

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

CIVIL APPEAL NO. HBA 17 of 2012

FROM THE DECISION OF THE
MASTER in Action No. 301 of 2011

IN THE MATTER of an application
Under Section 169 of the Land Transfer
Act, Cap 131 and under Order 113 of
the High Court Rules.

BETWEEN:

NARAYAN SAMI, VISHAL LAXMI, IMITIAZ ALI and
VISHWA NADAN all of Ucalia Baulevu Road, Nausori
occupation unknown.

APPELLANT/DEFENDANTS

AND:

CHINAMMA of Calia, Baulevu Road, Nausori, Domestic
Duties, **NAND RAJAN** of Auckland, New Zealand
Technician, **SHIU SAMI** of Brisbane, Australia, Painter and
SAGA DEWAN of Calia Baulevu Road Nausori, Plumber.

REPOUDENT/PLAINTIFFS

COUNSEL:

Mr Sunil Kumar for the Appellant
Mr M Nand for the Respondent

Date of Judgment:

9 August 2013

JUDGMENT

1. This appeal is concerned with a decision of the Master granting vacant possession of the property comprised in certification of Title No. 24441 being Lot 4 on DP 5776 located at Calia Baulevu Road, Nausori containing an area of

3.3905ha occupied by the Appellant to the Respondent, upon its application under section 169 of the Land Transfer Act.

2. The decision for vacant possession was granted by the Master on 11 May 2012 and the Appellants filed a notice and grounds of appeal on 31 May 2012 against the decision.
3. The Appellant's appeal to this court on the following seven grounds of appeal:
 - a) *That the learned Master erred in law and in facts by making the order that the Plaintiffs are granted possession of the property described in the summons when the summons was defective.*
 - b) *That the learned Master erred in law and in facts in failing to consider that there was serious dispute of facts and Originating Summons procedure was not suitable in terms of Order 28 Rule 5 (3) of the High Court Rules 1988, it required cross examination of the deponents on their affidavits.*
 - c) *That the learned Master erred in law and in facts by failing to consider the Affidavit filed in opposition to the section 169 application.*
 - d) *That the learned Master erred I law ad in facts in deciding upon the indefensibility of the tile when the Appellant was only supposed to show cause in terms of 172 of the Land Transfer Act Cap 131 why he is refusing to vacate and which the Appellants have done so filing comprehensive affidavit as the Applicant Respondent had given the house site to the Appellant as dowry.*
 - e) *That the learned Master erred in law and in fact in failing to consider that the Notice to Quit was defective as Notice to quit only refers to the Certificate of Title No 24441 only, it has lots and the area is 3 hecters*

3,905 square meters as per Certificate of Title annexed to the application does not specify whether whole of the land or part of land is occupied by the Appellants.

- f) That the learned Master erred in law and in facts in making an Order for possession of the property described in the summons is 3,395 square meters when no such area is mentioned in the Certificate of Title No. 24441.*
 - g) That Appellant/Plaintiff reserves the right to add, alter and or amend his grounds of appeal upon receipt of the learned Masters notes and the exhibits.*
4. Saga Dewan, the power of Attorney holder of 1st, 2nd and 3rd named respondents by virtue of power of Attorney no 5311 filed an affidavit in opposition to the notice and grounds of appeal, sworn on 7 September 2012.
 5. Narayan Sami, the 1st named Appellant filed an answering affidavit to the affidavit in opposition to the grounds of appeal filed by Saga Dewan.
 6. At the hearing both counsel tendered written submissions in open court and made Oral Submissions as well.
 7. **Determination**

The Appellants, admit that the land described in the summons belong to the Respondents and also the last registered proprietor of the property described in certification of title filed by the Respondents in the summons.

8. Ground A of Appeal

The ground A of the grounds of appeal appears to be an objection to the jurisdiction of the Master to hear and determine applications made under

section 169 of the Land Transfer Act. It is submitted that the master did not have power to hear application under section 169 of the Land Transfer Act, as the delegated powers Pursuant to Order 59 of the High Court Rules are inconsistent with section 3 of the Land Transfer Act.

