

IN THE HIGH COURT OF FIJI  
AT SUVA  
CIVIL JURISDICTION

HBC No. 182 of 2015

IN THE MATTER of an application under  
Section 169 of the Land Transfer Act

BETWEEN : SCUBAHIRE LIMITED a limited liability company having its  
registered office at Suva, Fiji.

PLAINTIFF

AND : WAISAKE ERONI DELAI WAQAITUINAYAU of 73 Marine Drive,  
Lami trading as Waisake Waqaituinayau Investments.

DEFENDANT

BEFORE: Acting Master Vishwa Datt Sharma.

COUNSELS: Mr. Tuitoga for the Plaintiff.  
Mr. Nacolawa for the Defendant.

Date of Hearing: 04<sup>th</sup> August, 2015  
Date of Decision: 27<sup>th</sup> October, 2015

RULING

INTRODUCTION

1. The Plaintiff filed an Originating Summons on 14<sup>th</sup> May, 2015 and sought for the following orders-

- (a) That the Defendant **WAISAKE ERONI DELAI WAQAITUINAYAU** do show cause why an Order for immediate vacant possession of the land comprised in Native Lease No. 9094 being Lot 2, Nukuwatu Subdivision, Lami situated at 73 Marine Drive, Lami, of which the Plaintiff is the registered Lessee, should not be made against him upon the grounds set forth in the Affidavit of **LORRAINE ALICE EVANS**.
2. This application is supported by an affidavit of **LORRAINE ALICE EVANS** sworn and filed on 14<sup>th</sup> May, 2015.
  3. The application is made pursuant to *Section 169 of the Land Transfer Act, Cap 131*.
  4. The Defendant was personally served with this application on 19<sup>th</sup> May, 2015 and an affidavit of service to this effect has been filed into court.
  5. The Counsel representing the Defendant filed his **Affidavit in Opposition** on 14<sup>th</sup> July, 2015 and thereafter the Plaintiff filed a **Reply** on 21<sup>st</sup> July, 2015.
  6. The case was adjourned for hearing on 04<sup>th</sup> August, 2015.
  7. This case proceeded to hearing on a **defended basis** and both parties to the proceeding were represented by Counsels at the hearing.
  8. This court has a duty to determine the pending issue before the court in a just and fair manner in terms of the laws provided for in *ss169, 171 and 172 of the Land Transfer Act [Cap 131]*.

### THE LAW

9. *Section 169 of the Land Transfer Act [Cap 131]*.

*“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."*

10. The procedure under s.169 is governed by sections 171 and 172 of the Land Transfer Act (Cap 131) respectively which stipulates as follows: -

*"s.171. 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."*

*s.172. If a 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."* (Underlined is mine for emphasis)

11. It is for the defendant to 'show cause' why he refuses to give vacant possession of the residential leasehold property to the Plaintiff as sought for by the Plaintiff.

12. The procedure under s169 is most appropriate here. In the case of *Ram Narayan v Moti Ram (Civ. App. No. 16/83)* Gould J.P. said

*"... the summary procedure has been provided in the Land Transfer Act and, where the issues involved are straightforward, and particularly where there are no complicated issues of fact, a litigant is entitled to have his application decided in that way."*

13. As far as the requirements in terms of *section 172* are concerned, the Supreme Court in the case of *Morris Hedstrom Limited v. Liaquat Ali (Action No. 153/87 at p2)* said as follows and it is pertinent:

*"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."*

14. The requirements of *section 172* have been further elaborated by the Fiji Court of Appeal in *Ajmat Ali v Mohammed Jalil (Action No. 44 of 1981 - judgment 2.4.82)* where the court said:

*"It is not enough to show a possible future right to possession. That is an acceptable statement as far as it goes, but the section continues that if the person summoned does show cause the judge shall dismiss the summons; but then are added the very wide words "or he may make any order and impose any terms he may think fit" These words must apply, though the person appearing has failed to satisfy the judge, and indeed are often applied when the judge decides that an open court hearing is required. We read the section as empowering the judge to make any order that justice and the circumstances require. There is accordingly nothing in section 172 which requires an automatic order for possession unless "cause" is immediately shown. (emphasis added).*

