

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 316 of 2013

BETWEEN : CHAYA KUMAR of 64 Nakasi Road, Nakasi, Nasinu, Fiji

PLAINTIFF

AND : NILAM WATI of Tacirua, Naitasiri, Fiji.

DEFENDANT

BEFORE : Acting Master ThusharaRajasinghe

**COUNSEL : Mr. Vananalagi R. for the Plaintiff
Mr. ReddyJ. for the Defendant**

Date of Hearing : 08th April, 2014

Date of Ruling : 10th June, 2014

JUDGMENT

A. INTRODUCTION

1. The Plaintiff instituted this action by way of this Originating Summons pursuant to section 169 of the Land Transfer Act seeking following orders inter alia that;
 - i. *The Defendant show cause as to why she, her family and her invitees should not give up immediate vacant possession of the land situated at Tacirua, Dugulava No 2 Plan; R 1656, Naitasiri, Fiji being land comprised in iTaukei lease No 30289 of which the Plaintiff is the registered lessee and which the Defendant and her invitees now unlawfully occupy; and,*
 - ii. *The cost of this application be paid by the Defendant to the Plaintiff.*

2. Upon being served with this Summons, the Defendant appeared before the court. Thereafter directions were given to the parties to file their affidavit in opposition and affidavit in reply, which they filed respectively. Subsequently, the Summons was set down for hearing on the 8th of April 2014. The learned counsel for Plaintiff and the Defendant made their oral arguments and submissions during the course of the hearing. Beside their oral arguments, both counsel tendered their respective written submissions at the hearing. Having considered the Summons, respective affidavits and submissions, I now proceed to pronounce the judgment as follows.

B. BACKGROUND

Plaintiff's case,

3. The Plaintiff claims that she is the last registered lessee of the land comprised and described in iTaukei lease No 30289 and the Defendant and her family is unlawfully occupying the property without her authority. She further deposed that this land had been previously leased to her late father under an iTaukei lease reference No 4/03/1567. Her father had to move out of the property with the family in 1992 due to his employment commitment. He then permitted the late husband of the Defendant to reside in the property as the caretaker. The Plaintiff's father passed away in 2008 and the said lease was expired on 31st of December 2011. Subsequently, a new lease was granted to the Plaintiff for a period of 50 years from 1st of January 2012. Having obtained the new lease, the Plaintiff requested the Defendant to vacate the property which she refused. The plaintiff then issued a notice to quit and subsequently instituted this action.

Defendant's Case.

4. The Defendant vehemently opposed this Summons and her objections are founded on following main grounds, that;

- i. The Defendant has purchased the property from the late father of the Plaintiff in the year of 1996 for a sum of \$7000,
- ii. The Defendant had been paying all the rates for this property,
- iii. The Plaintiff had initially agreed to transfer this lease to them and obtained money, however, she then fraudulently obtained the lease on her name,
- iv. The Defendant has been occupying the property for last 30 years and developed the land.

C. THE LAW

5. I now turn to briefly review the laws pertaining to the application under section 169 of the Land Transfer Act (hereinafter mentioned as “the Act”).
6. Sections 169 to 172 of the Act have stipulated 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 section 169 of the Act to evict the person who is in possession of the land without a right to the possession.
7. Section 171 and 172 of the Act deal with the scope of the hearing and the burden of the parties. 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.”

8. Section 172 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;

9. The scope of the hearing of the application under section 169 constitutes with two main limbs. The first is the onus of the Plaintiff to satisfy the court that he is the last registered proprietor or the lessor described under the section 169 (a), (b) and (c) of the Act. Once the Plaintiff satisfied it, the burden will shift on the Defendant to satisfy the court that he has a right to the possession of the land. The scope of the Defendant’s burden of prove of a right to the possession of the land has 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 present some tangible evidence to establish a right of possession or the existence of an arguable case for such a right to defeat the Plaintiff’s claim. The tangible evidence is constitutes with evidence which is real and capable of establishing something and it should not be vague or elusive.

D. ANALYSIS,

10. Upon perusal of the respective affidavits filed by the parties and their respective submissions, I find that the Defendant’s objection constitute with two limbs. The first limb is that the Father of the Plaintiff had sold the property in 1996 for a sum of \$7000

and promised to transfer the lease to the Defendant. The second limb is that the Plaintiff promised the Defendant that she will arrange the lease to be transferred to her and obtained money for that. However, the Plaintiff has fraudulently obtained the lease by misrepresenting to the NLTB.

11. I now turn to the first limb of the objection. The Defendant did not dispute that the late father had a lease with the NLTB for this property. Moreover, there is no dispute that the land is a native land and comes within the preview of the NLTB pursuant to Native Land Trust Act. Hence the nature of the proprietorship the late father had on this property was the lessee to the property. He was not in a position to transfer any other rights or titles than what he had under the lease. Under such circumstances, if he had sold the property to the Defendant, it would have been the lease which was expired on 31st of December 2011. This property is not subject to the lease of the late father. It is now under a new lease issued by the NLTB to the Plaintiff for a period of 50 years from 1st of January 2012. Accordingly, whatever the rights that the Defendant claimed to be obtained from the late father during the period of previous lease have come to end with the expiration of that lease. Moreover, there is no credible evidence that the Plaintiff had constructively involved in the dealing with her father in respect of those alleged transactions.

12. The second limb of the objection is mainly founded on the allegation of fraud. The Defendant does not dispute the registered proprietorship of the Plaintiff. Her allegation is that she was promised by the Plaintiff to make an arrangement to get this lease transferred to her. The authority of granting of the lease on native land is with the NLTB. The Defendant alleges that she gave the Plaintiff \$ 600 for the application fees. The Plaintiff admitted of obtaining of such amount but denied that it was for the application process but stated that money was for the rates due in 2012. Apart from the allegation of fraud in her affidavit, the Defendant has failed to provide any form of evidence to substantiate her claim. Under such circumstances, it is prudent to consider the subsequent or concurrent conduct of the Defendant. While making an allegation that she gave the Plaintiff \$600 for the Application fee, she admitted in her affidavit that she also applied separately for a new lease for this property. The Defendant failed to provide any acceptable reason for why did she apply separately despite the fact that she has already

given the money to the Plaintiff for the same purpose. This in fact lessens the credibility of her allegation of fraud. In the absence of any credible evidence of the fraud done by the Plaintiff, I am inclined to disregard this allegation of fraud of the Plaintiff.

Conclusion,

13. Having considered the reasons set out above, I hold that the Defendant has failed to prove to the satisfaction of the court a right of the possession of the land or the existence of an arguable case for such a right. I accordingly make following orders that;

- i. The Plaintiff is hereby granted the vacant possession of the land situated at Tacirua, Dugulava No 2 Plan; R 1656, Neitasiri Fiji being the land comprised in iTaukei lease No 30289,
- ii. No order for cost,

Dated at Suva this 10th day of June, 2014.



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