

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

Civil Action No. HBC 108 of 2024

BETWEEN: **REYNAULD JOSEPH CALDWELL aka REY**
CALDWELL

PLAINTIFF

AND: **SEKOVE SORO AND KATHERINA LEDUA SORO**

DEFENDANT

For the Plaintiff **:** **Ms. Fong. M**
For the Defendant **:** **Not Present**
Date of Decision **:** **16 August 2024**
Before **:** **Waqainabete-Levaci, S.L.T.T, Puisne Judge**

JUDGEMENT

(SUMMONS FOR VACANT POSSESSION)

PART A - BACKGROUND

1. This is an application by way of Originating Summons seeking for the Defendant to give up possession of the property registered and described in the Certificate of Title No. 264489 described on Lot 2 Deposited Plan No. 5099 at Caubati (referred to as “the property”).
2. The Plaintiffs are registered proprietors of the property and annexed a Certificate of Title to establish this.
3. Tonita Ingrid Kwong Wah and Rowanne Miranda Caldwell have also authorized the Plaintiff to act on their behalf to file these proceedings.
4. A notice of vacant possession was issued on 15 December 2023 and served on Defendant on 11 January 2024.
5. That Plaintiffs had allowed the Defendants to occupy the property and to repair and keep the property maintained in lieu of rent payment.
6. The Plaintiff has visited the property every two years and repaired and renovated the property as the Defendants failed to upkeep the property.
7. Despite verbal conversations with the Defendants, the Defendants have failed to vacate the property.
8. The Plaintiffs seeks for vacant possession in order to sell the property.
9. The Defendants appeared in person on the first call date and objected to the application arguing that verbally, they were given the first option to purchase.
10. Despite time given to the Defendants to file an Affidavit in Objection, they have failed to do so nor to appear on subsequent dates or appear at hearing of the matter. Furthermore they failed to appoint a Counsel to appear on their behalf.

PART B: LAW ON VACANT POSSESSION

11. The provisions under section 169 of the Land Transport Act is a summary proceedings to restore the registered proprietor to their indefeasible title.
12. When expounding the meaning of registered proprietor in section 39 of the Land Transfer Act, it was stated in Subramani -v- Sheela [1982] 28 FLR 82 (2 April 1982) at page 65;

‘It is our opinion clear that the restriction of the definition of registered proprietor to purchaser for value applies only in the case specified, that is to say an erroneous description of the land concerned. There is nothing in subsection (b) to indicate that ‘registered proprietor’ in any other circumstances is to be interpreted only as ‘purchaser of value’. The indefeasibility of title under the Land Transfer Act is well recognized; and the principles clearly set out in a judgment of the New Zealand Court of Appeal dealing with provisions of the New Zealand Land Transfer Act which on that point is substantially the same as the Land Transfer Act of Fiji. This case is Fels -v- Knowles 26 N.Z.L.R 608. At page 620 it is said:

“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.”

The question of indefeasibility of title of the registered proprietor is fully examined and determined with authority by their Lordships of the Privy Council in Frazer -v- Walker, their judgment being set out in full in 1967 N.Z.L.R 1069. This Court must therefore hold that the title of the respondents are registered proprietors is not subject to any unregistered encumbrances such as those put forward on behalf of appellants. Accordingly this ground fails.”

13. In 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 who seeks to re-enter where the lessee or tenant is in arrear for such period as may be provided 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. Therein 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.”

14. In Shayam Lal -v- Schultz [1972] FjLwRpt 72; [1972] 18 FLR 152 (30 October 1972) Gould V.P, Marsack J.A and Spring J.A held that a registered proprietor may be impeached on the proof of fraud against him:

“The third ground of appeal, in my opinion, can have no validity in view of the provisions of Section 39 of the Land Transfer Act. The only circumstance in which the title of the respondent could be impeached would be on proof of fraud, that is to say, fraud on the part of the registered proprietor. There is no evidence whatever that respondent had acquired his registered title to the land through fraud; and in fact no allegation of fraud has been made against him. That being so, I would hold that the title of the respondent to the land is not subject to any interest, equitable or otherwise, of the appellant.”

15. Where the Plaintiff proves he is the registered proprietor, the law then requires the Defendant to show cause why he should not vacate the premises. The onus of proof shifts to the Defendant to show that he has a present and not future right to the possession of land.

PART C: ANALYSIS

16. In this case before this Court, the Plaintiff has sort for vacant possession.
17. The Plaintiff has been authorized by the two other owners to make this application on their behalf. The authorization was made by way of a reference and by way of a leave to represent the other two owners.
18. In Narawa -v- Native Lands Trust Board [2002] FJCA 9; ABU 0012.99S (31 December 2022) the Court held:

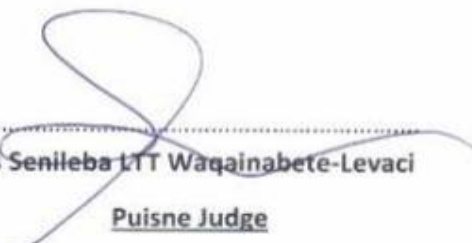
“Where, however, the personal rights of an owner, as distinct from the rights of the mataqali, have been directly infringed, that person can bring an action for a remedy resulting from such infringement: see Serupepeli Dakai No 1 & ors v Native Land Development Corporation & ors Civ App No 30/1982 FCA: CA 543/1979 and *Waisake* (above).”

19. In this application, the Plaintiff has sort for vacant possession and by an authority letter deposed in the Affidavit of the First Plaintiff, the First Plaintiff is authorized to appear for and on behalf of the two other plaintiffs.
20. The Court accepts this deposition and appearance of the first Plaintiff.
21. Having considered the application, the Court is satisfied that the Plaintiffs have established that they are the registered owners of the property.
22. The Court is also satisfied that the Defendant was duly notified and served with the notice to vacate. The Court is also satisfied that the Defendant was served with section 169 application.
23. Despite the Court granting time for the Defendant to defend themselves, they have failed to properly represent themselves nor to comply with orders of the Court to file Affidavit in Opposition.
24. The Court therefore finds that the Defendant has failed to prove to the satisfaction of the Court that they should to continue to occupy the said property.

PART D: COSTS AND ORDERS

25. Given that the Plaintiff has succeeded, the Court will award the Plaintiffs costs of \$500 for this application given that the Defendant had failed to defend themselves and therefore delayed these proceedings.
26. **The Court Orders as follows:**
 - (a) *That the Defendants and their occupants to vacate the property known as Certificate of Title No. 264489 described on Lot 2 Deposited Plan No. 5099 at Caubati within 30 days from today;*
 - (b) *Costs of \$500 awarded to the Plaintiff.*




Ms Senileba LTT Waqainabete-Levaci
Puisne Judge