

IN THE HIGH COURT OF FIJI
AT LABASA
CIVIL JURISDICTION

CIVIL ACTION NO: HBC 61 OF 2014

IN THE MATTER of an application by
the Plaintiffs under Section 169 of the
Land Transfer Act.

BETWEEN : **RAJESH PRASAD** and **USHA PRASAD** both of
Savusavu

PLAINTIFFS

AND : **NILESH RAM, VINI PRASAD, TULA RAM, SANJAY**
KUMAR, SANT RAM SINGH, RAM PAL, SOTIANA
NAIVA, MEREWALESI MAY and **RADHA CHETTY**
all of Savusavu

DEFENDANTS

Appearances : *Mr. Sen of Maqbool & Co for the Plaintiffs*
Mr. Vere of Naipote Vere & Associates for the
Defendants

Date of Hearing : 21 November 2014

Date of Ruling : 11 December 2015

R U L I N G

Introduction and Background

1. This is the plaintiff's application for vacant possession made by summons dated on the 16 September 2014. The application was

supported by an affidavit which states that they are the last registered proprietor of the piece of land referred to in the Certificate of Title No. 21229 as Nacekoro being Lot 1 on Plan 5321 containing one hectare, eight hundred and seventy six square meters and is situated in the district of Savusavu in Vanua Levu.

2. The affidavit further states that the plaintiffs purchased the property through a mortgagee sale and that the defendants have remained in occupation of the said land without any colour of right since it was acquired. The defendants are not tenants, have no right to remain on the property and although they were served with a notice to vacate they still remain on the property. The plaintiffs therefore seek an order for vacant possession with costs of \$4,000:00.
3. The Defendants oppose the application and by their affidavit in opposition sworn by Sanjay Vinesh Kumar who states that he is authorised by the rest of the defendants to swear the affidavit on their behalf and states the following:-
 - (1) That the plaintiffs had filed a similar action against Munesh Prasad and that they ought to have been a party to that proceedings;
 - (2) That they had already paid Munesh Prasad's father some money so that when the land is sub-divided they would be able to purchase a residential block and Munesh Prasad had assured them that he would keep his father's promise to them and to therefore remain on the land until his civil action is completed; and
 - (3) That the land was transferred to the plaintiffs by fraud and that the said Munesh Prasad is taking the mortgagee to Court in a High Court Action for breach of contract and negligence in failing to transfer the land to him.

4. The plaintiffs in their affidavit in reply briefly states that the action between them and Munesh Prasad has no relevance to the defendants right to remain on the land and that the matters raised in their affidavits has no merits and that they should vacate the land.

Determination

5. When this matter was heard the decision on Action No. 48 of 2014 was still pending so it was thought prudent that the ruling be deferred until a decision in that matter was delivered. The decision in that matter would affect this matter because the defendant's right to remain on the land was by virtue of a relationship and an agreement entered into between them and Munesh Prasad's father.
6. The land in question had an interesting history and has been the subject of a few civil actions in the High Court and for the purposes of this action this Court does not wish to refer to them.
7. The decision in Civil Action No. 48 of 2014 was delivered on the 2nd December 2015. There is no doubt that the plaintiffs are the last registered proprietor of the subject land. They purchased the property by mortgagee sale and are now the registered proprietor. In a section 169 application, all the plaintiffs had to do was provide proof that they are the last registered proprietor of the land. They have satisfied this requirement by attaching in their affidavit a true copy of the Certificate of Title in which states that the property was transferred to them by mortgagee sale on the 4 June 2014.
8. The onus now lies on the defendants to show cause why they should not give up vacant possession (section 172). Their affidavits indicate that they rely on the success of Munesh Prasad's case in his action against the mortgagee and his defence of the Section 169 application by the plaintiffs to give rise to their right to remain. Hence if the action

against Munesh in the Section 169 action fails then it follows that they have no right to remain.

