

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 205 of 2019

IN THE MATTER of an application
for possession of Land under section
169 of the **Land Transfer Act [Cap
131]**.

BETWEEN : **AJAY KUMAR** of Wailoaloa, Nadi, Businessman.

PLAINTIFF

AND : **SURES KUMAR** aka **SURESH KUMAR** t/a Early Shop of Wailoaloa,
Nadi.

DEFENDANT

Appearances : Mr D. S. Naidu for the plaintiff
Mr T. Kaloulasulasu for the defendant

Date of Submission : 15 May 2020 (plaintiff), 22 May 2020 (defendant) & 28 May 2020
(plaintiff's reply)

Date of Judgment : 10 June 2020

J U D G M E N T

Introduction

[01] This is an application for vacant possession of land.

[02] Initially, the matter had been handled by the learned Master (*the Master*) since its initiation on 8 August 2019. On 5 March 2020, Mr Naidu of counsel for the plaintiff had sought an early hearing date on the matter. The Master then referred the matter to Deputy Registrar to check whether this matter could be heard by a judge on an early date indicating that he can only fix the hearing in

November 2020 as per his diary. As a result, the matter was referred to me and I fixed the hearing on 30 March 2020. On 30 March, the hearing did not proceed due to Covid-19 lockdown. Then the matter was listed for mention on 11 May 2020. When the matter was taken up on 11 May, both parties agreed that this matter could be decided on submissions. The parties accordingly had filed their respective submissions. The plaintiff filed his submission on 15 May 2020 and the defendant on 22 May 2020. The plaintiff then filed his replying submission on 28 May 2020.

[03] By his application dated 8 August 2019, the plaintiff seeks an order:

“That the defendant to give up immediate vacant possession to the plaintiff of that portion and piece and parcel of land comprised in the State Lease No. 21724, Lot 1 on SO 7289 known as Pt of Enamanu & Solawaru situated in the District of Nadi and Province of Ba, LD Ref. 4/10/5602 of which the defendant (Sures Kumar aka Suresh Kumar) is in occupation [“the property”]

[04] The parties had filed the following affidavit evidence on which they rely:

Plaintiff

- A. Plaintiff’s affidavit in support for ejectment filed on 8 August 2019.
- B. Plaintiff’s supplementary affidavit filed on 17 October 2019.
- C. Plaintiff’s further supplementary affidavit filed on 7 November 2019.
- D. Plaintiff’s affidavit in response to Defendant’s Affidavit in Opposition filed on 23 January 2020.

Defendant

- E. Affidavit in opposition filed by the defendant on 4 November 2019.

[05] The application is filed under section 169 of the Land Transfer Act CAP 131 with the consent of the Director of Lands.

Background

[06] The brief background facts are as follows:

- 6.1 Ajay Kumar, the plaintiff was the registered proprietor of Crown Lease No. 7590 Ref. No. 4/10/1492 situate at Wailoaloa Nadi and on which stood a commercial building which was leased to Sures Kumar aka Suresh Kumar, the defendant as per the lease agreement dated 8 October 2013 ("AK2" or "*the lease agreement*") which carries on the first page consent of the Director of Lands endorsed on 4 June 2014.
- 6.2 The lease agreement was for 3 years with effect from 1 May 2013, at a monthly rental of \$1,000.00 which expired on 30 April 2016. Despite the expiry of the lease agreement, the defendant was allowed to continue as a monthly tenant, but without the consent of the Director of Lands.
- 6.3 In the interim the plaintiff carried out subdivision works on his State Lease (Crown) No. 7590 and this resulted in the commercial site being subdivided and a new State Lease No. 21724 being Lot 1 on SO 7289 LD Ref. 4/10/5602 ("AK8"). The property occupied by the defendant is now covered by the new State Lease No. 21724 of which the plaintiff is the lessee, the proprietor.
- 6.4 The defendant is in occupation of the property despite the expiry of the lease agreement and notice to vacate issued against him and refusing to deliver up possession to the plaintiff. This has resulted in the plaintiff filing the current eviction proceedings against the defendant under section 169 of the Land Transfer Act ("*the Act*")

The law

[07] The law relevant to this application is found in sections from 169 to 172 of the Act.

[08] Section 169 provides, so far as relevant:

“Ejectors

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) ...

(c)” [Emphasis supplied]

[09] Section 170 sets out:

“Particulars to be stated in the 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 16 days after the service of the summons.”

[10] Section 171 states:

“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.”

