

IN THE HIGH COURT OF FIJI
AT LABASA
CIVIL JURISDICTION

Civil Action No. HBC 18 of 2016

IN THE MATTER of an application for possession of land under section 169 of the Land Transfer Act.

BETWEEN : **EDWIN AMITESH PILLAY**

PLAINTIFF

AND : **MANU MATAI**

DEFENDANT

Appearances : Maqbool & Co. for the Plaintiff
Legal Aid Commission for the Defendant

JUDGMENT

1. The Plaintiff brings this application pursuant to section 169 of the Land Transfer Act (the Act), for the Defendant to show cause why he should not give immediate vacant possession of that part of the Plaintiff's land which he occupies. The property in question is described in Certificate of Title No. 42296, being land known as "Ravi Ravi and Dreka", Lot 1 on Deposited Plan No. 10507 in the District of Savusavu, on the island of Vanua Levu, containing an area of 1012 m².
2. The affidavit in support is sworn by the Plaintiff who deposes, inter alia, that he is the registered proprietor of the said property. He says the Defendant is illegally occupying the property and though served with a notice to quit dated 23 November 2015, remains in occupation.

The law

3. Section 169 of the Act allows the following persons to 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
 - (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 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 rent;
 - (c) a lessor against a lessee or tenant where a legal notice to quit has been given or the term of the lease has expired.
4. What the Plaintiff is required to do is to first show locus by proving he belongs to at least one of the categories of persons named in section 169 (1) above.
5. Once this is established, section 172 of the Act requires that the Defendant prove to the satisfaction of the Court that he has a right to possession. In *Muthusami v Nausori Town Council* F.C.A. 23/86 the Court of Appeal stated that that must be done by way of affidavit evidence. In the oft cited case of *Morris Hedstrom Ltd v Liaquat Ali* (Action No. 153 of 1987), the Court stated that the Defendant need not prove conclusively a right to possession, and that it is sufficient if it proves that there is some tangible evidence establishing the existence of a right.

Analysis

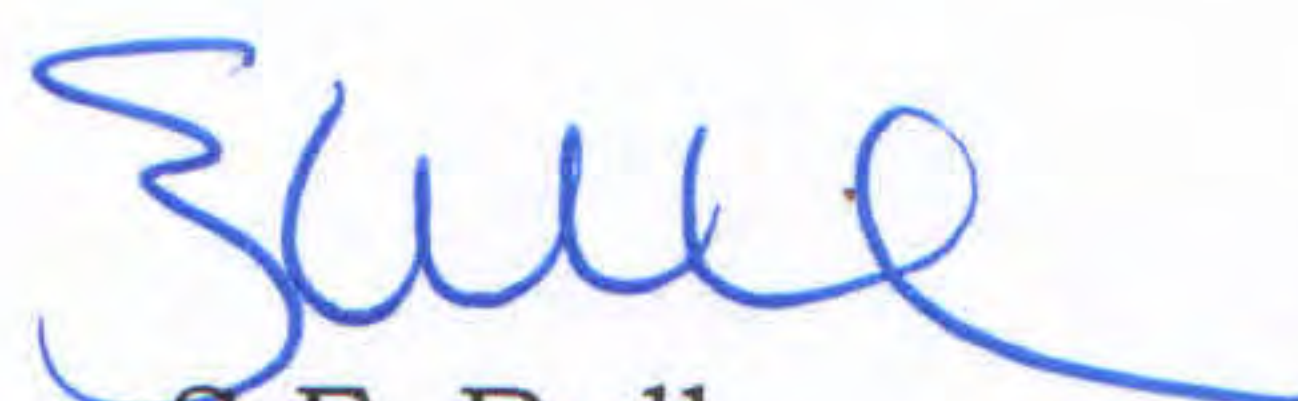
6. The issue for the Court's determination is whether an order for vacant possession ought to be made.
7. The Plaintiff brings this application as the registered proprietor of the property. A copy of the certificate of title annexed to the affidavit in support confirms he is the last registered proprietor and therefore has standing under section 169 (a) of the Act, to institute these proceedings. Locus having been established, the Defendant is now required to show he has a right to possession.
8. The Defendant in Court is Manu Mote. He was served with summons, affidavit in support, and notice to quit. He says he does not know who Manu Matai is that is named in the originating summons.
9. Order 20 Rule 5 (3) of the High Court Rules 1988 allows an amendment to correct the name of a party even though the effect thereof would be the substitution of a new party. What the Court needs to be satisfied about in such an application is that the mistake sought to be corrected was a genuine mistake and not misleading, or such as to cause any reasonable doubt as to the identity of the person intended to be sued.
10. In this case, the Defendant had advised the Court in the presence of counsel appearing for the Plaintiff on 30 June 2016 that he was not "Manu Matai" named in the originating summons. Indeed, his brief affidavit in opposition raised this very point that he did not know who Manu Matai was. The Plaintiff did not reply to this and submitted only that the summons reads "...that the defendant and/or any other person who may be in occupation do show cause..." Plaintiff's counsel also

submits that the Defendant has made an appearance and cannot escape the application.

11. With respect, I do not think that the mere fact of making an appearance means he is the Defendant named in the originating summons.
12. For the Court, the intitulement of the action names "Manu Matai" and no one else as the Defendant. The person before the Court is Manueli Mote. There is nothing to say that he is one and the same person. There is nothing to say that the Plaintiff had made a mistake in the name, and that Manu Matai is a misnomer. In fact, Manueli's evidence that he is not Manu Matai stands undisputed. Earlier in proceedings, Mr. Mote had informed the Court that he was not Manu Matai and that his name was Manueli Mote. The Plaintiff could have applied to amend the name of the Defendant under Order 20 Rule 5 (3) but did not. It served the notice to quit, originating summons, and affidavit in support on Mr. Mote.
13. Though Manueli Mote in his answering affidavit said he knew not who Manueli Matai was, the Plaintiff neither replied nor applied to amend/correct the name on the originating summons.
14. In my opinion, the failure to correctly identify and name the Defendant poses an additional difficulty for the Court when it comes to enter judgment for or against the parties. For, even if I were to assume that Mr. Mote is the correct Defendant, how, and to whom would an order for vacant possession be framed, in the absence of an amendment to the name of the Defendant? *A fortiori* in the absence of such an application to amend?

15. The difficulty faced by the Plaintiff in light of this is as unfortunate as it is unnecessary, but is of its own making.
16. Notwithstanding that the reference is to civil procedure rules of another jurisdiction, I consider just as relevant here the comments of W. Hamilton Bryson¹ that "All of the parties to a lawsuit must be identified and named with accuracy" because "one of the rules of good pleading requires that the correct name of the parties litigant be used in the pleadings... These matters are elemental, and a mere restatement of them discloses the necessity for definiteness and accuracy in naming the defendant" *Baldwin v. Norton Hotel, Inc.*, 163 Va. 76, 80, 175 S.E. 751, 752 (1934).
17. Doing the best I can on the material before me, I consider that the Defendant Manu Matai as named in the originating summons is non-existent and that as a result, the summons is a nullity.
18. The Orders of the Court therefore are:
 1. The application for vacant possession is struck out, with costs in the sum of \$800.

Dated at Labasa this 1st day of September, 2017


S.F. Bull
Acting Master

¹ *Virginia Civil Procedure* § 5.01, at 5-2 (4th ed.2005)