

IN THE HIGH COURT OF FIJI AT SUVA
CENTRAL DIVISION
CIVIL JURISDICTION

Civil Action No. HBC 324 of 2022

BETWEEN:

SALMA BI ZAMAN aka SHEIKH SALMA BI of
92 Brooker Terrace, Richmon in the State of South
Australia, Migration Agent, the Executrix, and
Trustee in the Estate of **MOHAMMED KHALID**
ZAMAN late of 92 Brooker Terrace, Richmond in
the State of South Australia, Machinist, Testate.

PLAINTIFF

AND:

HARUN NISHA of Lot 46 Kauvula Street,
Naulu/Nakasi.

DEFENDANT

Date of Hearing : 27 November 2024
For the Applicant : Mr Faktaufon V.
For the Respondent: In Person
Date of Decision : 18 January 2024
Before : Levaci, SLTTW Acting Puisne Judge

JUDGEMENT

(APPLICATION FOR VACANT POSESSION)

PART A - BACKGROUND

1. This is an application by way of Originating Summons by the Applicant as Executrix and Trustee of the Estate of Mohammed Khalid Zaman the owner of the Crown Lease number 463428 located at Lot 46, Kauvula Place, Wainibuku Low cost Subdivision in the District of Naitasiri, Viti Levu seeking the Defendants to give up vacant possession of the said property pursuant to section 169 of the Land Transfer Act.
2. In their Affidavit of Opposition, the Respondent argues that her father Abdul Khalil was the owner of the property and that on his death, her brother Mohammed Khalid Zaman was appointed as Trustee and Executor of the Estate of her father under a Will dated 1st December

1986. The Will divided the property with equal shares amongst his sons namely Mohammed Roshan Zzaman, Mohammed Khalid Zaman, Mohammed Akhtar Jamal, Mohammed Farook Zamar (Applicant's late husband) and Mohammed Faiyaz Jamal.

PART B: AFFIDAVITS

3. The Applicant has filed a supporting Affidavit as follows –

“3. That I am the Executrix and Trustee of the estate of my late husband Mohammed Khalid Zaman (hereinafter referred to as the Deceased) whereby the Certificate of Grant of Probate was issued by the High Court of Fiji on the 9th of March 2023 being grant of Probate No. 63763, granting me power to administer the said Estate. Annexed hereto and marked SS1 is a copy of the aforementioned grant of Probate.

4. That on the 16th of August 2022 a Transmission by Death was registered at the Registrar of Titles Office. Annexed hereto and marked as SS2 is a copy of the State Lease Number 463428 described as Lot 46 on Kauvula Place, Wainibuku Low Cost Subdivision situated in the District of Naitasiri, in the Island of Viti Levu (herein after referred to as ‘the property’) which shows in the memorial, the registered Transmissions by Death.

5. That on the 27th day of June 2022 I duly executed the Consent to Transfer and Transfer application and my Solicitors, Vama Law are currently in the process of obtaining a Consent to Transfer by way of grant of probate. Annexed hereto and marked as SS3 is a copy of the said executed Transfer and Consent documents.

6. THAT as the deceased at the time of his death was as a citizen of the Fiji Islands. Annexed hereto and marked as SS4 is a copy of the deceased Certificate of Citizenship.

7. THAT as the Executrix of the deceased estate, I verily believe that I am legally obliged to administer the property being Lease No. 46348 described as Lot 46 on Kauvula Place, Wainibuku Low Cost Subdivision situated in the District of Naitasiri, on the island of Viti Levu.

8. THAT the Defendant is the wife of the Deceased's late brother Mohammed Farook Zamar and has been living on the property with her son and his family for about 20 years.

9. THAT there was a verbal agreement between the deceased and the Defendant's husband that they would pay monthly rent of \$200 as contribution towards the care of the Deceased's mother.

10. THAT on 5th September 2017, a Notice to Vacate the Property was served on late Mr Farook by the deceased. Annexed hereto and marked SS5 a copy of the notice.

11. THAT the Defendant's husband failed to pay and now the Defendant is doing the same.

12. THAT the Defendant without seeking consent from either the Deceased or me sublet the basement flat to a tenant and was obtaining financial gains from the rent proceeds.

13. THAT it came to my attention that the Defendant had sublet the basement flat only upon enquiry with her.

14. THAT on 23rd May 2022 I personally served a Notice to Vacate to the Defendant and informed her that I was in the process of winding up the deceased's Estate and will require vacant possession of the house. Annexed hereto and marked as SS6 is a copy of the Notice to Vacate.

15. THAT the Defendant had acknowledged the Notice but has failed to vacate the property.

16. THAT I have incurred costs in having to travel to Fiji on various occasions in the hope to have possession of the property and wind up my husband's Estate.