9. Section 3 of the Act states as follows:

“All written laws, Acts and practice whatsoever so far as inconsistent with this Act shall not apply or be deemed to apply to any land subject to the provisions of this Act or to any estate or interest therein.”

10. The jurisdiction of the Master is setout in order 59 of the High Court rules order 59 rule 2(k) and 2(l) states as follows:

(k) possession of land under section 169 of the Land Transfer Act (Cap. 13) and Orders 88 and 113, where uncontested; and

(l) any other matter in respect of which jurisdiction is conferred upon the Master by or under any other written law or by the Chief Justice.

11. Extension of jurisdiction to the Master to hear contested application under section 169 of the Land Transfer Act has been granted by the Chief Justice on 5 October 2009.

12. Court is unable to apprehend the submissions of the Appellant as there is no inconsistency whatsoever between the Land Transfer Act and the High Court Rules for the court to apply Section 3 of the Land Transfer Act which supersedes the all other Written Laws, Acts and Practices.

- 13.** It is noted that the extension of the jurisdiction to the Master is strictly within the rules and I see no basis in the Ground A of the grounds of appeal.

The Ground E and F of Grounds of Appeal

14. These grounds of appeal provide that the Master has failed to consider the defects in Notice to Quit as the Notice to Quit only refers to certification of Title No. 24441.

15. In the case of **Singh v Wison-Speakman [1988]** FJCA 12, court considered the following description of the land is sufficient to satisfy the necessary requirements in the Notice to Quit:

“Take notice that as Lessee of the land known as “Bala” as contained in registered lease. No. 53574 you are hereby given 3 months notice to quit the said land.”

16. In the above case, court relied upon the case of **Ram Lochan v Satya Nand Verma 11 FCR 24** to elaborate the basic requirement in a Notice to Quit as follows:
 1. Be addressed to the right person.
 2. Properly describe the premises to which it relates.
 3. Be plain and unequivocal.
 4. Expire at the proper time.

17. Having considered the two authorities cited above, the notice to quit in the instant case, has necessary particulars. Further, the Appellants did not object to the description of the land and admit that the land in dispute belong to Respondent before the learned master.

18. It is to be noted that three objections set-out in grounds A, E and F have not been raised before the Master. Any objection to the summons or to the notice to quit ought to have raised at the earliest opportunity and cannot be raised at the appeal stage.

19. In the case **Keshwan v Devi [2009]** FJCA 22; ABU 0035U.2006 court held that:

“Dr Sahu Khan’s submissions on nullity and irregularity also involve two other important considerations. The first is that RHC 02 r.1 specifically provides that irregularity does not, as a general rule, nullify the proceedings. Secondly, an application to set aside for irregularity must be made within a reasonable time of the party becoming aware of the irregularity and before any other step is taken in the proceedings (O.2r.2).

*Dr Sahu Khan’s suggestion that there had been a total failure to serve the Appellant (a suggestion hard to accept in view of the affidavit of service of Vandana Archari filed on 7 December 2001) and that therefore the proceedings were a nullity also overlooks the rule that a party who in fact appears on a summons cannot, after the summons has been heard and dealt with, be heard to complain that the service was defective (**Boyle v Sacker (1888)** 39 CH D 249).”*

20. It is further noted Order 2 Rule 2(1) of High Court Rules states as follows:

“An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.”

21. I accordingly dismissed ground A, E and F in the grounds of appeal.

Ground B and C of the Grounds of Appeal

22. The assertion of these grounds of appeal are that the summary procedure was unsuitable where the issues between parties could not be satisfactorily resolved by consideration only of affidavit evidence.

23. Counsel for the Appellant relied on three authorities to support the assertion that when there are serious dispute of facts, originating summons is not the correct procedure and needs to be tryable by writ.

