

2. The Plaintiffs sort orders of the Court for vacant possession, as deposed in their Affidavit, as the Defendant had failed to pay rent for 7 years.
3. The Defendant had filed an answering Affidavit objecting to the application for vacant possession.

LAW AND ANALYSIS

4. Section 169, 170, 171 and 172 of the Land Transfer Act provides as follows –

“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.

Particulars to be stated in summons

170. The summons shall contain a description of the land and shall require the person summoned to appear at the court on a day not earlier than sixteen days after the service of the summons.

Order for possession

171. 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.

Dismissal of summons

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.”

5. The requirement under section 169 (1) (a) of the Land Transfer Act is the Plaintiff to show that he is the last registered owner of the property.
6. The Affidavit in Support of the application, is deposed by the brother of the Plaintiff. He annexed a Certificate of Title which confirms that the Plaintiffs names are the registered proprietor of the property.
7. However the Affidavit in Support garnered the signature of the First Plaintiff to authorize the Deponent to depose the Affidavit on their behalf. The Second Plaintiff has not signed the same letter of authorization although the First Plaintiff admitted the letter was on their behalf.

Deposing on behalf of another

8. In Kalabo Investments Limited -v- New India Assurance Co Ltd [2019] FJCA 2 10;ABU 0010.2019 (4 October 2019) Basnayake JA, Guneratne JA and Jameel JA stated:

[66] Order 41r.9 (2) which had been relied upon by the Respondent to have Peter Faire’s affidavit rejected, provides as follows:

“Every affidavit must be indorsed with a notice showing on whose behalf it is filed and the dates of swearing and filing, and an affidavit which is not so indorsed may not be used or filed without the leave of court”

[67] Order 41 r. (1) 4 provides as follows:

(4) Every affidavit must be expressed in the first person and, unless the Court otherwise directs, must state the place of residence of the deponent and his occupation or, if he has none, his description, and if he is, or is employed by, a party to the cause or matter in which the affidavit is sworn, the affidavit must state that fact.

In the case of a deponent who is giving evidence in a professional, business or other occupational capacity the affidavit may, instead of stating the deponent’s place of residence, state the address at which he works, the position he holds and the name of his firm or employer, if any. (Emphasis added).

[68] The requirement in Order 41 r.9 (2) is to be read in the context of its purpose. In this case, Peter Faire was not employed by the Appellant, in the sense of being a regular pay-roll employee. He was an independent contractor engaged by the Appellant for his professional expertise. He had been engaged by the Appellant, as an expert and Peter Faire says as much in paragraph 17 of his affidavit.

[69] Order 41 r. (1) 4 requires a person who files an affidavit on behalf of his employer to state so because of the legal relationship of principal and agent, and the consequences that flow from that. That rule does not apply to a person who is not employed by the party on whose behalf he deposes the affidavit.

[72] However, in seeking to enforce compliance with rules of procedure, it is necessary to bear in mind the purpose of the rule. Rule r. 9 of Order 24, is unlike r.6 which deals with the contents of the affidavit, or rule 4 which deals with defective affidavits. Those rules are in respect of the substantive contents itself. However, r.9 is only in respect of a matter extraneous to the contents of the affidavit, and therefore striking out the affidavit is not only not provided for, but is on the contrary, left to the discretion of court to make a determination as to whether to allow the affidavit to be filed or used, as the case may be.

[73] Affidavit evidence is an alternative to oral evidence, and is required to be expressed in the first person, to ensure direct evidence, identification and capacity, and due authorization to depose to the contents of the affidavit.”

9. Having considered the Affidavit of the Plaintiff, the deponent is the brother of the First Plaintiff.
10. The deponent obtained the authority to depose of the affidavit on behalf of the Plaintiffs.
11. The Court finds that it will accept that due authority was given to the deponent to depose of the Affidavit based on his personal knowledge of the matter given that he was involved and resided together with the Defendant at the Wairua property in accordance with Order 41 rule 5 (1) of the High Court Rules.

Swearing of Affidavit before barrister and solicitor of party etc

12. Order 41 rule 8 prescribes as follows:


“No Affidavit shall be sufficient if sworn before the Barrister and Solicitor of the party on whose behalf the affidavit is to be used or before any agent, partner or clerk of that barrister or solicitor.”

13. Referring to para 73 of the case of Kalabo Investment Ltd -v- New Assurance Ltd (Supra), Affidavit is an alternative to oral evidence expressed in the first person.
14. The Defendant in this instance, deposed of an Affidavit sworn before his Barrister and Solicitor who appeared to represent the Defendant before this Court.
15. I have warned the Defendant Counsel, and heard submissions by both of them on this issue. The Counsel for the Defendant apologies to Court admitting it was an inadvertent mistake whilst Counsel for the Plaintiff sort for their Affidavit to be struck out. He later added that even if the Affidavit is not struck out and the Court considers the facts and evidence that it still failed to establish the interest of the Defendant to remain in resident.
16. Court finds therefore in accordance with the provisions of Order 41 rule 8, that the Affidavit of the Defendant was not sufficient.
17. When considering the evidence and facts of the Affidavit of the Plaintiff, the Court finds that the Plaintiffs have established that they are the registered owners of the said property in Deuba.
18. The Court also finds that the Defendant has failed to establish, virtue of their Affidavit not being sufficient to be accepted into Court, that they have a valid interest in remaining in occupation at the said property in Deuba.
19. The Court will therefore grant the application for Ejectment.
20. Given the manner in which the Defendants Counsel has dealt with the case, the Court will impose costs against Defendant.

Orders

21. **Court Orders the vacant possession of the property described as Lot 1 on DP No. 6510 on Certificate of Title No. 26549, an address known as Lot 1 Queens Road, Deuba to the Defendant and occupiers.**
22. **Costs against the Defendants summarily assessed at \$500.00.**




Mrs SLTRW Levaci
A/Judge