

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. 184 of 2021

BETWEEN: **SABRINA EVELYN ALPORT WISHART and FRANK**
ALPORT RYAN as Trustees of the Estate of Lady Evelyn
May Barker of Nasese, Suva.

PLAINTIFFS

AND: **ALL THOSE PERSONS, NAMES UNKNOWN**, in occupation of
all that land comprised in Certificate of Title CT 19586 and/or the
PERSONAL REPRESENTATIVES IN THE ESTATE OF
OLIPANI BABA, of Lot 25 Ratu Sukuna Road, Nasese, Suva.

DEFENDANT

Counsel

Plaintiff : **Ms. Ali. N**
Defendants : **Ms.Vaurasi. L**
Date of Hearing : **01.08.2022**
Date of Judgment : **31.08.2022**

JUDGMENT

INTRODUCTION

1. This is an action filed under Section 169 of Land Transfer Act 1971(the Act). Plaintiffs are co-trustee of the Estate of late Evelyn May Barker who was the last registered proprietor of CT10316 being Lot 25 in DP 2226(the Property). The present occupants are descendants of the lessees of the Property. The lease had admittedly expired in 2020, and the occupants have not paid lease rentals since 2016. The notice to vacate was given in 2020 and one year was requested from 2.3.2020 to obtain a loan to purchase it, and now more than two years and eight months have lapsed since notice to vacate dated 30.1.2020. Under Torrens System, the Title to the property is everything subject to statutory exceptions such as fraud. The long occupation in the property with or without payment of rental cannot create a right to possession, in terms of Section 172 of the Act. Defendants have not shown such right to possession, recognized in Torrens system, in order to dismiss this application.

FACTS

2. The Plaintiff filed an Originating Summons on 10 .9. 2021, to evict the Defendants pursuant to section 169 of the Act. This is an action seeking vacant possession from the Property.
3. This action was filed pursuant to a notice of vacation issued on 30.1.2020 for which a reply was made on 2.3.2020 which sought one year time period.
4. Plaintiff had instituted this action nearly one year and nine months after notice of vacation was issued.
5. There are no disputed facts and Defendants only sought time to obtain a loan to purchase the Property, but this had not happened.
6. The Property was leased to late Mr Olipani Baba on 8 .8. 1989 pursuant to registered lease which had expired on 31 .12.2019. Since then the Lease has not been renewed or extended. (See affidavit in opposition para 5, and 6 where admissions are made to said facts).
7. Deponent of the affidavit in opposition had admitted that she and her children came in to the possession of the Property in terms of the abovementioned lease in 1989, of her late husband. She had admitted that children of their marriage have not grown up and had married and having grandchildren.
8. Despite the lease had expired in 2019, no rentals were paid since 2016.
9. The Plaintiffs are the registered proprietors of the Property as Trustees of the Estate of their late Lady Evelyn May Barker.
10. Plaintiffs are over eighty years old and seeks to finalize the estate before their demise.
11. On 30.01.2020, the Plaintiffs' solicitor served the Defendants with a Notice of Non-Renewal and Notice to Vacate Property. Defendants were granted thirty days.
12. On 2.3.2020, the Defendants wrote to the Plaintiffs' solicitor requesting one year on humanitarian grounds, to seek a loan, to purchase the Property.
13. On 12.3.2020, the Plaintiffs' solicitor wrote to the defendants informing that the request for further time was declined and instructing the Defendants to immediately vacate the Property.
14. No action was taken, and again on 7.12.2020, the Plaintiffs' solicitor served another Notice of Non-Renewal and Notice to Vacate Property within one month, but

Defendants did not vacate the premises and this action was instituted on 10.9.2021.

15. Defendants in their submission state that they were in the property for over thirty years under the lease. Plaintiff rely on Court of Appeal decision of (Full Court Basnayake JA, Lecamwasam JA and Dayaratne JA) where their lordships held that 'mere possession for more than 20 years itself would qualify the respondent to seek protection under Section 172 of LTA.'
16. The issue is fairly and squarely whether long possession of a land under Torrens System is sufficient defence in terms of Section 172 of Land Transfer Act 1971.

