

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 211 of 2015

BETWEEN : **WADIGI INVESTMENT LIMITED** a limited liability company
having its registered office at Lauwaki Village, Lautoka.

PLAINTIFF

AND : **ALENA LAQAI** of Saweni, Lautoka.

DEFENDANT

(Ms) Patricia Valesasa Mataika for the Plaintiff
Mr. Kevueli Tunidau for the Defendant

Date of Hearing: - 18th May 2016
Date of Ruling : - 16th September 2016

RULING

(A) INTRODUCTION

- (1) The matter before me stems from the Plaintiff's Originating Summons dated 25th November 2015, made 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 she should not give up vacant possession of the Plaintiff's property comprised in Native Lease No:- 27235 known as Natuanivibona S/D Lot-3 on SO 4523 in the Tikina of Vuda and Province of Ba and having an area of approximately 835m².
- (3) The application for eviction is supported by an Affidavit sworn by one Apimeleki Nasalo.

- (4) The application for eviction is strongly contested by the Defendant.
- (5) The Defendant filed an “Affidavit in Opposition” opposing the application for eviction. The Plaintiff did not file an “Affidavit in Reply”.
- (6) The Plaintiff and the Defendant were heard on the Originating Summons. They made oral submissions to Court. In addition to oral submissions, Counsel for the Plaintiff and the Defendant filed a careful and comprehensive written submission for which I am most grateful.

(B) THE LAW

- (1) In order to understand the issues that arise in the instant case, I bear in mind the applicable law and the judicial thinking reflected in the following judicial decisions.
- (2) 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]

- (3) 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.'

- (4) 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."

- (5) 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

- (1) What are the facts here? It is necessary to approach the case through its pleadings/affidavits, **bearing all those legal principles uppermost in my mind.**
- (2) To give the whole picture of the action, I can do no better than set out hereunder the **main averments/assertions of the Pleadings/Affidavits.**
- (3) The Plaintiff's Originating Summons for vacant possession is supported by an Affidavit sworn by one 'Apimeleki Nasalo', a Director of the Plaintiff Company, which is substantially as follows;

- Para 1. *THAT I am one of the directors of the Private Company Wadigi Investments Limited and I am duly authorised by the Plaintiff Company to depose this Affidavit. There is now produced and marked as "AN-1" is a copy of the Company search.*
2. *THAT I make this my Affidavit from matters well known to me and from documents which I have come into my possession and which I believe to be true.*
 3. *THAT the Plaintiffs are the Registered Proprietor of Native Lease No. 27235 known as Natuanivibona S/D Lot 3 on SO 4523 in the Tikina of Vuda and Province of Ba and having an area of approximately 835m². There is now produced and marked as "AN-2" is a Certified True copy of the Native Lease No. 27235.*
 4. *THAT the Plaintiff entered into a Tenancy agreement with the Defendant whereby the Defendant would pay a monthly rental in the sum of \$350.00 a month at the end of the month and started residing on the property on or about in 2012.*
 5. *THAT the Defendant defaulted in paying his rent in February 2014 till to date and the Plaintiff through their Solicitors at that time Gordon and Co issued a Legal Notice to quit to the Defendant dated 14th April 2014. There is now produced and marked as "AN-3" is a copy of the letter.*
 6. *THAT the Defendant failed or neglected to pay the arrears or to vacate the property even though she was residing on the property without the consent of the Plaintiff.*
 7. *THE Plaintiff then issued another Notice to Vacate through their Solicitors Vuataki Law on 7th July 2014 to the Defendant. There is now produced and marked as "AN-4" is a copy of the letter.*
 8. *THE Defendant still did not pay her rental arrears or vacate the property so the Plaintiff then issued another Notice to vacate dated 26th August 2015. There is now produced and marked as "AN-5" is a copy of the letter.*

