

**IN THE HIGH COURT OF THE REPUBLIC OF FIJI**  
**AT LAUTOKA**  
**WESTERN DIVISION**

**[CIVIL JURISDICTION]**

**Civil Action No. HBC 152 of 2013**

**IN THE MATTER** for an application under **Section 169** of Part xxvi of the **Land Transfer Act Cap 131** for an order for immediate vacant possession.

**BETWEEN** : **RAJ KUMAR of** Balevuto, Ba but currently residing in Toronto, Canada.  
**Plaintiff**

**AND** : **RAJEN PRASAD and/or THE OCCUPIERS OF NATIVE LEASE NO. 20576** of Balevuto, Ba  
**Defendant**

**Before: Actg Master M H Mohamed Ajmeer**

Counsel: Mr Dayal for the plaintiff

The defendant was not represented

Date of Hearing: 27 January 2014 & 20 March 2014

Date of Ruling: 15 April 2014

**J U D G M E N T**

**Background**

[1] This is a summons by the plaintiff under section **169** of the Land Transfer Act, Cap 131 (the LTA) (the application) seeking immediate vacant possession of the premises situated on the land comprised in Native Lease

No. 20576, Nararavatu No. 3 (Lot 2 on S.O. 001948), in the Tikina of Magodro, Ba Province, Ba, being residential property (“the property”). The lease expires in July this year (2014). The application is supported by an affidavit of Anil Kumar, plaintiff’s attorney (Attorney’s Affidavit).

[2] On 16 October 2013 defendant filed an affidavit in reply. In addition, he also filed affidavit of Ganga Prasad to support his case.

[3] When the matter came up for hearing on 27 January 2014, I raised an issue on the propriety of the affidavit in support filed by the plaintiff, which is sworn by the attorney and invited the counsel for the plaintiff to address the court on this issue. He then agreed to file a supplementary submission on that issue. He accordingly filed his supplementary submission. Along with the submission he had also filed a supplementary affidavit of Anil Kumar, plaintiff’s attorney. The defendant appears and represents by himself. The supplementary affidavit had been filed without leave of court. I therefore disregard and expunge the plaintiff’s supplementary affidavit, for it had been filed without leave of court.

#### **Plaintiff’s case**

[4] In July 1989 he became the registered proprietor of the property (“AK-2”). Currently he resides in Canada. According to his attorney, the defendant does not have the consent of the iTLTB to occupy the property as it is a Native Lease property. He has been a nuisance to him and his peaceful enjoyment of the property. He says, the defendant failed, refused and/or neglected to vacate the property despite the notice to vacate served on him through his (plaintiff’s) solicitor on 20 July 2012 (“AK-3”).

#### **Defendant’s case**

[5] The defendant’s position is that, he admits that the Native Lease belongs to the plaintiff. The plaintiff granted license to him to occupy part of the

property. He says, the plaintiff's attorney Mr Anil Kumar is abusing his powers under the Power of Attorney. He built the house because the plaintiff requested him to work on his sugar cane farm on share farming basis.

### **The Legislation**

[6] The relevant sections in this case are ss. 169-172 of the LTA. I will refer these sections in my analysis where material.

### **Analysis and decision**

[7] The plaintiff as last registered proprietor of the property has brought these summary proceedings to recover possession from the defendant who is occupying part of the property. He is entitled to initiate these proceedings pursuant to **s. 169 (a)** of the LTA. That section, so far as material provides:

*“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) ... (Emphasis added”

[8] The application must describe the land and must require the defendant to appear at the court on day not earlier than 16 days after the service of the summons as per **section 170** of the LTA. All requirements of section 170 had been complied with and there were no dispute over this.

[9] According to **section 172** of the LTA, the judge must dismiss the application with costs against the applicant, if the defendant appears and show cause why he refuses to give possession of the property and, if he proves to the satisfaction of the judge a right to the possession of the land.

[10] In these proceedings, the burden is on the defendant to show cause and to prove a right to possession of the property. That is not to say that final or incontrovertible proof of a right to remain in possession must be adduced. What is required is to some tangible evidence establishing a right or

supporting an arguable case for such a right, must be adduced; see **Morris Hedstrom Limited v. Liaquat Ali** (Action No.153/87SC at p2).

### **Whether plaintiff's attorney swear affidavit on his behalf**

[11] Before I deal with the issue of show cause and right to possession, I think it is wise to deal with the supporting affidavit and the affidavit in reply filed on behalf of the plaintiff.

[12] Unorthodoxly, the plaintiff has filed the supporting affidavit and affidavit in reply sworn by his attorney, albeit he brought these proceedings under his name. The plaintiff resides in Canada. He has given a power of attorney to his attorney to look after his affairs in Fiji.

[13] The issue that has arisen here is that whether the plaintiff's attorney has necessary power to swear an affidavit on behalf of the plaintiff. Counsel for the plaintiff orally argued that the attorney had necessary power to swear affidavit on behalf of the plaintiff, as he has got general power of attorney (AK-1). He also filed supplementary written submissions touching this issue after I raised the point during hearing.

