

**IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION**

Civil Action No. **HBC 301 of 2023**

IN THE MATTER of an application for possession of land under Section 169 of the Land Transfer Act.

AND

IN THE MATTER of **SABIR HUSSAIN** late of Lot 4, Sasawira Street, Nasinu, Deceased, Testate.

BETWEEN: **FARUK HUSSAIN** as the Executor and Trustee for the Estate of **SABIR HUSSAIN** late of Lot 4, Sasawira Street, Nasinu, Deceased, Testate and **FARUK HUSSAIN** of Lot 4, Flat 2, Sasawira Street, Nasinu.

PLAINTIFF

AND: **JARINA BIBI** of Lot 4, Flat1, Sasawira Street, Nasinu.

1st DEFENDANT

AND: **FATIMA BIBI** of Caubati 1 Rd, Daniels Place, Nasinu.

2nd DEFENDANT

AND: **FARINA BIBI** of Korobou St, Makoi, Nasinu.

3rd DEFENDANT

Representation

Plaintiff: Mr. K. Singh (KS Law).

Defendants: Mr. A. Khan (Messrs Khan & Co).

Date of Hearing: 13th December 2024

Ruling

A. Introduction

[1] The Plaintiff filed originating summons seeking the following reliefs:

“A. *An Order that the estate property described as CL No. 161914 on Lot 4 DP No. 4598 located at Wainibuku Subdivision in the Tikina Naitasiri, and Province Naitasiri consisting of a total area of 1 rood and 4.4 perches be sold at market value or forced sale value price.*”

- B. *That sale of property described as CL No. 161914 on Lot 4 DP No. 4598 located at Wainibuku Subdivision in the Tikina Naitasiri, and Province Naitasiri consisting of a total area of 1 rood and 4.4 perches be sold by listing the property with a real estate.*
- C. *An Order that the monies received from the sale of the Estate property described as CL No. 161914 on Lot 4 DP No. 4598 located at Wainibuku Subdivision in the Tikina Naitasiri, and Province Naitasiri consisting of a total area of 1 rood and 4.4 perches be distributed as per their share amongst all beneficiaries after payment of fees charges and debts of the Estate.*
- D. *An Order that the 1st named Defendant its agent or servants vacate the property described as CL No. 161914 on Lot 4 DP No. 4598 located at Wainibuku Subdivision in the Tikina Naitasiri, and Province Naitasiri consisting of a total area of 1 rood and 4.4 perches and provide keys to the 1st Named Plaintiff.*
- E. *That the Nakasi Police Station assist in execution of orders mentioned in D Above.*
- F. *An Order for Costs of this action be borne by the Defendants personally.*
- G. *Such further or other relief as this Honorable Court deems fit and proper.”*

[2] The application is supported by an affidavit of Faruk Hussain. An affidavit in reply of the Defendants was filed on 4th December 2023.

B. Determination

[3] The Plaintiff in this matter is seeking vacant possession of the property. The Plaintiff is also seeking that the property be sold at market value or forced sale value. The Plaintiff’s request is based on disputes and difficulties involving the Defendants and others on the property.

[4] Section 169 of the Land Transfer Act 1971 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) *...*
- (c) *...”*

Section 170 of the Land Transfer Act 1971 requires the particulars be stated in the summons and that “*the 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.”*

Section 171 of the Land Transfer Act 1971 dealing with order of possession states that “on the day appointed for the hearing of the summons, if the person summoned does not appear, then upon proof to the satisfaction of the Judge of the due service of such summons and upon proof of the title by the proprietor or lessor and, if any consent is necessary, by the production and proof of such consent, the Judge may order immediate possession to be given to the Plaintiff, which order shall have the effect of and may be enforced as a judgment in ejectment.”

Section 172 of the Land Transfer Act 1971 provides that “if the person summoned appears he may show cause why 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, mortgage 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.”

