

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

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 86 OF 2014

BETWEEN : **UTTRA KUMARI aka UTTRA DEVI & AKRAM KHAN** of
Rabulu, Tavua, Cultivator.

Plaintiff

AND : **SEKH REYAZIL SHABIB** of Rabulu, Tavua, Cultivator.

Defendant

Counsel:

Mr N Nawaikula for the plaintiff
Ms M Latianara for the defendant

Date of Hearing : 16 October 2014

Date of Judgment: 24 November 2014

J U D G M E N T

Introduction

- [1] This is an application under section 169 of the Land Transfer Act (LTA).
- [2] By their application applicants have called upon defendant, Sekh Reyazil Shabib do show cause why an order for immediate vacant possession of the property situated at Tuvu, Tavua, being comprised NL 974 known as Tuvu in the province of Colo, North (the property), of which the applicants are the registered proprietors should not be made against himself.

- [3] In support of the application the plaintiffs have filed two affidavits. One is affidavit of Akram Khan sworn and filed on 29 May 2014. Another is further affidavit of Akram Khan in answer to the affidavit filed by Sekh Reyazil Shabib and Wajid Ali.
- [4] The respondent has also filed two affidavits namely affidavit in reply of Sekh Reyazil Shabib and affidavit of Wazid Ali. Both affidavits were sworn and filed on 24 June 2014.
- [5] At hearing, both parties orally argued the matter and they also agreed to file their respective written submissions. Accordingly, the defendant filed his written submissions on 4 November 2014 while the applicants on 7 November 2014 with the consent of the respondent.

Background

- [6] According to the applicants the fact are as follows: they are the last registered proprietors of the property. The defendant has been in occupation of the subject land from about September 2013 after he has left for New Zealand when he granted his Power of Attorney to one Mr Wajid Ali who brought in the defendant to occupy his house and farm. After he revoked his Power of Attorney, he issued a Notice to Vacate dated 29th November 2013 that was served on the defendant on 30th November 2013 seeking possession of the property as he needs to move in to reoccupy his house.
- [7] According to the defendant, Mr Wazid Ali brought him to the property to work for him on the farm. This was done after Mr Wazid Ali entered into a Sale & Purchase Agreement with Mr Akram Khan, the second named applicant to purchase his one undivided half share of Native Lease No. 974. He says service of the Notice to Vacate is defective and the fact deposed by the second named applicant in his affidavit is misleading this Honourable Court. He paid a total sum of \$15,000.00

to the second named applicant and has to pay the balance of \$10,000.00.

- [8] Mr Wazid Ali in his affidavit confirms that he entered into a Sale & Purchase Agreement with the second named applicant Mr Akram Khan on 25 July 2013 to purchase his one undivided half share in Native Lease No. 974.

The Law

- [9] Sections from 169 to 172 of the Land Transfer 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

[10] The applicants have issued summary proceedings for eviction of the defendant from the property in which the defendant is occupying. The last registered proprietor may take out such proceedings by reason of section 169 (a) of the LTA. The applicants are the registered proprietors under the LTA of the Native Lease Registered No. 974 ('AK1'). Original of which was shown to me at the hearing for my perusal. According to 'AK1' the applicants are the last registered proprietors of the property. The fact that the applicants are the registered proprietors of the property was not denied by the defendants. So, as the last registered proprietors of the property the applicants are entitled to take out summary proceedings pursuant to section 169 (a) of the LTA.

[11] Pursuant to section 170 of the LTA, 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. The section imposes two requirements on the applicant. Firstly the summons shall contain description of the land. The summons filed by the applicants sufficiently describes the land with reference to Lease number. First requirement of the section has been complied with. Secondly the summons shall require the respondent to appear at the court on a day no less than sixteen days after the service of the summons. The summons which was returnable on 4 July 2014 was served on the respondent on 30 May 2014, which is a day clearly more than 16 days after the service of the summons. The second requirement too has been complied with.

- [12] The applicants have proved that they are the registered proprietors of the property. Since they have discharged their obligation, the burden now shifts to the defendant. He must show cause why he refuses to give up possession to the applicants.
- [13] Section 172 of the LTA 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.**
- [14] The plaintiff's application would be dismissed with the cost against her if the defendant proved to the satisfaction of the court that she has a right to the possession of the land. 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 show 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).
- [15] I will now turn to the issue whether the defendant has a right to possession of the property. The respondent states that a Mr Wazid Ali brought him to the property to work for him on the farm. This was

done after Mr Wazid Ali entered into a Sale and Purchase Agreement with Mr Akram Khan, the second named applicant to purchase his one undivided half share of Native Lease No. 974. The defendant has filed affidavit of Mr Wazid Ali to confirm his version and he does so.

- [16] In his affidavit in support the second named applicant states that he granted a power of attorney to Mr Wazid Ali on 26 July 2013 after he left for New Zealand and he revoked the same on 3 October 2013.
- [17] Interestingly, the alleged Sale and Purchase Agreement by the respondent has been executed on the same day on which the power of attorney was executed. The Sale and Purchase Agreement has been executed so hurriedly and apparently both instruments have been executed before the same Commissioner for Oath, Mr Arun Kumar.
- [18] The respondent claims right to possession by reason of the alleged Sale and Purchase Agreement. It is therefore important to find the validity of that agreement. The applicants are lessees of the Native Land Lease (No. 974). That lease is granted to them subject to certain condition. Condition 4 of the Lease states that:

'(4) The Lessee shall not transfer or sublet this lease without the written consent of the Commissioner of Lands.'

- [19] The defendant does not say the consent was obtained for the dealing. Nor did he say he ever applied for the consent for the transaction. The alleged Sale and Purchase Agreement has been executed and performed without the written consent of the Director of Lands. The respondent will never get the required consent because of the notice dated 13 August 2014 issued by iTLTB to the defendant to the effect that he is in unlawful occupation of part hereof and that he holds no title or consent from iTLTB to be in occupation of the land. The Sale and Purchase Agreement which the defendant relies on cannot be considered lawful, for it is entered into between the attorney of the second named applicant and the defendant and performed without the

Final outcome

[22] The final outcome is that the defendant shall forthwith deliver up possession of the property situated at Tuvu, Tavua, being comprised NL 974 known as Tuvu in the district of Tavua, in the province of Colo, North to the applicants. The defendant shall pay summarily assessed cost of \$500.00 including disbursement to the applicants in 21 days of the date of this judgment. Order accordingly.



24 November 2014

M H Mohamed Ajmeer

.....
M H Mohamed Ajmeer
Puisne Judge
[as Master of the High Court]

Solicitors:

Messrs Nawaikula Esquire, Barristers and Solicitors for the applicants

Messrs Siddiq Koya Lawyers, Barristers and Solicitors for the respondent