

IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

CIVIL APPEAL NO: ABU 32 of 2013
(High Court HBC 189 of 2004 Ltka)

BETWEEN : **RAJ DATT**
Appellant

AND : **SUNIL DATT**
Respondent

Coram : **Calanchini P**
Wati JA
Kumar JA

Counsel : **Appellant in person.**
Mr H Ram for the Respondent.

Date of Hearing : **6 February 2014**

Date of Judgment : **5 March 2014**

JUDGMENT

Calanchini P

[1]. This is an appeal from an ex tempore judgment of the High Court at Lautoka delivered on 28 June 2005. The judgment is sufficiently brief to enable it to be reproduced in its entirety:

“This is the Plaintiff’s application for an order for immediate possession of the land contained in Crown Lease No.14796 at Navakai, Nadi.

Both parties appeared before me today and I heard what each had to say. Each has filed affidavit evidence and I have read the affidavits. The Defendant Raj has consulted a lawyer but he does not expect the lawyer here today.

I have said to the parties that this is a Court of law and that they can reach their own agreement if they wish, otherwise this Court must apply the law. In law it is proved that the land belongs to Sunil. He wants Raj to leave. Raj has lived there for nearly 15 years but Raj must now leave. The Court will allow 4 months for Raj to give up vacant possession and the matter will be listed for enforcement action if needed on 28 October 2005 in Court 3.

If Raj has any legal rights he has one last chance to find out what they are and enforce them before 28 October. For this he will certainly need a lawyer.

The Plaintiff Sunil seeks no other remedies and I make no further orders.”

[2] It would appear that the Appellant (the Defendant in the court below) subsequently made an application for further stay of execution which was withdrawn and dismissed. The orders made on 28 June 2005 were confirmed by the learned Judge in Chambers on 13 January 2006.

[3] It is against the orders made on 28 June 2005 that the Appellant now seeks to appeal. The Appellant seeks an order from this Court that the decision of the learned Judge be set aside and in its place judgment entered for the Appellant on the following grounds:

“(1) That the learned Judge erred in law and in fact in granting respondent the land and making the order for the Appellant to vacate the said land.

(2) That the learned Judge erred in law and in fact by not giving enough time to vacate the land.

(3) That the learned Judge erred in law and in fact by prejudging that the land belongs to the respondent.”

The Appellant is the Respondent’s uncle. The Appellant’s brother, Rudra Datt, was the Respondent’s father.

[4] The proceedings were commenced by the Respondent in the High Court as summary proceedings under section 169 of the Land Transfer Act Cap 131 by way of summons dated 29 June 2004. The Respondent sought an order that the Appellant “*do show cause why he should not give up immediate vacant possession to the (Respondent) of part of all that land ___ contained in Crown Lease No.14796 ___.*”

[5] The application was supported by an affidavit sworn on 21 June 2004 by Sunil Datt. In that affidavit the Respondent deposed that he was the registered proprietor of the land described in Crown Lease No.14796 measuring 6917m² at Navakai Nadi. The copy lease that was annexed to the affidavit showed that the Crown lease was registered in the Respondent’s name on 18 July 2002. The copy lease also showed that the Respondent’s father’s name was Rudra Datt also of Navakai Nadi. Clauses 3 to 6 of the affidavit are relevant to the present proceedings and are reproduced:

“3. *That sometime in 1990 my father bought 5 acres of Crown Land and divided according to his knowledge and measurement in 3 portions, giving me one and the other 2 to my two brothers.*

4. *That in 1990 when the Defendant had no place to live on his request I allowed him to make a temporary shelter on my portion of the land and to find alternative place and move out to which the Defendant agreed. The Defendant asked for twelve months to move out.*

5. *That at later stage the said 5 acres of land was subdivided, three separate lease were made and my portion is subject to CL No.14796.*

6. *That the Defendant continued to live on my land and after the lease was issued to me thus giving me legal ownership, I asked the Defendant to vacate my land but failed to do so.”*

[6] Certainly, on the basis of the copy lease annexed to his affidavit, the Respondent had established that he was the registered proprietor of the land in question thereby establishing a basis for summoning the Appellant to show cause why he should not give up possession of the land to the Respondent. He was the registered proprietor of Crown Lease 14796 (from head lease 10093) and the Appellant was occupying part of that lease.

