

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No.HBC 312 of 2013

BETWEEN : **GYAN MATI** of Tokotoko Back road, Navua, Fiji, Domestic Duties.

PLAINTIFF

AND : **PRATAP CHAND** of Lot 21 Tokotoko Back road, Navua, Fiji.

DEFENDANT

BEFORE : **Master Thushara Rajasinghe**

COUNSEL : **Mr. Nand** for the Plaintiff
Mr. Nand. M for the Defendant

Date of Hearing : **13th October, 2014**

Date of Ruling : **28th November, 2014**

JUDGMENT

A. INTRODUCTION

1. The Plaintiff instituted this action by way of this Originating Summons dated 6th of November 2013 against the Defendant and his family members, seeking an order for immediate vacant possession of the property described in certificate of title No 33286 on Lot 21 on DP 8162, situated at Lot 21, Tokotoko Backroad, Navua, in the Republic of Fiji Islands pursuant to section 169 of the Land Transfer Act.

2. Upon being served with this Summons, the Defendant filed his affidavit in opposition which was followed by the Plaintiff's reply affidavit. Subsequently, this Summons was set down for hearing on the 16th of June 2014. Learned Counsel for the Plaintiff and the Defendant requested to conduct the hearing by way of written submissions, I accordingly directed them to file their respective written submissions, which they filed as per directives. Having carefully considered the respective affidavits and the written submissions of the parties, I now proceed to pronounce the judgment as follows.

B. BACKGROUND

Plaintiff's case,

3. The Plaintiff claims that she is the last registered proprietor of the property as described in the originating summons. The Defendant is one of her elder brothers, who was given permission to live in the property by the previous registered owner, who was another elder brother of the Plaintiff. Subsequent to the death of the previous registered owner, the property was transferred to the Plaintiff and she was then registered as the registered proprietor of this property. After she became the registered proprietor of the property, she sent a notice of peaceful occupation dated 8th of July 2013 to the Defendant setting out a few conditions for him to comply with in order to continually stay in the property. However, the Defendant failed to comply with that notice, wherefore; the Plaintiff issued a notice to quit on 25th of July 2013. The Plaintiff claims that the Defendant has no right to the possession of this land, wherefore; she is entitled for immediate vacant possession of her property.

Defendant's Case.

4. The Defendant contended in his affidavit in opposition that he was invited by his late brother to live in this property with his family. Upon that invitation the Defendant started to live in this property and spent nearly \$20,000 for the extension and building of the house which he is now occupying. He further contended that he is still critical

and not satisfied with the way his late brother got the title of this property. He claimed that his late father paid the money in installments to the Tokotoko Land Purchase Cooperative Society to purchase this land, wherefore this is a family property.

5. The Plaintiff in her reply affidavit deposed that the Tokotoko Land Purchase Cooperative Society transferred the registered proprietorship to her late brother upon his payments to the said society. She admitted that it was their late father who initially paid to the Society, however subsequent to his death; the late brother continued with the payment and obtained the title of this property. She further deposed that in view of the annexure PC 2 of the Defendant's affidavit in opposition, the late brother has given the permission to the Defendant's de facto wife to occupy the land as the Defendant was having domestic issues with her. In view of that letter, the Defendant was given only a conditional permission to stay on the land.

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 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 proof 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 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 proof of a right to the possession of the land was 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 of the possession or the existence of an arguable case for such right to defeat the Plaintiff's claim.

D. ANALYSIS,

11. Having carefully considered the respective affidavits and submissions of the parties, it appears that the main contention of the Defendant is that he was invited by his late brother to stay in this property. He then upon such invitation moved into the property and spent nearly \$20,000 for the renovation and extension of the house he is now occupying. In view of the Defendant's contention, it appears that his defense is founded on the principle of proprietary estoppel by encouragement.

12. Lord Kingsdown in his dissenting speech in **Ramsden v Lee Dyson and Joseph Thornton (1866) LR 1 HL 129** has defined the essential components of the proprietary estoppel by encouragement, where his lordship outlined that:

"if a man, under a verbal agreement with a landlord for a certain interest in land, or what amount to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a court of equity will compel the landlord to give effect to such promise or expectation. If on the other hand, a tenant being in possession of land, and knowing the nature and extent of his interest, lays out money upon it in the hope or expectation of an extended term or an allowance for expenditure, then if such hope or expectation has not been created or encouraged by the landlord, the tenant has no claim which any court of equity can enforce."

13. Lord Walker of Gestingthorpe in **Thorner v Major and Others (2009) 2 All ER 945** found three main elements of proprietary estoppel, where his lordship held that:

"nevertheless most scholars agree that the doctrine is based on three main elements, although they express them in slightly different terms, a representation or assurance

made to the claimant; reliance on it by the claimant; and detriment to the claimant in consequence of his (reasonable) reliance”.

14. Having outlined the main elements of proprietary estoppel, Lord Walker then observed the nature and scope of the representation or assurance made to the claimant, where his lordship found that *“there is some authority for the view that the “clear and unequivocal” test does not apply to proprietary estoppel. That view was expressed by Slade LJ in Jones v Watkins (26 November 1987, unreported.) The same view has been expressed in at least the past three editions of Treitel Law of contract. The current (12th) edition (2007) by Mr. Edwin Peel, in a passage comparing promissory and proprietary estoppel, states (para 3-144): “promissory estoppel arises only out of a representation or promise that is “clear” or “precise and unambiguous”. Proprietary estoppel on the other hand, can rise where there is no actual promise; e.g where on party makes improvements to another’s land under a mistake and the other either knows of the mistake or seeks to take unconscionable advantage of it”..... if all proprietary cases (including cases of acquiescence or standing –by) are to be analysed in terms of assurance, reliance and detriment, then the landowner’s conduct in standing by in silence serves as the element of assurance. As Lord Eldon LC said over 200 years ago in Dann v Spurrier (1802) 7 Ves 231 at 235-236, 32 ER 94 at 95 “this court will not permit a man knowingly, though but passively, to encourage another to lay out money under an erroneous opinion of title; and the circumstance of looking on is in many cases as using terms of encouragement”.*

15. I now draw my attention to this instance case. According to the annexure PC 3 of the Defendant, it appears that the Defendant was not invited by his late brother to occupy this house. It was his de- facto wife that was given permission to occupy the land with her kids and the Defendant was given a conditional permission to stay with them without causing problems to them. He was then given a permission for peaceful occupation by the Plaintiff in her letter dated 8th of July, 2013. At no point in time, the Defendant was mistaken with the ownership of the property. He was not misled with the nature of permission given to him by his late brother. Under such

circumstances, it is my view that he is not entitled to claim a right to the possession of this land on the ground of proprietary estoppel by encouragement.

16. 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 the following orders that;

- i. The Plaintiff is granted immediate vacant possession of the property as described in certificate of title No 33286 on Lot 21 on DP 8162, situated at Lot 21, Tokotoko Backroad, Navua, in the Republic of Fiji Islands.
- ii. The Plaintiff is awarded with cost of \$700, assessed summarily.

Dated at Suva this 28th day of November, 2014.



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