

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO.ABU 37 OF 2018
(High Court of Suva Civil Action No. HBC 260 of 2016)

BETWEEN : **ORGANIC EARTH (FIJI) LIMITED** *Appellant*

AND : **ROSALIA CHUTE** *Respondent*

Coram : **Basnayake JA**
Lecamwasam JA
Dayaratne JA

Counsel : **Mr. D. Toganivalu for the Appellant**
Mr. D. Sharma with Ms. N. Choo for the Respondent

Date of Hearing : **14 May 2019**

Date of Judgment : **7 June 2019**

JUDGMENT

Basnayake JA

[1] The plaintiff/appellant (appellant) filed this appeal to have the judgment of the learned High Court delivered on 27 October 2017 set aside. In the notice of appeal (pgs. 7-8 of

the Record of High Court (RHC) the appellant has set out the following grounds in support of this appeal.

Grounds of Appeal

1. *The learned Judge has erred in law in applying the legal test for vacant possession required under section 172 of the Land Transfer Act by taking into consideration a requirement on the part of the Appellant to show that she had lawful ownership of the property.*
2. *The learned Judge has erred in law and in fact in holding that the Appellant had not tendered the resolution of the company authorizing the sale, a factor which had no bearing to the application for vacant possession.*
3. *The learned Judge has erred in law and in fact in suggesting that the Appellant had not brought the proceedings with “clean hands and full facts”, when there was no evidence produced to indicate that the Appellant had misled the court.*

The appellant’s case

[2] The appellant filed this action with originating summons dated 1 November 2016 together with an affidavit from one Sangeeta Devi Reddy-Bridgman. The appellant filed several amended summons thereafter. The deponent claims in the affidavit that she is a Director and a shareholder of the appellant company. The originating summons seeks an order from court that the respondent give immediate vacant possession to the appellant of the premises described in the Certificate of Title No. NL 16044 of which the appellant is the registered proprietor and the respondent is in occupation.

[3] It is stated in the affidavit that the appellant bought this premises from a company called Rosewood Limited on 3 August 2015. Since that time the appellant had been unsuccessful in ousting the respondent from the property. This is an admission to the fact that the purchase was made whilst the respondent was in occupation of the premises. Therefore it cannot be said that the property was bought with vacant possession. The appellant states that the respondent had been in the premises without paying rent for more than 12 months. The Director of the appellant states the following in her affidavit:

- *“Whilst we understand that Ms. Chute (respondent) will try to turn this into a complicated matter involving other cases...*
- *We would like to make clear that whatever cases the defendant (respondent) Ms. Chute has with Rosewood Limited or with its Directors is a matter for her and Rosewood to deal with, and it should not interfere with the rights of the plaintiff (appellant), who is the current registered owner.*
- *The defendant Ms. Chute was never a lessee of this property nor does she have a registered interest in the title or the lease.*
- *The defendant Ms. Chute is now occupying these premises illegally.”*

The respondent’s case

[4] The respondent in an affidavit dated 8 November 2016 (pgs. 43 to 49 RHC) mentions a previous action filed against her to oust her on 19 November 2015 with an affidavit sworn by one Samara Prasad. This action was dismissed on 25 July 2016. The respondent states that she is a shareholder of Rosewood from whom the appellant allegedly bought this premises. She states that at no stage was a shareholder resolution passed to sell this property to the appellant.

[5] She further states that Rosewood is no longer the beneficial owner of this property since in 2009 the Fiji Court of Appeal (Kenneth Roberts v Chute ABU 40 of 2007 (17 March 2009) (RHC 58 to 89) declared this property as matrimonial property and that the respondent was entitled to 50% equity. The balance 50% was owned by her former husband Kenneth Roberts. The said Roberts was given 48 days to make certain payments in 2009 which he did not do. The respondent states that the said Roberts is having a defacto relationship with Ms. Sangeetha Reddy who filed an affidavit for the appellant in this case. The respondent states that the said Roberts has orchestrated the transfer of this property to the appellant.

[6] The respondent states that she has a legitimate interest in the property for the reason that the property was declared to be matrimonial property by the Court of Appeal, that she was allocated 50% equity of the property, she was in occupation of the property in 2014 when Kenneth Roberts tried to interfere with her occupation and as a consequence she

has applied and obtained on 30 May 2014 a Domestic Violence Restraining Order (DVRO). Her former husband Roberts in defiance of the said DVRO had transferred the property to his girlfriend's company, the appellant whilst the DVRO was still pending and not dissolved. The respondent further states that the property was sold at a grossly undervalued price.