- [7] However at this stage I feel compelled to indicate that I have some reservations (to which further reference will be made later in this judgment) concerning the material in paragraphs 3 and 5 of the affidavit which have been quoted above in full. In particular the reference to the Respondent's father having bought 5 acres of crown land sometime in 1990 is vague. In my view the title particulars of the purchase, the parties involved and the particulars of the transactions should have been disclosed in that paragraph. Similarly there is an equally obvious lack of particulars provided in respect of the subdivision to which reference is made in paragraph 5 of the affidavit.
- [8] In any event the position was that the Appellant was required under section 172 of the Land Transfer Act to show cause why he refused to give up possession of the land on which he was residing. He was required to prove to the satisfaction of the judge that he had a right to the possession of the land in question. If he could do that then the judge would dismiss the summons with costs or make orders and impose terms that he considered appropriate. In such a case the Respondent could still proceed to recover possession by way of an action commenced by writ with pleadings and evidence.
- [9] To show cause the Appellant filed an answering affidavit sworn on 21 September 2004. In that affidavit the Appellant referred to and annexed a copy of a Deed of Family Settlement dated 16 October 1990. The Appellant acknowledged that in 1990 the Respondent's father (being the Appellant's brother) Rudra Datt purchased land known as Crown Lease No.10093. The Appellant deposed that before the Respondent's father had purchased Crown Lease No.10093, he was a lessee of Crown Lease land at Wailoaloa in Nadi. That land was occupied by the Respondent's father (Rudra Datt) and his three brothers, including the Appellant. By 16 October 1990 Rudra Datt had sold the Crown land at Wailoaloa (since he as the eldest brother was the registered lessee of that land) to Club (Fiji) Ltd for \$90,000.00. The purchaser required immediate vacant possession of that land. As at 16 October 1990, the Respondent's father Rudra Datt was in the process of purchasing Crown lease No.10093. The purchase price for the Crown lease 10093 was \$21,000.00.
- [10] Pursuant to the Deed Settlement the Respondent's father gave to each of his three brothers a sum of \$2000.00 as a non-refundable loan. He also gave to each brother (including the Appellant) one quarter area of residential site on Crown lease No.10093

permanently with the rental payments of be apportioned. Rudra Datt (the Respondent's father), upon transfer of Crown Lease 10093 to him, was required to execute a proper title to each of the brothers (including the Appellant). Each of the brothers was entitled to create substantial developments on Crown Lease 10093 for their occupation.

- [11] Perhaps, most importantly, upon receipt of \$2000.00 and a residential site of one quarter on Crown Lease 10093, each brother would release Rudra Datt of any claim he had in respect of the Crown lease land at Wailoaloa against Rudru Datt. It would appear that the Appellant relied on the Deed of Settlement as the basis of his claim to remain in possession of the land he occupied.
- [12] The Respondent filed a reply affidavit sworn on 15 October 2004. In that affidavit the Respondent deposed that he was not a party to the Deed of Family Settlement, although he admits that Rudra Datt was his father. It would appear that, as a result of paragraph 6 of his reply affidavit, the Respondent denied a substantial amount of the factual material set out in the preamble to the Deed.
- [13] Although the Respondent in paragraph 9 of his reply affidavit claimed that the Director of Lands had not consented to the Deed, the preamble on the top of page 2 states that the Director gave his consent to the terms and conditions "*stated hereinafter*" on 24 September 1990. The Respondent's father along with his brothers all executed the Deed and in doing so agreed with the factual material set out in the preamble. The Respondent deposes to a number of matters in paragraph 9 to the effect that the Appellant at no time took any action to secure his title and as a result his interest under the Deed had been extinguished.
- [14] In his brief ex tempore decision the learned Judge made no reference to the Deed of Settlement. His decision implies that to succeed in the summary proceedings the Appellant was required to establish "*any legal rights.*"
- [15] The Appellant's Notice of Appeal was filed well out of time. In a decision delivered on 7 June 2013 I granted leave to the Appellant to file out of time by extending the time for filing pursuant to Rule 27 of the Court of Appeal Rules.

[16] The Appellant also filed an application for leave to adduce further evidence under Rule 22(2) of the Court of Appeal Rules. The affidavit of Raj Datt sworn on 24 June 2013 and filed in support of his application exhibited copies of the further evidence which he sought to have placed before the Court. Since that material was in existence at the time of the proceedings in the Court below, the Appellant was required to establish special grounds under the proviso to Rule 22 (2) of the Rules. Those special grounds are usually accepted as being the conditions set out in **Ladd v Marshall** [1954] 1 WLR 14 89. However special grounds are only required in the event that the judgment under appeal followed “*a trial or hearing of any cause or matter upon the merits.*” In my judgment the order granting the Respondent’s application under section 169 of the Land Transfer Act (the Act) is not a decision after a hearing on the merits because the Appellant was only required to show cause why he refused to give possession to the Respondent. The nature of proceedings commenced under section 169 and the effect of section 172 of the Act have been the subject of judicial comments in many cases. This Court in **Prasad v Hamid** (ABU 59 of 2003; 19 March 2004) observed that what was required was that “*some tangible evidence establishing a right or supporting an arguable case for such a right must be adduced.*” In summary proceedings under section 169 of the Act it is not necessary for the person claiming a right to possession to prove a conclusive or documented title.

