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IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0032 OF 2007S
(High Court Civil Action No. HBC 0194 of 2006L)

BETWEEN:	VETAIA BARI	*First Appellant*
	VERETI RALULU	*Second Appellant*
AND:	TILIVASEWA DEVELOPMENT AND INVESTMENT LIMITED	*Respondent*

Coram: Byrne, JA
Goundar, JA
Lloyd, JA

Hearing: Wednesday, 12th November 2008, Suva

Counsel: N. Nawaikula for the Appellants
K. Vuetaki for the Respondent

Date of Judgment: Wednesday, 19th November 2008, Suva

JUDGMENT OF THE COURT

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[1] The appellants appeal to this Court from orders made by a High Court judge in chambers on 5 September 2006 giving the respondent company immediate possession of certain land in the province of Ba. The orders were made by the judge after a hearing in chambers of a summons for possession brought by the respondent pursuant to the provisions of s169 of the Land Transfer Act, Cap 131 ('the Act'). The

originating summons was filed by the respondent in the High Court Registry at Lautoka on 10 July 2006. The summons was supported by an affidavit sworn by a director of the respondent company on 7 July 2006. The summons was made returnable on 21 July 2006. The summons sought orders for possession in respect to two plots of land, but given that the judge rejected the respondent's application as regards one of the plots, in this judgment we will only deal with the plot of land in respect of which possession was ordered.

[2] The facts of the matter may be briefly stated. The respondent company Tilivasewa Development and Investment Ltd ('the respondent') is the economic and management arm of the Mataqali of Tavulevu Village Tavua. In 2005 the respondent signed a development lease with the Native Land Trust Board ('the NLTB') over 1.0438 hectares of land at Tavua Town, the NLTB reference for the land being NLTB No. 4/4/2145. According to the appellants they and their families have been living on the subject land and farming sugar cane there since at least 2001. The respondent wants possession of the land for commercial development, such development intended to be for the benefit of all members of the Mataqali. The appellants are also members of this Mataqali. There has been a history of animosity between the appellants and other members of the Mataqali, seemingly caused by the appellants' occupation of the subject land. This animosity has at times resulted in police intervention.

[3] The summons was called on for a hearing in chambers before the judge on 5 September 2006. The respondent was legally represented at the hearing but the appellants appeared without representation. On the hearing of the summons before the judge the appellants resisted the orders for possession as best they could and upon several grounds; assertions that they had been in customary occupation of the land since 2001 (including the building of their family homes on the land); that they had filed an application in the Agricultural Tribunal on 26 September 2005 seeking a declaration from that tribunal that they held an agricultural tenancy over the land

under the provisions of s5 of the Agricultural Landlord and Tenant Act, Cap 270 and that, in effect, the respondent's lease was invalid under the terms of the Native Land Trust Act, Cap134 and it could not be registered under the terms of the Land Transfer Act.

[4] The appellants submitted to the judge that the hearing of the matter should be adjourned pending the decision of the Agricultural Tribunal. The judge rejected this submission and after a relatively brief and informal hearing in chambers the judge rejected the other submissions made by the appellants and made the orders sought by the respondent in relation to the single plot of land we have detailed above.

[5] In their grounds of appeal the appellants effectively repeat the same arguments raised by them before the judge in the lower court with an additional ground that since there were clear disputes as to the facts the matter warranted a full hearing.

[6] Regardless of the merits of the appellants present grounds of appeal we have uncovered a more fundamental problem going to the very heart of these proceedings, which problem we raised with counsel at the outset of the hearing of this appeal. The problem arises from the mandatory terms of s170 of the Land Transfer Act.

[7] Section 170 provides as follows:

> *"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"*** (emphasis added).

[8] It is clear on the face of the summons that the time requirement of s170 of the Act has not been fulfilled. The summons was filed on 10 July 2006 and made returnable on 21 July 2006, a period of only 11 days. Lest there be any doubt about the matter, we called for the Registry file and saw from the affidavit of service of the summons that the summons was served on the appellants' solicitors on 19 July 2006. We

showed the affidavit of service to counsel appearing for the parties on the hearing of this appeal. The result is that the appellants were given only two days notice of the return date of 21 July 2006. We cannot determine from the High Court record what, if anything took place on 21 July 2006. But it can be seen from the record of proceedings that the matter was mentioned by consent on 25 July 2006 before the judge who then adjourned the matter for several days. So when the matter came before the judge on 25 July 2006 it was still within the 16 day period stated in s170. No application was made at any time to the judge or the court registry by the respondent for amendment of the summons prior to its issue.

[9] The problem that arises is one of statutory interpretation. Are the terms of s170 of the Act mandatory, the breach of which should be regarded as invalidating the summons or are they directory in nature whereby substantial compliance would save the summons from invalidity. The principles applicable to the resolution of the problem are set out in the judgments of the High Court of Australia in the case of ***Project Blue Sky Inc & Ors v Australian Broadcasting Authority*** (1998) 194 CLR 355. The High Court stated (at paragraph [93]) that the appropriate test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. In determining purpose regard must be had to the language of the relevant provision and the scope and object of the whole statute.

[10] The terms of s170 of the Act are clear and unambiguous. The language used by the legislature is mandatory. In our opinion the legislature intended that if the time requirements laid down in the section are breached then the summons is defective. Strict adherence to the terms of s170 of the Act is essential in order to vest the High Court with jurisdiction over the matter. This is particularly so given the possibly dire consequences resulting to persons ejected from land where they have lived for possibly many years.

[11] It is clear from the record of the lower court and from their written submissions on their appeal to this Court that the appellants have at no time raised any issue concerning the terms of s170 of the Act. It could also be argued that by appearing at the hearing of the summons they have waived any right to complain about the clear breach of the terms of s170. But in our opinion these matters cannot cure the clear breach of the terms of s170 of the Act, whether that breach is discovered in the lower court or only on appeal.

[12] Our own researches have failed to turn up a single case where a breach of the time provision set out in s170 of the Act has been discussed. Counsel appearing for the parties on the hearing of the appeal could take the matter no further. But in order to do justice to the appellants and in all the circumstances of the case we have no alternative but to allow the appeal and dismiss the summons on the basis the provisions of s170 of the Act were breached.

[13] No doubt the respondent will be unhappy at this turn of events but it was quite clearly the responsibility of its legal representatives to ensure the terms of s170 were strictly adhered to. In any event there is no prohibition on the respondent instituting fresh ejectment proceedings under the provisions of s169 of the Land Transfer Act.

Orders

[14] For the above reasons we order that:

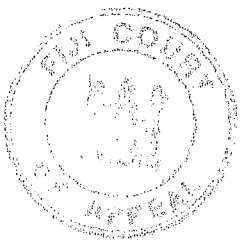
(1) The appeal be allowed;

(2) The orders made by the judge in the High Court on 5 September 2006 be set aside;

(3) The summons dated 10 July 2006 be dismissed;

(4) Each party to pay their own costs of these proceedings and the proceedings in the High Court.

Byrne, JA



Goundar, JA

Lloyd, JA

Solicitors:

Nawaikula Esquire, Suva for the Appellants
Komai Law, Nasinu for the Respondent