

**IN THE HIGH COURT OF REPUBLIC OF FIJI**  
**WESTERN DIVISION**  
**AT LAUTOKA**

**[CIVIL JURISDICTION]**

**NO. 134 OF 2013**

**IN THE MATTER** of section 169 of the  
Land Transfer Act 1971, Cap. 131

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**BETWEEN** : **TASNEEN KHAN** of Waiyavi, Lautoka, Domestic Duty

**PLAINTIFF**

**AND** : **RAVEN PRAKASH, RADHIKA LATCHMI, KAMLESH PRAKASH, CHNDRIKA PRAKASH, POOJA DEVI AND ROSHNI KIRAN LATA** all of, Lot 30, SO 1436, Guruwaiya Street, Waiyavi, Lautoka

**DEFENDANTS**

Mr A Patel for the Plaintiff

Mr Nacolawa for the Defendant

Date of Ruling: 25 November 2013

**R U L I N G**

**APPLICATION**

1. I have an application before me filed by the Plaintiff on 25/07/13 seeking immediate vacant possession of residential leasehold land known as Lot 32 on SO 1436, Guruwaiya Street, Waiyavi, Lautoka comprised in Native Lease No. 24496 and remove the lean to dwelling

there from on the ground that the applicant is the last registered proprietor of the property and costs of and incidental to this application. The application has been filed pursuant to section 169 of the Land Transfer Act (LTA).

2. In support of this application, the Plaintiff has filed her Affidavit sworn on 23 July 2013. Documents marked "A"-“F” had been exhibited to the affidavit.
3. The Defendants have filed an Affidavit of Roshni Kiran Lata sworn and filed on 1 October 2013 in opposition. The affidavit contains documents marked "RKL1" –“RKL8”.

#### **PLAINTIFF’S CASE**

4. The plaintiff is the last registered lessee of the property in question. She became as such following a mortgage sale under and by virtue of Native Lease No. 24496 (Exhibit A). She was a successful tenderer at the mortgage sale. In February 2013 the Housing Authority duly transferred the property to her. She says that she never agreed to lease the property to the defendants or authorized anyone else to collect rent for the property occupied by the defendants on her behalf. Notice to quit has been duly served on each of the defendants on 27 May 2013. Despite the quit notice the defendants had failed to deliver up vacant possession of the property and continue in occupation.

#### **DEFENDANT’S CASE**

5. Ms Roshni Lata Karan, 6<sup>th</sup> named defendant in her affidavit in opposition states that way back in 1979 her father Kisun Lal came from Tavua and settle in the subject land among many squatters living in the same place. The subject land was then administered by NLTB (now iTLTB) through its business arm the Native Land Development Corporation. She says her father was given first offer of lease of the

land. In 1984 the land was taken over by the Housing Authority for the purpose of a housing estate. Her father was a tenant under Housing Authority with monthly rent of \$56.00. Her father defaulted and fall into arrears of rents. The Housing Authority advertised sale of the property as her father failed to clear the arrears of rent. The plaintiff bought the property at the mortgage sale and became the registered lessee of the property.

### **APPLICABLE LAW AND PRINCIPLES TO THIS APPLICATION**

6. Sections 169-172 of the LTA are the applicable to this application. These sections provide:

#### Ejectors

**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) ...

#### *Particulars to be stated in summons*

**170.** *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.*

#### *Order for possession*

**171.** *On the day appointed for the hearing of the summons, if the person summoned does not appear, then upon proof to the satisfaction of the judge of the due service of such summons and*

*upon proof of the title by the proprietor or lessor and, if any consent is necessary, by the production and proof of such consent, the judge may order immediate possession to be given to the plaintiff, which order shall have the effect of and may be enforced as a judgment in Ejectment.*

#### *Dismissal of Summons*

**172.** *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, mortgage or lessor or he may make any order and impose any terms he may think fit;*

*Provided that 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 may be otherwise entitled:*

*Provided also that in the case of a lessor against a lessee, if the lessee, before the hearing, pay or tender all rent due and all costs incurred by the lessor, the judge shall dismiss the summons.*