17. THAT the Defendant and her family have no legal rights to stay or occupy the said property and nor do they have any beneficial or equitable interest to remain on the same."

4. The Defendant filed a response denying the Affidavit paragraphs but for the following –

"8. I cannot admit nor deny the contents of paragraph 4 of the Plaintiff's Affidavit because I am unaware as to how the property situated at Lot 46 on Kouvula Place, Wainibuku Low Cost Subdivision described as Certificate of Crown Lease No. 463428 ("the property") was transferred to Mohammed Khalid Zaman ("the deceased"). The deceased was appointed as Trustee in the Estate of Abdul Khalil, my late husband's

father. The deceased was appointed as trustee in the late Abdul Khalil's Will. Annexed hereto and marked HN1 is a copy of Abdul Khalil's last Will dated 1st December 1986.

10. I admit to the contents of paragraph 8 of the Affidavit in Support and further state that I have been residing at the property for more than 38 years now. The property belonged to the late Abdul Khalil and as per his last Will he gave all his estate both real and personal to all his sons namely Mohammed Roshan Zaman, Mohammed Khalid Zaman, Mohammed Akhtar Jamal, Mohammed Farook Zaman (my late husband) and Mohammed Faiyaz Jamal. The property has been our family house and beneficiaries are unaware how the whole property was transferred to the deceased.

14. I admit the contents of paragraphs 14 and 15 of the Affidavit in Support and further state that I have beneficial interest in the property for my late husband's 1/5 share entitlement therefore I am residing at the property. My husband never renounced his 1/5 share in the property. In fact, he wrote 3 letters to the Director of Lands seeking clarification as to how the property was transferred to the deceased. However, the Director of Lands did not reply to the letters. Annexed hereto and marked HN2 are copies of the letters addressed to the Director of Lands.

16. I deny the contents of paragraph 17 of the Affidavit in Support and further state that I have beneficial interest in the property of my husband's 1/5th share entitlement."

PART C: LAW ON VACANT POSSESSION

5. Section 169 and section 171 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.

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.”

6. Section 13 of the Crown Land Act requires Director of Lands Consent as follows –

13.-(1) Whenever in any lease under this Act there has been inserted the following clause:-

"This lease is a protected lease under the provisions of the Crown Lands Act"

(hereinafter called a protected lease) it shall not be lawful for the lessee thereof to alienate or deal with the land comprised in the lease of any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever, nor to mortgage, charge or pledge the same, without the written consent of the Director of Lands first had and obtained, nor, except at the suit or with the written consent of the Director of Lands, shall any such lease be dealt with by any court of law or under the process of any court of law, nor, without such consent as aforesaid, shall the Registrar of Titles register any caveat affecting such lease.

Any sale, transfer, sublease, assignment, mortgage or other alienation or dealing effected without such consent shall be null and void.

(2) On the death of the lessee of any protected lease his executors or administrators may, subject to the consent of the Director of Lands as above provided, assign such lease.”

PART D: ANALYSIS

7. The Defendant is claiming she has an interest on the property from her husband’s 1/5th share as a beneficiary on the property.
8. On the other hand, the Applicant has filed into Court an Affidavit appended with it is the Crown Lease under the Applicant husband’s name. By a registered Transmission of Death, the Applicant is now in possession of the property as Executor and Trustee of the Estate of

the deceased husband. There is nothing in the said Crown Lease that indicates to this Court that Abdul Khalil, the father in law of both Applicant and Respondent was the registered owner of the said property.

9. The Applicant served a Notice to Vacate to the Defendant for which the Defendant opposes on the basis that her husband also has 1/5th share in the said property. This she claims is her right. However despite the Defendant's claim, no probate has been shown to this court to confirm that she is appointed as Executor and Trustee of the property share of her husband to administer the property of her late husband.
10. The Defendant has also not been able to prove that her late father in law, Abdul Khalil was the registered owner of the property and hence rightfully bequeathed the property in equal shares amongst his five sons, which included her husband.
11. The Court finds that the Defendant is unable to establish her right to remain in possession of the property.
12. She has also sub-letted the basement flat to an occupier. This sub-letting is contrary to the requirements for a consent by the Director of Lands. Hence the Tenancy Agreement is thus null and void.
13. The Court will therefore award costs to the Applicant summarily assessed at \$800.

Orders of the Court:

14. **The Court orders as follows:**

(a) That Court Orders the Defendant and any occupier for she had entered into a tenancy agreement with to vacate the property on CL 464328 on Lot 6 DP 4020 at Wainibuku Low Cost Subdivision in Naitasiri within 60 days;

(b) Costs to be paid by the Defendant summarily assessed at \$800 payable in 60 days.

 
Mrs Senileba LWTT Levaci
Acting Puisne Judge