

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 111 of 2015

IN THE MATTER of an application
under Section 169 of Part 24 of the
Land Transfer Act, Cap 131 for an
order for immediate vacant
possession.

BETWEEN: RATU ELIA MALAKAI BAKANICEVA aka ELIA MALAKAI BAKANICEVA
of Vuanirere subdivision, Nausori, Professional Rugby Player.

PLAINTIFF

AND: FILIMONI TAGICAKIBAU of Vuca South Road, Nausori.

DEFENDANT

BEFORE: Master Vishwa Datt Sharma

COUNSELS: Mr. Bukarau - for the Plaintiff
In Person - Defendant

Date of Ruling: 22nd February, 2018

RULING

*(Application seeking Vacant Possession pursuant to
Section 169 of the Land Transfer Act, Cap 131)*

A. INTRODUCTION

1. There are two (2) applications filed by the Plaintiff for Court's determination.
2. First application whereby the Plaintiff by his Summons sought for the following orders against the Defendant pursuant to Section 169 of the Land Transfer Act, Cap131-
 - (i) That the Defendant Filimoni Tagacakibau do show cause as to why an order for immediate vacant possession of the property known as Lot 1 Vunirere Subdivision being Lessee to Agreement for Lease vide TLTB Ref 4/14/39411, situated at Vuci South Road, Nausori, of which the Plaintiff is the Registered Lessee, should not be made against them upon the grounds set forth in the Affidavit of Ratu Netava Bakaniceva the father of the Plaintiff who is authorised to make this affidavit that is sworn and filed herein.
 - (ii) That the Defendant pay the Plaintiff's costs of these proceedings summarily assessed at \$1,500 within the next 14 days.
 - (iii) Any other orders that this Honourable Court deems just.
3. Second application is seeking joinder of Itaukei Land Trust Board to this proceedings.
4. The Defendant strongly opposed the applications and filed an Affidavit in Response.
5. There are 3 (Three) affidavits filed before the Court:
 - a) Affidavit in Support of Ratu Netava Bakaniceva on 22nd August, 2017 ("Plaintiff's Affidavit");
 - b) Affidavit in Opposition/Response of Filimoni Tagacakibau filed on 18th September, 2017 ("Defendant's Affidavit In Opposition");and
 - c) Affidavit in Reply of Filimone Tagacakibau filed on 03rd October, 2017. (Plaintiff's Affidavit in Response).
6. This case proceeded to hearing on a defended basis on 30th November, 2017.
7. 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 *ss. 169, 171 and 172 of the Land Transfer Act* [Cap 131].

PRACTICE and PROCEDURE

8. The Plaintiff has made his application pursuant to *Section 169 of the Land Transfer Act 1978, Cap 131*.

9. 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).
10. Pursuant to *Section 172 of the Act*, the onus is on the Defendant to show cause why he is refusing to give up possession to the Plaintiff and why an order for possession should not be made against him.
11. The Plaintiff is the registered Lessee of the Agreement to Lease.
12. *"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."*
13. Pursuant to *section 172 of the Act* the onus is on the Defendants to show cause why he refuses to give up possession to the Plaintiff and why an order for possession should not be made against him.

PLAINTIFF'S CASE (In Summary)

14. That the Affidavit in Support is deposed by the Plaintiff's father, Ratu Netava Bakaniceva on behalf of his son Elia Malakai Bakaniceva.
15. He stated that the Plaintiff, Elia Malakai Bakaniceva is the registered Lessee of the land comprised in Agreement for Lease vide TLTB Ref 4/14/39411, situated at Vuci South Road, Nausori.
16. That as a pre requisite to this application, he had instructed his current Solicitors to issue eviction notice to occupants of his property.
17. That when his son is playing professional rugby in France and wish to return home upon once he retires; to cultivate and dwell on the land.
18. That the Defendant is a member of Mataqali Vunidakua the land owning unit (LOU) and claims to be the landowner of the lease.

19. That the Lease is communally owned by the Mataqali Vunidakua and members of the Mataqali have consented to the lease to TLTB by fulfilling all the requirements for leasing.
20. That his son (Plaintiff) was issued with the lease with effect from 1 July 2013. To date his son has not been able to construct or dwell on the lease as the Defendant fails to vacate the premises.

