

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 139-142 OF 2012

IN THE MATTER of an application under section 169 of Part XXIV of the Land Transfer Act, Cap 131 for an Order for immediate vacant possession.

BETWEEN : **UTTRA KUMARI aka UTTRA DEVI KUMARI & AKRAM KHAN** of Tuvu, Rabulu, Tavua.

APPLICANTS/PLAINTIFFS

AND : **CHANDRA PRASAD (139/12)** of Rabulu, Tavua.

1ST RESPONDENT / 1ST DEFENDANT

AND : **RAM SHARAN (140/12)** of Rabulu, Tavua.

2ND RESPONDENT / 2ND DEFENDANT

AND : **CHANDRA BAN (141/12)** of Rabulu, Tavua.

3RD RESPONDENT / 3RD DEFENDANT

AND : **PREM NATH (142/12)** of Rabulu, Tavua.

4TH RESPONDENT / 4TH DEFENDANT

Appearances : Mr N. Nawaikula for Applicants
: Mr S. K. Ram for Respondents

Date of Hearing : 21 April 2017

Written submissions filed on: 16 & 21 June 2017

Date of Judgment : 23 June 2017

J U D G M E N T

Introduction

- [01] I have before me three consolidated applications (CA Nos. 139-142) filed under section 169 of the Land Transfer Act, Cap 131 (“LTA”) for orders for immediate vacant possession of the land described in the applications.
- [02] The Applications commenced the summary proceedings under section 169 in July 2012. However, the court ordered that these matters are to be converted into Writs because iTaukei Land Trust Board (“iTLTB”) had issued offers for lease over the same lands to these Respondents and other occupants. The iTLTB has now withdrawn all lease offers extended to the Respondents (1st, 2nd & 4th).
- [03] The Third Respondent has voluntarily removed his house and vacated the land. As a result, the Applicants had withdrawn the Application filed against him (HBC 141/12). The court accordingly struck out and dismissed the Application filed against the Third Respondent.
- [04] A change of circumstances has emerged since the iTLTB has withdrawn the lease offers given to the Respondents. Considering the change of circumstances, the court converted the matters back to summary

eviction proceedings under section 169 of the LTA. Accordingly, the Applicants filed the consolidation under a section 169 Summons on 17 January 2017 together with its Supporting Affidavits. These were served on the Defendants Solicitors on the same day and the Affidavit of Service filed on 23rd January 2017. The Respondents filed their Affidavit in Response.

[05] In essence, I have before me three consolidated applications seeking immediate vacant possession of the land.

[06] At the hearing, the parties orally made submissions. They had also filed written submissions.

Background

[07] Uttra Kumari aka Uttra Devi Kumari & Akram Khan, the Applicants are registered proprietors of the land in question. The Applicants seek summary eviction of the Respondents, Chandra Prasad, Ram Sharan and Prem Nath on the basis that any lease or tenancy given by the Agricultural Tribunal to the Respondents have expired. The Respondents are in possession of the land and claim that they have a right to remain in possession because they were offered a lease by the head lessor, the iTaukei Land Trust Board (“iTLTB”).

The Law

[08] Sections 169-172 of the LTA are applicable to this application. These sections provide, so far as material, as follows:

Ejectors

169. *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) ... ;

(c) ... (Emphasis added).

Particulars to be stated in summons

170. *The summons shall contain a description of the land and shall require the person summoned to appear at the court on a day not earlier than sixteen days after the service of the summons.*

Order for possession

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.*

Dismissal of Summons

172. *If the 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, mortgage or lessor or he may make any order and impose any terms he may think fit;*

Provided that the dismissal of the summons shall not prejudice the right of the plaintiff to take any other proceedings against the person summoned to which he may be otherwise entitled:

Provided also that in the case of a lessor against a lessee, if the lessee, before the hearing, pay or tender all rent due and all costs incurred by the lessor, the judge shall dismiss the summons.

Discussion

- [09] The Applicants are registered proprietors of the land in dispute. Thereby they fall within the persons who can bring summary proceedings against the persons in possession without right. This fulfills the requirement of section 169.
- [10] It is not in dispute that the Applicants are registered proprietors of the land.
- [11] It is also not in dispute that the Applicants have complied with the requirement of section 170 that the summons shall contain a description of the land and shall require the person summoned to appear at the court on a day not earlier than sixteen days after the service of the summons.

Disputes of Facts

- [12] Mr Ram, counsel appearing for the Respondents advances argument that in the light of evidence and the existence of a binding contract between the iTLTB and the Respondents, it should be very obvious that the matter can no longer proceed by way of summary eviction. The evidence, according to him, should be tested. He cited cases such as: *Qarase v Bainimarama* [2007] FJHC 41; HBC.07 (22 June 2007), *Rao v Rao* [2015] FJHC 314; HBC123.120.2013 (24 April 2015), *iTLTB v Singh* [2015] FJHC146.2013 (28 April 2015), *Prasad v Prakash* [2002] FJHC 308; HBC0157.2000 (22 August 2002) and *Darshan Singh v Ram Singh* [1987] 33 Fiji L.R 63.

