

IN THE HIGH COURT OF FIJI  
AT SUVA  
CIVIL JURISDICTION

Civil Action No. HBC 83 of 2016

AND IN THE MATTER of an application  
for Vacant Possession pursuant to *Section*  
*169 of the Land Transfer Act, Cap131.*

**BETWEEN** : **ROSHINI DEVI** of 10 Summer Stroll Circle, Sacramento, CA 95823, USA,  
Domestic Duties.

PLAINTIFF

**AND** : **MARIA VAKADULA** of Vuninokonoko Back Road, Navua.

DEFENDANT

**BEFORE:** Master Vishwa Datt Sharma

**COUNSELS:** Mr. Pranish Kumar for the Plaintiff  
Mr. Maisamoa on behalf of Vakaloloma & Associates for the Defendant

**Date of Hearing:** 09<sup>th</sup> November, 2016

**Date of Ruling:** 28<sup>th</sup> March, 2017

**RULING**

[Vacant possession pursuant to section 169 of the Land Transfer Act, Cap 131]

- (viii) That the Defendant refuses to vacate the property and therefore seeks for the Orders as per the Summons.

### Defendant's Case

7. The Affidavit In Opposition deposed by the Defendant can be summarised as follows-

- (i) That she was only informed that the registered proprietor lives overseas.
- (ii) That she admits presently living on or occupying the said property at Navua on the instruction of her daughter, who is the proper the tenant.
- (ix) That a tenancy agreement was entered into and signed between the Landlord and her daughter for rental of the Navua property at \$300.00 per month.
- (x) That she has no knowledge of the Plaintiff's intention to sell the property, but as far as she knows, her daughter had offered to purchase the property at the price of \$80,000.00 (Eighty Thousand Dollars) and the Landlord had promised that if she decides to sell the property, she will ensure her daughter will be given the first priority. Her daughter is awaiting the decision of the Plaintiff on her offer of \$80,000.00 (Eighty Thousand Dollars).
- (xi) That to shift the blame and say that she is refusing to vacate the property, is most unreasonable and unwarranted and unjustified considering rental that had continued to be paid and collected as per the advice of the Landlord.
- (xii) That she prays for the Plaintiff's action to be dismissed with cost.

### THE LAW

8. 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."*

9. 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."

10. 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)

11. 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."*

12. 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)*

13. 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) refers.*

14. 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.
15. It is for the defendant to 'show cause' why she is refusing to give vacant possession of the land comprised in the Certificate of Title No. 24334, being Lot 5 on DP 5630 located at Vuninokonoko, Back Road, Navua of which the Plaintiff is the registered proprietor?
16. 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

17. The question for this court to determine is whether the Plaintiff is entitled to the possession of the land comprised in the Certificate of Title No. 24334, being Lot 5 on DP 5630 located at Vuninokonoko, Back Road, Navua, in the Republic of Fiji, of which the Plaintiff is the registered proprietor in terms of s169 of the *Land Transfer Act [Cap 131]*?
18. In this case, the Plaintiff 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.*

19. In this instance, the first limb of s169 applies. The annexure marked 'RD1' within the Affidavit in Support of Roshini Devi confirms that Roshini Devi, the Plaintiff in this action is the last registered proprietor of the Certificate of Title No. 24334, being Lot 5 on DP 5630 located at Vuninokonoko, Back Road, Navua, in the Republic of Fiji .

In this respect, the certified true copy of the Certificate of Title No. 24334 shows clearly that the land in question was granted to the Plaintiff Roshini Devi on 23<sup>rd</sup> November, 2000. The Plaintiff, Roshini Devi for the purposes of section 169 application is the last registered proprietor of the said Certificate of Title No. 24334.

20. The Defendant raised the Defence of Proprietary Estoppel and informed Court of what had actually transpired between the Plaintiff and the Defendant's daughter who according to the Defendant was the legal Tenant and what made the Plaintiff commence this proceedings and seek an order for vacant possession against the Defendant, Maria Vakadula.

21. Proprietary Estoppel is a legal claim which may arise in relation to rights to use the property of the owner, and may even be effective in connection with disputed transfers of ownership. Proprietary estoppel transfers rights if-

- Someone is given a clear assurance that they will acquire a right over property;
- They reasonably rely on the assurance;
- They act substantially to their detriment on the strength of the assurance; and
- It would be unconscionable to go back on the assurance.

