

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 229 of 2013

IN THE MATTER of an application under section 169 of part XXIV of the Land Transfer Act, Cap. 131 for an Order for immediate vacant possession.

BETWEEN : **PATRICK JOHN JAY**, of Nausori, Retired.

PLAINTIFF

AND : **SEMITI DIDITAKI** of Vuci Road, Nausori, Military Officer.

DEFENDANT

BEFORE : **Acting Master Thushara Rajasinghe**

COUNSEL : **Mr. Tirath Sharma** for the Plaintiff
Mr. Rayawa A. for the Defendant

Date of Hearing : **15th October, 2013**

Date of Ruling : **28th November, 2013**

JUDGMENT

A. INTRODUCTION

1. The Plaintiff filed this Summons dated 30th of July 2013 pursuant to section 169 of the Land Transfer Act seeking an order for vacant possession of the premises on the land comprised and described in the agreement for lease (NLTB Ref; 4/14/2896) situated in the Tikina of Nausori on the province of Tailevu and Island of Viti Levu having an area of 1289 square meters and occupied by the Defendant.

2. The Defendant upon being served with the Summons filed his affidavit in opposition which was followed by the reply affidavit of the Plaintiff. Subsequent to the filing of the respective affidavits, the matter was set down for the hearing on 15th of October 2013. The learned counsel for the Plaintiff and the Defendant made their oral arguments during the hearing of this summons. Thereafter, I invited both counsel to file their legal submissions which they filed accordingly.
3. Having considered the Summons, respective affidavits and written submissions of the parties and their respective oral arguments, I now proceed to pronounce my judgment as follows.

B. BACKGROUND

4. The Plaintiff claims that he is the registered proprietor of the property comprised in the Agreement for Lease (NLTB Ref: 4/14/2896) situated in the Tikina of Nausori on the province of Tailevu and Island of Viti Levu having an area of 1289 square meters. He stated that he purchased the said property from one Shashi Lata vide transfer dated 5th of April 2012 and registered on 22nd of April 2013. The Defendant has been living on the said property as tenant prior to this transfer on to the Plaintiff. The Plaintiff further stated that the Defendant has not been paying any rent to him since he became the proprietor of this property. The Defendant was issued with a notice dated 21st of May 2013 to quit and deliver vacant possession of the property and served the same on him on the 8th of June 2013. However, the Defendant failed to vacate the property and deliver vacant possession of the land. The Plaintiff contended that the Defendant has no legal right to stay or occupy the said property.
5. The Defendant admitted that he is presently occupying the said property and stated that he entered into the property as he was offered to purchase this land by one Mr. Yogen and his wife Shashi Lata. The Defendant's main contention is that the Plaintiff is not the proper registered proprietor of this land and this alleged dealing of this land is now under investigation. He refused to deliver vacant possession to the Plaintiff.

C. THE LAW

6. I now turn to briefly review the laws pertaining to the application under section 169 of the Land Transfer Act (hereinafter mentioned as “the Act”).

7. Sections 169 to 172 of the Act stipulate the procedure for the application in this nature. In view of the section 169 of the Act, the last registered proprietor of the land and/or a lessor with power to re-enter where the lessees or tenant is in arrear for such period and/or a lessor who has issued a legal notice to quit or the term of the lease has expired are allowed to institute proceedings under section 169 of the Act to evict the person who is in possession of the land without a right to the possession.

8. Section 171 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”.

9. In view of the section 171 of the Act, the onus is on the plaintiff to prove his title of proprietorship in order to obtain a judgment for vacant possession inter alia requirements stipulated in section 171.

10. Section 172 deals with the Defendant’s burden of prove where it states that

“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”.

