

IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

Civil Action No. HBC 080 of 2024

BETWEEN : **HANUMAN LAL**
Plaintiff

AND : **ANAL WALLY LAL aka WALLY**
Defendant

Counsel : **Mr A Pal for the Plaintiff**
Mr V Faktaufon for the Defendant

Hearing : **17 May 2024**

Judgment : **29 August 2024**

JUDGMENT

(Summons seeking vacant possession under s 169 of Land Transfer Act)

- [1] The Plaintiff is the administrator of the Estate of Moti Lal. His nephew, the Defendant, is occupying two flats that are owned by the Estate. The Plaintiff seeks the immediate removal of the Defendant from the flats. The Defendant says he has an interest in the flats and that the Plaintiff does not have the authority to remove him.
- [2] The question for determination in this proceeding is whether to grant the Plaintiff's application for an order for vacant possession.

Background

- [3] The facts can be briefly stated as follows:
- i. The late Moti Lal appears to have had at least two properties when he passed away on 10 May 1994. One of the properties is described as Certificate of Title No 10148

being Lot 1 on DP 2364, the physical address being 85 Nailuva Road, Suva (which I will refer to as 'the Nailuva Road property'). Mr. Moti Lal originally purchased the Nailuva Road property on 14 October 1964 and remained the registered owner up to the time of his death in 1994.

ii. Mr. Moti Lal prepared a will before passing away. Therein, Mr Moti Lal created a trust appointing one of his sons, Surendra Lal, to be the sole executor and trustee of his Estate. The terms of the trust were:

- Mr Moti Lal allowed his two sons, the Plaintiff and Amrit Lal, to each occupy, 'free from any charges whatsoever', a flat in the Nailuva Road property for their lifetimes. There are several flats at the Nailuva Road property.
- The third term of the trust reads:

To hold the remainder of my estate for the benefit of my son SURENDRA LAL for his lifetime and upon his death to my youngest son SHALENDRA LAL for his own use and benefit absolutely.

- The trustee's powers were specified as including power to borrow money and invest the money.

iii. Surendra Lal was granted letters of administration over the Estate and remained the administrator of the Estate of Moti Lal until he passed away on 23 November 2021. The Plaintiff subsequently sought and was granted letters of administration on 5 February 2023.

iv. Amrit Lal has passed away. It is not stated when this occurred.

v. The Plaintiff entered into an arrangement with the Defendant who is a son of Amrit Lal. In consideration for the Defendant assisting with the maintenance and upkeep of the Nailuva Road property he was permitted to occupy one of the flats at the Nailuva Road property. At some point in time, (it is unclear when) the Defendant ceased performing these duties. This does not appear to be in dispute between the

parties. What is also not in dispute is that the Defendant now appears to be using two flats at the Nailuva Road property.

- vi. On 30 January 2024, the Plaintiff served a Notice of Possession on the Defendant giving him notice to vacate the flats within one month. The Defendant refused to do so.
- vii. These proceedings were filed on 18 March 2024 by way of an Originating Summons and a supporting affidavit from the Plaintiff. The Defendant has filed an affidavit in opposition and the Plaintiff has availed himself of his right of reply.

Parties Respective Positions

[4] The Plaintiff's position as follows:

- i. The late Moti Lal is the last registered proprietor of the Nailuva Road property. The Plaintiff is the administrator of the Estate of the late Moti Lal. As administrator, the Plaintiff has authority to obtain orders under s 169 of the Land Transfer Act evicting the Defendant. The Certificate of Title for the Nailuva Road property and court documents granting the Plaintiff letters of administration are annexed to his affidavit dated 15 March 2024.¹
- ii. The Plaintiff relies on ss 9 and 13 of the Succession, Probate and Administration Act 1970, which provide that on grant of administration all property in the estate is passed to and vested in the administrator. Further, the administrator has the same rights '*with respect to the real estate of the deceased that executors or administrators respectively heretofore had*'.²
- iii. The Defendant has no right to remain in the two flats. He is not a beneficiary of the will of the late Mr Moti Lal. The arrangement between the Plaintiff and the Defendant that entitled the Defendant to occupy the flat was not adhered to by the Defendant. He forcefully took possession of the second flat.

¹ Filed in support of the Plaintiff's Originating Summons.

