

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA

[CIVIL JURISDICTION]

CIVIL ACTION NO. HBC 202 OF 2013

(On an Appeal from the Judgment delivered by the Learned Master of the High Court of Fiji at Lautoka on the 9th of February 2015 in Civil Action No. HBC 202 of 2013)

BETWEEN: **DIVENDRA KUMAR** of Solosolo, Veisaru, Ba, Farmer.

Appellant / Defendant

AND: **KAUSALYA DEVI** of Solosolo, Veisaru, Ba, Domestic Duties

Respondent / Plaintiff

Before : Hon. Mr. Justice R. S. S. Sapuvida

Counsel : Mr. Nivend Padarath for the Appellant
 Mr. Victor Sharma for the Respondent

Date of Judgment : 7th April 2017

JUDGMENT

Introduction

- [1]. This is an Appeal from the judgment delivered by the Puisne Judge of the High Court of Fiji at Lautoka, sitting as the Master of the High Court, dated 9th February 2015. The Respondent/Plaintiff (hereinafter referred to as the Respondent) had filed summary eviction proceedings against the Appellant/Defendant (hereinafter referred to as the Appellant) pursuant to *Section 169* of the Land Transfer Act, Cap.131.
- [2]. The Learned Master has ruled that the Appellant did not have any cause to remain on the property in dispute (hereinafter referred to as the property) as such; an order for delivery of the vacant possession was made.

- [3]. The Appellant submits that the Master has erred for not properly considering the submissions of the Appellant when he determined that the Respondent has satisfied the Court that she is the *last registered proprietor*, and he failed to consider whether sufficient cause was established by the Appellant to remain on the property. However, these issues will be discussed in length later in this judgment.
- [4]. There are two main issues in this appeal. The central legal issue is whether a person who holds an instrument of tenancy by way of a deed registered with the Registrar of Deeds rather than a title registered with the Registrar of Titles can be considered the *last registered proprietor* under the Land Transfer Act, Cap.131. It is submitted by the Appellant's Counsel that unless there is a title registered with the Registrar of Titles, a person cannot be considered the *last registered proprietor* pursuant to the Land Transfer Act, Cap.131. However, the real legal issues in the case in hand are more intricate than they were appeared at the hearing. I will discuss.
- [5]. The second issue is, if the Respondent is held to be the *last registered proprietor*, Was the Appellant able to establish an equitable right to remain on the land?

Background

- [6.] The Respondent instituted eviction proceeding against the Appellant on or about 7th November 2013. The Respondent's foothold is that she is the *last registered proprietor* of land known as Lot 1 on Mavua subdivision situated in the District (part of) of Bulu, in Island of Viti Levu, (the property) having an area of 80910 hectares, under the Instrument of Tenancy number 6606.
- [7]. Respondent claims that she acquired the property *Inter-Vivos* from Vijendra Kumar, her late husband and the father of the Appellant. The Respondent in her affidavit originally filed in support of the application for eviction has stated that this transaction was done on or about the 22nd December 2011.
- [8]. The Appellant claims that he was in occupation of the property since his birth and had been working on the property with this father. Sometime in 1989, he moved to a property at Namada, owned by his late father.
- [9]. The Appellant's late father had invited the Appellant back to the subject property sometime in the year 2000, when the lease was expired on the land at Namada. Subsequently, the Appellant's late father had promised the Appellant that he would assign 5 acres of land to the Appellant from the property where the Appellant is now residing.
- [10] The Appellant's biological mother passed away sometime in 1987 and his father got married to the Respondent sometime in 1990.

- [11]. The terms between them became sour and eviction proceedings were instituted by the Respondent after the demise of the Appellant's father.
- [12]. The Appellant was even unaware of the death of his father until he came to know it from the family friends and relatives since the Respondent did not even allow the Appellant to visit his father at the hospital when he was hospitalized from time to time due to his ill health.
- [13]. The Appellant had adduced these facts by way of affidavit evidence at the lower court.

The Master's Decision

- [14]. The Learned Master in his judgment firstly holds that the application for summary eviction is filed by the Respondent pursuant to Section 169 of the Land Transfer Act, Cap.131. Thereafter, the Learned Master proceeds to determine the evidence on the principles outlined under Section 169 of the Land Transfer Act, Cap.131.
- [15]. The Learned Master in paragraph (13) of his judgment states that in order to proceed, he must see whether the Respondent is the last registered proprietor of the property so as for her to qualify to bring these proceedings under Section 169 (a) of the Land Transfer Act, Cap.131. The Respondent had relied on the Instrument of Tenancy No. 6606, and the Transfer No. 40990. The Appellant had raised an objection stating that the Instrument of Tenancy No. 6606 is an instrument registered with the *Registrar of Deeds* and not with the *Registrar of Titles*. Thus, the Appellant contends that the Respondent falls short to prove that she is indeed the last registered proprietor for the purpose of the Land Transfer Act, Cap.131.
- [16]. The Learned Master held that the Instrument of Tenancy is a lease given under Section 8 (3) of the Agricultural Landlord and Tenant Act, Cap.270. The provisions under Cap.270 there, in essence states, that if an Instrument of Tenancy is not registrable under the Land Transfer Act, Cap.131, it is then registered as a deed under the provisions of the Registration Act, Cap.224. This discussion will be continued.
- [17]. The Learned Master in paragraph (16) of his judgment held that the Respondent is the last registered proprietor and is capable of bringing this action against the Appellant. Furthermore, the Learned Master makes a finding at paragraph (26) that the Appellant does not have any equitable right against the Respondent. He relied on the decision of Charmers v Pardoe (1963) 1 WLR 677.