LAW and Analysis

17. Section 169 of the Act provides for the following:

"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) a lessor against a lessee or tenant where a legal notice to quit has been given or the term of the lease has expired."(emphasis added)

18. There is no dispute as to the proprietorship of the Plaintiffs and or their *locus* to institute this action. In the affidavit in opposition alleges, discrimination and also insist that land be sold to them by Plaintiffs which estop challenge to the Plaintiff's proprietorship.
19. Defendant had contended the affidavit in support is from only one co-trustee of the estate, to which the Property belongs. This cannot be a valid objection, as there is no requirement under the Act or any other law that requires all the trustees to swear affidavits filed in support of Section 169 of the Act.
20. Pursuant to section 2 of the Interpretation Act 1967, "registered" means "registered under the provision of any written law for the time being applicable to the registration of such document or title". In this instance the registration was under the Act.
21. Section 2 of the Act defines "proprietor" as "the registered proprietor of land or of **any estate**

or interest therein."(emphasis added)

22. Once the proprietorship is established , the burden is fairly and squarely fall on the Defendants to prove a right to possession in terms of Section 172 of the Act , and if not possession is granted to the Plaintiff in terms of Section 171 of the Act.

23. Section 171 of the Act states

"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.**" (emphasis added)

24. Section 172 of the Act:

"If the 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 or she 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." (emphasis added)

25. If there is a valid and unexpired lease, the eviction cannot be ordered for arrears of rentals if all of such arrears settled before hearing. In this case Defendants admit that they had not paid rentals since 2016, but the said lease had expired in 2019 and lease was not extended after 2019. Plaintiffs had indicated in January, 2020 that there will not be an extension of lease and also sought to evict the tenants.

26. The advent of Torrens system and need for such system was explained in *Fels and another v Knowles and another* (1907) 26 NZLR 604 in the joint majority judgment (delivered by Edwards J) at p 619 as follows:

‘In the course of centuries of our English history there had grown up a complicated system of rules regulating dealings with and transfer of real property. The result was that every dealing necessitated a minute and careful inquiry into the preceding title, attended by great expense, and never resulting in absolute certainty to title.

More especially the rules affecting the administration of trusts and the fact that notice, direct or constructive, of a breach of trust might result in grievous loss to wholly innocent persons were felt to bear very hardly, without sufficient compensating advantages. Impressed by this view of the matter, it occurred, now many years ago, to an ingenious gentleman in South Australia, Mr. Torrens, that the Merchant Shipping Acts supplied a model for which a scheme of land registration could be devised, by which all trusts should be excluded from the register, and under which a person dealing honestly with the registered proprietor should not be called upon to look further than the register, and should be entirely unaffected by any breach of trust committed by the registered proprietor with whom he dealt. From this genesis sprang the system of land registration which now prevails in all the Australian Colonies and is now represented in this colony by “The Land Transfer Act 1885” and its amendments.’

27. The above brief history and the reason behind the Land Transfer Act 1971 ,in Australia and New Zealand is equally applicable to Fiji as the Land Transfer Act 1971, which came in to operation on 1.8. 1971 in Fiji is based on Torrens system and provisions in issue are analogous to the Land Transfer Acts in New Zealand and Australia, at that time.
28. So, when the law contained in the Act has to be applied and interpreted, keeping in mind the rationale behind the indefeasibility in title and the words in the said enactment is clear and unambiguous as to the rights of the last proprietor of property.
29. It is also clear that statutory rights based on Torrens System must not be eroded and or conflict of the trite principles of indefeasibility of title.
30. In *Fels and another v Knowles and another* (supra) further at p 620 the following appears:

‘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.’
31. Indefeasibility of title is paramount consideration, in the Act. (See *British American Cattle Co v Caribe Farm Industries Ltd* [1998] 1 WLR 1529 at 1533 (PC) per Lord Browne-Wilkinson (citing *Gibbs v Messer* [1891] AC 248 at 254 (PC) per Lord Watson); *Half Moon Bay Ltd v Crown Eagle Hotels Ltd* [2002] UKPC 24 at [21] per Lord Millett).
32. As stated earlier the registration of the title is everything under the Torrens System and the exceptions to this rule is Fraud. There is no definition of fraud contained in the Land

Transfer Act, but again it must be interpreted in the light of the provisions contained in the Act. The indefeasibility and its exceptions are dealt in Sections 39, 40 and 41 of the Act.