² Section 13.

- iv. The Defendant has failed to show cause under s 172 of the Land Transfer Act why he refuses to give possession and failed to prove a right to possession of the property.

[5] The position of the Defendant is as follows:

- i. The Plaintiff does not have any locus standi to bring this proceeding. The Plaintiff is the administrator of the Estate and not the last registered owner of the Nailuva Road property as is required under s 169. The Plaintiff's name is not on the Certificate of Title.
- ii. Shalendra Lal is the sole remaining beneficiary of the Estate and is the only person entitled to bring these proceedings against the Defendant.
- iii. Shalendra Lal has permitted the Defendant to occupy the flats. The Defendant relies on an undated written statement from, apparently, Shalendra Lal which reads:

I, Shalendra Lal, current owner of the property CT 10148 being of 85 Nailuva Road, which Wallace Lal son of late Amrit Lal, resides, would like to formally declare that he has full rights to continue residing on that property with my full authority. It has come to my knowledge that in my absence, Wallace Lal has had external pressure and threats to involuntarily vacate the premises, however, with no issues presented thus far, and as the rightful and legal owner of the property, I would like to secure and authorise his residence on 85 Nailuva Road and would urge any parties trying to threaten my family and the arrangements I have with him to cease immediately. If you have any concerns about the legality of my claim on this property or any others, please feel free to contact me directly, to prevent legal repercussions

Regards

Shalendra Lal³

³ A phone number for Shalendra Lal is supplied in the document along with a picture of his Australian driver's licence. It appears he is currently residing in New South Wales, Australia.

[6] In reply, the Plaintiff states that the Defendant's reliance on authority from Shalendra Lal is misconceived. Shalendra Lal is a beneficiary not a trustee and has no authority to permit the Defendant to occupy the flats. The Plaintiff argues that if a beneficiary has a dispute with a decision of the administrator, the proper course is for the beneficiary to apply to the court for a review of the administrator's decision under s 90(1) of the Trustee Act 1966. There has been no review brought.

[7] Further, the Plaintiff argues that the Defendant has not produced any cogent evidence from Shalendra Lal verifying permission to occupy the flats. The alleged letter from Shalendra Lal annexed to the Defendant's affidavit in opposition cannot be given any weight as it cannot be authenticated; the Defendant ought to have arranged for Shalendra Lal to provide sworn evidence. The Plaintiff deposes that he has received no direct communication from Shalendra Lal regarding the Defendant.⁴

Land Transfer Act

[8] The Plaintiff seeks orders under s 169 of the Land Transfer Act 1971. The provision reads:

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.⁵*

⁴ Para 7 d, of Plaintiff's affidavit in reply dated 9 May 2024.

⁵ My emphasis.

[9] Pursuant to s 170 '[t]he summons shall contain a description of the land and shall require the person summoned to appear at the court on a day not earlier than sixteen days after the service of the summons.

[10] Section 172 reads:

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.

Decision

[11] The issues in this case are as follows:

- i. Whether the Plaintiff is the last registered proprietor of the Nailuva Road property.
- ii. If the Plaintiff can establish this, then the onus falls on the Defendant to demonstrate, to the satisfaction of the Court, that the Defendant has a right to possession of the two flats.

Is the Plaintiff the last registered proprietor?

[12] The Plaintiff brings this proceeding in his capacity as administrator of the Estate of the late Moti Lal. He says that as administrator, the property of the late Moti Lal is vested in him as per the Succession, Probate and Administration Act. That may be so, but for the

purposes of the Land Transfer Act he is not the last registered proprietor of the Nailuva Road property. The Certificate of Title shows that the late Moti Lal is the last registered proprietor.

[13] That is not to say that an administrator cannot apply for vacant possession under s 169. In *Kumari v Singh* [2024] FJSC 143 (26 July 2024) the Court of Appeal accepted that the administrators of an Estate were permitted to bring such proceedings where they had registered their interest by a Transmission by Death. Qetaki JA stated:

[43] ... it is established that a Transmission by Death of the Estate of Shant Kumar was registered on the relevant leasehold Property. The Appellants' names appear on the said leasehold title as the last registered proprietors of State Lease No. 19528, and they have the capacity to issue the Originating Summons under section 169 of the Act.

