

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 179 of 2014

IN THE MATTER of Part XXIV of the Land
Transfer Act, Cap. 1971

BETWEEN : **BHAN MATI** of Tunalia, Nadi, Domestic Duties

PLAINTIFF

AND : **KAMAL PRAKASH** of Tunalia, Nadi, Casual Labourer

DEFENDANT

(Ms) Unaisi K. Baleilevuka for the Plaintiff
Mr. Eroni Maopa for the Defendant

Date of Hearing :- 29th May 2015
Date of Ruling :- 10th July 2015

RULING

(A) INTRODUCTION

- (1) Before me is the Plaintiff's Originating Summons pursuant to Section 169 of the Land Transfer Act for an order for vacant possession against the Defendant.
- (2) The Defendant is summoned to appear before the court to show cause why he should not give up vacant possession of the Plaintiff's property comprised in Instrument of Tenancy No. 9922, (NLTB No. 04/10/1441)
- (3) The application for eviction is supported by an affidavit sworn by the Plaintiff on 05th March 2014.
- (4) Upon being served with Originating Summons, the Defendant appeared in Court and strongly resisted the application.

- (5) The Defendant filed an Affidavit in Opposition followed by an affidavit in reply thereto.
- (6) The Plaintiff and the Defendant were heard on the Originating Summons. They made oral submissions to Court. In addition to oral submissions, the Plaintiff filed a careful and comprehensive written submission for which I am most grateful. Regrettably, the Defendant failed to do so.

(B) THE LAW

- (1) Sections from 169 to 172 of the Land Transfer Act (LTA) are applicable to summary application for eviction.

Section 169 states;

“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)
- (c) ...

Section 170 states;

“The summons shall contain a description of the land and shall require the person summoned to appear at the court on a day not earlier than sixteen days after the service of the summons.”

Section 171 states;

“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.

Section 172 states;

“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, mortgage or lessor or he may make any order and impose any terms he may think fit;

Provided that the dismissal of the summons shall not prejudice the right of the plaintiff to take any other proceedings against the person summoned to which he may be otherwise entitled:

Provided also that in the case of a lessor against a lessee, if the lessee, before the hearing, pay or tender all rent due and all costs incurred by the lessor, the judge shall dismiss the summons.

[Emphasis provided]

- (2) The procedure under Section 169 was explained by Pathik J in **Deo v Mati** [2005] FJHC 136; HBC0248j.2004s (16 June 2005) as follows:-

The procedure under s.169 is governed by sections 171 and 172 of the Act which provide respectively 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.”

It is for the defendant to ‘show cause.’

- (3) The Supreme Court in considering the requirements of section 172 stated in **Morris Hedstrom Limited v. Liaquat Ali** (Action No. 153/87 at p2) 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.”

- (4) The requirements of section 172 have been further elaborated by the Fiji Court of Appeal in *Azmat Ali s/o Akbar Ali v Mohammed Jalil s/o Mohammed Hanif* (Action No. 44 of 1981 – judgment 2.4.82) where it is stated:

“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.”

(C) THE FACTUAL BACKGROUND AND ANALYSIS

- (1) What are the facts here? It is necessary to approach the case through its pleadings/affidavits, bearing all those legal principles in my mind.
- (2) To give the whole picture of the action, I can do no better than set out hereunder, which I hereby do, the main averments/assertions of the pleadings/affidavits;
- (3) The Plaintiff in her Affidavit in Support deposes *inter alia* that;
- (a) **THAT** I am the lessee of all that piece and parcel of land comprised in Instrument of Tenancy No. 9922 NLTB No. 4/10/1441 having an area of 1.9001 hectares together with improvements thereon (hereinafter referred to as the “Property”). A copy of the Instrument of Tenancy No. 9922 is annexed hereto and marked as annexure “B M 1”.
- (b) **THAT** I allowed the Defendant to reside on the Property and construct a temporary timber and iron house on the Property provided the Defendant harvested my sugar cane and assisted in the cane farm works.
- (c) **THAT** the Defendant had failed to harvest my sugar cane and does not assist me in the farm.
- (d) **THAT** all the permission and rights given to the Defendant was revoked by the letter dated 23rd September 2014.