Judgment

[7] The appellant's case was that the appellant purchased this property from Rosewood Limited. However the appellant did not tender a resolution passed by Rosewood Limited authorizing the sale. The learned Judge held that a company cannot dispose of its properties by directors without first having a resolution passed approving the sale. The learned Judge queried whether the appellant has a legal right over the property to file this application. The learned Judge further stated that applications under section 169 of the Land Transfer Act are decided on affidavit evidence and the appellant should therefore come to court with clean hands and full facts. Hence the summons was refused.

Section 169 and 172 of the Land Transfer Act

[8] *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) & (c) not reproduced*

*172; If the person summoned appears he or she may show cause why he or she refuses to give possession of such land and, if he or she proves to the satisfaction of a Judge **right to a possession of the land**, the Judge shall dismiss the summons with costs against the proprietor...provided 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 or she may be otherwise entitled....(emphasis added)*

Submissions of the learned counsel for the appellant

[9] The learned counsel for the appellant submitted that the learned Judge had placed an onus on the appellant to prove that she had lawful ownership of the property. It was submitted that to require the appellant to submit a special resolution has no bearing on a section 169 application. The learned counsel submitted that there are lot of accusations by the respondent rather than facts being submitted. The learned counsel submitted that the Court of Appeal had declared the respondent's interest in the matrimonial case as \$65,000.00 and this amount was paid into the Family Court Registry. He queried as to how the respondent, after having accepted the amount in settlement, is continuing to occupy the property.

Submissions of the learned counsel for respondent

[10] The learned counsel for the respondent submitted that there is no dispute that the appellant is the last registered proprietor of the property and for that reason the legality of the application under section 169 of the Land Transfer Act. Now the question is how the respondent came into occupation. The learned counsel submitted that in a section 169 applications, proof of ownership itself does not give license to evict an occupier. The court has to consider section 172 of the Act under which the respondent has to satisfy court a right to possession. If that is done the court has to dismiss the application. The learned counsel submitted that the appellant had made an attempt to show that the respondent was in illegal occupation. However on perusal of the affidavit of Sangeeta Devi Reddy Bridgeman (12 to 15 of RHC) one can see that it is not a simple case of illegal occupation.

[11] The learned counsel submitted that this property was said to be sold in the year 2015 for \$220,000.00 whilst this property was purchased in 1993 for \$275,000.00. According to a sale and purchase agreement (Pgs. 110 to 115 of RHC) the property was sold free of all encumbrances. Vacant possession to be given to the purchaser within 60 days of execution. The purchaser had accepted that it had inspected or caused to be inspected the

property. The agreement was executed on 15 January 2015. The appellant states that the property was purchased on 3 August 2015. Did the appellant buy the property while the respondent was in occupation? If that is the case how could the seller agree to give vacant possession?

[12] On 17 May 2009 the Court of Appeal declared this property a matrimonial property in their judgment delivered on 17 May 2009 in the case between Kenneth Roberts and the respondent. Kenneth Roberts was a director of Rosewood Limited. The appellant is said to have bought this premises from Rosewood Limited while the respondent was living in it. The Court of Appeal declared in 2009 the share of the matrimonial property of the respondent as follows, namely: (a) \$12,000.00 in respect of the car. (b) \$100,000.00 in respect of 100,000 shares in Mokosoi and (c) \$ 65,000.00 in respect of the matrimonial home which is the subject matter of this case totaling \$ 177,000.00. This amount to be paid to the respondent by Kenneth Roberts within 48 days and costs.

[13] The learned counsel for the appellant submitted that these amounts have been deposited in court. The learned counsel for the respondent claims that the respondent has not received any money at all and the respondent was never informed of such deposit. The learned counsel further submitted that although payment was ordered to be made within 48 days, Mr. Kenneth Roberts who was the appellant in that case (ABU 40 of 2007-HBC 283 of 2002) had absconded and gone to Australia without making any payment. The learned counsel submitted that the respondent had gone into occupation of this premises in 2014 and is still in occupation.

