

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 85 of 2019

BETWEEN : **ATMA RAM SHARMA** of Malamala, Nadi.

Plaintiff

A N D : **RUP NARAYAN** and **PREM LATA** of Carerras Road,
Votualevu, Nadi

Defendants

Before : Master U.L. Mohamed Azhar

Counsels : Ms. A. Swamy for the Plaintiff
Mr. V. Nettles for the Defendants

Date of Judgment : 07.12.2021

JUDGMENT

01. The plaintiff summoned the defendants, pursuant to section 169 of the Land Transfer Act (Cap 131) to show cause why they should not immediately give up vacant possession of all that land comprised in Certificate of Title Number 22887, being Lot 1 on Deposited Plan Number 5649 containing an area of One Thousand Eighty Square Metres, in the District of Nadi, known as Malawai or Votualevu (hereinafter referred to as the **subject property**) to the plaintiff. The plaintiff sworn the affidavit supporting the summons and annexed two documents marked as Exhibit **A** and **B**.
02. The defendants appeared through their solicitors and filed the affidavit sworn by themselves in opposition of the summons. The affidavit in opposition contains documents marked from **A** to **D**. This was followed by an affidavit of the plaintiff. At hearing of the summons, the counsel for the plaintiff made oral submission and tendered her written

submission. On the other hand, the counsel for the defendants made oral submission and moved the court for leave to file her written submission later. The leave was granted and the matter was adjourned to 12.05.2021. However, the matter was not called on that date as there was no sitting of the court due the lockdown caused by the pandemic. The defendants' solicitor too did not file the written submission. Finally, the matter was listed on 26.10.2021 and the counsel for the defendants moved for further time. The court allowed her motion and the matter was then adjourned to 30.11.2021. On 30.11.2021, the counsel for the defendant sought further time for written submission which was vehemently objected by the counsel for the plaintiff, on the basis this matter has been prolonged due to the failure of the defendants' written submission. The court granted further time till 03.12.2021 and fixed the matter for judgment on 07.12.2021. However, no submission was filed on behalf of the defendants till 4.30 p.m. on 06.12.2021.

03. The plaintiff seeks delivery of possession of the subject property on the basis that, he is the last registered proprietor. He annexed a copy of the instrument of title duly certified by the Registrar of Titles. It is the conclusive evidence of the fact that the plaintiff the last registered proprietor as per section 18 of the Land Transfer Act. In any event, the defendants did not dispute the proprietorship of the plaintiff. The description of the property is not in dispute and the defendants were given sufficient time to prepare their defence in this matter. The consent of the Director of Land is a requirement for proceedings under section 169 of the Land Transfer Act (**Prasad v Chand** [2001] FJLawRp 31; [2001] 1 FLR 164).
04. The burden now shifts to the defendants to show cause their defence to remain in possession of the subject property. The Supreme Court in **Morris Hedstrom Limited –v- Liaquat Ali** CA No: 153/87 explained the duty of a defendant in application of this nature and held 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)

05. Generally, the duty on defendants in this application, 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" (10th Edition, page 678). Therefore, the duty of the defendants in this case too is to produce some real or demonstrative physical evidence demonstrating their right to remain in possession of the subject property. However, this duty will not be fulfilled mere assertion in the affidavit.

06. Furthermore, 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).

07. The abovementioned two decisions require the court to decide whether the defendants adduced any real or demonstrative physical evidence establishing a right or supporting an arguable case for such a right, or even they failed to adduce such evidence whether an open court hearing is required or not, given the circumstances of this case.
08. The defendants stated in their affidavit that, the plaintiff is known to them and they were brought by him to the subject property to look after his father who was a stroke person, on the promise that, the plaintiff would pay all expenses incurred in looking after him. Later, they started to pay the rent in sum of \$ 100 per month after the plaintiff's father was moved by his sister, to her house. The defendants further stated that, they were allowed to plant vegetables and maintain the subject property. The plaintiff did not pay their expenses for looking after his father. The total amount claimed by the defendants is sum of \$ 163,350.00 for 3264 days at the rate of \$ 50 a day. The defendants claim that, they would vacate the subject property only if the total amount is paid by the plaintiff. The question is whether this claim can give the defendants the right to remain in possession of the subject property in this matter.
09. As this court said in other cases, it is the Torrens system of registration that resulted in the guarantee and protection for the last registered proprietor. The protection of indefeasible title from illegal occupation is the high priority of this registration system.

This protection is not only against any illegal occupant of a particular land or property, but also is extended against any person who otherwise entered any property by a legal authority, but continued to occupy that property even after cessation of such authority or permission. That is why the section 169 (b) allows the lessor to bring the summons for eviction even the rental for a month is due. This shows that even a tenant, who legally entered any property, becomes an illegal occupant if the rental falls in arrears. Accordingly, the only defence or right which can suggest challenging the indefeasibility of title of any registered proprietor could be a valid defence or can give a right to remain in a property in proceedings under section 169 of the Land Transfer Act. The issues relating to tenancy or other transactions are not the valid defence in proceedings under section 169 of the Land Transfer Act, nor they can give any right to anyone to remain in possession of any property challenging the indefeasible title of a registered proprietor.

10. The claim of the defendants for the amount for looking after the father of the plaintiff is a transaction and or dealing that has nothing to do with indefeasibility of plaintiff's title. It can only give a cause of action for money recovery if they had intended to create any legal obligation on their alleged agreement to look after the father of the plaintiff. It cannot in any circumstance give any right to remain in possession of the subject property. The position taken by the defendants therefore neither demonstrates any tangible evidence establishing a right or supporting an arguable case for such a right, nor does it warrant open court hearing in this matter.
11. Accordingly, the issues in this matter are straightforward and there are no complicated issues of facts. The plaintiff's proprietorship is undisputed and there is no defence at all for the defendants to possess the subject property. Gould V.P. delivering the unanimous judgment of Fiji Court of Appeal in **Ram Narayan v Moti Ram** (Civ. App. No. 16/83 FCA) stated:

"... the summary procedure has been provided in the Land Transfer Act and, where the issues involved are straightforward, and particularly where there are no complicated issues of fact, a litigant is entitled to have his application decided in that way".

12. It follows that, the plaintiff is entitled for immediate vacant possession in this case; the defendants ought to be evicted from the property; and should be ordered to immediately deliver the vacant possession of the subject property to the plaintiff. Further the plaintiff is entitled to reasonable cost for this application.
13. In result, I make the following orders:

1. The defendants is ordered to immediately deliver the vacant possession of the subject property described in the summons to the plaintiff, and
2. The defendants are further ordered to pay a summarily assessed costs in sum of \$ 1000 to the plaintiff within a month from today.



**At Lautoka
07.12.2021**


U.L.Mohamed Azhar
Master of the High Court