

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 195 of 2020

IN THE MATTER of application under section 169 of Part XXIV of the Land Transfer Act, Cap 131 for an Order for immediate vacant possession

BETWEEN : **BIR CHAND** of Wairuku, Cociu, Rakiraki, Fiji, Farmer.

Plaintiff

AND : **ANITA DEVI AND OTHER OCCUPANTS** of Naqalau, Rakiraki.

Defendants

Before : Master U.L. Mohamed Azhar

Counsels : Mr. N. Padarath for the Plaintiff
Ms. J. Raman with Ms. S. Ali for the Defendants

Date of Judgment : 24.06. 2022

JUDGMENT

01. The plaintiff, by this summons filed pursuant to section 169 of the Land Transfer Act (Cap 131), summoned the defendants to show cause why they should not give up vacant possession to the plaintiff of the premises situated on land known as State Lease No. 20478 (L/D Reference No. 4/13/571) being land known as Part of Naqalau – formerly CT 11693 Lot 2 on RR 1138 having an area of 4.6894 hectares (hereinafter called and referred to as “the subject property”). The summons is supported by an affidavit sworn by the plaintiff and has four annexures marked from “**BC 1**” to “**BC 5**”. The affidavit in opposition was sworn by Anita Devi and it has two annexures marked as “**AD 1**” and “**AD2**”. The plaintiff then replied with his affidavit and annexed two more documents marking as “**BC 1**” and **BC 2**”.

02. At hearing the summons, the both counsels made oral submission and in addition, the counsel for the plaintiff tendered the written submission. The counsel for the defendants informed that, no written submission would be filed on behalf of the defendants. Accordingly, the matter was fixed for judgment.
03. The procedure under Part XXIV of the Land Transfer Act which is known as “169 procedure” is a speedy procedure for obtaining possession when the occupier fails to show cause why an order should not be made (Jamnadas v Honson Ltd [1985] 31 FLR 62 at page 65). Sections 169 to 173 of the Land Transfer Act provide for this special procedure for ejectment. The *Locus Standi* of a person who can invoke the jurisdiction of this court under this procedure is set out in section 169. Three persons, named in that section, have locus to invoke the jurisdiction of this court under this procedure. The section 170 requires the summons to give full description of the subject property and to serve the summons on the defendant to appear not earlier than 16 days after service of the summons.
04. The sections 171 and 172 provide for the two powers that the court may exercise in dealing with the applications under section 169. The consent of the Director of Land is not necessary as 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). The burden to satisfy the court on the fulfillment of the requirements, under sections 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.
05. The duty on defendants in this application 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. This was laid down by the Supreme Court in the often cited decision of Morris Hedstrom Limited –v- Liaquat Ali CA No: 153/87. Even the person appearing has failed to satisfy the court as per the above decision; the court can dismiss the summons if it decides that an open court hearing is required (Ali v Jalil [1982] 28 FLR 31).
06. 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 summoning a lessee for default of rentals, 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.

07. The plaintiff, in order to discharge the burden casted on him under this procedure, annexed a copy of the Instrument of Title marking as "BC 1". It is certified as true copy by the Registrar of Titles. It is conclusive proof of its contents by operation of section 18 of the Land Transfer Act. The plaintiff is the last registered proprietor. It seems that, there was an error on part of the office of the Registrar of Titles in registering the capacity of the plaintiff. However, it had already been corrected by the Registrar of Titles. The summons gives full description of the subject property and the defendants were given time to respond the summons. In any event, the defendants did not dispute the plaintiff's proprietorship, description of the subject property given in the summons and the time given to them to prepare their affidavit. Accordingly, the burden shifted to the defendants to satisfy the court, of their right to remain in the subject property by adducing some tangible evidence.
08. The defendants took up three positions in their affidavit to justify their possession of the subject property. First is that, they entered the subject property as the care takers on request of the plaintiff and therefore, they have right to remain in the subject property. The fact that, the defendants were allowed by the plaintiff to stay in the subject property is not disputed. However, the question is whether this permission can give right to them to remain in the subject property even after it ceased.
09. I must emphasize the very reason of speedy process for vacant possession under section 169 of the Land Transfer Act (Cap 131). 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 (c) allow the lessor to bring the summons for eviction of tenant, if the notice to quit has been issued. The rationale is that, the moment the notice to vacate is issued, the tenant should be evicted and the indefeasible title of the lessor, which is the high priority of the registration system, should be upheld. Any dispute relating to tenancy should be dealt with in an appropriate forum and not in the proceeding for eviction. If this is the situation for a tenant who enters a property on a tenancy agreement, a caretaker cannot claim the right to remain in any property when the permission to stay ceases. The permission granted to the defendants in this matter ceased with the letter sent by the plaintiff through his solicitors on 29.06.2020. The said letter is marked as "BC 2" and annexed with the supporting affidavit of the plaintiff. Accordingly, the first defence taken up by the defendants fails.

