sought in the said action. The Defendant had not appealed against the said decision. The Plaintiff is seeking eviction based on the title and said determination of the court which dismissed the Defendant's equitable

claim to property. The Defendant failed to establish a right to possession since his affidavit in opposition allege equitable right to remain in the property, which was rejected by the court.

B. ANALYSIS

2. The Plaintiff and the Defendants are father and son respectively. There is no dispute as to the ownership of the property and to the title. The Defendant had admitted the title. The Defendant had remained in the property for a long time. He alleges that he was promised of the property by his father. The Defendant filed an action seeking equitable right to the property and that action was dismissed and the decision of said case at paragraph 39 states as follows

‘39. Undisputedly, the defendant is the owner of the property, since the plaintiff has failed to establish any equitable right over the property in dispute, he has no right to remain in the property without the consent of the defendant.’

3. No order for eviction was granted in the said action as no such relief was sought, and the Plaintiff had filed the present application in terms of the Section 169 of the Land Transfer Act. Section 172 of the Land Transfer Act states as follows

“If the person summoned appears he may show cause why he refuses to give possession of such land and, if he proves to the satisfaction of the judge a right to the possession of the land, the judge shall dismiss the summons with costs against the proprietor, mortgagee or lessor or he may make any order and impose any terms he may think fit;”

4. In Morris Hedstrom Limited –v- Liaquat Ali CA No: 153/87, the Supreme Court of Fiji described the scope of the said provision contained in section 172. The Defendant is claiming equitable relief for the improvements done by him which

had been rejected by this court after a trial and this decision had not been even appealed.

5. In the case of Morris Hedstrom Limited -v- Liaquat Ali CA No: 153/87, the Supreme Court said that:-

*“Under Section 172 the person summonsed may show cause why he refused to give possession of the land if he proves to the satisfaction of the Judge a right to possession or can establish an arguable defence the application will be dismissed with costs in his favour. The Defendants must show on affidavit evidence some right to possession which would preclude the granting of an order for possession under Section 169 procedure. **That is not to say that final or incontrovertible proof of a right to remain in possession must be adduced. What is required is that some tangible evidence establishing a right or supporting an arguable case for such a right must be adduced.**”*
(emphasis is mine)

6. What the Defendant has to satisfy is not a final proof of a right to remain in possession but some **tangible evidence supporting an arguable case for a right** to remain in possession. The dismissal of his action for equitable right to said property put the issue at rest. The Defendant cannot relitigate the same issue in this application for eviction.
7. The Defendant who appeared in person at the hearing sought at least 6 months to vacate the premises. Considering the long occupation and the relationship between the Plaintiff and Defendant the request seemed somewhat reasonable, but the Plaintiff fatly refused this request. It seems that the relationship between the parties have broken beyond repair and any further stay of the Defendant would aggravate the love lost between the parties. The Defendant filed an action seeking equitable relief on the said property in 2007 and it was decided in 2012. He had sufficient time during time period from 2007 – 2012 to find out suitable accommodation. Because of this action filed in 2007 the Plaintiff could not obtain an eviction of Defendant and he had not paid for his

occupation during this time. The present action was filed in 2013 and in the circumstances I will not grant further time for the Defendant to remain in occupation of the property.

C. CONCLUSION

8. The Defendant had not established a right to possession of the property. The alleged issue of improvements to the property and the equitable right to it had already been decided against the Defendant after a trial. Since the Defendant could not establish an equitable right to the property in the action he had filed seeking relief in HBC 423 of 2007, he cannot relitigate that issue again and he could not establish a right to remain in the property. The Plaintiff is granted immediate possession of the property. Considering the circumstances of the case I will not award any cost.

D. FINAL ORDERS

- a. The Plaintiff is granted immediate possession.
- b. No cost.

Dated at **Suva** this **30th day** of **April, 2013**.

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Justice Deepthi Amaratunga
High Court, Suva