

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

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 218 of 2013

IN THE MATTER of Section 169 of the
Land Transfer Act.

BETWEEN : **KULWINDER KAUR** of 10971 Anemone Circle, Moreno
Valley Ca, 92557, United States of America, Domestic
Duties

Plaintiff

AND : **ABHINESH VIKASH PRASAD** of Malomalo, Sigatoka

Defendant

Before: Master M H Mohamed Ajmeer

Counsel:

Mr A Dayal for the plaintiff

Mr S Jitoko with E Meru for the defendant

Date of Hearing : 19 May 2014

Date of Judgment : 8 July 2014

J U D G M E N T

Introduction

[1] This is an application filed by Kulwinder Kaur, plaintiff pursuant to section 169 of the Land Transfer Act seeking immediate vacant possession of the premises situated on the land contained in Crown Lease No. 8348, Land Known as Part of Maro, Lot 2 on Deposited Plan No. N 1948 and Farm 5115 & ML 11 being Lot 17 on Deposit Plan No. N 1949, in the District of Malomalo, in the Republic of Fiji containing

an Area of 6.85690 hectares situated at Malomalo, Sigatoka being residential property and farm (“the land”). The application is supported by an affidavit of Ravidra Singh (attorney of the plaintiff) sworn on 4 December 2013 and filed on 6 December 2013 (supporting affidavit). The supporting affidavit annexes two documents marked “RS1” and “RS2”.

- [2] Defendant opposed the application and filed on 29 January 2014 his affidavit sworn on 28 January 2014 in response (responding affidavit). The responding affidavit annexes six documents marked “AVP1”-AVP6”.
- [3] The plaintiff filed affidavit of Ravidra Singh in reply (replying affidavit). The replying affidavit annexes three documents marked “RS1”-RS3”.
- [4] Both parties have filed useful written submissions.

Background

- [5] The brief facts of the case, according to the plaintiff (through her attorney), are as follows: The Plaintiff became the registered lessee of the property (Crown Lease) in September 2005. The Defendants are in possession of the property without any consent or permission from the plaintiff. On 3 October 2013 the plaintiff through her solicitors Samuel K Ram served a notice dated 30 September 2013 on the Defendants. The defendants refuse to vacate.
- [6] It is also pertinent to state the facts as alleged by the defendant. The facts, according to the defendant, are as follows: In April 2006, the Plaintiff allowed him to occupy her residential property and cultivate her sugar cane farm no. 5115 under Crown Lease No. 8348. In 2007, the Plaintiff migrated to the USA. She has not returned since as agreed. He (the defendant) was cultivating and occupying the property since 2006. After harvesting, part of the cane proceeds would be deducted to pay lease rental to Director of Lands. The balance thereof

was paid directly to the Plaintiff's bank account. After which, Ashween Kumar as a holder of Power of Attorney for the Plaintiff would deduct half income from Plaintiff's bank account and pay it to him (the defendant) as his half shares. But this payment stops sometimes in 2010. Despite that, the defendant still continues to cultivate and occupy the property until today. But, the defendant says, he is unable to farm it this year due to lack of funds as he has not been receiving any money from the Plaintiff's Attorney despite his cultivation. The defendant also says he had not received any notice to vacate from the Plaintiff within the first 3 years. The Agricultural Landlord and Tenant Act (ALTA) apply. He is tenant pursuant to ss. 4 & 5 of ALTA. Section 13 of Crown Lands Act does not apply.

The Law and analysis

- [7] The plaintiff as last registered proprietor of the property has brought these summary proceedings to recover possession of the land from the defendant. He is entitled to initiate these proceedings pursuant to **s. 169 (a)** of the Land Transfer Act (LTA). That section, so far as material provides:

“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) ... (Emphasis added”

- [8] The application must describe the land and must require the defendant to appear before a judge in chambers on a day not earlier than 16 days after the service of the summons as per **section 170** of the LTA. All requirements of section 170 had been complied with and there were no dispute over this.

- [9] According to **section 172** of the LTA, the judge must dismiss the application with costs against the applicant, if the defendant appears and show cause why he refuses to give possession of the property and, if he proves to the satisfaction of the judge a right to the possession of the land.
- [10] In these proceedings, the burden is on the defendant to show cause and to prove a right to possession of the property. 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; see **Morris Hedstrom Limited v. Liaquat Ali** (Action No.153/87SC at p2).