10. Secondly, the defendant stated in paragraphs 6 to 9 of the affidavit in opposition that, the subject property belonged to her grandfather and after his death it went under the estate and her father had shares on the subject property. The defendant also said that, the plaintiff is her uncle and he promised to give the subject property to her. The plaintiff admitted that the father of the defendant is his brother. However, he denied all other averments and stated that, the subject property belonged to his father Shiu Shankar and he bequeathed it to his wife and mother of the plaintiff – Jesoda Devi. Thereafter, his mother Jesoda Devi bequeathed it to him. He annexed the copies of Wills of late Shiu Shankar and Jesoda Devi with the copies of Probates marking as “BC 1” and “BC 2” respectively. These annexures together with his assertion in his affidavit in reply completely refute the claim of the defendant that her father had shares on the subject property.
11. Thirdly, the defendant claims that, she spent almost \$ 60,000 to re-build the house damaged by Tropical Cyclone Winston and therefore, she would vacate only if the plaintiff pays that total amount to her. The defendant annexed several invoices in support of her assertion and stated that, she spent on the house in the subject property with the knowledge of the plaintiff and he promised to give the area where the house is situated. On the other hand, the plaintiff denied that he promised to give the land and also denied that, the defendant spent on building the house. It appears that, the defendant tries to claim proprietary estoppel to remain in the subject property.
12. **Snell's Principles of Equity** (28th Edition 1982) at page 558, expounds the rule on proprietary estoppel. It states:

“Proprietary estoppel is one of the qualifications to the general rule that a person who spends money on improving the property of another has no claim to reimbursement or to any proprietary interest in the property. Proprietary estoppel is older than promissory estoppel. It is permanent in its effect, and it is also capable of operation positively so as to confer a right of action. The term “estoppel”, though often used, is thus not altogether appropriate. Yet the equity is based on estoppel in that one is encouraged to act to his detriment by the representation or encouragement of another so that it would be unconscionable for another to insist on his strict legal rights”.
13. At pages 560 and 561 the conditions for the proprietary estoppel have been explained with the illustrations as follows:
 - (1) Expenditure. In many cases A has spent money on improving property which in fact belongs to O, as by building a house on O's land, or by doing repairs to O's house and paying mortgage

instalments and other outgoings, or by contributing to a joint venture to be carried out on O's land, or by paying premiums required to maintain O's life insurance policy.

- (b) *Expectation or belief.* A must have acted in the belief either that he already owned a sufficient interest in the property to justify the expenditure or that he would obtain such an interest. But if A has no such belief, and improves land in which he knows he has no interest or merely the interest of a tenant (or licensee), he has no equity in respect of his expenditure.
- (c) *Encouragement.* A's belief must have been encouraged by O or his agent ^{or} predecessor in title. This may be done actively, as where a father persuades his son to build a bungalow on the father's land, or a mother assures her daughter that she will have the family home for her life, or a man assures his former mistress that the house in which they lived together is hers.
- (d) *No bar to the equity.* No equity will arise if to enforce the right claimed would contravene some statute, or prevent the exercise of a statutory discretion or prevent or excuse the performance of a statutory duty

14. The affidavit of the defendant obviously lacks the evidence to satisfy the first three requirements of proprietary estoppel. The subject property is a state land and the lease is issued for agricultural purpose. The section 13 of the State Lands Act prevents any dealing with the state lands without prior consent of the Director of Lands. This section 13 manifestly stands as complete bar to any equitable estoppel arising in favour of the defendants. Accordingly, even the defendant is able to satisfy this court on first three requirements of proprietary estoppel; the defendant is still unable to claim the same by operation of section 13 of the State Lands Act. If at all, the defendant might have other cause of action to claim such amount she alleges to have spent on the house; however, this will not give any right to her or her family members to remain in the subject property.
15. This is a straightforward case where no complicated issues involved. Therefore, the plaintiff is entitled to have their matter decided in their favour as Justice Gould V.P. stated in **Ram Narayan v. Moti Ram** (Civil Appeal. No. 16/83 FCA, decided on 28.07.1983) as follows:

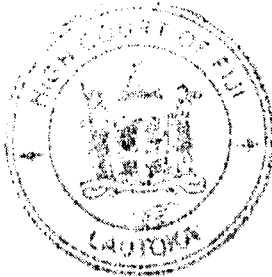
"...the summary procedure has been provided in the Land Transfer Act and, where the issues involved are straightforward, and particularly where there are no complicated issues of fact, a litigant is entitled to have his application decided in that way".


16. The defendant further stated in her affidavit that, she has been in occupation of the property since 2006 and have been maintaining the subject property. However, being in occupation for long time or care and compassion for the land cannot supersede the clear principles on which the Land Transfer Act (Cap131) is founded. In CPS Realty-Fiji Inc And David Simpson & Anne Simpson Civil Action No. 178/90 (unreported) Jayaratne J., held that:

"Section 169 of the Land Transfer Act is very strict in its application. It is very effective piece of legislation to obtain recovery of possession of land by Summary Judgment. No amount of compassion, unfairness or caring for the land as urged by the Defendant can be allowed to supersede the statutory legal effect of the Section".

17. The plaintiff therefore entitled to immediate vacant possession of the subject property for the reasons adumbrated above. In the meantime I am mindful of the fact that, the defendants are represented by the Legal Aid Commission. As a result, I make the following orders:
1. The defendants are ordered to immediately deliver the vacant possession of the subject property to the plaintiff, and
 2. There is no order as to cost.

At Lautoka
24.06.2022




U.L. Mohamed Azhar
Master of the High Court