33. According to **Hinde McMorland & Sim Land Law in New Zealand** , under Indefeasibility –Concept of Indefeasibility (9.006) stated

“There are two interconnected aspects of the concept of indefeasibility. First, protection is given against the claims **of a competing owner, that is, a person who, under the general law, would have been able to claim** the land, for example, because of some defect in the proprietor’s Second, the title of the registered owner is **free from estates and interests not registered or noted on the register** including those not capable of being registered or noted on the registered.” (emphasis is added)

34. So it is clear that Torrens System had excluded unregistered interests such as long possession or adverse possession and registration is everything. If long possession is a ground to remain in possession that is directly conflicts with the principles of Torrens System, as stated in the text Land Law (supra).

35. Section 41 of the Act deals with fraudulent entries to the land registrar and it has no application to the present appeal. The section 40 of the Land Transfer Act deals with fraud, and this is an exception that one can find in the said Act, which vitiates the rights derived from the registration of the title. Sections 39, 40 and 41 of the Land Transfer Act states as follows:

“Estate of registered proprietor paramount, and his title guaranteed

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.'

Purchaser not affected by notice

40. Except in the case of **fraud**, no person contracting or dealing with or taking or proposing to take a transfer from the proprietor of any estate or interest in land subject to the provisions of this Act shall be required or in any manner concerned to inquire or ascertain the circumstances in or the consideration for which such proprietor or in any previous proprietor of such estate or interest is or was registered, onto see to the application of the purchase money or any part thereof, or shall be affected by notice, direct or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding, and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as **fraud**.

Instrument etc, void for fraud

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." (emphasis added)

36. *Assets Co Ltd v Mere Roihi (Consolidated Appeals)* ([1905] AC 176) the principles contained in Sections 39, 40 and 41 of the Land Transport Act (in the said case analogous provisions in NZ Land Transfer Act were dealt, as opposed to indigenous people's rights to land in terms of the said Act) were described as 'unimpeachability' of the title. The same principles are most commonly described as 'indefeasibility' of title, too. In *Frazer v Walker and Others* [1967] 1 All ER 649 the word 'indefeasibility' was dealt by the Privy Council as regard to the analogous provisions contained in the Land Transfer Act of New Zealand and the earlier decision of *Assets Co Ltd v Mere Roihi (Consolidated Appeals)* ([1905] AC 176) was also considered in this later decision. In the said decision it was held that this concept of 'indefeasibility' is central to the system of registration found in the Land Transfer Act. In *Fraser v Walker and Others* (supra) at page 652 the following appears:

"It is these sections which, together with those next referred to, confer on the registered proprietor what has come to be called "indefeasibility of title". **The expression, not used in the Act itself, is a convenient description of the**

immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys. This conception is central in the system of registration. It does not involve that the registered proprietor is protected against any claim whatsoever; as will be seen later, there are provisions by which the entry on which he relies may be cancelled or corrected, or he may be exposed to claims in personam. These are matters not to be overlooked when a total description of his rights is required; but as registered proprietor, and while he remains such, no adverse claim (except as specifically admitted) may be brought against him.

