

IN THE HIGH COURT OF FIJI
AT LAUTOKA
WESTERN DIVISION

HBC 146 of 2012

BETWEEN : **AMIRJAN** of Delaivoce, Sabeto, Farmer

PLAINTIFF

AND : **MOHAMMED ZAHEED** of Delaivoce, Sabeto, Labourer

DEFENDANT

Appearances : Vuataki Law for the Plaintiff
Pillai Naidu & Associates for the Defendant

R U L I N G

INTRODUCTION

[1]. The plaintiff applies for an Order for summary eviction against the defendant pursuant to section 169 of the Land Transfer Act (Cap 131). The land in question is Native Lease No. 26824 known as Delaivuna Lot 5 ND1320 in the Tikina of Sabeto in the province of Ba comprising 8 acres and 3 roods (“**lease**”). Section 169 states as follows:

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.

[2]. The plaintiff qualifies under the first limb. A copy of the lease is annexed to his affidavit confirming the same.

RELATIONSHIP BETWEEN PLAINTIFF & DEFENDANT

[3]. Before the plaintiff became the registered proprietor of the lease over the land in question, one Ramjan used to hold a lease over the same land. Ramjan’s lease had actually expired on 27 June 1996. Notably, Ramjan had died some years before his lease expired. But after the expiry of Ramjan’s lease, a fresh lease was created and issued to the plaintiff. The late Ramjan was the plaintiff’s father and the defendant’s grandfather. The plaintiff is the uncle of the defendant. Ramjan had three sons, of whom the plaintiff was the youngest. The defendant is the son

of Ramjan's eldest child namely the late Mohammed Jan. Jan died on 23 February 1999.

- [4]. The plaintiff deposes that between him and his two brothers, he was the only one who stayed and worked the farm with their father Ramjan. This is denied by the defendant who asserts that the plaintiff, his (defendant's) late father, and his other uncle all worked in paid employment and all worked the farm in their spare time and during the weekends.
- [5]. The plaintiff says that upon his acquiring a fresh new lease over the said land, he allowed the defendant to stay on in one of the houses erected on the land on the condition that the defendant "**does labour work for me**". According to the plaintiff, the defendant failed to comply with that condition which then caused the plaintiff to instruct his solicitors to "**terminate such verbal agreement and [gave the defendant] thirty (30) days to vacate the land**". The defendant refutes this allegation in his affidavit.

ONUS ON DEFENDANT

- [6]. Once it is shown that the plaintiff is the last registered proprietor, the onus shifts to the defendant to show cause as to why an Order for vacant possession should not be granted (see **section 172** of the **Land Transfer Act**). In discharging that burden, the defendant must show on affidavit evidence some right to possession which would preclude the granting of an order for possession under **section 169**. This does not mean that he has to prove conclusively a right to remain in possession. On the contrary, it is enough that he shows some tangible evidence establishing a right or at least supporting an arguable case for such a right (see **Morris Hedstrom Limited v. Liaquat Ali (Action No. 153/87 at p2)**).
- [7]. The defendant acknowledges that the plaintiff is the last named registered proprietor of native Lease No. 26284. However, he asserts a right to remain on the property based on an equitable estoppel-type of argument. His case is that his grandfather, the late Ramjan, had appointed the plaintiff to be the executor and trustee of his last will and testament dated 15 September 1990. In that Will, Ramjan had bequeathed his properties¹ to his sons Khan Jan and Mohammed Jan, two (2) acres each from the Native Lease cultivated and occupied by them absolutely. The balance of the estate was to revert to the plaintiff conditional upon Raitul Nisha (Ramjan's daughter) and her children having quiet enjoyment, occupation and possession of the dwelling house occupied by her.

¹ (annexed to the defendant's affidavit and marked as annexure :MZ1" is a copy of the probate).