15. In *Premji v Lal [1975] FJCA 8; Civil Appeal No 70 of 1974 (17 March 1975)* the Court of Appeal said:

*'These sections and equivalent provisions of the Land (Transfer and Registration) Ordinance (Cap. 136-1955 Laws of Fiji) have been considered in a number of cases in this court and the Supreme Court. In *Jamnadas & Co. Ltd. v. Public Trustee and Prasad Studios Ltd. (Civil Appeal No. 39 of 1972 - unreported)* this court said -*

16. Under *Section 172 of the Act* the judge is empowered to dismiss the summons if the respondent proves to his satisfaction that he has a valid defence, a right to possession, locus standi and or a licence. It further provides that a judge may make any order and impose any terms that he may think fit. The dismissal of the summons is not to prejudice the right of a Plaintiff to take any other proceedings to which he may be otherwise entitled.
17. Reference is made to the case authorities of *Caldwell v. Mongston (1907) 3 F.L.R. 58* and *Perrier Watson v. Venkat Swami (Civil Action 9 of 1967 - unreported)* wherein the Supreme Court held '*that if the proceedings involve consideration of complicated facts or serious issues of law, it will not decide the cases on summary proceedings of this nature, but will dismiss the summons without prejudice to the Plaintiff's right to institute proceedings by Writ of Summons.*'

#### BACKGROUND FACTS OF THIS CASE

18. The Plaintiff, Scubahire Limited states that it is the registered proprietor of the subject land comprised in Native Lease No. 9094 being Lot 2, Nukuwatu Subdivision, situated at 73 Marine Drive, Lami.
19. The Plaintiff and the Defendant entered into a tenancy agreement on 16<sup>th</sup> November, 2012 wherein it was agreed upon the parties that the Defendant as tenant will pay monthly rental of \$3000 for the first year, thereafter, for second year rental at \$ 3400 per month, and \$3800 per month from the third year.
20. The Plaintiff states that after the Defendant made few payments, he defaulted and was in arrears of \$14,600.
21. The Defendant stated that the deceased, David Evans, the husband of Lorraine Evans, who had instituted this action, executed the tenancy agreement and that the main purpose of renting the premises was to run a business of restaurant, accommodation and bar, the business was thriving and the lease would have expired on 16<sup>th</sup> November, 2017. Upon the death of David Evans that Plaintiff Lorraine and

her daughter together with Lami Police and Lami Town Council worked together to oust the Defendant from the premises.

20. The Defendant was issued with a notice to vacate the premises within 1 month but was suspended allowing the Defendant to accept the conditions as was stated in the notice by 20<sup>th</sup> April, 2015, but the Defendant refused to accept.

The Defendant has been occupying the property illegally as the tenancy agreement executed on 16<sup>th</sup> November, 2012 has ceased and terminated as a result of breach by the Defendant.

The Plaintiff now sought for vacant possession of the Plaintiff's property.

#### DETERMINATION OF THE ISSUES

19. Both parties to the proceedings furnished court with comprehensive written submissions in support of their respective cases wherein these issues were raised:

(i) Whether the Plaintiff has Locus Standi and is entitled to the possession of the land comprised in Native Lease No. 9094 being Lot 2, Nukuwatu Subdivision, Lami, situated at 73 Marine Drive, Lami, in terms of *s169 of the Land Transfer Act [Cap 131]*?

(ii) Whether any consent was obtained by the Plaintiff or the Defendant from the Lessor iTLTB?,

(iii) Whether Notice to Quit was appropriately served on the Defendant? and

(iv) Whether the Defendant has showed tangible evidence in this case?

(v) Whether there is a pending related case seeking a similar order for vacant possession?

