

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

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 14 of 2014

IN THE MATTER of section 169 of the
Land Transfer Act (Cap. 131).

BETWEEN : **JOSEPH FOON AND WINNE YOO KWAIN SUE**
of 23 Tualesia Street, Simla, Lautoka.

Applicants

AND : **JOANA WAINIQOLO RAIDRIWA** of 23 Tualesia Street,
Simla, Lautoka

Respondent

Counsel:

Ms Lidise for the Applicants

Mr K Tunidau for the Respondent

Date of Hearing : 15 August 2014

Date of Judgment : 19 November 2014

J U D G M E N T

Introduction

[1] This is an application filed by Joseph Foon and Winne Yoo Kwain Sue, applicants pursuant to section 169 of the Land Transfer Act seeking immediate vacant possession of all that part of land known as 23 Tualesia Street, Simla, Lautoka comprising double storey residential building situated on an area of 1079 square metres comprised in

Certificate of Title No. 21448 including a flat on the ground floor being occupied by respondent, Joana Wainiqolo Raidriwa (the premises).

- [2] The application is supported by joint affidavit of the applicants sworn on 31 January 2014 and filed on 5 February 2014 (the supporting affidavit). The supporting affidavit annexes three documents marked "FS1" - "FS3".
- [3] The respondent opposes the application and filed on 17 April 2014 her affidavit in opposition sworn on 15 April 2014 (respondent's affidavit). The respondent's affidavit annexes five documents marked "JF-1"- "JF5".
- [4] The applicants filed their affidavit in response (responding affidavit). The responding affidavit annexes no documents.
- [5] Both parties agreed to file written submissions. The respondent was given 28 days to file and serve her written submission and 14 days thereafter to the applicants to file and serve their responding submission. Neither party filed written submissions within the time allowed for that purpose. However, the court, with the consent of the applicants' counsel, granted further 14 days to the respondent to file and serve her written submission. The matter was set for ruling on 19 November 2014. The respondent accordingly filed her written submission on 31 October 2014. The plaintiff's written submission reached me only this morning by 8.30 before I pronounce my judgment in court at 11.00am.

Background

- [6] The brief facts of the case, according to respondent, are as follows: The applicants are owners and proprietors of the premises. The respondent is daughter in law of the applicants. The respondent is married to the applicants' son namely Dallas Douglas David Foon,

they were married in December 2004 and have three children. The respondent, her husband and the applicants began to live together as a family since 1996 when the family was then living at Sugar Avenue. In 1997 the family moved to the current residential property at 23 Tualesia Street, Simla, Lautoka. The respondent regards the current residential property as the family property, the family she is married into. The marriage is still current. Dispute arose between the respondent and her husband. As a result the respondent took out a Domestic Violence Restraining Order (DVRO) against her husband in September 2013 (Lautoka DVRO No. 314 of 2013). She was granted an interim DVRO which includes, non-molestation order, orders for non-contact, protection of spouse, conditions for the children, urgent monetary relief and occupancy order under the provisions of the Domestic Violence Decree. Her husband had also filed cross DVRO application with interim orders for non-molestation against her as well. It is in this background the application for vacant possession is filed.

The Law and analysis

[7] Admittedly, the applicants are registered proprietor of the premises. They, as last registered proprietors of the premises, have brought these summary proceedings to recover possession of the land from the respondent. They are entitled to initiate these possession proceedings pursuant to s. 169 of the Land Transfer Act (LTA). That section provides as follows:

‘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) 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 added).

- [8] The application must describe the land and must require the respondent to appear before a judge in chambers on a day not earlier than 16 days after the service of the summons by reason of **section 170** of the LTA. The summons contains description of the premises and the summons which is returnable on 6 March 2014 was served on the respondent on 18 February 2014, i.e. it has been served not earlier than 16 days before the returnable day. Hence, both requirements envisaged in section 170 had been complied with and there was no dispute over this.
- [9] The judge shall dismiss the application with costs against the proprietor, mortgagee or lessor or he may make any order and impose any terms he may think fit; if the person summoned (respondent) 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, see section 172 of the LTA.
- [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).

