

**IN THE HIGH COURT OF FIJI AT LAUTOKA**

**APPELLANT JURISDICTION**

**Civil Appeal No. HBC 206 OF 2015**

**BETWEEN :** **MIRA SAMI, RAM RAJ, RITESH MANI** and other occupants of the Premises all of Naisosovou, Nadi.

**APPELLANTS**

**AND :** **HARI PRASAD** of 610A Mt Wellington Hwy, Mt. Richmond 1062, Auckland, New Zealand.

**RESPONDENT**

**Appearances :** Mr S.Valenitabua for Appellants

Mr D.S. Naidu for Respondent

**Date of Hearing :** 08 March 2017

**Date of Judgment:** 04 August 2017

**J U D G M E N T**

INTRODUCTION

[01] This timely appeal is pursuant to the Master's order evicting the respondents from the land in dispute. The learned Master ("the Master") by his order dated 15 December 2016, delivered in eviction proceedings, ordered that the defendants (the appellants) deliver immediate vacant possession of the land comprised in Certificate of Titles No. 19443, Lot 1

on DP 4497. The appellants are now appealing that decision. The court [1] stayed the Master's order pending this appeal on 3 March 2017.

#### BACKGROUND

[02] In order to place the matter in proper context, it is necessary to state the factual matrix to the application in the Court below.

[03] The respondent ("Mr Hari Prasad") brought eviction proceedings under section 169 of the Land Transfer Act 1971 ("LTA") against the appellants ("M/s Mira Sami, Ram Raj and Ritesh Mani") seeking immediate vacant possession of the land comprised in Certificate of Title No. 19443 Lot 1 on DP 4497.

[04] The appellants resisted the application for eviction and stated that they have the right to remain in occupation of the land as they had lodged an application for vesting order over CT 19443 pursuant to section 78 of the LTA considering their continued possession and occupation of the land for not less than twenty years and that their vesting order application is still on foot and is currently at a stage where the Solicitor General's office is finalizing their legal opinion on the same.

#### THE JUDGMENT OF THE COURT BELOW

[05] The crux of the appellants' case in the Court below was that section 78 of the LTA which allows any person is in possession of any land and such possession has been continued for a period of not less than twenty years to apply for an order vesting the land in him for an estate in fee simple.

[06] When giving his reasons, the Master made the following findings:

*"The wording of Section 172 is unmistakably clear to me, i.e.; **"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, ..."***

*“Under Section 172, the onus is upon the Defendants to show cause why they refuse to hand over vacant possession and they must prove to the satisfaction of the Court a **present right to possession**.*

*“It is not enough to show a **possible future right to possession**.*

*“(See; **Azmat Ali v Mohammed Jalil, Fiji Court of Appeal decision No. 44 of 1981, decided on 02<sup>nd</sup> August 1982.**)*

***In my opinion, the Defendants application for a Vesting Order is a possible future right to possession and is not a present right to possession.***

*“Therefore, I do not attach importance to the Defendants application for a Vesting Order.”*

- [07] Based on the above findings, the Master granted vacant possession of the land to the Respondent and further ordered the appellants to pay costs of \$1,000.00 to the respondent in 14 days.

#### THE GROUNDS OF APPEAL

- [08] On appeal before me, the appellants are persisting with their claim of vesting order application made pursuant to section 78 of the LTA and are raising the following grounds of appeal:

1. The Master of the High court erred in law and in fact in ordering the Appellants to deliver immediate vacant possession of the land comprised in Certificate of Title No. 19443, Lot 1 on Deposited Plan No. 4497.
2. The Master of the High Court erred in law and in fact in ordering the Appellants to pay \$1000.00 costs to the Respondent.
3. The Master of the High Court erred in law and in fact in holding that the Appellants' vesting order application lodged with the Registrar of Titles is a 'possible future right to possession' and is not present right to possession.

4. The Master of the High Court erred in law and in fact in failing to consider that the Appellants' vesting order application they made under Section 78 of the Land Transfer Act, was lodged prior to any attempts were made by the Respondent to evict them.

