

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC161 of 2014

BETWEEN: VALDA EDMA SUSAN HOERDER

PLAINTIFF

AND: TEVITA KOLIKOLI

DEFENDANT

COUNSEL: Ms. Vasiti for the Plaintiff
No appearance of the Defendant

BEFORE: Acting Master Vishwa Datt Sharma

Date of Hearing: 11th February, 2015

Date of Ruling: 26th February, 2015

RULING

INTRODUCTION

- [1] This is an application under s 169 of the Land Transfer Act [Cap 131] filed by the Housing Authority on behalf of the Plaintiff seeking an order to evict the Defendant from its land.
- [2] The Plaintiff claims that she is the registered Lessee of all that residential leasehold property known as Unit 01A SLP 18 situate at Edenville, Toorak and comprised in Strata Lease No. 341155 (hereinafter called 'the residential leasehold property').

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- [3] The **Plaintiff** further claims that the **Defendant** and his family are **occupying the residential leasehold property without any licence, right or consent** from her and is therefore a **trespasser-at-law**.
- [4] The **Plaintiff** could not serve the application on the defendant and as a result this case remained pending in the system for some time.
- [5] Housing Authority on behalf of the **Plaintiff** subsequently appointed Lajendra Law as Counsel to act for the **Plaintiff**. Notice of change of Solicitors was accordingly filed by the law firm and thus the **Plaintiff's** case was handled by Lajendra Law.
- [6] An interlocutory application by way of an Ex-Parte motion was filed by the **Plaintiff's** lawyers seeking an order for substitute service. That is to serve the pending application on the defendant by way of fixing the Originating Summons, Affidavit in Support and Acknowledgment of Service on the main door of the residential leasehold property occupied by the defendant.
- [7] This court acceded to the **Plaintiff's** application and granted the order for substitute service and accordingly upon service of the same an affidavit of service was filed in court for the matter to take its normal cause of action.
- [8] The Defendant failed to file any acknowledgment of service and or personally appear in court and serve any summons to show cause why should he not give up vacant possession of the land in terms of the application before this court.
- [9] It is essential to mention that this proceeding was heard on an **undefended basis** (in the absence of the Defendant). This court has a duty to determine the pending issue before the court in a just and fair manner in terms of the laws provided for in *ss169,171 and 172 of the Land Transfer Act* [Cap 131].

THE APPLICATION

- [10] The **Originating Summons** filed by the Housing Authority is asking the **Defendant** to **show cause** why he should not hand over **immediate vacant possession** of the said **land** to the **Plaintiff** of the **residential Leasehold property** known as Unit 01 A SLP 18 situate at Edenville, Toorak, comprised in Strata Lease No. 341155 situated in the province of Rewa and in the district of Suva.
- [11] This application was supported by an affidavit sworn by **VALDA EDNA SUSAN HOERDER** who is the **Plaintiff** in this action.
- [12] She confirmed through her affidavit the following-
- (i) *That she was the registered Lessee of all that residential leasehold property known as Unit 01A SLP 18 situate at Edenville, Toorak and comprised in Strata Lease No. 341155.*
 - (ii) *That erected on this property is a 1 bedroom dwelling house occupied by the Defendant and his family without any licence, right or consent from her and is therefore trespasser-at-law.*
 - (iii) *That on 31st day of July, 2013, the Housing Authority exercised its powers of sale and duly transferred the said residential leasehold property namely Lease no. 341155 to her.*
 - (iv) *That she had never at any time agreed to lease the said residential leasehold property to the defendant or authorised anyone else to collect rent for the said residential leasehold property occupied by the defendant on her behalf.*
 - (v) *That the Notice to Quit dated the 01st day of November, 2013 was served on the defendant by leaving a copy on the property on the 13th day of November, 2013.*

- (vi) *That despite the notice, the defendant has failed to deliver up vacant possession of the said residential leasehold property and continues in occupation of the same.*
- (vii) *That she requires the defendant to give immediate vacant possession of the said residential leasehold property.*
- (viii) *That she prays for an order in terms of the Summons filed herein.*
- [13] The defendant failed to file any acknowledgment of service and or summons to show cause as to why should he not be evicted from the said premises nor did he make any court appearances to defend this case as required in law.
- [14] The **Plaintiff** Counsel chose not to file or furnish this court with any written submissions but relied on the application and the affidavit in support filed in court.

THE LAW

- [15] The application is filed in terms of s 169 of the *Land Transfer Act* [Cap 131] which provides as follows:

“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) *a lessor with power to re-enter where the lessee or tenant is in arrear for such period as may be provided in the lease and, in the absence of any such provision therein, when the lessee or tenant is in arrear for one month, whether there be or be not sufficient distress found on the premises to*

countervail such rent and whether or not any previous demand has been made for the rent;

- (c) *a lessor against a lessee or tenant where a legal notice to quit has been given or the term of the lease has expired."*

- [16] The procedure under s.169 is governed by sections 171 and 172 of the Land Transfer Act (Cap 131) respectively which stipulates as follows:-

"s.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."

s.172. If a 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, mortgagee or lessor or he may make any order and impose any terms he may think fit." (Underlined is mine for emphasis)

- [17] It is for the defendant to 'show cause' why he refuses to give vacant possession of the residential leasehold property to the Plaintiff as sought for by the Plaintiff.

- [18] The procedure under s169 is most appropriate here. In the case of *Ram Narayan v Moti Ram (Civ. App. No. 16/83)* Gould J.P. said

"... the summary procedure has been provided in the Land Transfer Act and, where the issues involved are straightforward, and particularly where there are no complicated issues of fact, a litigant is entitled to have his application decided in that way."