Grounds of Appeal

- [18]. The Appellant had originally submitted 7 grounds of appeal and later at the hearing the parties identified 3 main issues which can be summarized as follows;
- (a) That the learned Master erred in law in holding that the Respondent was the last registered proprietor for the purposes of Section 169 of the Land Transfer Act, Cap.131 when the Respondent had not shown any evidence of an Instrument of Title registered pursuant to the Land Transfer Act, Cap.131.
 - (b) That the Respondent failed to produce a certified true copy of the Instrument of Tenancy duly certified by the Registrar of Titles; and
 - (c) That the Learned Master erred in relying on the authority of Charmer v Pardoe (supra) in holding that the Appellant had no equitable right to possession of the land.

Ground 1 - That the Master erred in Holding that the Respondent was the last registered proprietor for the purposes of section 169.

- [19]. The Appellant's Counsel submits that the Respondent was not the *last registered proprietor* for the purpose of Section 169 of the Land Transfer Act, Cap.131. The Respondent at the court below relied on the Instrument of Tenancy No. 6606. This instrument is registered with the Registrar of Deeds and not with the Registrar of Titles. The rubber stamp of the Registrar of Titles is not a confirmation that an instrument of tenancy is finely tuned by the Registrar of Titles. In fact, by a letter issued by the Registrar of Titles dated 1st October, 2014 (DK-1), it was clarified that this was solely for the purpose of confirming that a copy is lodged with the Registrar of Deeds. For the purpose of completeness, the body of the said letter is reproduced as follows;

*"RE: CONFIRMATION FOR REGISTRATION OF INSTRUMENT OF
TENANCY*

1. *We refer to the letter dated 26th August 2014 regarding the above matter.*
2. *We confirm that the instrument of Tenancy No. 6606 is registered in the Deeds Registry. The certification of the copy indicated that the Instrument of Tenancy is registered.*
3. *Please note that there are two registries in our office. Titles and Deeds. All*

documents made pursuant to Land Transfer Act are registered in Titles registry. Documents that are not subject to Land Transfer Act but are used for preservation and publication purposes are registered in Deeds registry pursuant to Registration Act Cap.224.

4. *Instrument of Tenancy is registered in Deeds registry as such there are no memorials endorsed at the back of the said document unlike in Titles where the memorials are endorsed at the back of the lease titles."*

[20]. The Respondent filed her affidavit in support sworn on 23rd October 2013 together with a copy of the Instrument of Tenancy No. 6606 (KD-1). It should be noted however, that this is just a photocopy but not a certified true copy issued by the Registrar of Titles.

[21]. The Appellant at the hearing of the application at the lower court had raised the objection that the Instrument of Tenancy No. 6606 is not a document registered under the Land Transfer Act, Cap.131 as such; the Respondent cannot be considered the last registered proprietor.

[22]. The operative word being *registered proprietor*. The Learned Master in paragraph (16) of his judgment holds that, since the Instrument of Tenancy No. 6606 is given pursuant to Section 8 (3) of the Agricultural Landlord and Tenant Act, Cap.270, which is capable of being registered as a deed under the Registration Act, Cap.224, the Respondent is also a *registered proprietor* for the purposes of the Land Transfer Act, Cap.131.

[23]. The Appellant's Counsel submits that the Respondent does not fall within the meaning of registered proprietor within the provisions of the Land Transfer Act, Cap.131. The term *proprietor* is defined under the Land Transfer Act, Cap.131 as follows:

"Proprietor means the registered proprietor of land, or of any estate or interest therein"

[24]. In addition, the term *estate or interest* is further defined under Section 2 (1) of the Land Transfer Act, Cap. 131. The definition reads as follows:

"estate or interest means any estate or interest in land subject to the provision of this Act includes any mortgage thereon"

(emphasis added)

[25]. Moreover, the term "registered" is defined in the Interpretation Act. The definition reads as follows:-

"Registered used with reference to a document or the title to any immovable property means registered under the provision of any written law for the time being applicable to the registration of such document or title.

[26]. The Appellant's Counsel submits that these definitions would need to be read together and not in isolation. Thus taking into account the above, the term *registered proprietor* means a person holding registration of land under the provision of the Land Transfer Act, Cap.131 only.

[27]. However, the Respondent's Counsel is in a different view on this and heavily relying on, among similar other case law authorities submitted by the Counsel on the same, the decision of Habid v Prasad [2012] FJHC 22; HBC 24. 2010 (17 January 2012), as Hon. Madam Justice Anjala Wati dealt with a similar application brought by a party to evict a defendant from an agricultural holding, registered under the provision of Agricultural Landlord and Tenant Act, Cap.270, and said that for the purposes of Section 169(a), such registration is sufficient.

