

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. 133 of 2021

IN THE MATTER of an application under Section 169 of the Land transfer Act 1971

BETWEEN

MACIU LAGIBALAVU of Howell Road, Rewa Street, Suva,
Retired Civil Servant.

PLAINTIFF

AND

ULITA LOMAYACO VAKALOLOMA of Koroqaqa, Baulevu,
Domestic duties.

DEFENDANT

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| Counsel | : | Ms. U. Fa with Mr. E. Wainiqolo for the Plaintiff Ms. L. Vaurasi with Ms. Baleilevuka for the Defendant |
| Date of Hearing | : | 21 st October 2022 |
| Date of Judgment | : | 06 th April 2023 |

JUDGMENT

- [1] The Plaintiff filed this summons pursuant to section 169 of the **Land transfer Act 1971** seeking an order for the Defendant to show cause why an order should not be made against for immediate vacant possession of the land commonly known as 'Wainivoce' encompassed under the Certificate of Title No. 21516 being Lot 1 on DP 5438 comprising an area of 4 hectares 3,606 square meters of which the Plaintiff is the registered owner.
- [2] The affidavit filed by the Plaintiff states that he purchased the land in 1997 through a mortgagee sale. The Defendant is the aunt of Plaintiff's wife. She came in to the property in September 2004 to reside on a temporary basis. Plaintiff claims that his last Demand Notice was issued on 07th June 2021 for the Defendant to vacate the property. However she has refused to do so.
- [3] The Defendant states that there had been an agreement between the Plaintiff and her late husband for the sale and purchase of the property. She claims that the Plaintiff has failed to keep his part of the agreement despite the payments made by the Defendant's family.
- [4] Section 169 of the **Land Transfer Act 1971** (the Act) 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.

Section 172 of the Act 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.

- [5] In the case of **Attorney General of Fiji v Premium Plastics Ltd** [2014] FJHC 159; HBC297.2013 (14 March 2014) it was held:

The scope of the hearing of the application under section 169 constitutes with two main limbs. The first is the onus of the Plaintiff to satisfy the court that he is the last registered proprietor or the lessor described under the section 169 (a), (b) and (c) of the Act. Once the Plaintiff satisfied it, the burden will shift on the Defendant to satisfy the court that he has a right to the possession of the land.

- [6] In the case of **Morris Headstrom Limited v Liaquat Ali** C.A. No.153/87 the following observations were made by the Court of Appeal:

"Under Section 172 the person summoned 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 favor.

The Defendant 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."

- [7] The Plaintiff provided the Certificate of Title 21516 for the land in question. He states that the fully fenced land included a four bedroom house with a swimming pool, crop and vegetable plantation and a Thilapia fish pond. Towards end of year 2004 the Defendant moved in to the property, initially for a temporary period. Thereafter the Defendant and her husband offered to purchase the property. The Plaintiff was not interested in selling, however later he changed his mind. On 12th January 2005 the Plaintiff and the Defendant's husband entered in to a Sale and Purchase Agreement at a purchase price of \$120,000. Parties agreed that \$112,500 of the agreed sum to be paid in \$1000 monthly payment. A part of this land (1000 square meters) had been initially left for the purpose of a Church by the Plaintiff. Later in 2016 the Plaintiff entered in to another agreement to sell the said land portion for a sum of \$15,000.
- [8] Plaintiff states that between 2005 to June 2009 he received \$54,000 from the Defendant's son in \$1000 monthly payment. Between July 2009 and November 2012 another \$58,400 had been paid directly in to the Plaintiff's HFC Loan account. In 2014 further \$8000 has been paid into the FDB Loan account by the Defendant's son. The Plaintiff says that he received a total sum of \$125,000. However that was below the purchase price of his property.
- [9] The Defendant states that her son has paid \$120,000, the purchase price as per the Sale and Purchase Agreement. According to her a total payment of \$75,000 had been made to the personal account of the Plaintiff between 2005 and 2009. The Defendant's position is that she came to know about the HFC mortgage when bank personnel visited the property

for an intending mortgagee sale. Thereafter her son has paid \$57,430 to the HFC bank in installments since 2009. The Defendant states that her children have paid \$141,490 in total, hence there has been an overpayment of \$21,490. However the Plaintiff refused to transfer the property and demanded the Defendant's husband to enter into a new agreement. She says that the plaintiff demanded her late husband another \$57,600 which they never agreed.

