

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 167 of 2015

BETWEEN : DHARAM RAJ of 430 90 47th Ave #127 Sacramento, California 95824 Landlord.

PLAINTIFF

AND : SANJEEV KUMAR of Lot 14, Nakauvadra Place, Delainavesi, Lami Town.

DEFENDANT

BEFORE: Master Vishwa Datt Sharma
COUNSELS: Mr. Ashnil Nand for the Plaintiff.
Mr. Pranesh Kumar for the Defendant.
Date of Hearing: 20th August, 2015
Date of Ruling: 08th February, 2016

RULING

(Vacant Possession- Section 169 of the Land Transfer Act Cap 131)

INTRODUCTION

1. The Plaintiff filed an Originating Summons on 28th April, 2015 and sought for the following orders-
 - (a) That the Defendant to vacant possession of the land and premises comprised in the Certificate of Title No. 8457 being Lot 14 on DP No. 2010, containing an area of .8 perches situated in the District of Suva, AND that the costs of this application be paid by the Defendant to the Plaintiff.
2. This application is supported by an affidavit deposed by Dharmendra Kumar in his capacity as the appointed Attorney for the Plaintiff in terms of the Power of Attorney No. 56691. The affidavit was sworn and filed on 28th April, 2015.

3. The application is made pursuant to *Section 169 of the Land Transfer Act, Cap 131*.
4. The application was served on Avishek Kumar by the Appointed Attorney Dharmendra Kumar on 04th May, 2015 and an affidavit of service to this effect has been filed into court. The application should have been served personally on the Defendant and not served by the Appointed Attorney since he represents the Plaintiff as one of the parties to the proceedings. One party cannot just file proceedings in a court of Law and effect service of the application on the other party.
5. Since the Defendant was represented by Counsel on the returnable date of the Originating Summons, he was granted 14 days time to file and serve his affidavit in opposition and a reply by the Plaintiff 14 days thereafter.
6. The case was adjourned for hearing on 20th August, 2015.
7. This case proceeded to hearing on a **defended basis** and both parties to the proceeding were represented by Counsels at the hearing.
8. This court has a duty to determine the pending issue before the court in a just and fair manner in terms of the laws provided for in *ss169, 171 and 172 of the Land Transfer Act [Cap 131]*.

THE LAW

9. 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."*

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."

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

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.'

ANALYSIS and DETERMINATION

17. The question for this court to determine is whether the Plaintiff is entitled to the possession of the land which the Plaintiff is the registered proprietor of in terms of s169 of the Land Transfer Act [Cap 131]?
18. 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.*
19. In this instance, the first limb of s169 applies; the plaintiff is the last registered proprietor of the land comprised in the Certificate of Title No. 8457 being Lot 14 on DP No. 2010, containing an area of .8 perches situated in the District of Suva.
20. In this respect the plaintiff has annexed in his affidavit a certified true copy of the Certificate of Title No. 8457 which shows clearly that the land was

transferred to the Plaintiff on 18th August, 1997 at 12.50 PM under transfer number 149202. The Plaintiff is for the purposes of *section 169* the last registered proprietor of the land comprised in the **Certificate of Title No. 8457 being Lot 14 on DP No. 2010**,

21. *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).
22. 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 sets 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."

23. Bearing the above in mind, I find that the Plaintiff has the locus standi to bring this action against the Defendant in this case.
24. After the Plaintiffs have established the first limb test of *section 169*, that is, that the Plaintiff is the registered proprietor of the subject land comprised in the **Certificate of Title No. 8457 being Lot 14 on DP No. 2010**, then the Defendant bears the onus of showing cause as to why vacant possession should not be granted to the Plaintiff.

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25. 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).
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. The Plaintiff's application seeking vacant possession was served on 04th May, 2015.
28. The annexed Certificate of Title does not show that the defendant was at any stage the registered proprietor of the said Title or property.
29. I have very carefully perused the entire affidavit in opposition filed by the Defendant in the within action and it appears that his defence is founded on the **principle of proprietary estoppel** by encouragement. The same can be summarized as follows-
- (a) *That the Defendant came to reside on the property sometime in 1990 and have continued to reside there since with the knowledge of the Plaintiff.*
 - (b) *That Vijay Kumar was a caretaker who invited him to stay on the property and advised him that he has taken consent from the Plaintiff.*
 - (c) *That Plaintiff gave consent to Vijay Kumar to assist the Defendant in building a house and organise his marriage to take place from that house.*
 - (d) *The Defendant together with his brother, Dharmen then built a 3 bed room wood and iron house for occupation by him and his family and used all his savings to purchase the building material.*
 - (e) *The Defendant was told that he can stay on the premises as long as he wants, no one will evict him.*
 - (f) *The Defendant also repaired the flat left vacant by Vijay Kumar and also paid town rates to Lami Town Council.*
 - (g) *The Defendant states that he has an equitable interest in the said property.*
 - (h) *The Plaintiff had earlier filed HBC action No. 262 of 2014, 327 of 2014 and later filed this application without reinstating the cases and tantamount to abuse of court process.*

