

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

HBC No. 121 of 2014

IN THE MATTER of the property comprised in Certificate of Title No. 9048 containing 163 acres in the district of Rewa land known as Wainikia.

AND

IN THE MATTER of an application by the Plaintiff for an Order for vacant possession under Section 169 of the Land Transfer Act, Cap 131.

BETWEEN : DEO NARAYAN (on behalf of Ajay Ram Maharaj pursuant to Power of Attorney No. 55861 granted on the 4th of February, 2014) of Muaniweni Settlement, Naitasiri, Self Employed.

PLAINTIFF

AND : VIJAY LAL of Wainikia Estate, Farmer.

1ST DEFENDANT

AND : MUKESH LAL of Wainikia Estate, Farmer.

2ND DEFENDANT

AND : RAM JATTAN of Wainikia Estate, Farmer.

3RD DEFENDANT

AND : RANJIT KUMAR of Wainikia Estate, Farmer.

4TH DEFENDANT

AND : SHYAM NARAYAN RUP of Wainikia Estate, Farmer.

5TH DEFENDANT

BEFORE: Master Vishwa Datt Sharma

COUNSELS: Mr. Vosorogo for the Plaintiff
Mr. Raman Singh for the Defendants

Date of Hearing: 09th April, 2015
Date of Decision: 10th November, 2016

RULING

*(Application seeking Vacant Possession pursuant to
S169 of the Land Transfer Act Cap 131)*

INTRODUCTION

1. The Plaintiff filed the **Originating Summons** together with an **Affidavit in Support** on 02nd May, 2014 and sought for the following orders:
 - (a) That the Defendants, its servants, agents and employees and/or occupants give up immediate vacant possession to the Plaintiff of the premises located on the land described as Certificate of Title No. 9048, 163 acres in the District of Rewa in the Island of Viti Levu, otherwise more commonly referred to as Wainikia, ; AND
 - (b) That the costs of this application be paid by the said Defendants.
2. The application was filed pursuant to *section 169 of the Land Transfer Act (LTA), Cap 131*, on the **Grounds** the Plaintiff is entitled to possession and that the Defendants in occupation are in occupation without any **licence or consent**.
3. There are 7 (Seven) affidavits filed before the Court:
 - a) Affidavit in Support of Deo Narayan filed on 02nd May, 2014, ("**Plaintiff's Affidavit**");
 - b) Affidavit in Opposition by and on behalf of all the 5 (five) Defendants ("**Defendant's Affidavits In Opposition**");
 - c) Affidavit in Reply by Deo Narayan filed on 20th August, 2014. ("**Plaintiff's Affidavit**")

4. The proceeding was heard on a defended basis and therefore this court has to determine the pending issue in terms of the laws provided for in **ss169, 171 and 172 of the Land Transfer Act [Cap 131]**.

THE LAW

5. The application is filed in terms of **s.169 of the Land Transfer Act [Cap 131]** which 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) *lessor against a lessee or tenant where a legal notice to quit has been given or the term of the lease has expired."*

6. Pursuant to **section 172 of the Act** the onus is on the **Defendant** to show cause why she refuses to give up possession to the Plaintiff and why an order for possession should not be made against her.

7. 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."

8. 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."

(Underline is mine for emphasis)

9. 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."

10. The requirements of **section 172** have been further elaborated by the Fiji Court of Appeal in **Ajmat Ali s/o Akbar Ali v Mohammed Jalil s/o Mohammed Hanif (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)

11. 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 - 'Under Section 172 of the Act the Judge is required to dismiss the summons if the respondent proves to his satisfaction a right to possession ...'

12. Under **Section 172 of the Act** the judge is empowered to dismiss the summons if the respondent proves to her satisfaction that she 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.
13. 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.'

