

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

**CIVIL JURISDICTION**

**CIVIL ACTION NO. HBC 100 OF 2014**

**IN THE MATTER** of Part XXIV of the  
Land Transfer Act, Cap 131

**BETWEEN** : **UPESH KUMAR** of Namoli Avenue, Lautoka

***Applicant***

**AND** : **RUPENI KOROI & AMELIA DAVETALALA** both of Lot 10  
Tualesia Subdivision, Vomo Street, Lautoka

***Respondent***

**Counsel:**

Mr S Nocolawa for the applicant

Mr T Fa for the respondents

**Date of Hearing** : 04 August 2014

**Date of Ruling** : 27 October 2014

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

[1] This is an application by applicant seeking orders that the respondents do show cause why they should not give up immediate vacant possession to the applicant of his Native Lease No. 29420 being Lot 10, Tualesia S/D on SO 4026 LD 4/7/5004 containing an area of 1002m<sup>2</sup> in the District of Vitogo, Province of Ba ("the property").

[2] The applicant relies on the following documents:-

- (i) Applicant's Affidavit in Support filed on the 20<sup>th</sup> June 2014.

- (ii) Applicant's Supplementary Affidavit filed on 1<sup>st</sup> of July 2014.
  - (iii) Applicant's Affidavit in Reply to the Affidavit of Rupeni Koroi filed on 31<sup>st</sup> of July 2014.
  - (iv) Supplementary affidavit of applicant filed on 13<sup>th</sup> of August 2014.
- [3] Respondents oppose the application for the grant of vacant possession of the property. They filed affidavit of Rupeni Koroi in opposition on 31 July 2014.
- [4] Both parties have filed useful written submissions.

### **Plaintiff's Case**

- [5] The applicant is the registered proprietor of the property. The respondents have been tenants of the property since the applicant acquired the same from its former owner in November 2012 at a monthly rental of \$800.00. They are in arrears of a total sum of \$9700.00 from November 2012 to May 2014. On the 14<sup>th</sup> day of May 2014, the law firm of Young & Associates wrote on behalf of the applicant to the respondents demanding them to deliver up vacant possession of the property within 28 days from the receipt of the said letter and also to pay up the outstanding arrears of \$8,900.00 in the said Solicitors Trust Account. The respondents are now occupying the property illegally and are now a trespasser.

### **Respondents' case**

- [6] According to the respondents, it was the applicant that borrowed \$30,000.00 from the first respondent, informing them that once the applicant's loan at the bank had been approved, then the subject property to be given for vacant possession in this action would be transferred to the second respondent and that the respondents would pay the balance purchase price in instalments of \$800.00. In summary, the respondents' opposition to the applicant's application for the granting of orders for vacant possession against them are as follows:-
- a) That the applicant had entered into a Sale & Purchase Agreement with the first respondent on the 29<sup>th</sup> of March 2013 for the first respondent

to purchase the property from the applicant in the sum of \$30,000.00. That agreement was subject to the consent of the iTLTB.

- b) That the first respondent through Korotu Investment Limited paid to the applicant the sum of \$45,000.00 as a deposit for the property.
- c) That, further to the deposit that it has paid, the first respondent had been making payments of \$800.00 per month to the applicant towards the final purchase price of the property.
- d) That the first respondent only stopped making payment, as a result of the applicant's refusal to consummate the Sale & Purchase Agreement.

### **The Law**

- [7] Sections from 169 to 172, the Land Transport Act (LTA) are applicable to summary application for eviction. These sections, so far as material, provide:

#### Ejectors

**169.** *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) ...

#### *Particulars to be stated in summons*

**170.** *The summons shall contain a description of the land and shall require the person summoned to appear at the court on a day not earlier than sixteen days after the service of the summons.*

#### *Order for possession*

*171. 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.*

#### *Dismissal of Summons*

*172. 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**, mortgage or lessor or he may make any order and impose any terms he may think fit;*

*Provided that the dismissal of the summons shall not prejudice the right of the plaintiff to take any other proceedings against the person summoned to which he may be otherwise entitled:*

*Provided also that in the case of a lessor against a lessee, if the lessee, before the hearing, pay or tender all rent due and all costs incurred by the lessor, the judge shall dismiss the summons. [Emphasis provided].*

#### **Determination**

[08] This is an application for summary eviction filed pursuant to 169<sup>a</sup>, LTA. Under that section, the last registered proprietor 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.

- [09] It is common ground that the applicant is the last registered proprietor of the property. In para 2 of the affidavit in support the applicant avers that, he is the registered owner of the lease of the property. This averment has been admitted by the respondents. In para 2 of the affidavit in opposition the respondents state that, paragraph 2 of the affidavit in support of the plaintiffs is admitted. So, as the last registered proprietor, the applicant is entitled to summon the respondents who occupy the property to show cause why they should not deliver up possession of the property to the applicant.
- [10] According to section 170, LTA, the summons must give particulars of the property. The summons filed by the applicant provides sufficient particulars in the application required to identify the property. By doing so, the applicant has complied with one of the requirements contemplated in that section. Another requirement that is to be fulfilled by the applicant is that the summons must require the respondent/s to appear at the court on a day not earlier than sixteen (16) days after the service of the summons. The summons was served on the respondents on 4 July 2014. The respondents did not dispute service of the application. Therefore, there has been compliance with all requirements of section 170 by the applicant.
- [11] Section 171, LTA has no application to the present case. That section will be applicable when the respondent defaults in appearance on the hearing day. Under s. 171, order of possession will be granted to the applicant, if the respondent does not appear on the hearing day of the summons, 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.
- [12] In this case, the respondent appeared and filed their affidavit in opposition. Hence section 172, LTA applies. That section states that, if the person summoned (respondent) 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 (applicant).