20. This court now needs to deliberate on the above Questions or Issues respectively.

21. It is not in dispute that the Land in question is a Native Land and that iTaukei Land Trust Board the lessor. The Native Lease No. 9094 was transferred and

registered to the Plaintiff, ScubaHire Limited on 08<sup>th</sup> January, 1991. The effect of registration of a native lease with the Registrar of Titles is that upon registration it becomes subject to the *Land Transfer Act, Section 10(2) of the Native Land Trust Act, Cap 134 states as follows-*

*‘When a lease made under the provisions of this Act has been registered it shall be subject to the provisions of the Land Transfer Act, so far as the same are not inconsistent with this Act, in the same manner as if such lease has been made under that Act, and shall be dealt with in a like manner as a lease so made. (Cap. 131.)’*

22. The Plaintiff commenced this application pursuant to *section 169 (a) of the Land Transfer Act Cap 131* which states- *‘the last registered proprietor of the land.’*

*Proprietorship*

23. The question to be asked here is, whether the Plaintiff, ScubaHire Limited is the registered proprietor of the land comprised in Native Lease No. 9094 being Lot 2, Nukuwatu Subdivision, Lami situated at 73 Marine Drive, Lami?

24. Section 2(1) of the Land Transfer Act clearly states that “Proprietor” means the registered proprietor of land or of any estate or interest therein. The registration of the lease under a statutory authority, herein referred to as the *iTLTB Act Cap 134*, creates a legal interest on the land making the Plaintiff the registered proprietor of the land for the purpose of the *Land Transfer Act Cap 131*. Not only that, the Memorandum of lease annexed as ‘L1’ in the Plaintiff’s affidavit in Support is evidence before this court that the Plaintiff, ScubaHire Limited is the last Registered proprietor of the land herein.

25. Further, sections 39-42 of the *Land Transfer Act Cap 131*, and under the Torrens system of land registration which operates in Fiji, the title of the registered proprietor is indefeasible unless actual fraud is proved. (Case of *Subramani v Sheela* [1982] FJCA 11; [1982] 28 FLR 82 (2 April 1982); *Assets Company Ltd v Mere Roihi* [1905] AC 176 at p. 210; *Fels v Knowles* 26 N.Z.L.R. 608, at p 620 refers).

In Subramani (supra) the Fiji Court of Appeal (per Gould V.P.' Marsack, J.A., and Spring J.A.) states as follows-

*"The indefeasibility of title under the Land Transfer Act is well recognized; and the principles clearly set out in a judgment of the New Zealand Court of Appeal dealing with provisions of the New Zealand Land Transfer Act which on that point is substantially the same as the Land Transfer Act of Fiji. The case is Fels v Knowles 26 N.Z.L.R. 608. At page 620 it is said;-*

*"The cardinal principle of the statute is that the register is everything, and that, except in case of the actual fraud on the part of the person dealing with the registered proprietor, such person, upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against all the world."*

24. It is trite law that once the Plaintiff satisfies the court that the Plaintiff herein is the registered proprietor, then the onus is on the defendant to 'show cause' why he refuses to give vacant possession of the leasehold property to the Plaintiff as sought for by the Plaintiff.

25. In terms of *section 172 of the Land Transfer Act*, the Defendant does not have to prove a conclusive right to remain in possession rather some tangible evidence establishing a right or at least supporting an arguable defence as discussed hereinabove in case of *Morris Hedstrom Limited v. Liaquat Ali (Action No. 153/87)*.

26. The Defendant has in his Affidavit in Opposition and the written submissions stated that there were two (2) shareholding Directors of the Plaintiff Company, namely Lorraine Alice Evans and David Evans, who is now a deceased. The issue raised by the Defendant is whether the surviving shareholding Director, Lorraine Alice Evans alone has the locus standi to commence proceedings and whether a grant of probate needs to be obtained first in the deceased David Evans Estate and then commence with this proceedings?