PLAINTIFF'S CASE

14. The Plaintiff, Deo Narayan instituted this eviction proceedings in his capacity as the **Power of Attorney Holder** of **Ajay Ram Maharaj** who is the Executor and Trustee of the Estate of **Gammu Maharaj** and is the **owner** of all the land known as **Wainikia** more appropriately described as **Certificate of Title No. 9048** containing 163 acres in the District of Rewa.
15. In early May and June 2013, the Attorney caused a letter to the Defendants to quit and give up vacant possession of the said land.
16. Again the Plaintiff's Solicitors wrote to the Defendants on 04th February, 2014 and put them on notice to vacate the said premises.
17. The Defendants continue to live on the said property without any color of right and therefore seek the grant of eviction order as per the summons with costs.

18. Therefore, the Plaintiff is seeking an order for vacant possession against all the Defendants herein.

DEFENDANT'S CASE

19. The **Defendants** have raised **several issues** with respect to the current eviction proceedings filed by the **Plaintiff** and are listed hereunder-
- (i) *Power of Attorney given in personal capacity and not in the capacity of an Executor and Trustee;*
 - (ii) *Absence of Letters of Administration and or Probate in the Application for Eviction by the Plaintiff;*
 - (iii) *Plaintiff is the Executor and Trustee of only seven undivided eighth share of the land comprised in CT 9048;*
 - (iv) *Defendants entitled to stay on the land pursuant to Agricultural Landlord & Tenants Act Cap 270;*
 - (v) *Notice to evict is defective as it is not in compliance with Property Law Act;*
 - (vi) *Action to be maintained by the last registered proprietor of the said land; AND*
 - (vii) *Deo Narayan not authorised to swear affidavit on behalf of Ajay Ram Maharaj expressly stated in the Power of Attorney.*

ANALYSIS and DETERMINATION

20. The question or issue for this court to determine is whether the Plaintiff is entitled to the vacant possession of the premises located on the land described as Certificate of Title No. 9048, 163 acres in the District of Rewa in the Island of Viti Levu, otherwise more commonly referred to as Wainikia in terms of s.169 of the Land Transfer Act Cap 131?
21. In this case, the Plaintiffs must first comply with the requirements of section 169 of the Land Transfer Act cap 131, which are stated hereunder as follows:
- (a) The first requirement or the first limb of section 169 is that the applicant must be the last registered proprietor of the subject land.
 - (b) The **second** is that the applicant be a lessor with power to re-enter where the lessee or tenant is in arrears; and

- (c) *The third is where a lessor against a lessee or tenant where a legal notice has been given or the term of the lease has expired. The second and third limb of section 169 does not appear to apply in that the defendant is not the plaintiff's tenant who is in arrears and/or the term of the lease has expired.*

(Underline for emphasis)

22. In this case, the first limb Test of s169 applies. However, the Defendants herein state that the Plaintiff in the Originating Summons is cited as Deo Narayan pursuant to the Power of Attorney and is wrongly named as the Plaintiff. Further, Ajay Ram is the registered proprietor of CT 9048 in terms of the Transmission by Death, as an Executor and Trustee in respect of the seven undivided eighths shares only of the land. Therefore one eighth undivided eighth share is still being owned by someone else. Therefore, the Plaintiff's Originating Summons is defective as the Plaintiff is seeking an eviction order of the whole of the said land being 163 acres. Since the said land is still undivided, it is really difficult to state as to which defendant is occupying the seven eighth share of the land and which defendant is occupying the one undivided eighth share of the said land. Therefore, there is a dispute in terms of the occupation and the shares of seven and one undivided eighth share of the said land.

23. The Plaintiff has annexed in the Affidavit in Support a copy of the Certificate of Title No. 9048 bearing the photocopy seal of the Registrar of Titles.

The Certificate of Title No. 9048 clearly shows that the Title was transferred by Transmission by Death to "Ajay Ram" in his capacity as an Executor and Trustee, pursuant to Folio No. 217712 on 24th April, 1992.

