

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 219 of 2014

IN THE MATTER OF THE LAND
TRANSFER ACT Section 169 of Part
XXXIV.

BETWEEN : SHRI NARAYAN of Yalalevu, Ba.

PLAINTIFF

AND : INOSI VATUCICILA of Lot 12, Tokotoko, Navua, Senior Pastor.

DEFENDANT

BEFORE: Master Vishwa Datt Sharma

COUNSELS: Mr. Ritesh Naidu on instructions of Patel & Sharma for the Plaintiff.
Mr. Romanu for the Defendant.

Date of Hearing: 07th July, 2015

Date of Ruling: 11th December, 2015

RULING

INTRODUCTION

1. The Plaintiff filed Summons for Ejectment on 6th August, 2014 and sought for the following orders-
 - (a) That the Defendant do show cause why he should not give up immediate vacant possession to the Plaintiff of all that land comprised in Certificate of Title Number 37796, Lot 12, DP 8581 and costs of this application, of which the Plaintiff will rely on the Affidavit of Shri Narayan. And

(b) Costs of this application.

2. This application is supported by an affidavit of Shri Narayan sworn and filed on 8th August, 2014.
3. The application is made pursuant to *Section 169 of Part xxxiv of the Land Transfer Act, Cap 131*.
4. The Defendant was personally served with this application on 25th August, 2014 and an affidavit of service to this effect has been filed into court.
5. The Counsel representing the Defendant was granted 14 days time to file and serve his affidavit in opposition on 02nd December, 2013.
6. The case was adjourned for hearing on 07th July, 2015.
7. This case proceeded to hearing on a defended basis and both parties to the proceeding were represented by Counsels at the hearing.
8. This court has a duty to determine the pending issue before the court in a just and fair manner in terms of the laws provided for in *ss169, 171 and 172 of the Land Transfer Act [Cap 131]*.

PLAINTIFF'S AFFIDAVIT IN SUPPORT OF APPLICATION

9. The Plaintiff deposed as follows-

(i) *That I am the Plaintiff in the action herein.*

- (ii) That in so far as the contents of this Affidavit are within my personal knowledge, they are true; and in so far as they are not within my personal knowledge, they are true to the best of my knowledge and information and belief.
- (iii) That I am the registered lease of the land comprised in Certificate of Title Number 37796, Lot 12 DP 8581. (hereinafter referred to as the said land). I annexe hereto and mark as Exhibit A copy of the lease for the said land.
- (iv) That the Defendant illegally occupies a portion of the said land.
- (v) That on the 15th of January 2014 I instructed my solicitors to write to the Defendant requiring him to vacate the said land. I annexe hereto and marked as Exhibit B is copy of my solicitors aforementioned notice.
- (vi) That the Defendant had instituted a High Court Action against me in respect of the said land, which action has now been struck out. A copy of the Order is annexed hereto and Marked as Exhibit C.
- (vii) That the aforementioned notice was served on the Defendant on the 6th of March 2014 on the Defendant. I annex hereto and mark as Exhibit D a copy of Statutory Declaration of Emosi Ugavule, Community Advisor of Eainndio, Navua confirming service of the aforementioned notice on the Defendant.
- (viii) That despite the notice being served on the Defendant he continues to reside and occupy a portion of the said land.
- (ix) That I therefore seek order in terms of the Originating Summons filed herewith.

DEFENDANT'S AFFIDAVIT IN OPPOSITION

10. That INOSI VATUCICILA of Lot 12, Tokotoko, Navua, Senior Pastor in response say as follows:

- (i) That in response to paragraph 1 of the 1st Plaintiff's Affidavit in support of the summons ("the Affidavit") I neither admit nor deny contents of the same and that the 2nd Plaintiff's name is missing from this action initiated by the 1st Plaintiff.
- (ii) That in response to paragraph 2 of the Affidavit I neither admit nor deny its contents therein.

- (iii) That as to the contents of paragraph 3 of the Affidavit I state that the lawful owner of the land was and still is one Jagendra Narayan whose property I had been occupying since 2004 and further state that the 1st Plaintiff claim to be registered lessee is very suspicious.
- (iv) That in response to paragraph 4 of the Affidavit I categorically deny its contents therein and say that I am not occupying portion of any of the 1st Plaintiff's land but I had been occupying the property owned by Jagendra Narayan consisting of a two bed-room house that it had been on the land for more than 20 years before the sub-division occurred in 2007 as claimed by the 1st Plaintiff.
- (v) That I neither admit nor deny contents of paragraph 5 of the Affidavit and further state that initially the 1st plaintiff was trying to subdivide and sell each lot from the land and that I was to be given the first chance to purchase as it was of the arrangement and promises by Jagendra Narayan also by one Ukesh Narayan who also to be the owner of the land claimed by the 1st Plaintiff.
- (vi) That I categorically deny its contents of paragraph 6 of the Affidavit and further state that the High Court action was not only instituted by me as 1st Plaintiff but together with the Trinity Mission Fellowship, a Christian Church denomination as 2nd Plaintiff against the 1st Plaintiff (1st Defendant) and Ukesh Narayan as 2nd Defendant and repeat paragraph 5 herein and that the High Court Action vide HBC Action No. 2496 of 2012 is now being filed for the struck out Order to be set -aside.
- (vii) That I categorically deny contents of paragraph 7 of the Affidavit as there was no Court Order to vacate the property over served on me and that the Statutory Declaration was falsely made under oath is a breach of the court process which is illegal with no legal effect.
- (viii) That I deny contents of paragraph 8 of the Affidavit and in response I repeat contents of paragraph 5, 6 and 7 herein above.
- (ix) That in response to paragraph 8 of the Affidavit I say that the 1st Plaintiff manner for claim of ownership is very suspicious giving rise to the nature of his claim over the land only from 2007 and such application is an abuse of legal process, frivolous, vexatious and ought be struck out.

