

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 114 of 2015

IN THE MATTER of Section 169 of
the Land Transfer Act [Cap 131] for an
order of vacant possession.

BETWEEN : **HOUSING AUTHORITY** a body corporate duly constituted under the
provisions of the Housing Act and having its registered Head Office at Valelevu.

PLAINTIFF

AND : 1. **JOSEFA VOSA** and family
2. **JOSHUA TULAVU** and family
Both of Lot 2 on DP 4233, Bauka Place, Nadera.

DEFENDANTS

BEFORE: Master Vishwa Datt Sharma

COUNSELS: Ms. Vasiti - for the Plaintiff
Mr. Koroi - for the 1st Defendant
No Appearance of 2nd Defendant

Date of Hearing: 18th November, 2015

Date of Ruling: 06th July, 2016

RULING

*(Application seeking Vacant Possession pursuant to
S.169 of the Land Transfer Act Cap 131)*

INTRODUCTION

1. On the outset, it is rather important for record purposes that I state by consent of Defendant No.2 (Joshua Tulavu), this Court on 25th May, 2015 made an order for vacant possession. Execution was suspended till 25th June, 2015.
2. This application proceeded to Hearing against **Defendant No, 1 Josefa Vosa** only.
3. The Plaintiff by their **Amended Originating Summons** dated 20th April, 2015 is seeking that the Defendants do **show cause why they should not hand over vacant possession to the Plaintiff** of the portions of the said **open reserved land situate at Bauka Place, Nadera Subdivision and comprised in Headlease No. 12551 and to remove their illegal lean-to-dwelling** therefrom on the grounds set forth in the affidavit of Sisilia Rakesa together **with costs** of and incidental to this application and **Police Assistance for vacant possession**.
4. There are 3 (Three) affidavits filed before the Court:
 - a) Affidavit in Support of Sisilia Rakesa sworn on 05th March, 2015 ("**Plaintiffs Affidavit**");
 - b) Affidavit in Reply of Josefa Vosa (D1) sworn on 28th May, 2015 ("**Defendant (D1) Affidavit**");
 - c) Affidavit in Reply of Josefa Vosa sworn on 11th June, 2015 ("**Defendant (D1) Affidavit**").
5. This case proceeded to hearing on a **defended basis** and both parties to the proceeding made oral/written submissions at the hearing.
6. 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

7. 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."*
8. Pursuant to **section 172 of the Act** the onus is on the Defendant to show cause why he refuses to give up possession to the Plaintiff and why an order for possession should not be made against him.
9. The Plaintiff is the **registered owner** as a **Lessee** in this instant case. The term "**Lessee**" is defined as proprietor of a Lease or sub lease in the Land Transfer Act. Therefore, the term "**Lessee**" follows within the ambits of **section 169** application.
10. 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."

11. 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)

12. 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."

13. 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)

14. 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 ...'

15. Under **Section 172 of the Act** the judge is empowered to dismiss the summons if the respondent proves to his 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.
16. 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

17. The Plaintiff's Affidavit filed in this case deposed as follows:

- (i) *That she is informed and verily believe that the Housing Authority is the registered proprietor of 11 that portion of the open reserved land situate at Bauka Place, Nadera Subdivision (hereinafter referred to 'the open reserved land') and comprised in Headlease No. 125551. A certified true copy of the said Lease is attached hereto and marked 'A'.*
- (ii) *That she is informed and verily believe that the Defendants are squatters occupying the portions of the said open reserved land and the Defendants have been squatting for the last 10 to 20 years.*
- (iii) *That the Defendants have illegally erected on the said portion of the open reserved land lean-to-swellings without a licence, right or consent from the Plaintiff and therefore are trespassers-at-law.*
- (iv) *That the open reserved land that is subject to this litigation is Lot 2 on DP, 4233 and highlighted in orange is the portion wherein the Defendants are squatting presently. Annexed hereto and marked 'B' is a copy of registered survey plan.*
- (v) *That she is informed and verily believes that due to the improper sewerage inspection chambers and improper drainage, the Defendants are causing wastewater discharges in a manner currently posing harmful and dangerous health risk and have become a daily health risk to the neighbouring resident.*
- (vi) *That she is informed and verily believe that Defendants share a common washroom and toilet facility which is highly unhygienic.*
- (vii) *That she is informed and verily believe that the neighbouring resident are getting different kind of skin diseases and are fed up with the stanch smell of wastewater discharges going into their area. The affected neighbouring resident's from yard is always soggy from the Defendants' waste water discharges. Further the Defendants throws heir rubbish down and are nuisance to the affected neighbouring resident. Annexed hereto and marked 'C' emails received from the affected neighbouring resident.*