- [13] At issue in this case is whether the respondents have right to possession of the property.
- [14] The respondents seek to show that they are entitled to possession of the property by reason of the alleged Sale & Purchase Agreement.
- [15] The respondents are, according to the applicant, tenants of the property since acquisition by the applicant and they were tenants of the property before acquisition of the property. They were to pay monthly rental of \$800.00 from November 2012 to the applicant but they are in arrears of \$9,700.00.
- [16] Respondents deny that they are tenants of the applicant. They state that, they have a Sale & Purchase Agreement with the applicant and state that after 7 months of paying monthly instalments of \$800.00, an agreement still had not been handed to them for proper execution, hence they wanted to sign a proper Sale & Purchase Agreement before proceeding with the payments.
- [17] It is interesting to note that the applicant states that the payment of \$800.00 was towards rent, whereas the respondents state that payment was towards purchase price.
- [18] The alleged Sale & Purchase Agreement was not witnessed and it has no consent of the iTLTB. In the absence of these requirements it cannot be said it is a legally binding document. In my judgment the respondents cannot claim right to possession based on an invalid document.

[19] The case of **CPS Reality -Fiji Inc -v- David Simpson & Anne Simpson** (Suv Civ No. 178/90) was referred to me by counsel for the applicant. In that case it was thought that:

“The company is the last registered proprietor of the land in questions. There are no encumbrances legally valid to be enforced in favour of the Defendant”.

*“Section 169 of the Land Transfer Act is very strict in its application. It is very effective piece of legislation to obtain recovery of possession of land by Summary Judgment. No amount of comparison, unfairness or caring for the land as urged by the Defendant can be allowed to supersede the statutory legal effect of the Section.”*

[20] In **Ajmat Ali v Mohammed Jalil** (Action No. 44 of 1981 – Judgment 2.4.82), also a case cited by the applicant, the Fiji Court of Appeal further elaborated on the requirements of Section 172 as follows:-

*“It is not enough to show a possible future right to possession. That is an acceptable statements as far as it goes but the section continues that if the person summoned does show cause the Judge shall dismiss the Summons but then are added the very wide words **“or he may make any order and impose any terms he may think fit”**. These words must apply, though the person appearing has failed to satisfy the Judge, and indeed are often applied when the Judge decides that an open court hearing is required. We need the section as empowering the Judge to make any order that justice and the circumstances require. There is accordingly nothing in Section 172 which requires an automatic order for possession unless **“cause” is immediately shown**”*

[21] The respondents have taken up the position that the rent agreement was a forged one, for they did not sign it. If there is no rent agreement, what is their right to occupy the property? The resultant position would be that they occupy the property without lease. So, they cannot claim possession of the property.

[22] On the affidavit in reply of the applicant under annexure 4 is a letter from the Office of the Official Receiver dated 28/07/14 stating that Rupeni D Koroi (respondent) was issued with a Receiving Order by the Lautoka Magistrates Court on the 15<sup>th</sup> July 2009 and that Order has not been rescinded. Accordingly the applicant says the respondent

Rupeni D Koroï is still under receivership. So much of argument was advanced by the respondent in this regard. The issue whether the respondent is under receivership or a receiving order was made by the court and that has not been rescinded is not relevant to these proceedings. In these proceedings the court's task is to satisfy itself whether the respondents have a right to possession of the property in dispute. In my judgment it would be inappropriate to deal with the receiving order made against the respondents in these proceedings as it is irrelevant.

### **Conclusion**

[23] In my judgment, the respondents have failed to show that they have a right to possession of the property. They have even failed to satisfy me that there is an arguable issue regarding the property and its possession. Further, they have also failed to show that there are encumbrances legally valid to be enforced in their favour.

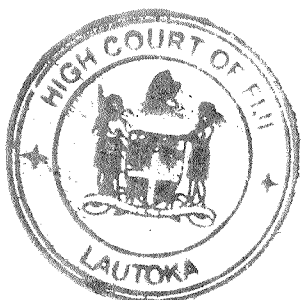
[24] I therefore give judgment in favour of the applicant. I accordingly order the respondents to forthwith deliver up vacant possession of the property to the applicant. However, execution of this judgment will be suspended till 11 November 2014. This is because the respondents sought some time to vacate the property. The applicant is entitled to costs of these proceedings as winning party. He seeks the sum of \$2000.00 as indemnity costs. But, nonetheless having considered all I summarily fix costs at \$600.00. The respondents will pay the costs to the plaintiff.

### **Final Orders**

1. There will be judgment in favour of the applicant.
2. The respondents are ordered to forthwith deliver up vacant possession of the property in Native Lease No. 29420 being Lot 10, Tualasia S/D on SO 4026 LD 4/7/5004 containing an area of 1002m<sup>2</sup> in the District of Vitogo, Province of Ba.



3. The execution of this judgment will be suspended till 11 November 2014.
4. The respondents will pay summarily assessed costs of \$600.00 to the applicant.
5. Orders accordingly.



At Lautoka

27/10/14

Messrs Nacolawa & Co, Barristers & Solicitors for the applicant  
Messrs Fa & Company, Barristers & Solicitors for the respondents

*M H Mohamed Ajmeer*

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