

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. 130 of 2022

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

BETWEEN

KHAIRUL NISHA also known as KAIRUL NISHA also known as KHAIRUN NISHA OF 43,
Shalimar Street, Samabula, Suva. Domestic duties.

PLAINTIFF

AND

KIRAN WATI also known as KATHERINE SHAH and **DAVID MORRISON CHRISTOPHER**
of 43, Shalimar Street, Suva.

DEFENDANTS

Counsel : Mr. S. Singh for the Plaintiff
Mr. J. Vulakouvaki for the Defendants

Date of Hearing : 27th February 2023

Date of Judgment : 08th June 2023

JUDGMENT

- [1] The Plaintiff filed this Originating Summons pursuant to section 169 of the **Land transfer Act 1971** claiming vacant possession of the property described in the Certificate of Title No.9698 being Lot 19 on DP No.2320.
- [2] Plaintiff deposed an affidavit dated 12th April 2022 in support of the summons.
- [3] The affidavit states that the Plaintiff has been the registered owner of the property since May 1992. The Defendants are Plaintiff's daughter in law and nephew. The Plaintiff states that there had been a verbal authority given to the Defendants to occupy the property on rent. However no rent payments have been paid and the Plaintiff now wishes to evict the Defendants. There has been a notice dated 10th March 2022 served on the Defendants. However they have failed to vacate the property.
- [4] The Defendants in their affidavit in opposition state that the property had been a family owned place and initially owned by her husband's grandfather. The Defendants occupied the house for over 40 years without any request to pay rent. However the circumstances changed when Defendant's husband passed away in 2020. There had been a request to have a lease agreement by the Plaintiff and it was refused by the Defendant. The Defendants state that they have invested on the property over the past 40 years and now the Plaintiff wants to acquire their investment.
- [5] 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.

[6] 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.

[7] 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.

- [8] 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."
- [9] The case before me is between the mother in law and her daughter in law. There is no dispute to the fact that the Plaintiff has been the registered owner of the property. Parties have been living in different flats on the same property.
- [10] The Defendants position is that they have been residing on the property for more than 40 years. Though the Plaintiff claims that there had been a verbal license to occupy the flat on rent, there had been no payment of rent by the Defendants. However the Defendant, daughter in law states that her late husband and son used to give money to the Plaintiff in the past but it was never receipted. The Plaintiff further states that there was no agreement between her and the Defendants for them to carry out renovations if any on the flat they occupied within the property.
- [11] In **CPS Realty - Fiji Inc v David Simpson & Anne Simpson** (Suva Civ. No. 178/90) Jayaratne J. in a situation somewhat similar to this where certain expenditures were incurred by the Defendant who was tenant of the Plaintiff for 20 years and verbal arrangement was made for them to stay on the property said that:

"the company is the last registered proprietor of the land in question. There are no encumbrances legally valid to be enforced in favor of the Defendant. 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] However the Defendants of the case before me submit that there is proprietary estoppel in their favor.
- [13] The doctrine of proprietary estoppel is applicable where one party knowingly encourages another to act, or acquiesce in the other's actions to his detriment and in infringement of the first party's rights (Hanbury and Maudsley Modern Equity 11th Ed, p. 736)
- [14] In **Inwards v Baker** [1965] EWCA Civ 4; [1965] 2 QB 29; [1965] 1 All ER 446. There a son had built on land owned by his father who died leaving his estate to others. Lord Denning MR, with whom Danckwerts and Salmon L J agreed, said that all that was necessary; "... is that the licensee should, at the request or with the encouragement of the landlord, have spent the money in expectation of being allowed to stay there. If so, the court will not allow that expectation to be defeated where it would be inequitable so to do.
- [15] The Defendants have provided a building condition and status report together with several invoices prepared by a contractor named Build to Last. However all these invoices dated post 2020 and no proof of expenditure, maintenance or renovation works provided prior to 2020. The Court notes 'Build to Last' the company provided this report has the same address as the Defendants and during the hearing counsel accepted that it was Defendant's business. Further the Defendants failed to provide me any evidence that the Plaintiff as the landlady encouraged these renovations.

- [16] What appears from the Defendant's evidence is that the renovation invoices were produced as a countermeasure to Plaintiff's request to get them in to a formal lease agreement. I am of the view that there is no chance of any proprietary estoppel to operate in these circumstances. Even if there is any, I think the proper remedy would be to consider compensation. It would not become a 'right to possession' under section 172 of the Act.
- [17] It is quite unfortunate that this dispute has to end this way despite the long relationship between the parties. As stated in *CPS Realty - Fiji Inc* no amount of compassion can be allowed to supersede the legal effect of section 169 of the Land Transfer Act. In conclusion the Plaintiff has established her case and I enter judgment in favor of the Plaintiff.

ORDERS

1. The Defendants to give up possession of the property contained in Lot 19 of DP 2320 of the Certificate of Title No. 9698.
2. The Defendants given 3 months from the date of this judgment to comply with order No. 1.
3. Defendants to jointly pay cost of \$1500 (One thousand five hundred dollars) to the Plaintiff within 14 days of this judgment.



Yohan Liyanage

JUDGE

At Suva on 08th June 2023