- (viii) That she is informed and verily believe that the Plaintiff has never accepted any rent from the Defendants for the portion of the said **open reserved land** occupied by the Defendants.
- (ix) That she is informed and verily believes that the Plaintiff has not authorised anyone else to collect rent for the portion of the said **open reserved land** occupied by the Defendants or to lease the portion of the said **open reserved land** illegally by the Defendants on its behalf on its behalf.
- (x) That by Notices to Quit dated 20th day of December 2014 requesting the Defendants to deliver up vacant possession to the Plaintiff and remove their illegal lean-to-dwellings therefrom. Copies of the said Notices are marked 'D' and 'E' respectively and annexed hereto.
- (xi) That the defendants have failed to deliver up vacant possession of the portion of the said **open reserved land** and the removal of their illegal lean-to-dwellings therefrom and continue in unlawful occupation of same.
- (xii) That the Plaintiff requires the Defendants to vacate the portion of the said **open reserved land** situate at Bauka Place, Nadera Subdivision and to remove their illegal lean-to-dwellings therefrom.
- (xiii) The she hereby prays that an Order in terms of the Summons filed herein be made in favour of the Housing Authority, the Plaintiff.

Defendants' Case

18. **The Affidavit deposed by Defendant Josefa Vosa states as follows:**

- (i) That he cannot admit or deny paragraph 1 and 2 as they are is privy to the plaintiff.
- (ii) That he takes issue with the plaintiff at paragraph 3 and says that he has been constantly going to the Housing Authority for the lease of the said piece of land so as to legalize their stay there and he was upon the verge of achieving the same when one Verenaisi Tuvuki-Raicola made false accusations against him and his family which had triggered this proceedings. Annexed hereto and marked 'JV 1' is a copy of his reply to the plaintiff's Notice to Quit.
- (iii) That he denies paragraph 4 and have this to say: before he occupies the area and built his lean-to-house 22 years ago so that he can raise his children and send them to school, he had first attended to Housing Authority to explain that

he would be on the said piece of land on temporary basis until the plaintiff will want to use it.

- (iv) That he partially admits paragraph 5 but not for squatting and reiterated his averments in paragraph 3 above.
- (v) That he denies paragraph 6 and say that he has liaised with the relevant authorities including the plaintiff in trying to rectify the issues raised.
- (vi) That he denies paragraph 7 and put the plaintiff to strict proof.
- (vii) That he denies paragraph 8 and put the plaintiff to strict proof. Annexed hereto and marked 'JV 2' is his submission to the learned Resident Magistrate at the Nasinu Magistrates' Court dated 4th April, 2015.
- (viii) That he cannot deny or admit paragraph 9 as they are privy to the plaintiff.
- (ix) That he cannot deny or admit paragraph 10 as they are privy to the plaintiff.
- (x) That he admits paragraph 11.
- (xi) That he takes issue with the plaintiff at paragraph 12 and repeat his averments in paragraphs 5 here-above.
- (xii) That he denies paragraph 13 and say that there are 4 other families staying in the area with the same status as him and yet they have not been not given notices.
- (xiii) That he denies paragraph 14 and **Prays** that the Summons filed by the plaintiff be dismissed and he has this to say to **Show Cause** why he should not evicted.
 - (a) That he understands and he verily believes that the government through the plaintiff is identifying a piece of land to relocate them in the near future and he has been reliably informed of the same.
 - (b) That he reads in one of the dailies at the 3rd page of Thursday 21st May 2015 Fiji Sun about the piece of land for relocation and he looks forward with high hopes toward he fulfilment of having a piece of land for his family. Attached and marked 'JV 3' is a copy of the newspaper extract.
 - (c) That he therefore prays that they be allowed time until the said planned relocation is carried out.
 - (d) That in the meantime, he adhere to the plaintiff and the Nasinu Town Council directives as regards to health and sanitation at Lot 2 Bauka Place, Nadera.