[17] I have concluded that the decision of the learned Judge was not a decision after a hearing on the merits. As a result the conditions set out in **Ladd v Marshall** (supra) do not apply. I am prepared to allow some of the fresh evidence to be adduced on the basis that the Appellant may not have been properly advised when he did have legal representation and because he attempted to conduct the proceedings in the court below unrepresented. The Deed of Settlement was already before the learned trial Judge. The documents that I propose to give leave to be adduced are relevant to issues in these proceedings. The documents are (1) the letter dated 4 August 1997 from Sheela Wati to the Assistant Director of Lands, (2) the letter dated 21 February 1991 from Pillai Naidu and Associates to the Appellant, (3) Crown Land Lease System Print out showing “*Sheela as Adm. – estate of Rudra D as lessee of Lease No.10093 expiring*

on 30 June 2013,” (4) Crown Lease No.10093 and (5) letter dated 9 September 1998 from Divisional Surveyor Western to Sheela Wati.

[18] The question for this Court is whether the learned Judge has erred in reaching his conclusion that the Appellant had not established to the Court’s satisfaction that there was an arguable case for him to remain in possession. Clearly the matter upon which the Appellant relied was the Deed of Settlement. Under the Deed the Respondent’s father, Rudra Datt, had for consideration from his three brothers, agreed to give to each brother one quarter area of residential site on Crown Lease 10093 permanently. Furthermore, Rudra Datt also promised, that upon transfer to him of Crown Lease No.10093 he would execute a proper title to each of the three brothers. It is not disputed that some time in 1990 Crown Lease 10093 was transferred to Rudra Datt who subsequently was registered as proprietor of the lease on 17 December 1990.

[19] In my judgment what follows from the Deed is that the Appellant and his two brothers acquired an equitable interest pursuant to what became a constructive trust with Rudra Datt, upon his being registered as proprietor of Crown Lease 10093, as trustee. I am satisfied that there was sufficient evidence in the form of the Deed to establish that once Rudra Datt became the registered proprietor of Crown Lease 10093 he held it as trustee for his brothers and himself. Rudra Datt remained trustee until he had executed a proper title to each of his brothers in accordance with clause 3 of the Deed or until his death in early 1991. Upon his death, the estate held on trust by him vested in his personal representative pursuant to section 10 of the Succession Probate and Administration Act Cap 60. Rudra Datt died intestate. Section 10 states:

“All property held by any person in trust shall vest as aforesaid subject to the trusts and equities affecting the same.”

[20] The material before this Court indicated that Sheela Wati, the wife of Rudra Datt and the Respondent’s mother, obtained letters of administration of the estate of Rudra Datt. She then became registered lessee on transmission by death as the administrator of the estate of Rudra Datt on 3 May 1991. As such she was required to perform the function of trustee of the constructive trust under the Deed of Settlement until a new trustee or trustees were appointed. It would appear that after the death of Rudra Datt,

Sheela Wati eventually subdivided Crown Lease 10093 in favour of her three children and in breach of the Deed of Settlement. It was as a result of that subdivision that the Respondent acquired Crown Lease 14796. The material that was subsequently admitted into evidence would indicate that at the very least Sheela Wati was aware of the circumstances under which the Appellant had remained in possession of a portion of the head lease land that was once described as Crown Lease 10093.

[21] In my judgment there was sufficient evidence before the learned Judge to indicate that fraud was an issue under section 40 of the Land Transfer Act that may be sufficient to defeat the title held by the Respondent which might otherwise be described as indefeasible under section 39 of the Land Transfer Act.

[22] I have concluded that there was sufficient evidence before the court below that established the need for a full investigation of the facts and the law by way of writ, pleadings and evidence. In this case the summary procedure under section 169 of the Land Transfer Act was inappropriate since there were and are complicated questions of fact including issues of fraud and as a result I would allow the appeal and set aside the judgment and orders of the court below. The Respondent should be ordered to pay costs to the Appellant fixed summarily in the sum of \$1,000.00 within 28 days.

Wati JA

[23] I agree with the judgment of Calanchini P.

Kumar JA

[24] I also agree with the reasons and proposed orders of Calanchini P.

Orders:

- (1) *Appeal allowed.*
- (2) *Judgment and orders of the Court below are set aside.*

- (3) *Respondent to pay costs of \$1,000.00 to the Appellant within 28 days.*

HON. MR JUSTICE CALANCHINI
PRESIDENT, COURT OF APPEAL

HON. MADAM JUSTICE WATI
JUSTICE OF APPEAL

HON. MR JUSTICE KUMAR
JUSTICE OF APPEAL