

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 02 of 2014

BETWEEN : **MERVYN MALCOM BENTLEY** of Lot 6, Salala Road, Nasinu,
Unemployed.

FIRST PLAINTIFF

: **MILIANA LAWA** OF 18 Rosi Street, Nasinu, Civil Servant

SECOND PLAINTIFF

AND : **MONICA CHUTE** of 5 Evetts Place, Tamavua, Suva

DEFENDANT

BEFORE : **Master Thushara Rajasinghe**

COUNSEL : **Mr. Lajendra N.** for the Plaintiff
Mr. V. Singh. for the Defendant

Date of Hearing : **2nd April, 2014**

Date of Ruling : **1st August, 2014**

JUDGMENT

A. INTRODUCTION

1. The Plaintiffs instituted this action by way of this Originating Summons dated 7th of January 2014 seeking an order for immediate vacant possession of the property as described in certificate of title No 16812, Lot 26 on DP 3971 “ Tamavua” (part of) containing an area of 33.2 perches and situated in the District of Suva and Island of Vitilevu.

2. Upon being served with this Summons, the Defendant filed her affidavit in opposition which was followed by the Plaintiff's reply affidavit. Subsequently, this Summons was set down for hearing on the 4th of April 2014 where the counsel for the Plaintiff and the Defendant made their respective oral arguments and submissions. Having carefully considered the respective affidavits and the submissions of the parties, I now proceed to pronounce the judgment as follows.

B. BACKGROUND

Plaintiff's case,

3. The Plaintiffs claim that they are the last registered proprietors of the property as mentioned in the originating summons. They have rented the top flat to the Defendant for a period of two years commencing from 15th of April 2013 and expires on 15th of April 2015. The Plaintiffs and the Defendant have entered into a tenancy agreement on the 3rd of April 2013. However, the Plaintiffs served the Defendant a notice to quit dated 12th of September 2013 to obtain the vacant possession of the flat in two months' time of the said notice. The Plaintiffs claim that the Defendant failed to give vacant possession pursuant to the notice of quit and has been illegally occupying the premises. The Plaintiffs further deposed that they have entered into an agreement for sale of this house with a third party and the intended purchaser wants the vacant possession of the top flat.

Defendant's Case.

4. The Defendant contended that the termination of the tenancy agreement is illegal and doing such, the Plaintiff has breached the tenancy agreement. The Defendant further urged that she was promised a tenancy period of two years without any interruption and disturbance by the Plaintiffs. Upon such promise and representation, she took the lease for a period of two years, however, within a few months into the tenancy period she was

asked by the Plaintiffs to vacate the premises as they want to sale the property. The Defendant contended that she has a right to the possession of the property until the expiration of the lease agreement based on the Plaintiffs' representation and agreement to provide uninterrupted possession of the premises for the agreed two years.

5. Moreover, the learned counsel for the Defendant argued that the form of the Originating Summons is defective and not in conformity with the relevant rules, wherefore, it should be refused and dismissed. He further contended that the notice of termination issued by the Plaintiff is also defective pursuant to Property Law Act.

C. THE LAW

6. I now turn to briefly review the laws pertaining to the application under section 169 of the Land Transfer Act (hereinafter mentioned as "the Act").
7. Sections 169 to 172 of the Act have stipulated 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 section 169 of the Act to evict a person who is in possession of the land without a right to the possession.
8. Section 171 and 172 of the Act deal with the scope of the hearing and the burden of prove of the parties. 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."

9. Section 172 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;

10. The scope of the hearing of the application under section 169 constitutes two main limbs. The first is the onus of the Plaintiff to satisfy the court that he is the last registered proprietor or the lessor as described under the section 169 (b) and (c) of the Act. Once the Plaintiff satisfies it, the burden will shift on the Defendant to satisfy the court that he has a right to the possession of the land. The scope of the Defendant's burden of prove of a right to the possession of the land has discussed in **Morris Hedstrom Limited-v-Liaquat Ali** CA No: 153/87 , where it was held that

"Under Section 172 the person summonsed 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."

Accordingly, the defendant is only required to present some tangible evidence to establish a right to the possession or the existence of an arguable case for such right to defeat the Plaintiff's claim.

D. ANALYSIS,

11. I first draw my attention to deal with the two preliminary objections raised by the learned counsel for the Defendant. The first is that the format of the Originating Summons is not in conformity with Order 7 r 2 (1). I do not wish to discuss extensively on this issue and refer Order 2 r 1 and section 170 of the Land Transfer Act. The form used by the Plaintiff is an irregularity which falls within the scope of Order 2 r 1. This irregularity, itself does not make this Summons void. Apart from that, I find that the Defendant had given sufficient time to show cause pursuant to section 170 of the Land Transfer Act. Wherefore, I accordingly disregard this first preliminary objection of the Defendant.

