

IN THE HIGH COURT OF FIJI
AT LABASA
CIVIL JURISDICTION

Civil Action No. HBC 26 of 2016

IN THE MATTER of section 169 of
the Land Transfer Act, Cap 131.

BETWEEN : **CARPENTERS FIJI LIMITED** a limited liability company
having its registered office at Rodwell Road, Suva.

PLAINTIFF

AND : **KALISI TOGA** of Nakama, Savusavu, Fiji

DEFENDANT

Appearances : Patel Sharma Lawyers for the Plaintiff
Defendant in person

JUDGMENT

1. This is the Plaintiff's application for an order that the Defendant whom it says is occupying part of its property, give immediate vacant possession of the land comprised in Crown Grant No. CG 932, more particularly situated at Nakama (part of) in the District of Savusavu, Vanua Levu. The application is made pursuant to sections 131 and 169 of the Land Transfer Act, and Order 113 of the High Court Rules.

The law

2. Section 131 of the Land Transfer Act provides for the powers of the Registrar of Titles to enter caveats, correct errors in certificates of titles, and, with the approval of the Minister, to destroy documents. It seems this provision has been cited in error as it is of no relevance to these proceedings.
3. On the other hand, section 169 of the Land Transfer Act enables certain persons to summon any person in possession of the land to show cause why they should not give up possession to the applicant.

4. In a section 169 application for vacant possession, the onus is first on the plaintiff to satisfy the Court that it has standing to institute proceedings against the defendant. It does this by proving it belongs to one or more of the following classes of persons under paragraphs (a) – (c) of the section:

1. the last registered proprietor;
2. a lessor who has power of re-entry where the lessee is in arrears for a period stated in the lease, or,
3. where there is no such provision in the lease, a lessor against a lessee who is in arrears for one month, regardless of whether there is sufficient distress on the land to countervail the rent, and whether or not a demand has been made for the rent;
4. a lessor against a lessee or tenant in a case where a legal notice to quit has been served, or the term of the lease has expired.

5. Once the Plaintiff has shown it has standing to bring proceedings under section 169, the onus then shifts to the Defendant to show cause, in accordance with section 172 of the Act, why he refuses to give possession of the land. If he is able to satisfy the court that he has a right to possession, the summons shall be dismissed with costs against the proprietor, mortgagee or lessor. Alternatively, the court may make any order and impose any terms it considers fit.

6. In this case, the Plaintiff also places reliance on Order 113 of the High Court Rules which provides:

Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this Order.

7. Proceedings under both section 169 of the Land Transfer Act and Order 113 are summary in nature and must be taken only in the clearest of cases. (*Tuidraki v Seasea* Civil Action No. HBC 148 of 2014; *Kumar v Kumar* Civil Action No. HBC 157 of 2008L)

Analysis

8. The issue for the Court's determination is whether the Plaintiff is entitled to an order for vacant possession. The Plaintiff brings this application pursuant to section 169 of the Land Transfer Act, and Order 113 of the High Court Rules.
9. In *Singh v Hoit* Civil Action No. 370 of 2011, Master Sharma dealt with an application for vacant possession brought under both section 169 LTA and Order 113. Of this practice, the Master stated:

The Plaintiff cannot commence eviction proceedings on both provisions of the Law confined to one particular Civil Court file in terms of Order 113 and Section 169.

10. Following an assessment of the facts in the affidavits, the Master was of the view that the application before him properly came within the scope of Order 113 and not section 169, and dealt with it accordingly.
11. In this case, Daniel Kingston Whippy who deposes the affidavit in support states that the Plaintiff Company is the registered proprietor of the land described in the originating summons. The Defendant has for some time been in illegal and unlawful occupation of part of the property and has illegally, unlawfully and without any permission, authority, lease or licence, erected a house on the property, and is residing there. On 8 May 2015, the Plaintiff's solicitors caused a trespass notice and notice to quit to be served on the Defendant and other occupants. The said notice gave the Defendant 30 days from the date of service, to vacate the property. In defiance of the notice, the Defendant continues in occupation of the property and has kept the premises in a dilapidated condition. The Plaintiff now intends to carry

out works on the property and, having a legal right to possession in law, the Plaintiff is entitled to an order for vacant possession.

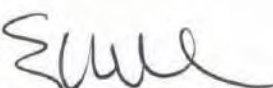
12. In response to the affidavit in support, the Defendant deposed that she had not been served with the trespass notice or notice to quit; that she cleans and maintains the land; that sometime in 1992, she had sought the approval of the landowners, Yavusa Nakama, to stay on the land; how she had presented soap, kerosene and material and was granted permission to reside and plant on the land; that she has not degraded the land but has converted it to good use by building and planting crops on it; that she and her family have lived and built their lives on the property for 24 years; that she was not aware that the Plaintiff required them to vacate the property since she did not receive the notice dated 8 May 2015; that the notice is void and of no effect, and that the Plaintiff's application ought to be struck out with costs.
13. From the contents of the affidavits, it appears that the Plaintiff's application, founded as it is on its title to the property and the allegation that the Defendant is occupying the property without permission, authority, lease or licence, falls within the scope of Order 113 of the Rules.
14. Pursuant to this Order, the burden first falls on the Plaintiff to show it has a legal right to bring these proceedings. To this end, the Plaintiff has annexed to its affidavit in support a copy of the title which it says shows it as the last registered proprietor of the property.
15. I have perused the copy of the title annexed. It is a poor copy which is incomplete, with major parts of it cut off in the photocopying process. Of significance also is the absence of anything on the copy before the Court to say that the document is in respect of Crown Grant CG 932 referred to in the originating summons. It is impossible to read the description of the property. Though the memorials recording the last transactions on the property show the Plaintiff as the last registered

proprietor, this means little when weighed against the fact that there is nothing on the document annexed that says it is the certificate of title for Crown Grant CG. 932.

16. The burden is on the Plaintiff to show it has a legal right to bring these proceedings against the Defendant. An order for vacant possession has drastic consequences for the party against whom such an order is made, and in my opinion, requires of the Plaintiff strict compliance in proving it has a superior title. I am not satisfied that the Plaintiff has discharged the onus on it to show a legal right to bring these proceedings. For this reason, there is no need for the Defendant to show a right to be in occupation, and no order for vacant possession can be made.
17. The Defendant must not be mistaken in taking this decision to mean she has a right to be in occupation of the property. Far from it. The decision not to grant the application for vacant possession against her is due to the failure of the Plaintiff to discharge the onus on it to adduce evidence to show it has a legal right to bring these proceedings.
18. Order
 1. The application for vacant possession is dismissed.
 2. Costs for the Defendant, summarily assessed in the sum of \$800.

Dated at Labasa this 19th day of September, 2017.




S.F. Bull
Acting Master