

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 267 of 2013

IN THE MATTER of an application under Section 169 of Part XXIV of Land Transfer Act, Cap 131 for an Order for immediate vacant possession.

BETWEEN : **SUNDAR MASIH SUKHU** aka **DAYA MASIH SUKHU** as the administrator of the **ESTATE OF SUKHU** aka **SUKHU MAHAJAN** of 18 Park Road, Raiwasa, Suva, in Fiji, Retired.

PLAINTIFF

AND : **SALEND KUMAR** of off Bidesi Place, Raiwasa, Suva, in Fiji, Labourer.

DEFENDANT

BEFORE : **Acting Master Thushara Rajasinghe**

COUNSEL : **Ms. Swastika Narayan** with **Ms. Buksh** for the Plaintiff
Defendant in Person

Date of Hearing : **28th January, 2014**

Date of Judgment : **28th February, 2014**

JUDGMENT

A. INTRODUCTION

1. The Plaintiff filed this Originating Summons dated on 12th of September 2013 seeking an order for immediate vacant possession of the property comprised in Certificate of Title No 6576 being Lot 1 on Deposited plan No 1145 and of an area of 84 acres 1 rood 25.1

perches, situated at Raiwasa in the district of Suva, in the Island of Viti Levu, in Fiji of which the Plaintiff is the legal owner.

2. Upon being served with the Summons, the Defendant filed his affidavit in opposition. The Plaintiff opted not to file any reply to the affidavit in opposition. Subsequently, this matter was set down for the hearing on the 28th of January 2014. The learned counsel for the Plaintiff and the Defendant in person made their oral arguments and submissions during the hearing. At the conclusion of the hearing, I invited the parties to file their respective written submissions which they filed accordingly.
3. Having considered the Summons, respective affidavits and written submissions of the parties and their respective oral arguments, I now proceed to pronounce my judgment as follows.

B. BACKGROUND

Plaintiff's case.

4. The plaintiff claims that he is the appointed Executor and Trustee of the estate of late Sukhu aka Sukhu Mahajan who is the registered proprietor of this land. He deposed that he was one of the co –executors and trustees of the estate with his brother David Naresh Sukhu who latter passed away on or about 4th of May 1997. The plaintiff specifically stated in his affidavit in support that Sukhu Mahajan was the registered proprietor of the property comprised in Certificate of Title No 6576 and he is the Executor and the Trustee of that estate property. The Plaintiff tendered a copy of the Certificate of Title No 6576 marked as annexure “B” to his affidavit in support for my perusal and consideration. He further deposed that the Defendant was hired by him as a caretaker of the said property to maintain the property in good condition. The Defendant sometimes later requested the Plaintiff to allow him to reside on the estate property which was not permitted. However, the Defendant without the consent of the Plaintiff constructed a dwelling house on the property and started to reside in it. Having outlined the factual background of the dispute, the Plaintiff sought an order of vacant possession of the estate property.

Defendant's Case,

5. The Defendant denied the allegation made in the Plaintiff's affidavit. He deposed in his affidavit in reply that the memorials attached to the Certificate of Title show that the property has been transferred to the respective owners named, wherefore; the application of the Plaintiff is misconceived.

C. THE LAW

6. Sections 169 to 172 of the Land Transfer Act (Hereinafter referred as "the Act") outline the procedure for the application in this nature. In view of the section 169 of the Act, the last registered proprietor of the land and/or a lessor with power to re-enter where the lessees or tenant is in arrear for such period and/or a lessor who has issued a legal notice to quit or the term of the lease has expired are allowed to institute proceedings under this section to evict the person who is in possession of the land without a right to the possession.

7. Section 171 states that

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".

8. Section 172 deals with the Defendant's burden of prove where it states that,

"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”.

9. According to section 169, 171 and 172 of the Act, proceedings under this summary procedure constitutes two main limbs. The first is that the onus of the Plaintiff to satisfy the court that he is the last registered proprietor or a lessor defined under section 169 (a), (b) and (c) of the Act and the Defendant is in possession of the land. Once the Plaintiff satisfied the first limb, the burden will shift on the Defendant to prove that he has a right to the possession of the land.

D. ANALYSIS

10. Having reviewed the laws pertaining to the applications under section 169 of the Act, I now turn to analyse the evidences adduced before me with the relevant legal provisions and principles.
11. The Defendants’ main contention is founded on that the title of the property has been transferred to various owners subsequently, wherefore; the Plaintiff is not the registered proprietor of the land described in Certificate of Title No 6576. In view of this contention, the first issue to be determined in this instance case is that whether the Plaintiff is the last registered proprietor of this land comprised in Certificate of Title No 6576.
12. It should be noted that the copy of the Certificate of Title No 6576 which was tendered as annexure “B” of the Plaintiff’s affidavit is not a clear copy. It is the duty of the Plaintiff to provide clear and legible document if they wish to reply on it as their evidence. However, with difficulties, I find nearly 47 leases were granted and 75 partial transfers have been registered subsequent to the registered proprietorship of late Sukhu Mahajan. In respect of lease granted, it is difficult to ascertain the period of lease and the extend of the land given in those 47 leases. I can express the same sentiment in respect of those 75

partial transfers as illegible nature of the document prevents to ascertain the extend of the land given in those partial transfers.

13. As I mentioned above, it is the onus of the Plaintiff not only to satisfy the court that he is the last registered proprietor of the land, but also to satisfy the court that the Defendant is in possession of the land. Once the Plaintiff discharged his burden of prove, the burden then shift to the Defendant to show cause why he refuse to give possession of the land pursuant to section 172 of the Land Transfer Act.
14. The uncertainty nature of the Plaintiff's evidence do not satisfy that late Sukhu Mahajan is the last registered proprietor of the land of eighty four acres, one rood and twenty five perches described in the Certificate of Title No 6576 as claimed in the Originating Summons. There is no evidence before the court to determine that whether the subsequent leases and partial transfers have disposed the entire land and/ or extend of the land presently owned by the Plaintiff. Moreover, the ambiguity nature of the evidence on proprietorship of late Sukhu Mahajan, requires specific evidence to satisfy the court that the Defendant is presently occupying the land which comes under the proprietorship of the Plaintiff which the Plaintiff failed to provide. He vaguely deposed in his affidavit that he is the appointed executor and trustee of the estate of late Sukhu Mahajan described in the Certificate of Title No 6576, when the memorials attached therein shows otherwise. The learned counsel of the Plaintiff tried to tender a document with list of memorials recorded on the Certificate of Title with her written submission which I do not allow and refuse to consider it as evidence.

E. CONCLUSION,

15. In conclusion, I hold that the Plaintiff failed to satisfy the court that he is the last registered proprietor of the property comprised in Certificate of Title No 6576 being Lot 1 on deposited plan No 1145 and of an area of 84 acres 1 rood 25.1 perches situated at Raiwasa in the district of Suva and that the Defendant is in possession of the land. I accordingly make following orders that;

- i. The Originating Summons filed by the Plaintiff on the 12th of September 2013 is refused and dismissed accordingly,
- ii. The Defendant is granted a cost of \$ 1000 assessed summarily,

Dated at **Suva** this **28th** day of **February, 2014**.

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R.D.R Thushara Rajasinghe
Acting Master of High Court, Suva