- [19] As far as the requirements in terms of section 172 are concerned, the Supreme Court in the case of *Morris Hedstrom Limited v. Liaquat Ali (Action No. 153/87 at p2)* said as follows and it is pertinent:

"Under Section 172 the person summoned may show cause why he refused to give possession of the land and if he proves to the satisfaction of the judge a right to possession or can establish an arguable defence the application will be dismissed with costs in his favour. The Defendants must show on affidavit evidence some right to possession which would preclude the granting of an order for possession under Section 169 procedure. That is not to say that final or incontrovertible proof of a right to remain in possession must be adduced. What is required is that some tangible evidence establishing a right or supporting an arguable case for such a right must be adduced."

- [20] The requirements of section 172 have been further elaborated by the Fiji Court of Appeal in *Ajmat Ali s/o Akbar Ali v Mohammed Jalil s/o Mohammed Hanif (Action No. 44 of 1981 - judgment 2.4.82)* where the court said:

"It is not enough to show a possible future right to possession. That is an acceptable statement 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 read 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. (emphasis added)

- [21] In *Premji v Lal [1975] FJCA 8; Civil Appeal No 70 of 1974 (17 March 1975)* the Court of Appeal said:

'These sections and equivalent provisions of the Land (Transfer and Registration) Ordinance (Cap. 136-1955 Laws of Fiji) have been considered in a number of cases in this court and the Supreme Court. In Jamnadas & Co. Ltd. v. Public Trustee and Prasad Studios Ltd. (Civil Appeal No. 39 of 1972 - unreported) this court said -

- [22] Under *Section 172 of the Act* the judge is empowered to dismiss the summons if the respondent proves to his satisfaction that he has a valid defence, a right to possession, locus standi and or a licence. It further provides that a judge may make any order and impose any terms that he may think fit. The dismissal of the summons is not to prejudice the right of a **Plaintiff** to take any other proceedings to which he may be otherwise entitled.
- [23] Reference is made to the case authorities of *Caldwell v. Mongston (1907) 3 F.L.R. 58* and *Perrier Watson v. Venkat Swami (Civil Action 9 of 1967 - unreported)* wherein the Supreme Court held '*that if the proceedings involve consideration of complicated facts or serious issues of law, it will not decide the cases on summary proceedings of this nature, but will dismiss the summons without prejudice to the Plaintiff's right to institute proceedings by Writ of Summons.*'

DETERMINATION OF THE ISSUE

- [24] The question for this court to determine is whether the **Plaintiff** is entitled to the possession of the residential leasehold property known as **Unit 01A SLP 18** situated at Edenville in Toorak, Suva in terms of *s169 of the Land Transfer Act [Cap 131]*?
- [25] Counsel representing the **Plaintiff** on behalf of the **Housing Authority** informed the court that she will not furnish any written submissions per se but will rely on the application filed in court coupled with the supporting affidavit of the **Plaintiff**.
- [26] The **Plaintiff** in her affidavit in support of her originating summons confirmed that she was the **registered Lessee** of all that residential leasehold

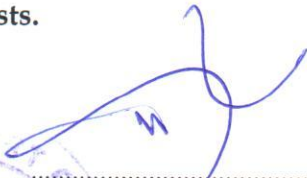
property known as **Unit 01A SLP 18** situated at **Edenville in Toorak, Suva** and was comprised in **Strata Lease No. 341155**. Erected on the said property was a one (1) bedroom dwelling house which was occupied by the defendant and his family without any licence, right or consent from the **Plaintiff** and that the **defendant** was a trespasser-at-law.

- [27] Reference is also made to the annexure marked '**A**' within the affidavit of support of the **Plaintiff** which confirms that it is a Housing Authority Lease No. 341155 which was transferred by the **Housing Authority** on a mortgagee sale to the **Plaintiff** VALDA EDNA SUSAN HOERDER on 31st day of July, 2013. This further confirms that the **Plaintiff** had purchased the property in question from the Housing Authority by way of a mortgagee sale. This instrument in itself confirms that the **Plaintiff** is the rightful owner of this Housing Authority Lease and that she has the locus standi to institute the proceedings in terms of the law and ask for an order to evict the defendant from her property.
- [28] Further, **Notice to Quit** was also served onto the defendant on the 01st day of November, 2013, but he continued to occupy the said property without any entitlement. According to the **Plaintiff**, the defendant is a trespasser-at-law.
- [29] The **defendant** was appropriately served with the **Plaintiff's application** but he failed to file any **acknowledgment of service** in this proceeding nor did he find it appropriate to **show cause** why he refuses to give **vacant possession** of such **leasehold property** which he is presently occupying. He chose to stay away from this proceeding for the reasons best known to him.
- [30] I have carefully considered the facts and the affidavit evidence filed by the **Plaintiff** in this case coupled with the **annexure** marked '**A**'.

- [31] I find that the **Plaintiff** has proved her **right to possession** of the **residential leasehold property** known as **Unit 01A SLP 18** situated at **Edenville** in **Toorak, Suva** and that the **defendant** is the **trespasser**.
- [32] For the aforesaid rationale, I **grant** an **order** for an **immediate vacant possession** of the said land to the **Plaintiff** of the residential lease hold property known as **Unit 01A SLP 18** situate at **Edenville, Toorak, Suva**.

ORDERS

- [33] The **Orders** are therefore as follows:
1. That the **Plaintiff's** application seeking an order for the eviction of the **Defendant** filed on **18th June, 2014** succeeds.
 2. That the **Defendant** to deliver to the **Plaintiff** an **immediate vacant possession** of the said leasehold property hereinabove mentioned accordingly.
 3. There will be no order as to costs.


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VISHWA DATT SHARMA
Acting Master of the High Court
Suva