"16. The word registered is making reference to registration of land and not the nature of land. If the land is registered either in Registrar of Titles office or in the Deeds Office, it is still registered land. This land has been registered on 4th March 2004 and is registered at the Registrar of Deeds office, it is still registered land. The registration is sufficient to meet the definition of registered in the Interpretation Act Cap.7:-

"Registered" used with reference to a document or the title to any immovable property means registered under the provision of any written law for the time being applicable to the registration of such document or title". "

[28]. The decision in Habid v Prasad [supra] (though the application for ejectment under Section 169 of the Land Transfer Act, Cap.131 was dismissed), can be distinguished as the court there did not consider what the words *estate* or *interest* meant for the purposes of Land Transfer Act, Cap.131. The words *estate* or *interest* as stated in paragraph [24] above, mean any estate or interest subject to the provision of the Land Transfer Act, Cap.131.

[29]. The conclusion I would confer, with all due regard to the Habid v Prasad (supra) case, is correct to the scope that registration can be either under the Registrations Act, Cap.224 (that is, as a deed) or under the Land Transfer Act, Cap.131 (as a legal title). The fundamental difference we must understand between these two

forms is that the registration as a deed under the Registration Act, Cap.224 gives the deed holder an equitable title to the land while the registration under the Land Transfer Act, Cap.131 gives a legal and indefeasible title.

- [30]. The best answer for the question of registration of a native lease can simply be found in Section 10 of the Native Land Trust Act, Cap. 134;

Form of lease, registration and fees

10. - (1) All leases of native land shall be in such form and subject to such conditions and covenants as may be prescribed, and such leases shall be recorded in a register to be kept by the Registrar of Titles entitled "Register of Native Leases", and it shall be lawful for the Board to charge and collect in respect of the preparation of any lease or for any matter in connection therewith such fees as may be prescribed.

(2) *When a lease made under the provisions of this Act has been registered it shall be subject to the provisions of the Land Transfer Act, so far as the same are not inconsistent with this Act, in the same manner as if such lease has been made under that Act, and shall be dealt with in a like manner as a lease so made.*

(3) *It shall be lawful for the Registrar of Titles to charge and collect in respect of any lease registered under the provisions of this Act, or in respect of any dealing with such lease, the fees prescribed under the Land Transfer Act in the same manner as if such lease was a lease under that Act.*

(emphasis added)

- [31]. In the case in hand there is no doubt that the Instrument of Tenancy No. 6606 originally granted to Vijendra Kumar by the Native Land Trust Board is a contract of tenancy. In order to give it the evidential value, it is instrumented by way of a written document called "instrument of tenancy" for the purpose of Section 8 (1) of the Agricultural Landlord and Tenancy Act, Cap.270. Then, in its form, it is a Deed.

- [32]. The learned Master has correctly arrived at a conclusion in paragraph (15) of his Judgment having cited Section 8 (3) of the Agricultural Landlord and Tenancy Act, Cap.270, that the provisions of the said Act will apply to such property. The Section 8 (3) reads;

Section 8 (3) reads as follows: -

"(3) Every instrument of tenancy shall be signed by the parties thereto and

(a) if registrable under the provision of the Land Transfer Act, shall be registered in accordance with the provisions of that Act and, notwithstanding the provisions of section 60, all other provision of the said Act shall apply to such instrument and all dealings relating thereto or

(b) if, not registrable under the provision of the Land Transfer Act, shall, together with all dealings relating thereto, be registered as deeds under the provision of the Registration Act".

(emphasis added)

[33]. I am not ending my discussion here on Section 8 (3) of the Agricultural Landlord and Tenancy Act, Cap.270, but need to build up a debate on some other matter before I get back to it later in this judgment.

[34]. Looking at the Section 3 of the Registration Act, Cap.224, I firmly opine that any deed registered for the provisions of the said Act is only for publication, preservation and for execution or a combination of all or any of these. Whereas, the effect of registration under the Land Transfer Act, Cap.131 creates, varies, extinguishes or passes any estate or interest or encumbrance in, or over any land.

[35]. Section 3 of the Registration Act, Cap.224 reads thus;

"Object of registration

3. Deeds may be registered for publication, for preservation and for execution, or for one or more or all of these objects combined."

[36]. Therefore, the registration of a deed is not a mandatory requirement under the Registration Act, Cap.224. That is why it intended so, to say "*Deeds may be registered.....*", and it is so clear that the registration of a deed is for the purposes explained within the Section 3 of the Registration Act, Cap.224.

[37]. This opinion can be substantiated further by Section 2 of the Registration Act, Cap.224 as it says as follows;

Registration of deeds. Definition

2. All deeds made within Fiji, whether deeds inter partes or deed poll may be registered in the office of the Registrar of Titles who, for the purposes of this Act, shall be Registrar of Deeds. In sections following the term "Registrar" used without qualification means the Registrar of Deeds.

[38]. But, this is not so under the Land Transfer Act, Cap.131. The reason why I say so is again as clear as crystal if we look at the Section 4 of the Registration Act, Cap.224;

“Deeds registered under the Land Transfer Act

4.- All deeds forming titles to land which are provided for by the Land Transfer Act are registered under the provisions of that Act for preservation and publication, and no deed or title so registered requires to be again registered under the provisions of this Act.”

