

IN THE COURT OF APPEAL, FIJI ISLANDS

ON AN APPEAL FROM HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU 0041/09

[High Court Action No: HBC 115 of 2008S]

BETWEEN: KISSUN CHAND

Appellant

AND: JOJI BACAU

Respondent

Coram: Hon. Justice Izaz Khan, Justice of Appeal  
Hon. Justice Kankani T. Chitrasiri Justice of Appeal  
Hon. Justice Priyantha Fernando, Justice of Appeal

Counsel: Mr R Chaudhary for the Appellant  
Mr F Vosarogo for the Respondent

Date of Hearing: Tuesday, 3rd November, 2010

Date of Judgment: Monday 22nd November, 2010

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## JUDGMENT

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The defendant and his wife have been in a occupation of the appellant's land being all that piece or parcel of land in Certificate of Title 37702 and known as Tokotoko since 21st February, 1998. The appellant sought possession of his land pursuant to S.169 of the *Land Transfer Act 1978, Cap.131*. The respondent defended the action and judgment was given in his favour by the trial judge His Lordship Inoke J who dismissed the appellant's summons for possession and made other ancillary orders. This appeal is from that decision.

According to the defendant's affidavit in reply sworn on 29th September 2008, the defendant explained that he and his wife went into occupation of the appellant's land at the appellant's instigation as an expression of gratitude for his wife's assistance in securing a business visa to Australia in 1998 for the appellant. He deposed further that before the appellant left for Australia on 22<sup>nd</sup> February 1998, he asked the defendant and his wife to occupy his property and to take care of it until his return from Australia. The appellant also requested the Defendant and his wife to take care of his property generally and in particular of his father who lived

on the property as well. He promised to give the respondent and his wife a piece of land upon which they could build their home.

The trial judge's acceptance of the defendant's version of events is recorded in paragraph 26 of his judgment which is in the following terms;

*"...The Defendant has given a reasonable explanation as to why he is in occupation, which occupation is not denied and in fact confirmed by the appellant in his notice to quit. The Defendant further says that the appellant promised that he would give him a 'piece' of his land for the service that he and his wife have rendered in the past and will in the future. The appellant did not specifically deny that such a promise was made when given the opportunity of filing an affidavit in response."*

In part of paragraph 4.2 of his affidavit of 2nd September 2008, Joji Bacau made the following statement:

*"In respect of Paragraph 3 of the Kissun Chand affidavit, I say that:*

- a) my family and I have been occupying Kissun Chand's property since 21.02.98;*
- b) the occupation was authorized by and was at Kissun Chand's instigation;*

- c) *the occupation was in favour for my wife's assistance in securing Kissun Chand's business visa to Australia in 1998;*
- d) *Kissun Chand left for Australia on 22.02.98;*
- e) *Before Kissun Chand left for Australia he tell me and my wife to occupy his land and house and to take care of the property until his return from Australia. We were to take care of everything including the premises which his father Ram Kissun occupied. He also told us that he would give us a piece of his land upon his return from Australia so that we could build our own house on it;"*

A number of affidavits were sworn and filed on behalf of the appellant but none of those affidavits contained any denial in reply to what was alleged here by the respondent.

The Appellant had applied to evict the respondent and his family from his land under S.169 of the Land Transfer Act. As the trial judge observed: *the summons does not specify which subsection he is proceeding under but it is obvious that he is proceeding under S.169(a) as the last registered proprietor".* We agree.

The appellant has appealed to this court essentially attacking the trial judges' refusal to order eviction of the defendant and his family from his property allegedly in circumstances when the respondent had no right to possession and on the grounds that the ancillary orders he made were in error on procedural and substantive matters.

Section 169(a) 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;***

Consideration of S.169 is not complete unless attention is given also to S.171 and S.172 which respectively deal with an order for possession and dismissal of summons for possessions. Section 172 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:*

Thus the question arises whether the respondent had shown cause to be on the appellant's land.

Clearly he had. This is by way of an estopple.

An estopple is a remedy which can operate both at law and in equity to prevent injustice. As Dixon J observed in *Thompson v. Palmer (1933) 49 CLR 507 at p.547* the purpose of estopple was to prevent an unjust departure by one person from an assumption adopted by another as a basis of some act or omission which, unless the assumption be fulfilled would cause harm to the other party's rights.

In *Grundt v Great Boulder Pty Goldmines Ltd (1937)59 CLR 641 at pp.674-5*

Dixon J explained the meaning of estopple in the following terms:

*This means that the real detriment or harm from which the law seeks to give protection is that which would flow from the change of position if the assumption were deserted that led to it. So long as the assumption is adhered to, the party who altered his situation upon the faith of it cannot complain. His complaint is that when afterwards the other party makes a*

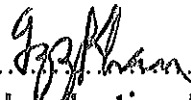
*different state of affairs the basis of an assertion of right against him then, if it is allowed, his own original change of position will operate as a detriment. His action or inaction must be such that, if the assumption upon which he proceeded were shown to be wrong and an inconsistent state of affairs were accepted as the foundation of the rights and duties of himself and the opposite party, the consequence would be to make his original act of failure to act as a source of prejudice.*

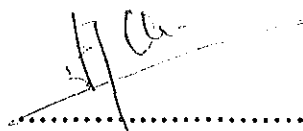
It seems to us that the respondent has a good argument to show that the appellant is estopped from denying possession to him because of the detriment he has suffered in looking after the appellant's property and his father during the appellant's absence in Australia. Further, the respondent may be able to establish a proprietary estoppel for the transfer of a piece of appellant's land. Further evidence will have to be adduced in order to enable the court to make proper orders. All of these matters are for the final hearing of this case. For the present, we are satisfied that the appellant has shown cause why he should remain on the appellant's land until the final decision of this matter on proper evidence.


In the light of the foregoing, we make the following orders:

1. The appeal is dismissed,
2. Orders (b) to (f) inclusive of the trial judge Inoke J are quashed
3. The appellant is to pay the respondent's costs as agreed or taxed.



  
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**Hon Justice Izaz Khan**  
**Justice of Appeal**

  
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**Hon Justice Chitrasiri T. Kankani**  
**Justice of Appeal**

  
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**Hon. Justice Priyantha Fernando**  
**Justice of Appeal**