

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 257 of 2016

IN THE MATTER of an
application under section 169 of
the Land Transfer Act (Cap 131)

BETWEEN : **DAVENDRA PRASAD** of Nasau, Nadi, Registered Proprietor.

Plaintiff

AND : **MAHESH PRASAD** of Nasau, Nadi, unemployed.

Defendant

Before : Acting Master U.L. Mohamed Azhar

Counsels : Mr. D.S.Naidu of *Pillai, Naidu & Associates* for the plaintiff
Mr. Inoke B. Lutumailagi of *Lutumailagi & Associates* for the
Defendant

Date of Judgment : 08th December 2017

JUDGMENT

01. Before me is the summons for ejectment filed by the plaintiff on 02nd December 2016, pursuant to section 169 of the Land Transfer Act Cap 131 against the defendant, seeking an order on the defendant to deliver vacant possession of the property known as Certificate of Title No. 42457, Lot 2 on Deposit Plan No. 10398 situated in the District of Nadi in the Island of Viti Levu. The summons is supported by the affidavit sworn by the plaintiff and the documents marks as ***DP 1*** to ***DP 4***. The ***DP 1*** is the copy of the Certificate of Title, the ***DP 2*** is the copy of an agreement, the ***DP 3*** is the Notice sent by the solicitors of the plaintiff to the defendant to vacate the said property and ***DP 4*** is the reply sent by the defendant to the solicitors for the plaintiff.
02. The defendant upon service of the above summons, appearing through his solicitors filed the Notice of Intention to defend followed by an affidavit in opposition. He also attached a copy of a receipt, marked ***MP 1***, for sum of \$ 800.00 by a person whose signature is illegible. The plaintiff thereafter, filed an affidavit of one Sunil Dutt in reply to the affidavit of the defendant.

03. At the hearing of the summons both counsels made oral submission and the counsel for the plaintiff filed a written submission too, highlighting the facts of the case together with the law on the summary procedure under section 169 of the Land Transfer Act Cap 131. The counsel for the defendant sought time to file his submission and the court allowed him to file the same. However, it was not filed and on the next mention date, the defendant appeared in person. The court, then, granted further time to file his submission on or before 20.09. 2016 and adjourned the matter for judgment. Unfortunately, no such submission was filed on behalf of the defendant.
04. The procedure under the section 169 of the Land Transfer Act Cap 131 is a summary procedure to promptly and speedily restore the registered proprietor to the possession of the subject property when the occupier is unable to show his or her right to possess the particular property. This section provides a speedy procedure for obtaining possession when the occupier fails to show cause why an order should not be made: Mishra JA in Jannadas v Honson Ltd [1985] 31 FLR 62 at page 65. The rationale for this speedy remedy available for the registered proprietors stems from the cardinal principle of the statute that, the register is everything and in the absence of any fraud, the registered proprietor has an indefeasible title against the entire world. The Fiji Court of Appeal in Subaramani v Sheela [1982] 28 FLR 82 (2 April 1982) held that:

The indefeasibility of title under the Land Transfer Act is well recognised; and the principles clearly set out in a judgment of the New Zealand Court of Appeal dealing with provisions of the New Zealand Land Transfer Act which on that point is substantially the same as the Land Transfer Act of Fiji. The case is Fels v. Knowles 26 N.Z.L.R. 608. At page 620 it is said:

"The cardinal principle of the statute is that the register is everything, and that, except in case of actual fraud on the part of the person dealing with the registered proprietor, such person, upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against all the world."

05. The relevant provisions of the Land Transfer Act Cap 131 are as follows;

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) 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) a lessor against a lessee or tenant where a legal notice to quit has been given or the term of the lease has expired.

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, mortgagee 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.

06. Simply, the sections 169 and 170 set out the requirements for the applicant or the plaintiff and the application respectively. The *Locus Standi* of the person who seeks order for eviction is set out in section 169 and the requirements of the application, namely the description of land and the time period to be given to the person so summoned, are mentioned in section 170. The other two sections, namely 171 and 172, provide for the two powers that the court may exercise in dealing with the applications under the section 169. The burden to satisfy the court on the fulfillment of the requirements, under section 169 and 170, is on the plaintiff and once this burden is discharged, it then shifts to the defendant to show his or her right to possess the land. The exercise of court's power, either to grant the possession to the plaintiff or to dismiss the summons, depends on how the said burden is discharged by respective party to the proceedings.

