

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

HBC No. 52 of 2015

BETWEEN : KELTON INVESTMENTS LIMITED a company incorporated in Fiji
whose registered office is at 51 - 55 Foster Road, Walu Bay Suva, Fiji.

PLAINTIFF

AND : TEVITA BAINICAGI # 2 of Calia Squatter Settlement, Navua, Fiji.

DEFENDANT

BEFORE: Acting Master Vishwa Datt Sharma

COUNSELS: Mr. Anand Singh for the Plaintiff
No Appearance of the Defendant
No Appearance of Mr. Siga (Assisting Defendant)

Date of Hearing: 21st April, 2015

Date of Decision: 21st April, 2015

DECISION

INTRODUCTION

1. This is an application under s 169 of the Land Transfer Act [Cap 131] filed by the Plaintiff seeking an order to evict the Defendant and his family members from its land.
2. The Plaintiff commenced this proceeding by filing an Originating Summons together with an Affidavit in Support of one Anthony Ah Koy.

3. The **Plaintiff** claims that 'Kelton Investments Limited' is the registered proprietor of all that land comprised and described in Certificate of Title No. 24709, Lot 2 on DP 2167 situated at Lot 2 Calia Road, Navua.
4. The Originating Summons and the Affidavit in Support was served onto the Defendant on 07th February, 2015.
5. The Defendant appeared in court on 11th March, 2015, assisted by Savenaca Siga (a third year Law student) and opposed the Plaintiff's application for vacant possession.
6. The court granted the Defendant 14 days to file and serve his Affidavit in Opposition and show cause why he should not vacate the plaintiff's property.
7. The matter was adjourned to Tuesday, 21st April, 2015.
8. The Counsel representing the Plaintiff was present but neither the Defendant nor the person assisting him was present in court. Further, the Defendant failed to file and serve his Affidavit in Opposition to the Plaintiff's application.
9. Mr. Anand Singh representing the Plaintiff asked court to grant the orders in terms of his application before this court.
10. It is essential to mention that this proceeded on an **undefended basis** (in the absence of the Defendant and his assistance). 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

11. The **Originating Summons** filed by the Plaintiff is seeking an order to evict the **Defendant** and his family members from its land comprised and described in

Certificate of Title No. 24709, Lot 2 on DP 2167 situated at Lot 2 Calia Road, Navua.

12. The application was supported by an affidavit sworn by Anthony Ah Koy in his capacity as the Company Director.
13. He confirmed through his affidavit the following-
 - (i) *that he was authorized by the Plaintiff to make this affidavit ;*
 - (ii) *that the Plaintiff is the registered proprietor of all that land comprised and described in Certificate of Title No. 24709, Lot 2 on DP 2167 situated at Lot 2 Calia Road, Navua;*
 - (iii) *that a notice to quit and deliver vacant possession was given to the Defendant on 05th December, 2014;*
 - (iv) *that despite the notice, the Defendant has failed and or neglected to vacate the said property; and*
 - (v) *sought for an order that the Defendant and his family members do forthwith vacate the said property.*
14. The Defendant failed to file and serve any Affidavit in Opposition nor did he show cause why he should not vacate the said property.

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.

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.'

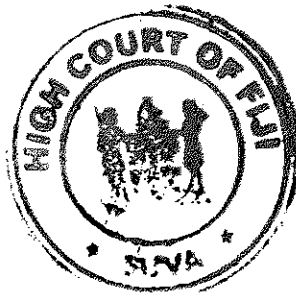
DETERMINATION OF THE ISSUE

24. The question for this court to determine is whether the Plaintiff is entitled to the possession of all that land comprised and described in Certificate of Title No. 24709, Lot 2 on DP 2167 situated at Lot 2 Calia Road, Navua.
25. The Plaintiff in the affidavit in support of the originating summons confirmed that Kelton Investments Limited was the registered proprietor of all that land comprised and described in Certificate of Title No. 24709, Lot 2 on DP 2167 situated at Lot 2 Calia Road, Navua.
26. Reference is also made to the annexure marked as 'AAK' within the affidavit of support of Anthony Ah Koy which confirms that the Plaintiff Kelton Investments Limited is the proprietor or the rightful owner of all that land comprised and described in Certificate of Title No. 24709, Lot 2 on DP 2167 situated at Lot 2 Calia Road, Navua.
27. Further, Notice to Quit was also served onto the defendant on the 05th December, 2014, and he continues to occupy the said property without any entitlement.
28. The defendant was appropriately served with the Plaintiff's application but he failed to file any affidavit in opposition. He did not think appropriate to show cause why he refuses to give vacant possession of such property which he is

presently occupying. He chose to stay away from this proceeding for the reasons best known to him.

29. I have carefully considered the **application; facts** and the **affidavit evidence** filed by the **Plaintiff** in this case coupled with the **annexure** marked 'AAK'.
30. I find that the **Plaintiff** has proved the **right to possession** of all that land comprised and described in Certificate of Title No. 24709, Lot 2 on DP 2167 situated at Lot 2 Calia Road, Navua.
31. For the aforesaid rationale, I grant the following orders-
- (i) An Order for the Defendant and his family members to give vacant possession of the land to the Plaintiff comprised and described in Certificate of Title No. 24709, Lot 2 on DP 2167 situated at Lot 2 Calia Road, Navua.
 - (ii) The Defendant and the family members are granted one (1) month to deliver vacant possession to the Plaintiff.
 - (iii) Each party to bear their own costs.

Dated at Suva this 21st Day of April, 2015



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VISHWA DATT SHARMA
Acting Master of High Court, Suva