

IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

Civil Action No. HBC 269 of 2022

IN THE MATTER of an Application made pursuant to Section 169 of the Land Transfer Act 1971.

BETWEEN: **CHANDRA KUMARI** and **SMITA KUMARI SINGH** of 9 Sese Street, Samabula, as Executors and Trustees of the Estate of Shant Kumar

PLAINTIFFS

AND: **DIWAN SINGH** of 15 Sese Street Samabula, Suva

DEFENDANT

Counsel

Plaintiffs: Ms. Fatima G.

Defendant: Mr. Skiba K.

Date of Hearing: 14.2.2023

Date of Judgment: 31.3.2023

JUDGMENT

INTRODUCTION

1. Plaintiffs are executors and trustees of the estate of late Shant Kumar. First Plaintiff is the wife of late Shant Kumar, and holds residue of the estate, of her late husband, after payment of debts, funeral expenses and other testamentary expenses, as life interest. After death of said life interest holder, the estate of late Shant Kumar, devolved to his four children in equal shares. Defendant is a beneficiary to the estate as a child of late Shant Kumar. This action is instituted to evict Defendant from a property belonging to the estate of late Shant Kumar, by Plaintiffs as trustees of the estate. The two trustees are seeking eviction of Defendant who is beneficiary, from Residential Lease No 19528, Samabula Indian Settlement (part of), Province of Rewa and District of Suva (The Property). There is no registered life interest, on the memorial of the certificate of title of the Property. Hence the

only basis for eviction in this action is trusteeship under last will. There is no affidavit from life interest holder whether she required the Property as unregistered life interest. Defendant is a tenant in common, along with second named Plaintiff and two other siblings in equal shares, subject to unregistered life interest of first named Plaintiff. Defendant has shown a right to remain in possession proportionate to his share of the Property in term of Section 172 of Land Transfer Act 1971, subject to life interest of his mother, who is yet to exercise her life interest. Strangely said life interest holder had taken neither side and remained neutral. In my mind such a situation does not warrant summary eviction of Defendant who will be a tenant in common to the Property for 25% of the Property.

ANALYSIS

2. First Plaintiff is the mother of second Plaintiff and Defendant and also the life interest holder of the residue of the estate of late Shant Kumar. Plaintiffs are also a joint trustee and executor of the estate of late Shant Kumar.
3. This action is instituted on the basis of trusteeship of the executors of the last will of late Shant Kumar. According to the said last will residue of the estate is subject to life interest of first named Plaintiff.
4. Affidavit in support is filed by one daughter of late Shant Kumar and also joint trustee to the Property alleging her mother and joint trustee was removed from the Property by Defendant.
5. Defendant had denied that he had removed her mother from the Property but stated that she had left on her own accord. As first Plaintiff is a party to this action she could have denied that fact, but decided to remain silent.
6. Affidavit in reply has no evidence from the mother of Defendant again it is from second named Plaintiff, so this remains a disputed fact. The affidavit in reply tried unsuccessfully to overcome, this vital fact, by stating that second Plaintiff is filing an affidavit in reply on behalf of first Plaintiff. If first named Plaintiff, who is the unregistered life interest holder of residue of the estate, was removed from the Property belonging to estate she should say so on a sworn statement and at least a reason why she cannot do so.
7. As to determine right to possession of the Property evidence presented through evidence are analyzed. So I am not inclined to accept allegations against Defendant as to the removal of his mother from the Property.
8. The Property belongs to the estate of late Shant Kumar and the latest memorial shows a transmission by death to the Plaintiffs as trustees.

9. There is no registration in the memorial of the Property as to the life interest of first Plaintiff. So Plaintiffs cannot seek eviction of Defendant on the basis of unregistered right of first Plaintiff under section 169 of Land Transfer Act 1971 which reads;

“169. 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.”