- [5] **Morris Hedstrom Ltd v. Liaquat Ali (SBC 153/87S) Supplementary FLR Volume 1 (Civil) 1887-2000) 141, Gurdial Singh v Shiu Raj (ABU 44/82) Supplementary FLR Volume 1 (Civil) 1887-2000, 84, Shyam Lal v Eric Martin Schultz (1972) 18 FLR 152 and Azmat Ali v. Mohammed Jalil (1982) 28 FLR 31** are some relevant cases that have dealt with Section 169 Land Transfer Act 1971 applications. These and a number of other cases have set out the procedure for Section 169 Applications.
- [6] Section 169 (a) of the Land Transfer Act, requires the Plaintiff to be the **last registered proprietor** of the land. The term “**proprietor**” is defined in the Land Transfer Act as “*the registered proprietor of land, or of any estate or interest therein*”. The term “**registered**” is defined in the Interpretation Act, as “*registered used with reference to a document or the title to any immovable property means registered under the provisions of any written law for the time being applicable to the registration of such document or title*”. In this matter I find that the Plaintiff by virtue of being the Executor and Trustee of the Estate and having registered the transmission by death is recognized as the registered proprietor of the property. 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.
- [7] Section 172 of the Land Transfer Act 1971 shifts the burden upon the Defendants to establish their right to remain on the subject property. It is upon the Defendants in this application to adduce some tangible evidence establishing a right or supporting an arguable case for such a right for them to remain on the property. Final or incontrovertible proof of right to remain in possession need not be adduced (**Morris Hedstrom Ltd v. Liaquat Ali**). If the Defendants do show cause the Judge shall dismiss the Summons (**Azmat Ali v. Mohammed Jalil**).
- [8] The affidavit of the Defendants sets out their position. The 1st Defendant has a DVRO against the Plaintiff. The Defendants rely on the last will of Sabir Hussein and are of the view that the last will states that the property can only be sold upon the death of Faruk Hussain. According to the Defendants, Faruk Hussain has life interest and upon his

demise his share goes to his wife. The Defendants position is that the 1st Defendant is weak, old, unmarried and unemployed and will not have a place to stay if the property is sold.

[9] The clauses 4 and 5 in the last will of Sabir Hussein aka Sabir Hussain is as follows:

***“4. I GIVE DEVISE AND BEQUEATH** my personal or real property of whatsoever kind and wherever so situated of which I shall be entitled to or over which I shall have disposing power at the time of my death unto my children as follows:*

a) FARUK HUSSAIN- 50%.

b) ZAHID HUSSAIN, FATIMA BIBI, FARINA BIBI, AIRUL NISHA, & ZARINA BIBI – Equal share of 50%.

5. I DIRECT that my Estate property can only be sold after the death of FARUK HUSSAIN and his proceeds than will be allocated to his wife absolutely.”

[10] The will of Sabir Hussian aka Sabir Hussein gives shares to the defendants in his land. The land from which the Plaintiff is seeking to vacate them from. It is also clear from the will that the land can only be sold after the death of the Plaintiff. This was the intention of Sabir Hussian aka Sabir Hussein. These must be carried into effect by the testator/executor of the estate. An executor/testator cannot have his way. For this reason the land cannot be ordered to be sold.

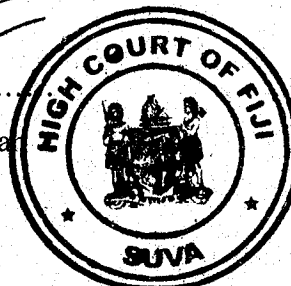
[11] The defendants have shown that they have a right to be on the land from which they are being asked to vacate. The Plaintiff’ application is dismissed. I summarily assess costs in favour of the Defendants in the sum of \$2000.00. It is to be paid within 21 days.

C Court Orders

(a) The originating summons filed by the Plaintiff is dismissed.

(b) Plaintiff to pay Defendants \$2000.00 as costs within 21 days. Costs have been summarily assessed.

.....
Chaitanya S.C.A Lakshma
Puisne Judge



17th February 2025