24. The Defence Counsel amongst other issues, raised-

- (a) That the issue that the Power of Attorney given by Ajay Ram Maharaj is in his personal capacity and not in the capacity of an Executor and Trustee;

The Defendant stated "that the Plaintiff Deo Narayan has no locus to institute the proceedings before the Court as the Annexure Marked "DN1" in the Affidavit in Support sworn by Deo Narayan on 9th April 2014 and filed on the 2nd May 2014 being the Power of Attorney has been given by Ajay Ram Maharaj in his personal capacity and not in the capacity of him being the Executor and Trustee in the Estate of Gammu Maharaj. "

It was obvious from the above that a challenge was raised by the Defence Counsel whether the Power of Attorney given by Ajay Maharaj to the Plaintiff, Deo Narayan empowered the Plaintiff Deo Narayan and had that he had the locus standi to institute this action on behalf of the Executor and Trustee, Ajay Maharaj?

In countering the same, the Plaintiff submitted 'The Power of Attorney document specifically gives the Plaintiff the right to commence proceedings on behalf of the Donee in any matters which the Donee may be interested in and to take these proceedings to judgment, inter alia. He referred Court to clause 16 of the case authority of Richard RYAN Macdonald-v- Anare Sovanivalu, Suva HBC 189 of 2011 where the Court stated' *the said document grants the Plain inter alia to do any acts that Mr. Andres could do..'*

The Plaintiff further submitted that the challenges argued by the Defendants in their affidavits do not hold any merits. Therefore, the Plaintiff has the express power granted to him under the Power of attorney.

The Court directed itself to provisions of **Section 118 of the Land Transfer Act, Cap 131** which specifically allows a registered proprietor of any land to appoint a Power of Attorney on his behalf and upon its registration to execute transfers on behalf of the registered proprietor. The aforesaid section 118 is reproduced hereunder:

Registered proprietor may deal by attorney:

'118. 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 or specially, authorise 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 document required under the provisions of this Act, or to make any application to the Registrar or to any court or judge in relation thereto.'

Further, **Section 119** of the same Act provides as hereunder that a Power of Attorney which is intended to be used for the purposes under the **Land Transfer Act** must be registered with the Registrar of Titles-

'119. Every power of attorney intended to be used under the provisions of this Act, or a duplicate or certified copy thereof, verified to the satisfaction of the Registrar, shall be deposited with the Registrar who shall register the same by entering in the register to be known as the "Powers of Attorney Register" a memorandum of the particulars therein contained and of the date and hour of its deposit with him.'

It is apparently clear from the above provisions of the **Land Transfer Act** that it is not a bar for the execution of a Power of Attorney by a Registered Proprietor. However, upon a careful examination of the Power of Attorney used herein by the Plaintiff I note the following-

- (i) It is pertinent to consider the nature and the validity of the Power of Attorney used in the current proceedings. A Power of Attorney is an Instrument used for construction of authority and which confers authority according to the well-established rules. The rule, that words are to be construed according to their natural meaning, has in fact been described as the 'Golden Rule of Construction.' The crux of the above principle is that the Court should give effect to the words used by the parties and there is little scope for the Court

to seek to reconstruct in words or its own the contract which it thinks the parties in fact intended.' Case of Luxor Eastborne Limited & Others v Cooper 1 ALL E.R. 33 at page 52 refers.

- (ii) That the Certificate of Title No. 9048 confirms Ajay Ram as the Executor and Trustee of the Estate of Gammu Maharaj and the same was acquired by him through the Deceased's Will upon a Cessate Grant issued to him on 01st February, 1983. Therefore Ajay Ram in pursuant to the Cessate Grant empowers him to administer the Deceased's Estate as an Executor and Trustee and in Law in the interim is the Registered Proprietor of the said Title which would empower him to distribute the Deceased's Estate according to the Deceased's Will. Thus, the Power of Attorney given by the Registered Proprietor, Ajay Ram, is given in his personal capacity to Deo Narayan as the Plaintiff in the current case and not as an Executor and Trustee since it reads 'I Ajay Ram Maharaj of 7778 Mancha Way, Sacramento, CA 95823, Businessman.' The words 'Executor and Trustee' does not appear on the Power of Attorney and therefore this Court cannot reconstruct these words "Executor and Trustee" into the Power of Attorney to give effect to the same as intended by Ajay Ram Maharaj.