#### THE ISSUE

- [09] The crisp issue before me, as an appellate Court, is whether the right of the appellants to apply for a vesting order pursuant to section 78 of the LTA is a future right or current right giving an arguable case to resist an application for eviction filed under section 169 of the LTA.

#### THE LAW APPLICABLE

- [10] Section 169 of the LTA, so far as material, provides as follows:

*"169 The following persons may summons 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) ...;"*

- [11] Section 172 of the LTA is also applicable. That section provides:

#### **"[LT 172] Dismissal of summons**

*s.172 If a person summoned appears he or she may show cause why he or she refuses to give possession of such land and, if he or she 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 or she 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 or she 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".*

[12] As for the appellants are concerned, section 78 of LTA is relevant. That section provides as follows:

***“[LT 78] Application for vesting order***

*78 (1) Where –*

*(a) Any person is in possession of any land subject to the provisions of this Act, for which a certificate of title has been issued or a State grant registered under the provisions of this Act; and*

*(b) such possession has been continuous for a period of not less than 20 years, and is such that he or she would have been entitled to an estate in fee simple in the land on the ground of possession if the land had not been subject to the provisions of this Act,*

*he or she may apply to the Registrar in the manner hereinafter provided for an order vesting the land in him or her for an estate in fee simple or for such other estate or interest as may be claimed by him or her, provided that, unless such person has been in possession of such land for a continuous period if not less than 30 years, no such application may be made in respect of any land or any part thereof, if the registered proprietor of, or any person appearing by the register to be entitled to the benefit of, any estate or interest therein is under any disability.*

*(2) For the purpose of the Part, possession of any land by any other person through or under whom any person making an application under the provisions of this section (hereinafter in this Part referred to as “the applicant”) claims, shall be deemed to be possession by the applicant.”*

THE APPLICATION OF THE LAW TO FACTS

[13] The case for the appellants is that the respondent relied on section 169 of the LTA to apply for eviction order against the appellants. Therefore, it is the well-settled law that the respondent must satisfy the element that he is the last registered proprietor of the land in the first instance. It is only after that the burden shifts to the appellants to show cause why they refuse to give possession of the land pursuant to section 172 of the LTA. They submit that the respondent had lost his proprietorship once the

appellants satisfied the elements of section 78 of the LTA. The appellants referred, in support of their submissions, to the judgment in *Azmat Ali v Mohammed Jalil* [1982] 28 FLR (2 April 1982). In that judgment, as in this instance, the plaintiff, in the court below, had issued eviction proceedings under section 169 of the LTA and the defendant had claimed to be there cultivating and occupying and he had instituted an application to the Agricultural Tribunal for assertion of his rights under Agricultural Landlord and Tenant Act ("ALTA"), the hearing for which had been pending. He sought stay of eviction proceedings, the High Court (the then Supreme Court) referring to the eviction proceedings, made order that the defendant to give up possession of the land. On appeal, the Fiji Court of Appeal allowing the appeal held that Section 172 of the Land Transfer Act gave the court power to make various orders when an application is before it including postponing making an order and accordingly, the refusal of a stay involved some risk of injustice to the Appellant. The Fiji Court of Appeal set aside the order for possession.

- [14] The respondent is opposing the appeal and contending that the appellants filed a vesting order on 21 January 2015 when they were issued notice to vacate by the respondent's solicitors on 4 November 2014.
- [15] It is submitted on behalf of the respondent that it was merely an application for a vesting order and no vesting order has been consented to by the Registrar of Titles. It is also submitted that the respondent had verbally and in writing asked the appellants on numerous occasions to vacate the premises in previous years and the vesting orders came too late after the notices were issued and served on the appellants on 4 November 2014, and that the initial summons for proceedings against the appellants under High Court Rules O.113 (High Court Civil Action No. HBC 05/2015) brought by the respondent was filed on 14 January 2015 and served on the appellant on the same day.

