

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 258 of 2015

IN THE MATTER of the Land
Transfer Act, Section 169.

BETWEEN : JAMES AJENDRA NATH SUKUL of Narere, Nasinu, Police Officer.

PLAINTIFF

AND : WILLIAM LUM KON of Lot 11, Malima Street, Suva, Process Worker.

DEFENDANT

BEFORE: Master Vishwa Datt Sharma

COUNSELS: Mr. Shelvin Singh for the Plaintiff.
William Lum Kon in Person (Defendant)

Date of Hearing: 26th January, 2016

Date of Ruling: 03rd March, 2016

RULING

(Application in terms of section 169 of Land Transfer Act Cap 131)

INTRODUCTION

1. The Plaintiff filed an Originating Summons on 22nd July, 2015 and sought for the following orders pursuant to *Section 169 of the Land Transfer Act Cap 131*:
 - (a) That the Defendant give up immediate vacant possession to the Plaintiff of the property comprised in Crown Lease No. 19378 being Lot 11 on Plan No.

S 856 which the Plaintiff is the registered proprietor of, which the Defendant occupies; and

- (b) That the costs of this Application be paid by the Defendant to the Plaintiff.
2. This application is supported by an affidavit deposed by James Ajendra Nath Sukul and filed on 22nd July, 2015.
 3. The Defendant appeared in person on the returnable date of the Summons and opposed the Plaintiff's application.
 4. This case proceeded to hearing on a **defended** basis.
 5. 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 Case

- (i) *That the Plaintiff is the registered proprietor of the property contained in Crown Lease No. 19378 being Lot 11 on Plan No. S 856 ('the said property').*
- (ii) *That the Defendant is the previous owner of the lease and has been staying on the said property without his knowledge and consent.*
- (iii) *That by a notice dated on 16th February, 2015, the Plaintiff sought for vacant possession of the property from the Defendant to be given on or before 22nd February, 2015.*
- (iv) *The notice was duly served on the Defendant on 16th February, 2015.*
- (v) *That despite the Notice, the Defendant has failed to vacate the property and continues to occupy the same.*
- (vi) *That on 12th June, 2015, the Director of Lands has granted the Plaintiff with the consent to institute proceedings against the defendant.*

- (vii) *That the Plaintiff seeks from this Honourable Court an order that the Defendant be ordered to give immediate vacant possession of the said property in terms of the Originating Summons filed herein.*

Defendant's Case

- (i) *That the Defendant appeared in person and opposed the Plaintiff's application.*
- (ii) *That the Defendant contended that he is in possession of the original lease to the property seeking vacant possession and therefore should not be vacated from the property.*

THE LAW

6. 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."*

7. 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."

8. 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."

(Underline is mine for emphasis)

9. 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."

10. The requirements of section 172 have been further elaborated by the Fiji Court of Appeal in *Ajmat Ali v Mohammed Jalil* (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)

11. 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 -

12. 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.
13. It is for the defendant to 'show cause' why he refuses to give vacant possession of the part of the land comprised in Certificate of Title No. 37922, being Lot 1 on Deposit Plan No. 7798 which contains 1 hectare 2171 square metres to the Plaintiff as sought for by the Plaintiff.
14. 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

15. The question for this court to determine is whether the Plaintiff is entitled to the possession of the property comprised in Crown Lease No. 19378 being Lot 11 on Plan No. S 856 in terms of s.169 of the Land Transfer Act [Cap 131], occupied by the Defendant, of which the Plaintiff is the registered proprietor of ?
16. 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-

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- (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.
- (Underline is mine)
17. In this instance, the first limb of s169 applies; the plaintiff is the last registered proprietor of the property comprised in Crown Lease No. 19378 being Lot 11 on Plan No. S 856 issued to him on 27th October, 2014.
18. In this respect the plaintiff has annexed in his affidavit a certified true copy of the Crown lease No. 19378 being Lot 11 on Plan No. S 856 issued to him on 27th October, 2014.
19. The Plaintiff is for the purposes of *section 169* the last registered proprietor of the Crown lease No. 19378 being Lot 11 on Plan No. S 856.
20. 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).
21. 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."

22. Bearing the above in mind, I find that the Plaintiff has the locus standi to bring this action against the Defendant in this case.
23. After the Plaintiff has established the **first limb test of section 169** that is that the Plaintiff is the registered proprietor of the subject property comprised in the **Crown lease No. 19378** being Lot 11 on Plan No. S 856, then the **Defendant** bears the onus of showing cause as to why vacant possession should not be granted by him to the Plaintiff.
24. Pursuant to *section 172 of the Land Transfer Act Cap 131*. The Defendant needs to satisfy this court on affidavit evidence that he has a right to possession. (Case of **Muthusami v Nausori Town Council F.C.A. 23/86** refers).
25. 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).

26. The Defendant was served with the Plaintiff's application seeking vacant possession but failed to file and serve any affidavit in opposition. The Defendant appeared in person in court at the scheduled hearing date of 26th January, 2016 and defended himself stating that he was in possession of the original lease and therefore was entitled to continue with the occupation of the same.
27. Upon citing the lease in the possession of the Defendant, it was revealed to court that the lease had been cancelled and therefore is immaterial. Subsequently on 27th October, 2014, the Plaintiff was granted with the new lease as per Annexure "A" within the Affidavit in Support of the Plaintiff filed herein accordingly.
28. For the aforesaid rational, I find that the property comprised in the Crown lease No. 19378 being Lot 11 on Plan No. S 856 was granted to the Plaintiff on 27th October, 2014 by the Director of Lands according to law.
29. 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.*
30. There is accordingly nothing in *section 172* which requires an automatic order for possession unless "cause" is immediately shown.
31. Following are the final orders of this court.

FINAL ORDERS

- A. The Defendant to give vacant possession of the land comprised in the Crown lease No. 19378 being Lot 11 on Plan No. S 856 in the Republic of Fiji, to the Plaintiff.

- B. The Defendant to deliver vacant possession to the Plaintiff in one (1) month's time on or before the 03rd April, 2016.
- C. Execution is hereby suspended till the 03rd April 2016.
- D. Cost is summarily assessed at \$500 against the Defendant.

Dated at Suva this 03rd day of March, 2016




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MR VISHWA DATT SHARMA
Master of High Court, Suva

cc: *Shelvin Singh Lawyers, Suva;*
William Lum Lok of Lot 11, Malima Street, Suva.