

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 322 of 2012

BETWEEN : **JONE MUA** of 11 Rakua Street, Suva, Breeder Manager.

PLAINTIFF

AND : **ADREA RATU NALEBA** of Navutu Settlement, Natovi, Tailevu, Farmer.

DEFENDANT

BEFORE : **Justice Deepthi Amaratunga**

COUNSEL : **Mr. Tuitonga T.** for the Plaintiff
Mr. Bukaru T.V. Q for the Defendant

Date of Hearing : 7th May, 2013

Date of Judgment : 22nd July, 2013

JUDGMENT

Catch Words

Right to Possession – Sections 3, 172 and of the Land Transfer Act- Section 62(3) and 62(4) of Agricultural Landlord and Tenant Act (ALTA) - Does an application in terms of Section 5 of ALTA establish a right to possession – In defeasibility of title – mortgagee sale.

A. INTRODUCTION

1. The Plaintiff is the last registered owner of the property in pursuant to a mortgagee sale. The Respondent who remained in cultivation of the land was a previous owner who transferred his interest to his two sons and one son had mortgaged the property holding a power of attorney for his brother, and defaulted the payments, and this resulted the mortgagee sale to the Plaintiff. The Plaintiff instituted an action for eviction in terms of Section 169 of the Land

Transfer Act, and the Defendant filed an affidavit in opposition. The Defendant also filed an inter partes notice of motion to restrain the Plaintiff from proceeding with the eviction application.

B. FACTS

2. The undated notice of motion issued on 9th April, 2013 filed by the Defendant, seeking an interim injunction against the Plaintiff from proceeding with the eviction application (the Summon for eviction in terms of Section 169 of the Land Transfer Act) can be considered an abuse of process, and should be struck off in limine since such application is superfluous and aimed to delay the special provision contained in the Land Transfer Act for an expedited eviction procedure. The procedure contained in the Land Transfer Act is summary in nature and once the Defendant had filed its affidavit in opposition the matter needs to be heard and this cannot be scuttled by superfluous applications in order to delay the proceedings.
3. If the Defendant had any ground for injunction of the proceedings instituted in terms of Section 169 of the Land Transfer Act, the same grounds can be alleged in the affidavit in opposition and the court is required to inquire in to that at the hearing and there is no need of any special application for restraining of the Plaintiff. If the Defendant can show a right to possession in terms of Section 172 of the Land Transfer Act to the satisfaction of the court, the application for the eviction will be struck off.
4. The procedure in terms of the determination of the right to possession is through affidavit evidence similar to the application for injunction and the procedure is summary in nature and in practice, almost all the cases would not take more than one day for hearing and the court adjourns the matter for judgment, and in this case there is no urgency in obtaining a restraining order since the Defendant is in the possession and enjoying the fruits of the property.
5. This is summary application for eviction in terms of the provisions contained in the Land Transfer Act. It is superfluous to seek injunction for such application as the nature of the application is summary. Injunction is not a remedy for such application when the matter is already fixed for inter partes hearing and

also the Defendant had filed an affidavit in opposition unless there are special circumstances that had arisen since the filing of the affidavit in opposition. Any objections to summary procedure for eviction as contained in the Land Transfer Act can be done through an affidavit in opposition and any such summary applications are inbuilt to such procedures indicating that the facts of this action are not disputed.

6. The Defendant's contention is that the Plaintiff cannot obtain possession of the property since he had lodged an application to the Agricultural Tribunal for the determination in terms of Section 5 of the ALTA. The Plaintiff who bought the land from the mortgagee sale contends that he is a bona fide purchaser for a value and should not be deprived of the enjoyment of the property, merely on the fact of Defendant's application in terms of Section 5 of the ALTA. The Plaintiff state that Agricultural Tribunal does not enjoy exclusive jurisdiction over matters relating to the possession of the agricultural lands hence the High Court could entertain an application for eviction in spite of the pending application for determination of tenancy in terms of Section 5 of the ALTA.
7. The Defendant had not lodged a caveat over to property and the mortgagee sale was conducted despite the mortgagor was not in occupation of the property. The Plaintiff purchased the property through the mortgagee sale and by that time the Defendant was in occupation of the property and had also cultivated the land for a considerable time period. These are facts both parties admitted.
8. The Plaintiff relied on a Fiji Court of Appeal decision of Lotan v Garrick [1984] FJCA 7; Civil Appeal No 45 of 1984 (24 November 1984), and stated that the ratio of the said decision favours a determination of eviction proceedings in terms of Section 169 of the Land Transfer Act, despite the Defendant's pending application for a determination on his alleged tenancy to the Agricultural Tribunal in terms of the Section 5 of the ALTA.