DEFENDANT'S CASE (In Summary)

21. The Defendant filed its Affidavit in Response/Opposition and prima facie submitted as follows-
 - *The Registered Lessee of the Agreement for lease of Malakai Bakaniceva is illegal because it does not follow the procedure of the law of the land S. 9 of Native Land Act, Cap 134 says "no Native Land shall be dealt with by way of lease or licence under the provisions of this act unless the Board is satisfied that the land proposed to be made the subject of such lease or licence is not beneficially occupied by Fijian owner. The land can only be given to anyone to lease if the land is empty, and not been used by the land owner, but the Plaintiff is using the Defendant's land when ITLB gave it away to Malakai to lease.*
 - *He admits receiving the eviction notice but cannot pull his farming or vacate land because he did not break the law.*
 - *That Filimoni Tagacakibau is Registered as iTaukei land owner of Mataqali Vunidakua Lot 156.*
 - *That Malakai Bakaniceva leases the land from 1 July 2013 and the Defendant and brothers have been planting on his land from 2005 till today*

ANALYSIS AND DETERMINATION

7. 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?

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. 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 on 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)

10. In the instant case, the first limb of s169 applies. However, this Court upon the perusal of the Affidavit in Support of Ratu Netava Bakaniceva deposed on 21st August, 2017 at paragraph 2 wherein he states that I am authorized to make this affidavit, which I do so from my personal knowledge of the matters....true to the best of my knowledge.
11. Upon a further perusal of the annexures filed within the respective affidavit I could not find the Authority in terms of which the Plaintiff's father Ratu Netava Bakaniceva deposed the Affidavit in Support of the Summons seeking an order for Vacant Possession against the Defendant.
12. I make reference to *Order 41 Rule 9 of the High Court Rules, 1988* which states as follows-
- (1) *Except as otherwise provided by these Rules, every affidavit must be filed in the Registry.*
 - (2) *Every affidavit must be indorsed with a note showing on whose behalf it is filed and the dates of swearing and filing, and an affidavit which is not so indorsed may not be filed or used without leave of the Court.*

13. The Affidavit of Ratu Netava Bakaniceva cannot be relied upon for the reasons that it is in contravention of the provisions of Order 41 Rule 9 of the High Court Rules and lack of authority from the person on whose behalf the affidavit has been deposed.
14. Therefore, in absence of such "Authority" to swear an Affidavit on behalf of the Plaintiff, the Plaintiff's 1st application for vacant possession against the Defendant must fail and is dismissed.
15. Likewise, the 2nd Application by Summons seeking joinder of party Itaukei Land Trust Board to be joined as a nominal Defendant for the same rational, that "No Authority" to swear the affidavit on behalf of the Plaintiff can be ascertained from the Affidavit filed herein, also fails and is dismissed.
16. In the circumstances, the Defendant is entitled to costs summarily assessed at \$500.
17. In Conclusion, for the aforesaid rational, I have no other alternative but to make the following final Orders-

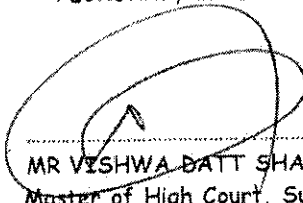
FINAL ORDERS

- A. The Plaintiff's Summons seeking an order for vacant possession of the property known as Lot 1 Vunirere Subdivision being Lessee to Agreement for Lease vide TLTB Ref 4/14/39411, situated at Vuci South Road, Nausori, against the Defendant fails and is dismissed.
- B. The 2nd application by Summons seeking Joinder also fails and is dismissed.
- C. The Plaintiff is ordered to pay costs to the Defendant summarily assessed at \$500 (Five hundred dollars) and the same to be paid within 14 days.
- D. Orders accordingly.

DATED AT SUVA THIS 22ND DAY OF FEBRUARY, 2018



cc: Messrs. ~~INSANI~~ Law Suva
Filimoni Bakaniceva


MR VISHWA DATT SHARMA
Master of High Court, Suva