11. Moreover, the first proviso to the section 172 states that the dismissal of the summons shall not prejudice the right of the Plaintiff to take any other proceedings against the Defendant to which he is otherwise entitled.
12. In view of sections 171 and 172 of the Act, I find the purpose of this special proceedings under section 169 is to provide a summary procedure for the registered proprietor and/ or the lessor to eject the occupiers from the land who either occupy the same without any legal right to possession or breach of tenant or lease agreement. Accordingly the proceedings under this summary procedure constitutes two main limbs. The first is that the onus of the Plaintiff to satisfy the court that he is the last registered proprietor or a lessor defined under section 169 (a), (b) and (c) of the Act. Once the Plaintiff satisfied the first limb, the burden will shift on the Defendant to prove that he has a legal right to possess of the land.
13. In Morris Hedstrom Limited-v- Liaquat Ali CA No: 153/87 held that

“Under Section 172 the person summonsed may show cause why he refused to give possession of the land and if he proves to the satisfaction of the Judge a right to possession or can establish an arguable defence the application will be dismissed with costs in his favour. The Defendants must show on affidavit evidence some right to possession which would preclude the granting of an order for possession under Section 169 procedure. That is not to say that final or incontrovertible proof of a right to remain in possession must be adduced. What is required is that some tangible evidence establishing a right or supporting an arguable case for such a right, must be adduced.”

14. Accordingly, I find the defendant is only required to adduce some tangible evidence to establish a right of possession or an arguable case to dismantle the Plaintiff’s claim.

Hence, I find that the Plaintiff is burdened with to establish a conclusive and indefeasible registered proprietorship on the land he claims.

D. ANALYSIS

15. Having reviewed the laws pertaining to the applications under section 169 of the Act, I now turn to analyse the evidences adduced before me by the parties with those relevant legal provisions and principles.
16. The Defendant's main contention is that the Plaintiff is not the registered proprietor of this land. Accordingly the main issue to be determined in this ruling is that whether the Plaintiff is the last registered proprietor of the land as defined in section 169 (a) of the Act.
17. In order to establish his registered proprietorship, the Plaintiff tendered a copy of an Agreement for Lease prepared and executed by one Ram Pati and the Native Land Trust Board pursuant to Regulation 12 of Native Land Trust (Leases and Licences) Regulation 1984 (Hereinafter referred as Regulation 1984). This document which is marked and tendered as annexure "A" to the Plaintiff's affidavit in support contains the first and last pages of the document only. The learned counsel for the Plaintiff subsequently tendered a complete copy of said Agreement for Lease for my perusal and consideration. Apart from the Agreement for Lease, the Plaintiff tendered a photo copy of a Transfer of Leasehold" made pursuant to section 44 of Land Transfer Act as annexure "B" to his affidavit. The said Transfer of Leasehold was executed on the 5th of April 2012 and was subsequently registered by the Registrar of Titles on 22nd of April 2013 as it indicates the stamped of the Registrar of Titles on the first page of said document. Plaintiff claims that Shashi Lata transferred all her estate and interest in the lease described in annexure "A" to him in this Transfer of Leasehold.
18. While tendering those documents as annexure for my perusal and consideration, the Plaintiff contended that he purchased this property from Shashi Lata on the 5th day of April 2013 and he is the registered proprietor of this land.

19. In view of the evidence presented by the Plaintiff, I now turn to consider whether these two documents tendered by the Plaintiff constitute a valid registered proprietorship for the Plaintiff.
20. Section 2 of the Act interprets the “Proprietor” as the Registered Proprietor of land, or of any estate or interest therein.
21. This is a native land owned by the Mataqali Burelailai. Accordingly, any dealings of this land should be governed by the provisions of Native Land Trust Act (Hereinafter referred as NLTB Act). Section 10 of the Native Land Trust Act deals with the forms of lease and registration of lease, where it states that;
 1. *All leases of native land shall be in such form and subject to such conditions and covenants as may be prescribed, and such leases shall be recorded in a register to be kept by the Registrar of Titles entitled "Register of Native Leases", and it shall be lawful for the Board to charge and collect in respect of the preparation of any lease or for any matter in connection therewith such fees as may be prescribed. (Amended by Ordinance 30 of 1945, s. 7.)*
 2. *When a lease made under the provisions of this Act has been registered it shall be subject to the provisions of the Land Transfer Act, so far as the same are not inconsistent with this Act, in the same manner as if such lease has been made under that Act, and shall be dealt with in a like manner as a lease so made. (Cap. 131.)*
 3. *It shall be lawful for the Registrar of Titles to charge and collect in respect of any lease registered under the provisions of this Act, or in respect of any dealing with such lease, the fees prescribed under the Land Transfer Act in the same manner as if such lease was a lease under that Act. (Cap. 131.)*

22. According to section 10 of the NLTB Act, to constitute a valid registration of a lease of Native Land, the lease shall be in a prescribed form and shall be recorded and registered in “the Register of Native Lease” by the Registrar of Titles.