- [16] It is noteworthy that the initial proceedings (HBC 05/2015) under Order 113 of the High Court Rules 1988 (“HCR”) brought by the respondent to evict the appellants on the basis that they (appellants) are over staying tenants were dismissed and struck out for default of appearance by the respondent. Not only the abortive action for eviction of the appellants but also the respondent had, verbally and in writing, asked the appellants on numerous occasions to vacate the premises in previous years did not interrupt the appellants’ continued possession of the land. Eviction, in the strict sense of the word, only takes place when a court order is pronounced which deprives a party of his right to continue to occupy the property.
- [17] In the court below, the appellants on affidavit evidence showed that they have been in possession and occupation of the land for more than twenty years and they had made an application for an order vesting the land in them pursuant to section 78 of the LTA and awaiting outcome of their application.
- [18] The respondent could not successfully deny the fact that the appellants have been in possession of the land for more than twenty years. It is the continued possession of not less than twenty years that enables the possessor to make an application for a vesting order as contemplated in section 78 of the LTA. By virtue of their possession, the appellants had acquired their statutory right to apply for a vesting order pursuant to section 78 of LTA. I am of opinion that the right of the appellants to apply for a vesting order pursuant to section 78 of the LTA is not a future right but a current right giving an arguable case to resist an application for evictions brought under section 169 of the LTA.
- [19] In *Morris Hedstrom Limited v Liaquat Ali* (Action No. 153/87 at p2), the then Supreme Court (equivalent to the present High Court) in considering the requirements in section 172 stated:

*“Under Section 172 the person summoned may show cause why he refused to give possession of the land 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.**” (Emphasis provided)*

- [20] The appellants, in the court below, on affidavit stated that they have been possessing the land for more than twenty years. Thereby, in my opinion, the appellants had shown some tangible evidence establishing a right or supporting an arguable case for such a right.

#### CONCLUSION

- [21] The appellants had shown cause on affidavit evidence that they have at least an arguable case arising out of their possession of the land entitling them to make an application for a vesting order pursuant to section 78 of the LTA.
- [22] Eviction, in the strict sense of the word, only takes place when a court order is pronounced which deprives a party of his right to continue to occupy the property.
- [23] If the subject land was possessed for not less than twenty years openly, peaceably and without any interruption that was sufficient on its own terms to constitute a real right to the subject land disposed to the possessor the right under section 78 of the LTA to make an application for an order vesting the land in him or her for an estate in fee simple.
- [24] It is my view that the Master acted incorrectly in holding that the appellants’ application for a vesting order is a possible future right to possession and is not a present right to possession and he also acted incorrectly in granting immediate vacant possession to the respondent



when there was tangible evidence showing that the appellants had a right or supporting an arguable case for such a right. It is also my view that the appellants' right to apply for a vesting order pursuant to section 78 of the LTA is not a future right but a current right giving an arguable case to resist an application for evictions brought under section 169 of the LTA. On this ground alone, the appeal must succeed. I would accordingly allow the appeal and set aside the Master's order dated 15 December 2016.

[25] For these reasons, the appeal is allowed with cost of \$1,500.00 payable by the respondent to the appellants.

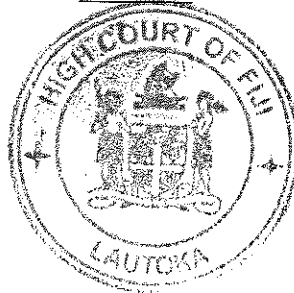
#### FINAL OUTCOME

1. Appeal allowed.
2. Master's order set aside.
3. The respondent will pay cost of \$1,500.00 to the appellants.

*M.H. Mohamed Ajmeer*  
4/8/17

**M.H. Mohamed Ajmeer**

**JUDGE**



**At Lautoka**

**4 August 2017**

Solicitors:

For appellants: M/s Toganivalu & Valenitabu, Barristers & Solicitors

For respondent: M/s Pillai Naidu & Associates, Barristers & Solicitors