...

[45] Having fully considered the decision of the learned High Court judge, the grounds of appeal, the written and oral submissions of the Appellants and the Respondent, I am satisfied that the Appellants have established and satisfied the statutory criteria set out in sections 169, 170 and 172 of the Act.

[46] Also, I find that there is no legal requirement, as also conceded by Counsel for the Respondent, for the First Appellant to register her life interest as mistakenly determined by the learned judge to be an essential step to be taken by the First Appellant, to establish her status as registered proprietor, and capable of issuing an Originating Summons to eject the Respondent from her property.

[47] I find that the First Appellant/First Plaintiff had authorised the Second Appellant/Second Plaintiff to swear the Affidavit in support of the Originating Summons on her behalf....

[48] The Appellants/Plaintiffs are the last registered proprietors of State Lease No. 19528...

[14] A similar conclusion was reached by the High Court in *Prasad v Naivalu* [2024] FJHC 125 (28 February 2024). Lakshman J stated:

4. ...In this matter the Plaintiff, Ram Prasad aka Ram Prasad Lochan, is the Administrator De Bonis None of the estate. The Plaintiff is registered by virtue of the Transmission by Death (No. 806 430) as the Administrator De Bonis Non for the subject land for which vacant possession is being sought. Section 93 (3) of the Land Transfer Act 1971 provides that "... the person so registered shall hold such estate or interest subject to all equities affecting the same, but for the purpose of any dealing therewith shall be deemed to be the absolute proprietor thereof." (my underlining) Furthermore by virtue of Section 93 (4) of the Land Transfer Act the Plaintiff's title is deemed in law to be vested in him. The Plaintiff has locus to seek vacant possession in this matter.

[15] Again, in *Sen v Singh* [2016] FJHC 808 ((2 September 2016) Master Nanayakkara (as he was then) stated:

The certified true copy of CT 16304 (DRS-2) clearly notes that the subject property is registered under the name of 'Arjun Sen' and that the Plaintiff was registered as the 'administrator' on the title on 08th August 2014.

It seems to me perfectly plain that the Plaintiff holds a registered title and could be characterized as the last registered proprietor. Therefore, I have no hesitation in holding that the Plaintiff falls within the ambit of Section 169 (a) of the Land Transfer Act.⁶

[16] The Plaintiff is not registered as the administrator on the title for the Nailuva Road property. As such, he does not have standing to bring the present proceedings.⁷

⁶ My emphasis.

⁷ It came to my attention as I was writing this judgment that in a related decision by Amaratunga J in *Lal v Lal* [2024] FJHC 506 (13 August 2024), the Court noted at [19] that Hanuman Lal (the Plaintiff in the present proceeding), 'had registered transmission by death as trustee and administrator of the Nailuva Road property'. No evidence of this Transmission by Death was placed before me. I brought this matter to the attention of the parties on 26 August 2024 and gave the Plaintiff an opportunity to produce this evidence to the Court. The Plaintiff has not done so and as such I am unable to accept that the Plaintiff is registered on the Title as the Administrator by Transmission by Death.

Does the Defendant have a right to possession of the two flats?

- [17] While the finding regarding the Plaintiff's status effectively disposes of the proceeding, for completion I will address the second issue, namely whether the Defendant can show, under s 172 of the Land Transfer Act, that he has a right to possession of the two flats. The learned Master considered this requirement in *Sen v Singh* (supra), noting:

The Supreme Court in considering the requirements of Section 172 stated in Morris Hedstrom Limited v. Liaquat Ali (Action No. 153/87 at p2) as follows and it is pertinent:

*"Under Section 172 the person summoned may show cause why he refused to give possession of the land and 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 favour. The Defendants 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."*⁸

- [18] The Defendant deposes that he has permission from the sole beneficiary of the Estate, Shalendra Lal, to occupy the flats. He annexes an undated letter from Shalendra Lal supporting his continued occupation. I agree with Mr Pal that, preferably, the Defendant should have arranged for Shalendra Lal to provide sworn evidence on the matter. However, the Plaintiff could equally have arranged for sworn evidence from Shalendra Lal to show that he had not provided any such permission to the Defendant. The Plaintiff and Shalendra Lal are brothers. Notwithstanding, the undated letter at face value supports the Defendant's own sworn evidence that he had Shalendra Lal's permission. I am satisfied that there is tangible evidence establishing a right or supporting an arguable case for such a right. While Shalendra Lal is not the administrator he is the sole beneficiary

⁸ My emphasis.

of the Estate and currently is entitled under the will to the use and benefit absolutely of all of the Estate (with the exception of one of the flats at the Nailuva Road property which the Plaintiff has a life interest).