I also note the fact that each of the Defendants in this proceedings were issued with the Notice to Evict and give immediate vacant possession by the Executor and Trustee, Ajay Ram and not the Plaintiff, Deo Narayan., who was already appointed as the Power of Attorney holder executed on 24th November, 2013 and subsequently registered with the Registrar of Titles on 04th February, 2014, the date the Notices were issued on the instructions of Ajay Ram.

- (iii) Further, the Power of Attorney annexed within the Affidavit in Support deposed by the Plaintiff, Deo Narayan is a photocopy of the copy document, not even a duplicate or a certified copy and or verified to the satisfaction of the Registrar as per the requirements of the provisions of *Section 119 of the Land Transfer Act, Cap 131*.

For the aforesaid rational, I find that that Ajay Ram in his capacity as the Executor and Trustee in the Deceased Estate of Gammu Maharaj to which the Certificate of Title No. 9048 refers did not give the Power of Attorney to the Plaintiff Deo Narayan in his capacity as an Executor and Trustee to carry out the responsibilities as enumerated therein on his behalf in the Estate of Gammu Maharaj. It is evidently clear that it was given in his personal capacity as a Businessman. The Document in itself is self-explanatory and no interpretation as such of the document is required. The Plaintiff Deo Narayan therefore does

not have the 'Locus Standi' to bring or commence this action against the Defendants accordingly.

Reference is made to the case Supreme Court Case of Lok v Ram [2014] FJSC 4; CBV001.2013 94 April 2014), whereby the Court explained the meaning of 'locus standi' as follows-

'The concept of locus standi connotes the meaning of 'standi'. The Plaintiff must have such interest in the matter to which her claim relates. Where a person has no interest at all or no sufficient interest to support a particular legal claim or action, such person will not have locus standi and thus no standing to sue another person. In other words, it is a threshold to give standing to sue'.

25. The Plaintiff for the purposes of section 169 is not the last registered proprietor of the said premises located on the land described as Certificate of Title No. 9048, 163 acres in the District of Rewa in the Island of Viti Levu, otherwise more commonly referred to as Wainikia.
26. Accordingly, the Plaintiff, Deo Narayan, does not have the locus standi to commence or bring this proceeding against the Defendants. The Plaintiff has failed to establish the first limb test of section 169 *that the applicant is the last registered proprietor of the subject land. (The Plaintiff in this case, Deo Narayan through the Power of Attorney given in his personal capacity by Ajay Ram Maharaj to him is not in his capacity as the Executor and Trustee of the Estate of Gammu Maharaj) (underlined emphasis in bold is mine).*
27. Since the Plaintiff did not have any locus standi to commence this proceedings, because he is not the Registered proprietor or has any interest and does not have the appropriate powers given to him in terms of the Power of Attorney Document by Ajay Ram Maharaj as an Executor and Trustee, would it be appropriate for this Court then to dismiss this action since the onus now of showing cause why the Defendants should not give vacant possession in this case does not shift to the Defendants in terms of section 172 of the Land Transfer Act, Cap 131?

Alternatively, should the Court go further and deal with the other issues raised by the Defendants since they are all more or less interrelated or interlinked with each other including the first issue, and therefore is it appropriate to complete deliberation on all the remaining issues raised hereinabove accordingly?

28. In the interest of Justice, it would be appropriate for me to deliberate on the remaining issues raised by the Defendants for the sake of the completeness since it will allow me to deal with the current proceedings in its entirety.
29. The remaining issues raised by the Defendants are as follows-

- (b) That there was an absence of Letters of Administration and or Probate in the Application for Eviction by the Plaintiff- (This could have been grouped together with issue (a) rather dealt with separately).

The Defendants stated that no Letters of Administration and or Probate has been annexed with the Affidavit in Support to substantiate that Ajay Ram Maharaj is the Executor and Trustee of the Estate of Gammu Maharaj as annexure marked "DN2" specifies that a Transmission by Death has been registered by Ajay Ram as the Executor and Trustee and not Ajay Ram Maharaj.