ANALYSIS and DETERMINATION

19. The question for this court to determine is **whether the Plaintiff is entitled to the vacant possession of the portions of the said open reserved land situate at Bauka Place, Nadera Subdivision and comprised in Headlease No. 125551 and whether Defendant No. 1 should remove his illegal lean-to-dwelling together with costs of and incidental to this application and Police Assistance for vacant possession, of which the Plaintiff is the registered proprietor of in terms of s.169 of the Land Transfer Act [Cap 131]?**
20. 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)*
21. In this instance, **the first limb of s169 applies; the plaintiff is the last registered proprietor of the portions of the said open reserved land situate at Bauka Place, Nadera Subdivision and comprised in Headlease No. 125551.**
22. In this respect the plaintiff has annexed in her affidavit a certified true copy of the **Headlease No. 125551.**

The **Headlease No.125551** clearly shows that the **Headlease** was registered to the Plaintiff on 28th September, 1972 at 11.25 am.

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23. The Plaintiff is for the purposes of section 169 the **last registered proprietor** of the portions of the said **open reserved land situate at Bauka Place, Nadera Subdivision and comprised in Headlease No. 125551.**
24. After the Plaintiff has established the **first limb test of section 169** that is that the Plaintiff is the **registered proprietor** of the portions of the said **open reserved land situate at Bauka Place, Nadera Subdivision and comprised in Headlease No. 125551**, then the **Defendant** bears the **onus of showing cause** as to why **vacant possession** should not be granted to the **Plaintiff.**
25. Pursuant to *section 172 of the Land Transfer Act Cap 131*, **Defendant No. 1** needs to satisfy this court on affidavit evidence that he has a right to possession. (Case of *Muthusami v Nausori Town Council F.C.A. 23/86* refers).
26. There is no need to prove conclusively a **right to possession** and it is sufficient for the **Defendant** to prove that there is **some tangible evidence** establishing the existence of a right or of an **arguable defence.** (Case No. **152 of 1987-Morris Hedstrom Ltd v Liaquat Ali** refers).
27. Defendant No. 1 in his Affidavit In Reply has stated that he took issue with the Plaintiff at paragraph 3 and said that he has been constantly going to the Housing Authority for the lease of the said piece of land so as to legalise their stay there and he was upon the verge of achieving the same when one Verenaisi Tuvuki Raicola made false accusations against him and his family which had triggered this proceedings.
28. *Sections 39-42 of the Land Transfer Act*, 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).

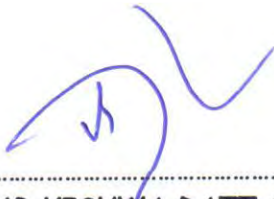
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29. **Section 39(1) of the Land Transfer Act** simply states that a **registered title** is deemed paramount and is not affected or defeated by an unregistered interest except in case of **fraud**.
30. Once the hearing in this matter was concluded on 18th November, 2015, the Defence Counsel representing the 1st Defendant requested Court to defer the Ruling to mid 2016. When Court enquired into the reason, Counsel said *'that he may be relocated which he could gather from the two correspondence from the Housing Authority'*. This in itself is an indication to Court that 1st Defendant was aware that he was in an unlawful occupation of premises and needed to either vacate the premises or be relocated accordingly.
31. Bearing in mind the above, I find that the Plaintiff is the registered **proprietor** of the portions of the said **open reserved land situate at Bauka Place, Nadera Subdivision and comprised in Headlease No. 125551**. The Defendant therefore has the locus standi to bring this action against the Defendant seeking an order for vacant possession.
32. The **Defendant** was served with a **Notice to Quit** on 29th December, 2014 and subsequently served with an **Originating Summons** seeking an order for **Vacant Possession** as per the requirement of the law.
33. The **Defendant** has failed to show any cause including *a right to possession* or has *tangible evidence establishing a right or supporting an arguable case for such a right* that must be adduced in terms of *section 172 of the Land Transfer Act, Cap 131*.
34. There is accordingly nothing in **section 172** which requires an automatic order for possession unless "**cause**" is immediately shown.
35. Following are the final orders of this court.

FINAL ORDERS

- A. Defendant No.1 to give vacant possession to the Plaintiff of the portions of the said open reserved land situate at Bauka Place, Nadera Subdivision and comprised in Headlease No. 12551 in one months' time, on or before 06th August, 2016.
- B. Defendant No.1 to remove his illegal lean-to-dwelling therefrom in one months' time, on or before 06th August, 2016.
- C. Defendant No. 1 to pay the Plaintiff Costs summarily assessed at \$1,000.
- D. Fiji Police to provide all assistance necessary when enforcement of vacant possession is being carried out.
- E. Execution is hereby suspended till 06th August, 2016.

Dated at Suva this 06th day of July, 2016




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MR VISHWA DATT SHARMA
Master of High Court, Suva

cc. *Lajendra Law, Suva*
Koroi Law, Nausori