

IN THE HIGH COURT OF FIJI
AT LABASA
CIVIL JURISDICTION

Civil Action No. HBC 52 of 2017

IN THE MATTER of an application
by the Plaintiff under section 169
of the Land Transfer Act.

BETWEEN : **HERMANT KUMAR** of Naqere, Savusavu,
Businessman.

PLAINTIFF

AND : **RAM KUMARI and YOGESH PRASAD** of Naqere,
Savusavu.

DEFENDANTS

Appearances : Plaintiff in person
: Ramanu, I for the Defendants

JUDGMENT

1. This is the Plaintiff's application pursuant to section 169 of the Land Transfer Act (the Act) for the Defendants and/or any other persons who may be in occupation, to show cause why they should not give to the Plaintiff immediate vacant possession of the premises which they occupy and which is described in Certificate of Title No. 13589 as "Qara ni Qatio" and "Navigo" (Part of) Lot No. 5 on Plan No. 3400 situated in the District of Savusavu on the island of Vanua Levu.

The law

2. Section 169 (1) 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.
3. In summary proceedings under section 169, the Plaintiff must first show locus by proving he belongs to at least one of the categories of persons named in section 169 (1) above.
4. 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. The Defendant need not prove conclusively a right to possession, it being sufficient that he shows some tangible evidence establishing the existence of a right. (Morris Hedstrom Ltd v Liaquat Ali (Action No. 153 of 1987))

Analysis

5. The issue for the Court's determination is whether an order for vacant possession ought to be made in the Plaintiff's favour.

6. In this case, the Plaintiff is the last registered proprietor of the land comprised in Certificate of Title No. 13589, known as "Qara ni Qatio" and "Navigo" (Part of), containing 37 perches and 8/10 perch, situated in the District of Savusavu in the island of Vanua Levu, and being Lot 5 on Deposited Plan No. 3400. A copy of the title annexed to the Plaintiff's affidavit in support puts it beyond doubt that he is the last registered proprietor and therefore has standing pursuant to section 169 of the Land Transfer Act to bring this application against the Defendants.
7. The Defendants now need to show to the satisfaction of the Court that they have a right to possession. (Section 172 Land Transfer Act) The Defendants' answering affidavit is sworn by Yogesh Prasad, the second named Defendant who deposes that he and the first named Defendant had, in 2005, instituted proceedings against the Plaintiff in this action, and other Defendants. That action was decided against them and they have appealed the decision of the High Court to the Court of Appeal and have there paid \$4000 as security for costs. The Defendants ask the Court to take judicial notice of the pending proceedings in the Court of Appeal and to suspend this action until after a decision on the appeal.
8. What section 172 of the Act requires is that the Defendants show the existence of a right to possession, the burden of proof being to the Court's satisfaction. Here, the only reason cited by the Defendants in objection to the Plaintiff's application, is the pendency of appeal proceedings in the Court of Appeal. In my opinion, this is not sufficient to resist an application for eviction under section 169 of the Act.
9. Jamnadas v Honson Ltd [1985] FJCA 8; [1985] 31 FLR 62 (20 July 1985) was an appeal from a High Court order for vacant possession under section 169. In the High Court proceedings, the Respondent

had cited the pendency of related proceedings in the High Court to say that the summary application for vacant possession therefore ought to be dismissed. Said the Court of Appeal:

The learned Judge, quite correctly in our view, held that existence of such proceedings was, by itself, not a cause sufficient to resist an application under section 169 of the Land Transfer Act.

10. In *Bhaskar v Khan* [2003] FJHC 260; HBC0043-45j.2002b (27 August 2003), Pathik J (as he then was) dealt with three separate applications for vacant possession under section 169 of the Land Transfer Act. It was submitted for the Defendants that there was a pending action instituted by the Defendants and others, seeking an order for continued occupation. In that action, the Plaintiffs had counterclaimed for vacant possession. The Court held:

The pendency of an action is no bar to proceedings under s. 169 of the Act as the plaintiff has done in this case.

11. The Court in *Bhaskar* (supra) also cited *Muthusami s/o Ram Swamy v Nausori Town Council* (Civ. App. No. 23/86 F.C.A.) where Mishra J.A stated that:

... mere institution of proceedings by writ did not by itself shut out a claim under section 169 of the Land Transfer Act in a proper case. It was for the appellant to show, on affidavit evidence, some right to remain in possession which would make the granting of an order under section 169 procedure improper.

Conclusion

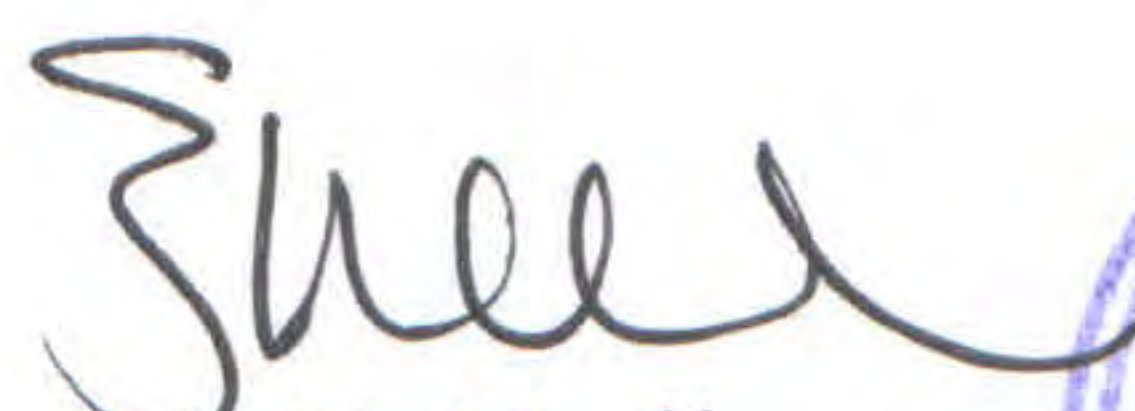
12. In this case, the Defendants have failed to place before the Court any evidence pointing to the existence of any right on their part to continue in possession, and I have no hesitation in holding that the

Plaintiff is entitled to the order he seeks. The authorities are clear that the pendency of related proceedings is not cause enough to resist an application for vacant possession under section 169 of the Land Transfer Act.

13. Order

1. The application for vacant possession is granted.
2. The Defendants are to give to the Plaintiff immediate vacant possession of the property comprised and described in Certificate of Title No. 13589, known as "Qara ni Qatio" and "Navigo" (Part of) Lot No. 5 on Plan No. 3400 situated in the District of Savusavu on the island of Vanua Levu.
3. Costs for the Plaintiff, summarily assessed in the sum of \$800.

Dated at Labasa this 19th day of April 2018


S.F. Bull
Master