(emphasis added)

[39]. This can be further illuminated as it succinctly stats in Section 3 of the Land Transfer Act, Cap.131 that reads;

“Laws inconsistent not to apply to land subject to Act

3. All written laws, Acts and practice whatsoever so far as inconsistent with this Act shall not apply or be deemed to apply to any land subject to the provisions of this Act or to any estate or interest therein.”

(emphasis added)

[40]. This can be more simplified if I bring here the Section 37 of the Land Transfer Act, Cap.131 which says:

“Instrument not effectual until registered

37. No instrument until registered in accordance with the provisions of this Act shall be effectual to create, vary, extinguish or pass any estate or interest or encumbrance in, on or over any land subject to the provisions of this Act, but upon registration the estate or interest or encumbrance shall be created, varied, extinguished or passed in the manner and subject to the covenants and conditions expressed or implied in the instrument.”

(emphasis added)

[41]. In addition, the registration under the Land Transfer Act, Cap.131 creates an indefeasible title over the land. Section 38 of the Land Transfer Act, Cap.131 reads;

“Registered instrument to be conclusive evidence of title

38. No instrument of title registered under the provisions of this Act shall be impeached or defeasible by reason or on account of any informality or in any

application or document or in any proceedings previous to the registration of the instrument of title."

(emphasis added)

- [42]. Moreover, it is widely accepted and well found notion that the Land Transfer Act, Cap.131 incorporates the Torrens system in Fiji. Once an owner is registered as the owner, his title is good against the whole world. But, for this, the instrument should be registered under the provisions of Land Transfer Act, Cap.131, particularly when the dispute originates or the action is brought, under Land Transfer Act, Cap.131.
- [43]. This is more fully signified in Section 39 of the Land Transfer Act, Cap.131 as follows;

Estate of registered proprietor paramount, and his title guaranteed

39.-(1) Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the registered proprietor of any land subject to the provisions of this Act, or of any estate or interest therein, shall, except in case of fraud, hold the same subject to such encumbrances as may be notified on the folium of the register, constituted by the instrument of title thereto, but absolutely free from all other encumbrances whatsoever except-

(a) the estate or interest of a proprietor claiming the same land, estate or interest under a prior instrument of title registered under the provisions of this Act; and

(b) so far as regards any portion of land that may by wrong description or parcels or of boundaries be erroneously included in the instrument of title of the registered proprietor not being a purchaser or mortgagee for value or deriving title from a purchaser or mortgagee for value; and

(c) any reservations, exceptions, conditions and powers contained in the original grant.

(2) Subject to the provisions of Part XIII, no estate or interest in any land subject to the provisions of this Act shall be acquired by possession or user adversely to or in derogation of the title of any person registered as the proprietor of any estate or interest in such land under the provisions of this Act.

- [44]. The leading case law authority in Fiji which expounds the phrase "indefeasibility of title", is the Supreme Court case of Star Amusement Ltd v Prasad [2013] FJSC 8; CBV0005.2012 (23 August 2013) where it was held that;

"37. All this may be beside the point, if one takes into consideration the fact that the Land Transfer Act, Cap. 131, is based on the "Torrens System" which is a system of land title where a Register of land holdings maintained by the State

guarantees an indefeasible title to those included in the Register. The system had its origins in New South Wales in the late 19th Century, and has since influenced the development of the law in many jurisdictions including Fiji.

38. The phrase "indefeasibility of title" is not found in the legislation of New South Wales or the other Australian States or in the statute law of other nations that borrowed the system including Fiji, but is derived from the word "defeasible" found in the legislation. Section 38 of the Land Transfer Act, Cap. 131 provides that-

"No instrument of title registered under the provisions of this Act shall be *impeached or defeasible* by reason or on account of any informality or in any application or document or in any proceedings previous to the registration of the instrument of title."

40. Section 39(1) carries the concept further and enacts that "the registered proprietor of any land subject to the provisions of this Act, or of any estate or interest therein, shall, *except in case of fraud*, hold the same *subject to such encumbrances as may be notified on the folium of the register*, constituted by the instrument of title thereto, but *absolutely free from all other encumbrances whatsoever except-*

(a) the estate or interest of a proprietor claiming the same land, estate or interest under a *prior instrument* of title registered under the provisions of this Act; and

(b) so far as regards any portion of land that may by *wrong description or parcels or of boundaries be erroneously included in the instrument* of title of the registered proprietor not being a purchaser or mortgagee for value or deriving title from a purchaser or mortgagee for value; and

(c) any *reservations, exceptions, conditions and powers* contained in the original grant." (*emphasis added*)

42. The decision in *Subramani & Maria v Dharam Sheela and three others, supra*, is important not only because of the peculiar facts of that case, but also because Marsack JA., in the course of his judgment in that case, referred to with favour the landmark decision of the majority of the Court of Appeal in New Zealand in *Fels v. Knowles* (1906) 26 NZLR 604 in which it was observed at page 620 that-

"The cardinal principle of the statute is that *the register is everything*, and that, except in cases of 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 the world ...* Everything which can be registered gives, in the absence of fraud, an indefeasible title to the estate or interest, or in the cases in which registration of a right is authorised, as in the case of easements or incorporeal rights, to the right registered." (*emphasis added*)

48. We are therefore firmly of the view that the Court of Appeal clearly failed to uphold the cardinal principle of the Land Transfer Act that the Register is *absolute and conclusive* except in case of actual fraud, which has to be brought home to the registered proprietor. Question (i) above has to be answered in favour of the Petitioner.”
(*emphasis added by me*)

[45]. The Section 169 (a) of the Land Transfer Act, Cap.131 says;

“(a) the last registered proprietor of the land;”

[46]. Therefore, I am firmly of the view that the meaning of last registered proprietor under Section 169 (a) of the Land Transfer Act, Cap.131 is restricted only to that Act. It is abundantly clear that the Section 169 (a) of the Land Transfer Act, Cap.131 is only applicable to any Land registered under the provisions of the Land Transfer Act, Cap.131 only.

