

IN THE HIGH COURT OF FIJI  
AT SUVA  
CIVIL JURISDICTION

HBC No. 73 of 2015

BETWEEN : URMILA WATI of Lot 5 at Magu Maharaj Road, Kinoya, Nasinu.

PLAINTIFF

AND : TAITO SOLIKOVITI of Lot 5 at Magu Maharaj Road, Kinoya, Nasinu.

DEFENDANT

BEFORE: Acting Master Vishwa Datt Sharma

COUNSELS: Ms. Karan - for the Plaintiff  
Mr. Daveta - for the Defendant

Date of Hearing: 21<sup>st</sup> April, 2015

Date of Decision: 8<sup>th</sup> June, 2015

DECISION

INTRODUCTION

1. This is an application under *s 169 of the Land Transfer Act* [Cap 131] filed by the Plaintiff seeking an order that the Defendant do give vacant possession to the Plaintiff's land comprised and registered and described as Housing Sublease No. 238313 being land described as LE/KT/5/KIN land known as Lot 5628 at Naitasiri.
2. The Plaintiff commenced this proceeding by filing an Originating Summons together with an Affidavit in Support of the Plaintiff, Urmila Wati.
3. The Plaintiff claims that 'CHITTYA NAND and URMILA WATI' are the registered proprietors of all that land comprised and described in Housing

Sublease No. 238313 being land described as LE/KT/5/KIN land known as Lot 5628 at Naitasiri.

4. The Originating Summons and the Affidavit in Support was served onto the Defendant on 14<sup>th</sup> day of February, 2015.
5. The Defendant opposed the Plaintiff's application for vacant possession.
6. Initially when ordered by the court to file and serve his affidavit in opposition, he failed to do so but was granted further time to file and serve her opposing affidavit, which she did.
7. The matter was adjourned to Tuesday, 22<sup>nd</sup> April, 2015 for hearing.
8. The case proceeded on for hearing on a **defended basis**.
9. 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] accordingly.

#### THE APPLICATION

10. The Originating Summons filed by the Plaintiff is seeking an order to evict the Defendant from the land comprised in Housing Sublease No. 238313 being land described as LE/KT/5/KIN land known as Lot 5628 at Naitasiri.
11. The application was supported by an affidavit deposedf by the Plaintiff, Urmila Wati.
12. She confirmed through her affidavit the following-
  - (i) *that she was the Plaintiff in the within action and authorized to swear this affidavit ;*
  - (ii) *that the Plaintiff is the registered proprietor of all that land comprised and described in Housing Sublease No. 238313 being land described as LE/KT/5/KIN land known as Lot 5628 at Naitasiri.*
  - (iii) *That the defendant occupied the said property on verbal tenancy agreement from 2010 and paid a monthly rental of \$250.*
  - (iv) *That since May, 2014, the defendant failed to pay any rent to the Plaintiff and despite various requests the defendant had failed to vacate the said property. The total sum owed as unpaid rent is \$1900.*

- (v) that a notice to quit and deliver vacant possession was given to the Defendant on 05<sup>th</sup> June, 2014;
- (vi) that the defendant has caused some emotional distress and harassment;
- (vii) that despite the notice, the Defendant has failed and or neglected to vacate the said property; and
- (viii) that she seeks for an order that the Defendant do forthwith vacate the said property.

## THE LAW

13. 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) *a lessor against a lessee or tenant where a legal notice to quit has been given or the term of the lease has expired."*

14. 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)*

15. 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.

16. The procedure under s169 is most appropriate here. 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."*

17. 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."*

18. 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).*

19. 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."*

20. 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.

21. 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.'*

#### DETERMINATION OF THE ISSUE

22. The question for this court to determine is whether the Plaintiff is entitled to the possession of all that land comprised and described in *Housing Sublease No. 238313 being land described as LE/KT/5/KIN land known as Lot 5628 at Naitasiri.*
23. The Plaintiff in the affidavit in support of the originating summons confirmed that only she was the registered proprietor of all that land comprised and described in *Housing Sublease No. 238313 being land described as LE/KT/5/KIN land known as Lot 5628 at Naitasiri.*
24. Reference is also made to the first un- marked annexure within the affidavit in support of the Plaintiff, Urmila Wati, which confirms that the Plaintiff, Urmila Wati together with one CHITTYA NAND are the proprietors or the rightful owners of all that land comprised in *Housing Sublease No. 238313 being land described as LE/KT/5/KIN land known as Lot 5628 at Naitasiri.*
25. Further, Notice to Quit or the Eviction Notice only mentions the Plaintiff, Urmila Wati as the sole Lessee of the said property and not CHITTYA NAND as also the other proprietor.
26. The defendant even though was served with the notice to quit, continued to occupy the said property without any entitlement.
27. The defendant has filed and served his affidavit in opposition but has failed to show any defence and or cause why he should not give up vacant possession of the property in question.

28. The defendant was appropriately served with the Plaintiff's application.
29. However, I note that there is an error in the application which needed to be cured first before proceeding with this case any further.
30. The error is that the Housing Authority Lease shows evidence of two Lessees or proprietors of the said land namely the Plaintiff, Urmila Wati and one CHITTYA NAND.
31. In law one of the two owners and or lessees of the land and property alone cannot initiate proceedings in a court of law. Alternatively, the Plaintiff, Urmila Wati could have named the second lessee CHITTYA NAND also as the plaintiff and deposed an affidavit upon his authorization and appeared alone in court with the counsel to represent the 'Plaintiff's' case, but unfortunately this was not done.
32. In Law, there is a requirement in terms of *section 169(a) of the Land Transfer Act Cap 131*, that the Plaintiff must establish the last registered proprietor of the above mentioned land. Upon citing the Housing Authority Lease provided for and annexed in this application it establishes that there are two registered proprietors namely Urmila Wati and Chitty Nand.
33. Further, the second lessee or proprietor, Chitty Nand is not named nor that the Plaintiff Urmila Wati has taken any authority from the second named lessee or proprietor to depose any affidavit in support on his behalf to complete the application.
34. I have carefully considered the **application; facts** and the **affidavit evidence** filed by the **Plaintiff** in this case coupled with the un- marked annexure (*the Housing Authority Lease*) contained within the affidavit in support of the Plaintiff.
35. I find that the **Defendant** has failed to show any cause and or defence as to why he should not give up the vacant possession to the Plaintiff as sought for by the Plaintiff in her application.

36. The technical error discovered on the Plaintiff's application seeking for vacant possession that she failed to establish to this court that together with the Plaintiff, Chitty Nand is also the registered lessee and or the proprietor and that she has failed to depose any authorized affidavit on behalf of Chitty Nand's.
37. The Plaintiff, Urmila Wati has therefore not succeeded in proving the right to possession of all that land comprised in *Housing Sublease No. 238313 being land described as LE/KT/5/KIN land known as Lot 5628 at Naitasiri* as required by section 169 (a) of the Land Transfer Act Cap 131. She must establish the proprietorship or the ownership as required in Law.
38. For the aforesaid rationale, I grant the following orders-
- (i) An Order seeking for the vacant possession of the Plaintiff's land in *Housing Sublease No. 238313 being land described as LE/KT/5/KIN land known as Lot 5628 at Naitasiri* fails.
  - (ii) The Originating Summons together with the Affidavit in Support is hereby dismissed.
  - (iii) No order as to costs.

Dated at Suva this 8<sup>th</sup> Day of June, 2015



  
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**VISHWA DATT SHARMA**  
Acting Master of High Court, Suva

cc: Ms.Karan, Pacifica Barristers & Solicitors, Nausori

Mr. Daveta, Veretawatini Law, Nausori