

**IN THE HIGH COURT OF FIJI**  
**WESTERN DIVISION**  
**AT LAUTOKA**

**[CIVIL JURISDICTION]**

**Civil Action No. HBC 104 of 2020**

**BETWEEN** : **NARENDRA KUMAR** of Korolevu, Sigatoka, Fiji.  
**1<sup>st</sup> Plaintiff**

: **NARENDRA KUMAR** of Korolevu, Sigatoka, Fiji as  
Administrator in the Estate of SAINTI aka SHANTI DEVI.  
**2<sup>nd</sup> Plaintiff**

**AND** : **RAUTO and VIKA QILAQILA** of Korokoro Settlement,  
Korolevu, Sigatoka, Fiji.  
**1<sup>st</sup> Defendants**

**AND** : **SEIVALATI VIDOI and MATELITA VIDOI** of Korokoro  
Settlement, Korolevu, Sigatoka, Fiji.  
**2<sup>nd</sup> Defendants**

Before : Master U.L. Mohamed Azhar

Appearance : The Plaintiff and the 1<sup>st</sup> Defendant in person  
Ms. E. Radrole and Ms. A. Sharma of Legal Aid Commission for  
the 2<sup>nd</sup> Defendant

Date of Judgment : 25.02.2021

**JUDGMENT**

(Summons for ejection and locus of a joint proprietor)

01. The plaintiff, in his personal capacity as the beneficiary of, and as the Administrator in the Estate of SAINTI aka SHANTI DEVI summoned the defendants pursuant to section

169 of the Land Transfer Act to show cause why they should not give up immediate vacant possession of the land being Lot 2 N 1674 on Native Lease No. 30833 in the District of Nadroga Navosa in the island of Viti Levu. The plaintiff appeared in person, and the summons is supported by the affidavit sworn by him. He annexed four documents with his affidavit. They are copy of Letter of Administration, copy of iTaukei Lease No. 30833 issued for agricultural purpose, copies of some letters sent by his solicitors to the defendants requesting them to vacate the subject property and a copy of letter he wrote to iTLTB. One affidavit was filed on behalf of the two persons named as 'First Defendants', and another was filed on behalf of the other two persons named as 'Second Defendants'. The plaintiff filed two separate affidavits in reply to both affidavits filed on behalf of the defendants.

02. At hearing of the summons, plaintiff and first named first defendant made oral submission, and the counsels from Legal Aid Commission represented Second Defendants and made oral submission on their behalf. 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. Mishra JA in Jamnadas v Honson Ltd [1985] 31 FLR 62 succinctly explained the nature of this procedure and stated at page 65 that, this section provides a speedy procedure for obtaining possession where the occupier can show no cause why an order should not be made. 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."

03. 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. However, dismissal of a summons shall not prejudice the right of a plaintiff to take any other proceedings to which he or she may be otherwise entitled against any defendant. Likewise, in the case of a lessor against a lessee, if the lessee, before hearing of the summons, pays or tenders all rent due and all costs incurred by the lessor, the summons shall be dismissed by the court.
04. The plaintiff averred in his affidavits that, he is the beneficiary and the Administrator of the Estate of SAINTI aka SHANTI DEVI. He annexed the copy of Letter of Administration granted to him to administer the Estate of SAINTI aka SHANTI DEVI marking as "NK 1" and a copy of the Instrument of Title marking as "NK 2" for the proof of his locus to summons the defendants. Both documents indicate that the plaintiff is the Administrator of the Estate of SAINTI aka SHANTI DEVI and registered as the joint proprietor. It is a transmission by death. The other joint proprietor is one Arvin Kumar. The second defendants admit that, the plaintiff is the Administrator of the Estate of SAINTI aka SHANTI DEVI. However, the first defendants denied it and stated in the affidavit filed on their behalf that, "NK 1" (Letter of Administration) is not a certified copy and cannot be accepted.
05. The section 11 (1) of the Civil Evidence Act provides that, a document which is shown to form part of the records of a business or public authority may be received in evidence in civil proceedings without further proof. Subsection 2 of the same section provides that, a document is to be taken to form part of the records of a business or public authority if that is produced to the court with a certificate to that effect signed by an officer of the business or authority to which the records belong. The document marked as "NK 1" is the copy of Letter of Administration issued by the Probate Division of the High Court in Suva. It is duly certified by an officer who acted on behalf of the Chief Registrar who is the authority to sign such document. This document fulfills requirement of section 11 of the Civil Evidence Act and is admissible as evidence to the effect that, the plaintiff is the Administrator of Estate of SAINTI aka SHANTI DEVI. Accordingly, I decline to accept the objection of the first defendants in relation to the documents "NK1".



