

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

**CIVIL APPEAL NO.ABU 118 OF 2017**  
**(On appeal from a decision delivered on 4 August 2017 at**  
**High Court of Lautoka in civil action HBC 206 of 2015)**

**BETWEEN** : **HARI PRASAD** *Appellant*

**AND** : **MIRA SAMI, RAM RAJ,**  
**RITESH MANI AND OTHERS** *Respondents*

**Coram** : **Basnayake JA**  
**Lecamwasam JA**  
**Dayaratne JA**

**Counsel** : **Mr. Naidu for the Appellant**  
**The Respondents absent and unrepresented**

**Date of Hearing** : **17 May 2019**

**Date of Judgment** : **7 June 2019**

**JUDGMENT**

**Basnayake JA**

[1] The appeal hearing of this case was vacated on 15 February 2019 for the purpose of supporting an application to adduce fresh and further evidence by the learned counsel for

the plaintiff/respondent/appellant (appellant) together with the appeal hearing. When this case was taken up for argument on 17 May 2019, the learned counsel for the appellant was permitted by court to abandon the application to lead fresh evidence.

[2] The appellant filed this appeal to have the judgment dated 4 August, 2017 (pg. 4 of the Record of High Court (RHC) set aside. The appellant relied on the following grounds of appeal to wit:-

1. *That the learned Judge has erred in law and in fact in holding that the respondents/original appellants had shown tangible evidence establishing a right or supporting an arguable case for such right under section 172 of the Land Transfer Act Cap 131.*
2. *That the learned Judge has erred in law and in fact in holding that the respondents/original appellants had a current right and not a future right despite the respondents/original appellants:-*
  - a) *Failing to establish that their application for a vesting order pursuant to section 78 of the Land Transfer Act Cap 131 was wrong in law.*
  - b) *Failing to file an application for a vesting order pursuant to section 78 of the Land Transfer Act Cap 131 was in compliance with the same.*
  - c) *Failing to establish that their application for a vesting order under section 78 of the Land Transfer Act Cap 131 satisfied the test for a vesting order.*
3. *That the learned trial Judge has failed to take into account the application of the law under section 169 (a) where the respondent/original appellant had applied as the "Last Registered Proprietor" as the respondent/original appellants had not shown any equitable/legal right to occupation/possession.*
4. *That the learned Judge has erred in law and in fact in holding that the respondent/original appellants had established a right to occupation of the Certificate of Title 19443 under section 169.*
5. *That the learned Judge has erred in law and in fact in failing to consider the evidence that the respondent/original appellants were served with eviction proceedings prior to filing their vesting application under section 78 of the Land Transfer Act Cap 131.*
6. *That the learned Judge has erred in law and in fact in failing to consider that the respondent/original appellants had not instituted proper proceedings for a vesting order application.*
7. *That the learned Judge has erred in law and in fact in overturning the orders made by the Master for vacant possession against the respondent/original appellants.*
8. *That the learned Judge has erred in law and in fact in making an order for costs against the appellant/original respondent.*

- [3] This case originated with the issue of summons for ejectment (pg 13 RHC) under section 169 of the Land Transfer Act (LTA). The summons required the respondent/appellant/respondents (respondents) to show cause why they should not give up immediate vacant possession to the appellant all that piece and parcel of land comprised in the Certificate of Title No. 19443 lot 1 on DP 4497 an area of 20 acres 2 roods and 36 perches (pg. 25 RHC).
- [4] The respondents filed an affidavit in opposition (pgs. 47 and 63 RHC) stating that the occupation of the respondents has been for more than 20 years. The respondents stated that they had lodged an application for a vesting order over this land which is under consideration. On 15 December 2016 (pg. 83 RHC) the court made order against the respondents to deliver immediate vacant possession. On 30 January 2017 the respondents filed a notice of appeal (pg. 93 RHC) to have the judgment of the Master of High Court set aside. The High Court in the exercise of its appellate jurisdiction, on 4 August 2017, having allowed the appeal, set aside the order of eviction.

