

**IN THE HIGH COURT OF FIJI AT SUVA**  
**APPELLATE JURISDICTION**

**Civil Action No. HBC 62 of 2019**

**IN THE MATTER** of section 169 of the **Land Transfer Act 1971**

**BETWEEN**

**TEVITA UMUFUKE** of Lot 2 Bureni No. 3, Nausori, Tailevu, Unemployed.

**APPELLANT (ORIGINAL DEFENDANT)**

**AND**

**SAIRUSI RABICI** of Lot 7 Vama Place, Navosai, Narere, Business Analyst.

**RESPONDENT (ORIGINAL PLAINTIFF)**

**Counsel** : Mr. A. Chand for the Appellant  
Mr. P. Niubalavu for the Respondent

**Date of Hearing** : 11<sup>th</sup> August 2020

**Date of Judgment** : 25<sup>th</sup> August 2020

## JUDGMENT

- [1] The respondent filed the Originating Summons pursuant to section 169 of the Land Transfer Act 1971 seeking the following order;

that the defendant do show cause why an order for immediate vacant possession of the premises situated on the land comprised and described on Instrument of Tenancy No. 8596 as Bureni No. 3 Lot 2 situated in the Tikina of Nausori in the Province of Tailevu in the Island of Viti Levu containing 1.4119 hectares of which the plaintiff is the registered proprietor, should not be made against the defendant together with costs of this application upon the grounds set forth in the affidavit of Sairusi Rabaci.

- [2] In the affidavit in support the plaintiff has averred that he is the registered owner of the property. He has attached a certified true copy of the Transfer and the sketch plan to the affidavit in support. It has also been averred that the plaintiff has obtained the consent of the iTLTB to institute these proceedings. The letter consenting to institute these proceedings is also attached the affidavit in support.

- [3] The defendant's position is that he is residing on this property with the instructions and authority of his brother Akuila Umufuke and that he has been made aware by his brother he had a verbal agreement to purchase this property.

- [4] The learned Master of the High Court in paragraphs 23 and 24 of her judgment made the following orders:

The defendant to give vacant possession of premises situated in the land comprised and described on Instrument of Tenancy No. 8596 as Bureni No. 3, Lot 2 situated in the Tikina of Nausori in the Province of Tailevu. Execution is stayed for 30 days.

The defendant is further ordered to pay cost of this action summarily assessed at \$1000. The cost to be paid in 14 days.

[5] Being aggrieved by the decision of the learned Master of the High Court the appellant preferred this appeal on the following grounds:

1. That the Learned Acting Master of the High Court erred in law and in fact by holding that any dealing if any between the former tenants and Appellant/Defendant and his brother to be illegal.
2. That the Learned Acting Master of the High Court erred in law and fact by holding that the Appellant/Defendant is the right person being sued.
3. That the Learned Acting Master of the High Court erred in law and in fact by no considering the fact that the Appellant/Defendant has proprietary interest due to massive investment made on the property comprised and described on instrument of Tenancy No. 8596 as Bureni No. 3. Lot 2 situated in the Tikina of Nausori in the Province of Tailevu.
4. That the Learned Acting Master erred in law and in fact by holding that Appellant/Defendant to give vacant possession of premises situated on the land comprised and described on instrument of Tenancy No. 8596 as Bureni No. 3, Lot 2 situated in the Tikina of Nausori in the Province of Tailevu.
5. That the Learned Acting Master of the High Court erred in law and in fact in not holding that the Appellant/Defendant showed an arguable case for a right to remain on the property by virtue of improvement carried out on the said property.
6. That the Learned Acting Master of the High Court erred in law and in fact in not considering the fact that a Constructive Trust existed between the previous owner and or registered proprietor/Lessee upon which the Appellant/Defendant had a right to occupy the said flat as a result of the

improvements carried out on the property with the full concurrence and authority of the Plaintiff.

7. That the Learned Acting Master of the High Court erred in law and in fact in not holding that there was an implied agreement between the Appellant/Defendant and the previous owner and or registered Proprietor/Lessee to purchase the said lease.
8. That the Learned Acting Master erred in law and in fact by holding that the Appellant/Defendant is ordered to pay cost of this action summarily assessed at \$1,000 and the said cost to be paid in 14 days.

[6] The respondent has established that he is the registered proprietor of the property in question by tendering the Transfer document which is the best evidence to establish title to a property.

[7] Section 169 of the **Land transport Act 1971** provides;

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.

[8] Section 172 Of the **Land transfer Act 1971** provides:

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.

[9] The learned counsel submits that the appellant has an interest in the property since he is cultivating it. Entering upon a property without leave of the registered proprietor and cultivating it does not confer a right to stay on the property.

[10] In **Chand v Chandar** [2003] FJCA 10; ABU0021U.2002S (28 February 2003) the Court of Appeal held:

...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. On the other hand, if improvements are carried out pursuant to some understanding, however loose, it may be that in some cases rights will be conferred on tenants at least to purchase the land if a price can be agreed upon. One cannot lay down any hard and fast rule. Every case will depend upon its own facts.

[11] This property has been transferred to the respondent by Emele Wati. The appellant's position is that his brother had a verbal arrangement with Emele's son, Ula to purchase this property. The learned Master has dealt with this issue properly. In the judgment she has held that the property cannot be alienated without the prior consent of the lessor. In this case the lessor is the iTaukei Lands Trust Board. As correctly referred to by the learned Master clause 11 of the Instrument of tenancy provides:

The tenant shall not alienate or deal with the land hereby leased or any part thereof whether by sale, transfer or sub-lease or any manner whatsoever without the consent in writing of the lessor first had and obtained.

[12] Therefore, any agreement that could have had with Emele's son has no force or avail in law since they have failed to obtain prior consent of the iTaukei Lands Trusts Board.

[13] Section 59 of the **Indemnity, Guarantee and Bailment Act 1881** provides:

No action shall be brought-

- (a) whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or
- (b) whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person; or
- (c) to charge any person upon any agreement made upon consideration of marriage; or
- (d) **upon any contract or sale of lands, tenements or hereditaments or any interest in or concerning them; or**
- (e) upon any agreement that is not to be performed within the space of one year from the making thereof,

unless the agreement upon which such action is to be brought or some memorandum or note thereof is in writing and signed by the party to be charged


there or some other person thereunto by him lawfully authorised. (Emphasis is mine).

- [14] From the above provisions it is clear any agreement for sale of a land must be in writing. Therefore even if the defendant had an oral agreement to purchase the property, it is not enforceable in law.
- [15] For these reasons this court holds that the learned Master of the High Court has arrived at the correct finding that the defendant has not satisfied the court that he has a right to remain in possession. One of the grounds of appeal is that the learned Master erred in awarding \$1000.00 as costs. The learned counsel for the appellant did not make any submission on this issue. In my view the costs awarded is not excessive.
- [16] For the reasons afore mentioned the court makes the following orders.

#### **ORDERS**

1. The appeal of the appellant is dismissed.
2. The appellant is order to pay \$1000.00 as costs of this appeal (summarily assessed) to the respondent within 14 days from today.



  
Lyone Seneviratne

**JUDGE**

25<sup>th</sup> August 2020