III. Those sections of the Land Transfer Act, 1952, which state the effect of the certificate of title. The principal section on this subject is s 75. The certificate, unless the register shows otherwise, is to be conclusive evidence that the person named in it is seized of or as taking estate or interest [sic] in the land therein described as seized or possessed of that land for the estate or interest therein specified and that the property comprised in the certificate has been duly brought under the Act. This section is of a similar character to those last discussed; it creates another--a probative--aspect of "**indefeasibility**", none the less effective though, as later provisions show, there are means by which the certificate may be cancelled or its owner compelled to hold it on trust or to deliver it up through an action in personam." (emphasis is mine)

37. So, the indefeasibility of the title or unimpeachability of the title are the same principles that are commonly contained in the Land Transfer Act, 1971 that grants the impunity to the title of the land upon the registration of the instruments recognized in the Land Transfer Act. The rights derived from the registration of such instruments are not absolute and the exceptions are fraud and mistake or error in terms of Sections 40 and 41 of the Land Transfer Act, but it cannot go beyond statutory provisions as the indefeasibility itself is a statutory creature. So, its exceptions are not found in common law and needs to confine to Land Transfer Act 1971.
38. So, there is no room for Defendant's to claim any adverse claim through long possession since 1989. The current occupants are wife and children and grandchildren of late Olipani Baba who obtain the lease for the Property in 1989 for a period ending 2019. In any event, such a claim for adverse possession till it is registered under the Act cannot prevent eviction, too. Defendants have accepted Plaintiff's title by the lease which expired in 2019, then Defendants were seeking time to obtain a loan to purchase the property. So they will be estopped from claiming any adverse possession or long term possession to remain in the property.
39. It is unlawful for Defendant's to remain in possession after expiration of lease. So there is no right to possession recognized in law for them to remain in possession stated in the affidavit in opposition.

40. Defendants have admitted the corpus (paragraph 5 of the affidavit in opposition). Admitted that possession was pursuant to the lease entered in 1989. The time period for the said lease had expired in 2019.

41. The Respondent is not alleging any fraud against the Plaintiff in his affidavit in opposition. Even a mere allegation is not sufficient to disallow eviction in terms of Section 172 of the Land Transfer Act, as stated by Gates J (as his lordship then was) in Prasad v Mohammed [2005] FJHC 124; HBC0272J.1999L (3 June 2005). In that case it was further held:

'A threshold of evidence must be reached by the Defendant before the Plaintiff can be denied his summary remedy.'

42. The above judgment indicates the sanctity given to title subject to statutory exception. So it is clear that a long possession will not create a valid defence in terms of Section 172 of Land Transfer Act 1971.

43. Accordingly, the statement 'mere possession for more than 20 years itself would qualify the respondent to seek protection under Section 172 of LTA' (CA Appeal No Abu 118 of 2017 decided on 7.6.2019) in unreported case of Hari Prasad Vs Mira Sami et al. is respectfully not applied for obvious reasons for this case for reasons given above.

44. At paragraph 8(ii) of the Defendants' Affidavit, the deponent states

"I insisted that they sell the Property to us..."

There is no basis for such a request unless in an action for specific performance, which is not an issue in this action.

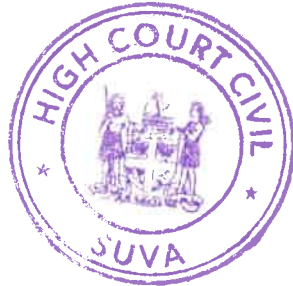
45. Similarly, at paragraph 9 of the Defendants' Affidavit, the deponent claims that they were discriminated as they were not allowed to purchase the property. Occupants had only asked for one year in March, 2020 to obtain a loan and there was no evidence of such a loan or sale and purchase agreement or an offer being made and accepted. So the said discrimination is without any facts and needs to be rejected.

46. Pursuant to section 172 of the Act, the Defendants must "*prove to the satisfaction of the Judge a right to the possession of the land*". There is no such proof. A long possession since 1989 was pursuant to a lease which had expired in 2019. Neither can they insist a sale to them nor can they remain on the property. So the Defendants who are occupants of the Property are evicted forthwith. The cost of this action is summarily assessed at \$2,000.

FINAL ORDERS

- a. Plaintiff is granted vacant possession and Defendants are ordered to vacate the Property comprised in CT 19586 immediately.
- b. The cost of this action is summarily assessed at \$2000 to be paid within 21 days.

Dated at Suva this 31st day of August, 2022.



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Amulya
Justice Deepthi Amaratunga
High Court, Suva