

In the High Court of Fiji at Suva

Civil Jurisdiction

HBC 213 of 2013

Between: Ravindra Prasad

Plaintiff

Tagi Vonolagi

First Defendant

Maciu

Second Defendant

Temo Bogitini

Third Defendant

Sekeraia

Fourth Defendant

Titilia Ravutia

Fifth Defendant

Emosi

Sixth Defendant

Inimoci

Seventh Defendant

Appearances: Mr Kunal Singh for the plaintiff

The first defendant in person

Mr Tuifagalele for the third defendant

Dates of hearing: 30th October, 2012, and 18th June, 2012

JUDGMENT

1. By originating summons filed on 15th July, 2013, the plaintiff seeks vacant possession of his land in native lease no 8869 described as Lot 21 Section 3, Nausori Township situated at 17 Cakobau Road, Vunimono, Nausori, (the property) and containing an area of 34.1 perches occupied by the first to seventh defendants and for costs. The application is made under the Land Transfer Act, (cap. 131). The property consisting of seven flats, have been occupied by the first to seventh defendants.

2. The plaintiff, in his affidavit in support, states as follows :
 - a) His mother acquired the leasehold rights of the property by Native Lease No. 8869. Upon her death, the property was transferred to the plaintiff on 14th October, 2010.
 - b) He employed the services of a former Nausori law firm known as Eroni Veretawatini Esq, to obtain an amended approval plan for the property and rent out the property, after obtaining iTLTB's approval. He is unaware if Eroni Veretawatini had obtained the consent of the iTLTB.
 - c) Seven families reside in the property. Apart from the first defendant, the others have not been paying him rent. The first defendant is presently, not paying any rent. Notice to quit has been served on the first to seventh defendants. They have refused to move out.
 - d) The property is in a deteriorated state and he wishes to repair the property and bring it to "*living standard*". He also wishes to install electric metres.
 - e) The iTLTB has given its consent to the plaintiff, to evict his tenants.

3. The first defendant, in his affidavit in response, states:
 - i. The plaintiff has not provided evidence of consent from the iTLTB nor other authorities such as the National Fire Authority (NFA), Nausori Town Council (NTC), Fiji Electricity Authority (FEA) to sublease or extend the original property.
 - ii. The plaintiff did not make an enquiry to the iTLTB office from 2008 till this year.
 - iii. He stopped paying rent, since no repairs were done, despite repeated requests being made to the plaintiff.
 - iv. He was informed by FICAC in 2010 not to pay rent, as two people were claiming ownership of the property.
 - v. He made improvements to the flat, as shown in his annexure for over \$2,000.00. He refuses to move out, until the plaintiff compensates him.
 - vi. He admits that the property has been in a deteriorating state from the time he first moved in. The standard of the property is below living standards. Flat 9 was built on top of a septic tank.
 - vii. The electricity metre box in his flat is not affixed onto the wall. The plaintiff has obtained consent from the iTLTB, to institute these proceedings.

4. The plaintiff, in his affidavit in reply, states as follows :
- (i) The first defendant did not make a request for repairs to be done in his flat.
 - (ii) No improvements were done by the first defendant. If improvements were done, it was without his knowledge and consent.
 - (iii) The first defendant has to move out of the property, so that general repairs can be done and the property be brought to a living standard.
 - (iv) The first defendant is not paying any rent.
 - (v) If the subletting is illegal, it follows that the first defendant's occupancy is illegal. He is a squatter who needs to be evicted.
5. (a) On 22nd August, 2013, when this matter was called over, Mr Singh, counsel for the plaintiff stated that the first to seventh defendants had been served notice of the originating summons. An affidavit of service was filed. The first defendant was present and given time to file his affidavit in opposition. The hearing, as against the first defendant was fixed for 5th November, 2013. I granted order in terms of the originating summons against the second to seventh defendants, since they were absent and unrepresented.
- (b) On 13th March, 2014, Mr Singh supported an application for leave to issue writ of possession against the second, third, fourth, sixth and seventh defendants. An affidavit of service was filed. Only, the fifth defendant was present in court. He undertook to move out from the property, in 30 days. I granted order to issue writ of possession against the second, third, fourth, sixth and seventh defendants.
- (c) On 4th April, 2014, the third defendant filed an ex parte motion to stay writ of possession against him, on the ground that summons for possession of the property was not served on him. On 7th April, 2014, the application was supported by Mr Tuifagalele, counsel for the third defendant. Order was granted in terms of the motion
- (d) On 9th May, 2014, Mr Singh conceded that the order against the third defendant has to be set aside. I directed the third defendant to file affidavit in opposition on 16 May, 2014, and fixed the hearing against the third defendant for 18th June, 2014.