To this the Plaintiff stated that Lorraine Alice Evans is the sole executrix of David Evans Estate and a grant is being sought to formalise things. In her affidavit in reply she stated that she has been authorised as a shareholder Director to commence this



proceeding. No evidence to this extent has been furnished to court whether there is a pending application for a grant and how she has been authorised by the Deceased Estate to commence proceedings nor a 'Will' has been enclosed to show that she is the appointed executrix of David Evans Estate. Further, the deceased and the Plaintiff are husband and wife and each holds 7500 shares in the company.

This court is of the view that since Lorraine Alice Evans has sworn an affidavit stating that she is authorised to swear an affidavit and commenced proceedings in this matter, the court is of the view that it is in order. Why? Because it does not mean that if one of the Company Directors is a deceased, then the Company in the circumstances cannot proceed to commence proceedings in a court of law, whether it be an urgent application or otherwise as applies in this case. As far as there is an existence of a Company Director, and she is empowered in law to institute and handle court proceedings in the best interest of the Company, why not?

27. Now, bearing in mind that the issue of 'consent' has been raised and that the subject land under occupation is a native lease, it is appropriate that I make reference to *section 12* of the Native Land Trust Act Cap 134 which states:

*'12. -(1) Except as may be otherwise provided by regulations made hereunder, it shall not be lawful for any lessee under this Act to alienate or deal with the land comprised in his lease or any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever without the consent of the Board as lessor or head lessor first had and obtained. The granting or withholding of consent shall be in the absolute discretion of the Board, and any sale, transfer, sublease or other unlawful alienation or dealing effected without such consent shall be null and void:*

*Provided that nothing in this section shall make it unlawful for the lessee of a residential or commercial lease granted before 29 September 1948 to mortgage such lease. (Substituted by Ordinance 30 of 1945, s. 8; amended by 29 of 1948, s. 3.)*

*(2) For the purposes of this section "lease" includes a sublease and "lessee" includes a sublease. (Inserted by Ordinance 35 of 1943, s. 2.)*

*Effect of Absence of consent*

28. In *Khan v Prasad* [1996] FJHC 85; Hbc0480j.96s (23 December 1996); Pathik J stated:

*“There is no evidence of any consent having been obtained either by the Plaintiff or the defendant. This 'dealing' therefore is null and void and the defendant's occupation of the flat is therefore unlawful, null and void. The defendant cannot in the circumstances be regarded as a lawful tenant of the Plaintiffs (vide CHALMERS v PARDOE (1963) 3 A.E.R. 552; JAI KISSUN SINGH v SUMINTRA (1970) 16 F.L.R. 165 F.C.A.; PHALAD v SUKH RAJ (Civ. App. 43/78 F.C.A.)*

*The defendant submits that because there was no consent of the Director of Lands he cannot be evicted. I hold that the defendant is in unlawful possession of the 'flat' on the property and he cannot justify remaining in possession. The defendant's assertion will not stand as in MISTRY AMAR SINGH v KULUBYA 1963 3 AER p.499, a Privy Council case, it was held 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. That case "concerned an illegal lease of 'Mailo' land by an African to a non-African which was prohibited by a Uganda Statute except with the written consent of the Governor. No consent was obtained to the lease. After the defendant had been in possession for several years the plaintiff gave notice to quit and ultimately sued him for recovery of the lands. He succeeded." (quoting from RAM KALI below).*

*Also in RAM KALI f/n Sita Ram and SATEN f/n Maharaj (Action No. 93/77) KERMODE J. expressed a similar view: -*

*“It is not necessary to determine whether there was an alleged sale as the defendant contends or a tenancy as the plaintiff alleges. Either transaction was illegal without the consent of the Director of Lands. .... While the plaintiff did disclose the illegal tenancy her claim for possession is based on the independent and untainted grounds of her registered ownership and she does not have to have recourse to the illegal tenancy to establish her case”.* (underlining mine).