### **DISCUSSION**

7. The application has been filed under section 169 (a) of the LTA against the Defendants seeking immediate possession of the land comprised in the Native Lease No. 24496 on the ground that they are in occupation of the premises without licence or consent and refuse to give possession to the Plaintiff.
8. The Plaintiff has invoked section 169 (a) of the LTA. The High Court has jurisdiction under the section to make immediate possession to be given to the Plaintiff. That is an order specially made to deal with people

who occupy premises without any colour or right whatsoever and still refusing to go out. It is a speedy summary procedure for the recovery of possession of land. According to section 169 (a) of the LTA the last registered proprietor may summon any person in possession of the land to appear at the Court and show cause why he should not give up possession to the applicant. The extract of title (Plaintiff exhibit "B") confirms that transfer has been registered on 21 February 2013 to Tasneen Nisha Khan, the Plaintiff. The defendants are in possession of the land. The Plaintiff is entitled to summon the Defendants to show cause why they should not deliver up possession to her.

9. Description of the land has been given in the summons/application. The description of the land is required by section 170 of the LTA. Moreover, the application must be served on the Defendants to appear in Court on a date not earlier than 16 days after the service of the summons. The summons has been duly served on each of the Defendants as required. Therefore the Plaintiff has complied with the requirement of section 170.
10. On the day appointed for the hearing of the summons, if the person summoned (Defendant) does fail to appear, then upon proof to the satisfaction of the judge of the due service of such summons and upon proof of the title by the proprietor or lessor, the judge may make order to deliver immediate possession to the Plaintiff (s.171). On 27 August 2013 the Defendants appeared through their lawyer and sought time to file their affidavit in opposition. The Court then granted 21 days to Defendants to file and serve their affidavit in opposition and 14 days thereafter to the Plaintiff to file and serve affidavit in reply.
11. The Defendants filed affidavit in opposition on 10 October 2013. Then section 172 of the LTC applies. According to this section, if the person summoned does appear and **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 etc.

12. The only issue to be decided in this matter is that whether the Defendants have shown cause, i.e. a right to the possession of the land for refusing to give possession to the Plaintiff to the satisfaction of the Court.
13. I will read affidavits filed by both parties in order to determine the above issue.
14. Ms Roshni Kiran Lata in her affidavit in opposition, affidavit filed on behalf of all Defendants, states that her father was settled in the land as a squatter, he had first offer of lease by NLTB in 1979 and later the Housing Authority took over the land and her father became a tenant under the Housing Authority. Subsequently, her father defaulted in rent and fell into arrears and her father could not settle the arrears as her father was unemployed.
15. Mr. Nacolawa on behalf of the Defendants submitted that the Housing Authority did not give an opportunity for them to settle the rent arrears and that there has been some fraud on the part of the Housing Authority.
16. Mr. A Patel, counsel for the Plaintiff counter argued that the Plaintiff is a bona fide buyer at the mortgage sale there is nothing to suggest the Plaintiff obtained title by fraud.
17. The Defendants did not challenge that the Plaintiff is now the registered lessee of the land in dispute, nor did make any allegation of fraud on the part of the Plaintiff.
18. The Housing Authority is not a party to these proceedings.

19. The mortgage sale was published in newspapers. If the Defendants were really interested they had every opportunity to stop the mortgage sale by settling the arrears on rent after publication of the mortgage sale of the property. They had failed to do so. Moreover, if they had a right to possession of the property it was open for them to file a caveat to prevent registration of transfer to the Plaintiff. They did not exercise that option as well.
20. Fiji Court of Appeal in the case of **ETUATE MATAWALU v NEMANI TAMANISAU & Anr** [Civil Appeal No. ABU 32 of 2011, decided on 3 October 2013] stated at paragraphs 35 & 36 as follows:

*“[35] The Respondent is not alleging any fraud against the Plaintiff – Appellant in his affidavit in opposition and in fact sympathies for the plight of the Plaintiff – Appellant indicating that there was not even a mere allegation of fraud against the Plaintiff – Appellant. Even a mere allegation is not sufficient to disallow eviction in terms of Section 72 of the Land Transfer Act, as stated by Gates J (as his Lordship then was) in Prasad v Mohammed [2005] FJHC 124; HBC 0272J. 1999L (3 June 2005). In that case it was further held:*

*“A threshold of evidence must be reached by the Defendant before the Plaintiff can be denied his summary remedy.”*

*I cannot see from the affidavit in opposition that threshold being reached. There was, in my opinion, no evidence even to support an arguable case for a finding of wilful blindness in order to indicate a form of cognisance which law and equity alike equate to subjective knowledge from which dishonesty may be inferred.*

*[36] The learned High Court Judge held that the conduct of the Housing Authority was “inappropriate” in this land dealing which transferred the interest of the land to the Plaintiff – appellant. The said “inappropriateness” of the behaviour of the Housing Authority towards the occupants of the house cannot by itself be considered as a fraud against the bona fide purchaser,*

*who is the Plaintiff – Appellant in this case. The said ‘impropriety’ of Housing Authority who was not even a party to this action cannot disturb indefeasibility of the title to the Plaintiff – Appellant which can only be impeached in terms of the provisions of the Land Transfer Act. Since there is no error or mistake in the registration the other ground for challenge to the title is fraud. The Respondent is not alleging fraud against the plaintiff – appellant and or his agent. On the facts contained in the affidavit in opposition, learned High Court Judge held ‘there is no doubt that he (Master) recognised that here was a real possibility of impropriety by the Housing Authority.’ I cannot find such impropriety on the part of Housing Authority, since they were not given an opportunity to explain their conduct, as they were not a party to this eviction proceeding. Even assuming that the Housing Authority acted ‘improperly’ this would not vitiate the rights derived from the transfer of the sub-lease to the Plaintiff – Appellant in the absence of fraud. There is no wilful blindness on the part of the purchaser, as he had obtained the property from the mortgagee, the Housing Authority, when the previous mortgagor had defaulted the payments for a considerable period of time. In the circumstances the Master had correctly applied the law and the decision of the High Court Judge is set aside. I would also allow the appeal”.*

21. In the above case Justices of the Fiji Court of Appeal held that the said **“inappropriateness”** of the behaviour of the Housing Authority towards the occupants of the house cannot by itself be considered as a fraud against the bona fide purchaser, who is the Plaintiff – Appellant in this case.
  
22. In the matter at hand too the Defendants allege “inappropriateness” or fraud on the part of the Housing Authority. Such allegation cannot by itself be considered as a fraud against the bona fide purchaser. In this case the Plaintiff is the bona fide purchaser who did not know any fraud committed by the Housing Authority towards the Defendants. There is no wilful blindness on the part of the Plaintiff who purchased the land at the mortgage sale.



23. The Plaintiff is the last registered proprietor of the subject land. The Defendants admits that they are occupying the land. But they did not show me that they have a right to possess the land. Instead they blame the Housing Authority.
24. The summons/application filed under section 169 seeking immediate vacant possession will be dismissed with cost under section 172, if the Defendant proved to the satisfaction of the judge a right to the possession of the land. Unfortunately, in this case the Defendants did not prove to my satisfaction that they have a right to the possession of the land.
25. In my judgment the Plaintiff has proved to my satisfaction that she has a title to the property in dispute. Therefore I order that the Defendants are to deliver up vacant possession of the land to the Plaintiff. I also order that Defendants must pay costs which I summarily assess at \$350.00 to the Plaintiff.

**ORDERS**

- 1) The Plaintiff shall have an order for possession against the Defendants in respect of the residential leasehold land known as Lot 32 on SO 1436, Guruwaiya Street, Waiyavi, Lautoka comprised in Native Lease No. 24496.
- 2) The Defendants shall pay to the Plaintiff summarily assessed costs of \$350.00.

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**M H Mohamed Ajmeer**  
**Acting Master**

At Lautoka.