

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 87 of 2015

BETWEEN : **RAMESH CHAND** as Executor and Trustee in the **ESTATE OF SURESH CHAND**,
Deceased, Testate.

PLAINTIFF

AND : **DONASIO RATUBULI** of Tokotoko, Navua.

DEFENDANT

BEFORE: Master Vishwa Datt Sharma

COUNSELS: Mr. Ravi Singh for the Plaintiff.
No Appearance of the Defendant.

Date of Hearing: 02nd February, 2016

Date of Ruling: 04th February, 2016

RULING

INTRODUCTION

1. The Plaintiff filed an Originating Summons on 6th February, 2015 and sought for the following orders -

- (a) That the Defendant do show cause why he should not give **immediate vacant possession** of part of the land comprised in **Certificate of Title No. 37922**, being **Lot 1 on Deposit Plan No. 7798** which contains 1 hectare 2171 square metres; **AND**

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- (b) That the costs of and incidental to this application to be paid by the Defendant.
2. This application is supported by an affidavit of **Ramesh Chand** sworn on 04th February, 2015 and filed on 6th February, 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 11th February, 2015 and an affidavit of service to this effect has been filed into court.
 5. The Defendant chose to represent himself and was granted 14 days time to file and serve his affidavit in opposition and the matter adjourned to 30th March, 2015.
 6. There was no appearance by the Plaintiff/Counsel and the Defendant failed to file any Affidavit in Response to show cause, the matter was struck out for want of prosecution.
 7. Subsequently, the Plaintiff filed a Motion and Affidavit seeking an order to reinstate the Application to the list.
 8. The Defendant was accordingly served and did not oppose the Plaintiff's application to reinstate the application. He was granted 14 days to file and serve his affidavit in Opposition and the matter was eventually adjourned for hearing on 02nd February, 2016. In the interim, only the Plaintiff furnished this court with his written submissions.
 9. This case proceeded to hearing on an **undefended basis** and both parties to the proceeding were represented by Counsels at the hearing.
 10. 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]*.

Plaintiff's Case

- (i) That he is the Executor and Trustee in the Estate of Suresh Chand pursuant to Probate No. 55267 and am duly/authorised to depose to matters on behalf of the Estate.
- (ii) That late Suresh Chand who was his brother the registered owner of all that land comprised in Certificate of Title No. 37922, being Lot 1 on deposit plan no. 7798 which contains One Hectare Two Thousand One Hundred and Seventy One square metres [**"the land"**]. A true copy of the Certificate of Title is annexed hereto marked **"RC-1"**.
- (iii) That Suresh Chand died on the 25th November 2013 and Probate No. 55267 was granted in the Estate of Suresh Chand appointing him as the sole Executor and Trustee pursuant to will dated 17th May, 2010. A true copy of the back endorsement showing transmission on the Certificate of Title is annexed hereto marked **"RC-2"**.
- (iv) That on the 30th July 2014, the said land was transferred to Ramesh Chand by way of transmission by death so that he could administer it according to the Last Will and Testament of Suresh Chand dated 17th May, 2010. A true cop of the back endorsement showing transmission on the Certificate of Title is annexed hereto marked **"RC-3"**.
- (v) That according to the Last Will and Testament of Suresh Chand dated 17th May, 2010, all properties of the late Suresh Chand are to be bequeathed to his wife, Saraswati and unto his daughters, Avneeta Chand and Sheekha Chand after the death of Saraswati in equal shares. A true copy of the last Will and Testament of Suresh Chand is annexed hereto marked **"RC-4"**.
- (vi) That he recall that his late brother, Suresh Chand had appointed the Defendant's father whose name he do not know as caretaker of the said land who he had come to know died sometime in December 2013.
- (vii) That the Defendant is the son of the late caretaker of the said land and as far as he was aware was never granted permission to reside on the land.

- (viii) *That as far as he was aware his late brother, Suresh Chand had appointed the Defendant's father as the caretaker about 15 ears back and allowed him [Defendant's father] to live rent free on the said land provided that he looked after the land.*
- (ix) *That the Defendant's father who was the caretaker had built a lean-to corrugated iron house which he was living in and which is now occupied by the Defendant and his family.*
- (x) *That after the caretaker passed away, he had his solicitors serve the Defendant on the 13th August, 2014 with a notice of quit dated 11th June 2013 so that Sarawati who is the beneficiary to the estate of Suresh Chand could utilize the land. A true copy of the said notice to quit is annexed hereto marked as "RC-5".*
- (xi) *The Defendant has despite being served with the notice to quit, has wilfully refused and /or neglected to vacate the Plaintiff's land.*
- (xii) *He is legally advised that the Defendant has no legal or equitable right to remain on the said property and therefore ought to deliver vacant possession of the same.*
- (xiii) *He also does not have any problems in allowing the Defendant to remove his father's lean-to house when he vacates the land.*
- (xiv) *He therefore pray for Orders in terms of the Originating Summons filed herewith.*

Defendant's Case

- (i) *That he referred to the Affidavit in support of Ramesh Chand and admits paragraphs 1 to 7.*
- (ii) *That the first part of paragraph 8 is admitted by him but denies second part. Further he says that his father and members of his family, including him, were given the permission by the Deceased, owner of the property, to reside on the land.*
- (iii) *That he admits paragraph 9, 10, 11 and 12 respectively.*
- (iv) *Further he says that his late father had assisted the Deceased, the late Suresh Chand, financially in acquiring the said property as there was a rival claim made by one Feroz in Court to acquire the said property. The Deceased told his late father that if he won the case, he would give half property to his father.*

- (v) That he denies paragraphs 13 and 14 but he reiterates what he says in paragraph 10 in his affidavit in opposition.
- (vi) That he therefore sought for the said Originating Summons to be dismissed and/or further Order or Relief as this Honourable Court would deem in the circumstances.

