

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CIVIL JURISDICTION**

**Civil Action No. HBC 297 of 2013**

**IN THE MATTER** of an application under section 169 of the Land Transfer Act and Order 113 of the High Court Rules of Fiji.

**BETWEEN** : **THE ATTORNEY – GENERAL OF FIJI** for and on behalf of the Ministry of Finance.

**PLAINTIFF**

**AND** : **PREMIUM PLASTICS LIMITED** a private company duly incorporated under the Companies Act and having its usual place of business at Factory 6 Kalabu Tax Free Zone, Nasinu.

**DEFENDANT**

**BEFORE** : **Acting Master Thushara Rajasinghe**

**COUNSEL** : **Mr. Jitoka J. with Mrs. Chand** for the Plaintiff  
**Mr. Young C.B.** for the Defendant

**Date of Hearing** : **21<sup>st</sup> January, 2014**

**Date of Judgment** : **14<sup>th</sup> March, 2014**

## **JUDGMENT**

### **A. INTRODUCTION**

1. The Plaintiff by this Originating Summons instituted this action pursuant to section 169 of the Land Transfer Act (hereinafter referred as “the Act”) and Order 113 of the High Court rules (H.C.R.) seeking following orders inter alia that,

- i. The Defendant does forthwith give vacant possession of Factory 6 of Kalabu Tax Free Zone, Nasinu, Crown Lease No 13324 and more particularly described as

Lot 1 on DP 8032 with an area of 19.8641 hectares and all improvements, in the district of Naitasiri and Province of Naitasiri,

- ii. For an order that the cost of this application be paid by the Defendant on an indemnity basis,
  - iii. For such other order or orders this honourable court deems fit to make in the circumstance of the case.
2. Upon being served with this Originating Summons, the Defendant filed his affidavit in response. The Plaintiff opted not to file any reply to the Defendant's response. Subsequently, this Summons was set down for hearing on the 21<sup>st</sup> of January 2014. The learned counsel for the Plaintiff and the Defendant made their oral arguments and submissions during the hearing. The learned counsel for the Defendant tendered his written submissions at the conclusion of the hearing. The Plaintiff's counsel was given time to file his closing written submissions; however he did not file it with the time given for that purpose.
3. Having considered the respective affidavits, oral arguments and submissions of the counsel, I now proceed to pronounce my judgment as follows.

## **B. BACKGROUND,**

### *Plaintiff's Case,*

4. Mr. Sakiusa Navunilawa filed an affidavit in support for this Summons together with annexure marked as SN 1 to SN 13. Mr. Sakiusa deposed in his affidavit that the Plaintiff and the Defendant entered into a tenancy agreement for a period of nine months commencing from 01<sup>st</sup> of March 2012 to the 31<sup>st</sup> of December 2012 in respect of the Factory 6 of Kalabu Tax Free Zone, Nasinu in Crown Lease No 13324 which is more particularly described as Lot 1 on DP8031. Subsequent to the withdrawal of the Fiji National Provident Fund as intended purchaser for the entire Zone, the Plaintiff offered the Defendant to sale this property in March 2012. The Plaintiff further stated that there was damage to the roller –door entrance of the premises during the delivery of machines

in March 2012 by the Defendant and the Plaintiff expanded a substantial sum in repair and electrical and other works. The Plaintiff claimed \$ 53,818 for such repairs and upgrades. However, the Defendant did not progressively respond for the offer to sale this property. Eventually a deadline was agreed by the parties for this sale as of 30<sup>th</sup> of April 2013 during their discussion held on 26<sup>th</sup> of February 2013. In the meantime, the Plaintiff wrote to the Defendant on 15<sup>th</sup> of April 2013 outlining the monies owed and reminding the pending expiry of the 30<sup>th</sup> of April 2013 deadline. A Demand notice was issued by the Plaintiff on 24<sup>th</sup> of June 2013 and subsequently the Defendant made a lump sum payment of \$100,000 on 25<sup>th</sup> of June 2013. The Plaintiff then issued to the Defendant a notice to vacate on the 15<sup>th</sup> of July 2013 which was refused to accept by the Managing Director of the Defendant Company.

***Defendant's Case,***

5. The Defendant filed an affidavit of Ravin Lal who is the Director of the Defendant as for their response. The Defendant denied that the Plaintiff is the Registered Proprietor of the Property but admitted the existence of the tenancy Agreement with the Plaintiff. He further deposed that when the parties entered into this agreement, the Plaintiff was aware that the Defendant was going to use this facility for its plastic manufacturing business and needed three phase power supply as the existed power was inadequate. The Defendant has entered into occupation of the property upon the representation made by the Plaintiff that they would install necessary power supply.
6. The Defendant admitted that the Plaintiff made an offer to sale the property in accordance with the agreement. However, the Plaintiff demanded the expenses incurred by the Plaintiff for the installation of power supply as a condition for the sale since it will permanently benefit them once the Defendant purchased the property. The Defendant stated that irrespective of their initial disagreement and reluctance, they made a payment of \$100,000 as a condition of the sale. The Defendant specifically stated in Paragraph 5 of Mr. Lal's affidavit that they were aware that this sum of \$100,000 was to pay for rental arrears and for the cost of the three phase power supply.
7. The Defendant somehow failed to proceed with the propose sale before the deadline of 30<sup>th</sup> of April 2013. Mr. Lal stated that various correspondences were subsequently

exchanged between the solicitors of the parties via e-mails. The copies of those e-mails were tendered as annexure to the affidavit. However, the Plaintiff declined to proceed with the propose sale and instituted this action.