- (e) **THAT** the Defendant is in unlawful occupation of the Land. HE does not have any rights or interest in the Land and is a trespasser.
- (f) **THAT** despite numerous verbal requests the Defendant has refused to vacate the Land. I have also caused a Demand Notice to be served on the Defendant and demanded him to vacate the Property. A copy of the said Notice to Vacate is annexed hereto and marked as annexure "BM2".
- (g) **THAT** the Defendant to date has not vacated my Property despite numerous requests.
- (h) **THAT** the Defendant does not have any rights and/or interest on the said Property and is a trespasser as his tenancy has been determined.
- (4) In the Affidavit in Opposition, the Defendants deposes *inter alia* that;
- (a) As to paragraph 4 of the said affidavit, I deny the contents and state that the Plaintiff and her husband approached me at Pandit Sanjay Sharma's place. They offered me to stay on their property and work on the farm as their got permanent residence in Australia. I annexed herein letter of consent given by Plaintiff marked as annexure **KCPI**.
- (b) I agreed upon discussions with my family members to stay on the property as caretaker. I requested the Plaintiff to draw up proper agreement so there be no problems in future. The Plaintiff showed us the house around and a verbal agreement was made that in one room they will keep their belongings, whatever will be left as they were selling their household items and the other rooms will be occupied by my family.
- (c) That upon the Plaintiff's request I started cultivating on the farm. Few months later just before they depart for Australia, I again requested to draw up agreement. The meetings were held in front of Pandit Sanjay, Yaten Prasad, Pardeep Kumar, Son-in-law (Sandip). I was told by the Plaintiff that making agreement with the Growers Council and also Lawyers is too expensive and they assured me that they will stick to the vocal agreement and their son-in-law Mr Sandip will be as a witness between us and also the people present will be the witness too.
- (d) As to paragraph 5 of the said affidavit, I deny the contents and state that I have worked on the farm. I was told by the Plaintiff that I will have to cultivate the farm on 50/50 basis on the cane proceed the first year and 1/3 2/3 basis from next year onwards after deducting all the expenses like Land rent, fertilizer. I annexed herein letter from Gang Sardar regarding cultivation of the said farm marked as annexure **KCP2**.

- (e) *The Plaintiff and her husband assured me that if anything goes wrong in Australia and if they have to return back to Fiji, then they will arrange a place somewhere to stay and I will continue staying there and work on the farm. Upon there assurance, I continued staying and working.*
- (f) *As to paragraph 6 of the said affidavit, I deny its contents. I have equitable and constitutional right to be on the land and not to be arbitrary evicted.*
- (g) *As to paragraph 7 of the said affidavit, I deny the contents and state that the Plaintiff after few months in Australia returned back to Fiji and told me that they having some problems with their son. I was told to build my house in their compound as they were willingly giving the Area for the house because they promised me to do so. I annexed herein photographs of the house being built by me marked as annexure **KCP3**.*
- (h) *The building materials were paid from our own pockets.*
- (i) *We were allowed to use power supply from their house and pay half the bill for only using 2 energy saver bulbs. They also allowed us to use the water supply. Later on we were told by the Plaintiff to complete the house and do electrical wiring and also apply for permanent power supply. I used their electric water pump to pump water for both the family for 6 months.*
- (j) *As to paragraph 8 of the said affidavit, I admit receiving the notice to vacate. I through our solicitor replied to her letter. I annexed herein copy of letter marked as annexure **KCP4**.*
- (k) *I state that I have suffered financial loss and I am entitle for the compensation if they want to vacate me from the property. Particulars are as follows:*
- *50% cane proceeds of 2014 harvest*
 - *Caretaking property and clearing compound for 5 months - \$3,000.00*
 - *Built kitchen - \$300.00*
 - *Dismantle the house 2 times - \$6,000.00*
 - *Hiring transport to cart water etc. - \$1,500.00*

(5) The Plaintiff filed an affidavit in rebuttal deposing *inter alia* that;

- (a) **THAT** *as to Paragraph 4 of the said Affidavit I am unaware of the contents therein therefore I deny the contents therein and say that the Defendant is lying on oath and I further say that I went to Australia on a 3 months tourist visa and was to return back after a period of 3 months and no intention of applying for a permanent residence as alleged by the Defendant.*
- (b) **THAT** *as to Paragraph 5 of the said Affidavit I deny the contents therein and say that the Defendant is lying on oath and I further say that the initial agreement was for the Defendant to reside on the said property as caretaker and assist in the harvesting of the cane on my sugarcane farm and I further*

say that there was no agreement made between me and Defendant with regards to the use of the room in my house.