The Plaintiff referred Court to section 93 of the Land Transfer Act Cap 131- (reproduced hereunder), which deals with Transmissions and persons claiming under transmission may be registered and empowers the Donor to exercise his powers as Executor and Trustee through his Attorney the Plaintiff, to evict the Defendants. Hence, by law the Donor Executore and Trustee has the absolute proprietorship of the said property.

93.-(1) Any person claiming to be entitled to any estate or interest in land subject to the provisions of this Act by virtue of any transmission, whether as the result of the death of the registered proprietor of such estate or interest or otherwise, may make application in the prescribed form to the Registrar to be registered as the proprietor of such estate or interest.

(2) Every application made under the provisions of subsection (1) shall be signed by the applicant and attested by a qualified witness and shall accurately define the estate or interest claimed by the applicant, and shall state that he is entitled to the estate or interest in respect of which he is applying to be registered as proprietor; and the statements in such application shall be supported by the production to the Registrar of the original or certified true copies of all documents under which the applicant claims to be entitled to such estate or interest.

(3) If on any application made under the provisions of subsection (1), and upon the evidence adduced in support thereof, the Registrar is satisfied that the applicant is entitled to the estate or interest claimed, the Registrar shall register the applicant as the proprietor thereof, and the person so registered shall hold such estate or interest subject to all equities affecting the same, but for the purpose of any dealing therewith shall be deemed to be the absolute proprietor thereof.

(4) The title of every personal representative of a deceased proprietor registered under the provisions of this section shall relate back to and take effect from the date of death of the deceased proprietor.

This Court agrees with the contention of the Defendants that there is no evidence of any Grant of Letters of Administration and or Probated annexed within the Plaintiff's application. However, this Court has taken the judicial notice of the fact that the Certificate of Title No. 9048 shows evidence that-

'Ajay Ram' by Transmission by Death on 24th April, 1992, acquired the right to administer the Deceased's Estate as an Executor and Trustee.

However, the Court always need evidence, documentary or otherwise of any Grant issued to Ajay Ram Maharaj so that he is able to substantiate to the Court that Ajay Ram Maharaj is the Executor and Trustee of the Estate of Gammu Maharaj. There appears to be a missing link or chain in terms of the evidence as to the empowerment granted by any Grant issued by the Court to Ajay Ram Maharaj. I find that there is absence of the black and white and or documentary evidence of any Grant issued to Ajay Ram Maharaj on the file.

(C) The issue that the Plaintiff is the Executor and Trustee of only seven undivided eighth share of the land comprised in CT 9048:

The Defendants further submitted that the Certificate of Title No. 9048 annexed in the Plaintiffs Affidavit in Support as "DN2" is a certificate of title for only seven undivided eighths shares only as such one eighth undivided share is still being owned by someone else. Therefore the Plaintiff's Originating Summons is defective as the Plaintiff is seeking an eviction of the whole said land being 163 acres. Since the said land is not subdivided it is really difficult to state as to which defendant is occupying the seven eighth share of the said land and which defendant is occupying the one undivided eighth share of the said land.

The Plaintiff's contention was and submitted that the Defendants are not challenging his proprietorship. They are simply challenging the Donee's precision or ability to evict or issue eviction proceedings and have not provided any evidence of these assertions. They further say that it does not matter which part of the land the person occupies as long as it is clear that they are on the land the eviction notice is detailed to let them know that it is a notice to evict all and any part of the land on the title, and after the issuance of eviction notices they have no color of right to remain on the property.

The Plaintiff added that the Defendants upon payments made to the Estate of Gammu Maharaj, the receipts attached in the Affidavits of the five Defendants is self-evident itself that the Defendants accepted that the land that they occupy belongs to the Estate of Gammu Maharaj aka Gammu Singh, whereby the Donor is the Executor and Trustee of the Estate.