***Plaintiff's Submissions,***

8. The learned counsel for the Plaintiff stated in his submissions that this application was made pursuant to section 169 of the Land Transfer Act, and not pursuant to Order 113 of the High Court Rules as it was stated in the Originating Summons. Having outlined the factual background of the Plaintiff's case, the learned counsel submitted that the Plaintiff made this application under section 169 (a) and (c) of the Act since the possession of the Defendant is derived from this Tenancy Agreement. The Notice to vacate the factory was issued to the Defendant as the Tenancy Agreement expired on December 2012.

***The Defendant's Submissions,***

9. The learned counsel for the Defendant submitted that his show cause to this Summons are founded on four main grounds, they are that;
  - i. *The Plaintiff "the Ministry of Finance" is not the last registered proprietor in terms of section 169 (a), rather the "Government of the Republic of Fiji" is. Hence the Proceedings should be filed on "the Attorney General for and on behalf of the government of the Republic of Fiji".*
  - ii. *The Plaintiff has unjustly retained \$ 59, 464.00 paid to it by the Defendant and this should be set off as rental so that it allows the Defendant to be in the Premises until end of August 2014,*
  - iii. *Since there is a dispute between the parties the tenancy agreement provides at clause 19 that the dispute shall be referred to mediation and if the dispute is unresolved then to arbitration,*
  - iv. *There is no legal notice to quit,*

10. Based on these grounds, the learned counsel argued that there is no rental arrears at the time of issuing of this Notice to Vacate, wherefore the Notice is not valid and effective. Since the Defendant has paid his rent up to September 2013, he is entitled to be in possession of the property. He further elaborated that the dispute over the expenses of power installation should be referred to Mediation wherefore this action should be dismissed. He forcefully submitted that the Defendant paid the sum of \$ 100,000 for the rental arrears and the cost of the installation of the power supply as for a condition for the proposed sale. Since the Plaintiff declined to proceed with the sale, they are not entitled to retain the cost of the installation of power supply. The refusal of the Plaintiff to reimburse that money is the nexus of the dispute between the parties which should be resolved through the mediation as it is provided by the Tenancy Agreement.

**C. THE LAW.**

11. Section 169 of the Land Transfer Act states that ;

*“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.”*

12. Accordingly, the last registered proprietor of the land and/or a lessor with power to re-enter where the lessees or tenant is in arrears of rent 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.

13. Section 171 and 172 of the Act deal with the scope of the hearing and the burden of the parties. 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.”*

14. Section 172 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;*

15. The scope of the hearing of the application under section 169 constitutes with two main limbs. The first is the onus of the Plaintiff to satisfy the court that he is the last registered proprietor or the lessor described under the section 169 (a), (b) and (c) of the Act. Once the Plaintiff satisfied it, the burden will shift on the Defendant to satisfy the court that he has a right to the possession of the land. The scope of the Defendant’s burden of prove of a right to the possession of the land was discussed in **Morris Hedstrom Limited-v-Liaquat Ali** CA No: 153/87 , where it was 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."*

Accordingly, the defendant is only required to present some tangible evidence to establish a right of possession or the existence of an arguable case for such right to defeat the Plaintiff's claim.

#### **D. ANALYSIS,**

16. The first contention of the Defendant is that the Plaintiff is not the last registered proprietor of this property; hence the Plaintiff should not be allowed to maintain this action. The learned counsel for the Defendant contended that the registered proprietor of this property is the Government of the Republic of Fiji and not the Ministry of Finance. Hence the Attorney General of Fiji should have instituted this action on behalf of the Government of the Republic of Fiji instead of for the Ministry of Finance. In response, the counsel for the Plaintiff stated that they instituted this action pursuant to section 169 (a) and (c) of the Act.
17. The Defendant came into the possession of this property pursuant to the tenancy agreement entered by them with the Ministry of Finance. The said tenancy agreement specifically stated that the Ministry of Finance is the Sub Lessor to the agreement on behalf of the Government of the Republic of Fiji. It is apparent that this action was instituted by the Plaintiff as a lessor pursuant to the tenancy agreement against the Defendant.
18. Section 169 (b) and (c) allow the Lessor to institute proceedings against the Lessee on the following instances, where the lessee is in arrears of rent, or where a legal notice to quit has been given to the lessee or where the terms of the lease has expired. Under such instances, the Lessor could institute the proceeding under section 169 and he is not

necessarily required to be the last registered proprietor of the property. The Plaintiff has derived his locus *standi* to institute this action from the tenancy agreement with the Defendant and not from the registered proprietorship of the property.

