

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 130 of 2017

IN THE MATTER of an application
under Section 169 of Part XXIV of
Land Transfer Act, Cap 131.

BETWEEN: **LAWRENCE MICHAEL RAJALINGAM** of Balmoral, Auckland 1342, New Zealand,
Director.

PLAINTIFF

AND: **EDMOND CLARENCE RAJALINGAM** of 22 Johnson Street, Toorak, Suva, Fiji, Retired
Hardware Salesman.

DEFENDANT

BEFORE: **Master Vishwa Datt Sharma**

COUNSELS: **Ms. Radhika Naidu - for the Plaintiff**
Mr. Goundar - for the Defendants

Date of Ruling: **22nd September, 2017**

RULING

*(Application seeking Vacant Possession pursuant to
S.169 of the Land Transfer Act Cap 131)*

A. INTRODUCTION

1. The Plaintiff by his Originating Summons dated 10th May, 2016 is seeking an order that the Defendant do immediately give vacant possession to the Plaintiff of all the property comprised and described in Certificate of Title No. 8909 being Lot 3 on Deposited Plan No. 2118 of which the Plaintiff is the registered proprietor of together with costs.
2. The application is made pursuant to *Section 169 of the Land Transfer Act, Cap 131*.
3. There are 3 (Three) affidavits filed before the Court:
 - a) Affidavit in Support of Lawrence Michael Rajalingam filed on 09th May, 2017 ("Plaintiff's Affidavit");
 - b) Affidavit in Opposition of Edmond Clarence Rajalingam filed on 15th June, 2017 ("Defendant's Affidavit In Opposition"); and
 - c) Affidavit in Response of Lawrence Michael Rajalingam filed on 10th July, 2017 ("Plaintiff's Affidavit").
4. This case proceeded to hearing on a defended basis and both parties to the proceeding were represented by Counsels at the hearing.
5. 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 *ss. 169, 171 and 172 of the Land Transfer Act [Cap 131]*.

Plaintiff's Case

6. *The Plaintiff relies on his Affidavit in Support filed 09th May, 2017.*
7. *He further made oral submissions as follows-*
 - (a) *He seeks an order for an immediate vacant possession against the Defendant.*
 - (b) *The Plaintiff is the Registered Proprietor of the Certificate of Title annexed "LR1".*
 - (c) *The Plaintiff is the bona fide purchaser of the Property which was mortgaged to Westpac.*
 - (d) *There was no oral or written agreement with the Plaintiff by the Defendant to occupy the property.*
 - (e) *That annexure "LR7" sale & Purchase agreement refers.*
 - (f) *When the settlement was completed, the Defendant failed to give vacant possession.*

- (g) *The Plaintiff is not permitted into the property but the Defendant lives on the property with his family.*
- (h) *The Plaintiff is the new owner after the purchase of the property and the Defendant has continued to occupy the property and not giving vacant possession.*
- (i) *The Defendant is illegally occupying the premises.*
- (j) *The Defendant admits in his affidavit in opposition that once he gets his quantification of his proper shares (3/7 share).*

Defendant's Case

- 8. The Defendant also relied on his Affidavit in Opposition filed on 15th June, 2017 and made oral submissions to this Court.
- 9. The Defendant submitted the following in his written submissions-
 - (a) *He referred court to annexure LR 9 in the Plaintiff's affidavit which stated that the Defendant was given 21 days' notice to quit instead of 30 days' notice;*
 - (b) *Reference was made to the case authority of **Sudha Kumari v Balwant Ram Civil Action No. 63 of 2013;***
 - (c) *The Plaintiff has for the 2nd time instituted this action to evict the Defendant;*
 - (d) *That a Judge of the High Court has made certain orders that the Administrator of his father's Estate is entitled to \$68,937-90 as the Estate expenses;*
 - (e) *The non-payment of beneficiaries is again hampering the Defendant from leaving the property;*
 - (f) *1st. it is for the Plaintiff to give 30 days' notice;*
 - (g) *The Defendant is permitted to remain on the property as he has lived on the property since birth as his family home; Defendant is entitled to 3/7 portion of the property and remains unpaid and therefore he is entitled to stay on the property; and*
 - (h) *The Plaintiff's summons be struck out.*

THE PRACTICE and PROCEDURE

10. 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."*

11. 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."