06. The counsels appeared for the second defendants admitted that, the plaintiff is one of the joint-proprietors of the subject property. However, they raised two points. Firstly, the plaintiff being a joint-proprietor cannot bring this summons alone. Both proprietors should be the plaintiffs in this case. Secondly, the counsels submitted that, the second defendants entered into a "Joint Venture Agreement" with the other joint-proprietor, namely Arvin Kumar, and that agreement makes them entitled to possess the subject property. In fact the first defendants too, took up this second point in the affidavit filed on their behalf. The first point raised by the counsels is connected with the locus of the plaintiff and it needs to be dealt with first. The second point, raised by all the defendants, is their defence to remain in the subject property, and will be considered when discussing their burden under this procedure.
07. Admittedly, both the plaintiff, by virtue of transmission by death and one Arvin Kumar, by direct grant, are the joint-lessees of the iTaukei Lease No. 30833 granted for agricultural purpose. The plaintiff alone summoned the defendants in this case and other joint-proprietor did not join the plaintiff in summoning the defendant. The question then arises, as raised by the counsels for the second defendants, as to whether a joint proprietor can bring a summons of this nature without the other joint-proprietor? The interest of the joint proprietors or co-owners of the property should be considered to find the answer to the above question. The English law recognizes the co-tenancy and requires establishing four 'unities' for its existence. They are unities of possession, interest, title and time (AG Securities v Vaughan [1990]1 A.C. 417). The result is that, each joint-owner is equally and wholly entitled to whole land (Burton v Camden LBC [2000] 2 AC 399, HL *per* Lord Millett). Each joint tenant is conceived as holding every part and the whole of the land - "per my et per tout" (Wright v. Gibbons [1949] HCA 3; (1949) 78 CLR 313). "Per my et per tout" is a phrase from French Law which means 'by the half and by the whole'. It is the phrase descriptive of the mode in which joint tenants hold the joint estate. The effect of the phrase is, technically considered, that for purposes of tenure and survivorship each is the holder of the whole, but for purposes of alienation each has only his own share, which is presumed in law to be equal. A fortiori, a joint owner or proprietor is barred from evicting his or her co-owner or joint proprietor from the property. However, he or she is, certainly, not barred from evicting a third party or a stranger who has entered the land or the property without any right, because, he or she holds the whole property for the purpose of tenure and survivorship. Accordingly, a joint-proprietor is entitled to bring the summons either alone or together with the other joint-proprietor to evict the strangers and trespassers.
08. The plaintiff being the joint-proprietor of the subject property in this case holds the whole property for the purpose of tenure and survivorship. He can only alienate his share which is legally presumed to be half. However, as long as he continues as a joint-proprietor he



holds whole property, and he is entitled to take actions against all trespassers. This makes me to come to a conclusion that, the plaintiff, being the joint proprietor has the locus to summon the defendants in this case. As the result, I am unable to concur with the first point raised by the counsels for the second defendants.

09. The defendants did not dispute other two procedural requirements, namely the description of the property and the time that should be given to a person so summoned under the section 170 of the Land Transfer Act. The section 171 requires the proof and production of 'consent', if any such consent is necessary. The plaintiff annexed a copy of letter, he wrote to iTLTB informing of his action against the defendants. It is marked as "NK4". He further stated that, he obtained consent from the iTLTB to bring this action against the defendants. The second defendants referring to that letter stated in their affidavit that, it was not the consent from iTLTB, but mere letter written by the plaintiff. In fact, it is not a consent letter by the iTLTB. However, the question is, whether any such consent from the Director of land or iTLTB is necessary for an application under 169. This had already been settled by His Lordship the Former 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".*

10. Accordingly, the plaintiff in this matter passed the threshold under sections 169 and 170 of the Land Transfer Act Cap 131. The burden now shifts to the defendants to show cause their right to remain in possession of the subject property. The often cited decision of the then Supreme Court in **Morris Hedstrom Limited –v- Liaquat Ali** CA No: 153/87 explains the duty of a defendant in application of this nature 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)*