30. Lord Kingsdown in his dissenting speech in Ramsden v Lee Dyson and Joseph Thornton (1866) LR 1 HL 129 has defined the essential components of the proprietary estoppel by encouragement, where his lordship outlined that:

“if a man, under a verbal agreement with a landlord for a certain interest in land, or what amount to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a court of equity will compel the landlord to give effect to such promise or expectation. If on the other hand, a tenant being in possession of land, and knowing the nature and extent of his interest, lays out money upon it in the hope or expectation of an extended term or an allowance for expenditure, then if such hope or expectation has not been created or encouraged by the landlord, the tenant has no claim which any court of equity can enforce.”

31. Lord Walker of Gestingthorpe in Thorner v Major and Others (2009) 2 All ER 945 found three main elements of proprietary estoppel, where his lordship held that:

“nevertheless most scholars agree that the doctrine is based on three main elements, although they express them in slightly different terms, a representation or assurance made to the claimant; reliance on it by the claimant; and detriment to the claimant in consequence of his (reasonable) reliance”.

32. Lord Walker then observed the nature and scope of the representation or assurance made to the claimant, where his lordship found that as follows-

“there is some authority for the view that the “clear and unequivocal” test does not apply to proprietary estoppel. That view was expressed by Slade LJ in Jones v Watkins (26 November 1987, unreported.) The same view has been expressed in at least the past three editions of Treitel Law of contract. The current (12th) edition (2007) by Mr. Edwin Peel, in a passage comparing promissory and proprietary estoppel, states (para 3-144): “promissory estoppel arises only out of a representation or promise that is “clear” or “precise and unambiguous”. Proprietary estoppel on the other hand, can rise where there is no actual promise; e.g where on party makes improvements to another’s land under a mistake and the other either knows of the mistake or seeks to take unconscionable advantage of it”..... if all proprietary cases (including cases of acquiescence or standing -by) are to be analyzed in terms of assurance, reliance and detriment, then the landowner’s conduct in standing by in silence serves as the element of assurance. As Lord Eldon LC said over 200 years ago in Dann v Spurrier

(1802) 7 Ves 231 at 235-236, 32 ER 94 at 95 "this court will not permit a man knowingly, though but passively, to encourage another to lay out money under an erroneous opinion of title; and the circumstance of looking on is in many cases as using terms of encouragement".

33. I have taken into consideration the Defendant's affidavit in opposition coupled with the written submissions. The Defendants contention is that he has been residing on the property since 1990 to date with the Plaintiffs knowledge and has built a 3 bedroom house with his savings since he was promised that he can never be evicted from that property and can live on the property as long as he wanted to do so. There is no evidence before this court that the Plaintiff had made promises to him and gave any consent to reside on the said property. The Defendant at no point in time had any mistaken believe with the ownership of the property. If the Defendant was of the view and believe that he had any **entitlement, claim or proprietary interest** in the land comprised in the Certificate of Title No. 8457 being Lot 14 on DP No. 2010, containing an area of .8 perches situated in the District of Suva, then he should have proceeded with an application for a "vesting order" and sought for the orders accordingly but he failed to do so in the circumstances. This prompts me to believe that he was aware that he had no legal claim over the property and that he was residing on a temporary basis within that relationship. It is my view that he is not entitled to claim a right to the possession of this land on the grounds of proprietary estoppel by encouragement as claimed by him.
34. There is accordingly nothing in *section 172* which requires an automatic order for possession unless "cause" is immediately shown.
35. 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.*
36. I find that the Plaintiff is the rightful registered proprietor of the land comprised in the Certificate of Title No. 8457 being Lot 14 on DP No. 2010, containing an area of .8 perches situated in the District of Suva.

37. I proceed to make the following orders accordingly-

FINAL ORDERS

- A. The Defendant to give vacant possession of the land comprised in the Certificate of Title No. 8457 being Lot 14 on DP No. 2010, containing an area of .8 perches situated in the District of Suva in the Republic of Fiji, to the Plaintiff, of which the Plaintiff is the registered proprietor of.
- B. The Defendant to deliver vacant possession to the Plaintiff in one (1) months' time on or before the 08th March, 2016.
- C. Execution is hereby suspended till the 08th March, 2016.
- D. Cost is summarily assessed at \$750 against the Defendant.

Dated at Suva this 08th day of February, 2016



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MR VISHWA DATT SHARMA
Master of High Court, Suva