[11] Section 172 says:

“Dismissal of Summons

172 *If the person summoned appears he or she may show cause why he or she refuses to give possession of such land and, if he or she 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 or she may make any order and impose any terms he or she 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 or she 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."*

The submissions

- [12] Mr Naidu of counsel for the plaintiff argues that the defendant has not shown cause for remaining in occupation of the land. The notice to vacate was served on the defendant on 25 April 2019. Despite various requests the defendant had continued to reside on the property. The defendant does not have any interest on the property to grant his continued occupation.
- [13] Conversely, Mr Kaloulasulasu of counsel for the defendant in his submission contends that the plaintiff knew that the lease had expired yet he allowed the defendant to stay in the property. If the plaintiff wanted to vacate the property then he should have asked the defendant to vacate when the Tenancy Agreement expired in 2016. The plaintiff instead allowed the defendant to stay and took monthly rent from him. The plaintiff always demanded for the defendant to pay \$1,500.00 per month as rental payment and whenever the defendant paid the plaintiff \$1,500.00 as his monthly rental payment, the plaintiff gave the defendant a receipt for \$1000.00. The defendant had spent a lot of expenditures into the property and he is also running a business there. The plaintiff has the right to remain in possession of the land.
- [14] In replying submission, Mr Naidu submits that the allegation of overcharging the rent, which is denied, does not prove or give any legal right to possession of

the land to the defendant. The plaintiff did not give consent to the defendant to improve or renovate the property. A true copy of State Lease No.21724 had been annexed to the supplementary affidavit filed on 7 November 2019 ('AK8').

Discussion

- [15] This is an eviction proceeding under section 169 of the Act. Under this section the last registered proprietor of the land is entitled 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.
- [16] In the present case, the defendant is in possession of the property in dispute. As such, the plaintiff has summoned the defendant to appear before a Judge in chambers to show cause why he should not give up possession of the property to the plaintiff.
- [17] The proceedings under 169 are summary in nature. The court will fix the hearing date, a date which should not be earlier than 16 days after the service of the summons. Section 170 postulates that summons must require the defendant to appear at the court on a day not earlier than 16 days after the service of the summons. It is significant to note that under the 169 proceedings the first day/returnable date itself is the hearing date. Therefore, the defendant must show cause at the hearing. The 169 proceedings should not be protracted unnecessarily like a writ action. The speedy disposition of the application is envisaged.
- [18] The summons filed by the plaintiff on 8 August 2019 was issued (by the Master) fixing the hearing date of 12 September 2019. The summons was served on the defendant on 16 August 2019. There were more than 16 days between the date of service (16 August 2019) and the day fixed for hearing of the summons (12 September 2019). That complies with the requirement of section 170 that the hearing date should not be earlier than 16 days after the service of the summons.
- [19] Section 170 also requires that summons must contain a description of the land. The summons sufficiently describes the land the defendant occupies, giving the name of the land and Lot number on SO 7289. There was no dispute about the description of the land.

- [20] The plaintiff has issued these proceedings on the basis that he is the last registered proprietor of the property of which the defendant is in possession.
- [21] On the issue of proprietorship, only objection the defendant raised was that the plaintiff did not provide the certified true copy of the State Lease to prove the fact that he is the last registered proprietor of the land. It is true that the plaintiff did not provide the certified true copy of the State Lease along with his application. However, he had annexed the certified true copy of the State Lease to his supplementary affidavit filed on 7 November 2019 (*Annexure "8"*).
- [22] The certified true copy of the State Lease No. 21724 clearly demonstrates that the plaintiff is the registered lessee of the land in contest. After the plaintiff provided the certified true copy of the State Lease, the defendant did not raise the issue of proprietorship of the land. On the evidence, I am satisfied that the plaintiff is the last registered proprietor of the land for the purpose of these proceedings. Thus, as the last registered proprietor of the land, the plaintiff is entitled to bring these eviction proceedings against the defendant.
- [23] The plaintiff has brought these proceedings against the defendant on the grounds:
- A) The Plaintiff (Ajay Kumar) is the registered proprietor of the land in question.
 - B) The defendant is in unlawful occupation of the premises, as his tenancy has expired and hence has no consent by the Head Lessor, Director of Lands.
 - C) The defendant was served with various notices informing him of his illegal occupation, despite these notices the defendant failed to vacate.
 - D) The defendant had failed to show in their affidavit any valid grounds and or reasons as to why they should remain on the said property.
- [24] In the current case the defendant has appeared at the court. Therefore, section 172 of the Act applies. This means that he is to show cause why he refuses to deliver up possession to the plaintiff. In terms of section 172, "*..., if he or she*

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, ..."

