

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 125 of 2014

IN THE MATTER of Part XXIV of section 169 of the
Land Transfer Act Cap 131.

BETWEEN : **SUNIL DUTT KRISHNA** of Wainibokasi, Nausori,
Taxi Driver.

PLAINTIFF

AND : **PAULA TAVAKINABOU** of Wainibokasi, Nausori.

DEFENDANT

Counsel : Ms. Karan, N. for the Plaintiff
Ms. Raikaci, N. for the Defendant

Before : Acting Master S. F. Bull

Judgment : 1 February 2016

JUDGMENT

Introduction

1. The Plaintiff in this action seeks an order for the Defendant to give up vacant possession of Crown Lease No. 13872, described as LD 4/14/2522 being land known as Lot 1 on T.L 1823 Viruka No. 2 Subdivision, Nakelo, Tailevu which is currently being occupied by the Defendant.

The affidavits

2. In support of the application is an affidavit sworn by the Plaintiff, deposing the following:

- He is the registered proprietor of the land described in Crown Lease 13872 being land described as LD 4/14/2522, known as Lot 1 on T.L. 1823 Viruka No. 2 Subdivision, Nakelo, Tailevu. A copy of the Crown Lease is annexed and marked A.
- From 2005, the Defendant occupied the property on a verbal tenancy agreement, and paid a monthly rent of \$350.
- Since May 2013, the Defendant has not been paying rent and the amount owed by the Defendant for unpaid rent is \$4,200.
- The Plaintiff's Crown lease was renewed on 1 January 1999. The Defendant is occupying land without paying rent.
- Because the Defendant refuses to vacate the property, the Plaintiff has been denied his property rights, and has been unable to carry out repairs and maintenance works on the place.

3. Opposing the application, the Defendant avers that:

- The Plaintiff is not the last registered owner of Crown Lease No. 13872, described as LD 4/14/2522 known as Lot 1 on TL 1823 Viruka No. 2 Subdivision, Nakelo, Tailevu.
- The land in question is a protected lease.
- The existence of a verbal tenancy agreement from 2005 and the payment of a monthly rental of \$35 is not disputed. However, he is advised by his counsel and he verily believes that the purported tenancy agreement is void and

unenforceable in law in that the consent of the Director of Lands was never had and obtained by the Plaintiff for the land to be sub-leased to him.

- He had been paying rent but the Plaintiff has not given him any receipts for the said payments.
- He has been advised that the Plaintiff is not the last registered proprietor or lessee of Crown Lease 13872 and therefore has not been deprived of any property rights.
- He did not vacate the property because he wanted the Plaintiff to give him all the receipts for his rent payments.
- Despite his complaints to the Plaintiff, the latter has refused or neglected to repair the property.
- He is advised by his counsel that the Plaintiff has no cause of action against him that his claim is unenforceable in law and equity.
- That the Plaintiff's summons be dismissed with costs on a higher scale.

4. To the Defendant's answering affidavit, the Plaintiff replied:

- He is the registered lessee of Crown Lease 13872 as confirmed by a letter from the Registrar of Titles, dated 27 March 2015. A copy of this is annexed.
- The Defendant has been given receipts for rental payments received from him. He annexes copies of receipts given to the Defendant from 04/10/11 to 05/02/15.
- The Defendant is now occupying his land without paying rent, claiming that the Plaintiff is not the registered owner of the lease.
- The defendant is responsible for the damage to the house.
- The Defendant has not shown cause why he should not give vacant possession.

- He needs the property for his own use and urgently needs to carry out repairs and maintenance works on the property.

The law

5. Section 169 of the Land Transfer Act provides:

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.

6. The procedure under s. 169 LTA therefore requires the Plaintiff to first show he has locus under either (a), (b) or (c) to institute proceedings against the Defendant.

7. A lessee under section 169 may seek ejectment of a trespasser if he is the last registered proprietor. (*Chand v Wati* [2015] FJHC 329; HBC 49.2013 (1 May 2015)).

8. In *Sharma v Tabuela* [2004] FJHC 183; HBC0026.2004 (15 March 2004), the Court stated that sub-section (b) and (c) of the Act applies where

...there is a landlord tenant relationship. The words 'lessee' mean proprietor of a lease or sublease and lessor is a proprietor of the land leased and includes a sublessor - Section 2. Proprietors mean the registered proprietor of land or any estate or interest therein -Section 2. Registration in title is the key to applications under Section 169.