9. The defendants do not have to prove a conclusive right to remain in possession only some tangible evidence establishing a right or at least supporting *an arguable case for such a right* (see **Morris Hedstrom Limited -v- Liaquat Ali** (Action No: 153/87)). For the evidence to be tangible it must be real and capable to be established, not a vague or an elusive perception of a right of possession. The matters raised by the Defendants in their affidavit evidence are not tangible and cannot be established by adduced facts. It must be evidence of a tangible right of possession against the plaintiff's right. In my view the fact that they rely of an agreement entered into between them and Munesh's father is not tangible evidence against the plaintiff's right as the registered proprietor of the land, which can give a right to remain.
10. This matter could have been determined by itself without the need to refer to the Munesh Prasad's case as giving rise to a right to remain but the issue of fraud having been raised it was considered prudent to await that decision.
11. In respect of fraud Justice Kumar came to the following conclusion on page 9 of his decision that "*no evidence has been produced to Court to show that the plaintiffs have committed any fraud when they became registered proprietors*".
12. He further stated that the plaintiffs could not be responsible for the mortgagee refusing to transfer the property to Munesh Prasad or for the Register of Title removing the caveat wrongfully. In my view damages is sufficient remedy for Munesh Prasad against the mortgagee.
13. The conclusion reached there was that the defendant has not satisfied the Court that he has cause to remain on the property. Similarly in this action the defendants have also failed to show cause to remain on

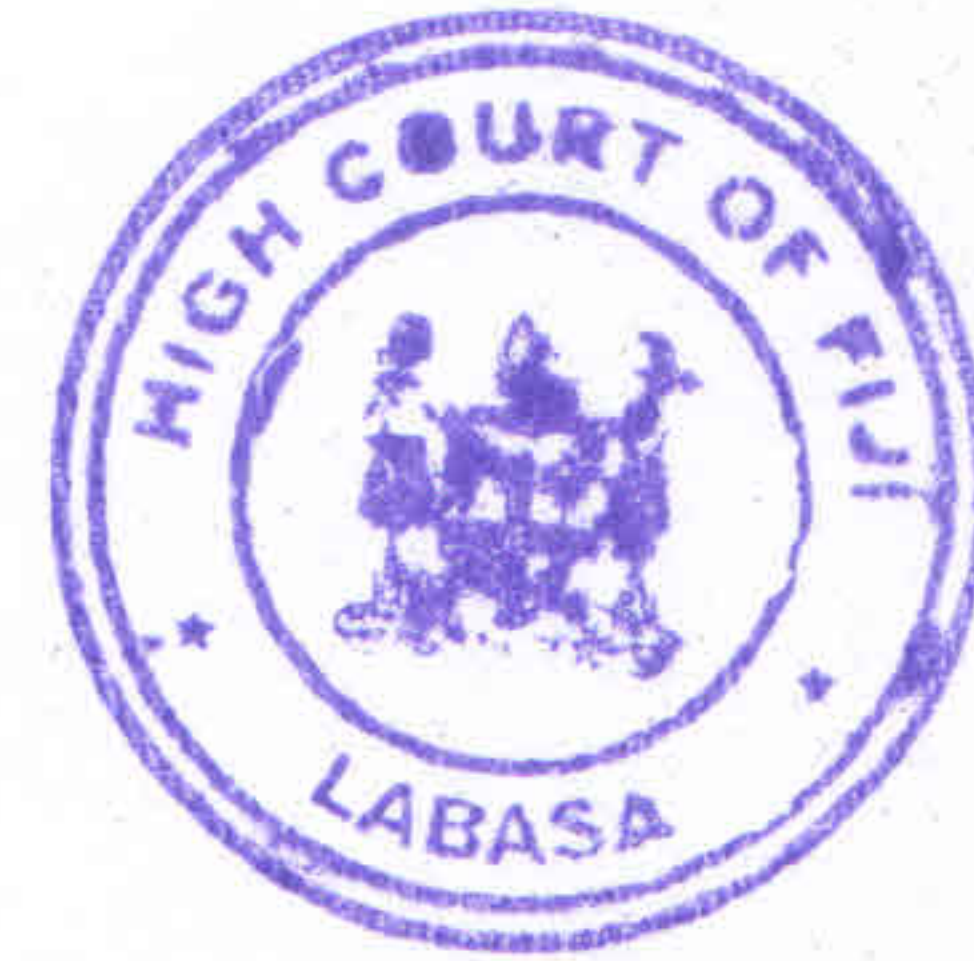
the property in that they did not provide sufficient tangible evidence against the plaintiff's right to remain on the property. Therefore the plaintiff succeeds in their application for vacant possession.

14. I therefore make the following orders:-

1. The plaintiffs application for vacant possession is granted;
2. That the defendants are to give vacant possession to the plaintiffs by the 11 January 2016; and
3. That the defendants are to pay costs to the plaintiffs summarily assessed at \$1,000:00.



H A Robinson
Master
Labasa High Court



11 December 2015