

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 250 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 : **RAJESH SINGH** of Nacovi, Nadi, Farmer.

Plaintiff

A N D : **ABHINESH SINGH** and **JYOTI SINGH** both of Nacovi, Nadi, Businessman and Businesswoman respectively.

Defendants

Before : Master U.L. Mohamed Azhar

Counsels : Mr. R. Singh and Ms. Vreetika for the Plaintiff
Mr. R. Charan for the Defendants

Date of Judgment : 28.03. 2024

JUDGMENT

01. The plaintiff is the last registered proprietor of the land comprised in State Freehold Land Lease No. 844744, being Lot 4, DP No. 9753, land known as Nacobi Part of – formerly Lot 71 ND 3904, containing an area of 1075m², in the District of Nadi, in the Province of Ba (the subject property). The plaintiff summoned the defendants to show cause why they should not give up immediate vacant possession to the plaintiff of the subject property. The plaintiff sworn the affidavit that supports the summons.

02. The defendants opposed the summons and filed the affidavit sworn by the first named defendant. The plaintiff too replied to the affidavit of the defendants. Both counsels for the parties made lengthy argument and also filed the written submission with the authorities.
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 ejection. 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. There is no dispute as to the locus standi of the plaintiff to invoke the jurisdiction of this court under Section 169 of the Land Transfer Act. The plaintiff is the last registered

proprietor of the subject property and followed all necessary steps in summoning the defendants. However, it was agreed by both parties that, there were two agreements by which the defendants were allowed to occupy the subject property, and they have been in occupation for more than 18 years now.

08. The actual background of this matter is that, the plaintiff and one Rodney Eichenberger of USA entered into a Sale and Purchase Agreement whereby the plaintiff agreed to sell and Rodney agreed to buy the subject property. Thereafter, the plaintiff, Rodney and the Defendants entered into a Nomination Agreement whereby Rodney nominated the defendants to purchase the subject property. The plaintiff accepted the nomination made by Rodney and agreed to transfer the subject property to the defendants. The transfer was consented and the consideration was paid. A Copy of the Nomination Agreement and a copy of Transfer were marked as “AS 2” and “AS3” respectively and annexed with the affidavit in opposition. The plaintiff admitted both documents in paragraph 6 of his affidavit in reply. However, the transaction did not go through.
09. The defendants then sued the plaintiff in Civil Action No. HBC 63 of 2019 and sought specific performance among other reliefs. The plaintiff filed the summons to strike out the above action and was successful as the judge who heard that application struck out the defendants’ Action No. HBC 63 of 2019. The defendants then appealed the decision of the judge to the Fiji Court of Appeal. In the meantime, the plaintiff brought this current summons to evict the defendants from the subject property.
10. The counsel for the plaintiff submitted that, the defendants’ action was struck out by the judge and the Fiji Court of Appeal did not grant stay against the decision of the judge. Therefore, the plaintiff should be granted the possession of the subject property. On the other hand, the counsel for the defendants argued that, the decision of the judge striking out the defendants’ action was wrong as there were several complicated issues between the parties in the said action.
11. Finally, the Court of Appeal by its unanimous decision on 28.07.2023 allowed the appeal and set aside the decision of the judge striking out the defendants’ Civil Action 63 of 2019. The Court of Appeal and remitted the matter back to the high court to determine the issues between the parties on the evidence. The matter took normal and the plaintiff filed his statement of defence.
12. It appears from the affidavits of the parties that, there is number of complicated issues which warrant detailed trial. Some of them are: (a) whether the Sale and Purchase Agreement between the plaintiff and Rodney and the subsequent Nomination Agreement among the plaintiff, Rodney and the defendants are valid and enforceable? (b) whether the

consent of the Minister is required as per section 6 of the Land Sales Act, since area of the subject property is less than an acre? (c) If so, whether defendants have equitable interest over the subject property? (d) whether section 13 of the State Land Act is a bar to equity? It is the settled law that, order for vacant possession should not be granted in cases where complicated matters are raised and they warrant determination by the court through a full-blown trial. (Lal v Schultz [1972] 18 FLR 152 (30 October 1972); Devi v Sharma [1985] 31 FLR 130 (1 January 1985); Wati v Vinod [2000] 1 FLR 263 (20 October 2000);

13. It is significant to note here the very reason or purpose of the speedy process for vacant possession provided under the section 169 of the Land Transfer Act. The Land Transfer Act is based on the Torrens system of registration. It cuts off the retrospective or derivative character of the title upon each transfer or transmission. Each registered proprietor becomes like the same person as a grantee direct from the Crown. The the title of each registered proprietor comes from the fact of registration. The registration is made the source of the title. It is a system of title by registration and not a system of registration of title. The title becomes indefeasible once registered, and can only be challenged on the limited ground of fraud. Therefore, a necessity arose for a mechanism which can operate with minimum delay, expense and technicality as opposed to plenary trial involving oral examination of witnesses to protect the indefeasible title of the proprietor. Thus the eviction procedure under section 169 was introduced to achieve this purpose.
14. However, this special mechanism cannot be employed in case where the fraud is alleged and the where the holder of indefeasible title voluntarily entered into a Sale and Purchase Agreement to alienate his title to a prospective buyer. In this latter case, the prospective buyer does not occupy the subject property challenging the indefeasible title of the vendor, but he (prospective buyer) tries to enforce the contract he entered into with the vendor – the registered proprietor. The procedure under section 169 should cannot be employed in this case. The sanctity of the contract must be recognized and it should be left to the competent court to determine the right and duties as per the contract of the parties. If the registered proprietors are allowed to utilize the section 169 procedure and evict the potential purchasers after they entered into a Sale and Purchase Agreement with them, it will lead to abuse of the process under the section 169 by the vendors, because the vendors will repudiate the agreements and summarily evict the purchasers in order to sell the properties to the new highest bidders.
15. In this, the plaintiff entered into a Sale and Purchase Agreement with Rodney and subsequently signed another Nomination Agreement with Rodney and the defendants, agreeing to transfer the subject property to latter. Therefore, the plaintiff who is a party to those agreements cannot employ the special mechanism under section 169 of the Land Transfer Act and summarily evict other party to one of the agreements. All the issues

among the parties to those agreements should be determined by the court in a full-blown trial and not by the summary procedure under section 169 of the Land Transfer Act.

16. Accordingly, the I make the following orders:
- a. The summons filed by the plaintiff is dismissed; and
 - b. The parties to bear the costs.

At Lautoka
28.03.2024




U.L.Mohamed Azhar
Master of the High Court