- [8]. However, after his grandfather's lease expired, the plaintiff evicted Raitul Nisha as well as the other uncle. Around the time when the grandfather's lease was about to expire, the plaintiff, according to the defendant, had assured him (defendant) that he (the defendant) could **“have his father's share when the application for a new lease was made...upon my agreeing to pay \$5,000-00 towards the goodwill and premium...to the Mataqali and the Native Lands Trust Board for issuance of a new lease”**.
- [9]. The arrangement, according to the defendant, was that the new lease would be held under the plaintiff's name as he (the plaintiff) was the main beneficiary of the Ramjan estate and that, upon being issued with a new lease, the plaintiff would let the defendant, his brother, and mother remain thereon.
- [10]. According to the defendant, the beneficiaries in the Estate of Ramjan had agreed that the plaintiff would apply for a fresh new lease and that upon a new lease being granted, the plaintiff would then hold title on trust for the others as provided in the said Will.
- [11]. Based on that understanding, the defendant says that he contributed \$5,000.00 towards grant of the new lease as they were all working the said farm and he was working it full time because the plaintiff was in outside employment as a bus driver.
- [12]. But as it turns out, the plaintiff is now renegeing on that arrangement.
- [13]. The defendant then attempts to explain that he did not obtain probate in his father's estate after his death in 1999 as the plaintiff had assured them that they would be given their father's entitlement.
- [14]. The defendant further says the house that he and his family occupies was built by his father (plaintiff's brother), the late Mohammed Jan in 1990 on the belief that the defendant would remain on the said Native Lease. He exhibits some FEA bills that confirm that the electricity meter connected to their dwelling house is still in the name of his late father, namely Mohammed Jan.
- [15]. The defendant says he was born on the property and had cultivated the land from the time he came of age until recently when he was stopped by the plaintiff.

PLAINTIFF'S REPLY

- [16]. In his affidavit in reply, the plaintiff clarifies that his father (the late Ramjan) had bequeathed the lease to him by his last will and testament dated 16 November 1994. This last will revoked his earlier will dated 15 September 1990. And probate

37031² was in fact given to him on the 1994 Will. I accept this as the truth based on the documents exhibited. I also accept that the home which the defendant occupies was built by his late father.

CONCLUSION

[17]. After considering all, I am of the view that the defendant has not shown sufficient cause to remain in possession. The only tangible evidence provided by defendant is his grandfather’s will of 15th September, 1990. But that will was revoked by a later will in November 1994. And by that latter will, Ramjan had bequeathed the lease to the plaintiff. This will was upheld by the High Court in HBC 262 of 1998L. The plaintiff had therefore inherited his father’s lease. But even so, after the grandfather’s lease had expired, the plaintiff was given a fresh new lease altogether for a term of 30 years commencing 01st July 2004. Any interest in the lease that the defendant might claim under the grandfather’s estate, assuming there was one (which there is not given the last will of November 2004) would have died upon the expiration of the grandfather’s estate’s lease. The plaintiff had allowed the defendant to occupy a house on the lease on the condition that the defendant works as labourer on his farm. Because defendant went to work on other farms and not work on plaintiffs land, the plaintiff has decided to revoke the licence that he had given the defendant. The defendant’s allegation that the plaintiff holds the lease in question on trust for the defendant/family is rather fanciful. No “tangible evidence” of this trust is offered by defendant. All he offers is a letter by one Josefata Lalawa (annexure MZ2) who he says is “the landowner”. Lalawa is only a member of the Tokatoka Dunadoravo.

ORDERS

The defendant is to vacate NL No. 26824 described as Delaiwoce Lot 5 ND 1320 situated in the Tikina of Sabeto in the province of Ba within 28 days of the date of this Ruling. Costs to the plaintiff which I summarily assess at \$850-00 (eight hundred and fifty dollars only). I also direct that the defendant be allowed to dismantle and remove from NLN: 26824 the home which he currently occupies.

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Master Tuilevuka
06 June 2013.

² Copy of Will and Probate exhibited to the plaintiff’s Affidavit in Reply.