Is there a valid supporting affidavit?

- [11] Before I deal with the issue of show cause and right to possession, I think it is wise to deal with the supporting affidavit and the affidavit in reply filed on behalf of the plaintiff sworn by her attorney.
- [12] Abnormally, the plaintiff has filed the supporting affidavit and affidavit in reply sworn by his attorney, albeit she brought these proceedings under her name. The plaintiff resides in the United States. She has given a power of attorney to his attorney, Ravidra Singh to look after her affairs in Fiji. Previously she had given a power of attorney to Ashwin Kumar. The power of attorney given to Ashwin Kumar was later revoked by the plaintiff for one reason or the other.
- [13] The issue (in fact I raised) that has arisen here is that whether the plaintiff's attorney has necessary power to swear an affidavit on behalf of the plaintiff. Counsel for the plaintiff submitted that the attorney had necessary power to swear affidavit on behalf of the plaintiff, as he has got general power of attorney (RS-1).

[14] It is true that the attorney of the plaintiff has got general power of attorney including power to initiate legal proceedings on behalf of the plaintiff. Cl.3 of the power of attorney reads:

*“to **commerce** prosecute enforce defend answer or oppose all actions and other **legal proceedings** and demand touching any matters in which I am or may hereafter be interested or concerned and also if thought fit to compromise refer to arbitration abandon submit to judgment or become non suited in any such action or proceedings as aforesaid.”*

[15] In addition, Cl.16 of the power of attorney provides:

*So far as I can lawfully give or delegate such powers discretions and authorities respectively to sell transfer lease mortgage dispose of deal with and manage any property real or personal which may be or become vested in or administered or controlled by me alone or jointly with any other person or persons as a trustee assignee executor administrator director committee attorney agent substitute or delegate or in any fiduciary capacity whatsoever **and to exercise any powers and discretions bring and defend actions and proceedings control and administer any estate or funds execute and sign any deeds and instruments and generally to do any acts whether in my own name or in the name of any other person or persons which I could lawfully exercise execute sign do and cause to be done in any and every such capacity whether solely or jointly with any other person or persons** (Emphasis added).*

[16] It should be noted that although the attorney of the plaintiff had all the powers to bring these proceedings under his name on behalf of the plaintiff he chose and opted to bring these proceedings under the name of his grantor, the plaintiff who currently resides in the United States. Nonetheless, he has opted to swear an affidavit on behalf of the plaintiff exercising his powers and authorities granted under the power of attorney. This is where I am astonished. Why he (the attorney) opted only to swear affidavits on behalf of the plaintiff without initiating proceedings under his name on behalf of the plaintiff? The plaintiff instituted these proceedings under her name, but she could not swear and file an affidavit in support.

[17] It is to be noted that an originating summons must accompany an affidavit. It is an essential requirement under the rules to commence proceedings.

[18] Mention of section 118 of the LTA must be made at this point. That section provides:

“the registered proprietor of any land subject to the provisions of this Act, or of any estate or interest therein, may by power of attorney in the prescribed form or such other form as may be approved by the Registrar, and either in general terms of specially, authorize and appoint any person on his behalf to execute transfers of, or other dealings with such land, estate or interest or to sign any consent or other documents required under the provisions of this Act, or to make any application to the Registrar or to any court or judge in relation thereto.” (Emphasis added).

[19] Undoubtedly, the attorney may have authority to transfer of any land and sign any document in relation to such transfer on behalf of the grantor. But does it include the power to swear an affidavit?

[20] In the case of **Clauss and another v Pir** [1987] 2 All ER 752 it was held that:

“A party could not do by an attorney an act which he was only competent to do by virtue of some duty of a personal nature requiring skill or discretion for its exercise. The effect of s 7 of the 1971 Act [similar to our s.118 of LTA] was purely procedural, and merely allowed an attorney to use his own signature instead of that of his principal in the execution of an instrument which he was empowered to execute on his principal's behalf or to do in his own name some other thing which he was empowered to do in the name of his principal, and it did not enlarge the scope of things which could be done by an attorney beyond that which was already established. The verification of the relevant documents by affidavit could not be delegated by the defendant since it was a personal duty which he alone could perform because of the personal knowledge required. It followed therefore that the defendant had failed to comply with the order. In the circumstances, however, it would be just to

extend the time for compliance, and the defendant would be granted a further six weeks in which to comply personally with the master's order" (Emphasis added).

