

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. 53 of 2012

IN THE MATTER of an application for possession of Land under Section 169 of the Land Transfer Act

BETWEEN : **NIRAJ NILESH KUMAR** of Lot 31, Ibo Road, Nadawa, Nasinu, Technical Officer.

PLAINTIFF

AND : **DEO RAJ** and **PRAKASH WATI** both of Lot 31, Ibo Road, Nadawa, Nasinu Retired and Domestic Duties respectively.

DEFENDANT

BEFORE : **Master Deepthi Amaratunga**

COUNSELS : **Mr. Reddy** for the Plaintiff
Mr. V. Singh for the Defendant

Date of Hearing : **5th November, 2012**
Date of Ruling : **6th November, 2012**

RULING

1. The Plaintiff filed this action seeking eviction of the Defendants who are mother and brother of the Plaintiff. The Property is a co-owned property and the Plaintiff has only ½ share and the other co-owner has not given the consent or made a party to this action. The Defendants have lodged a caveat to the property and also sought a declaration from the court for a share of the property in HBC 203 of 2012, where the Plaintiff in this action defaulted in filing their opposition when such failure was fatal, due to an unless order in the said action. The Plaintiff has sought a similar order under the family law

seeking eviction of the Defendants in Magistrate Courts in 11 /NAS/0229. In the circumstances though the Plaintiff is a joint owner of the property he needed to add the joint owner as a plaintiff or obtain consent of her to bring this action.

2. The Plaintiff has shown that he is a joint owner of the property. This not sufficient in the light of the circumstances of this action as the Plaintiff and Defendants are members of a same family. Plaintiff is the son of the 1st Defendant and a brother of the 2nd Defendant. The defendants had secured their rights to the premises by lodging a caveat and there is no application to remove the same and this application for eviction is filed.
3. The Defendants had sought an order through originating summons relating to the property in issue and in this case the Plaintiff in this case had failed to file his opposition. The failure to reply was made fatal by an unless order of the court in that action and in the circumstances the Plaintiff cannot seek eviction of his mother and the brother who had already filed the said action.
4. Section 172 of the Land Transfer Act states as follows

“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;”

5. In the case of Morris Hedstrom Limited -v- Liaquat Ali CA No: 153/87, the Supreme Court said that:-

“Under Section 172 the person summonsed 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 in 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.***” (emphasis is added)

6. This action cannot be dealt by originating summons as the mother and brother of the Plaintiff who are living under one roof had shown more than sufficient reason in terms of Section 172 of the Land Transfer Act. The action for eviction is struck off. I will not order any cost considering the circumstances of the case.

A. FINAL ORDER

- a. The action is struck off.
- b. No costs.

Dated at **Suva** this **6th day** of **November, 2012**.

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Master Deepthi Amaratunga
High Court, Suva