This Court has very carefully examined the Certificate of Title No. 9048 marked as anneture 'DN2' of the Plaintiff's Affidavit in Support, with regards to which the Plaintiff seeks eviction of the Defendant. The front page of the Certificate of Title states - 'seven undivided eighths share only of that piece of land known as 'Wainikia" and containing 163 acres.' There seems to be an issue existing which needs to be dealt with in a Trial proper where the evidence of the parties to the proceedings and the

appropriate witnesses can be tested to deal with the issue raised herein. This is only possible by a Writ Action and not the current pending Originating Summons.

- (d) The issue that the Defendants contention is that the Defendants are entitled to stay on the land pursuant to Agricultural Landlord & Tenants Act Cap 270:

The Defendants submitted that it is not in dispute by the Plaintiff that the Defendants have been residing and farming on the said land for a long time. The Affidavit in Support and the Affidavit in reply filed by the Plaintiff. It is also not in dispute that each of the Defendants have been occupying and farming on more than 15 acres of the said land. The circumstances presented by the Defendants that they have been occupying a land of more than 1 hectare in which they have been residing and farming this particular fact is not disputed by the Plaintiff in their Affidavit in Support or in their Affidavit in Reply. Each of every defendant satisfies the interpretation section of agricultural land.

Each tenant had agricultural tenancies as evidenced by their occupation, cultivation and payment of rent in terms of Section 4 of the Act deals with the Presumptions with regards to tenancies.

They further submitted 'that all the Defendants have been occupying the said land for more than 2 decades (notice of eviction issued by Plaintiff in person dated 21 May 2013 paragraph 1 states two decades) and has been cultivating the said land for a period of more than 3 years and the landlord late Mr. Gammu Maharaj took no steps in evicting the Defendants and he even failed to satisfy that the occupation was without his consent saying so it is clear that a presumption of tenancy existed and is still existing.'

'The Defendants have also fully satisfied section 4 (2) of the Agricultural and Landlord Tenants Act in the sense that payments in money were paid to the landlord receipts are enclosed in the Affidavit in Oppositions of all the Defendants to prove that as such the amount received by the landlord can be presumed to be rent.'

The Plaintiff submitted 'that the land in the current action is registered as a Freehold land as is evident as per annexure 'DN2". The Defendants have knowledge that they are residing on the property on a temporary basis. Adding on, they state that Section 8(3) of the Agricultural Landlord and Tenants Act clearly provides that the instrument of tenancy shall be signed by both parties and shall be registered in accordance with the Land Transfer Act or as Deeds under the provisions of the Registration Act. There is no instrument of tenancy that was created between the parties, no evidence of instrument of to the Registration Act. The land is not an agricultural land, as there is no instrument of tenancy registered to the said land.'

After a careful consideration of the above and taking the recognizance of the Certificate of Title for which the eviction order is being sought, there is a legal question and issue to be dealt with and is only possible by testing the evidence in a trial proper and not by a summary proceedings or affidavit evidence as is presently sought in this case before me.

- (e) The Defendants state that the Notice to evict is defective as it is not in compliance with Property Law Act:

The Defendants submitted 'that the Notice to evict and give vacant possession issued by the Solicitors which is marked and annexed as annexure "DN10" in the Affidavit in Support sworn by Deo Narayan is defective as the notice only gave 14 days to the Defendants to evict the said land.

As far the notice issued by the Trustee and other two owners of the said land (Indar V. N Mahraj & Om Prakash Gaumukh Maharaj) dated 21 May, 2013 gives 36 months (3years) for the Defendants which is deemed to expire on the 21st May, 2016 to remove their houses and any other structures they may have on the said land for the new owners to fully utilize the land. The notice further allows the Defendants that they will only be allowed to have 20 feet of space for their survival till 2016 for which they will be charged \$100 being the rate.

In both the notice one issued by the Plaintiffs Solicitor and the Plaintiff in person are defective in the sense that the notice given by the Solicitors for the Plaintiff is not in compliance of the Property Law Act and the Notice issued by the Plaintiff has not expired to allow the Plaintiff to issue a legal proceedings against the Defendants.'