- [13] On the other hand, Mr Nawaikula, counsel appearing for the Applicant submits that there is nothing complicated in the facts of this case, there is documentary proof that an offer was made to the Respondents by iTLTB and that it later withdrew, most likely because it realized it cannot grant a lease over the Applicants' existing lease. He further submits that what is clear however is that the Applicants are not privy to that and there cannot be a contract of lease over the Applicants' existing lease such that it is not an issue that stop the grant of possession. He concludes his submission by adding that the Respondents and iTLTB can take the dispute elsewhere.
- [14] In *Qarase* (above), Gates J (as he then was) allowed the matter to proceed on originating summons despite having found earlier that there was substantial dispute of facts in the matter.
- [15] In *Rao* (above), the court found that if there were substantial dispute of facts, the matter could be ordered to proceed as if it were a Writ of Summons.
- [16] In *iTLTB v Singh* (above), where the Plaintiff said that due to a typographical error they had given wrong area of land. The third party that was affected by this mistake was not a party to the proceedings and proceedings were brought on the instrument of tenancy that was issued in error, the court [I] held that this was not simply a question of law but a question of fact which cannot be determine by way of affidavit evidence and originating process was not correct.
- [17] When the basis facts were not in dispute and section 169 procedure would be appropriate (See *Darshan Singh v Ram Singh* (above)).
- [18] In the matter at hand, the Respondents claim that the substantive issue which cannot be determined by these proceedings is the validity of the contract between the Respondents and the iTLTB and that if the contract

between them is valid, then the Respondents have a right to lease over the very property that the Applicants seek to evict them from.

[19] It is true that iTLTB issued offer for lease to the Respondents over the same land which the Applicants seek to evict Respondents from. The offer was made over the Applicants' existing lease without the Applicants surrendering the portion. The iTLTB had withdrawn the lease offers, sensing perhaps that they could not have made that offer over the Applicants' existing lease. The Respondents claim breach of the contract against the iTLTB. The iTLTB is not a party to these proceedings. The Applicants are not privy to the offer of lease and subsequent withdrawal of the same. They have nothing to do with the alleged breach of the contract. The Respondents might have claimed against the iTLTB for the alleged breach of the contract. The Respondents can take the dispute in a separate action.

[20] The Applicants proprietorship is not in dispute. The proceedings do not raise consideration of complicated facts or serious issues of law as between the Applicants and the Respondents. In the circumstances, summary procedure pursuant to section 169 was appropriate for seeking vacant possession.

Right to Possession

[21] I now turn to the question of right to possession.

[22] The Respondents may show cause show cause why they refuse to give possession of the land and, if they prove to the satisfaction of the judge a right to the possession of the land, the judge must dismiss the summons with costs against the Applicants, or he may make any order and impose any terms he may think fit (See s.172).

[23] On the issue of right to possession, the Fiji Court of Appeal in *Ajmat Ali v Mohammed Jalil* (Action No.44 of 1981) said:

*“It is not enough to show a possible future right to possession. That is an acceptable statements 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 need 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”*

[24] In this case, the affidavit evidence of the Respondents is that:

Chandra Prasad [139/12]

(a) He is occupying a portion of the Applicants’ land. He inherited his right to possession from his father. He admits that he is there under a tenancy that was given to this father in 1971 for 21 years. He also admits that the tenancy that was given and extended by an order of the Agricultural Tribunal expired in 2012. He further admits receiving a Notice from the Applicants to vacate when the extension expired. After expiration of the tenancy, he was offered a lease by iTLTB and that was later withdrawn.

Ram Sharan [140/12]

(b) He had a tenancy over the Applicants’ land. The Agricultural Tribunal by its order granted to him a 20 year extension that expired in January 2012. Upon expiry of the tenancy, iTLTB offered to him a lease and that was later withdrawn in March 2015. He admits that he

has received a notice from the Applicants' solicitor to vacate the land he is occupying.

Prem Nath (142/12)

(c) He is sitting in the interest of Ram Sharan. He was given a 20 year extension by the Agricultural Tribunal and that had expired in January 2012. He is also relying on the offer made by iTLTB, which was later withdrawn. He confirms that he received a notice in March 2012 to vacate the land when the tenancy expired.

[25] Precisely, all three Respondents rely on the iTLTB's withdrawn lease offer as the right to possess the land in dispute. Otherwise, they do not have anything to offer the cause to refuse to vacate the land.

[26] As I said elsewhere in this ruling, there is no binding contract between the Respondents and the Applicants respecting tenancy over the land. The Applicants are not liable to breach of the contract arising from the lease offer made by the iTLTB and its subsequent withdrawal, as the Applicants are not privy to this offer and its withdrawal.

[27] Currently, the Respondents are occupying the land without permission either by the Applicants as the registered proprietors or by the iTLTB as the head lessor. This follows that the Respondents do not have right to remain in possession. The Respondents are not entitled to rely on any possible future right to possession.

Conclusion

[28] For all reasons which I have articulated above, I conclude that the Respondents have failed to satisfy me that they have a right to

possession. The inevitable result of that failure is that they must deliver up possession of the land to the Applicants. I accordingly order the Respondents to immediately deliver up possession of the land to the Applicants. I would make no order as to costs.

Final Outcome

1. The Respondents (Defendants) to deliver up vacant possession of the land with immediate effect.
2. No order as to costs.

M.H. Mohamed Ajmeer
23/6/17

M.H. Mohamed Ajmeer

JUDGE

At Lautoka

23 June 2017

Solicitors

M/s Nawaikula Esquire, Barrister & Solicitor for Applicants

M/s Samuel K Ram, Barrister & Solicitor for Respondents