[47]. A similar view was taken up in the case of Khan v Khan [2013] FJHC 588; HBC03.2013 (7 November 2013) by Tuilevuka J about the meaning of registered proprietor;

“[7].From the above definitions, it is clear that an applicant, to qualify as a “lessor” under the second and third limbs of section 169 must be a “proprietor” which means a “registered proprietor” under Section 2. And a “registered proprietor” means a registered under the provisions of the Land Transfer Act.”

[emphasis added]

[48]. I will now look at whether or not the Respondent really has a right to use the word “last registered proprietor” or “registered proprietor” owing to some other serious legal issues she faces apart from the ones I discussed above, to which neither the Appellant’s Counsel nor the Respondent’s has given their attention.

[49]. The original eviction proceedings were instituted for the vacant possession of the land by the Respondent against the Appellant at the lower court pursuant to Section 169 of the Land Transfer Act, Cap.131 by way of her Originating Summons dated 07 November 2013.

[50]. The Respondent files her affidavit in support of the claim on 23rd October 2013, and says;

“2. THAT I am the registered proprietor of Instrument of Tenancy No: 6606 known as Lot 1 on Mavua Subdivision situated in the district (part of) of Bulu in the Island of Viti Levu, NLTB Reference number 4/1/899 comprising an area of

8.0910 hectares. Annexed hereto and marked with letter "KD 1" is a copy of the said Instrument of Tenancy.

3. THAT I became the registered owner of the Property when the Last owner (my late husband) transferred the property under my name on the 23rd of December, 2011. The instrument of transfer was duly registered on the 22nd of December, 2011 under registration number 40990. Annexed hereto and marked "KD 2" is a copy of the transfer instrument.

4. THAT the Respondents are occupying the said property illegally, forcefully and without my consent from the date of the said transfer. I have verbally notified them various occasions to vacate the property. They had on occasions promised to give vacant possession.

10. THAT I most humbly pray to this Honourable Court for the following orders:

(a) An order that the Respondent, their agents, servants or others do forthwith give immediate vacant possession of the property described in instrument of Tenancy No: 6606 known as Lot 1 on Mavua Subdivision situated in the district (part of) of Bulu in the Island of Viti Levu, NLTB Reference Number 4/1/899 comprising an area of 8.0910 hectares together with all improvements thereon."

(emphasis added)

- [51]. The Respondent is relying on two instruments according to her own statements, viz. the Instrument of Tenancy No.6606 and the Instrument of Transfer No. 40990.
- [52]. The Respondent affirms in her affidavit that she is the registered proprietor based on the Instrument of Tenancy No. 6606. The said Instrument of Tenancy No. 6606 if so granted, it was solely granted to Vijendra Kumar by the Native Land Trust Board. The Respondent's name is nowhere in this Instrument of Tenancy No. 6606 as a tenant. Therefore, she must prove that she has a valid transfer in her hand given to her by Vijendra Kumar or by the Native Land Trust Board for her to call herself the registered proprietor.
- [53]. The Learned Master in paragraph (15) of his judgment finds that the property is a lease property given under an Instrument of Tenancy issued under the Agricultural Landlord and Tenancy Act, Cap.270, and has entrusted on the annexure "A" as the said instrument for his final decision. He further says in the same paragraph thus; "The Plaintiff has provided a certified true copy of the Instrument. It has been issued by the Registrar of Tile (sic) on 12 August 2014. It is stamped by the Registrar of Tiles (sic) and by the Registrar of Deeds and it

has folio number 6606. That document clearly shows that the transfer of the property to the plaintiff.”

(emphasis added)

[54]. Now I will again come back to the Section 8 (3) of the Agricultural Landlord and Tenancy Act, Cap.270. Section 8 (3) that reads as follows: -

“(3) Every instrument of tenancy shall be signed by the parties thereto and-

[55]. Therefore, it should be well understood that the annexure “A” referred to in paragraph [52] above, which is the Instrument of Tenancy No. 6606, and under which the Learned Master granted the vacant possession to the Respondent, shall carry the signatures of the respective parties to it as it is mandatory requirement under Section 8 (3) of the Agricultural Landlord and Tenancy Act, Cap.270 to have it signed by the parties to it, and let alone the generally accepted legal requirement for a deed or for a written contract between two or more parties to have their signatures in it.

[56]. It is astonishing to see that the annexure “A”, the Instrument of Tenancy No. 6606 does not carry the signature of the Landlord, viz. the Native Land Trust Board, which is, as I look at it, fatal to its validity.