[10] The Defendant's daughter has filed a Writ of Summons in the High Court under HBC 342 of 2020 seeking specific performance and injunctive relief against the Plaintiff.

[11] I have perused the Civil Action No. HBC 342 of 2020. The daughter of the Defendant in this case has filed the action against the Plaintiff seeking specific performance under the two agreements mentioned earlier. The action has been instituted on 12th November 2020. Several months later, on 02nd July 2021 the Plaintiff filed this action for eviction. It appears both parties have pleaded identical factual sequences in the two actions.

[12] The Defendant takes up the view that she is at disadvantage having paid the amounts agreed in the two agreement, and yet to get the property transferred to her late husband. It would mean an unfair advantage to the Plaintiff if, allowed to deny the Defendant's beneficial interest.

[13] The Court notes there is a disagreement amongst the parties on the amounts paid. Further there had been some agreed conditions outside the scope of written Sale and Purchase Agreements such as payments of the Loan installments of the Plaintiff. The Defendant seeks protection under section 172 of the Land Transfer Act based on the two Sales and Purchase Agreements based on the principles of equity.

[14] In **Nisha v Munif** [1999] 45 FLR 246 the Court held that the purpose of the equitable doctrine of constructive trusts is to prevent the person with the legal interest in that property from behaving unconscionably. A presumption of advancement exists where the

legal owner is related to the purported equitable owner, although of course this presumption may be rebutted, as it often is in family property disputes. In the early case of **Bannister v. Bannister** [1948] 2 All ER 133, The Court of Appeal held that in equity a constructive trust existed to prevent a legal owner from defeating a beneficial interest belonging to another.

- [15] In **Hussey v. Palmer** [1972] 1 WLR 1286 the plaintiff had paid for an extension to the defendant's home on a promise by the defendant that she could live there as long as she liked. She left and claimed reimbursement to the value of her contributions. Lord Denning M.R. and Phillimore LJ held that the defendant held the property upon a constructive trust for the plaintiff of a beneficial interest proportional to the amount of her payment. Lord Denning said of the doctrine of constructive trusts at p.1290. "It is a liberal process, founded upon large principles of equity, to be applied in cases where the legal owner cannot conscientiously keep the property for himself alone, but ought to allow another to have the property or the benefit of it or a share in it. The trust may arise at the outset when the property is acquired, or later on as the circumstances may require. It is an equitable remedy by which the court can enable an aggrieved party to obtain restitution.
- [16] In my view, any equitable remedies available to the Defendant cannot be resolved through summary proceedings. The Defendant has satisfactorily established her right to possession. Any matters relating to breach of contract should be resolved by the Court through a proper trial after evaluating evidence before it. Rightfully parties have engaged in this process in the case HBC 342 of 2020.
- [17] On a separate note the Court placed observations on the unsworn Affidavit in Support filed by the Plaintiff. There was no application under Order 41 Rule 4 of the **High Court Rules 1988** by the Plaintiff to rectify the error made by him or to use the same in as

evidence. Nevertheless the Court admitted the affidavit to avoid any further delays in this action.

[18] In conclusion, for the reasons stated in paragraph 16, I am of the view the Defendant through her affidavit evidence has supported an arguable case of her right to be in possession of the land. Accordingly the Court makes following orders.

ORDERS

1. The Summons filed under section 169 of the Land Transfer Act 1971 is hereby dismissed.
2. Plaintiff to pay cost of \$1500 (One thousand five hundred dollars) to the Defendant within 14 days of this judgment.



A handwritten signature in black ink, appearing to be "Yohan Liyanage", written over a horizontal line.

Yohan Liyanage

JUDGE

At Suva on 06th April 2023