9. *THE Defendant has neglected to pay her rental arrears or to vacate the property and because of her default the Plaintiff Company have not been able to make payments to iTLTB and to Fiji Revenue and Customs to clear the Lease and Tax arrears. There is now produced and marked as "AN-6" "AN-7" is a copy of the letter from iTLTB (which is the file copy from iTLTB) dated 29th September 2015 and a copy of the Official Receipt from Fiji Revenue and Customs dated 22 January 2015.*
10. *THAT the Defendant was required to pay rent of \$350.00 per month and have failed to do so since February 2014 till to date.*
11. *THAT a letter from iTaukei Land Trust Board regarding rent payment was issued to the Defendant on the 29th of September 2015, but the Defendant still failed to pay the rental arrears. There is now produced and marked as "AN-8" is a copy of the letter.*
12. *THAT the Defendant has been unjustly enriched and continues to reside on the property without the consent of the Plaintiff and the Plaintiff continues to suffer due to the default in payments by the Defendant.*
13. *THAT the Defendant is residing on the property illegally and unlawfully without the consent of the Plaintiffs.*
14. *THAT the Plaintiffs intends to rent out the property in January 2016 to Students from the Solomon Islands attending the University of Fiji and the Plaintiffs wish that the Defendant vacate in exercise of their rights as the Registered Proprietor of the said property.*
15. *THAT I therefore ask in terms of our Originating Summons filed herewith.*

(4) The Defendant for her part in seeking to show cause against the Summons, filed an Affidavit in Opposition, which is substantially as follows;

- Para 1. THAT I am the within-named Defendant.*
- 2. THAT I make this Affidavit from matters well known to me and from documents which have come into my possession and which I believe to be true or otherwise believe to be true.*
- 3. THAT I have read the Affidavit in Support of Apimeleki Nasalo on 24 November, 2015 (herein referred to as the "Affidavit").*
- 4. THAT in response to paragraph 1 of the Affidavit I say as follows:*
- 4.1 That the copy of the company search produced and marked as annexure AN-1 of the Affidavit did not disclose the Memorandum and Articles of Association of the Plaintiff Company to reveal the shareholders of the Plaintiff Company, how the Plaintiff Company was formed and for*

what purpose, and the terms of the Directors' tenure including that of Apimeleki Nasalo.

- 4.2 *That I am legally advised and believe as true that the Plaintiff Company was formed pursuant to the provisions of the TOKATOKA WADIGI DEVELOPMENT DEED OF TRUST (herein referred to as the "Deed") registered sometimes in October, 2001. A copy of the said Deed is annexed and marked "AL-1".*
- 4.3 *That the Deed formed the TOKATOKA WADIGI DEVELOPMENT TRUST whose trustees were Poasa Naluvea, Rusiate Ratu and Apimeleki Nasalo. I verily believe that trustee namely Apimeleki Nasalo is the same person who deposed the Affidavit.*
- 4.4 *That Part III, clause 5 of the Deed states '....the Trustees may initiate the formation of a limited liability company or companies to further the commercial interest of the Tokatoka after complying with paragraph 4 above.'*
- 4.5 *That I verily believe that Apimeleki Nasalo as a trustee under the Deed became a Director of the Plaintiff Company on its incorporation and that Tokatoka Wadigi registered members in the Register of Native Land (RNL) or Vola ni Kawa Bula (herein referred to as the "VKB") pursuant to the ITaukei Lands Act, are the shareholders.*
- 4.6 *That I am legally advised and believe as true that Apimeleki Nasalo has no express and written mandate or authority of the majority of the shareholders of the Plaintiff Company to take out this action against me.*
- 4.7 *That Apimeleki Nasalo has not disclosed and annexed in the Affidavit any documentary evidence of any duty given authorisation of the majority of shareholders of the Plaintiff Company to take out this legal action.*
- 4.8 *That I am legally advised that Part III, clause 14 of the Deed contain the grounds whereby 'Trustees will automatically cease to be Trustee or be subject to removal as Trustee'.*
- 4.9 *That, among other grounds, ground (d) of Part III, clause 14 of the Deed states as a ground of automatic cessation or removal of the trustees or a trustee was where the trustees or trustee:*