THE LAW

11. The application is filed in terms of s 169 of the Land Transfer Act [Cap 131] which provides as follows:

"The following persons may summon any person in possession of land to appear before a judge in chambers to show cause why the person summoned should not give up possession to the applicant:

- (a) the last registered proprietor of the land;*
- (b) a lessor with power to re-enter where the lessee or tenant is in arrear for such period as may be provided in the lease and, in the absence of any such provision therein, when the lessee or tenant is in arrear for one month, whether there be or be not sufficient distress found on the premises to countervail such rent and whether or not any previous demand has been made for the rent;*
- (c) lessor against a lessee or tenant where a legal notice to quit has been given or the term of the lease has expired."*

12. In the case of *Ram Narayan v Moti Ram (Civ. App. No. 16/83)* Gould J.P. said-

"... the summary procedure has been provided in the Land Transfer Act and, where the issues involved are straightforward, and particularly where there are no complicated issues of fact, a litigant is entitled to have his application decided in that way."

13. The procedure under s.169 is governed by sections 171 and 172 of the Land Transfer Act (Cap 131) respectively which stipulates as follows:-

"s.171. 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."

s.172. If a 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."

(Underlined is mine for emphasis)

14. As far as the requirements in terms of section 172 are concerned, the Supreme Court in the case of *Morris Hedstrom Limited v. Liaquat Ali (Action No. 153/87 at p2)* said as follows and it is pertinent:

"Under Section 172 the person summoned 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."

15. The requirements of section 172 have been further elaborated by the Fiji Court of Appeal in *Ajmat Ali s/o Akbar Ali v Mohammed Jalil s/o Mohammed Hanif (Action No. 44 of 1981 - judgment 2.4.82)* where the court said:

"It is not enough to show a possible future right to possession. That is an acceptable statement as far as it goes, but the section continues that if the person summoned does show cause the judge shall dismiss the summons; but then are added the very wide words "or he may make any order and impose any terms he may think fit" These words must apply, though the person appearing has failed to satisfy the judge, and indeed are often applied when the judge decides that an open court hearing is required. We read the section as empowering the judge to make any order that justice and the circumstances require. There is accordingly nothing in section 172 which requires an automatic order for possession unless "cause" is immediately shown. (emphasis added)

16. In *Premji v Lal [1975] FJCA 8; Civil Appeal No 70 of 1974 (17 March 1975)* the Court of Appeal said:

*'These sections and equivalent provisions of the Land (Transfer and Registration) Ordinance (Cap. 136-1955 Laws of Fiji) have been considered in a number of cases in this court and the Supreme Court. In *Jamnadas & Co. Ltd. v. Public Trustee and Prasad Studios Ltd. (Civil Appeal No. 39 of 1972 - unreported)* this court said -*

17. Under Section 172 of the Act the judge is empowered to dismiss the summons if the respondent proves to his satisfaction that he has a valid defence, a right to possession, locus standi and or a licence. It further provides that a judge may make any order and impose any terms that he may think fit. The dismissal of the summons

is not to prejudice the right of a Plaintiff to take any other proceedings to which he may be otherwise entitled.

18. It is for the defendant to 'show cause' why he refuses to give vacant possession of the residential leasehold property to the Plaintiff as sought for by the Plaintiff.
19. Reference is made to the case authorities of *Caldwell v. Mongston* (1907) 3 F.L.R. 58 and *Perrier Watson v. Venkat Swami* (Civil Action 9 of 1967 - unreported) wherein the Supreme Court held '*that if the proceedings involve consideration of complicated facts or serious issues of law, it will not decide the cases on summary proceedings of this nature, but will dismiss the summons without prejudice to the Plaintiff's right to institute proceedings by Writ of Summons.*'