### **Judgment**

- [5] The learned Judge states that the respondent in the court below (High Court before Master) on affidavit evidence has shown that they have been in possession and occupation of the land for more than 20 years and they had made an application for an order vesting the land in them pursuant to section 78 of the LTA and are awaiting the outcome of their application. The appellant could not successfully deny the fact that the respondents have been in possession of the land for more than twenty years. *“It is the continued possession of not less than twenty years that enables the possessor to make an application for a vesting order as contemplated in section 78 of the LTA. By virtue of their possession, the respondents had acquired their statutory right to apply for a vesting order pursuant to section 78 of LTA. I am of the opinion that the right to apply for a vesting order is not a future right but a current right giving an arguable case to resist an application for eviction brought under section 169 of the LTA (pg. 10 RHC).”*

[6] The learned Judge mentions the case of **Morris Hedstrom Limited v Liaquat Ali** (Unreported Supreme Court No. 153/87 (3 April 1987) at pg. 2: “*Under section 172 the person summoned may show cause why he refused to give possession of the land if he proves to the satisfaction of the Judge a right to possession or can establish an arguable defence the application will be dismissed with costs on his favour. The defendants must show on affidavit evidence some right to possession which would preclude the granting of an order for possession under section 169 procedure. That is not to say that final or incontrovertible proof of a right to remain in possession must be adduced. What is required is that some tangible evidence establishing a right or supporting an arguable case for such a right must be adduced.*” The learned Judge states that the respondent had shown cause on affidavit evidence that they have at least an arguable case arising out of their possession of the land entitling them to make an application for a vesting order pursuant to section 78 of the LTA. Hence the learned Judge having allowed the appeal set aside the order of eviction.

### **Submissions of the learned counsel for the Appellant**

[7] The learned counsel submits that there is an application for vesting order filed on 21 January 2015. Apart from this application for a vesting order, the respondent has not shown any legal right to possession. The learned counsel submitted that the respondent was issued with notice to vacate on 5 November 2014 and the application for vesting order was made thereafter. It was further submitted that a vesting order has not been made by the Registrar of Titles and what was submitted was a bare application for a vesting order.

### **Analysis**

[8] This is a case involving sections 169 and 172 of the LTA.

## **Section 169 and 172 of the Land Transfer Act**

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) & (c) not reproduced*

172; *If the person summoned appears he or she may show cause why he or she refuses to give possession of such land and, if he or she proves to the satisfaction of a Judge **right to a possession of the land**, the Judge shall dismiss the summons with costs against the proprietor...provided 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 or she may be otherwise entitled....(emphasis added)*

[9] Under section 169 what an applicant is required to prove is that he or she had been the last registered proprietor of the land. Once that is done the party noticed is required under section 172 to satisfy a right to possession. If the court is satisfied with regard to a right to possession of the occupier the court has to dismiss the application for eviction. After dismissal the applicant is entitled to take any other remedy available.

[10] In this case the respondent has been in possession of this land for more than 20 years. The appellant states in the affidavits filed that the respondent was required to leave this land on several occasions previously. Once he had been asked to leave in the year 2000. Again the respondent had been asked to vacate in 2006. However the respondent has not left. After 20 years in occupation the respondent made an application to the Registrar of Titles for a vesting order. *“What is required is that some tangible evidence establishing a right or supporting an arguable case for such a right must be adduced”* **Morris Hedstrom Limited v Liaquat Ali** (supra).

[11] I am of the view that mere possession for more than 20 years itself would qualify the respondent to seek protection under section 172 of the LTA. The application for a vesting order will give an additional boost. Therefore whether the application for a vesting order amounts to a current right or a future right is immaterial.

[12] All the grounds of appeal urged are concerning the learned Judge having erred in determining that the respondent had an arguable case and that the application for a vesting order amounted to a right to possession. I have already deliberated on these issues in my judgment. Therefore all the grounds urged should be answered in the negative. I am of the view that the learned Judge had rightly allowed the appeal of the respondent. The appeal of the appellant is without merit and dismissed without costs.

**Lecamwasam JA**

[13] I agree with the reasoning and conclusions of Basnayake JA.

**Dayaratne JA**

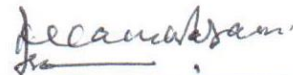
[14] I agree with the reasons given and the conclusions arrived at by Basnayake JA.

*Orders of court are:-*

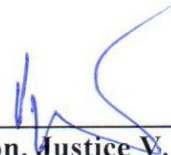
1. *Appeal dismissed.*
2. *No costs.*



**Hon. Justice E. Basnayake**  
**JUSTICE OF APPEAL**



**Hon. Justice S. Lecamwasam**  
**JUSTICE OF APPEAL**



**Hon. Justice V. Dayaratne**  
**JUSTICE OF APPEAL**