IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 270 of 2018

IN THE MATTER of application under section 169 of the Land Transfer Act (Cap 131)

BETWEEN	:	**MAHENDRA PRATAP** of Raviravi, Ba, Fiji Islands, Retired.
		Plaintiff
AND	:	**DAVE TUCINA** of Raviravi, Ba, Fiji Islands.
		Defendant

Before	:	Master U.L. Mohamed Azhar
Counsels	:	Mr. A. Dayal for the plaintiff The Defendant in person
Date of Hearing	:	20.09.2019
Date of Judgment	:	20.09.2019

JUDGMENT

01. The plaintiff, by his summons filed pursuant to section 169 of the Land Transfer Act (Cap 131), summoned the defendant to show cause why he should not give up vacant possession of the property described in Crown Lease No. 16608 known as Part of Raviravi, in the Tikina of Vuda in the Province of Ba, an agricultural property. The summons is supported by an affidavit sworn by the plaintiff himself. The plaintiff, who sought an order on the defendant to immediately deliver the vacant possession of the above property, tendered two documents marked as **"MP 1"** and **"MP2"** and annexed with his affidavit. The **"MP 1"** is the copy of the Crown Lease No 16608 and the **"MP 2"** is the copy of letter sent by his solicitors to the defendant terminating the tenancy and requesting him to deliver the vacant possession of the property.

02. The defendant appearing in person expressed his intention to defend this matter and the court granted him time to file his affidavit in opposition. On the following day, the counsel from Legal Aid Commission appeared as duty solicitor on behalf of the defendant and informed the court that, the defendant applied for the legal aid. The matter was then adjourned to check the status of defendant's application for legal aid. The matter was adjourned four times for the affidavit of the defendant as his application for legal aid was pending. Finally on the fifth occasion, i.e. on 14.06.2019 the counsel from the Legal Aid Commission informed the court that, the application of the defendant was rejected by the Commission. The defendant on the same day filed his affidavit in opposition. Thereafter, the plaintiff was granted time to file his affidavit in reply. However, the counsel for plaintiff informed the court that, he was not filling an affidavit as no valid cause was shown in the affidavit of the defendant. He therefore sought hearing date since his client was waiting for vacant possession from 2017 as the notice to vacate was sent on 11.12.21017.

03. The summons was taken up for hearing today and the counsel for the plaintiff made oral submission. The defendant appearing in person made his oral submission in iTaukei language and it was interpreted by the clerk of the court into English.

04. It is necessary to briefly note the background of the Land Transfer Act Cap 131, the nature of the summary procedure enshrined in it and the duty of each party under that procedure. The Land Transfer Act Cap 131 was introduced to Fiji in 1971 and it repealed the Land (Transfer and Registration) Ordinance (see: section 178 of the Land Transfer Act). However, the other two legislations, namely Crown Land Act (now known as State Land Act), Native Land Act (now known as iTaukei Land Act) continue to govern the lands fall under their purview. Both legislations were amended to bring them in line with the Land Transfer Act which is based on the well-known Torrens System of Registration. The effect and application of the said system of registration, that was generally applied in certain countries in Pacific, was explained in **Breskvar v. Wall** (1971-72) 126 CLR 376 and Barwick C.J stated at page 385 that:

> *The Torrens system of registered title of which the Act is a form is not a system of registration of title but a system of title by registration. That which the certificate of title describes is not the title which the registered proprietor formerly had, or which but for registration would have had. The title it certifies is not historical or derivative. It is the title which registration itself has vested in the proprietor.* (Emphasis added).

05. In that same case Windeyer J. concurring with the Chief Justice stated at pages 399 and 400 that:

I cannot usefully add anything to the reasons that he and my brothers McTiernan and Walsh have given for dismissing this appeal. I would only observe that the Chief Justice's aphorism, that the Torrens system is not a system of registration of title but a system of title by registration, accords with the way in which Torrens himself stated the basic idea of his scheme as it became law in South Australia in 1857. In 1862 he, as Registrar-General, published his booklet, A Handy book on the real Property Act of South Australia. It contains the statement, repeated from the South Australian Handbook, that:

"……any system to be effective for the reform of the law of real property must commence by removing the past accumulations, and then establish a method under which future dealings will not induce fresh accumulations.

