

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 102 of 2021

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

BETWEEN : **ARCHANA** aka **ARCHANA SINGH** of 9 Raven Place Ingleburn Sydney, Australia, Domestic Duties.

Plaintiff

AND : **SANDEEP PRASAD SINGH** of Sabeto Road, Nadi, Fire Officer.

Defendant

Before : Master U.L. Mohamed Azhar

Counsels : Mr. J.K. Singh for the Plaintiff
Ms. N. Kasturi for the Defendant

Date of Judgment : 29.09.2023

JUDGMENT

01. The plaintiff summoned the defendant pursuant to section 169 of the Land Transfer Act (Cap 131), to show cause why he should not give up vacant possession to the plaintiff of all that premises known as Crown Lease No 16664 being (Part of) Luvuci Lot 5 SO 5314 in the Province of Ba and District of Nadi containing an area of 1000m² (as to one undivided half share) and hereinafter called and referred to as "**the subject property**". The summons is supported by an affidavit sworn by the biological mother of the plaintiff. The defendant opposed the summons and filed an affidavit in opposition. However, the plaintiff opted not to file an affidavit in reply and moved the court on 23.05.2022 to fix the matter for hearing. The hearing was fixed accordingly.

02. However, on the hearing day, the counsel for the plaintiff moved the court to vacate the hearing and sought leave to file the affidavit in reply. The defendant strongly objected for both vacating hearing and granting leave to file affidavit in reply. The court noted that, it was the plaintiff who opted not to file affidavit in reply and moved the court to fix the summons for hearing and the hearing too was fixed almost 6 months before the hearing date. Therefore, the court refused to vacate the hearing and also refused the leave to file the affidavit in reply. However, the court allowed the parties to file their legal submission which was later filed by the respective counsels.
03. The procedure under Part XXIV of the Land Transfer Act which is known as "169 procedure" is a speedy procedure for obtaining possession when the occupier fails to show cause why an order should not be made (Jamnadas v Honson Ltd [1985] 31 FLR 62 at page 65). Sections 169 to 173 of the Land Transfer Act provide for this special procedure for ejection. The *Locus Standi* of a person who can invoke the jurisdiction of this court under this procedure is set out in section 169. Three persons, named in that section, have locus to invoke the jurisdiction of this court under this procedure. The section 170 requires the summons to give full description of the subject property and to serve the summons on the defendant to appear not earlier than 16 days after service of the summons.
04. The sections 171 and 172 provide for the two powers that the court may exercise in dealing with the applications under section 169. The consent of the Director of Land is not necessary as 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). The burden to satisfy the court on the fulfillment of the requirements, under sections 169 and 170, is on the plaintiff and once this burden is discharged, it then shifts to the defendant to show his or her right to possess the land.
05. The duty on defendants in this application 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. This was laid down by the Supreme Court in the often cited decision of Morris Hedstrom Limited -v- Liaquat Ali CA No: 153/87. Even the person appearing has failed to satisfy the court as per the above decision; the court can dismiss the summons if it decides that an open court hearing is required (Ali v Jalil [1982] 28 FLR 31).
06. The exercise of court's power, either to grant the possession to the plaintiff or to dismiss the summons, depends on how the said burden is discharged by respective party to the proceedings. However, dismissal of a summons shall not prejudice the right of a plaintiff

to take any other proceedings to which he or she may be otherwise entitled, against any defendant. Likewise, in the case of a lessor summoning a lessee for default of rentals, if the lessee, before hearing of the summons, pays or tenders all rent due and all costs incurred by the lessor, the summons shall be dismissed by the court.