[14] A DVRO order was made on 30 May 2014 in respect of this property (pg. 91 RHC) in favour of the respondent restraining Kenneth Roberts from entering into this property from 30 May 2014. No attempt was made to dissolve this DVRO up to date. The learned counsel submitted that this property belonged to Rosewood Limited in which the respondent, Kenneth Roberts and another were shareholders. The learned counsel further submitted that the sale of this property was done in defiance of the DVRO order. The learned counsel submitted that it is these facts that helped the learned Judge to satisfy the

requirement of “right to possession” of the respondent. The learned counsel submitted that the learned Judge had rightly dismissed the appellant’s application due to many disputes that were in existence at the time of filing the application under Section 169.

The Legal Matrix

- [15] There is no dispute that section 169 of the Land Transfer Act applications are heard in summary manner. Evidence is obtained by way of affidavits. The respondent has to show cause or proves to the satisfaction of a Judge with regard to the right to possession. There is no provision to take oral evidence. All these procedures have been tailored to expedite cases of an urgent nature. The owner has to enjoy his fruits of ownership. The owner would not allow an outsider to enjoy his fruits. Therefore simply what he is required to do is to prove his ownership and summon any person in the land to show cause, why he should not be evicted.
- [16] The mere ownership is not sufficient to get an order of ejectment. If the occupier has a right to occupy, that person has the opportunity of satisfying court of his rights and in that event the court has to dismiss the application for eviction. That dismissal is not a final one. The applicant or the plaintiff is able to file an action for ejectment with statements of claims and leading oral and documentary evidence. In such a case the respondent or the defendant may have a counter claim and the court could decide the issues at the end of the case by following regular procedure as against summary procedure.
- [17] In this case a vast amount of material were disclosed by the respondent whilst showing her right to possession. The property had been determined by the Appeal Court as matrimonial property. A property settlement was ordered by court. According to the respondent the orders of the court had not been complied with. The property was sold in defiance of the court orders. A DVRO order was issued in 2014. The respondent was given protection by court. With all that the property was sold in defiance of the court orders. The respondent had been in the property from 2014. However the property was sold on the basis that it was vacant.

- [18] An owner could bring even a tenant before court. In such a situation if the tenant could show that all rents had been paid or tender the arrears, the court has to dismiss the application for eviction and allow the plaintiff to institute an action under regular procedure. Under section 169 and 172 a person who is summoned before court has to satisfy court that he has a right to possession. That right could be a claim against the owner.
- [19] Having considered all the material placed before court I am of the view that the learned Judge had correctly dismissed the application of the appellant. The reasons for dismissal that we give however are different to those of the learned Judge. The learned Judge appears to have dismissed the application of the appellant on the basis of the appellant's failure not to disclose all the material facts and also due to the reason that the directors did not have authority to effect a transfer. Under section 172 of the LTA the Judge is required to satisfy himself that the respondent has a right to possession. In this case there is no dispute with regard to the ownership of the appellant. However mere ownership is not sufficient to obtain an order of eviction. The Act provides an opportunity to the occupier or the respondent to show cause why he or she should not be evicted.
- [20] In this case a large amount of evidence had been led to satisfy the Judge why an eviction order should not be issued. These disputes should be resolved by way of a regular action instead of a summary procedure. To that extent the learned Judge is correct in dismissing the appellant's application although the reasoning given in the judgment is questionable. The three grounds taken by the appellant could therefore be answered in favour of the appellant. However I am of the view that the material placed before the learned Judge by the respondent is sufficient to conclude that the respondent had satisfied the Judge with regard to a right to possession required by section 172. Hence this appeal is dismissed. In the circumstances I make no order as to costs.

Lecamwasam JA

[21] I agree with the reasons and conclusion of Basnayake JA.

Dayaratne JA

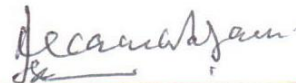
[22] I agree with the reasons given and conclusions of Basnayake JA.

Orders of court are:

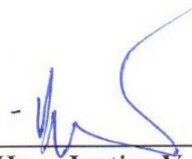
1. *Appeal dismissed.*
2. *No costs.*



Hon. Justice E. Basnayake
JUSTICE OF APPEAL



Hon. Justice S. Lecamwasam
JUSTICE OF APPEAL



Hon. Justice V. Dayaratne
JUSTICE OF APPEAL