

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No.: HBC169 of 2019

IN THE MATTER of an Application
under section 169 of Part XXIV of the
Land Transfer Act Cap 131 for an Order
for immediate vacant possession

BETWEEN : **JOELI TUPUA** of Delaidogo Settlement, Wainibuka, Nausori

PLAINTIFF

AND : **JOSEFA YALIDOLE** aka **JOSEFA YALIDOLE VEITOKIYAKI**
aka **SAKEO VEITOKIYAKI** and **AMELIA BROWN** aka
AMELIA BROWN VASIKALI both of Qauia Street, Lami.

DEFENDANTS

Counsel : **Plaintiff: Mr Naiwaikula. N**
Defendant: Mr Vula. E

Date of Hearing : **05.11.20**

Date of Judgment : **17.11.20**

JUDGMENT

INTRODUCTION

1. This is an application for enlargement of time, and leave to file an affidavit in opposition by way of motion by Defendant after the court had granted vacant possession to Plaintiff, in terms of Section 171 of Land Transfer Act 1971. There is no appeal from that decision, instead Defendants are now seeking to set aside the decision granting vacant possession. Plaintiff had filed this action on 31.5.2019 but there was no affidavit of service filed regarding 'summons' (sic) filed seeking eviction of Defendants in terms of Section 169 of Land Transfer Act 1971. This 'summons' was struck off by Master subsequently, it was reinstated, upon application. There was an affidavit of service filed on 11.12.2019 swearing that 'summons' and affidavit in support of the eviction, were served to the Defendants on the same day. On 12.12.2019 Defendants were ordered to file affidavit in opposition within fourteen days, and the matter was fixed for mention for hearing on 4.2.2020 and there was no affidavit in opposition or appearance for

Defendants and hearing was fixed on 17.2.2020. Again on this hearing day there was no appearance for the Defendants and or affidavit in opposition filed. As such immediate possession was granted to Plaintiff. The memorials of the title indicate Plaintiff as the registered proprietor and that transfer to him was on 15.11.2016. After obtaining vacant possession on 21.5.2020 Plaintiff filed summons seeking leave to issue writ of possession to enforce judgment in terms of Order 45 rule 2(2) of High Court Rules 1988 (HCR). There was an affidavit of service of this summons filed on 4.8.2020 and on the date stated on the said summons again Defendants did not appear hence leave to issue a writ of possession to enforce judgment was granted. A writ of possession was issued on 10.9.2020. Defendants filed present application on 14.9.2020.

FACTS

2. Plaintiff filed action in terms of Section 169 of Land Transfer Act 1971, and Defendant had not filed affidavit in opposition to the said application, though it was served to them.
3. On 17.2.2020, Master granted immediate vacant possession upon hearing of this action. Defendant did not appear at the hearing and or filed affidavit in opposition.
4. Plaintiff filed summons seeking leave for writ of possession in terms of Order 45 rule 2 of HCR. This was served to the Defendants, but again there was no appearance for the Defendants and leave was granted for the Plaintiff accordingly.
5. Upon that, Plaintiff issued writ of passion on 10.9.2020 and on 14.9.2020 Defendants filed a motion seeking following orders;

“1. That the Order made by the Acting Master in Court on Monday, the 17th day of February 2020 against the Defendants to immediately give up vacant possession of the property situated at Qauia, Lami being comprised in Native Lease 12271 Sec 6 known as Lami Subdivision in the Province of Rewa District of Suva with an area of 1 Rood and 10. 9 Perches ("the Property") be set-aside and execution processes thereof of the said Order be stayed until this matter is fully determined by this Honourable Court.

2. That the Defendants seek leave of this Court for enlargement of time to file their Affidavit in Response out of time and that this matter to take its normal course as this case involves serious questions to be tried regarding fraudulent activities surrounding the unlawful transfer of the said property without the surviving beneficiary knowledge, namely Peni Veisagai now living and being the lawful son of Vuniwaqa Baleiganagana late of Qauia, Lami (Deceased) who then was a Co-Owner of the said property with one Teresia Selita Biu formerly of Suva but now of England.”

6. Plaintiff opposed the said application and it was fixed for hearing and till this hearing there is an undertaking by Plaintiff that they will not execute the eviction.

ANALYSIS

7. Plaintiff is the last registered proprietor of the property in issue. Plaintiff obtained the property through transfer on 15.11.2016.
8. On the day of the hearing Defendants neither filed affidavit in opposition nor participated at hearing.

Section 171 of Land Transfer Act 1971 states,

“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.”