22. In the instant case, according to the Defendant, Maria Vakadula, her daughter occupied the Plaintiff's premises on the Certificate of Title No- 24334, being Lot 5 on DP 5630 located at Vuninokonoko, Navua as a monthly Tenant and she instructed the Defendant to occupy and live on the said property considering the fact that the rental was paid by her daughter. (Reference is made to paragraphs 5, 8 & 9 of the Defendant's affidavit).

23. The Defendant further deposed in her affidavit at paragraph 7 that 'her daughter who was in fact the Tenant of the Plaintiff had offered to purchase the Plaintiff's said property for a price of \$80,000 (eighty thousand dollars) as earlier promised by

the Plaintiff. Therefore, the Defendant is informing Court that her daughter has proprietary interest on the Plaintiff's property.

24. If there was any promise given by the Plaintiff to the Defendant's daughter then why didn't the Defendant's daughter execute the Sale and Purchase Agreement sent over to her and return the same executed for subsequent settlement and transfer of the Plaintiff's property into her name?
25. There is no evidence before this Court that the Defendant's daughter was the legal Tenant of the Plaintiff's property. This action has been filed against the Defendant, Maria Vakadula and not the daughter. Even if the daughter had instructed the Defendant (Mother) to live and occupy the Plaintiff's property without any prior **permission, approval and/or consent** of the Plaintiff would then tantamount to **sub-letting** in law and therefore was **unlawful and illegal** in itself.
26. According to the Plaintiff's affidavit in reply at paragraphs 7, 8 & 9, the Plaintiff clearly states that the current occupancy by the **Defendant** is **illegal** and a Sale & Purchase Agreement was sent over to the Defendant's daughter to execute the Agreement and to proceed with the purchase of the Plaintiff's property but that never eventuated since the Plaintiff did not receive any response from the Defendant's daughter. As a result, the Plaintiff entered into a new Sale and Purchase Agreement with another party at an agreed price of \$65,000 (Sixty-Five thousand dollars). (*Annexure marked "RD2" refers*).
27. On the other hand, there is no evidence of any Sale and Purchase Agreement executed between the Plaintiff and the Defendant and or the Defendant's daughter as raised by her but I do find that there is evidence of a Sale and Purchase Agreement entered upon and executed between the Plaintiff and another party, Robin Sharwan Singh on 16<sup>th</sup> November, 2015 (Reference is made to Annexure marked "RD2").
28. In absence of any evidence supporting the claim of **Proprietary Estoppel**, the Defendant's Defence of Proprietary Estoppel fails to the extreme.
29. In conclusion, the Defendant is in the present occupation of the Plaintiff's premises on the Certificate of Title No- 24334, being Lot 5 on DP 5630 located at Vuninokonoko, Navua. She was served with a Notice to Vacate on 04<sup>th</sup> December, 2015. According to the Plaintiff, the Defendant continues to occupy and live on the said property and to date is refusing to give vacant possession.
30. I do not find any defence and or evidence that she has any legal or equitable right to continue occupying the Plaintiff's property since the Tenancy has been terminated by the Plaintiff and this is supported by the fact that a Notice to Vacate was already

served onto the Defendant asking her to vacate the property which she has failed to do so up to the date of this decision.


31. I proceed to make the following final orders of this court.

FINAL ORDERS

- A. The Plaintiff's Originating Summons seeking an order for Vacant Possession hereby succeeds against the Defendant.
- B. The Defendant to give vacant possession of the Plaintiff's property comprised in the Certificate of Title No. 24334, being Lot 5 on DP 5630 located at Vuninokonoko, Back Road, Navua, in the Republic of Fiji in one (1) calendar months' time, on or before 28<sup>th</sup> April, 2017 at 4pm.
- C. Execution will be suspended till the 28<sup>th</sup> April, 2017 at 4 pm.
- D. Cost is summarily assessed at \$750 against the Defendant and to be paid within 28 days.

Dated at SUVA this 28<sup>TH</sup> day of MARCH, 2016



  
VISHWA DATT SHARMA  
Master of High Court, Suva

cc: *Nands Law, Suva*  
*Vakaloloma & Associates, Suva*