According to the Defendants, they were yearly tenants of the Plaintiff as such under section 89 (2) (a) of the Property Law Act the Plaintiff was required to give a 6 months' notice to evict which the Plaintiffs Solicitors have failed to do so as such the Application filed by the Plaintiff for vacant possession is unsustainable as it is not in compliance of the law.

The Defendants further says 'that the notice to evict is also defective on the ground that the notice to evict fails to include the names of all the beneficial owners of the said land.

The Certificate of Title is for seven undivided eighth shares only as such only three people have consented to give a notice to evict. A *fortiori* where the nature of the registered proprietor's interests in the land is one of "undivided tenants in common".

The Plaintiff stated that 'the Notice issued by the Plaintiff's Solicitors was a proper Notice, as it was a second Notice served to the Defendants, which was served due to non-payment of arrears owed by the Defendants to the Plaintiff.

Again there is a dispute raised by both parties to the proceedings together with a question of law in terms of section Section 89 (2) (a) that deals with Termination of Tenancies.

Section 89(2) (a) states-

'89 (2) In the absence of express agreement between the parties, a tenancy of no fixed duration in respect of which rent is payable weekly, monthly, yearly or for any other recurring period may be terminated by either party giving to the other written notice as follows -

'Where the rent is payable yearly or for any recurring period exceeding one year, at least six months' notice at the end of any year of the tenancy.'

This dispute raised hereinabove whether the Notice was defective in its nature issued in terms of section 89(2) of the Property Law Act and whether only three people have consented to give a notice to evict when the Certificate of Title is for seven undivided

eight shares only? The Court would need to test the evidence in terms of the issue raised and is only possible at a hearing proper and not by summary proceedings on affidavit evidence.

- (f) Action to be maintained by the last registered proprietor of the said land: *(This could have been grouped together with issue at (a) above, rather dealt with separately).*

The Defendants contention is that the Certificate of Title Annexed as "DN2" in the Affidavit in Support of the Deo Narayan filed on 2nd May 2014 reveals that the Certificate of Title No. 9048 is a certificate of Title for seven undivided eighth share only. The last registered proprietor for the said land was Gammu Singh however after the death of Gammu Singh a Transmission by death has been endorsed on the memorial of the title on the 24th of April, 1992. The action for eviction has been instituted by Deo Narayan on behalf of Ajay Ram Maharaj pursuant to the Power of Attorney No. 55861 which is annexed and marked as Annexure "DN1" in the Affidavit in support of Deo Narayan. As discussed above in part (a) the power of attorney fails to state the words that Ajay Ram Maharaj is giving power of attorney as the Executor and Trustee in the estate of Gammu Maharaj to Deo Narayan.

The consent to institute the eviction proceeding by the remaining one undivided eighth share of the said land is not provided in the Affidavit in Support of Deo Narayan knowing really well that the Certificate of Title No. 9048 is for seven undivided eighth share.

As such there is nothing mentioned in the Certificate of Title which could lead one to believe that the Plaintiff is the last registered proprietor of the said land he seeks possession of? Thus in so far the executor and trustee in the estate of Gammu Maharaj the administrator is to administrate 7 undivided 8th share in the said land and if he wants possession under section 169 (a) he must be joined by his remaining co-owner being the owner of one undivided eighth share to seek possession of the whole 163 acres of land.?

The Plaintiff stated that section 93 of the Land Transfer Act Cap 131 empowers the Donor to exercise his powers as Executor and Trustee through his Attorney the Plaintiff, to evict the Defendants and by law, the Executor (or) has absolute proprietorship of the said property. He also repeats paragraphs 32 and 33 of the Plaintiff's Preliminary Submissions which I will not reiterate since it is on the file record and has been taken into consideration.

This is once again an issue and also a dispute which needs consideration and determination at a full hearing and is only possible by testing the evidence.

- (g) Deo Narayan not authorised to swear affidavit on behalf of Ajay Ram Maharaj expressly stated in the Power of Attorney: *(This could have been grouped together with issue at (a) above, rather dealt with separately).*

According to the Defendants, 'the issue that has arisen here is that whether Deo Narayan has necessary power to swear an affidavit on behalf of Ajay Ram Maharaj?