9. So there was no requirement to hear Defendant when they did not file an affidavit in opposition and refrained from participating at hearing.
10. Plaintiff's registered title is indefeasible subject to the exception contained in Section 41 of Land Transfer Act 1971.

Section 41 of Land Transfer Act 1971 states,

“41. Any instrument of title or entry, alteration, removal or cancellation in the register procured or made by fraud shall be void as against any person defrauded or sought to be defrauded thereby and no party or privy to the fraud shall take any benefit therefrom.”

11. Plaintiff had obtained title from transfer, on 11.12.2016. Plaintiff had instituted this action and served Defendants, but they had repeatedly refrained from appearance in court.
12. Defendants in the affidavit in support of the motion filed on 14.9.2020 seeking to impeach title of the Plaintiff. This cannot be done in present proceedings in terms of Section 39 of Land Transfer Act 1971 which states;

“39.-(1) Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might

be held to be paramount or to have priority, the registered proprietor of any land subject to the provisions of this Act, or of any estate or interest therein, shall, except in case of fraud, hold the same subject to such encumbrances as may be notified on the folium of the register, constituted by the instrument of title thereto, but absolutely free from all other encumbrances whatsoever except-

(a) the estate or interest of a proprietor claiming the same land, estate or interest under a prior instrument of title registered under the provisions of this Act; and

(b) so far as regards any portion of land that may by wrong description or parcels or of boundaries be erroneously included in the instrument of title of the registered proprietor not being a purchaser or mortgagee for value or deriving title from a purchaser or mortgagee for value; and

(c) any reservations, exceptions, conditions and powers contained in the original grant.

(2) Subject to the provisions of Part XIII, no estate or interest in any land subject to the provisions of this Act shall be acquired by possession or user adversely to or in derogation of the title of any person registered as the proprietor of any estate or interest in such land under the provisions of this Act.”

13. Section 38 of Land Transfer Act 1971 states;

“38. No instrument of title registered under the provisions of this Act shall be impeached or **defeasible** by reason or on account of any **informality** or in any application or document or in any proceedings previous to the registration of the instrument of title.” (emphasis added)

14. *British American Cattle Co v Caribe Farm Industries Ltd* [1998] 1 WLR 1529 at 1533,

“One of the cardinal objectives of the Torrens system is to facilitate the proof of title to estates in land. It was of the very essence of the scheme designed by Torrens that henceforward the mere presence of the document of title in the Register Book should prove such title to all the world and against all the world. Therefore, every bona fide purchaser without notice can rely absolutely on the title appearing in the Register Book, and, on becoming registered in respect of such title, cannot be defeated in his purchase, notwithstanding whatsoever flaws there may have been in the title of his vendor.”

15. The above quote was cited in recent Privy Council decision of *Half Moon Bay Ltd v Crown Eagle Hotels Ltd* [2002] UKPC 24 at [21] per Lord Millett.

16. It is trite law that Defendants cannot and should not be allowed to prevent fruits of the judgment enjoyed by Plaintiff for following reasons

a. Defendants had not stated in this application why they did not appear and or did not oppose Plaintiff’s applications before the court. Defendant had not filed affidavit in

- opposition to eviction in terms of Section 169 of Land Transfer Act 1971 and or application seeking leave for writ of possession in terms of Order 45 rule 2 of HCR.
- b. Plaintiff's tile is indefeasible in terms of Sections 37-40 of Land Transfer Act 1971. An allegation of an interest derived from previous co-owner does not create a right to possession in terms of Section 171 of Land Transfer Act 1971.
 - c. The allegations stated in the affidavit in support are disputed facts as to legal heirs for a pervious co- owner. This is not sufficient to impeach the title of present proprietor.
 - d. At paragraph 13 of the affidavit in support Defendants state that they were awaiting Legal Aid to take their case but was refused. This cannot be accepted as Defendants could at least appear in court and inform to court such difficulty at least when leave to issue writ of possession was issued.
 - e. Defendants cannot seek set aside order of Master made on 17.2.2020 from a judge without seeking extension of time for appeal.
 - f. An application to file affidavit in opposition to summons for eviction cannot be filed before a judge it needs to be filed before Master.

CONCLUSION

- 17. Defendant's application fails as they had voluntarily refrained from appearing in court despite several notifications. Plaintiff is the last registered proprietor and had obtained orders from court for eviction and also to issue writ of possession. Considering circumstances no cost ordered.

FINAL ORDERS

- a. Notice of Motion filed on 14.9.2020 by Defendants struck off.
- b. No costs.

Dated at Suva this 17th day of November, 2020.



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Justice Deepthi Amaratunga
High Court, Suva