[14] It is true that the attorney of the plaintiff has got general power of attorney including power to initiate legal proceedings on behalf of the plaintiff. Cl.3 of the power of attorney reads:

*"to **commerce** prosecute enforce defend answer or oppose all actions and other **legal proceedings** and demand touching any matters in which I am or may hereafter be interested or concerned and also if thought fit to compromise refer to arbitration abandon submit to judgment or become non suited in any such action or proceedings as aforesaid."*

[15] In addition, Cl.16 of the power of attorney provides:

*So far as I can lawfully give or delegate such powers discretions and authorities respectively to sell transfer lease mortgage dispose of deal with and manage any property real or personal which may be or become vested in or administered or controlled by me alone or jointly with any other person or persons as a trustee assignee executor administrator director committee attorney agent substitute or delegate or in any fiduciary capacity whatsoever **and to***

*exercise any powers and discretions bring and defend actions and proceedings control and administer any estate or funds execute and sign any deeds and instruments and generally to do any acts whether in my own name or in the name of any other person or persons which I could lawfully exercise execute sign do and cause to be done in any and every such capacity whether solely or jointly with any other person or persons* (Emphasis added).

[16] It should be noted that although the attorney of the plaintiff has all the powers to bring these proceedings under his name he chose and opted to bring these proceedings under the name of his grantor, the plaintiff who currently resides in Canada for one reason or the other. Nonetheless, he has opted to swear an affidavit on behalf of the plaintiff exercising his powers and authorities granted under the power of attorney. This is where I am astonished.

[17] Mention of section 118 of the LTA must be made at this point. That section provides:

*“the registered proprietor of any land subject to the provisions of this Act, or of any estate or interest therein, may by power of attorney in the prescribed form or such other form as may be approved by the Registrar, and either in general terms of specially, authorize and appoint any person on his behalf to execute transfers of, or other dealings with such land, estate or interest or to sign any consent or other documents required under the provisions of this Act, or to make any application to the Registrar or to any court or judge in relation thereto.”* (Emphasis added).

[18] Undoubtedly, the attorney may have authority to transfer of any land and sign any document in relation to such transfer on behalf of the grantor. But does it include the power to swear an affidavit?

[19] In the case of **Clauss and another v Pir** [1987] 2 All ER 752 it was held that:

*“A party could not do by an attorney an act which he was only competent to do by virtue of some duty of a personal nature requiring skill or discretion for its exercise. The effect of s 7 of the 1971 Act [similar to our s.118 of LTA] was purely procedural, and merely allowed an attorney to use his own signature instead of that of his principal in the execution of an instrument which he was empowered to execute on his principal's behalf or to do in his own name some other thing which he was empowered to do in the name of his principal, and it did not enlarge the scope of things which could be done by an attorney beyond that which was already established. **The verification of the relevant documents***

*by affidavit could not be delegated by the defendant since it was a personal duty which he alone could perform because of the personal knowledge required. It followed therefore that the defendant had failed to comply with the order. In the circumstances, however, it would be just to extend the time for compliance, and the defendant would be granted a further six weeks in which to comply personally with the master's order"* (Emphasis added).

[20] In the above case, the defendant's affidavit verifying documents was sworn by his wife, on whom he had conferred a statutory power of attorney. The plaintiff applied for judgment, contending that the defendant was debarred from defending the action because he had not complied with the master's order. The defendant maintained that he had complied with the order; alternatively, he sought a further extension of time in order to do so. He contended that s 7 (1) (b) of the Power of Attorney's Act 1971 gave the donee of a power of attorney the power to do anything on behalf of the principal which the principal could do, and that therefore his wife was fully entitled to swear on his behalf an affidavit verifying documents. The court held that **a party could not swear an affidavit by attorney.**

[21] In the matter at hand too, counsel for the plaintiff contended that the plaintiff could swear an affidavit by his attorney since the attorney has general powers by virtue of the power of attorney.

[22] Swearing of an affidavit requires skill, personal knowledge and discretion for its exercise. In this case, the attorney in his affidavit in reply states that, "I am not aware of the full details of the dealing made between the Plaintiff and Defendant however, I am informed by the Plaintiff that he only allowed the Defendant to occupy the said land if he works on his farm that is harvesting and cutting of sugar cane", see para 7 of the attorney's affidavit in reply. This clearly shows that the attorney of the plaintiff had no personal knowledge and discretion to swear an affidavit on behalf of the plaintiff.

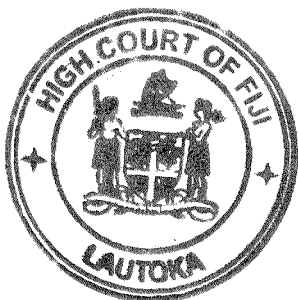
[23] In my opinion, unless specifically granted an attorney has no power to swear an affidavit on behalf of his principal. I would hold that the general power of attorney granted to the attorney in this case does not include the authority to swear an affidavit on behalf of his principal, the plaintiff.

[24] For all these reasons, I disregard, dismiss and struck out the supporting affidavit and subsequent affidavit in reply filed by the attorney, for they had been sworn by the attorney and not by the plaintiff. It follows that the application has been filed without a proper affidavit in support. I accordingly dismiss the application for summary recovery of possession with the costs of \$300.00 against the plaintiff. I have summarily assessed the costs. Nevertheless, this dismissal order will not prejudice the plaintiff to bring any other proceedings against the defendant to which he may be otherwise entitled.

**Final outcome**

- (a) The plaintiff's application for summary eviction filed on 2 September 2013 is dismissed with the summarily assessed costs of \$300.00 payable to the defendant within 28 days;
- (b) The plaintiff has liberty to take any other proceedings against the defendant to which he may be otherwise entitled;
- (c) Orders accordingly.

On this 15<sup>th</sup> day of April 2014



At Lautoka

*M H Mohamed Ajmeer*

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**M H Mohamed Ajmeer**  
Actg Master of the High Court