C. ANALYSIS

9. The main issue is whether the Plaintiff is entitled to indefeasibility of the title in spite of the pending application of the Defendant to the Agricultural Tribunal in

terms of Section 5 of the ALTA. In order to determine this issue the first point for determination is whether the High Court can exercise its discretion regarding the possession of an agricultural land if the cultivator in possession of the land had already applied to the Agricultural Tribunal for a determination of his tenancy in terms of the Section 5 of the ALTA.

10. The Defendant states that in an earlier application similar to this, the parties had consented to a stay of the hearing pending a determination of the tenancy in the Agricultural Tribunal, but this cannot be forced on the Plaintiff of this case as there is no such consent from the Plaintiff for a stay of the eviction procedure. In any event what parties do by consent cannot create any binding effect other than those parties who consented, irrespective of the concurrence of the court for such a consent/agreement and or a settlement. So, the first moot point that this matter should be stayed since an earlier action was dealt similarly by consent of the parties in that action, cannot be accepted.
11. The next issue is whether the High Court is precluded from exercise of its discretion in terms of the Section 169 of the Land Transfer Act , when there is a pending matter for determination of tenancy in terms of Section 5 of the ALTA. In the case of Lotan v Garrick [1984] FJCA 7; Civil Appeal No 45 of 1984 (24 November 1984) Fiji Court of Appeal held, that

‘Nevertheless, and contrary to the view which some counsel have expressed in other cases, **the Tribunals do not have exclusive jurisdiction in respect of agricultural land. Its powers are set out in Section 22.**’ (emphasis is mine)

12. It was also held in the said Lotan case (supra) that the provisions contained in the Land Transfer Act prevails over any other law in terms of the Section 3 of the Land Transfer Act. It was held further

‘The power to apply to the Court independently of ALTA is preserved in Section 169 (summarily) and in the first proviso to Section 172 (by writ). And under Section 3 the Land Transfer Act prevails over any other Act inconsistent therewith. Yet in Soma Raju v. Bhajan Lal F.C.A. Civil

Appeal 48/1976¹ this Court held that the indefeasibility provisions did not mean that registration under the Act extinguished an ALTA tenancy: an example of special provisions prevailing over general.’

13. So, the High Court is not precluded from inquiring in terms of the provisions contained in the Land Transfer Act, irrespective of the pending determination of the tenancy in terms of the Section 5 of the ALTA. The Plaintiff’s application has established a locus standi irrespective of the parallel determination of the issue of tenancy in terms of the Section 5 of the ALTA, but this is only the starting point and in order to succeed the Plaintiff’s application, the matter should be inquired by the High Court and should exercise its discretion after evaluation of the evidence before it. In this case the Plaintiff had established his right by annexing the title of the property where the Plaintiff is the last registered proprietor in pursuant to a mortgagee sale on 27th July, 2012. Then the Defendant is required to establish his right to possession in terms of the Section 172 of the Land Transfer Act. The Defendant’s contention is that since he had made an application for determination of the tenancy in terms of the Section 5 of the ALTA, hence this matter should be adjourned till a determination on that issue from the Agricultural Tribunal. As, I have held earlier in this judgment that is not the correct legal position and Fiji Court of Appeal in Lotan v Garrick (supra) had unequivocally rejected this contention.
14. Despite the Defendant’s main contention being rejected, I further consider whether a pending application in terms of the Section 5 of the ALTA would constitute a right to possession short of final right to possession of agricultural property. It was admitted that the land is subject to the provisions contained in the ALTA. At first look, it seems that if such an application is pending in Agricultural Tribunal, it might satisfy that the Defendant is having a right to possession of the agricultural land pending the determination of the Agricultural Tribunal as to the issue of tenancy. It is pertinent to note that the interpretation of the right to possession in terms of the Section 172 is cemented in the often cited case of Morris Hedstrom Limited -v- Liaquat Ali CA No:

¹Both parties relied on Lotan case but neither party submitted case but relied on paclii version, and I checked the decision, but the said citation for Soma Raju v. Bhajan Lal could not be located. My effort to obtain it failed, though the citation remained same in the web version as well as in the judgment.

