

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 198 of 2023

BETWEEN: **AUSTRALASIAN CONFERENCE ASSOCIATION LIMITED** having its
registered office at 357 Princess Road, Tamavua, Suva.

PLAINTIFF

AND: **ALFRED LUI WEDTH, NAI LEWA/NIA LEWA, BILI GITA/BILI QITA**
TOKIVAKADUA, SALOME BATIKIRE, JONE LAUKORO, RUSIATE
MATAI JUNIOR, EPARAMA MANI, PENAIPIA PIO, SEMEAMA VULA
SIGAVAKI, JITOKO NABETE, MERE MARIA LASE, JOJI OBA AKA
GEORGE OBA, MERE OBA, ANNY OBA, ENI SUKA, MERE MARICA, ISEI
RAKASO, ADRIU TOVILU, SALOME NAQURUWALE VINIANA
NAQURUWALE, MARICA JOWEKA, JOSAIPIA DICKSON, SOVITA
NASEMIRA, EPALEI NAWAQALIQALI, WAISEA WAWEI AND ALL
OTHER PERSONS (NAMES UNKNOWN) CURRENTLY IN OCCUPATION
OF LAND DESCRIBED IN CERTIFICATE OF TITLE NO. 7168 AND
BEING LOT 2 ON DEPOSITED PLAN NO. 1518 OTHERWISE KNOWN
AS TAMAVUA-I-WAI SETTLEMENT, SUVA.

DEFENDANTS

BEFORE : **Hon. Justice Vishwa Datt Sharma**

COUNSEL: **Ms. Pranjiwan R for the Plaintiff**
Mr. Tuifagalele N for the Defendant

DATE OF DECISION: **10th July, 2024 @ 9.30am**

DECISION

***[Vacant Possession, Dismantle dwellings and Prohibition of Defendants Constructing and
Maintaining dwellings outside designated Area]***

Introduction

1. The Plaintiff through its Summons filed on 30th June 2023 is seeking for the following Orders:
 - (a) The Defendants show cause as to why they and their family and invitees should not give up immediate vacant possession of the land and dwellings at Tamavua-i-wai settlement being the land comprised in Certificate of Title No. 7168 with the Legal description Lot 2 on deposited plan no. 1518 of which the Plaintiff is the registered proprietor and which the Defendants, their family and invitees now unlawfully occupy;
 - (b) That the Defendants not covered within (a) above, dismantle dwellings and be moved to the Designated Area of the Land;
 - (c) Prohibiting the Defendants from constructing and maintaining any dwellings on land outside of the Designated Area of the Land;
2. The application is made in support of the Affidavit filed and deposed by Eparama Drou, Internal Auditor of Trans- Pacific Union Mission of the Seventh Day Adventists Church [TPUM].
3. The Defendants did not file any affidavit in opposition rather relied on its written and oral submission furnished to Court at the Hearing
4. The Plaintiff furnished Court with its written submission and orally argued its case.

Plaintiff Contention

5. The Plaintiff is the registered proprietor of the land comprised in Certificate of Title No. 7168 on Lot 2, deposited plan no. 1518.
6. The Defendants, their family and invitees now unlawfully occupy the said land.
7. The Plaintiff is seeking that the Defendants show cause as to why they and their family and invitees should not give up immediate vacant possession of the land and the dwelling at Tamavua-i-wai settlement.
8. The Plaintiff purchased the said land from Ruby Alice Evelyn Barrick on 13th April 1949. Two to twenty-five families have been living on the land, including descendants of Solomon Islanders people permitted to settle on the land designated for them to stay back in the 1930's.

9. The Defendants have been permitted to live on the land since the early 1960's. However, this permission from the Plaintiff did not entitle the Defendants to any title to the land or any portion of it nor did it give any other rights in relation to the land.
10. Some of the Defendants began to build more dwellings and some had started to invite others to come and live on the land.
11. The Plaintiff intends to develop and subdivide the land it surveyed and fenced off a portion.
12. Unidentified new unlawful occupants have moved onto the Land and are unlawfully residing there at the invitation of one Joji Oba and his family by virtue of the 2016 Court Decision as one of the Defendants who is entitled to remain on the land with his family.
13. The identity of all the new unlawful Occupants cannot be accurately obtained as a result of the fluid Nature of their movement, those moving onto and moving out of the land.
14. The New unlawful occupants an unidentified new unlawful occupants in this matter have not established any reasons to displace this application per se.
15. The Plaintiff accordingly seeks grants of Order in terms of the current originating summons.