6. *The hearing*

6.1 The hearing in the case against the first defendant was taken up on 5th November, 2013.

6.2 The hearing in respect of the case against the third defendant was taken up on 18th June, 2014. At the outset, Mr Tuifagalele moved to file affidavit in opposition on behalf of the third defendant. Mr Singh opposed the application. I declined the application. The third defendant was directed to file affidavit in opposition on 16 May, 2014, and no application for an extension of time had been sought before the hearing date.

7. *The determination*

7.1 The issue for determination before the court is whether the first and third defendants have shown cause and proved to the satisfaction of court, a right of possession to the land.

7.2 Section 169 of the Land Transfer Act provides that the following three categories of persons may summon any person in possession of land to appear before a Judge, to show cause why he should not give up possession of the land to the applicant, namely:

(a) *The last registered proprietor of a land ;*

(b) *A lessor with power to re-enter where the lessee or tenant is in arrear for such period as may be provided in the lease and, in the absence of any such provision therein, when the lessee or tenant is in arrear for one month, whether there be or be not sufficient distress found on the premises to countervail such rent and whether or not any previous demand has been made for the rent.*

(c) *A lessor against a lessee or tenant where a legal notice to quit has been given or the term of the lease has expired. (emphasis mine)*

7.3 Section 169 of the Land Transfer Act provides that the last registered proprietor of a land may summon any person in possession of the land to appear before a judge, to show cause why he should not give up possession of the land to the applicant.

7.4 It is not disputed that the plaintiff is the last registered leaseholder of the property, as set out in the Native Lease. He is entitled to bring these proceedings under section 169(1)(a).

7.5 At the commencement of the hearing, Mr Kunal Singh, counsel for the plaintiff submitted that the first defendant's tenancy was illegal, since the consent of the iTLTB was admittedly not obtained, prior to the leasing.

7.6 The property is a protected lease and therefore the consent of the Director of Lands was required under section 13 of the State Lands Act, to lease the property. It follows that the first defendant's tenancy is illegal.

7.7 In *Khan v Prasad*, (1996) FJHC 85 Pathik J cited *Mistry Amar Singh v. Kulubya*, (PC)(1963)3 All ER 499, for the proposition that "a registered owner of land was entitled to recover possession because his right to possession did not depend on the illegal agreements in that case but rested in his registered ownership and as the person in possession could not rely on the agreements because of their illegality he could not justify his remaining in possession".

7.8 In my judgment, the first defendant cannot justify remaining on the property.

7.9 On an application under section 169, the onus is on the defendant to satisfy court that he has a right to possession of the land, as provided in section 172.

7.10 Section 172 reads :

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,... and 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.... (emphasis mine)

7.11 The requirements of Section 172 were elucidated in the oft quoted case of *Morris Hedstrom v. Liaquat Ali* (Action No. 153/87 at page 2) as follows:

Under Section 172 the person summoned may show cause why he refused to give possession of the land and 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 mine)

7.12 At the hearing, the first defendant stated that he was in arrears of rent for two and a half years. He is a monthly tenant. There is no written tenancy agreement. A valid notice to quit has been given to him. The plaintiff is entitled to evict the first defendant, under sub-section (b) of section 169 too.

7.13 The first defendant asserts that he has made improvements on the property. In support of this contention, he has attached three photographs to his affidavit in opposition

7.14 In my judgment, these photographs do not present evidence of any improvements made to the property by the first defendant.

7.15 Turning to the third defendant, he was given an opportunity to show cause. But he failed to do so.

7.16 The plaintiff has obtained the consent of the Director of Lands, to evict the defendants.

7.17 I would also note that the property is admittedly in a deteriorated state in several respects, as stated by the plaintiff and reiterated by the first defendant, in his affidavit in opposition.

7.18 In my judgment, the first and third defendants have failed to show an arguable defence or right to remain in possession, as required under section 172 .

7.19 In the outcome, the plaintiff succeeds in its application for immediate vacant possession of the property. The first and third defendants have not “*shown cause*” to remain in possession.

8. Orders

- (a) The first and third defendants shall give vacant possession of the property to the plaintiff with execution stayed for 28 days from the date of this judgment.

(b) The first and third defendants shall each pay the plaintiff costs summarily assessed in the sum of \$ 1000 within 21 days of this judgment.

24th June, 2014

A.L.B. Brito-Mutunayagam

A.L.B. Brito-Mutunayagam

Judge