[57]. The Instrument of Tenancy No. 6606 only carries two signatures. One signature is placed on the space provided for the tenant, while the other signature is placed on the space provided for the witness to the signature of the tenant. All other required fields except for the date (which is even illegible) are left unfilled and blank. As I earlier stated, an authorized officer for the Native Land Trust Board being the landlord (as the document reads) has not signed the tenancy agreement. I would say that this is just an ex-parte tenancy agreement which carries no value or authenticity at all. If I simplify this more, this Instrument of Tenancy, viz. the annexure “A” is an empty or blank document under which no title is conveyed.

[58]. Even though, the Learned Master in paragraph [15] of his judgment held that the document “A”, the Instrument of Tenancy No. 6606 clearly shows that the transfer of the property to the plaintiff (the Respondent in these proceedings), it does not do so because, the Respondent is not a party to this instrument.

[59]. Though, the several copies of the Instrument of Tenancy No. 6606 (sometime marked as “A” and sometime marked as “KD-1”) submitted by the Respondent at regular intervals, are filed of record, none of those copies of the Instrument of Tenancy No. 6606 carries an original certification as a true copy authenticated by the Registrar of Titles, and moreover, all these are mere photocopies.

[60]. An Instrument of Tenancy whatsoever executed under the provisions of Agricultural Landlord and Tenancy Act, Cap.270 shall contain all the necessary statutory requirements in order to secure the instrument.

[61]. Section 23 of the Agricultural Landlord and Tenancy Act, Cap.270 reads thus;

Securing instrument of tenancy

23.-(1) Where-

(a) in respect of any contract of tenancy, an instrument of tenancy has not been executed by the parties or such instrument does not contain the statutory requirements required by section 8 to be included therein, either the landlord or the tenant; or

(b) in any case coming within the provisions of section 5, the tenant,

if he has first requested the other party to the tenancy to have the contract evidenced by an instrument of tenancy or by an instrument in the prescribed form, as the case may be, and no such contract has been executed, may refer such matter to the tribunal of the agricultural district in which the holding is situated.

(2) On a reference being made to it under the provisions of paragraph (a) of subsection (1), the tribunal shall in its award-

(a) specify the existing terms of the contract of tenancy between the landlord and the tenant with any variation thereto agreed upon by the landlord and the tenant; and

(b) in so far as the existing terms make no provision similar to those specified in section 9 or provisions less favourable to the tenant or contain provisions inconsistent with those of such section, make provision for the inclusion in the instrument of tenancy of all the statutory conditions required by the provisions of this Act to be included in such instrument.

(3) On a reference being made to it under the provisions of section 5, the tribunal shall, if it is satisfied that it is just and reasonable so to do, declare that an agricultural tenancy under the provisions of this Act exists, and direct that an instrument of tenancy be entered into by the landlord and the tenant in a form pursuant to the provisions of this Act.

[62]. Therefore, for the reasons I explained in paragraphs [53] to [60] above, the Instrument of Tenancy No. 6606 ("A" or "KD-1") is not a secured instrument of tenancy for the purpose of the Agricultural Landlord and Tenancy Act, Cap.270.

[63]. The other legal issue exists attached to the Instrument of Tenancy No. 6606 ("A" or "KD-1") is the "Section 9 clause" in it. The Section 9 (2) of the Agricultural Landlord and Tenancy Act, Cap.270 reads;

9 (2), - *Every contract of tenancy shall be deemed to contain the following clause:-*

"This contract is subject to the provisions of the Agricultural Landlord and Tenant Act, and may only be determined, whether during its currency or at the end of its term, in accordance with such provisions. All disputes and differences whatsoever arising out of this contract, for the decision of which that Act makes provision, shall be decided in accordance with such provisions."

(emphasis added)

[64]. I find, the Instrument of Tenancy No. 6606 contains the "Section 9 clause" in the clause (15) of it clearly printed in its 4th page.

[65]. Hence, any dispute whatsoever arising out of the Instrument of Tenancy No. 6606 shall be decided in accordance with the provisions of Agricultural Landlord and Tenancy Act, Cap.270, but not under any other statutory provisions.

[66]. The interpretation Section 2 of the Agricultural Landlord and Tenant Act, Cap. 270 provides;

"instrument of tenancy" means the writing evidencing a contract of tenancy; and "contract of tenancy" means any contract express or implied or presumed to exist under the provisions of this Act that creates a tenancy in respect of agricultural land or any transaction that creates a right to cultivate or use any agricultural land; "

(emphasis added)

[67]. What is available before this Court, produced and relied upon by the Respondent to have the Appellant evicted under Section 169 of the Land Transfer Act, Cap. 131, is an Instrument of Tenancy issued under the Agricultural Landlord and Tenant Act, Cap.270.

[68]. Therefore, on one hand, in view of the expressed mandatory provisions provided for by Section 9 (2) of the Agricultural Landlord and Tenant Act, Cap.270, the Respondent in this case has no legal right whatsoever to invoke the jurisdiction of this Court under Section 169 of the Land Transfer Act, Cap. 131 for summary eviction of the Appellant or, to bring an action on any other dispute whatsoever arising out of the Instrument of Tenancy No. 6606 that she has produced in this case.

[69]. On the other hand, for the reasons discussed thus far in this judgment and for the other reasons to be followed, pertaining to the Instrument of Tenancy No. 6606, the Respondent has no *locus standi* to bring any action based on the same against any person whomsoever, let alone the Appellant in this case.