This is effectuated in South Australia by substituting 'Title by Registration' for 'Title by Deed'..."

Later, using language which has become familiar, he spoke of "indefeasibility of title". He noted, as an important benefit of the new system, "cutting off the retrospective or derivative character of the title upon each transfer or transmission, so as that each freeholder is in the same position as a grantee direct from the Crown". This is an assertion that the title of each registered proprietor comes from the fact of registration, that it is made the source of the title, rather than a retrospective approbation of it as a derivative right. (Emphasis added).

06. It was further held in **Fels and another v Knowles and another** (1907) 26 NZLR 604 by Stout C.J at page 620 as follows:

'The cardinal principle of the statute is that the register is everything, and that, except in case of actual fraud on the part of the person dealing with the registered proprietor, such person, upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against all the world. Nothing can be registered the registration of which is not expressly authorized by the statute.'

07. Accordingly, the registration is everything and it is the registration that confers the title to person so registered. It is the title by registration and not registration of title. This system of registration cuts off the retrospective or derivative character of the title upon each

transfer or transmission, so as that each freeholder or proprietor is in the same position as a grantee direct from the Crown. The registration is made the source of the title, rather than a retrospective approbation of it as a derivative right. The only exception is the actual fraud, and in the absence such fraud as provided in sections 39 to 41 of the Land Transfer Act, the registered proprietor shall have an indefeasible title. This was established by the Fiji Court of Appeal in **Subaramani v Sheela** [1982] 28 FLR 82 (2 April 1982) where the court held that:

> *The indefeasibility of title under the Land Transfer Act is well recognised; and the principles clearly set out in a judgment of the New Zealand Court of Appeal dealing with provisions of the New Zealand Land Transfer Act which on that point is substantially the same as the Land Transfer Act of Fiji. The case is Fels v. Knowles 26 N.Z.L.R. 608. At page 620 it is said:*
>
> *"The cardinal principle of the statute is that the register is everything, and that, except in case of actual fraud on the part of the person dealing with the registered proprietor, such person, upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against all the world."*

08. Accordingly, the Land Transfer Act (Cap 131) provides for title by registration and makes such title indefeasible except in case of actual fraud. As a result of this guarantee given to a registered proprietor, there was a need for a mechanism by which he or she could enforce his or her indefeasible right against any illegal occupant. This need was fulfilled by the special jurisdiction given to this court under the sections 169 to 172 of the Land Transfer Act. The underlying principle of the summary procedure is to protect the last registered proprietor who has an indefeasible title from illegal occupation by others at a minimal cost. Thus, having a summary procedure for eviction under those sections of the Land Transfer Act is the necessary consequence of Torrens system of registration. The nature of this summary procedure was explained by the Fiji Court of Appeal again and it was held that, it is a speedy procedure for obtaining possession when the occupier fails to show cause why an order should not be made (per: *Mishra JA in* **Jamnadas v Honson Ltd** [1985] 31 FLR 62 at page 65).

09. The sections 169 and 170 of the Land Transfer Act set out the requirements for the applicant or the plaintiff and the application respectively. The *Locus Standi* of the person who seeks order for eviction is set out in section 169 and the requirements of the application, namely the description of land and the time period to be given to the person so summoned, are mentioned in section 170. The sections 171 and 172 provide for the two powers that the court may exercise in dealing with the applications under section 169. The burden to satisfy the court on the fulfillment of the requirements, under sections

169 and 170, is on the plaintiff and once this burden is discharged, it then shifts to the defendant to show his or her right to possess the land.