9. Once the Plaintiff establishes locus, the onus shifts to the Defendant to show cause as to why vacant possession should not be granted. In accordance with section 172 of the LTA, he needs to satisfy the Court, on affidavit evidence, that he has a right to possession. (*Muthusami v Nausori Town Council* F.C.A. 23/86).
10. There is no need to prove conclusively a right to possession and it is sufficient if the Defendant proves that there is some tangible evidence establishing the existence of a right. (*Morris Hedstroms Ltd v Liaquat Ali*(Action No. 153 of 1987)

The procedure under section 169 Land Transfer Act:

11. The procedure for applications under section 169 of the LTA is as follows:
1. The person who issues a summons for vacant possession must be one of the following:
 - a. the last registered proprietor of the land;
 - b. a lessor with a power to re-enter where (i) the tenant or lessee is in arrears for the period stated in

the lease, or; (ii) when the lessee or tenant is in arrear for one month...whether or not a previous demand has been made for the rent;

- c. a lessor against a lessee where (i) a legal notice to quit has been given, or (ii) the term of the lease has expired.

- 2. The summons must meet the requirements of section 170. That is,

- (i) it must contain a description of the land, and
- (ii) it shall require the person summoned to appear at court not earlier than 16 days after service of the summons.

- 3. On the day of the hearing of the summons,

- (i) if the person summoned does not appear, the Court may order immediate possession to be given to the plaintiff if satisfied:

- (a) that the summons has been served on the defendant, and;
- (b) of the proprietor or lessor's title.
- (c) If consent is required, then proof of such consent.

- (ii) if the person summoned appears:

- (a) he may show cause why he refuses to give possession of such land.

- 4. If he satisfies the judge he has a right to possession:

- (i) the application shall be dismissed with costs against the proprietor, mortgagee, or lessor, or
 - (ii) the judge may make any order and impose any terms as he may deem fit.
12. The dismissal of the summons is not a bar to the plaintiff's right to take any other proceedings against the defendant as he may otherwise be entitled.
13. In the case of a lessor against a lessee, if, before the hearing, the lessee pays or tenders all rent due and all costs incurred by the lessor, the judge shall dismiss the summons.

Analysis

14. In this application, the Plaintiff says that he is the registered lessee of the Crown lease in question. Annexure A of the Plaintiff's affidavit in support is a copy of the said Crown lease. I note that though the lease is in the name of the plaintiff, the last dealing on its memorial, recorded on 24/07/09 at 2.46pm, is transfer no. 721759 to one Ravinesh Krishna. The Defendant says that the Plaintiff is therefore not the last registered proprietor of the lease in question.
15. The Plaintiff has annexed to its reply affidavit a letter dated 27 March 2015 from one Shayal Devi, for the Registrar of Titles, in which she states that according to their records, Crown Lease No. 13872 is registered under the name of the Plaintiff, and that transfer 721759 was returned for correction as the iTaukei Land Trust Board had not "formally vested the Schedule A land on the Board."
16. I consider that this letter ought to have been annexed to the supporting affidavit to explain why the last registered proprietor on

the memorial of the lease is not the Plaintiff. As it is, the Plaintiff, being aware of this entry, and not providing evidence in its affidavit in support to explain this, sought to introduce this letter in its affidavit in reply, which meant that the Defendant could not then address this in its answering affidavit.

17. In Munesh Prasad v NBF Asset Management Bank Civil Action No. 59 of 2014, at [18], this Court stated that all the evidence a party wishes to rely on in support of an application should be provided in the affidavit in support.
18. In Ridout v Ridout, 2001 MBQB 48, 154 Man. R. (2d) 178 at 181 (Q.B.), the Master stated:

[13]...the moving party must include in their initial affidavit all the facts they intend to rely on in support of their motion. They can file a second affidavit to reply to any new matter raised in the responding party's affidavit. "New matter" does not mean a new fact relating to an area or issue already raised by the moving party; it means a new area or issue that was raised for the first time by the responding party. (Underlining mine)

19. Similarly, in Lotz v Lotz 2012 MBQB 57(CanLII) at [22], the Court stated:

The purpose of a reply affidavit is not to reiterate one's position; it is to reply to new matters. Raised for the first time does not mean a different view on an area or issue already raised by the moving party. It means a new area or issue entirely.

20. In this case, the question of the Plaintiff being the last registered proprietor was first raised by the Plaintiff in its supporting affidavit. I do not consider that the Defendant has raised a “new matter” or new fact in referring to the memorial showing that the last registered proprietor is someone else, and therefore I do not think it proper that the Plaintiff has attempted to bring in the letter in this way in its reply affidavit.

21. In Dawasamu Transport Ltd v Tebara Transport Ltd [2015] FJCA 45; ABU26.2014 (20 March 2015) at [13] and [14], Calanchini P stated:

Affidavits can be used in the trial of an action to adduce evidence that may not be in dispute and which provide the formal proof of facts that have been pleaded. In interlocutory applications affidavits are filed to adduce the facts that form the basis for supporting or for opposing the application. As evidence two issues arise. First, is the evidence in the affidavit admissible and secondly, if admissible, what weight should be given to the evidence...

