

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 258 of 2021

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 : **VIKA NAIKAU** and **JOSEPH LOPEZ PECKHAM** both of
Toko, Tavua in Fiji, Bank Officer and Miner respectively.

Plaintiffs

A N D : **JOSEFA MASILAGI** of Nasivi, Vatukoula in Tavua.

Defendant

Before : Master U.L. Mohamed Azhar

Counsels : Mr. B. Kumar for the Plaintiff
Mr. J. Nuidamu for the Defendant

Date of Hearing : 10.05.2023

Date of Judgment : 12.05.2023

JUDGMENT

01. The plaintiff summoned the defendant pursuant to section 169 of the Land Transfer Act (Cap 131). The summons is supported by an affidavit sworn by the plaintiff and seeks the following orders:
 - a. That the defendant do immediately give vacant possession to the plaintiff of all the property comprised and described in Crown Lease No. 293100 known as Vatukoula (Part of) Lot 37 on DP 6592, and
 - b. That the cost of this application be paid by the defendant to the plaintiff on the solicitor client indemnity basis.

02. The defendant opposed the summons and filed the affidavit in opposition. However, the plaintiff opted not to file any affidavit in reply. The matter was fixed for hearing. At hearing of the summons, the counsels made oral submission based on the affidavits filed by the parties in this matter.
03. The procedure under Part XXIV of the Land Transfer Act which is known as “169 Application” is a speedy procedure for obtaining possession of a particular property 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 (Cap 131) provide for this special procedure for ejectment.
04. 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 clear days from the date of service. 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 decision of **Morris Hedstrom Limited –v- Liaquat Ali** CA No: 153/87. Even the defendant has failed to satisfy the court as per the above decision; the court can still 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 the 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. There is no dispute on the proprietorship of the plaintiff, as the defendant admitted that, the plaintiff is the last registered proprietor of the subject property in this matter. There is no dispute on the identity of the subject property as well. Conversely, The defendant stated in his affidavit that, the plaintiff bought the subject property from his step-father. The step-father was married to the defendant's mother and they were living there together. The step-father deserted his mother later and left them. The defendant remained in possession even after the demise of his mother. The defendant alleged that, he spent moneys to develop the subject property and his step-father promised him to sell the subject property to him. However, the step-father secretly sold the subject property to the plaintiff to defeat the contribution made by the defendant and his claim over the said property. For the above reasons, the defendant claims interest over the property and contends that, he has the right to remain in the subject property. The question is whether this could give any right to the defendant to remain in possession of the subject property, defeating the title of the plaintiff.
08. Under the Land Transfer Act, the registration is everything and it is the registration that confers the title to a person so registered. It is the title by registration and not registration of title. This system of registration cuts off the retrospective or derivative character of the title upon each transfer or transmission, so as that each freeholder or proprietor is in the same position as a grantee direct from the Crown/state. The registration is made the source of the title, rather than a retrospective approbation of it, as a derivative right (**Breskvar v. Wall** (1971-72) 126 CLR 376). The only exception is the actual fraud, and in absence of such fraud as provided in sections 39 to 41 of the Land Transfer Act, the registered proprietor shall have an indefeasible title. The Fiji Court of Appeal established this principle in **Subaramani v Sheela** [1982] 28 FLR 82 (2 April 1982) where the court 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."

09. Actual fraud or moral turpitude must be shown on the part of the plaintiff as registered proprietor or of his agents in order to defeat his title [**Prasad v Mohammed** [2005] FJHC 124; HBC0272J.1999L (3 June 2005)]. There is nothing in the affidavit of the defendant to show that the plaintiff fraudulently obtained the subject property from the step-father of the defendant. The defendant's believe that, his step-father secretly transferred the subject property to the plaintiff (as per paragraph 9 of his affidavit in opposition) is not sufficient to defeat the title of the plaintiff. The defendant's claim that, he spent money in developing the subject property for 25 years (paragraph 8 of the affidavit in opposition) cannot defeat the title of the plaintiff. However, it might give the defendant a cause of action to sue his step-father for damages had he acted on the promise of his step-father and developed it.
10. This is a straightforward case where no complicated issues involved. As a result, the plaintiff is entitled to have his matter decided in his 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”.
11. The defendant further stated in paragraph 7 of his affidavit that, he has sentimental value over 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”.
12. The plaintiff therefore entitled to immediate vacant possession of the subject property for the reasons adumbrated above. The counsel for plaintiff claimed the cost of this application on solicitor client indemnity basis. The counsel for the defendant objected and argued that, the defendant exercised his right to defend this application and should not be punished by imposing indemnity cost on him.

13. The general principle of awarding cost is that, 'the costs follow the event'. This means that the costs of an action are usually awarded to the successful litigant. Unless there are exceptional circumstances in a special instance, the rule is that, the costs should follow upon success. Bowen LJ in **Forster v Farquhar and Others** [1893] 1 Q.B 564 stated at page 569 that:

We can get no nearer to a perfect test than the inquiry whether it would be more fair as between the parties that some exception should be made in the special instance to the rule that the costs should follow upon success.

14. The primary purpose of awarding cost is to compensate a successful party. It is neither punishment nor reward. Further the cost awards are also a check on unmeritorious litigation and to encourage litigants to consider cost-effective alternatives to court litigation. However, award of costs should not prevent litigants from accessing to justice and seeking to enforce their rights through the courts. Edwards J in **Taylor v Roper** [2019] NZHC 16 (21 January 2019) discussed the purpose of awarding costs in paragraphs 6 and 7 and said:

The primary purpose of a costs award is to compensate a successful party for the costs they have expended in having their legal rights recognized and enforced in a court of law. Costs are not ordered as punishment against the losing party, nor as a reward for the winner. An award of costs is generally linked to the conduct of the proceeding and its result but is not usually concerned with what happened before the proceeding.

An award of costs also serves a number of other policy objectives. The prospect of an adverse costs award acts as a check on unmeritorious litigation being pursued through the courts. An award of costs also encourages litigants to consider whether there are cost-effective alternatives to court litigation to resolve the underlying dispute. Of course, counterbalanced against those objectives is the public interest in ensuring that an award of costs does not inhibit litigants from seeking to enforce their rights through the courts.

15. The overriding objective in awarding cost is to do justice between the parties. There are several authorities that guide the court in awarding indemnity cost in civil causes. Scutt J in **Prasad v Divisional Engineer Northern (No 2)** [2008] FJHC 234; HBJ03.2007 (25 September 2008) cited number of cases that lay down the principles governing the indemnity costs. Needless to re-produce all of them here. The principle that follows from

those authorities is that, the award of indemnity costs would only be considered in exceptional cases where the conduct of a party was reprehensible to a significant degree.

16. The defendant was of the view that, he has been occupying the subject property for long time and his step-father promised him to transfer it to him as he developed and maintained it. This led him to fight for his right, though his defence failed in the eyes of the law. Accordingly, the conducts of the defendant and the circumstances of this case do not warrant the indemnity cost in this matter. A summarily assessed cost is sufficient to do justice between the parties.
17. In result, I make the following orders:
 1. The defendant is ordered to immediately deliver the vacant possession of the subject property to the plaintiff, and
 2. The defendant should pay a summarily assessed cost in sum of \$ 1500 to pay the plaintiff within a month from today.

At Lautoka
12.05.2023




U.L.Mohamed Azhar
Master of the High Court