10. The Supreme Court in **Morris Hedstrom Limited –v- Liaquat Ali** CA No: 153/87 explained the duty of a defendant and held that:

> *"Under Section 172 the person summonsed 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 added)

11. The duty on the defendants is, not to produce any final or incontestable proof of their right to remain in the property, but to adduce some tangible evidence establishing a right or supporting an arguable case for their right to remain in possession of the property in dispute. **Black's Law Dictionary** defines "tangible evidence" as "physical evidence that is either real or demonstrative" (10th Edition, page 678). Thus, duty of the defendant is to produce some real or demonstrative physical evidence and not bare assertions. A bare assertion is not sufficient for this purpose.

12. Furthermore, the Fiji Court of Appeal in **Ali v Jalil** [1982] FJLawRp 9; [1982] 28 FLR 31 (2 April 1982) explained the nature of the orders a court may make in terms of the phrase used in section 172 of the Land Transfer Act, which says "*he (judge) may make any order and impose any terms he may think fit*". The Court held that:

> *"..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"*. (Emphasis added).

13. According to above decisions, the court is to decide whether a defendant adduced any real or demonstrative physical evidence establishing a right or supporting an arguable case for such a right, or even he failed to adduce such evidence whether an open court hearing is required or not, given the circumstances of a case. The exercise of court's

power, either to grant the possession to the plaintiff or to dismiss the summons, depends on how the said burden is discharged by respective party to the proceedings. However, dismissal of a summons shall not prejudice the right of a plaintiff to take any other proceedings to which he or she may be otherwise entitled against any defendant. Likewise, in the case of a lessor against a lessee, if the lessee, before hearing of the summons, pays or tenders all rent due and all costs incurred by the lessor, the summons shall be dismissed by the court.

14. The plaintiff brought this summons, being the last registered proprietor and the lessor of the property occupied by the defendant. The annexure marked as **"MP 1"** is the copy of the Crown Lease No 16608 issued for the agricultural purpose. It is duly certified by the Registrar of Titles and shall be received as evidence of its contents. Accordingly, the plaintiff is the registered proprietor of the property. The defendant too admitted that, the plaintiff is the last registered proprietor of the property he has been occupying. There is no dispute in relation to the other requirements too. The plaintiff further states that, the defendant entered into the property as the tenant on a monthly rental of $ 200 and he failed to pay the rent since February 2017 to date. There has been arrears of $ 1300 and the defendant not only failed to pay the same, but also has become a nuisance to plaintiff's family members and also started to harass and threaten them.

15. The defendant in fact admitted in his affidavit that, he entered the property as tenant. However, he disputes the rental amount and states it was $ 60 a month, and later increased to $ 100 per month. In any event the tenancy between the plaintiff and the defendant has been admitted, though they dispute in the amount of rent and the arrears. The defendant further admitted that he failed to pay the rental from 2017 to date. When a person enters a property as a lessee, the registered proprietor or the lessor may bring the summons for ejectment either under section 169 (b) when the lessee is in arrears 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. Likewise, the lessor may also summon the lessee under section 169 (c) where a legal notice to quit has been given or the term of the lease has expired. In this case, admittedly there has been arears of rent and the document marked as **"MP 2"** is the proof that, the notice to quit had already been sent to the defendant on 11.12.2017. In this circumstance the court can dismiss the summons of the plaintiff only if the defendant has paid all the rentals and the cost incurred by the plaintiff before hearing of the summons, as provided in the proviso of section 172 which reads as follows:

> *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.*

16. The above proviso shall be applicable only when the lessee is summoned to show cause for default of rent payment. It must be noted here that, the above proviso shall not be considered as derogation of the right of a registered proprietor when it comes to a lessee. In fact, the drafters of the Act in their wisdom struck the balance between the conflicting interests, i.e. the interest of the registered proprietor and interest of a lessee with whom the proprietor has covenant in relation to tenancy. That is to say, the title of a registered proprietor is indefeasible except in case of actual fraud and such proprietors are protected from illegal occupation. Even a lessee defaults in payment of one month rent, the section 169 (b) allows a registered proprietor to summon the defaulting lessee as the latter becomes an illegal occupant from the moment he fails to pay the agreed rent. In the meantime, the law provides that, the summons shall be dismissed if the lessee pays all rent due and the total cost incurred by the registered proprietor. When a registered proprietor enters into a tenancy agreement, the covenants should be implemented and it should not be terminated for mere delay in paying rent for a month. In this sense, the law recognizes that, there may be situations where the lessee fails to pay the rents on time due to some unavoidable circumstances. Therefore, the law recognizes such situation and allows the lessee to continue in occupation provided he pays all rent due and all costs incurred by the lessor in bringing the summons before hearing of summons. It is a balancing exercise in the wisdom of drafters of the law between the right of a registered proprietor and the right of a tenant to peaceful occupation of property as long as he pays the rent on time and clears the arears before hearing of summons for ejectment.

17. The defendant admitted at the hearing today that, he did not pay the rents from 2017 to date. Though the defendant claims that the plaintiff advised him not to pay the rent, the latter vehemently denied it. In fact, no lessor will instruct his or her lessee not to pay the rent when there is a tenancy either oral or written between them. Further, the plaintiff took out this summons only after the defendant had failed to pay the rentals as agreed and continued to enjoy the occupation whilst the plaintiff had been paying the ground rent to the state. Had the defendant paid all rent due and the cost incurred by the plaintiff before the hearing, this court would have dismissed the summons. However, the defendant continued to defend the summons whilst admitting his default in paying rent since 2017. The defendant further submitted at the hearing that, he built the house that he has been occupying, after the same was damaged during the Tropical Cyclone Winston. However, there is no iota of evidence before the court to that effect. When the court specifically asked for such evidence at hearing, the defendant replied that all the documentary evidences were damaged during a flood. However, it was argued on the other side that, house and the property in dispute is located in a high level and flood free zone in Raviravi, Ba. Thus, the defendant's submission and averments in his affidavit become implausible.

18. The defendant, as stated above, initially applied for legal aid assistance. However, he was unsuccessful in his application. Therefore he represented himself. He did not understand the procedure and the defences available under this summary procedure in the Land Transfer Act. When the procedure was explained to him by the court and specifically asked for his defence as per the relevant sections and the decided cases, he informed the court that, he did not have such defence and evidence to continue the occupation on the property belongs to the plaintiff. He then agreed and undertook to vacate the property with immediate effect.

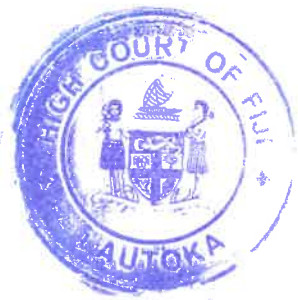
19. The summary of the discussion is that, the plaintiff is the last registered proprietor of the property and the defendant is the lessee. The defendant entered the property on agreement to pay a rent on monthly basis, however failed to pay the agreed rent since 2017. He neither paid the arrears till today - the hearing day, nor has other defence which can justify his stay on the property. On the other hand, the plaintiff being the last proprietor and lessor of the property continues to lose the rent payable by the defendant, and on top it has been paying the ground rent to the state whilst the defendant enjoys rental free residency. Thus, the defendant ought to be evicted from the property and should be ordered to immediately deliver the vacant possession to the plaintiff. The counsel for the plaintiff moved the court to order the defendant to pay a reasonable cost to the plaintiff for whatever incurred by him in bringing this summons. However, I decide not to impose the cost considering the financial circumstances of the defendant.

20. As a result, I make the following orders:

    1. The defendant is ordered to immediately hand over the vacant possession of the property described in the summons filed by the plaintiff.

    2. The defendant should not cause any damages to the property, and

    3. There is no order as to cost.



U.L.Mohamed Azhar
Master of the High Court

At Lautoka
20/09/2019