11. The duty on the defendants as per the above authority is, not to produce any final or incontestable proof of their right to remain in the properties, but to adduce some tangible evidence establishing a right or supporting an arguable case for their right to remain in possession of the properties in dispute. **Black's Law Dictionary** defines "tangible evidence" as "physical evidence that is either real or demonstrative" (10<sup>th</sup> Edition, page 678). Thus, duty of the defendants is to produce some real or demonstrative physical evidence and not bare assertions. A bare assertion is not sufficient for this purpose.
12. In addition, the Fiji Court of Appeal in **Ali v Jalil** [1982] FJLawRp 9; [1982] 28 FLR 31 (2 April 1982) explained the nature of the orders a court may make in terms of the phrase used in section 172 of the Land Transfer Act, which says "*he (judge) may make any order and impose any terms he may think fit*". The Court held that:

*"..but the section continues that if the person summoned does show cause the judge shall dismiss the summons; but then are added the very wide words "or he may make any order and impose any terms he may think fit".*



*These words must apply, though the person appearing has failed to satisfy the judge, and indeed are often applied when the judge decides that an open court hearing is required*". (Emphasis added).

13. Accordingly, the court should decide whether a defendant adduced any real or demonstrative physical evidence establishing a right or supporting an arguable case for such a right, or even he failed to adduce such evidence whether an open court hearing is required or not, given the circumstances of a case.
14. Now I consider the second point raised by the counsels for the second defendants. It was stated in the affidavit filed on behalf of the first defendants that they had a "Joint Venture Agreement" with the other joint-proprietor of the subject property. However, such an agreement was not annexed with that affidavit. Conversely, the second defendants, who took up the same defence, annexed in their affidavit a copy of an agreement claimed to be the "Joint Venture Agreement" they entered into with Arvin Kumar. It is marked as "MV 1". Firstly, it is uncertain whether such an agreement was actually entered by and between Arvin Kumar – the other joint proprietor and the defendants, because there is no date at the top of that agreement, but the bottom of the agreement has two different dates namely, 06.02.2020 and 10.02.2020, on which the parties claimed to have signed that agreement. On the other hand, the plaintiff claimed in his affidavit in reply that, the joint-proprietor Arvin Kumar migrated to New Zealand 20 years back. It creates doubt as to execution of such an agreement itself.
15. Secondly and more importantly, the subject property is an iTaukei lease (native lease) granted for agricultural purpose. It is a protected lease and the lessees are not allowed to deal with it in any manner whatsoever without first obtaining the consent from the iTLTB in writing as per condition 2 (k) of the lease. The reasons is that, this lease is subject to section 12 (1) of the iTaukei Land Trust Act, which requires the written consent of the Board before dealing with it in any manner. Therefore, the said agreement is ipso facto illegal and void. It cannot give any right whatsoever to the defendants to remain on the subject property. Thirdly, even if that agreement is considered to be a valid one, the defendants still cannot claim any rights, because it expired after six months from the so called latest date of execution (10.02.2020) as per clause 3 of it. This clearly shows that, the defendants do not have any right to remain in possession of the subject property. The defendants not only failed to show tangible evidence establishing their right to remain, but also failed in satisfying this court to form an opinion that, an open court hearing is necessary in this matter.
16. The summary of the discussion is that, the plaintiff is the last registered proprietor of the properties described in the summons, by virtue of transmission by death. The plaintiff

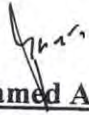
proved its locus under section 169 and there is no dispute in relation to other procedural requirements under section 170 of the Land Transfer Act. Conversely, the defendants failed to show cause as required by the statute and the decided cases thereunder. The plaintiff is therefore entitled for an order for immediate vacant possession of the subject property. The plaintiff must also be compensated for bringing this action against the defendants, who entered and remain in possession of the subject property without lawful authority.

17. In result, I make the following orders:

1. The defendants are ordered to immediately deliver the vacant possession of the subject property described in the summons to the plaintiff, and
2. Each defendant should pay a summarily assessed cost in sum of \$ 100.00 to the plaintiff (total is \$ 400) within 14 days from today.

At Lautoka  
25.02.2021



  
U.L.Mohamed Azhar  
Master of the High Court