07. The plaintiff in his affidavit, which supports his summons, averred his locus standi to file this summons against the defendant, where he states that he is the last registered proprietor

of all that piece and parcel of land known as Nasau comprised in Certificate of Title No. 42457, Lot 2 on Deposit Plan No. 10398 situated in the District of Nadi, in the Island of Viti Levu and containing an area of 4678 m². The **DP 1** – the certified true copy of Certificate of Title is the proof for the same. The plaintiff further explained in his affidavit the history of the title and stated that, one Narayan Datt (now deceased) was the original registered proprietor of CT 24786 having an area of 22 acres. The plaintiff and the defendant who is the younger brother of former occupied the said property under a contract. Thereafter, the plaintiff entered into an agreement with Narayan Datt to purchase 1 acre from him. The **DP 2** is the copy of the agreement. Upon the subdivision, the plaintiff became the registered proprietor of the said piece of land containing a dwelling house, which is the subject matter of this application. The parents of the plaintiff too remained in the property and his mother is still occupying in the house therein after the death of his father. The defendant – the younger brother of the plaintiff is occupying a portion of that land without the consent of the plaintiff and refused to vacate despite the notice sent by the solicitors to vacate.

08. There is no issue on the proprietorship of the plaintiff. The defendant in paragraph 3 of his affidavit unequivocally admitted that the plaintiff is the last proprietor of the piece of land in dispute which is described in both summons and the affidavit of the plaintiff. Accordingly, the first requirement under section 169 is fulfilled by plaintiff and confirmed by the admission of the defendant.
09. The second requirement is the particulars to be stated in the summons, which is the description of the land as required by the section 170. The fact that, the application for ejectment involves with the property right of a citizen and the order for possession deprives him from his right, which has more effect on his social and economic wellbeing, the courts in all jurisdictions had a tendency to be little tough on the applicants, especially in relation to compliance and the technicalities of the respective statutes. This position is clearly reflected in the judgement of Atunaisa Tavuto v Sumeshwar Singh HBC 332/97L. The court in that case held that, in application such as under section 169 of Land Transfer Act, the technicalities are strictly construed, because of the drastic consequences that follow for one of the parties upon the relief sought being granted. That was a case where an application for vacant possession was sought, however, the applicant failed to give the particulars such as Crown Lease number, lot number and the situation of land, though the Housing Authority Lease number was correctly mentioned. The court dismissed the summons stating that, it behoved the plaintiff and his counsel to have exercised more diligence in that regard.
10. The above case, however, was distinguished by Prakash J, in Wati v Vinod [2000] 1 FLR 263 (20 October 2000) and it was held that:

“The Court has not been provided nor able to locate any authorities to suggest that "a description" as per section 170 means a full description of the land. The Act itself does not specify what a description of the land entails. What is adequate or full description? What is a sufficient description? The purpose is clearly for the parties to be informed as to what land the application relates to. This is clear from the supporting affidavit. In this regard I cannot concur with the sentiments of my brother Justice Madraiwiwi in Atunaisa Tavuto v Sumeshwar Singh (Civil

*Action No. HBC0332 of 1997L) submitted by the Defence Counsel in support of his argument on s.170. It is not clear what Justice Madraiwiwi had meant in stating that "The Summons is defective in not properly describing the subject property" (emphasis added). It is not clear whether "a description means full or proper description. Further, the Supreme Court in the case of **Ponsami v Dharam Lingam Reddy** (Appeal No. 1 of 1996) was dealing with the need for compliance with the Supreme Court Rules not a statutory provision such as Section 170. The statute does not clearly specify what "a description" requires. In **Vallabh Das Premiji v. Vinod Lal, Nanki and Koki** (Civil Appeal 70 of 1974) the Court of Appeal had accepted a description as in the present summons as sufficient".*