23. The prescribed form for valid lease of native land is defined in Regulation 5 of the Native Land Trust (Leases and Licences) Regulations 1984, where it states that;

“Every Lease of Native land shall be in the form set out in the Second Schedule”.

24. Subsequent to the execution of the lease which is prescribed in the Second Schedule to the Regulations 1984, the same need to be registered in the Register of Native Lease by the Registrar of Titles. The Registration process of the lease of native land is governed by the provisions of the Land Transfer Act so far as the same are not inconsistent with the NLTB Act.

25. Section 21 of the Land Transfer Act deals with registration of instruments of title. In view of section 2 of the Act, the instrument of title includes a certificate of title, crown grant, lease, sublease, mortgage, or other encumbrance as the case may be. Section 21 of the Land Transfer Act stipulates that;

1) *Every instrument of title shall be deemed and taken to be registered under the provisions and for the purposes of this Act as soon as the same has been signed by the Registrar and marked with a serial number in the register, and every instrument purporting to transfer or in any way to affect land subject to the provisions of this Act, or any estate or interest therein, shall be deemed to be so registered as soon as a memorial thereof as herein described has been entered in the register upon the folium constituted by each existing instrument of title affected by such dealing.*

2) *The person named in any instrument of title or other instrument registered as provided in subsection (1) as the proprietor or as*

becoming a proprietor, of land subject to the provisions of this Act, or of any estate or interest therein, shall be deemed and taken to be the duly registered proprietor thereof.

26. Consequently, to constitute a valid registration of the lease of native land, the lessee is required to execute the lease pursuant to section 10 of the NLTB Act and registered the same with the Registrar of Titles pursuant to section 10 of NLTB Act and Section 21 of the Land Transfer Act.
27. Regulation 12 of the Native Land Trust (Leases and Licences) Regulations 1984 describes the agreement for lease, where it states that ;

“Where the board had approved that grant of a lease of native land to any person subject to this regulation, the board shall cause to be served on that person for execution by him an agreement for lease of that land, in duplicate, together with a notice in writing stating that the board had approved the grant of the lease subject to this regulation and requiring that person before the date specified in the notice in that behalf-

- a) to execute both copies of the agreement and to return one copy thereof to the Board, duly executed; and*
- b) to pay to the Board all monies due and payable by that person on or before that date under and in respect of the agreement, whether by way of premium, rent, fees, stamp duty or otherwise.*

No tenancy of native land shall be taken to subsist by virtue of any notice served in pursuance of paragraph (1) unless and until all the requirements of the notice as are mentioned in paragraphs (a) and (b) of that paragraph have been complied with, notwithstanding that any person has entered into possession of that land, with or without the consent of the Board, and

notwithstanding that any rent shall have been received by the Board in respect of that land.

An agreement for a lease of native land served on any person in pursuance of paragraph (1) shall set out in full the terms, conditions and covenants subject to which the land is to be demised and shall contain-

28. Having considered the abovementioned provisions and regulations of the NLTB Act, the Land Transfer Act and the Regulations 1984, I do not find the Agreement for Lease made pursuant to Regulation 12 of Regulations 1984 between one Ram Pati and Native Land Trust Board constitutes a valid lease of this native land. This agreement for lease could not be considered as an instrument of title and also could not to be registered in Register of Native Lease in accordance with section 21 of the Land Transfer Act.
29. I now draw my attention to the annexure “B” of the Plaintiff that is a copy of a Transfer of Leasehold executed pursuant to section 44 of the Land Transfer Act between Shashi Lata and the Plaintiff on 5th of April 2012. In this document, Shashi Lata claimed herself as a registered proprietor of the lease described in Agreement for Lease (NLTB Ref: 4/14/2896) that is annexure “A” and transferred all of her estate and interest in that lease to the Plaintiff. It is now needed to be considered that this transfer document and its registration with the Registrar of Titles on the 22nd of April 2013 had conferred a valid registered proprietorship on the Plaintiff in respect of this native land.
30. In that respect, I find section 44 (2), 21, 24, 25 and 18 of the Land Transfer Act are relevant to determine the validity of annexure “B” of the Plaintiff as a valid instrument of title for the lease.
31. Section 44(2) of the Act states that;

