

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 322 of 2016

AND 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 : **MANUELI DINATI** of Vaturua Village, Nakelo, Tailevu, Farmer.

PLAINTIFF

AND : **ASAELI ULUI MACANALAGI** and **VASEVA TADU ASHAM** farmer and Domestic Duties respectively of Motoriki, Lomaiviti, currently residing at Vaturua Village, Tailevu.

DEFENDANT

BEFORE: Master Vishwa Datt Sharma

COUNSELS: Mr. Abhay Kumar Singh with Mr. Ashneel Nand - for the Plaintiff
Mr. Isireli Fa - for the Defendant

DATE OF RULING: 22nd June, 2017

RULING

(Application seeking Vacant Possession pursuant to s169 of the Land Transfer Act Cap 131)

INTRODUCTION

1. The Plaintiff by his Originating Summons dated 15th December, 2016 is seeking an Order under *Section 169 of the Part XXIV of the Land Transfer Act Cap 131* that the Defendant **Asaeli Ului Macanalagi** and **Vaseva Tabu Ahsam** both of Motoriki, Lomaiviti now residing at Vaturua Village do show cause, why an order for immediate vacant possession of the property known as 'Vale-Naududu' in Vaturua Village, Tailevu, a concrete house with 3 sleeping room, bathroom, toilet and a kitchen which the Plaintiffs have registered Power of Attorney should not be made against them upon the ground set forth in the Affidavit of **Manueli Dinati** sworn and filed herein.
2. The Defendant was served with the application but failed to appear in Court.
3. The matter proceeded with on an undefended basis.

AFFIDAVTS FILED

4. There is 1 (One affidavit filed before the Court:
 - a) Affidavit in Support of Manueli Dinati filed on 23rd December, 2016- ("Plaintiff's Affidavit");

PRACTICE and PROCEDURE

5. The Plaintiff has made his application pursuant to *Section 169 of the Land Transfer Act 1978, Cap 131*.
6. A *Section 169 application* is a summary procedure for possession which enable various categories of persons to call upon a person in possession of a property to show cause why he or she should not give up possession. One such category, specified in paragraph (a) of the section is '*the last registered proprietor of the land*'. (*The Plaintiff does not fall under this category*).
7. Pursuant to *Section 172 of the Act*, the onus is on the Defendant to show cause why he is refusing to give up possession to the Plaintiff and why an order for possession should not be made against the Defendant.
8. The Plaintiff is not the registered proprietor or Lessor in this instance as that cannot be in anyway ascertained from the Plaintiff's application since there is no documentary

evidence annexed to the Affidavit to prove the ownership or proprietorship. The term "proprietor" is defined as the registered proprietor of land, or of any estate or interest therein in the Land Transfer Act. Hence the term "proprietor" follows within the ambit of the *Section 169* application.

9. *"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. Pursuant to *section 172 of the Act* the onus is on the Defendants to show cause why he refuses to give up possession to the Plaintiff and why an order for possession should not be made against him.

Plaintiff's Case

- (i) *That he holds a registered Power of Attorney duly appointed by Tui Felicity Bernadette (copy is attached as annexure marked MD-1).*
- (ii) *That he also been given power to deal with 'Vale-Naududu' by Samantha Geogina Koloba Dinati (copy is attached as annexure marked MD-2).*
- (iii) *That the property in question is a cement and iron dwelling house consisting of 3 bedroom with usual amenities.*
- (iv) *That the house was initially part of a housing project for the Dinati families by Samuel Dinati (now Deceased).*
- (v) *That when Samuela Dinati died his wife Tutaisa Dinati and two children namely Tui Felicity Bernerdette and Samantha Geogina Koloba Dinati lived on in the said property..*
- (vi) *That sometimes later Tutaisa Dinati send their two children to the West (Nadrga) where they have been residing until today as she wanted to rent out the house.*
- (vii) *That now that she has transpired, ownership of the house has traditionally passed on to the children and they want their house back.*

(viii) That the confirmation of true ownership by the Turaga ni Koro is attached. (copy is attached as annexure marked MD-3).

ANALYSIS AND DETERMINATION

11. The First question for this court to determine is whether the Plaintiff has satisfied to this Court the pre-requisites of section 169 and 170 of the Land Transfer Act, Cap 131.

If, the answer to the above question is in affirmative, then the burden shifts to the Defendant where he is required to show cause in terms of his right to remain on the Plaintiff's property and whether the Defendant has any arguable case before this Court in terms of s.172 of the Land Transfer Act Cap 131?

12. 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)

13. In this case, the Plaintiff 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.
(Underline for emphasis)

14. In the instant case, the first limb of s169 doesn't apply herein since there is no documentary evidence of any lease or title to the said land or property known as 'Vale-Naududu' in Vaturua Village, Tailevu, annexed to the Plaintiff's application to prove that the Plaintiff is either the last registered proprietor or the Lessor in any case whatsoever.
15. It can be ascertained from the "WILL" annexed within the Probate grant given to the Executrix and Trustee, Tui Felicity Bernadette Dinati that the property including one house, three iron and cement situate at Vaturua Village.
16. The land which is described herein and vacant possession sought for is within a Village setting. This Court is "ultra Vires" and therefore does not have the power to deal with such land/property within the Village setting. The Village land on which the property sits on or is a fixture is therefore inalienable.
17. **Reference is also made to Sections 38 and 39 (1) of the Land Transfer Act**, as set out hereunder can be regarded as the basis of the concept of "indefeasibility of title" of a registered proprietor. Under Torrens System of land law the registration is everything and only exception is fraud;

"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.

"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 if the register, constituted by the instrument of title thereto, but absolutely free from all other encumbrances whatsoever except...

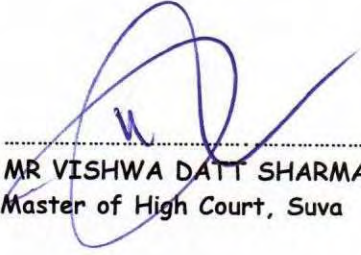
18. In the current case before me, the Plaintiff is seeking an order for 'Vacant Possession' in terms of **S.169 of the Land Transfer Act, Cap 131 in a Village setting which is not possible for the rational explained herein.**
19. In **Conclusion**, I refuse to grant the order for vacant possession as sought by the Plaintiff in his application.

ORDERS

- A. The Plaintiff's application is hereby dismissed.
- B. There will be no order for Costs since the Defendant failed to appear in Court.
- C. Orders accordingly.

Dated at Suva this 22nd day of June, 2017




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MR VISHWA DATT SHARMA
Master of High Court, Suva

cc. Veretawatini Law, Nausori.
Asaeli Ului Macanalagi And Vaseva Tadu Asham, Tailevu.