'upon acting contrary to the Deed of Trust or the interest and/or the benefit of the Yavusa as may be directed by a majority of the members of the Yavusa in a duly constituted meeting:'
- 4.10 *That by a subsequent deed styled TOKATOKA WADIGI DEVELOPMENT DEED OF TRUST (herein referred to as the "2nd Deed") executed on 13th April, 2010, Apimeleki*

Nasalo and his two other trustees in the Deed were removed as trustees and replaced by new trustees namely ESALA TAVUA, AKILI MASI, JOSEFA NAREKA NASALO, APIMELEKI DAWAI, SIRELI SARO and INOKE TORA. A copy of the said 2nd Deed is annexed and marked "AL-2".

- 4.11 *That the 2nd Deed contained a letter in the itaukei language dated 26th March, 2010 directed to the iTaukei Land Trust Board. The letter explained the reasons or grounds for the removal of Apimeleki Nasalo and his fellow trustees in the Deed by members of Tokatoka Wadigi of Lauwaki Village, Vuda, Lautoka. The English translation of the contents of the letter is as follows;*

"We the members of Tokatoka Wadigi of Mataqali Nabasara in the Yavusa Koi Vuda seek your support on one of our great desire that had been discussed by the whole Tokatoka with the consent of the Chief of the Tokatoka Ratu Setariki Nasalo.

The agenda of our meeting on Friday 19 March 2010 was the election of new trustees for Mataqali Nabasara, Tokatoka Wadigi in the village of Lauwaki in Vuda and the meeting was held at the chiefly house of Sayake in the Mataqali of Nabasara. Sir, we no longer accept the old trustees due to the manner they have poorly treated us for a number of years for the following major grounds:

- (a) The deceptive sale of land.*
- (b) Unlawful loss of vehicle, boat and outboard engine.*
- (c) Unclear record of income derived from housing.*
- (d) Unclear records of lease monies – no voucher*
- (e) Building of our housing on credit with no statement to rent.*
- (f) The giving away of our island (Vatunagahu) and we do not know where its rent money went to.*

Sir, we ask that monies derived from land sold through deceptive means be stopped. Your official had advised that the powers of the old trustees have ceased namely Apimeleki Nasalo, Rusiate Ratu and Sailosi Poasa. All that they want to do have to be stopped by your office (NLTB). That is the decision of the Tokatoka and we look forward to a life of peace, goodwill, prosperity as the leader of government intends."

- 4.12 *That I verily believe that the removal of Apimeleki Nasalo as as a trustee under the 2nd Deed by a majority of the members of Tokatoka Wadigi as per letter dated 26 March 2010*

referred to at subparagraph 4.11 above, shows that Apimeleki Nasalo did not have the mandate or authority of the majority of the members of the Tokatoka Wadigi registered in the VKB and who are the shareholders of the Plaintiff company to take out this legal action against me.

5. *THAT in response to paragraph 3 of the Affidavit I say that I am unaware of its contents and/or that there is no proof that the house I am occupying sits on the lease in question and/or otherwise the same is denied.*
6. *THAT in response to paragraph 4, I say that there was no written tenancy agreement with the Plaintiff on rent. The Plaintiff has not disclosed any documents on rent and that which pertains to my tenancy if that was so.*
7. *THAT the only written tenancy agreement I had was executed on 22 March, 2014 between me as tenant and the TOKATOKA WADIGI TRUST as the landlord (herein referred to as "the Tenancy Agreement"). Under the Tenancy Agreement the rent was \$3000.00 per month. A copy of the Tenancy Agreement is annexed and marked as "AL-3".*
8. *THAT prior to the Tenancy Agreement the trustees under the 2nd Deed agreed to my occupying the Tokatoka Wadigi property at the rent of \$300.00 per month. But I had been hassled and harassed by Apimeleki Nasalo to pay him the rent and on most occasions when he was drunk or at very odd hours of the night.*
9. *THAT I had been paying rent pursuant to clause 2.0 of the Tenancy Agreement.*
10. *THAT in response to paragraph 5 to 14, I say as follows:*
 - 10.1 *I repeat paragraph 4 herein-above.*
 - 10.2 *I likewise repeat paragraphs 6 to 9 herein-above.*
11. *THAT for the foregoing grounds, I have cause not to be evicted and seek that the Plaintiff's summons be dismissed with costs.*

(D) ANALYSIS

- (1) This is an application brought under Section 169 of the Land Transfer Act, Cap 131.