10. Section 2 of Land Transfer Act 1971 interprets proprietor in an exclusive manner to mean ;

““proprietor” means the registered proprietor of land, or of any estate or interest therein”

11. Accordingly trustees of the estate who had registered themselves through a transmission by death, can institute this action as registered proprietor.

12. Also Section 2 of the Land Transfer Act defines the word “instrument of title” as follows:

"instrument of title" includes a certificate of title, Crown grant, lease, sublease, mortgage or other encumbrance as the case may be.

13. The Property is ninety nine year lease of a state land registered in terms of Land Transfer Act 1971 having an area of one Rood and fourteen Perch.

14. Land Transfer Act 1971 based on the same principles and provisions are analogous as both are based on Torrens system. The language contained in the said Act and its provisions relating to indefeasibility of the title and the meaning is clear. The advent of Torrens system and need for such system was explained in *Fels and another v Knowles and another* (1907) 26 NZLR 604 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.'

15. In *Fels and another v Knowles and another* (supra) further at p 620 stated:

'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.'

16. Plaintiffs had instituted this action as joint trustees and, the basis on which this application for eviction is based on trusteeship of the Plaintiffs, and not the unregistered life interest of first named Plaintiff. The allegation that she was evicted by Defendant is a disputed fact.
17. The solicitor for Plaintiff had written a letter on 7.7.2022 to Defendant in which certain facts were alleged, and this is annexed as 'C' to the affidavit in support of this application. According to the said letter it was written on the instruction of "the trustee of the Estate of Shant Kumar". So it was not written on instructions of both trustees.
18. It is not clear which trustee had given instructions, but affidavit in support of the summons for eviction was from second Defendant who is also a beneficiary of the residue of the estate. It is unlikely that first named Defendant was the "trustee" who instructed on the analysis of the evidence. She had remained neutral in this action instituted by one daughter against Defendant who is a son.
19. According to the said letter of 7.7.2022 first named Plaintiff as the life interest holder can either use or rent the Property and Defendant's beneficial rights are contingent upon her death.

20. While accepting the above legal position the action is only based on registration and there is no registered interest for life interest in favour of first named Plaintiff and no evidence that life interest holder desired to exercise her right over the property.
21. So, the only basis on which Plaintiffs seeking eviction are the registration of transmission by death as trustees of the estate of late Shant Kumar.
22. The issue is whether trustees can evict a beneficiary of the estate in summary manner under section 169 of Land Transfer Act 1971. This will depend on the circumstances of the case. In my mind such an action for eviction there will be many factors to be considered, including and not limited to improvements to the Property by beneficiary, and also reason for eviction.
23. According to affidavit in support sworn by second Plaintiff, first Plaintiff is also registered proprietor of Crown Lease No 21145A, which is not the subject matter of this action, so a reasonable query arises whether first named Plaintiff required the Property for her life interest and whether she wants Defendant to be evicted.
24. Second named Plaintiff is the trustee and also a beneficiary of the Property, and it is not clear whether she is acting on her own accord, using her mother's unregistered life interest to evict the Defendant.
25. Defendant had contended that the last will was ambiguous as the Property was not expressly dealt. All the residue of the estate of late Shant Kumar is subject to life interest so there is no need to specify the Property.
26. Defendant in the affidavit in opposition stated that he is a beneficiary to the Property of the estate of his late father who had died in 2015. Counsel for Defendant also stated in the submission that Defendant had lived in the Property since birth for more than forty years.

Long term Possession

27. Defendant had been in the property since birth. According to affidavit in opposition he is now forty years old. In my mind long terms possession on its own will not give a right to possession.
28. *Matawalu v Tamanisau* [2013] FJCA 101; ABU0032.2011 (3 October 2013) Court of Appeal full bench held, (Per Lechamwasam JA)

“[9] However long possession alone would not give rise to a right as envisaged in section 172 nor does it create a good arguable appeal.”