07. The deponent of the supporting affidavit – the mother of the plaintiff – deposed in the said affidavit that, her two daughters - the plaintiff and one Diveena Anand were joint lessees of the subject property and the defendant is the ex-husband of the plaintiff. Both daughters were occupying the undivided property. The plaintiff built a house on her share with the assistance of Habitat. The plaintiff and the defendant divorced in year 2017. The plaintiff migrated to Australia in 2019. The defendant did not apply for distribution of matrimonial property. The other daughter (Diveena Anand) sold her share in the subject property to the defendant in 2015; however, the transfer was not completed. The defendant unlawfully broke into the subject property and has been occupying the same. On this ground the plaintiff seeks to eject the defendant.
08. Conversely, the defendant admits that, the plaintiff is registered proprietor of the undivided half share of the subject property and Diveena Anand was the proprietor of other undivided half share. He further stated that, the he and the plaintiff – the ex-wife – built the house situated on the subject property. The sister of the plaintiff – Diveena Anand – sold her shares to him and the transfer has been pending for the signature of the Registrar of Title. The annexure marked as “SPS 2’ is evident to his averment. The defendant further stated that, he and the plaintiff, after their divorce, mutually agreed that, he would remain in the subject property which they built and he would look after the two daughters. They also mutually agreed not to go for property distribution and the plaintiff then left to Australia. The defendant further stated that, the deponent of the supporting affidavit – the mother of the plaintiff – is not privy to all these agreements between him and the plaintiff – the ex-wife.
09. Number of facts have been revealed by the defendant in his affidavit of opposition. Some of those facts are that, the plaintiff and the defendants were the wife and the husband and now they are divorced; both of them built the matrimonial house on the undivided half share (the subject property) held by the plaintiff; the sister of the plaintiff and the co-owner sold her undivided half share to the defendant, but the transfer process was not completed and both the plaintiff and the defendant had mutual agreement on the residence of the children and matrimonial house situated on the subject property. However, the plaintiff did not file the affidavit to rebut the same. Accordingly, the claim of the defendant has become uncontested. It is also evident that, the deponent of the supporting affidavit is not privy to those facts and the agreement between the plaintiff and the defendant.

10. It has now become obvious that, the defendant has been occupying the matrimonial home after the divorce and upon mutual agreement between him and the plaintiff. He is not an illegal occupant who entered by force as claimed by the deponent of the supporting affidavit. Furthermore, the Diveena Anand also sold her share in to the defendant as admitted by the deponent of the supporting affidavit in paragraph 13. The name of the defendant had already been entered in the memorial of the Instrument of Title, but not initialed by the Registrar of Title. It is also evident that, the Director of Land too consented for the said transfer. It therefore appears that, there had been some arrangements between the plaintiff and the defendant on occupying the matrimonial property and also to transfer the other half share of Diveena Anand to the defendant. As the result, I am satisfied that the defendant has discharged his duty to show his right to remain on the subject property.
11. The counsel for the defendant submitted that, the summons of the plaintiff should be dismissed with costs. It is the legal aid commission that defended the defendant in this matter. In Ranadi v Banivetau [2020] FJHC 428; HBC211.2018 (16 June 2020) this court awarded costs in favour of the party who was supported by legal aid commission and gave reasons for awarding so. I now adopt *mutatis mutandis* the same reasoning in this matter too.
12. The primary purpose of awarding cost is to compensate a successful party and it is neither punishment nor reward. Further the cost awards are also a check on unmeritorious litigation and to encourage litigants to consider cost-effective alternatives to court litigation. However, award of costs should not prevent litigants from accessing to justice and seeking to enforce their rights through the courts. Edwards J in Taylor v Roper [2019] NZHC 16 (21 January 2019) discussed the purpose of awarding costs in paragraphs 6 and 7 and said:

The primary purpose of a costs award is to compensate a successful party for the costs they have expended in having their legal rights recognized and enforced in a court of law.⁶ Costs are not ordered as punishment against the losing party, nor as a reward for the winner.⁷ An award of costs is generally linked to the conduct of the proceeding and its result but is not usually concerned with what happened before the proceeding.

An award of costs also serves a number of other policy objectives. The prospect of an adverse costs award acts as a check on unmeritorious litigation being pursued through the courts. An award of costs also encourages litigants to consider whether there are cost-effective

alternatives to court litigation to resolve the underlying dispute. Of course, counterbalanced against those objectives is the public interest in ensuring that an award of costs does not inhibit litigants from seeking to enforce their rights through the courts.

13. The overriding objective in awarding cost is to do justice between the parties. The nature of representation offered to a litigant such as pro bono basis makes rare difference to that party's right to recover costs. In **R (Boxall) v Waltham Forrest London Borough Council** (2000) 4 CCLR 258, Scott-Baker J said:

"It would ordinarily be irrelevant that the claimant is legally aided. The overriding objective is to do justice between the parties without incurring unnecessary court time and consequently additional costs."

14. Lord Neuberger in **R (M) v Mayor and Burgess of the London Borough of Croydon** [2012] EWCA Civ 595; [2012] 1 WLR 2607; [2012] 3 All E.R. 1237 set out the general principle in awarding costs after trial in ordinary civil litigation and said at pages 1247 and 1248 that:

".....the basis upon which the successful party's lawyers are funded, whether privately in the traditional way, under a 'no win no fee' basis, by the Community Legal Service, by a Law Centre, or on a *pro bono* arrangement, will rarely, if ever, make any difference to that party's right to recover costs".