153/87, and the Defendant is not required to adduce a 'final or incontrovertible proof of a right to remain in possession' but what is required is some tangible evidence establishing a right or supporting an arguable case for such a right.

15. 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 mine)

16. Again, the Fiji Court of Appeal in Lotan v Garrick [1984] FJCA 7; Civil Appeal No 45 of 1984 (24 November 1984) held that mere application before the Agricultural Tribunal before an action for eviction will not preclude eviction application being determined by the High Court based on the date of such institution. It will be injustice to allow such a mechanical method for determination of the rights as any person could easily steal a march on the other party by making an application to Agricultural Tribunal as soon as eviction notice is given or when it is known that an action will be eventuate. This is what the Defendant did when he was served with the notice to quit. The date of application to Agricultural Tribunal may precede the action before court and that should not be a determining factor. It will not create a right of possession as required in terms of Section 172 of the Land Transfer Act.
17. In Lotan (supra) the Fiji Court of Appeal held

‘Nevertheless the courts and the tribunals are encouraged to work in harmony - see the provisions of Section 62 of ALTA aimed at avoiding conflict – in particular subsection (3) applying the principles of res judicata to the tribunals, and subsection (4) giving the tribunals discretionary powers to adjourn applications which concern matters pending before the courts. Conversely the general power in the courts to adjourn has often been exercised to enable tribunal adjudication to be obtained - which in many cases will define the status of the parties in a way which renders further court proceedings unnecessary.

It is the operation of these co-related powers of adjournment which lie at the heart of this appeal, and there are previous decisions of this Court which provide assistance, particularly in cases where a summary application for possession has been made under Section 169.

Given that the question of right to occupy may emerge before either the tribunal or the court, it would be quite inappropriate if the result were determined by the fortuitous circumstance of which jurisdiction was invoked first; so it is desirable to see if guiding principles have been laid down.’
(emphasis is added)

18. In Lotan (Supra) it was further held that the High Court is required to inquire in to the application for eviction in terms of the Section 169 irrespective of the pending determination in the Agricultural Tribunal and held further

‘Although the discretion of the Court will usually be exercised to allow a bona fide claim to be examined by the tribunal most conveniently suited to such a task, the **Court must still have the power in a given case to decide that there is no material fit to be so assessed.** If it had been the intention of Parliament that this should not be so in relation to agricultural land, then in our view Sections 169

and 172 would be differently expressed.’ (emphasis is mine)

19. The Defendant admits parting with the property to his two sons and also stated in the affidavit in opposition that despite this transfer of his rights he had remained cultivating the property in pursuant to a family arrangement. (see paragraph 4 of the affidavit in reply dated 12th March, 2013). This cannot create a tenancy to the Plaintiff who was not a privy to said arrangement and a bona fide purchaser of the property. Any application to the Agricultural Tribunal for the determination of the tenancy is doomed to fail. The affidavit evidence of the Defendant in this action is contrary to any tenancy with the Plaintiff. The words “tenancy” and “tenant” are interpreted in the Section 2 of the ALTA and I do not wish to reproduce them here, but would suffice to state that non would indicate any right for the Defendant over the Plaintiff.
20. The Plaintiff is a bona fide purchaser who had obtained title in pursuant to mortgagee sale. There is no allegation of fraud against the Plaintiff. His title to the property is indefeasible. In Prasad v Mohammed [2005] FJHC 124; HBC0272J.1999L (3 June 2005) Justice Gates (as his lordship then was) held that in Fiji under Torrens system of Land Law, the registration of the land is everything. It was held that;