[21] In the above case, the defendant's affidavit verifying documents was sworn by his wife, on whom he had conferred a statutory power of attorney. The plaintiff applied for judgment, contending that the defendant was debarred from defending the action because he had not complied with the master's order. The defendant maintained that he had complied with the order; alternatively, he sought a further extension of time in order to do so. He contended that s 7 (1) (b) of the Power of Attorney's Act 1971 gave the donee of a power of attorney the power to do anything on behalf of the principal which the principal could do, and that therefore his wife was fully entitled to swear on his behalf an affidavit verifying documents. The court held that **a party could not swear an affidavit by attorney.**

[22] In the matter at hand too, counsel for the plaintiff contended that the plaintiff could swear an affidavit by his attorney since the attorney has general powers by virtue of the power of attorney.

[23] Swearing of an affidavit requires skill, personal knowledge and discretion for its exercise. In this case, the attorney in his affidavit in reply states that, "I have been informed that Ashween Kumar (previous plaintiff's power of attorney holder) use to hire the defendant as casual labourer to work on the farm and he used to pay him daily wages for seasonal work. Ashween Kumar stopped hiring the defendant to work on the farm long time ago", see para 12 of the attorney's affidavit in reply. This clearly shows that the attorney of the plaintiff had no personal knowledge and discretion to swear an affidavit on behalf of the plaintiff. What the attorney states under para 12 of his affidavit in reply is clearly hearsay, not things which was within his personal knowledge. Furthermore, the defendant in affidavit in opposition states that he was cultivating and occupying

the said land since 2006 and that after harvesting, part of the cane proceeds would be deducted to pay lease rental to Director of Lands, the balance thereof was paid directly to the plaintiff's bank account [see para 5, Affidavit in Opposition]. These depositions were not specifically denied by the plaintiff's attorney's affidavit in reply.

[24] In the case of Raj Kumar v Rajan Prasad [Civil Action No. HBC 152 of 2013, I rejected attorney's affidavit in support and affidavit in reply as the attorney had no ostensible authority to swear an affidavit on behalf of his principal.

[24] In my opinion, unless specifically granted an attorney has no power to swear an affidavit on behalf of his principal. I would hold that the general power of attorney granted to the attorney in this case does not include the authority to swear an affidavit on behalf of his principal, the plaintiff. A party could not swear an affidavit by attorney.

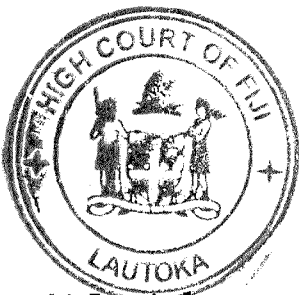
[25] In Clauss case (supra) the court granted further time to defendant on application to swear an affidavit personally. However, in the case at hand the plaintiff did not make such application.

[26] For all these reasons, I disregard, dismiss and struck out the supporting affidavit and subsequent affidavit in reply filed by the attorney for the plaintiff, for they had been sworn by the attorney and not by the plaintiff. It follows that the summary application for possession has been filed without a proper affidavit in support. I accordingly dismiss the application for summary recovery of possession with the costs of \$400.00 against the plaintiff. I have summarily assessed the costs. Nevertheless, this dismissal order will not prejudice the plaintiff to bring any other proceedings against the defendant to which he may be otherwise entitled.

Final outcome

- (a) The plaintiff's application for summary eviction filed on 6 December 2013 is dismissed and struck out with the summarily assessed costs of \$400.00 payable to the defendant by the plaintiff;
- (b) The plaintiff has liberty to take any other proceedings against the defendant to which he may be otherwise entitled;
- (c) Orders accordingly.

On this 8th day of July 2014



At Lautoka

M H Mohamed Ajmeer

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M H Mohamed Ajmeer
Master of the High Court

For the plaintiff: Messrs Samuel K Ram, Barrister & Solicitor

For the defendant: Messrs Qoro Legal, Barristers & Solicitors