29. Other related cases on ‘Absence of consent’ are as follows-

(i) *Nitya Wati v Hari Shankar and Others- The High Court Civil Action No. 53 of 1994 (Labasa)-*

*In this case, there was no evidence of iTLTB consent having been obtained by either parties. The lease was null and void and the court granted an order for vacant possession to the Plaintiff.*

(ii) *Patrick James Maybin and Another v Majorie Thomas Lavaki- High Court Civil Action No. 46 of 1994 (Suva)-*

*In this case, the court found that where a protected land that is sub-leased without the consent of the Director of Lands (First had and obtained), the sublease was null and void. The court granted an order for vacant possession.*

(iii) *Nair v Devi [2013] FJHC 45- High Court Civil Action No. 2 of 2012 (Labasa)-*

*In this case, the Defendant argued that the non-granting of iTLTB consent as justification for her to remain on the property. The court said that she was incorrect and granted an order for vacant possession.*

30. In light of the above, there was no consent taken from and or given by the iTLTB in relation to the Defendant entering into possession. The subsequent Commercial Tenancy Agreement is therefore null and void. In the circumstances, the Defendant cannot be regarded as a lawful tenant of the Plaintiff. Consequently, the Defendant cannot rely on the Commercial Tenancy Agreement because of its illegality and in turn cannot justify remaining in possession of the Plaintiff's property. The Defendant in the first place, before making any commitment to enter into a Commercial Tenancy Agreement, should have foremost resorted to obtain consent from iTLTB. The reason being, that the Plaintiff being the registered proprietor of the land or native lease in question, cannot sublease the land or lease without obtaining a prior consent from the iTLTB, and failing to obtain any iTLTB consent tantamount to illegal subleasing.

31. The Defendant is of the view that prior consent of the iTLTB should be obtained in order to commence or institute proceedings against the defendant in this case.

Reference is made to the case of *Chandra Prakash Dulare and Another v Sakeo Tuiwainikai- High Court Civil Action No. HBC 13 of 1994* (Suva)- Pathik J said-

*"In these circumstances, I therefore hold that the defendant's entering into possession and the subsequent agreement was an unlawful dealing in land comprised in the Native Land and null and void."*

32. The Defendant Counsel in his submissions informed court that there was a *High Court Civil Action No. 267 of 2015* pending determination of a similar issue and May tantamount to duplicity of orders.

I have personally perused the above court file and found that the Plaintiff Scubahire is the Defendant in that action whilst the Defendant Waisake Eroni Delai Waqaituinayau is the Plaintiff claiming for compensation and other relief and not an order for vacant possession.

The substantive claim in Case No. 267 of 2015 is not claiming for vacant possession, rather in the Defendant's counter-claim no doubt, she claims for vacant possession.

The Defendant must be informed that each case commenced in a court of law is dealt with on its own facts. Therefore, I will proceed to deliberate and make a decision in this case in accordance of the law, accordingly.

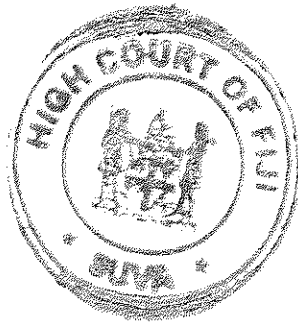
### CONCLUSION

33. I find for the abovementioned rational, that the Defendant has not shown any right to remain on the said property in question nor are there any triable issues. I therefore grant the following orders-

### ORDERS

- (i) That the Defendant to deliver vacant possession of the said property comprised in Native Lease No. 9094 being Lot 2, Nukuwatu Subdivision, situated at 73 Marine Drive, Lami to the Plaintiff.
- (ii) Execution of the enforcement be stayed for one month until 28<sup>th</sup> November, 2015.
- (iii) The Defendant to pay costs to the Plaintiff summarily assessed at \$750 and to be pain within 28 days from today.

Dated at SUVA This 27<sup>th</sup> Day of October 2015.



.....  
**VISHWA DATT SHARMA**  
Acting Master of High Court, Suva