Defendants Contention

16. According to the Plaintiff, the Defendants are not holding any title to occupy the said land and therefore have no legal right to be living on the land.
17. From the onset, this proceedings be dismissed following the Judgment of the then Coventry J in the High Court case of **Australian Conference vs Sala & Others (2007) FLR 12 (31 January 2007)**. Coventry J made the following remarks at paragraph 11:

"On the face of the affidavits before me the registered title holders of the land have done nothing sufficient to disabuse them (Defendants of this stance)."

18. At paragraph 38 of the Judgement, the High Court stamped its mark against the Plaintiff's application as follows:

"In my Judgment, given all the circumstances, there have, as far as the forebears and their descendants are concerned been clear indications from the previous and current registered title holders that they were saying "we know you are on the land, we know how you came on to the land, "we know in what way you regard your presence on the land or we close our eyes to these questions and we are content for you to be there." That is the position that has prevailed for nearly 70 years.

19. According to the Defendants it will be very unfair and an insult to justice to attempt to evict the Defendants who were on the subject land by License initially and where the Plaintiff waived to exercise its rights for decades to remove the said Defendants. Whether the Plaintiffs have made enquiries as to who the Defendants were, how they came onto the subject land, and for how long they were there for. By Promissory Estoppel alone, the Plaintiff's application should fail and be dismissed.
20. The Plaintiffs application was filed pursuant to Order 113 of the High Court Rules which applies only to squatters and trespasses to the land. The Defendants are neither squatters nor trespassers as they were given license to occupy the subject land in the First place and thus raises triable issues.
21. Section 77 of the Land Transfer Act (LTA) is applicable and the Defendants should be granted Estoppel or adverse possession for residing in the subject Land since 1930.
22. It seeks that Plaintiff's application by originating summons be dismissed and the Defendant's be granted rights over the subject land either by adverse possession and/or Promissory Estoppel.

Determination

23. The Plaintiff's application seeking for immediate vacant possession is filed pursuant to Section 169 of the Land Transfer Act 1971 which provides as follows:

"169. 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 states:

"172. 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.”

24. Section 169 of the Land Transfer Act no doubt is well settled.
25. The High Court in Fiji has laid down the principle - that so long the Plaintiffs are able to satisfy one (1) of the limbs of Section 169, the burden of proof shifts to the Defendants to prove their rights to possession in terms of Section 172 of the said Act.
26. In the current case, the Plaintiffs have commenced these proceedings to evict the Defendants under the limbs of sub-section 169(a) and (c) and in order of the following categories of Occupants per se:
 - i. New unlawful occupants; and
 - ii. Unidentified new unlawful occupants.
27. According to the Plaintiff, the Defendants are a set of unidentified new unlawful occupants who have moved onto the said land and are unlawfully residing there at the invitation of one Joji Oba and his family, by virtue of the 2016 Court Decision as one of the defendants who is entitled to remain on the land with his family.
28. No doubt the Plaintiff's, Australasian Conference Association Limited have established that they are the registered proprietors of the subject land described as the Certificate of Title No. 7168 on Lot 2 on deposited plan no. 1518 by transfer no: 42582 Registered with the Registrar of Titles on 13th April 1949.
29. Once the Plaintiff establishes its proprietorship to the subject land, the onus then shifts onto the Defendants to show cause as to why he or she should not give up vacant possession of the said property as sought for by the Plaintiff herein accordingly.
30. Before, I dwell any further, I am duty bound to peruse the affidavit evidence filed into Court together with the written and oral submissions of both parties to the proceedings.
31. The purpose for carrying out the above perusal is essential since it will reveal to this Court whether the evidence is plain and straight forward and the substantive issue for the immediate vacant possession can be determine in its summary manner?
32. Both parties to the proceedings written submissions draws this Courts attentions back to the '**Evidence Proceedings**' instituted by the Plaintiff in 2007 and subsequently on 2016 accordingly.

33. This Court has a duty to take its mind back to these cases, 2007 and 2016 respectively and find out what were the facts, orders sought therein and what was the determination made by the Court.