- (c) ***THAT*** as to Paragraph 6 of the said Affidavit I deny the content therein and further say that the Defendant was issued a letter to vacate on the 6th day of June, 14 after he failed to adhere to the agreement to assist in the harvesting of the cane on my sugarcane farm. Annexed hereto is the said letter and marked an annexure "**BMI**".
 - (d) ***THAT*** as to Paragraph 7 of the said Affidavit I deny the contents therein and further say that the Defendants had annexed a letter for consent for installation of power supply and not the letter regarding the cultivation of the said land and is therefore lying under oath.
 - (e) ***THAT*** as to Paragraph 10 of the said Affidavit I deny the contents herein and further say that there was no agreement made between me and the Defendant.
 - (f) ***THAT*** as to Paragraph 11 of the said Affidavit I deny the contents herein and further say that my son-in-law constructed the ground floor and the Defendant only brought his corrugated iron for his roof and timber for the walls.
- (6) This is an application brought under section 169 of the Land Transfer Act, (Cap. 131). Under Section 169, certain persons may summon a person in possession of land before a judge in Chambers to show cause why that person should not be ordered to surrender possession of the land to the claimant.

For the sake of completeness, Section 169 of the Land Transfer Act, is reproduced below.

Section 169 states;

“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)
- (c)

I ask myself, under which limb of Section 169 is the application being made?

Reference is made to paragraph (03) of the Affidavit in Support of the Plaintiff.

“THAT I am the lessee of all that piece and parcel of land comprised in Instrument of Tenancy No. 9922 NLTB No. 4/10/1441 having an area of 1.9001 hectares together with improvements thereon.”

In support of the above averment the Plaintiff annexed to its affidavit a copy of the "Instrument of Tenancy" No: 9922. The "Instrument of Tenancy" is registered with the Registrar of Deeds. Therefore, the Plaintiff submits that the Plaintiff is the last registered proprietor of the land.

At the beginning of the hearing of the matter, the Defendant raised a preliminary objection in relation to the Plaintiff's legal standing to bring the proceedings. The Defendant contends that the Plaintiff's title is not registered under the Land Transfer Act and therefore Section 169 is not suitable to Summons for the Possession of Land. To be more precise, the Defendant contends that, the Plaintiff is not a registered proprietor for the purposes of the Land Transfer Act.

The argument advanced by the Defendant, though exceedingly ingenious, was, in my opinion, really calculated to obscure and not to elucidate the point which the court is called upon to decide.

Be that as it may, on the question of whether an "Instrument of Tenancy" issued by the iTLTB under the Agricultural Landlord and Tenancy Act and which was registered under the Registrar of Deeds can be dealt with under Section 169, I need only refer to sentiments expressed by Master Robinson in "Nasarawaqa Co-operative Ltd v Chand" (2014 FJHC 281, HBC 18.2013.) As to the legal Principles, the learned Master said this;

*"It is clear that iTLTB as the Plaintiff's lessor can take an action under Section 169 to eject the Plaintiff. This is provided for under paragraphs (b) & (c). For the lessor to be able to eject the tenant or the lessee it must have a registered lease. It is not in dispute that the Plaintiff holds a registered lease, the lease is an "Instrument of Tenancy" issued by the iTLTB under the Agricultural Landlord and Tenancy Act. It is for all intents and purposes a native lease and was registered on the 29 November 2012 and registered in book 2012 folio 11824. It is registered under the register of deeds. **There is nothing in Section 169 that prevents a lessor ejecting a lessee from the land as long as the lease is registered.** How will the lessee then eject a trespasser if the lessor in the same lease can use Section 169? The lessee under Section 169 can eject a trespasser simply because the lessee is the last registered proprietor. The Plaintiff does not have to hold a title in fee simple to become a proprietor as long as he/she is the last registered proprietor. **A proprietor is defined in the Land Transfer Act as "proprietor" means the registered proprietor of land, or any estate or interest therein**". The Plaintiff has an interest by virtue of the instrument of tenancy and therefore fits the above definition and can bring the action under Section 169.*