22. On the introduction of new evidence in a reply affidavit, the Court in Faber v Nazerian [2013] ZAGPJHC (15 April 2013) at 22 referred to the general rule that an applicant’s case was to be made in the founding affidavit and not in the reply. The Court cited *Body Corporate, Shaftesbury Sectional Title Scheme (-v Rippert's Estate and Others* 2003 (5) SA 1 (C)) where it was held that notwithstanding the general rule above, the Court had a discretion to permit new material in the reply affidavit where special circumstances existed, such as where the applicant

...could not have known of such issues at the time of deposing to the founding affidavit. In other words, the Court will not permit or will strike out new issues raised in a replying affidavit if the applicant knew or ought to have known of the existence of such issues but failed for whatever reason to raise them in the founding affidavit.

23. Having considered the affidavit material before the Court, I am of the view that the Plaintiff knew, or ought to have known that the memorial of the lease annexed in the supporting affidavit showed that the Plaintiff was not the last registered proprietor, and therefore ought to have addressed this in that affidavit. I do not consider that any special circumstances exist in this matter to warrant the Court exercising its discretion to accept as evidence the letter of 27 March 2015 annexed by the Plaintiff to its affidavit in reply.
24. The only evidence therefore for the Court's consideration as to whether the Plaintiff is the last registered proprietor under section 169 (a), is the annexure A of the supporting affidavit, the memorial of which says that it is Ravinesh Krishna f/n Hari Dutt Krishna who is the last registered proprietor. In light of this, I find that the Plaintiff has not been able to satisfy the Court that he has standing to bring this application under section 169 (a) of the LTA.
25. I turn now to consider whether the Plaintiff qualifies to bring this application under paragraphs (b) and/or (c) of section 169. The Plaintiff avers in paragraph 3 of his supplementary affidavit in support that the Defendant had occupied the property on a verbal tenancy agreement from 2005, paying a monthly rental of \$350 until May 2013 when payments stopped.
26. I note that the lease the Plaintiff relies on is a Protected Lease under the provisions of the Crown Lands Act. The Defendant contends that

the consent of the Director of Lands to the purported lease agreement between the Plaintiff and himself, had not been obtained.

27. The Plaintiff does not dispute that the consent of the Director of lands had not been obtained, but says that that is of no consequence since he is the registered proprietor of the land.
28. Section 13 (1) of the Crown Lands Act provides:

Whenever in any lease under this Act there has been inserted the following clause:-

"This lease is a protected lease under the provisions of the Crown Lands Act"

(hereinafter called a protected lease) it shall not be lawful for the lessee thereof to alienate or deal with the land comprised in the lease of any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever, nor to mortgage, charge or pledge the same, without the written consent of the Director of Lands first had and obtained, nor, except at the suit or with the written consent of the Director of Lands, shall any such lease be dealt with by any court of law or under the process of any court of law, nor, without such consent as aforesaid, shall the Registrar of Titles register any caveat affecting such lease.

Any sale, transfer, sublease, assignment, mortgage or other alienation or dealing effected without such consent shall be null and void.

29. The provision above is clear that it is unlawful for a lessee of Crown land to alienate or deal with the land without the written consent of the Director first had and obtained. The absence of the Director's consent renders any such dealing null and void.
30. In Ami Chand v Avin Prakash Civil Action HBC 169 of 2010 at p. 7, Calanchini J (as he then was) stated:

To be more precise, the Plaintiff cannot be classified as a lessor with power to re-enter or as a lessor acting under a notice to quit (whether valid or otherwise) for the purpose of section 169. This is because the lessees entered into subleases with either the Defendant Avin Prakash or with TFIL which were null and void. In Indar Prasad and Bidya Wati v Pusup Chand [2001] 1 FLR 164 Gates J (as then was) noted at page 170:

Whatever the nature of the permission granted to [the Defendant] (by the lessees) to occupy the relevant State Land, it was clearly unlawful because it lacked the Director's consent...

31. As is clear from section 13, the purported tenancy agreement between the Plaintiff and Defendant, is null and void for want of the Director's consent. I consider that the Plaintiff cannot thereforerely on section 169 (b) and (c) of the LTA in bringing this application.

Conclusion

32. In light of all of the above, I find that the Plaintiff has not been able to satisfy the Court that he has locus to institute these proceedings under section 169 of the Land Transfer Act. The Defendant therefore

has no need to show cause under section 172. Accordingly, I dismiss the application. The parties are to bear their own costs.



A handwritten signature in blue ink, appearing to be "S.F. Bull", is written over the seal and extends to the right.

S.F. Bull
Acting Master