

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

CIVIL JURISDICTION

Civil Action No. HBC 137 OF 2014

BETWEEN : **DHAN LATCHMI** of Rarawai, Ba, Fiji

Plaintiff

AND : **JAITUN NISHA** of Rarawai, Ba, Fiji

Defendant

Counsel:

Mrs N Khan with Mr Padarath for Plaintiff
Ms Rigsby for Defendant

Date of Hearing: 7 November 2014
Date of Judgment: 26 November 2014

J U D G M E N T

Introduction

- [1] This judgment concerns with a summary application for possession of land.
- [2] By originating summons filed 20 August 2014 [‘the application’] plaintiff summons the defendant to show cause why she should not give up vacant possession to the plaintiff of the premises situated on the Crown Lease No. 9827, land known as PT of Rarawai & Vunisamaloa, formerly CT 7822 (Farm 1542), lot 13 on Plan BA 2354,

Lot 14 Plan Ba 2369, in the Tikina of Ba, in the province of Ba containing an area of 5.5669ha ('the land').

- [3] The application is supported by affidavit of the plaintiff, Dhan Latchmi sworn on 15 August 2014.
- [4] This application is made pursuant to section 169 of the Land Transfer Act Cap 131 Laws of Fiji (LTA).
- [5] The defendant filed affidavit of response. The plaintiff filed affidavit of response (reply).
- [6] At hearing, both parties made oral submissions.

Background

- [7] The plaintiff is the registered lessee of the land by virtue of Native Lease No. 9827 since 31 October 2013. The defendant is an occupant of part of the land. The plaintiff allowed the defendant to occupy part of the land on compassionate grounds. The plaintiff also entered into an agreement to sell that part of the land to the defendant. Thereafter the plaintiff through her solicitor issued a notice to quit. Despite the notice the defendant continues to occupy the land.

The Law and Analysis

- [8] This is a summary application for possession of land. The plaintiff has filed this application as the last registered proprietor of the land. The last registered proprietor of the land may summon any person who is in possession of land to appear before a judge in chambers and show cause why he should not give possession of the land to the applicant, see s.169 of LTA. The plaintiff is entitled to make this application

under s.169, for he is the last registered proprietor of the land by reason of the Native Lease.

- [9] The application must describe the land and must require the defendant to appear before a judge in chambers on a day not earlier than 16 days after the service of the summons as per section 170 of LTA. The summons gives description of the land and the summons which was returnable on 24 September 2014 was served on the defendant on 21 August 2014. Hence the summons has been served more than a month before the returnable day. Both the requirements of section 170 had been complied with and there was no dispute in this regard.
- [10] Admittedly, the plaintiff is the last registered lessee of the land. Therefore the burden shifts to the defendant to establish that he has a right to possession of the land.
- [11] Pursuant to s.172 of LTA the judge shall 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.
- [12] At hearing, Mrs N Khan raised a preliminary point with regard to the affidavit in response filed by the defendant. It is that the affidavit is defective, so should be disregarded as it is filed against the O.41, r.9 (2) of the High Court Rules 1988 (HCR). That rule provides:

'(2) Every affidavit must be indorsed with a note showing on whose behalf it is filed and the date of swearing and filing, and an affidavit which is not so indorsed may not be filed or used without the leave of the Court.'

- [13] In **Kim Industries**, In re (No.1), Gates, J (as he then was) held that normally leave must be obtained for affidavit to be filed or used if affidavit does not carry indorsement note. Failure of counsel will not always result in a court allowing indulgence.
- [14] When the preliminary issue was raised by the plaintiff's counsel, Ms Rigsby counsel for defendant did not seek leave of the court to use it despite the fact that it carries no indorsement. Instead, she said that, 'we are not relying on our affidavit. We rely on the plaintiff's affidavit. They say they entered into an agreement with the defendant. That's why my client is refusing to deliver up possession.'
- [15] For my part, I would decide that I should disregard the defendant's affidavit since the defendant does not want to rely on that affidavit. The resultant position then would be that there is no affidavit filed on behalf of the defendant.
- [16] The defendant says she is going to rely on the plaintiff's affidavit in that the plaintiff states that, the defendant is an occupant of part of the land described herein above. I had allowed the defendant to occupy part of the land on compassionate grounds. On the request of the defendant I agreed to formalize our arrangement by entering into an agreement to state that the defendant is authorized by me to occupy the said portion of the land, I will at all times be the owner, see paras 5 & 6 of the plaintiff's affidavit.
- [17] In essence, counsel for the defendant contended that the defendant has an agreement with the plaintiff to occupy the land. She therefore has a right to possession of the land.
- [18] On the other hand, counsel for the plaintiff argued that that agreement is void *ab initio* by reason of s. 13 of the Crown (Now State) Lands Act (SLA) S. 13 declares that:

'13.- (1) Whenever in any lease under this Act there has been inserted the following clause:-

"This lease is a protected lease under the provisions of the Crown Lands Act".

(hereinafter called a protected lease) **it shall not lawful for the lessee thereof to alienate or deal with the land** comprised in the lease of any part thereof, whether by sale transfer or sublease or in any other manner whatsoever, nor to mortgage, charge or pledge the same, **without the written consent of the Director of lands first had and obtained**, nor, ... **Any sale, transfer, sublease, assignment, mortgage or other alienation or dealing effected without such consent shall be null and void.'**

[19] The Crown Lease No. 9827 (through which the plaintiff is the lessee) expressly declares that this is a Protected Lease under the provision of the State Lands Act. If so, s. 13 of SLA will apply. S. 13 prohibits any dealing affecting the leased land without the consent of the Director of lands first had and obtained.

[20] The alleged Sale & Purchase Agreement (SAPA) between the parties had been entered and performed without the consent of the Director of lands. The SAPA is clearly unlawful due to lack of consent and thereby section 13 renders it null and void *ab initio*. The defendant cannot rely on an unlawful agreement. Moreover, the court will not assist to enforce an unlawful agreement.

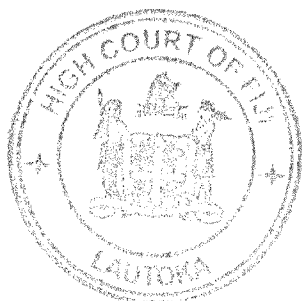
Conclusion

[21] In a summary proceedings initiated under section 169 for possession of the land the defendant must show that she has a right to possession. The defendant in this case relying on SAPA, which is unlawful and null and void by reason of consent required under section 13, says that she is entitled to possession of part of the land

(1/4 acre) and that is why she is refusing to deliver up vacant possession to the plaintiff. I would conclude that the defendant cannot claim a right to possession out of an unlawful agreement. Moreover, she cannot also establish an arguable case based on such an agreement. For all these reasons, I would enter judgment in favour of the plaintiff. I accordingly order the defendant to forthwith give possession of the land which relates to this action. The plaintiff will be entitled to summarily assessed cost of \$350.00.

Final result

[22] The final result is that the defendant is ordered to forthwith give possession of the land to the plaintiff. The plaintiff is entitled to summarily assessed cost of \$350.00. Order accordingly.



M H Mohamed Ajmeer

.....
M H Mohamed Ajmeer

Puisne Judge

At Lautoka

26 November 2014

For Plaintiff: Messrs Samuel K Ram, Barrister & Solicitor

For Defendant: Messrs Rigsby Law, Barristers & Solicitors