11. Seemingly, the view of Prakash J is based on the plain and unambiguous meaning of the statute which does not specify what description of land entails and what is adequate or full description of the land. It is not the duty of the court to impose more conditions and restrict the interpretation of a statute when the wording is clear and unambiguous. What is actually required by the statute is whether the person, so summoned to appear, had the full knowledge, without any misunderstanding, of the land and premises from which he ought to be evicted. If there is any misunderstanding of premises which is the subject matter of the proceeding, it should be brought by the person who is so summoned to show cause and in the absence of any such misunderstanding, the description given by any applicant seems to be sufficient and adequate under the section 170 of the Land Transfer Act. This view is supported by decision of the Court of Appeal in ***Premji v Lal* [1975] FJCA 8; Civil Appeal No 70 of 1974 (17 March 1975)**. It is incumbent on the court to consider the property right of the person so summoned under this application. However, the more emphasis should not be given to such property rights, at the expense of a registered proprietor of a land, who has indefeasible title against the entire world by *Torrens system* of land registration. Accordingly, the reasoning of Prakash J in ***Wati v Vinod*** (supra) seems to be more rational than the view of Madraiwiwi J in ***Atunaisa Tavuto v Sumeshwar Singh*** (supra). These two judgments are from the High Court and in same footing. Therefore, for better reasoning I prefer the view of Prakash J over the other. Accordingly, if an applicant provides the description of a land or premises which can give clear understanding for the persons so summoned under this section, the former is deemed to have discharged his duty under this section.
12. The plaintiff in his summons has given the full description of the land in dispute and attached the copy of the Certificate of Title which is clearly admitted by the defendant in his affidavit. Therefore, the question of description does not arise. The said summons was served and the defendant was given time more than what is required by the section. Accordingly, the plaintiff has discharged the onus casted by the section on him in this application.
13. The section 171 requires the proof and production of 'consent', if any such consent is necessary. The question is therefore, whether any consent from the Director of land is necessary for an application under 169. This matter has been settled by His Lordship the Chief Justice Anthony Gates (as His Lordship then was) in ***Prasad v Chand* [2001] FJLawRp 31; [2001] 1 FLR 164 (30 April 2001)**. His Lordship held that:

"At first sight, both sections would seem to suggest that an Applicant should first obtain the Director's written consent prior to the commencement of section 169 proceedings and exhibit it to his affidavit in support. However I favour Lyons J.'s approach in Parvati Narayan v Suresh Prasad (unreported) Lautoka High Court Civil Action No. HBC0275 of 1996L 15th August 1997 at p 4 insofar as his Lordship found that consent was not needed at all since the:

"section 169 application (which is the ridding off the land of a trespasser) is not a dealing of such a nature as requires the Director's consent."

This must be correct for the Director's sanction is concerned with who is to be allowed a State lease or powers over it, and not with the riddance of those who have never applied for his consent. With respect I was unable to adopt the second limb of Lyons J's conclusion a few lines further on where his lordship stated that the order could be made conditional upon the Director's consent. For if the court's order of ejectment was not "a dealing" then such order would not require the Director's consent and the court would not be subject to section 13. The court is not concerned with the grant of or refusal of, consent by the Director, provided such consent is given lawfully. Consent is solely a matter for the Director. The statutory regime appears to acknowledge that the Director's interest in protecting State leases is supported by the court's order of ejectment against those unable to show cause for their occupation of the land which is subject to the lease. The court is asked to make an order of ejectment against a person in whose favour the Director either, has never considered granting a lease, or has never granted a lease. The ejectment of an occupier who holds no lease is therefore not a dealing with a lease. Such occupier has no title. There is no lease to him to be dealt with. The order is for his ejectment from the land. There is no need for a duplicating function, a further scrutiny by the Director, of the Plaintiff's application for ejectment either before or after the judge gives his order".