29. In *Prasad v Sami* [2019] FJCA 100; ABU118.2017 (7 June 2019) Court of Appeal full bench judgment of Basnayake E JA and (Lechamwasam S , and Dayarathna V JJA, agreeing) held (at paragraph 11)

“I am of the view that mere possession for more than 20 years itself would qualify the respondent to seek protection under section 172 of the LTA. The application for a vesting order will give an additional boost. Therefore whether the application for a vesting order amounts to a current right or a future right is immaterial.”

30. I prefer to follow that long term possession alone, irrespective of time period would not qualify protection under Section 172 of Land Transfer Act 1971, as Torrens system gives priority to registration, over possession.

31. Defendant needs to ‘show cause’ as to the reasons for his refusal to vacate the premises in terms of Section 172 of Land Transfer Act 1971, which states,

“172. If the 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;

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 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.

32. So Defendant is required to prove to the ‘satisfaction’ of the court ‘a right to possession of the land’. This need not be a registered right. Defendant needs to prove to the court, a ‘right to possession’, which can arise from contingent right as tenant in common for 25% share of the Property.

33. The residue of the estate the Property is subject to life interest of Chandra Kumari, who had not issued notice to vacate. It is admitted fact that she held a registered title as the proprietor for a separate land, so she can decide whether she wants to exercise her right under last will of late Shant Kumar, to the Property.

34. First named Plaintiff, can decide to obtain possession of the Property or to let Defendant to be in possession as he continued to do since birth. First Plaintiff can also renounce the life interest to the Property and then, the trustees should take steps to transfer the Property to four beneficiaries, as tenants in common.

35. In the circumstances in my mind Defendant had shown a ‘right to the possession of the land’ based on his contingent interest of 25% of a land area of more than fifty four Perches, based on the facts submitted by affidavits.

36. Trustee of the Estate and contingent Beneficiaries of a will

Halsbury's Laws of England under Trusts and Powers (Volume 98 (2019)) stated

“45. Fully fiduciary powers as opposed to personal powers

A fiduciary power classically arises when a mere power of appointment is conferred on trustees of property¹. Such a fiduciary power is not rendered invalid merely because of the width of potential objects (for example everyone in the world except for existing beneficiaries, the trustees and the settlor and his spouse)². An **exercise of the power will be set aside** or the fiduciary made to account for any profit he made if such exercise involved a **conflict between the trustee's fiduciary duty and his self-interest** (unless authorised by the trust instrument or all the beneficiaries or the court)³. Where such a fiduciary power exists, the trustees must consider: (1) periodically whether or not to exercise the power; (2) the range of objects of the power; and (3) the appropriateness of individual appointments⁴. A fiduciary power of this nature cannot be released⁵. If the power is exercised in ultra vires fashion, so as purportedly to benefit a person outside the scope of the power, the exercise will be void in equity; while it will be voidable if the trustee had exercised his power intra vires but in breach of his equitable duties..”(emphasis is mine)

37. Affidavit in support of this action seeking eviction of Defendant was filed by second Plaintiff, who is also a contingent beneficiary and also a joint trustee of the estate of late Shant Kumar. She had again filed an affidavit in reply but in this affidavit she had stated that it was on behalf of first Plaintiff. Apart from her, other beneficiaries had not sought eviction of Defendant.

¹ *Mettoy Pension Trustees Ltd v Evans* [1991] 2 All ER 513, [1990] 1 WLR 1587(overruled on other grounds in *Pitt v Holt*; *Futter v Futter* [2011] EWCA Civ 197, [2012] Ch 132, [2011] 2 All ER 450; whose approach was endorsed on appeal in *Pitt v Revenue and Customs Comrs* [2013] UKSC 26, [2013] 3 All ER 429, [2013] 2 WLR 1200); and see *Re Hay's Settlement Trusts* [1981] 3 All ER 786, [1982] 1 WLR 202; *Re Beatty's Will Trusts*, *Hinves v Brooke* [1990] 3 All ER 844, [1990] 1 WLR 1503.