The Plaintiff is a duly incorporated limited liability Company having its registered office at Lauwaki Village, Lautoka.

The Plaintiff's Originating Summons for ejectment is supported by the Affidavit of one "Apimeleki Nasalo" filed on 24th November 2015.

“Apimeleki Nasalo” at paragraph one (01) of his Affidavit stated that he is one of the Plaintiff’s Directors and annexed as annexure “AN-1” a copy of Company search to show the Plaintiff’s Directors.

For the sake of completeness paragraph one of the Affidavit of “Apimeleki Nasalo” is reproduced below in full;

Para 1. THAT I am one of the directors of the Private Company Wadigi Investments Limited and I am duly authorised by the Plaintiff Company to depose this Affidavit. There is now produced and marked as “AN-1” is a copy of the Company search.

- (2) At the commencement of the hearing before the Court, Counsel for the Defendant raised objections to the Plaintiff’s Affidavit in Support.

They are very clearly outlined in the written submissions of the Defendant. They are;

Para 1. No locus standi of Apimeleki Nasalo to bring this action

The Plaintiff’s Summons for Ejectment is supported by the Affidavit in Support of Apimeleki Nasalo filed on 24 November, 2015. Apimeleki Nasalo at paragraph 2 of his Affidavit stated that he is one of the Plaintiff Directors and annexed as annexure “AN-1” a copy of the Company search to show the Plaintiff director.

- 1.1 Annexure AN-1 is not an official company search result by the office of the Registrar of Companies. It did not disclose the search date or the official stamp of the office of the Registrar of Companies certifying as correct the search result.*
- 1.2 Annexure AN-1 revealed the particulars of directors as it was presented by Solicitors Messrs Young & Associates in the year 2005. Whether the named directors in the said document were the same in 2015 when this action was filed cannot be known without an official search result.*
- 1.3 Most importantly, annexure AN-1 disclosed the names of Poasa Naluvea, Rusiate Ratu and Apimeleki as directors. There is no director by the name of Apimeleki Nasalo disclosed as a director by the said document. Annexure AN-1 contradicts the contention of Apimeleki Nasalo at paragraph 1 of his Affidavit in support that he is a director of the Plaintiff.*
- 1.4 Apimeleki Nasalo also deposed at paragraph 1 of his affidavit in support that he is duly authorised by the Plaintiff to depose the affidavit*

Firstly, this contention is defeated by our submissions at subparagraph 1.1 to 1.3 heretofore.

Secondly, Apimeleki Nasalo has not annexed any official written authorisation by the Plaintiff on its letter head with the company seal of such authorisation.

Thirdly, the lack of an official authorisation renders him no locus standi to bring this action against the Defendant.

- 1.5 *We submit that at common law, power in a company lay with the shareholders as a whole. Some of its powers may, according to its Articles, be vested and exercised by its directors (Automatic Self-Cleansing Filter Syndicate Co Ltd v Cunninham [1906] 2 Ch. 34; John Shaw and Sons (Salford) Ltd v Shaw [1935] 2 KB 113, 134; Black White & Grey Cabs Ltd v Fox [1969] NZLR 824 (C.A.)).*
- 1.6 *The Plaintiff did not disclose its Articles of Association to show who the shareholders of the company were in 2015 when bringing this action against the Defendant and whether a power was delegated to the directors to bring an action in court.*
- 1.7 *Unless delegated under the Articles of Association of the Plaintiff company, we submit that the power in the company, including the power to bring a legal action for the Plaintiff lay with its shareholders as a whole. With such an important document undisclosed, Apimeleki Nasalo cannot contend in his affidavit in support that he is somewhat authorised by the Plaintiff to bring this action against the Defendant. For this reason Apimeleki Nasalo lack locus standi to bring this action against the Defendant.*

- (3) As against this, I do not forget what was said in argument by (Ms) Mataika, Counsel for the Plaintiff.