ANALYSIS and DETERMINATION

20. The question for this court to determine is whether the Plaintiff is entitled to the possession of the land comprised in Certificate of Title Number 37796, Lot 12 DP 8581, of which the Plaintiff is the registered proprietor in terms of s169 of the Land Transfer Act [Cap 131]?
21. In this case, the Plaintiffs must first comply with the requirements of section 169 of the Land Transfer Act cap 131, which are stated hereunder as follows-
 - (a) *The first requirement or the first limb of section 169 is that the applicant must be the last registered proprietor of the subject land.*
 - (b) *The second is that the applicant be a lessor with power to re-enter where the lessee or tenant is in arrears; and*
 - (c) *The third is where a lessor against a lessee or tenant where a legal notice has been given or the term of the lease has expired. The second and third limb of section 169 does not appear to apply in that the defendant is not the plaintiff's tenant who is in arrears and/or the term of the lease has expired.*

22. In this instance, the first limb of s169 applies; the plaintiff is the last registered proprietor of the Certificate of Title Number 37796, Lot 12 DP 8581. In this respect the plaintiff has annexed in his affidavit a copy of the Certificate of Title Number 37796, Lot 12 DP 8581, which clearly shows that the land was transferred to the Plaintiff on 21st June, 2007. The Plaintiff is for the purposes of section 169 the last registered proprietor of the said Certificate of Title Number 37796, Lot 12 DP 8581.
23. Sections 39-42 of the Land Transfer Act, and under the Torrens system of land registration which operates in Fiji, the title of the registered proprietor is indefeasible unless actual fraud is proved. (Case of Subramani v Sheela [1982] FJCA 11; [1982] 28 FLR 82 (2 April 1982); Assets Company Ltd v Mere Roihi [1905] AC 176 at p. 210; Fels v Knowles 26 N.Z.L.R. 608, at p 620 refers).
24. In Subramani (supra) the Fiji Court of Appeal (per Gould V.P.' Marsack, J.A., and Spring J.A.) states as follows-

"The indefeasibility of title under the Land Transfer Act is well recognized; and the principles clearly set out in a judgment of the New Zealand Court of Appeal dealing with provisions of the New Zealand Land Transfer Act which on that point is substantially the same as the Land Transfer Act of Fiji. The case is Fels v Knowles 26 N.Z.L.R. 608. At page 620 it is said;-

"The cardinal principle of the statute is that the register is everything, and that, except in case of the actual fraud on the part of the person dealing with the registered proprietor, such person, upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against all the world."

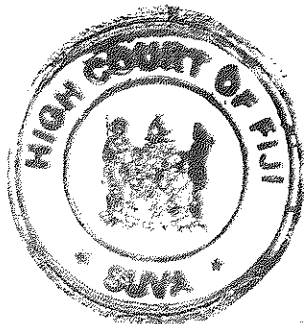
25. Bearing the above in mind, I find that the Plaintiff has the locus standi to bring this action against the Defendant in this case.
26. After the Plaintiffs have established the first limb test of section 169 that is that the Plaintiffs are the registered proprietors of the subject Certificate of Title No. 37796, Lot 12 DP 8581, then the Defendant bears the onus of showing cause as to why vacant possession should not be granted to the Plaintiffs.
27. Pursuant to section 172 of the Land Transfer Act Cap 131. The Defendant needs to satisfy this court on affidavit evidence that she has a right to possession. (Case of Muthusami v Nausori Town Council F.C.A. 23/86 refers).
28. There is no need to prove conclusively a right to possession and it is sufficient for the Defendant to prove that there is some tangible evidence establishing the existence of a right or of an arguable defence. (Case No. 152 of 1987- Morris Hedstrom Ltd v Liaquat Ali refers).
29. The Defendant was served with the Plaintiff's application seeking vacant possession on 25th August, 2014 and filed his affidavit in opposition on 23rd March, 2015.
30. I have very carefully perused the entire affidavit in opposition filed by the Defendant in the within action and reproduced at paragraph 10 hereinabove.
31. I have taken into consideration what materials the Defendant had deposed in his affidavit in opposition, as reproduced at paragraph 10 hereinabove.
32. For the aforesaid rational, I find that the Plaintiff is the rightful registered proprietors of the land comprised in Certificate of Title Number 37796, Lot 12 DP 8581.

33. The defendant has failed to show any cause including *a right to possession* or has *tangible evidence establishing a right or supporting an arguable case for such a right that must be adduced in terms of section 172 of the Land Transfer Act Cap 131.*
34. There is accordingly nothing in *section 172* which requires an automatic order for possession unless "cause" is immediately shown.
35. Following are the final orders of this court.

FINAL ORDERS

- A. The Defendant to give vacant possession of the land comprised in the Certificate of Title Number 37796, Lot 12 DP to the Plaintiff, of which the Plaintiff is the registered proprietor.
- B. The Defendant to deliver vacant possession to the Plaintiff in one (1) months' time on or before the 11th January, 2016 by 4pm.
- C. Cost is summarily assessed at \$750 against the Defendant.

Dated at Suva this 11th day of December, 2015.




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VISHWA DATT SHARMA
Master of High Court, Suva