- [19] The facts in *Sen v Singh* (supra) are similar to the present case. That case involved an application by administrators under s 169 for vacant possession. The defendant in that case claimed to have permission from the beneficiary of the estate of Arjun Sen to occupy the property. The following comments by the learned Master are applicable here:

In this case, the respective rights of the Plaintiff, viz, administrator De Bonis Non and Yugandar Sen, viz, a beneficiary of the estate under the Will of Arun Sen are in question.

In my view, the proceedings in this case involve the following serious issues of law;

- (1) *Whether a beneficiary can allow another person to take possession of an estate property?*

If the first question is answered in the affirmative the question arises;

- (2) *Whether a beneficiary can allow another person to take possession of an estate property under a Power of Attorney or by a consent letter?*

- (3) *Whether an equitable defence could be extended to persons who take possession of an estate property under a Power of Attorney or by a consent letter given by a beneficiary of the estate?*

In my view, the aforesaid questions have an important bearing in determining the rights of the Plaintiff and Defendant.

The Plaintiff has had recourse to Section 169 of the Land Transfer Act. This provides a summary and expeditious method of obtaining possession and is

applicable in most ordinary cases. It is not however, a method by which legal inferences can be satisfactorily dealt with. The evidence before me in the Affidavits is too meager to enable me to feel justified indefinitely deciding on this Originating Summons the serious issues of law between the parties.

In this, I am comforted by the decision of the Court of Appeal in:

In "Vallabh Das Premji v. VinodLal and Others, F.C.A Civil Appeal No. 70 of 1974 (unreported)" the Court said:

"In the past, on earlier but similar legislation, the Supreme Court has held that if the proceedings involve consideration of complicated facts or serious issues of law, it will not decide them on summary proceedings of this nature, but will dismiss the summons without prejudice to the plaintiff's right to institute proceedings by Writ of Summons. Instances quoted by counsel are Caldwell v. Mongston (1907) 3 F.L.R. 58 and Ferrier Watson V. Venkat Swami (Civil Action 29 of 1967 – unreported). The power of the court to adopt this approach has not been challenged so it is not material to consider whether it arises under section 172 of the Act or from inherent power to reject as unsuitable procedure where another, comprehensive and better suited to the determination of controversial matters, is available."

(Emphasis Added)

In "Jamaludin v Kamru Din" Civil Action No:- 37 of 2014, (unreported) the court held:

"Section 172 allows the Judge to make other orders and impose any terms but this can only be done if cause is shown by the defendant. For example the Judge can dismiss the summons and order that the application be instituted by a writ action where evidence is required to be adduced. In the past the High Court has held that if the proceedings involve complicated facts or

serious issues of law, it will not decide them on summary proceedings of this nature but will dismiss the summons without prejudice to the plaintiff's right to institute proceedings in another manner or by writ action (see Caldwell v Mongston (1907) 3 F.L.R. 58 and Pirrier Watson v Venkat Swami (Civil Action 9 of 1967 – unreported)."

(Emphasis Added)

Applying those principles to the present case and carrying those principles to their logical conclusion, I dismiss the Originating Summons with costs, but without prejudice to the Plaintiff's right to establish his claim to the land by any other process than the summary one to which he has had recourse.

[20] The same issues above arise in the present case. It is not appropriate to decide these issues in summary proceedings.

Orders

[21] Accordingly, and for the reasons stated, I make the following orders:

- i. The Plaintiff's Originating Summons is dismissed without prejudice to the Plaintiff's right to institute proceedings in another manner or by Writ of Summons.
- ii. The Defendant is entitled to costs summarily assessed in the amount of \$1,500 payable by the Plaintiff within 21 days.



Solicitors:

AP Law for the Plaintiff

Vama Law for the Defendant

D. K. L. Tuiqereqere

JUDGE