

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 159 of 2020

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 : **KANIAPPA** aka **KANIAPPA GOUNDER** aka **KANIAPPA GOUNDAR and NAGAPPA** both of Malolo Nadi, Farmers.

Plaintiffs

A N D : **SAKIL SHARMA** of Malolo Nadi, Occupation unknown.

Defendant

Before : Master U.L. Mohamed Azhar

Counsels : Mr. J. Prakashan for the Plaintiff
The Defendant in person

Date of Judgment : 17.06.2022

JUDGMENT

01. The plaintiff summoned the defendant, pursuant to section 169 of the Land Transfer Act (Cap 131) to show cause why an order, to deliver vacant possession of the property comprised in State Lease No. 20945 on Lot 5 of Nacaqara and Navo situated in the Province of Ba on the Island of Viti Levu to the plaintiff, should not be made against him. The summons is supported by an affidavit sworn by the attorney duly appointed by

the plaintiff. The defendant opposed the summons and filed the affidavit in opposition. The plaintiff's solicitor decided not to file an affidavit in reply and the matter was fixed for hearing. At hearing the solicitor for the plaintiff tendered the written submission and the defendant filed his submission later with the leave of the court.

02. A copy of the Instrument of Title is marked as "N02" and annexed with the supporting affidavit, to establish the fact that, the plaintiff is the last registered proprietor and therefore has locus to invoke the jurisdiction of this court under this procedure. The defendant in his affidavit stated that, he can neither admit, nor deny the proprietorship of the plaintiff. Annexure "N02" is a copy of Residential State Lease No. 20945 and it is duly certified by the Registrar of Title. As per section 18 of the Land Transfer Act, a duplicate instrument of title, duly authenticated under the hand and seal of the Registrar, shall be received 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 production of the register or a certified copy thereof, be conclusive evidence of its contents. It is evident from the said Residential Lease ("N02") that, the plaintiff is the last registered proprietor of the subject property, and therefore he has the locus to summon the defendant under section 169 of the Land Transfer Act (Cap 131).
03. The subject property is described in the summons and the defendant does not dispute its description. The defendant was also given sufficient time to prepare his affidavit. Further the consent of the Director of Land is not necessary as it was settled by His Lordship the former Chief Justice Anthony Gates (as His Lordship then was) in Prasad v Chand [2001] FJLawRp 31; [2001] 1 FLR 164 (30 April 2001). Accordingly, the plaintiff passed the threshold under sections 169 and 170 of the Land Transfer Act Cap 131.
04. The burden now shifts to the defendant to show cause his defence to remain in possession of the subject property. The Supreme Court in Morris Hedstrom Limited -v- Liaquat Ali CA No: 153/87 explained the duty of a defendant in application of this nature 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)

05. Generally, the duty on defendants in this application, as per the above authority is, not to produce any final or incontestable proof of their right to remain in the properties, but to adduce some tangible evidence establishing a right or supporting an arguable case for their right to remain in possession of the properties in dispute. **Black's Law Dictionary** defines "tangible evidence" as "physical evidence that is either real or demonstrative" (10th Edition, page 678). Therefore, the duty of the defendant in this case too is to produce some real or demonstrative physical evidence demonstrating his right to remain in possession of the subject property. However, this duty will not be fulfilled by mere assertion in the affidavit.
06. The Fiji Court of Appeal in Ali v Jalil [1982] FJLawRp 9; [1982] 28 FLR 31 (2 April 1982) explained the nature of the order 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).
07. The abovementioned two decisions require the court to decide whether the 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 this case.
08. The plaintiff claimed that, the defendant was renting the subject property, but did not pay the rent. This resulted in issuing notice of distress on him through the bailiff. However, the defendant in his affidavit in opposition totally denied the fact that, he was renting the subject property, and stated that, the house occupied by him is situated outside the Residential Lease of the plaintiff. The defendant further stated that, he spent considerable amount of money in renovating the said residential premises which is erected outside the formal lease boundaries of the plaintiff. His position is that, he is neither renting the subject property in this matter, nor the residential premises, he is occupying, is the situated within the boundaries of the subject property of the plaintiff.

09. However, he took up different position at the hearing of the summons. He filed, with leave of the court a well-versed written submission citing several cases. He stated that, the plaintiff is the registered owner of the State Lease No 20945. In addition, he stated that, it was agreed that, he (the defendant) has been renting said residential premises from the plaintiff. This admission is under the sub-heading “**Agreed facts of the Case**”. Thereafter, the defendant had gone on to say that, it was abandoned and he carried out repair and maintenance amounting to \$ 2,500. He further stated that, there was an implied condition between him and the plaintiff that, he pays a monthly rental of \$ 300 inclusive of water bill for the premises; however, the caretaker did not prepare the tenancy agreement as per their agreement.
10. It is obvious from the affidavit and the submission of the defendant that, he contradicts his own defence that, the dwelling is situated outside the boundaries of plaintiff’s residential lease. Secondly, the he corroborates the plaintiff’s position that, he was renting the subject property. It is settled that, the existence of tenancy or any dispute therewith is not a defence to resist an application for ejectment under section 169 of the Land Transfer Act. The residential lease is a protected lease and the defendant cannot have any proprietary right over it. If he has any dispute regarding his claim for carrying out repair and maintenance of the subject property, he has to take action in a different forum to establish his rights.
11. Accordingly, the issues in this matter are straightforward and there are no complicated issues of facts. The plaintiff’s proprietorship is proved by conclusive evidence and there is no defence at all for the defendant to possess the subject property. Gould V.P. delivering the unanimous judgment of Fiji Court of Appeal in **Ram Narayan v Moti Ram** (Civ. App. No. 16/83 FCA) stated:
- “... the summary procedure has been provided in the Land Transfer Act and, where the issues involved are straightforward, and particularly where there are no complicated issues of fact, a litigant is entitled to have his application decided in that way”.*
12. It follows that, the plaintiff is entitled for immediate vacant possession in this case; the defendant ought to be evicted from the property; and should be ordered to immediately deliver the vacant possession of the subject property to the plaintiff.
13. In result, I make the following orders:
1. The defendant is ordered to immediately deliver the vacant possession of the property described in the summons to the plaintiff, and

2. The defendant is further ordered to pay summarily assessed costs in sum of \$ 1000 to the plaintiff within a month from today.



At Lautoka
17.06.2022


U.L. Mohamed Azhar
Master of the High Court