[13] **In Fiji under the Torrens system of land registration, the register is everything:** Subaramani & Ano v Dharam Sheela & 3 Others [1982] 28 Fiji LR 82. Except in the case of fraud the title to land is that as registered with the Registrar of Titles under the Land Transfer Act [see sections 39, 40, 41, and 42]: Fels v Knowles (1906) 26 NZLR 604; Assets Co Ltd v Mere Roihi [1905] AC 176, PC. In Frazer v Walker [1967] AC 569 at p.580 Lord Wilberforce delivering the judgment of the Board said:

"It is to be noticed that each of these sections excepts the case of fraud, section 62 employing the words "except in case of fraud." And section 63 using the words "as against

the person registered as proprietor of that land through fraud." The uncertain ambit of these expressions has been limited by judicial decision to actual fraud by the registered proprietor or his agent: Assets Co Ltd v Mere Roihi.

It is these sections which, together with those next referred to, confer upon the registered proprietor what has come to be called "indefeasibility of title." The expression, not used in the Act itself, is a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys. This conception is central in the system of registration." (emphasis added)

21. In the absence of fraud the Plaintiff's title is indefeasible and Land Transfer Act which was enacted after the ALTA overrides it and Section 3 and 4 of the Land Transfer Act gives the Act overriding power over all other laws in Fiji. Section 3 deals with the application of the Act over the other laws and Section 4 deals with the scope of the Act and they are as follows;

"PART II-APPLICATION

Laws inconsistent not to apply to land subject to Act

3. All written laws, Acts and practice whatsoever so far as inconsistent with this Act shall not apply or be deemed to apply to any land subject to the provisions of this Act or to any estate or interest therein.

Scope of Act

4. All land subject to the provisions of the Land (Transfer and Registration) Ordinance and **every estate or interest therein** and all instruments and dealings affecting any such land, estate or interest shall from the commencement

of this Act be deemed to be subject to the provisions of this Act.” (emphasis added)

22. The Registration of land is conclusive evidence as to the rights of the party and this is enshrined in Section 38 of the Land Transfer Act and states as follows

“**38.** No instrument of title registered under the provisions of this Act shall be impeached or defeasible by reason or on account of any informality or in any application or document or in any proceedings previous to the registration of the instrument of title.”

23. Considering that the Defendant had admitted that he remained in cultivation despite transfer of the property , on a family arrangement itself is contrary to his application before the Agricultural Tribunal for a declaration of ‘tenancy’ over the Plaintiff who obtained the property through a mortgagee sale. There is no fraud alleged for the transfer of the property to the Plaintiff and for all purpose he remained a bona fide purchaser. The application before Agricultural Tribunal for determination of tenancy is without any merit and this was done after service of the notice to quit would also indicate that there was no issue of tenancy even when the property was sold in mortgagee sale. The Defendant had made the present application to the Agricultural Tribunal in order to steal a march on the Plaintiff, for any action for eviction, that was seemed inevitable after the service of such notice of action and also to quit the premises. This is a delaying mechanism which does not worth merits for determination. In my judgment the Defendnt had not established a right to remain in possession in the property as held in Lotan v Garrick [1984] FJCA 7; Civil Appeal No 45 of 1984 (24 November 1984). In the circumstances I will grant the order sought in the summons for the eviction of the Defendant, but considering the circumstances of the case I will not grant costs and parties will bear their own costs. Considering the nature of the application I will not grant immediate possession to the Plaintiff. The land is agricultural land and the Defendant had developed and planted a crop for harvesting for a considerable time. I do not have evidence of stage of the cultivation, but it would seem any immediate possession would either unjustly enrich the Plaintiff or will result a waste of the crops on land. Considering these special circumstances I will stay the execution

of the eviction for 6 months from today. If the Defendant is unable to harvest and remove the cultivation by this time the Plaintiff is entitle for execution of the judgment. The Defendant is precluded from any replanting during this time period and this time period is to allow the harvesting of the existing crop for the season.

D. FINAL ORDERS

- i. The Plaintiff is granted possession, but the execution is stayed for 6 months.
- ii. No costs.

Dated at **Suva** this **22nd day of July, 2013.**

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Justice Deepthi Amaratunga
High Court, Suva