- [25] I would dismiss, under section 172, the plaintiff's application for possession if I am satisfied that the defendant had proven a right to possession of the land.
- [26] Since I am satisfied that the plaintiff is the last registered proprietor of the land, the burden is on the defendant to prove that he has a right to possession of the land.
- [27] The then Supreme Court in considering the requirements of section 172 stated in *Morris Hedstrom Limited v. Liaquat Ali* (Action No. 153/87 at p2) as follows:
- "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."*
- [28] The defendant says that if the plaintiff wanted the defendant vacate the property then he should have asked the defendant to do so when the Tenancy Agreement expired in 2016. Instead, the plaintiff allowed the defendant to continue to be in possession of the land receiving monthly rental.
- [29] The plaintiff's position was that the defendant was a monthly tenant after the expiration of the Tenancy Agreement which expired in April 2016.
- [30] The plaintiff had served a 30-day-notice to quit dated 24 April 2019 on the defendant on 25 April 2019. The defendant admits service of the quit notice. By reason of the quit notice, the consent given by the plaintiff for the defendant to occupy the land is effectively revoked.

- [31] The service of quit notice will tantamount to terminating any agreement or permission granted to occupy the land. In the case of *Prasad v Chand* [2001] 1 FLR 164 (30 April 2001), the defendant claimed that there should be revocation of an invitation to occupy before giving notice to quit. However, Justice Gates (as he then was) found that there need not be a two-stage process. He held:
- “Where the defendant is an invitee to occupy land, it is not necessary that there should be two stages of eviction-service of revocation and then notice to quit. It would be sufficient if both were given together”* (Emphasis added).
- [32] It is to be noted the permission given by the plaintiff to the defendant to occupy the property as a monthly tenant after expiration of the initial lease agreement has now been terminated by the quit notice.
- [33] The defendant takes issue on the amount of the rental paid to the plaintiff. He says the plaintiff charged \$1,500.00 as rental instead of agreed rental of \$1,000.00. The amount of rental is irrelevant in these proceedings. Whatever the rental amount was the permission to occupy the land has been revoked.
- [34] Since the permission to occupy the property has been revoked, the defendant is not entitled to claim equitable right to the property saying that the plaintiff allowed him (defendant) to stay on the property even after the Tenancy Agreement had expired.
- [35] The defendant claims that he had spent a lot of expenditure into the property and running a business there. The defendant did not specify how much he spent for improvement. In any event, the defendant as a tenant was not entitled to improve the property without the consent of the owner. There is no evidence before the court to suggest that the defendant had ever obtained the plaintiff’s (owner’s) consent to expend money on improvement of the property.
- [36] In *Chand v Chandar* [2003] FJCA 10; ABU0021U.2002S (28 February 2003), the Fiji Court of Appeal said:

“... the fact that a tenant carries out improvements without the consent of his or her landlord does not give him a right to continue in the occupation of the land if the landlord is otherwise lawfully entitled to it...”

- [37] In the current case, the defendant (as tenant) appears to have carried out improvement without the consent of the plaintiff (the landlord). Therefore, the defendant is not entitled to claim a right to continue in the occupation of the land because the plaintiff is entitled to claim possession of the land under section 169.
- [38] In his submission, the defendant submits that the defence of proprietary estoppel applies to his case.
- [39] In *Re Basham* [1987] 1 All ER 405, Edward Huges QC sitting as High Court Judge, set out the requirements for the doctrine of proprietary estoppel in these terms (at p.410):

“Where one person (A) has acted to his detriment on the faith or a belief, which was known to and encouraged by another person (B), that he either has or is going to be given a right in or over B’s property, B cannot insist on his strict legal right if to do so would be inconsistent with A’s belief.”

- [40] There is no evidence before the court that the plaintiff gave any promise to the defendant or made the defendant believe that he (the plaintiff) either has or is going to be given a right in or over the plaintiff’s property. In the circumstances of the case, the proprietary estoppel has no application.

Conclusion

- [41] For the reasons I have given above, and having considered the affidavit evidence, the documents adduced in court and having considered the submissions of the parties, I conclude that the defendant has failed to prove to my satisfaction that he has a right to possession of the land or at least an arguable defence. It follows that the plaintiff is entitled to an order for possession. Accordingly, the defendant shall deliver up possession of the land to the plaintiff forthwith.

Costs

[42] The plaintiff as a successful party is entitled to costs of these proceedings. I consider all and summarily assess the costs to be \$1,500.00.

The outcome

1. The defendant shall forthwith deliver up possession of the land comprised in the State Lease No. 21724, Lot 1 on SO 7289 known as Pt of Enamanu & Solawaru situated in the District of Nadi and Province of Ba, LD Ref. 4/10/5602 to the plaintiff.
2. The defendant shall pay summarily assessed costs of \$1,500.00 to the plaintiff.



M.H. Mohamed Ajmeer
10/6/20

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M.H. Mohamed Ajmeer

JUDGE

At Lautoka
10 June 2020

Solicitors:

Pillai Naidu & Associates, Barristers & Solicitors for the plaintiff
Iqbal Khan & Associates, Barristers & Solicitors for the defendant