In Mohammed Habib -v- Janki Prasad the Court came to the conclusion that instruments of tenancy issued by the iTLTB under ALTA and which was registered under the Register of Deeds can be dealt with under Section 169. This is because the word registration refers to the registration of the land not the nature of land. Hence if the land is registered in either the Register of Titles or the Register of Deeds it is still registered land. I am of the view that this is the correct position for the following reasons. In the first instance the

torren's system of land ownership is a system of ownership by registration. It is the registration which defines ownership and makes the title indefeasible subject of course to certain exceptions. What the system does is to protect the registered proprietor of any estate or interest in land recorded in a folio of the register. In this matter the Plaintiff's derived his proprietorship from the registration of the instrument of tenancy in the Register of Deed book 2012. Folio 11824. The indefeasibility of his title is conferred to him as the registered proprietor of the land as the lessee, this is what the registration is protecting.

His Lordship Justice K A Stuart in Housing Authority –v- Muniappa (1977) FJSC states that Section 169 of the Land Transfer Act of those who may apply for relief against any person in possession of land. They include the last registered proprietor of the land, that is, the land of which the person summoned is in possession. The Plaintiff Housing Authority holds a registered lease therefore it could be characterised as the last registered proprietor. His Lordship therefore came to the conclusion that the Housing Authority can bring the action under Section 169. The Defendant relies on the decision of Justice Singh in Sharma –v- Tabuela (2004) FJHC 183 to confirm that registration must be under the Land Transfer Act before an action can be brought under Section 169. I am not certain that Justice Singh used that as the basis upon which he made his decision, his decision is based on the fact that the Plaintiff in that case did not have a title to the land which is registered in any form sufficient for the Plaintiff to act as the last registered proprietor and therefore bring the action. The Supreme Court decision in the Housing Authority – v- Muniappa (Supra) that those who could use Section 169 as the vehicle for seeking relief are those which include the least registered proprietor and those who hold a registered lease can be characterized as the last registered proprietor. Whether it was registered under the Register of Deeds Office or the Register of Titles Office was immaterial, what was important is that the title giving right to proprietorship must be registered with a book and folio number identifying the Plaintiff as the last registered proprietor. That is exactly the same as proprietorship by registration or title by registration.

The Defendant is, in my view, also wrong in assuming that the registered instrument of tenancy granted to the plaintiff does not fall within the ambit of the Land Transfer Act. Section 5 of the Land Transfer Act is clear as to which land is subject to it, this provision states:-

What lands subject to Act

The following freehold and leasehold land shall be subject to the provision of this Act:-

(a) all land which has already in any manner become subject to the provisions of the Land (Transfer and Registration) Ordinance;

(Cap. 136.) (1955 Edition)

(b) all land hereafter alienated or contracted to be alienated from the Crown in fee;

(c) all leases of Crown land granted pursuant to the provisions of the Crown Lands Act, all leases of native land granted pursuant to the provision of the Native Land Trust Act (iTLTB) and all mining leases, special mining leases, special site rights and road access licences granted pursuant to the provisions of the Mining Act;

(d)

Clearly this land falls under paragraph (c). It is firstly a native lease granted by the iTLTB to the Plaintiff to be used for agricultural purposes (hence the ALTA) requirement). If it was a mining lease the provisions of instrument of tenancy will be guided by the requirement of the Mining Act but it still is a native lease and therefore is subject to the Land Transfer Act.

To further bring this instrument of tenancy within the Land Transfer Act Section 10 of the Native Land Trust Act provides that all native leases shall be recorded by the Register of Titles in a Register of Native Leases. Section 10 (2) provides:-

When a lease made under the provision of this Act has been registered it shall be subject to the provisions of the Land Transfer Act, so far as the same are not inconsistent with this Act, in the same manner as if such lease has been made under that Act, and shall be dealt with in a like manner as a lease so made (my emphasis)

The subject lease is titled “Instrument of Tenancy” granted by the Native Land Trust Board to the Plaintiff. The Land Transfer Act defines an “instrument” to include every document registered or capable of registration under this Act or in respect of which any memorial is by this Act directed, required or permitted to be entered in the Register Book or endorsed on any registered instrument. At the bottom right hand corner of the instrument of tenancy is the detail of registration including the date of registration, the Book and the folio number. By virtue of its registration and its eventual entry in the Register Book it has complied with the requirement of the Land Transfer Act. I am therefore satisfied that the Plaintiff can bring the action under Section 169 of the Land Transfer Act.”

