

**IN THE HIGH COURT OF FIJI**  
**WESTERN DIVISION**  
**AT LAUTOKA**

**[CIVIL JURISDICTION]**

**Civil Action No. HBC 138 of 2020**

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

**BETWEEN** : **MOHAMMED ASLAM** of Tavua Town, Tavua, Fiji, Town  
Planner.

**Plaintiff**

**AND** : **DHIRENDRA SINGH** of Tavua Town, Tavua, Fiji, Businessman.

**Defendant**

Before : Master U.L. Mohamed Azhar

Counsels : Ms. S. Sandhya (on instruction) for the plaintiff  
Mr. J. Reddy for the Defendant

Date of Judgment : 09<sup>th</sup> August 2023

**JUDGMENT**

01. The defendant by his amended summons filed on 15.10.2020 moved the court to set aside the judgment entered against him on 12.10.2020 to immediately deliver the vacant possession of the subject property in this matter to the plaintiff. The summons is supported by the affidavit sworn by the defendant. The plaintiff opposed the summons and filed the affidavit.
02. The background of this matter, albeit brief, is that, the plaintiff summoned the defendant pursuant to section 169 of the Land Transfer Act Cap 131 to show cause why he should not vacate and deliver up immediate possession to the Plaintiff of all that part of land comprised in Commercial Crown Lease No. 793403 being Lot 5 on DP No. 938 situated in the District of Tavua in the Province of Ba containing an area of 751 m<sup>2</sup> and located at Kings Road, Tavua Town, Tavua (**the subject property**) owned by the plaintiff being

occupied by the defendant and his family. The summons was duly served and the Affidavit of Service was filed. However, the defendant failed to appear on the very first day (12.10.2020) on which the summons was returnable. The court then made the order as per the summons and ordered the defendant to deliver the vacant possession of the subject property to the plaintiff. The defendant then filed the summons on the following day (13.10.2020) to set aside the said order and the summons was later amended by the defendant.


03. The order that was made on 12.10.2022 is regular as the defendant failed to appear and despite service of the summons. The meritorious defence should be shown to set aside a regular judgment or an order (**Fiji National Provident Fund v Datt** [1988] FJHC 4; [1988] 34 FLR 67; 22 July 1988). In proceedings under section 169 of the Land Transfer Act, the duty of a defendant is to adduce some tangible evidence establishing a right or supporting an arguable case for the right to remain in possession of the property in dispute (**Morris Hedstrom Limited –v- Liaquat Ali** CA No: 153/87 ). Tangible evidence is any real or demonstrative physical evidence. Accordingly, the defendant should establish a right to remain in possession or an arguable case for such right or must adduce the evidence to satisfy the court to form an opinion that, an open court hearing is required, given the circumstances of a case. Generally accepted defences are the proprietary and promissory estoppel. In case of a lessor against lessee, the payment of full rent together with all the incurred cost is the defence to resist a summons as per the proviso in section 172 of the Land Transfer Act.
04. The defendant states in his supplementary affidavit that, firstly, the plaintiff did not give recent notice to vacate and notice was sent in 2016; secondly, the he had been paying the rent, but the subject property belongs to an Estate and no one has been paying rent after knowing it was an Estate Property; and finally that, he renovated the subject property and it does not need further renovation as claimed by the plaintiff.
05. Under the section 169 of the Land Transfer Act, the last registered proprietor can invoke the jurisdiction of this court, not only against any unlawful occupants, but also against the lessee who failed to pay the rent and who was served with the notice to quit. In this case, the defendant admitted entering the subject property on the tenancy and also admitted that, he did not pay the rent. Admittedly, there were several notices issued on the defendant to vacate the subject property. These notices are sufficient for the purpose of an application under section 169 of the Land Transfer Act, because the Act requires only to give notice. Therefore, argument for recent notice is meritless.
06. The question of renovating the subject property is not sufficient in this case to give an estoppel, because the defendant entered the subject property as a tenant and remained as tenant. It is the Torrens system of registration that resulted in the guarantee and protection for the last registered proprietor. The protection of indefeasible title from illegal occupation is the high priority of this registration system. This protection is not

only against any illegal occupant of a particular land or property, but also is extended against any person who otherwise entered any property by a legal authority, but continued to occupy that property even after cessation of such authority or permission. That is why the section 169 (b) and (c) allow the lessor to bring the summons for eviction even the rental for a month is due or notice to quite has been given or term of tenancy has expired.

07. This shows that even a tenant, who legally entered any property, becomes an illegal occupant if the rental falls in arrears or notice to quit is served or term expired. At this point, the law does not allow considering any dispute between the lessor and lessee in relation to the tenancy agreement, but the court should grant order for vacant possession unless the full rental and cost paid before the hearing as provided in proviso of section 172 of the Land Transfer Act (Cap 131). The rationale is that, the moment any lessee fails to pay the rental or has been served with notice to quit or his term has expired, he or she should be evicted and the indefeasible title of the lessor, which is the high priority of the registration system, should be upheld. Any dispute relating to tenancy/lease should be dealt with in an appropriate forum and not in this proceeding for eviction.
08. The defendant entered the subject property on tenancy and the notice was sent on him to vacate the same. The defendant has no option but to vacate the subject property. If the defendant has issues in relation to the tenancy between him and the plaintiff, he can commence necessary proceedings against the plaintiff. However, any such issue will not give any right to remain in possession of the subject property challenging the indefeasibility of the plaintiff's title.
09. Accordingly, the defendant failed to adduce any meritorious defence to set aside the order that was made on 12.10.2020 in his absence. Thus three summons filed by the defendant to set aside the said order should be dismissed. Furthermore, the plaintiff was compelled to defend the summons filed by the defendant even after obtaining a regular order. The plaintiff therefore should be compensated by a reasonable amount of costs.
10. In result, I make following final orders:
  - a. The summons filed by the defendant is dismissed, and
  - b. The defendant should pay a summarily assessed cost of \$ 2,000.00 to the plaintiff within a month from today.

At Lautoka  
09.08.2023



  
U.L. Mohamed Azhar  
Master of the High Court