[70]. Be that as it may, now, simply for the sake of completeness and for academic purpose, I will discuss the other grave legal deficiencies associated with the application filed by the Respondent in this case particularly focusing on the 2nd ground of appeal submitted by the Appellant

Ground 2 – Certified true copy of the instrument of Tenancy

[71]. The Respondent produced a document marked KD-2 annexed to her affidavit in support and still she says in it, that it is a copy of the Transfer Instrument.

[72]. The Learned Master has accepted the said Transfer (KD-2) stating in paragraph (15) of his judgment that the transfer has been registered under the Registration Act, Cap.224. He further says that the transfer has been duly registered under Registration Act, Cap. 224. He also says in his judgment that the plaintiff (Respondent in these proceedings) has provided a certified true copy of the Instrument (KD-2).

[73]. The Affidavit in Support sworn by the Respondent, Kausalya Devi on 23rd October 2013 does not exhibit a certified true copy of the Instrument of Tenancy No. 6606 or the Transfer No. 40990. Therefore, these instruments are not admissible. The Respondent herself says in her affidavit in support that KD-1 and KD-2 are "copies". She nowhere in her affidavit says that those are "certified true copies". If one just put one's eyes through would observe that those are just "photocopies".

[74]. The Respondent then deposes another affidavit on 19 August 2014 (on the directions given by the Learned Master to supply the certified true copies of the documents) marked 'A' to "D" annexed to the same.

[75]. The Respondent in that affidavit refers to the annexures 'A' to "D" and says as follows:

- *Annexed and marked "A" is a certified true copy of the instrument of lease*
- *Annexed and marked "B" is a copy of the transfer document.*
- *Annexed and marked "C" is a copy of my loan application to that instrument of tenancy a crop lien.*
- *Annexed and marked "D" is a copy of all rental payments made by me*

to lease ref 1/899 from 31st December 2010 to 12th August 2014.

- [76]. The most relevant and vital documents to confirm her claims against the Appellant are annexure "A" and "B".
- [77]. The annexure "A" is again a photocopy of a certified true copy. Interestingly, for the first time the official seal of the Registrar of Titles dated 12 August 2014 is visible on this document. However, this is a photocopy.
- [78]. Assuming that the Respondent produced the certified true copy of the instrument of tenancy, and still it is under the name of her late husband Vijendra Kumar.
- [79]. Then the Respondent needs to bring the certified true copy of the transfer deed annexure "B" which she is relying upon to establish her proprietorship to the property. As it is so clear from her own words in her affidavit dated 19 August 2014, the annexed and marked document "B" is a copy. More than a copy, it is a photocopy.
- [80]. As I earlier indicated, assuming that the Respondent produced a certified true copy of the document "B", there again she faces another incurable legal lump.
- [81]. The Respondent claims her ownership to the land on the instrument of transfer ("B") dated 23 September 2011. This transfer as she says was given by her late husband Vijendra Kumar.
- [82]. Vijendra Kumar cannot alienate or deal with the land thereby leased under the instrument of tenancy (annexure "A") No. 6606, because of the operation of clause (11) of the same.
- [83]. The clause (11) of the instrument of tenancy No. 6606 reads:

"(11),- The tenant shall not alienate or deal with the land hereby leased or any part thereof whether by sale, transfer or sub-lease or any other manner whatsoever without the consent in writing of the lessor first had and obtained.

(emphasis added)

- [84]. The clause (11) of the instrument of tenancy No. 6606 is a mirror image of the Section 12 (1) of the Native Land Trust Act, Cap. 134.

[85]. The Section 12 (1) of the Native Land Trust Act, Cap.134 reads as follows;

Consent of Board required to any dealings with lease

"12. -(1) Except as may be otherwise provided by regulations made hereunder, it shall not be lawful for any lessee under this Act to alienate or deal with the land comprised in his lease or any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever without the consent of the Board as lessor or head lessor first had and obtained. The granting or withholding of consent shall be in the absolute discretion of the Board, and any sale, transfer, sublease or other unlawful alienation or dealing effected without such consent shall be null and void."

[86]. The Respondent very wisely produces a document marked "KD - 2" annexed to the affidavit in reply sworn and submitted by her dated 15th May 2014, which she gives the reference to as a copy of the consent form dated 26th September 2011.

[87]. This is what the Respondent says in paragraph 5 of the said affidavit in reply:

"5. That as to paragraph 6 of the said affidavit, I admit the contents thereof and further state that the subject property was transferred to me prior to the death of my husband. The I-taukei land trust board gave full approval of the said transfer. Annexed hereto and marked "KD2" is a copy of the consent form dated the 26th September, 2011."

[88]. The document "KD-2" is again a photocopy at the first place. The most perilous part is not the form of this document. As I earlier said, assuming that the Respondent produced the certified true copy of this document "KD-2", and yet, the Respondent does not get any right whatsoever on this transfer ("B") because, the date of the transfer ("B") is prior to the date of consent form "KD-2", which manifestly contravenes the provisions of Section 12 of the Native Land Trust Act, Cap.134. Moreover, the perusal of this single-page document ("B") further reveals that most of the required fields to be filled with necessary details in this document are left blank. The date of the signature of the "Assigner" (Vijendra Kumar), the date of the Proposed Assignee (the Respondent), and most notably above all, the date of the attesting Barrister and Solicitor/ Commissioner of Oaths are all left blank. Hence, for the forging reasons discussed, I give this document "KD-2" (which is just a photocopy), no validity, or legality or value whatsoever.