(Emphasis added)

From the foregoing, it is clear beyond question that the Plaintiff can bring the action under the first limb of Section 169.

- (7) There are two problems that concern me. Annexed to the affidavit of the Plaintiff is what purports to be a certified photocopy of the instrument of Tenancy in the name of the Plaintiff. The document is not certified by the Registrar of Deeds as required by section 11 of the Civil Evidence Act. It is worth remarking that, No argument was addressed to me on the admissibility of the “Instrument of Tenancy”.

For the sake of completeness, Section 11 of the Civil Evidence Act is reproduced below.

Proof records of business or public authority

11. –(1) A document which is shown to form part of the records of a business or public authority may be received in evidence in civil proceedings without further proof.

(2) A document is to be taken to form part of the records of a business or public authority if this is produced to the court with a certificate to that effect signed by an officer of the business or authority to which the records belong.

(Emphasis Added)

Be that as it may, pursuant to Section 170 of the Land Transfer Act, the Summons shall contain a “description of the land” and shall require the person summoned to appear in the court on a day not earlier than “sixteen days” after the Service of Summons. The interval of not less than 16 days is allowed to give reasonable time for deliberation and to prevent undue haste or surprise.

The Summons filed by the Plaintiff does not contain a description of the land. For the sake of completeness, the Summons is reproduced below

“LET ALL PARTIES concerned attend before a Judge in Chambers at the High Court at Lautoka on the 25th day of November, 2014 at 8.30 o’clock in forenoon or so soon thereafter as Counsel can be heard on the hearing of an Application on the part of the Plaintiff for the following:

- 1. An **ORDER** that the Defendant forthwith quits and delivers vacant possession of all the Plaintiff’s land contained in Instrument of Tenancy No. 9922 NLTB No. 4/10/1441*
- 2. That the costs of the application be paid by the Defendant.*
- 3. Such further or other relief as this honourable Court may deem just.*

Therefore, it is clear beyond question, that the first requirement of the section 170 of the Land Transfer Act has not been complied with. I turn next to consider the second

requirement of Section 170. The summons which was returnable on 25th November 2014, was served on the Defendant on 11th November 2014, which is a day clearly less than 16 days after the Service of the Summons. Therefore, the second requirement too has not been complied with.

It is worth remarking that the Defendant did not make any reference to the said defects in his Affidavit in Opposition or at the hearing.

But nevertheless, I desire to emphasize that the court is bound to look into the “pre requisites” before the burden shifts to the Defendant.

(D) CONCLUSION

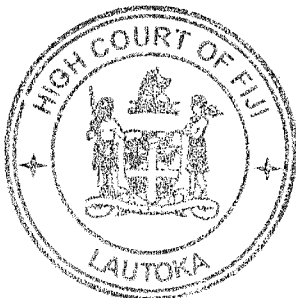
In light of the above, I have no hesitation in holding that the mandatory requirement of Section 170 of the Land Transfer Act and the legal consequences that flow from non compliance defeat the Plaintiff’s claim for vacant possession.

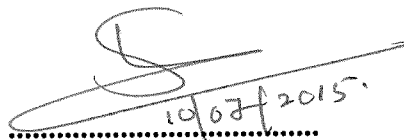
Therefore, the Defendant needs not show any evidence of a cause to remain on the property since this matter can go no further.

Accordingly, there is no alternate but to dismiss the Originating Summons.

(E) FINAL ORDERS

- (1) Originating Summons dismissed.
- (2) The dismissal of the Originating Summons under Section 169 of the Land Transfer Act has not closed the door on any other proceedings against the person summoned.
- (3) The Plaintiff is ordered to pay costs of \$1000.00 (summarily assessed) to the Defendant which is to be paid within 14 days from the date hereof.




10/07/2015

Jude Nanayakkara
Acting Master of the High Court

At Lautoka

10th July 2015