THE LAW

11. 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."*

12. 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. 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)

14. 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."

15. 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)

16. 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 -*

17. 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.
18. It is for the defendant to 'show cause' why he refuses to give vacant possession of the part of the land comprised in Certificate of Title No. 37922, being Lot 1 on Deposit Plan No. 7798 which contains 1 hectare 2171 square metres to the **Plaintiff** as sought for by the **Plaintiff**.
19. 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.*'

ANALYSIS and DETERMINATION

20. The question for this court to determine is whether the **Plaintiff** is entitled to the possession of the land comprised in Certificate of Title No. 37922, being Lot 1 on Deposit Plan No. 7798 which contains 1 hectare 2171 square metres in the Republic of Fiji, of which the **Plaintiff** is the registered proprietor of 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.*
22. In this instance, the first limb of s169 applies; the plaintiff is the last registered proprietor of the land comprised in Certificate of Title No. 37922, being Lot 1 on Deposit Plan No. 7798 by way of transmission by Death as the sole executor and trustee of the Estate of Suresh Chand.
23. In this respect the plaintiff has annexed in his affidavit a certified true copy of the land comprised in Certificate of Title No. 37922, being Lot 1 on Deposit Plan No. 7798 which shows clearly that the land was transferred to the Plaintiff by way of transmission by death as the sole executor and trustee of the Estate of Suresh Chand on 30th July, 2014 at 12:31 PM under transfer number 801382.
24. The Plaintiff is for the purposes of section 169 the last registered proprietor as the sole executor and trustee of the Estate of Suresh Chand of the said Certificate of Title No. 37922 on Deposit Plan No. 7798.
25. 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).

26. 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."

27. Bearing the above in mind, I find that the Plaintiff has the locus standi to bring this action against the Defendant in this case.
28. After the Plaintiff has established the **first limb test of section 169** that is that the Plaintiff is the registered proprietor of the subject property comprised in **Certificate of Title No. 37922**, being **Lot 1 on Deposit Plan No. 7798** by way of **transmission by death as the sole executor and trustee of the Estate of Suresh Chand**, then the **Defendant** bears the **onus of showing cause** as to why **vacant possession** should not be granted to the Plaintiff.
29. Pursuant to *section 172 of the Land Transfer Act Cap 131*. The Defendant 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).
30. 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).

31. The Defendant was served with the Plaintiff's application seeking vacant possession on 11th February, 2015 and filed his affidavit in opposition on 29th May, 2015. The Defendant failed to turn up to the court at the scheduled hearing on 02nd February, 2016 which he was aware of. The Plaintiff proceeded with his case and simultaneously filed written submissions in support of his application.
32. The Defendant stated in his affidavit in opposition at paragraph 10 "*Further he says that his late father had assisted the Deceased, the late Suresh Chand, financially in acquiring the said property as there was a rival claim made by one Feroz in Court to acquire the said property. The Deceased told his late father that if he won the case, he would give half property to his father.*"

If the Defendant was of the view that he had any claim or proprietary interest in the Certificate of Title No. 37922 being Lot 1 on deposit plan No. 7798 then he should have proceeded with an application for a "vesting order" which he failed to do so in these circumstances.
33. If the Defendant intended to defend this case then he should have been present in court to defend his case and likewise made an oral or a written submission accordingly.
34. However, the Defendant was not present in court on the scheduled date of the hearing for the reasons best known to him. This court has in his absence taken into consideration his **affidavit in opposition** filed into court on 29th May, 2015 accordingly.
35. For the aforesaid rational, I find that the property comprised in **Certificate of Title No. 37922**, being **Lot 1 on Deposit Plan No. 7798** which contains **1 hectare 2171 square metres** was transferred to the Plaintiff by way of transmission by death so

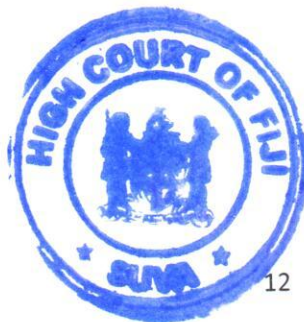
that the Defendant can administer the Estate of Suresh Chand in terms of his last Will and Testament dated the 17th March, 2010 according to law.

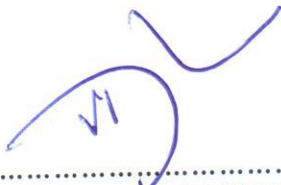
36. The defendant has failed to show any cause including *a right to possession* or has *tangible evidence establishing a right or supporting an arguable case for such a right that must be adduced in terms of section 172 of the Land Transfer Act Cap 131.*
37. There is accordingly nothing in *section 172* which requires an automatic order for possession unless "cause" is immediately shown.
38. Following are the final orders of this court.

FINAL ORDERS

- A. The Defendant to give vacant possession of the land comprised in Certificate of Title No. 37922, being Lot 1 on Deposit Plan No. 7798 containing 1 hectare 2171 square metres in the Republic of Fiji, to the Plaintiff.
- B. The Defendant to deliver vacant possession to the Plaintiff in one (1) months' time on or before the 04th March, 2016.
- C. Execution is hereby suspended till the 4th March 2016.
- D. Cost is summarily assessed at \$750 against the Defendant.

Dated at Suva this 04th day of February, 2016.




VISHWA DATT SHARMA
Master of High Court, Suva