She took me through paragraph one (01) of the correspondence annexed and marked AN-6 in the Affidavit in Support of 'Apimeleki Nasalo', viz, a letter addressed to 'Apimeleki Nasalo' by the Manager, ITLTB, dated 29th September 2015. The paragraph one (01) reads;

"As discussed yesterday, the 28th of September, 2015, with Apimeleki Nasalo, one of the Directors of Wadigi Investment Ltd, we anticipate by 2 weeks time a payment of \$5000.00 to clear off half of the amount due with the balance to be settled by making instalment.

She submitted that the only inference which could practically arise from the paragraph one of the aforementioned correspondence is that 'Apimeleki Nasalo' is one of the Directors of Plaintiff Company.

Upon perusal of correspondence annexed and marked AN-6, it is observed that it is an unsigned document. Therefore, I give it no weight whatsoever.

In the same breath, (Ms) Mataika, Counsel for the Plaintiff argued that the onus is on the Defendant to prove that 'Apimeleki Nasalo' does not have authority to depose on behalf of Plaintiff Company.

- (4) Let me now move to consider the objections raised by the Defendant.

A copy of the Plaintiff Company search is annexed and marked as "AN-1" in the Affidavit in Support of Apimeleki Nasalo. Upon perusal of annexure "AN-1", it is observed that "AN-1" discloses the names of "Posa Naluvea", "Rusiate Ratu" and "Apimeleki" as Directors. There is no Director by the name of "Apimeleki Nasalo".

Thus, the Annexure AN-1 effectively nullifies the assertion of "Apimeleki Nasalo" at paragraph one of his Affidavit, viz, he is one of the Directors of the Plaintiff Company.

Leave that aside for a moment!!

As I mentioned earlier, the Plaintiff is a limited liability Company. Therefore, "Apimeleki Nasalo" needs the sanction of the Plaintiff Company to swear on behalf of the Plaintiff. But "Apimeleki Nasalo" does not annex any authority given to him by the Plaintiff Company. As a result, I am left with the conclusion that the Affidavit of "Apimeleki Nasalo" is defective and a nullity because there is no 'ostensible' authority to prove that he was duly authorised to swear on behalf of the Plaintiff Company.

Therefore, I uphold the objection raised by the Defendant. Thus, Affidavit is expunged from the Court record. This may leave the Court with no option but to dismiss the Plaintiff's Originating Summons for ejectment since there is no evidence in support.

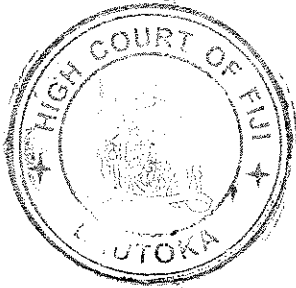
I cannot see any other just way to finish the matter than to follow the law.

In view of the approach I have adopted, I do not consider it necessary for me to express my views on the merits of the Plaintiff's application for ejectment. It will be at best, a matter of academic interest only or at worst an exercise in futility to discuss the merits of the application for ejectment.

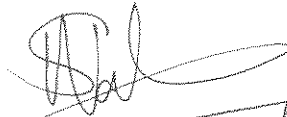
(E) FINAL ORDERS

- (1) The Plaintiff's Originating Summons for ejectment is dismissed.

- (2) The Plaintiff is to pay costs of \$500.00 (summarily assessed) to the Defendant which is to be paid within 14 days hereof.



At Lautoka
16th September 2016


.....16/09/2016.
Jude Nanayakkara
Master.