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."

(Underlined is mine for emphasis)

13. 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."

14. 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)

15. 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) refers.

16. Under *Section 172 of the Act*, the judge is empowered to dismiss the summons if the respondent proves to his satisfaction that he has a valid defence, a right to possession, locus standi and or a licence. It further provides that a judge may make any order and impose any terms that he may think fit. The dismissal of the summons is not to prejudice the right of a Plaintiff to take any other proceedings to which he may be otherwise entitled.

17. It is for the defendant to 'show cause' why he is refusing to give vacant possession of the land comprised and described in the *iTaukei Lease No. 30509 being Lot 1 on Plan TL 1464 known as 'Matairedi' in Waituri, Nausori in Fiji* of which the Plaintiff is the registered proprietor?
18. 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

19. The question for this court to determine is whether the Plaintiff is entitled to the immediate vacant possession of all that property comprised and Described in Certificate of Title No. 8909 being Lot 3 on Deposited Plan No. 2118 from the Defendant.
20. 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.
21. In this instance, the first limb of s169 applies. The annexure marked 'LR1' within the Affidavit in Support of Lawrence Michael Rajalingam confirms that Lawrence Michael Rajalingam, the Plaintiff in this action is the last registered Proprietor of the Certificate of Title No. 8909 being Lot 3 on Deposited Plan No. 2118.
22. In this respect, the certified true copy of the Certificate of Title No. 8909 being Lot 3 on Deposited Plan No. 2118 clearly shows and confirms that the Certificate of Title of that land and property in question was granted to

the Plaintiff on 30th September, 2016 via Folio No. 833963. The Plaintiff for the purposes of *section 169 application* is the last registered Proprietor of the Certificate of Title No. 8909 being Lot 3 on Deposited Plan No. 2118.

23. It is trite law that once the Plaintiff satisfies the court that he is the last registered proprietor or the lessor described under the *section 169 (a), (b) and (c) of the Act*, *the burden shifts to the Defendant to prove that he has a right as to possession*.
24. However, the Defendant lodged his Affidavit in Opposition and opposed the Plaintiff's application seeking orders for immediate Vacant Possession.
25. It is not in dispute that the property under contention is the Estate property which initially was owned by the Plaintiff and the Defendant's deceased father Michael Rajalingam.
26. The Plaintiff and Defendant in this proceedings are both real brothers.
27. The Deceased, Michael Rajalingam left behind a 'Will' which included the property which is under contention before the current proceedings pending before this Court.
28. The Defendant has been in occupation of the said property since his birth and lived therein to the current date.
29. A tender was invited to the said property. Both the Plaintiff and the Defendant submitted their respective tenders. The highest bid being made by the Plaintiff was finally awarded the tender although the Defendant was appraised of the same to reconsider tendering higher amount to which he subsequently failed to respond to.
30. However, the Plaintiff being awarded the tender consequently executed a sale and purchase agreement and eventually the said property was transferred to the Plaintiff.
31. The Plaintiff is therefore the *bona fide purchaser* of the said Property which was subsequently mortgaged to the Westpac.
32. Defendant was served with a notice to quit and refused to vacate the Plaintiff's premises resulting in the Plaintiff issuing an *Originating Summons* against the Defendant seeking an Order for the immediate Vacant Possession of the said property under contention.
33. Defendant opposed the Application stating that he should be given the *3/7* of his share from the Deceased father's property of which he was entitled to. He further stated that he would be prematurely leaving the property without receiving his proper share and would

be prejudiced since he would have to incur expenses for accommodation that he could not afford.

34. Further, the Defendant raised a technical issue that he was not given sufficient notice to quit the property rather given 21 days' notice instead of 1 month notice to vacate.
35. In the current case there was no oral or written agreement with the Plaintiff by the Defendant to occupy the said property.
36. However, reference is made in this regard to the Fiji Court of Appeal case in Dukhi v. Maganbhai Civil Appeal No. 51 of 1979 (unreported) in which the Court said at p.7:

"... since the passing of the Property Law Act, 1971, and in the absence of express agreement the matter of notice to quit is no longer governed by the common law..."

And more specifically at p.8 where the Court said:

"The former common law requirement that the notice must expire at the end of a rental period no longer applies."