(i) **2007 Eviction Proceedings.**

34. On 31st January 2007, the Plaintiff filed an application for '**Vacant Possession**'. The High Court upon determination ordered "that the Plaintiff was '**Estopped**' from removing those Defendants who were original grantees or the direct Descendants of original grantees, subject to their continuation of rituals and obligations performed by them in accordance with customs.

35. The Court also ruled 'that a writ of possession could be issued in respect of those Defendants who are not original grantees or their Descendants, once individually identified.

36. The original permission was granted to the remaining lawful occupants in perpetuity subject to the performance of customary obligations. It was a grant for the group of Solomon Island people and their Descendants.

37. If any of these conditions are not observed then the right to remain on the land will be lost.

38. Therefore, the Plaintiff's contention now is that there is no evidence before the Court of remaining lawful occupants having continued to satisfy the three (3) conditions of Estoppel:

- (i) Continuity of occupation,
- (ii) By the Direct Descendants of the original grantees; and
- (iii) The due performance of the custom obligations.

39. The Plaintiff is seeking for clear directions from this Court on the issue of location now that the Defendants have moved from where they originally resided and have erected additional dwelling in other parts of the land further into the Plaintiff's property.

2016 Eviction Proceedings

40. On 07th October 2016, the Plaintiff obtained a High Court Judgment for '**Vacant Possession**' which identified and ordered 26 of the 35 Defendants who were then in occupation of the Land to give up occupation immediately and further 9 Defendants confirmed to have the Right of possession to remain on the land subject to the continuation of the rituals performed by them in accordance with the customs.

41. Taking into consideration all above coupled with the Judgments and determination of the Courts decision then in 2007 and 2016 Eviction proceedings, together with the facts and submissions

of the current impending matter also seeking for immediate vacant possession order against the Defendants, this court can only determine the current impending substantive issue of vacant possession by hearing the parties to the proceedings on viva-voce evidence subjected to cross examination by the Defendants.

42. The application before this Court cannot be determined summarily, since I find that there are a number of triable issues to be looked at and taken into consideration before, a final determination could be made on the substantive impending issue.
43. The Defendants has in his written submission raised the triable issues of '**fraud**' that lies against the state for issuing a certificate of title over the subject land to the Plaintiff without considering that the said land was an '**iTaukei Land**' initially purported to be owned by Yavusa Matanikutu of Tamavua Village, Naitasiri.
44. The Defendants are of the view that they ought to be granted '**Estoppel**' or '**Adverse possession**' for residing on the land for decades since 1930 pursuant to section 77 of the Land Transfer Act [LTA].
45. The Defendants are also contending that they can only make an '**adverse possession**' and call for damages and/or '**equitable counterclaim**', should the Plaintiff's claim be amended from the present form.
46. Reference is made to the case of **Romer LJ in Moses v Lovegrove [1952] 2 Q.B 533 (Stated at 544)** echoed in the judgment of case of **Adiamma vs Dayal HBC No. 170 of 2016**:

"It seems to me that one can, in addition to looking at the position and rights of the owner, legitimately look also at the position of the occupier for the purpose of seeing whether his occupation is adverse. In my opinion, if one looks to the position of the occupier and finds that his occupation, is right to occupation, is derived from the owner in the form of permission or agreement or grant, it is not adverse, but if it is not so derived, then it is adverse, even if the owner is, by legislation, prevented from bringing ejectment proceedings".

47. Premised further on the analysis of the Law hereinabove, I reiterate that there are a number of triable issues that needs a clear determination of the current impending substantive issue in the case once and for all.
48. Accordingly, I have no alternative but proceed to dismiss the Plaintiff Originating Summons in its entirety filed on 30th June 2023.

Costs

49. The matter proceeded to full hearing by way of written and oral submission and affidavit evidence furnished and filed into Court.
50. It is only just and fair that I order that the Plaintiff pays the Defendants a summarily assessed cost of \$1,500 at the discretion of this Court within 14 days timeframe accordingly.

Orders

- i. The Plaintiff's originating summons filed on 30th June 2023 is dismissed in its entirety.
- ii. The Plaintiff to pay the Defendant a summarily assessed costs of \$1,500 within 14 days timeframe.

Dated at Suva this 10th day of July, 2024.



A handwritten signature in blue ink, appearing to be "Vishwa Datt Sharma".

Vishwa Datt Sharma
PUISNE JUDGE

CC: HOWARDS LAWYERS, SUVA
TUIFAGALELE LEGAL, SUVA