15. Lord Justice Irwin in **King's Lynn and West Norfolk Council v. Michelle Paula Bunning** [2016] EWCA Civ 1037 discussed several cases including the last mentioned two cases and stated at paragraph 39 that:

I accept also that it is important for costs orders to be made in favour of successful legally-aided parties. We were told that such an order makes a very considerable difference to those acting, who receive a very much reduced rate if paid by the Legal Aid Agency rather than the unsuccessful party. It will also be evident that if successful legally-aided parties do not obtain costs orders when they should, a false picture will emerge as to the care the Agency takes of public money; legal aid litigation will appear to be less effective and the judgements of the Agency less well-considered than they should.

16. A litigant who is in receipt of legal aid assistance obviously does not pay for the solicitors of the Legal Aid Commission. The only expenses that may be borne by such litigant would be the cost incurred for the transport to the Legal Aid Office and contacting the solicitors via telecommunication methods. Even though such litigant does not suffer pecuniary loss for the litigation, such person may have to spend reasonable time to come Legal Aid Office and even to the court, and that time could be utilized for the wellbeing and welfare of him or herself or family. This factor would be more severe if such person lives in interior where less facility available compared to towns and cities. Sometimes, a person may have to spend the whole day in coming to Legal Aid Office and court and going back home due to limited transport facilities available to such particular area. This factor should not be ignored when the court exercise its discretion in awarding cost. It must be noted here that, Order 62 rule 18 allows the taxing officer to award not exceeding \$ 4.00 per hour in respect of time reasonably spent by a litigant in person even though it appears to such officer that, the litigant in person has not suffered any pecuniary loss in doing any item of work.
17. Furthermore, the resources of the Legal Aid Commission, which are being exhausted in providing free legal service to the members of the public, cannot be overlooked. The Legal Aid Commission is a constitutionally recognized statutory body, which provides variety of free legal services to the members of public all over the country. It is the largest law firm in this country having number of branches in order to achieve its mission. However its resources, whether it is financial or human or logistic are limited as it is mainly managed by the fund appropriated by the Parliament from the taxpayers' money every year. Hence, regard should also be had to the impact of a case on the resources of the Commission. Those resources are not infinite and for every case handled by the Commission, the resources for another case are potentially reduced and the Commission is compelled to limit its services. That is why the section 6 (1) of the Legal Aid Commission Act provides that, the Commission shall provide, subject to the resources available to it, legal assistance to impoverished persons. Further the Commission provides its services only if it is satisfied that, the person who applies for legal aid has reasonable prospect of success in his matter as provided in section 9 of the Act. The rational for this filtering process is to save the limited resources of the Commission.
18. When the Commission provides its services within its limited resources to the meritorious cases chosen by it, any attempt by an opposing party to drag such cases in a censurable manner with an meritless claim or knowing very well that there is no prospect of success at all, will be an utter waste of resources of the Commission, and in turn it is a waste of public fund. In addition such attempt stands in the way of other more deserving cases being handled by the Commission. Sometimes, some litigants might continue to defend

some proceedings knowing that they have significantly weak cases, but nevertheless confident that, even if they lose, they will be immunized from any cost order as the Legal Aid Commission provides free services to other party. This attitude must be denounced for the very reason that, the Legal Aid Commission spends the public fund in providing such services for the impoverished people of the country, to fulfil the obligation of the state under section 15 (10) of the Constitution of Republic of Fiji. Hence, award of a reasonable cost payable to the Legal Aid Commission will be restitution to the Commission, and also will signify that the court denounces such attitude.

19. The plaintiff being the ex-wife of the defendant, must be well aware of the whole transactions and arrangements between her and ex-husband – the defendant - in relation to the subject property which is the matrimonial house. However, she instructed and authorized her mother to summon the ex-husband who has been occupying the matrimonial house with the children of marriage. Furthermore, the deponent of the supporting affidavit also could not have been unaware of these arrangements by which her ex- son in law has been occupying the matrimonial house with her grandchildren. However, the deponent described the defendant as the illegal occupant. It is a reprehensible conduct on part of the both the plaintiff and her mother who deposed the supporting affidavit. Therefore, I am of the view that, there should be some costs in favour of the defendant and the Legal Aid Commission.
20. In result, I make the following orders:
 1. The summons filed by the plaintiff is dismissed, and
 2. The plaintiff should pay a summarily assessed costs in sum of of \$ 2,000 to the Legal Aid Commission of Fiji and \$ 500 to the defendant within a month from today.

At Lautoka
29.09.2023




U.L. Mohamed Azhar
Master of the High Court