² See para 28; and *Re Hay's Settlement Trusts* [1981] 3 All ER 786, [1982] 1 WLR 202

³ *Lagunas Nitrate Co v Lagunas Syndicate* [1899] 2 Ch 392, CA; *Boardman v Phipps* [1967] 2 AC 46, [1966] 3 All ER 721, HL.

⁴ *Re Hay's Settlement Trusts* [1981] 3 All ER 786, [1982] 1 WLR 202per Megarry V-C.

⁵ *Mettoy Pension Trustees Ltd v Evans* [1991] 2 All ER 513, [1990] 1 WLR 1587per Warner J; and see para 175.

38. In the circumstances there is a potential conflict between the actions of second named Plaintiff who is a trustee and also beneficiary of the estate of late Shant Kumar, and Defendant who is also a beneficiary. It is also noted that remaining two beneficiaries of the last will had also not supported this eviction.
39. Trustee Act 1966 Section 106 state
- “106. In the event of any conflict arising between the provisions of this Act and the provisions of the Land Transfer Act, the provisions of this Act shall prevail.
40. So, the rights and obligations of trusteeship obtains priority. There is fiduciary duty on trustees conferred in Trustee Act 1966, overrides the provisions contained in Sections 169 and 172 of Land Transfer Act 1971.
41. Defendant who is a contingent beneficiary to the Property is aggrieved by the decision to evict him from the Property by the second named Plaintiff who is also a beneficiary and trustee and he could seek redress in terms of Sections 90 of Trustee Act 1966.
42. Section 90 (1) of Trustee Act 1966 states,
- 90.-(1) Any person who has, directly or indirectly, an interest whether vested or contingent, in any trust property, and who is aggrieved by any act, omission or decision of a trustee in the exercise of any power conferred by this Act, or who has reasonable grounds to apprehend any such act, omission or decision of a trustee by which he would be aggrieved, may apply to the Court to review the act, omission or decision, or to give directions in respect of the apprehended act, omission or decision; and the Court may require the trustee to appear before it and to substantiate and uphold the grounds of the act, omission or decision that is being reviewed, and may make such order in the premises as the circumstances of the case may require.
43. In my mind there are grounds in terms of Section 172 of Land Transfer Act 1971 read with Section 90 of Trustee Act 1966 and the fiduciary duties of second named trustee, a right to remain possession of the Property for which he is a contingent tenant in common for 25% of the Property. Absence of involvement of other beneficiaries and life interest holder also indicate that this matter is not suitable for summary eviction.
44. At the same time it should be borne in mind first named Plaintiff as the life interest holder may register her life interest on the Property and seek eviction of any person from the Property as life interest holder in term of Section 169 of Land Transfer Act 1971, but this is yet to happen.

45. Even without registering life interest first named Plaintiff, and mother of Defendant can seek vacant possession of the Property through a civil action, by way of writ of summons. Defendant had shown a right under section 172 of Land Transfer Act 1971.

CONCLUSION

46. So the issue is whether in this action trustees can seek summary eviction of Defendant, who is a beneficiary of the Property. Trustees are registered proprietors of the Property. Defendant is a contingent beneficiary of the Property who had lived on the same property since birth for over forty years. First Plaintiff had not registered her life interest on the Property, though more than seven years lapsed from death of late Shant Kumar. First named Plaintiff, who is the unregistered life interest holder can decide as to possession of the Property. So far there is no evidence of such exercise of right by First Plaintiff. In the circumstances I reject this action for eviction filed solely on the basis of trusteeship of Plaintiffs. Defendant as contingent beneficiary of 25% joint tenancy of the Property, had shown a right to remain in possession in terms of Section 172 of Land Transfer Act 1971. Considering the circumstances of the case, parties to bear their costs.

FINAL ORDERS

- a. Originating Summons dismissed.
- b. No order as to costs.

Dated at Suva this 31st day of March, 2023.




Justice Deepthi Amaratunga
High Court, Suva