19. In this instance action has being instituted by the plaintiff upon the ground that the tenancy agreement between the Ministry of Finance and the Defendant had come to end on 31<sup>st</sup> of December 2012, which indeed falls with the domain of the section 169 ( c) of the Act. Circumstances such are not required the plaintiff to be the last registered proprietor to institute the action. Moreover, the Plaintiff alleged that the Defendant had defaulted of paying the monthly rental installments. Indeed I am mindful of the Defendant contention that they had paid all rent money which I will address later in this ruling. However, at this point, the reasons set out above are sufficient to refuse and dismiss the first contention of the Defendant.
20. In respect of the dispute claimed by the Defendant over the incurred cost for the installation of the three phase power supply, the Defendant contended in his affidavit that he was requested by the Plaintiff to pay the cost as they were purchasing the property and will ultimately benefit from it permanently. It was a condition put by the Plaintiff to proceed with the proposed sale of this property. Irrespective of their initial disagreement, the Defendant paid this sum of \$ 100,000 for the renal arrears and the cost for the installation of the power supply as a condition for the sale. Despite of the said payment by the Defendant, the Plaintiff eventually declined to proceed with the sale as the Defendant failed to meet the deadline agreed by the parties. Under these circumstances, the Defendant claimed that the further retention of the cost for the installation of power supply by the Plaintiff is unjust and it should be return to the Defendant. The Defendant further claimed that this is a dispute arose out of this tenancy agreement which should be determined in accordance with the terms of the tenancy agreement.
21. Upon careful perusal of the affidavits tendered by the parties, I find no official correspondence or minutes of discussion between the parties in respect of this alleged request by the Plaintiff to pay the incurred cost for the installation of the power supply. Since the Plaintiff opted not to reply to the affidavit of Mr. Lal, there is no express denial or admission by the Plaintiff on this issue. Despite of the absence of express denial, the Plaintiff has not disputed the payment of \$100000 by the Defendant which covered the



rental arrears and the cost of installation of power supply. I have carefully considered the correspondences exchanged between the parties which were tendered as annexure to Mr. Sakiusa's affidavit, where I find the correspondence of the Plaintiff dated 9<sup>th</sup> of July 2012 requesting the Defendant to pay outstanding arrears. In this letter the Plaintiff has not indicated any other cost incurred by them apart from the defaulted rent money as the outstanding arrears. The Plaintiff had merely stated as of a reminder that they have been accommodating with the Defendant by repairs and maintenance of the factory including the upgrading of the driveways for that they have incurred more than \$95,000. The noticeable fact in this letter is that the plaintiff had not demanded any other expenses incurred by them from the Defendant apart from the defaulted rent money. Subsequent to the letter dated 9<sup>th</sup> of July 2012, the Plaintiff issued a notice to vacate on 28<sup>th</sup> of August 2012 on the ground of non compliance of the lease covenant by defaulting payment of rent from March 2012 to August 2012. Additionally, the Plaintiff had stated in that notice the Defendant can remedy the breach by paying the arrears rental money, yet again no indication or request for any other defaulted payment of incurred cost by the Plaintiff.

22. The issue of this incurred cost for the power installation was first raised by the Plaintiff in their correspondence to the Defendant dated 15<sup>th</sup> of April 2013 (SN11) where the Plaintiff advised the Defendant to pay a sum of \$ 82,649.48 including the rental arrears and the incurred cost for the electrical installation. This letter was corresponded as a consequent to the discussion held between the parties on 26<sup>th</sup> of February 2013 where both parties agreed to set a deadline for the sale of this property as of 30<sup>th</sup> of April 2013.

**E. CONCLUSION,**

23. In view of these finding, though it is not apparent, I find there are some tangible evidence to form an positive inference that the Plaintiff has requested the Defendant to pay the cost of installation of power supply as a condition for the sale of this property. Accordingly, I am satisfied that the Defendant has successfully provided some tangible evidence to establish the existence of a dispute between the parties over the incurred cost for the installation of power supply. The Defendant has paid \$100,000 to cover the rental arrears and cost for the installation of power supply believing that they could purchase the property. However, the Defendant failed to proceed with the said sale before the deadline

agreed by the parties. Under these circumstances, it is required to determine whether the Plaintiff is entitled to retain the money which they accepted as the incurred cost for the installation of power supply subsequent to the cancelation of this propose sale to the Defendant. In view of these facts, I am of the view that the Defendant has a right to be in the possession of this property until the determination of this dispute over the cost of the installation of power supply.

24. I accordingly make following orders, that

- i. The Originating Summons filed by the Plaintiff on the 11<sup>th</sup> of October 2013 is refused and dismissed accordingly,
- ii. The Defendant is granted a cost of \$ 2000 assessed summarily,

Dated at **Suva** this **14<sup>th</sup> day of March, 2014.**

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