HBC 40/2009 Labasa High Court, **WILFRED THOMAS PETER v HIRA LAL AND FARASIKO, FIMLA WATI v Ram VINOD 129/2009** Lautoka High Court and **Biju v Jai Kumar 74** FLR Volume 45, 1999.

24. Counsel for the Appellant although relied on above authorities, failed to demonstrate to court what the substantial dispute of fact which requires the issues to be tryable by writ in his Oral or Written Submissions. Court having perused the decision of learned Master and the notice and grounds of appeal and the answering affidavit of the 1st named Appellant is of the view that there is no substantial dispute of facts which requires court to act upon Order 28 Rule 5(3) of the High Court Rules.
25. It is important at this stage to state that a mere dispute of fact would not suffice for the court to act upon Order 28 Rules 5(3) but the dispute of facts needs to be a substantial dispute of facts which necessarily supports a defense for the Appellant to remain in possession.
26. In the case of **Singh v Singh [1994]** FJHC 135 HBC 0215. 94S [4 October 1994] court outlined to the scope of order 28 rule 5(3) in the following manners:

“According to my interpretation, where Rule 4(2)(b) provides that proceedings “*in which there is unlikely to be any substantial **dispute** of fact, are appropriate to be begun by originating summons”, it merely says “*appropriate*” meaning according to dictionary meaning ‘correct’ or ‘suitable’, and does not preclude commencing an action by originating summons where there are disputed facts. It does not say that it ‘*must*’ issue as in Or 5 r.3.”*

27. In view of the above reasoning I see no basis in Ground B and C of the grounds of appeal and dismiss accordingly.

Grounds D of the Grounds of Appeal

28. Counsel for the appellant submits that the Appellant has filed a comprehensive affidavit to satisfy court that a portion of the land was given as dowry and thereby has shown cause in terms section 172 of Land Transfer Act. He further submits that considerations of indefeasibility of the title by the master in his decision was incorrect as it was not an issue in the section 169 application and not relied upon by the respondent in his affidavits or submissions.
29. It is to be noted that in similar application under section 169 of the Land Transfer Act, court considered the indefeasibility of title as there was no allegation of fraud.
30. In the case of **Prasad v Mohammed [2005]** FJHC 124; HBC 0272J 1999L (3 June 2005)Gates J held:

In Fiji under the Torrens system of land registration, the register is everything. **Subaramani & Ano v Dharam Sheela & 3 Others [1982]** 28 Fiji LR 82. Except in the case of fraud the title to land is that as registered with the Registrar of Titles under the Land Transfer Act [see sections d39, 40, 41 and 42] **Fels v Knowles (1906)** 26 NZLR 604; **Assets Co Ltd v Mere Roihi [1905]** AC 176, PC. In **Frazer v Walker [1967]** AC 569 at p. 580 Lord Wilberforce delivering the judgment of the Board said:

“It is to be notice that each of these sections excepts the case of fraud, section 62 employing the words, “ except in case of fraud.” And section 63 using the words “as against the person registered as proprietor of that land through fraud.” The uncertain ambit of these expressions has been limited by judicial decision to actual

*fraud by the registered proprietor or his against: **Assets Co Ltd v Mere Roihi.***

It is these sections which, together with those next referred to, confer upon the registered proprietor what has come to be called “indefeasibility of title.” The expression, not used in the Act itself, is a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys. This conception is central in the system of registration.”

31. It is also important to state that the applicants have not alleged fraud on the part of the Respondents.
32. In consideration of the affidavit filed by the Appellant in opposition to the application under section 169 of the Land Transfer Act, the court is of the view that learned Master correctly held that the Appellant has not established any right to stay, in the property to the satisfaction of the court and to remain in possession. I accordingly dismiss the grounds of appeal.
33. The Appellant’s appeal is dismissed with costs summarily assessed in a sum of \$1,500.00 payable by the Appellants to the Respondents within 14 days of this judgment.
34. The Respondents are granted immediate possession of the property occupied by the Appellants.

Susantha N. Balapatabendi
JUDGE