- [11] The applicants do not specify which limb of section 169 they have made their application for eviction under. Presumably, it seems that they have made their application as the last registered proprietors of the premises, i.e. under section 169^a of the LTA.
- [12] In the supporting affidavit, the applicants fail to give detailed background facts. They simply state that they are owners and proprietors of the premises, they served a quit notice and the respondent refuses to vacate the premises. They did not even state their relationship with the respondent. It is through the respondent's affidavit detailed facts about the case came out.
- [13] In her affidavit the respondent states that, she is the applicants' daughter-in-law and is married to their son, she began to living together as a family since 1996 when the family was living at Sugar Avenue and in 1997 the family moved to the current residential premises. This she considers as the family property. She also states that, she is living on the premises with her three children but notice to quit has been issued to evict only her.
- [14] On behalf of the applicants Ms Lidise contended that, the applicants had issued summary proceedings under s. 169^a of the LTA, the respondent's affidavit fails to show lease for her to claim possession and the applicants are entitled to possession of the premises. She referred to two cases namely **Watti v Channan** [2011] FJHC 464; HBC71.2011 (23 August 2011) and **Shankar V Watti** [1997] FJHC 156; HBC0041j.97S (17 October 1997).
- [15] Mr Tunidau, counsel for the respondent argued that, the applicants have to prove the respondent's possession, she is occupying matrimonial home and statutory right will not override family right. He cited s. 35.-(1) of the 2013 Constitution which provides:

'35-(1) The state must take reasonable measures within its available resources to achieve progressive realisation of the right of every person to accessible and adequate housing and sanitation.'

- [16] It is true that section 35 (1) of the 2013 Constitution guarantees right to housing and sanitation. That section may be relevant to a dispute in which the state or state organ and an individual are involved. In the present case before me the dispute is between two family members. I am of opinion that section 35 (1) of the 2013 Constitution has no application to the present case as the dispute is between two individuals.
- [17] The cases cited by the applicants will not assist their case. In **Watti v Channan** (supra) summary application for possession was refused because the applicant failed to give proper and legal notice to quit to the defendant and his failure to establish at least month arrear of rent to succeed in his application. In the present case before me, there are no such issues hence Watti case will not be relevant. In **Shankar v Watti** (supra) a father took out summary proceedings for possession under s. 169 against his daughter and son-in-law. The first defendant stated that the plaintiff (father) gave them a portion and wanted them to build a house and live there for the rest of their life and produced a letter to that effect. D. Pathik, J rejecting the defendants' version and the document (letter) produced by them as forged, granted order for possession against the daughter and son-in-law. This situation did not arise in the current case. Hence the second case cited by the applicants is also not relevant to their case.
- [18] The applicants have filed this application after the respondent obtained an interim DVRO including occupancy order. The Magistrate's Court has granted occupancy order for respondent. The respondent is considered a protected person for the purpose of DVRO under Domestic Violence Decree 2009 (DVD). S. 2 of the DVD defines a protected person as follows:

“a **‘protected person’** means a person protected by a domestic violence restraining order made under this Decree and includes a person protected by an interim order or a final order”. Under the same provision **‘property of the protected person’** means property that a person protected by a domestic violence restraining order owns or does not own, but where the person does not own the property, the property was-

- (a) used or enjoyed by the person;
- (b) used for the person’s use or enjoyment;
- (c) in the person’s care or custody; or
- (d) at the person’s home or place or residence.

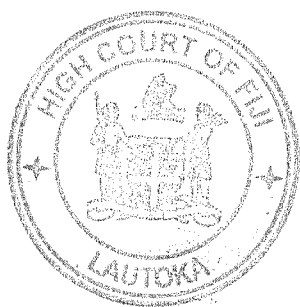
[19] By virtue of the interim DVRO the respondent has become a protected person. Pursuant to section 2 of the DVD, the property of the protected person means property that a protected person by a DVRO owns, or does not own, but where the person does not own the property, the property was used or enjoyed by the person. Though not owing, the respondent has been using the flat on ground of the premises since 1997. By reason of the interim DVRO the respondent is entitled to occupancy of the premises to which this application relates. The interim DVRO granted in favour of the respondent raises an arguable point that whether or not the applicants can take out possession proceedings under s.169 of the LTA against the respondent despite the interim DVRO.

Conclusion

[20] In my judgment, the occupancy order made under interim DVRO by the Magistrate’s Court gave the respondent a right to occupancy or possession of the premises. I therefore struck out and dismiss the application of the applicants for possession with summarily assessed costs of \$300.00. The dismissal of the summons will not prejudice the right of the plaintiff to take any other proceedings against the person summoned to which he may be otherwise entitled (see proviso to s.172 of the LTA).

Final outcome

- (a) The application for summary eviction filed on 5 February 2014 is dismissed and struck out with summarily assessed costs of \$300.00 payable to the respondent by the applicants in 28 days;
- (b) The applicants have liberty to take any other proceedings against the respondent to which they may be otherwise entitled;
- (c) Orders accordingly.



M H Mohamed Ajmeer

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M H Mohamed Ajmeer
PUISNE JUDGE

At Lautoka

19 November 2014

Solicitors:

For the applicants : Messrs Young & Associates, Solicitors
For the respondent : Messrs Kevueli Tunidau Lawyers, Barristers & Solicitors