

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 284 of 2013

IN THE MATTER of Section 169 of
Land Transfer Act Cap 131 Eviction
Action.

BETWEEN : **SUNIL MAHARAJ** aka **SUNEEL MATI** as the Administratrix of the Estate
of Shiu Narain, deceased.

PLAINTIFF

AND : **SOSI NARAIN** aka **SOSSI NARAIN** of Lot 19, Lemeki Street, Vatuwaqa,
Suva.

DEFENDANT

BEFORE : **Acting Master Thushara Rajasinghe**

COUNSEL : **Mr. Raman P. Singh** for the Plaintiff
Mr. Nunume L. for the Defendant

Date of Hearing : **4th February, 2014**

Date of Judgment : **28th February, 2014**

JUDGMENT

A. INTRODUCTION

1. The Plaintiff instituted this action by filing this Originating Summons dated on 8th of October 2013 seeking an order under section 169 of the Land Transfer Act that the Defendant do give vacant possession to the Plaintiff's property contained in Certificate of Title No 11347 being Lot 19 on DP 2411 situated in the city of Suva in the Island of Vitilevu and occupied by the Defendant.

2. Upon being served with the Summons, the Defendant filed her affidavit in opposition. The Plaintiff opted not to file any reply to the affidavit in opposition. Subsequently, this matter was set down for the hearing on the 4th of February 2014. The learned counsel for the Plaintiff and the Defendant made their oral arguments and submissions during the hearing. At the conclusion of the hearing, I invited the counsel to file their respective written submissions, however only the counsel for the Defendant filed it accordingly.
3. Having considered the Summons, respective affidavits and written submissions of the parties and their respective oral arguments, I now proceed to pronounce my judgment as follows.

B. BACKGROUND

Plaintiff's case.

4. The plaintiff claims that he is the Administratrix of the estate of late Shiu Narain deceased intestate who was the last registered proprietor of this property. He further deposed that in order to administer this estate for the benefit of all other beneficiaries he intends to sell the estate property and distribute the net shares to all the beneficiaries including the Defendant. Accordingly he seeks an order for eviction of the Defendant from this property as she is now occupying this property and refused to vacate it.

Defendant's Case,

5. The Defendant in her affidavit in opposition stated that her late husband was one of the beneficiaries of the estate of late Shiu Narain. She deposed that her late husband was the administratrix of this property; however he died without administrating this estate property. She claims that she is the sole and lawful trustee of her late husband's estate which include his entitled share of the estate of late Shiu Narain. She further deposed that she has been living in this property since her marriage to late Sudesh Narain and she is not an illegal occupier.

Plaintiff's Submissions.

6. Having outlined the factual backgrounds of this application, the learned counsel for the Plaintiff submitted that the Plaintiff has powers pursuant to section 23 of the Trustee Act to sell the estate property for the benefit of the beneficiaries. He further submitted that the Defendant is benefitting the estate property preventing other beneficiaries to obtain any benefits.

Defendant's Submissions,

7. The learned counsel for the Defendant submitted that the Defendant has a beneficial interest to the land and she is one of the beneficiaries under the estate. In view of these facts, she has a right of the possession to this land. The learned counsel further submitted that if the Plaintiff has an issue of administering the estate property as an Administratrix, he should have invoke the jurisdiction of the court pursuant to section 41 of the Succession, Probate and Administration Act instead of section 169 of the Land Transfer Act.

C. THE LAW

8. Sections 169 to 172 of the Land Transfer Act (Hereinafter referred as "the Act") outline the procedure for the application in this nature. In view of the section 169 of the Act, the last registered proprietor of the land and/or a lessor with power to re-enter where the lessees or tenant is in arrear for such period and/or a lessor who has issued a legal notice to quit or the term of the lease has expired are allowed to institute proceedings under this section to evict the person who is in possession of the land without a right to the possession.
9. Section 171 states that

“On the day appointed for the hearing of the summons, if the person summoned does not appear, then upon proof to the satisfaction of the judge of the due service of such summons and upon proof of the title by the proprietor or lessor and, if any consent is necessary, by the production and proof of such consent, the judge may order immediate possession to be given to the plaintiff, which order shall have the effect of and may be enforced as a judgment in ejectment”.

10. Section 172 deals with the Defendant’s burden of prove where it states that

“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”.

11. According to section 169, 171 and 172 of the Act, proceedings under this summary procedure constitutes two main limbs. The first is that the onus of the Plaintiff to satisfy the court that he is the last registered proprietor or a lessor defined under section 169 (a), (b) and (c) of the Act and the Defendant is in possession of the land. Once the Plaintiff satisfied the first limb, the burden will shift on the Defendant to prove that he has a right to the possession of the land.

12. In pursuant of section 172 of the Act, the Defendant is not required to prove his title against the title of the Plaintiff. He is only required to satisfy the court that he has a right to the possession of the land. The Defendant’s burden of prove under section 172 was discussed in **Morris Hedstrom Limited-v- Liaquat Ali** CA No: 153/87 , where it was held that

“Under Section 172 the person summonsed may show cause why he refused to give possession of the land and 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."

Accordingly, the defendant is only required to adduce some tangible evidence to establish a right of possession or the existence of an arguable case for such right to defeat the claim of the Plaintiff.

D. ANALYSIS

13. Having reviewed the laws pertaining to the applications under section 169 of the Act, I now turn to analyse the evidences adduced before me with the relevant legal provisions and principles.
14. The Defendants' main contention is that she has a beneficial interest to this land, wherefore the Plaintiff is not entitled to obtain an order of eviction against her pursuant to section 169 of the Act. The Plaintiff, himself admitted the existence of Defendant's beneficial interest to this land where in paragraph 10 of his affidavit in support he stated that "I intend to sell the estate property and distribute the net shares to all the beneficiaries including the Defendant".
15. In view of the findings set out above, the main issue to be determined in this case is that whether the beneficial interest of the Defendant constitutes a right of the possession of this land. The Defendant provided evidence to establish that she was married to late Sudesh Narain who was one of the sons of late Shiu Narain and one of the beneficiaries of Shiu Narain's estate. According to these evidence, she successfully established that she is one of the beneficiaries to the estate of late Shiu Narain. Accordingly, the Defendant is entitled to a share of the estate property pursuant to section 6 of the Succession, Probate and Administration Act. This entitlement of a share of the estate property constitutes a right of the possession of the land pursuant to section 172 of the Land Transfer Act. If the Plaintiff is having any question of administration of this estate as the Administratrix, the

proper cause would be to invoke the jurisdiction of the court pursuant to section 41 of the Succession, Probate and Administration Act.

E. CONCLUSION,

16. In concluding my judgment, I hold that the Defendant has successfully satisfied the court that she has a right of the possession of this land pursuant to section 172 of the Land Transfer Act. I accordingly make following orders that;

- i. The Originating Summons filed by the Plaintiff on the 8th of October 2013 is refused and dismissed accordingly,
- ii. The Defendant is granted a cost of \$ 1000 assessed summarily,

Dated at **Suva** this **28th** day of **February, 2014**.

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R.D.R Thushara Rajasinghe
Acting Master of High Court, Suva