[89]. Therefore, late Vijendra Kumar if he alienated or dealt with the land comprised in his instrument of tenancy No. 6606 or any part thereof, whether by sale, transfer

or sublease or in any other manner whatsoever, without the consent of the Native Land Trust Board, was then illegal and unlawful.

[90]. Unfortunately, these are the kind of documents that were produced before the Learned Master of the High Court by the Respondent to have the vacant possession of the land in dispute and also relied upon by the Learned Master to grant the eviction order in favour of the Respondent.

[91]. Section 11 (2) of the Civil Evidence Act, No. 27 of 2002, Provides: -

“A document is to be taken to form part of the records of a business or public authority if this is produced to the court with a certificate to that effect signed by an officer of the business or authority to which the records belong;”

[92]. Section 14 of the Registration Act, Cap.224 prevents any duplicate or copies of a deed registered with the Registrar of Deeds, being used as or receiving in evidence;

14. No duplicate or copies of a registered deed shall be deemed to be authentic or shall be received in evidence unless they contain an endorsement or marking by the Registrar that they have been examined with the registered deed and found to be correct but, when so endorsed or marked, they shall be received as evidence of the contents of the said deed in all courts of law within Fiji. The fees chargeable for copies or authentication of duplicates or copies shall be as prescribed.

[93]. None of those disputed documents produced by the Respondent contains the endorsement or the certification by the Registrar of Deeds for them to be used or received in evidence. They are merely a set of photocopies with no authenticity.

[94]. It was held in Sharma v Mati [2004] FJHC 366; HBM0425.2003L (4 February 2004) that, if a certified true copy was not exhibited then the lease was inadmissible and therefore the Plaintiff could not cross the first threshold under Section 169 of the Land Transfer Act, Cap.131 to prove that he or she was the registered proprietor.

[95]. Therefore, the Appellant’s ground 2 of the grounds of appeal is self-evidently a valid and strong ground on the face of it. However, these fundamental defects attached to the Respondent’s claim in this case had not been observed and taken into consideration at the lower court.

[96]. Undoubtedly, in a case of this kind brought under Section 169 of the Land Transfer Act, Cap.131, the onus does not shift to the defendant (the Appellant, if it is in this case) to show cause as to why he should not be dispossessed, until the plaintiff (the Respondent, if it is in this case) has established his/her right to bring

the action. This was precisely observed by Hon. Madam Justice Anjala Wati in the case of Habid v Prasad (supra) at paragraph 25.

[97]. In the case of Sharma v Mati ,(supra) it was held;

“The provisions of Section 169 of the Land Transfer Act are in my opinion mandatory and there is no discretion given to the Court as to the people who might commence proceedings pursuant to that section. There is no evidence in admissible form before the Court as to the registered proprietor of the lease.

There is no evidence before the Court of the consent of the Director of Lands as required by Section 13 of the Crown Lands Act to commence the proceedings.

I am of the opinion that both the requirements are, as I have stated, mandatory and without compliance with those requirements the proceedings cannot succeed or for that matter proceed and accordingly, I see no alternate but dismissed the summons.”

[98]. Therefore, in the present case in hand, for the reasons justified above, I hold, with greatest confidence that the Respondent has brought no evidence in admissible for this Court to believe that she is the *last registered proprietor* of the property in dispute.

[99]. In the result, the Respondent’s claim she made under Section 169 of the Land Transfer Act, Cap. 131, at the court below for summary eviction of the Appellant, should have been dismissed.

[100]. For all the reasons discussed above, and in paragraphs [96],[97] and [98] in particular, the issue of whether or not the Learned Master erred in relying on the authority of Charmer v Pardoe (supra), and in holding that the Appellant had no equitable right to possession of the land does not arise at all, since it is the Respondent’s duty to prove her right to bring this action first, before the onus shifts to the Appellant to prove his right to remain in the land.

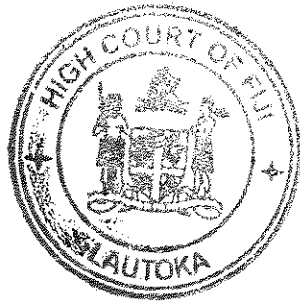
[101]. Therefore, I will not venture to discuss the issue of equitable right as a ground of appeal in this judgment since it is absolutely irrelevant now for me to discuss it in the present case.

Conclusions

[102]. The judgment of the Learned Master of the High Court dated 9th February 2015 and its orders are vacated.

[103]. The originating summons filed by the Respondent on 7th November, 2013, pursuant to Section 169 of the Land Transfer Act, Cap.131, is dismissed.

[104]. The Respondent shall pay costs summarily assessed in the sum of \$1,000.00 to the Appellant within 21 days from this judgment.



A handwritten signature in black ink, appearing to be "R. S. S. Sapuvida".

R. S. S. Sapuvida
[Judge]
High Court of Fiji

7 April 2017 at Lautoka