“transfer shall be registered in the prescribed manner and transferees shall have priority according to the date and time of registration”.

32. The prescribed manner of registration of any instrument of transfer of a land or of any estate or interest therein is provided in section 21 (1), where it states that;

*“Every instrument of title shall be deemed and taken to be registered under the provisions and for the purposes of this Act as soon as the same has been signed by the Registrar and marked with a serial number in the register, and **every instrument purporting to transfer or in any way to affect land subject to the provisions of this Act , or any estate or interest therein, shall be deemed to be so registered as soon as a memorial thereof as herein described has been entered in the register upon the folium constituted by each existing instrument of title affected by such dealing**”.* (Emphasized is mine)

33. Section 24 and 25 of the Land Transfer Act deal with the memorial of registration, where section 24 states that;

“Every memorial entered in the register shall state the nature of the instrument to which it relates, the day and hour of the presentation of such instrument for registration, and such other particulars as the Registrar may direct, and shall refer by number or symbol to such instrument, and shall be signed by the Registrar”.

34. Section 25 of the Act stipulates that;

“Whenever a memorial of any instrument has been entered in the register, the Registrar shall, except as herein otherwise provided, endorse the like memorial on each duplicate grant, certificate of title or other instrument affected thereby, unless he dispenses with production of the same, as hereinafter provided; and the Registrar

shall endorse on every instrument so registered a certificate of the time at which the instrument was presented for registration and shall authenticate each such certificate by signing his name and affixing his seal thereto, and such certificate shall be received in all courts as conclusive evidence that such instrument has been duly registered”.

35. In view section 21, 24 and 25 of the Act, the instrument of title of this instance case is the registered lease prescribed under section 10 of the NLTB Act and Regulation 5 of the Native Land Trust (Leases and Licences) Regulation. In order to effect a valid registration of transfer of this leasehold to the plaintiff the said transfer purported in annexure “B” need to be entered in the register upon the folium constitute by existing instrument of title, in this case, the registered lease, as a memorial thereof.
36. Having considered the section 44 (2), 21, 24 and 25 of the Land Transfer Act, I find the mere existence of a Transfer of Leasehold executed in accordance with section 44 (1) of the Land Transfer Act and the stamp of the Registrar of Title stating registered thereon, do not constitute a proper and valid Transfer of Leasehold unto the Plaintiff. Accordingly, I find the said document of Transfer of Leasehold marked and tendered as annexure “B” of the Plaintiff do not grant a conclusive and indefeasible registered proprietorship of land to the Plaintiff.
37. At this point, I wish to conclude my analysis of the evidence presented before me and do not wish to venture into the issue of consent of the Native Land Trust Board which is required for any dealings of native lands pursuant to section 12 of the NLTB Act, as this analysis is suffice for me to form my conclusion in this judgment.

E. CONCLUSION,

38. Moving on to my conclusion, I conclude that after considering the reasons set out above, the Plaintiff failed to establish that he is the last registered proprietor of this lease of native land according to section 169 (a) of the Land Transfer Act and the Defendant has

successfully adduced that there is an arguable case to determine the issue of the right of possession of this land. I accordingly make following orders that;

- i. The Summons dated 30th of July 2013 filed by the Plaintiff is refused and dismissed accordingly,
- ii. The Defendant is granted a cost of \$ 750 assessed summarily,

Dated at Suva this 28th day of November, 2013.

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R.D.R. Thushara Rajasinghe
Acting Master of High Court, Suva