37. The Notice to Quit was issued to the Defendant on 17th of October, 2016 and the contents of the notice said "21 days' notice commencing from 17th October, 2016 and ending 14th November, 2016 to quit and deliver Vacant Possession of the said property presently occupied by you".
38. Upon the Court's calculation of the notice period as indicated hereinabove, from and including 17th October, 2016 to the 14th November, 2016 inclusive, comes to a total of 29 days and not 21 days as stated within the notice.

Further, the Defendant was served with a Notice to Quit on the 17th of October, 2016. It is noted that from the date of the service of the Notice to Quit on the Defendant to the present date, the Defendant continues to be in occupation of the said property. Although the Defendant has failed to adhere and give effect to the Notice to Quit within the time-frame of 29 days and not 21 days per se, and if one calculates from the time of the service of the notice to the present date, it would tally up to a more than a month's notice.

39. This Court has taken into consideration both parties Affidavit evidence, oral and written submissions together with the case authorities.
40. The Defendant was served with a Notice to Vacate and to the present date he has defied the notice accordingly without any cause.

41. According to the Plaintiff, the Defendant continues to occupy and live on the said property and to date is refusing to give vacant possession. The said property under contention has been bought by the Plaintiff and the purchase price is held in the trust fund account of the Plaintiff's Counsel of which both parties to the proceedings are aware of and is awaiting the Estate distribution of the property and monies in terms of the Deceased Will and the law accordingly.
42. The delay that is being caused to carry out any distribution of the Funds held in the Trust Fund Account of the Plaintiff's Lawyers is the Defendant's desire to receive the three sevenths 3/7ths of the share from the Deceased Estate without deduction of exorbitant amount of expenses from the Estate funds. Therefore, it is the Defendant who has been causing the delay as well as the obstruction and now refusing to vacate the property of the Plaintiff when he knows and is aware of that the Plaintiff has purchased the property and he is now seeking for the Vacant Possession.
43. The Defendant must understand that the pending distribution of his father's Estate property and assets confined within his Will, will take its own course while the current proceedings for vacant possession will be dealt with by this Court within a Civil Jurisdiction accordingly.
44. It is for the Defendant to show cause why he refuses to give immediate vacant possession of the land and must be able to show Court some tangible evidence of his right to the possession of the land, which I find the Defendant has failed to do so to the extreme,
45. I further find that the Defendant has failed to raise any triable issues nor did he have any legal or equitable right to continue occupying the Plaintiff's property whatsoever.
46. I must reiterate and stress that the summary procedure has been provided in the *Land Transfer Act. Cap 131* 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.

This applies in the current case before the court and the Plaintiff is entitled to have his application decided summarily accordingly.
47. The delay on the part of the Defendant as outlined at paragraph 42 hereinabove gives the Court more reason to impose substantial nature of the costs against the Defendant summarily assessed at \$1,500; for causing unnecessary delay in the distribution of the Deceased Estate which included the current property under contention in this matter. Not only that, the Defendant was well aware of the fact that the Plaintiff is now the bona fide purchaser of the said property and having served with the Notice to Quit

should have known upon obtaining the legal advice that he should give up the Vacant Possession instead since he did not have any valid Defence in the matter.

48. In Conclusion, I proceed to make the following final orders of this court.

FINAL ORDERS

- A. The Plaintiff's Originating Summons seeking Vacant Possession of the property comprised and described in Certificate of Title No. 8909 being Lot 3 on Deposited Plan No. 2118 of which the Plaintiff is the registered proprietor of succeeds.
- B. The Defendant is hereby ordered to give Vacant Possession of the said property to the Plaintiff in one calendar months' timeframe on or before 22nd October, 2017 @ 4 pm.
- C. Execution is hereby suspended till the 22nd October, 2017 @ 4pm.
- D. The Defendant is ordered to pay costs to the Plaintiff summarily assessed at \$1,500 (One thousand five hundred dollars) and the same to be paid within 14 days.
- E. Orders accordingly.

Dated at SUVA this 22ND day of SEPTEMBER, 2017



MR VISHWA DATT SHARMA
Master of High Court, Suva

cc: Sherani Lawyers, Suva.
Lajendra Law, Suva.