The Affidavit in Reply sworn by Deo Narayan at Paragraph 4 (a) deposes that power of attorney given to Deo Narayan by Ajay Ram Maharaj specifically allows Deo Narayan to

institute proceedings on any matter that concerns the Donee's (Ajay Ram Maharaj) interest.

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.1 of the power of attorney which is annexed as "DN1" to the Affidavit in Support OF Deo Narayan reads:

"to commence 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 also if thought fit to compromise refer to arbitration abandon submit to judgment or become non suited on any such action or proceeding as aforesaid".

Clause 2 further reads;

"and also to enter into make sign seal execute deliver acknowledge and perform any contract agreement deed instrument writing or thing that may in the opinion of my said attorney or attorney be necessary or proper to be entered into made signed sealed executed delivered acknowledged or performed for effectuating the purposes herein mentioned or any of them.

Clause 3 reads;

"And generally to do execute and perform any other act deed matter or thing whatsoever which ought to be done executed or performed or which in the opinion of my said attorneys or attorney ought to be done executed or performed in or about my concerned engagement and business or every nature and kind whatsoever as fully and effectually to all intents and purposes as I myself could do if I were present and did the same in my proper it being by intent and desire that all matters instruments and things respecting the same shall be under the full management and direction of my said attorneys or attorney".

'It is quite surprising to note that the Power of Attorney provided by Ajay Ram Maharaj does not give power to Deo Narayan to institute legal proceedings under his name as per Clause 1 Deo Narayan to commence legal proceedings, the clause does not specify whether the action and or proceedings can be instituted under his own name.'

Further, he stated that 'another issue that has arisen here is that whether the Attorney has necessary power to swear an affidavit on behalf of Ajay Ram Maharaj. It is to be noted here that the Attorney has commenced a legal proceeding under his own name on behalf of Ajay Ram Maharaj and has sworn an affidavit on behalf of Ajay Ram Maharaj exercising his power and authorities which were not granted as per the Power of Attorney.'

The Plaintiff referred Court to section 93 of the Land Transfer Act, Cap 131 and states 'that as Administrator, the Donee has locus to personally institute proceedings or by valid instrument of delegation, like annexure 'DN1" (the Power of Attorney) to the Plaintiff. By law, the administrator has absolute proprietorship of the said property and his proprietorship in law dates back to the date of the death of the deceased proprietor. Having settled the Donee's locus by operation of law above, the Plaintiff's right to institute proceedings has been addressed through these submissions in paragraph 9 - 13. (Court has taken notice and consideration of the same).

I reiterate what was discussed at paragraph 23 hereinabove. The Power of Attorney is given by Ajay Ram Maharaj in his personal capacity as a Businessman and not in his capacity as an Executor and Trustee of the Estate of Gammuj. The application to evict the Defendants from the Certificate of Title No. 9048 is the Estate property of Gammu Maharaj. The Plaintiff, Deo Narayan does not have any interest or can derive any authority or power from the Power of Given by Ajay Ram Maharaj in his personal capacity to exercise jurisdiction to institute the present proceedings.


30. To summarise; Firstly, I find that the Plaintiff Deo Narayan does not have the locus to institute the present proceedings since the Power of Attorney given to him is not in the personal capacity of the Executor and Trustee Ajay Ram Maharaj in the Estate of Gammu Maharaj to which the Certificate of Title No. 9048 refers. Secondly, there are several triable issues in this case which can only be determined by testing the evidence of the available witnesses coupled with the documentary evidence at a full hearing and not by the current summary proceedings before this Court.
31. For the aforesaid rational, I proceed to make the following orders.

FINAL ORDERS

- A. The Plaintiff's Originating Summons is hereby Dismissed.
- B. The Plaintiff to pay Costs to each of the Defendants summarily assessed at \$300 and to be paid within 14 days.

Dated at Suva this 10th day of November, 2016




MR VISHWA DATT SHARMA
Master of High Court, Suva

cc: Mamlakah Lawyers, Suva
Kholi & Singh, Suva