

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 335 of 2015

IN THE MATTER of an application
under Section 169 of Part XXIV of
Land Transfer Act, Cap 131 for an
Order for immediate vacant
possession.

BETWEEN: SHIU RAM of 74 Norman Street, Prospect 2148, Sydney, Australia, Retired.

PLAINTIFF

AND: ARVEEN CHAND of Korocinicini, Nausori.

1ST DEFENDANT

AND: RAM HARAH of Korocinicini, Nausori.

2ND DEFENDANT

BEFORE: Master Vishwa Datt Sharma

COUNSELS: Ms. Swastika Narayan - for the Plaintiff
Mr. Pita Niubalavu - for the Defendant

Date of Ruling: 28th March, 2017

RULING

*(Application seeking Vacant Possession pursuant to
s169 of the Land Transfer Act Cap 131)*

INTRODUCTION

1. The Plaintiff by his Originating Summons dated 16th October, 2015 is seeking immediate vacant possession of the property comprised in NLTB Reference No 4/14/11715 described as Nasoqela No. 29 (part of), Lot 5 in the Tikina of Namata and in the Province of Tailevu, having an area of 1970m² (subject of survey) of which the Plaintiff is the legal owner.
2. There are 3 (Three affidavits filed before the Court:
 - a) Affidavit in Support of Shiu Ram filed on 16th October, 2015 ("Plaintiff's Affidavit");
 - b) Affidavit in Opposition of Arveen Chand and Ram Harakh filed on 12th February, 2016 ("Defendant's Affidavit In Opposition"); and
 - c) Affidavit in Response of Shiu Ram filed on 18th April, 2016 ("Plaintiff's Affidavit").

PRACTICE and PROCEDURE

3. The Plaintiff has made his application pursuant to Section 169 of the Land Transfer Act 1978, Cap 131.
4. A Section 169 application is a summary procedure for possession which enable various categories of persons to call upon a person in possession of a property to show cause why he or she should not give up possession. One such category, specified in paragraph (a) of the section is *'the last registered proprietor of the land'*. (*The Plaintiff falls under this category*).
5. Pursuant to Section 172 of the Act, the onus is on the Defendants to show cause why they are refusing to give up possession to the Plaintiff and why an order for possession should not be made against them.
6. The Plaintiff is the registered owner is a Lessee in this instance. The term "Lessee" is defined as proprietor of a lease or sub lease in the Land Transfer Act. Hence the term "Lessee" follows within the ambit of the Section 169 application.
7. *"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."

8. Pursuant to **section 172 of the Act** the onus is on the Defendants to show cause why they refuses to give up possession to the Plaintiff and why an order for possession should not be made against them.

ANALYSIS AND DETERMINATION

9. The First question for this court to determine is whether the Plaintiff has satisfied to this Court the pre-requisites of section 169 and 170 of the Land Transfer Act, Cap 131.

If, the answer to the above question is in affirmative, then the burden shifts to the Defendants where they are required to show cause in terms of their right to remain on the Plaintiff's property and whether the Defendants have any arguable case before this Court, in terms of *s.172 of the Land Transfer Act Cap 131?*

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."

(Underline is mine for emphasis)

11. 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.*

(Underline for emphasis)

12. In the instant case, the first limb of s169 applies. However, the Defendants neither admit nor deny the fact whether the Plaintiff is the registered proprietor of the property mentioned hereinabove at paragraph 1.
13. Upon the perusal of the Plaintiff's and the Defendant's annexures marked "A" and "F" within their respective affidavits filed herein, there cannot be any dispute that the Plaintiff in fact is the registered proprietor for the Agreement to Lease issued to him on 18th November, 2013 effective 01st January, 2012 for a period of fifty (50) years lease.
14. It has now become appropriate that I make reference to **Section 18 of the Land Transfer Act, Cap 131** which stipulates as follows-

Instrument of title to be evidence of proprietorship

18. Every duplicate instrument of title duly authenticated under the hand and seal of the Registrar shall be received in all courts as evidence of the particulars contained in or endorsed upon such instrument and of such particulars being entered in the register and shall, unless the contrary be proved by the production of the register or a certified copy thereof, be conclusive evidence that the person named in such instrument or in any entry thereon as seized of or as taking an estate or interest in the land described in such instrument is seized or possessed of such land for the estate or interest so specified as from the date of such certificate or as from the date from which such estate or interest is expressed to take effect. *(Underline mine for deliberation)*

15. A careful reading of Section 18 hereinabove makes it very clear that every duplicate and/or copy of title needs to be endorsed with a seal of the Registrar of Titles and can then only be admitted to prove as conclusive evidence unless the Register is produced into Court to prove the Instrument and/or a certified true copy of the Title/Lease is filed with the Court.
16. The Agreement for Lease (Residential purposes) in the present case filed by the Plaintiff seeking an eviction order is neither signed, under the hand and seal of the Registrar nor it is certified as a True Copy of the Original Agreement for Lease in terms of Section 18 of the Land Transfer Act, Cap 131. The Counsel representing the Plaintiff whilst arguing her case did admit that she has not complied with Section 18 of the Land Transfer Act but submitted that the Agreement for Lease filed by the Defendant's

within their Affidavit In Opposition was sufficient compliance to admit the Agreement for Lease to prove into evidence and grant the order for eviction as sought by her. Again the Agreement for Lease within the Defendants Affidavit is also a copy and not certified as a true copy of the original. Therefore, the defect in the Plaintiff's case cannot be cured by the usage of the Defendant's copy Agreement for Leased annexed within their affidavit.

17. Going one step further, since the Agreement for Lease cannot be admitted into evidence then the Court will not be able to ascertain the legal Registered Proprietor which is the first requirement in terms of Section 169 of the Land Transfer Act, Cap 131.
18. In the circumstances, the Plaintiff's case is fatal and cannot be taken any further to determine the substantive issue of Vacant Possession.
19. Counsels and litigants must always ensure that they file applications within the ambits of the Rules and Laws and are in compliance of every procedure set down by the Rules and Laws so that the Courts are able to deal with their applications in an expeditious, just and fair manner.
20. In Conclusion, for the aforesaid rational ,I have no other alternative but to make the following final Orders-


FINAL ORDERS

- A. The Plaintiff's Originating Summons seeking immediate vacant possession of the property comprised in NLTB Reference No 4/14/11715 described as Nasoqela No. 29 (part of), Lot 5 in the Tikina of Namata and in the Province of Tailevu, fails and is hereby Dismissed.
- B. The Plaintiff is ordered to pay costs to both Defendants summarily assessed at \$750 and the same to be paid within 14 days.

Dated at SUVA this 28TH day of MARCH, 2016



cc: Diven Prasad Lawyers, Suva.
Oceanica IP, Suva.


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MR VISHWA DATT SHARMA
Master of High Court, Suva