14. The section reads as '*...if any consent is necessary..*' and the above authority clearly states that, the consent of the Director for the application under 169 is not necessary. It follows that, the question of consent does not arise in applications under section 169.
15. Since the plaintiff has fulfilled the requirements under sections 169 and 170, the onus now shifts to the defendant to show his right to possess the land and premises in dispute in this application. The Supreme Court in the case of *Morris Hedstrom Limited -v- Liaquat Ali CA No: 153/87* said that:

"Under Section 172 the person summonsed may show cause why he refused to give possession of the land 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." (Emphasis added)

16. As per the above authority, the duty on the defendant is now not to produce any final or incontestable proof of his right to remain in the property, but to adduce some tangible evidence establishing a right or supporting an arguable case for his right. The defence put forward by the defendant is that, he had an oral agreement to buy a portion of land and the dwelling that he and his family occupies, from one Sunil Datt – the executor and trustee of the Estate of Narayan Datt. Attaching a copy of a receipt marked **MP 1**, the defendant further states that, he paid the said amount to Sunil Datt for the purchase of the land next to the house where his mother lives, however, the plaintiff who purchased only 1 acre of the entire land had fraudulently prepared a survey plan including the portion of land which he (defendant) lives with his family and intended to purchase. The defendant puts two facts before the court at this point. One is the alleged fraud on part of the plaintiff in surveying the land in dispute. The plaintiff has an indefeasible title by registration which cannot be challenged except by actual fraud. If the defendant is claiming the fraud in that title and the survey connect therewith, he should have filed the action in the proper forum and raised the issue of fraud. This is not the forum for the defendant to raise such an issue and the claim of fraud, therefore, cannot be accepted in the proceedings for ejection, which is based on the cardinal principle of the statute that the register is everything.
17. The second fact is the purported oral agreement between the defendant and Sunil Datt. The **MP 1**, which is a handwritten and undated receipt, reads as follows:

*Mahesh Prasad has paid the amount of \$ 800.00 for land which Sunil Datt(who as trustee & executor) of Farm No 12171. The land area is ¼ acre
Singature (illegible)*

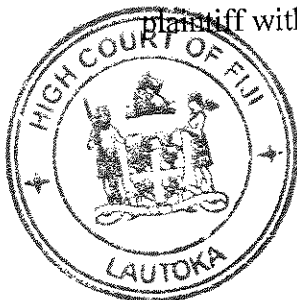
18. There are number of issues that arise out of this document. Firstly, it is not clear as to when it was issued as it is undated. Secondly, the defendant did not state who had issued this receipt. Thirdly, it relates to a Farm No 12171 and is not clear as how it is connected to the land in dispute. Fourthly, it is not the acknowledgment by Sunil Datt, but states that, paid for land. Fifthly, even it is accepted as the valid receipt for an intended purchase of portion of disputed land, it will not give any right for the defendant to occupy the land in dispute. For these reasons, I decline to place any value on it and reject the same. To support this position, is coming the affidavit of Sunil Datt, which was filed by the plaintiff. As stated above, the plaintiff, when he was directed to file the affidavit in reply to the affidavit in opposition filed by the defendant, he filed the affidavit of Sunil Datt. The said affidavit of Sunil Datt clears the air on the purported oral agreement claimed by the defendant. Sunil Datt in his affidavit states that, he is the son of Narayan Datt and the Executor and Trustee. However, he denied that, he entered into any agreement with the defendant as claimed by the defendant. He also denied the document **MP 1** and receipt of any money from the defendant as stated in **MP 1**. Accordingly, the defence put forward by the defendant has no merit and ought to be rejected. Apart from that, there is no any other defence which can support the possession of the defendant.

19. For the above reasons, I am of view that the defendant failed to adduce any tangible evidence establishing the right to possess the said property. It follows that, he must be ordered to immediately deliver the vacant possession of the property to the plaintiff who is last the registered proprietor of the same. In addition, the plaintiff is entitled for a reasonable cost for bringing and maintaining this application.

20. Accordingly, I make following final orders:

a. The defendant is ordered to deliver the vacant possession of the property described in the summons to the plaintiff,

b. The defendant is further ordered to pay a summarily assessed cost of \$ 500.00 to the plaintiff within 14 days from today.



At Lautoka
08/12/17


U.L. Mohamed Azhar
Acting Master