12. The second preliminary objection of the Defendant is that the notice to quit is not in conformity with section 89 of the Property Law Act. The learned counsel for the Defendant relied on **Wati v Channan(2011) FJHC 464;HBC71.2011 (23 August 2011)** in order to support his objection. However, I find that Hon. Master Amaratunga (as his lordship then was) has specifically demarcated the scope of section 89, where his lordship observed that; “ *it is clear that the application of the provisions contained in section 89 of the Property law, will come in to effect only, where there is no express agreement between the parties*”. However, in this instance case, the Plaintiffs and the Defendant have entered into a tenancy agreement, wherefore; the Plaintiffs are not required to follow the section 89 of the Property Law Act and only required to give notice of termination in accordance with the tenancy agreement. In view of these findings, I disregard the second preliminary objection of the Defendant.

13. Having considered the affidavit and the submissions of the Defendant, I could summarize that the Defendant’s main argument is founded on the principles of estoppel by matter of record and/or equitable estoppel. The Defendant argues that she entered into the tenancy agreement upon the promise and the representation made by the Plaintiffs, that the house is free of any obstruction and available for two years of lease term. She further stated that she has spent about \$1,500 to clean up the house before she entered into the occupation.

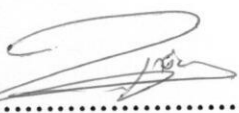
The learned counsel of the Defendant heavily relied on clauses 6 and 7 of the tenancy agreement.

14. I do agree with the Defendant's contention that the Plaintiffs have agreed to give the possession of the premises without any obstruction and interruption for a period of two years pursuant to clauses 6 and 7 of the agreement. However, the tenancy agreement also allows the Plaintiffs to terminate the agreement before the completion of the tenancy period on three separate grounds. The first is clause 33 (c) of the agreement where it allows the Plaintiffs to terminate the agreement if the tenant is more than 45 days in arrears of rent. Secondly, clause 34 deals with an instance where the landlord could terminate the agreement on the ground of a breach of this agreement. The third instance is clause 38, which allows the landlord, if he wishes, to terminate this agreement before the expiration of the tenancy period. The only requirement is to give a 60 days written notice to the tenant to find a suitable house to relocate pursuant to clause 38 (a). The clause 38 (b) further provides that the tenant is entitled to refund the bond if this agreement is terminated within six months of the tenancy due to a default from the landlord.
15. It appears that pursuant to clause 38 (a) and (b), the Plaintiffs if they wish, could terminate this agreement before the expiry of the agreement. This right of the landlord must be considered disjointedly from clauses 33 (c) and 34, where the landlord is only allowed to terminate either on the ground of default of rent payment or a breach of this agreement. The only requirement under clause 38 is to give 60 days of written notice to the tenant. The landlord is not refrained from terminating the agreement within the first six months of the tenancy period. The only obligation of the landlord under such circumstances is to refund the tenant the deposit if he terminated the agreement due to his own default. It seems to be imperative to note that the landlord is only liable to refund the deposit, if the termination is due to his default, but not due to a breach of the agreement. Accordingly, it appears to me, that the Plaintiffs, if they wish, are not restricted to terminate the agreement, though they have agreed to provide vacant possession of the premises under clauses 6 and 7 of the agreement.

16. The Defendant has entered into this agreement together with the renting guidelines on the 3rd of April 2013. It is apparent that the Defendant was fully aware of the right of the landlord to terminate this agreement before the expiration pursuant to clause 38. Under such circumstances, the Defendant could not only rely on clauses 6 and 7 of the agreement. At the commencement of the tenancy agreement, the parties were not only agreed of the Plaintiffs' obligation to provide the premises for a period of two years, but also agreed to the Plaintiffs' right to terminate this tenancy agreement pursuant to clause 38 of the agreement. Thus, the Defendant could not rely on the contention that the Plaintiffs are estoppel under the agreement or under equity to terminate this tenancy agreement before the expiration of two years period.
17. In conclusion, I find that the Defendant has failed to successfully satisfy the court, that he has a right to the possession of the land, or an arguable case for such right. I accordingly make following orders that;
- i. The Plaintiff is granted immediate vacant possession of the property as described in certificate of title No 16812, lot 26 on DP 3971 "Tamavua" (part of) containing an area of 32.2 perches and situated in the District of Suva and Island of Viti Levu.
 - ii. The Plaintiff is awarded with cost of \$1000, assessed summarily.

Dated at Suva this 01st day of August, 2014.




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