

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 144 of 2014

IN THE MATTER of section 169
of the Land Transfer Act

BETWEEN: **SANJAY PRASAD** of 9½ Miles, Davuilevu Squatter
Settlement, Nausori, Bank Officer.

PLAINTIFF

AND: **SEREIMA ADI DAVE** of Lot 9 on SO 1669, Marshall
Place, Cunningham Stage 4, Tacirua.

DEFENDANT

COUNSEL: Ms. Vasiti for the Plaintiff
Ms. Colavanua for the Defendant

BEFORE: **Acting Master S. F. Bull**

Hearing: 12 March 2015
Ruling: **29 April 2015**

JUDGMENT

Introduction

1. On 30 May 2014, the Plaintiff filed an originating summons and supporting affidavit pursuant to section 169 of the Land Transfer Act (the LTA), requiring the Defendant to show cause why she should not be

made to hand over immediate vacant possession of all that residential leasehold property known as Lot 09 on SO 1669, situate at Marshall Place, Cunningham Stage 4, Tacirua, as comprised in Native Lease No. 23204.

2. The Defendant filed an answering affidavit on 1 August 2014 and the matter finally proceeded to hearing on 12 March 2015.
3. At the hearing, the Defendant raised a preliminary objection. After hearing both counsel and to avoid further unnecessary delay, I decided to hear both the preliminary objection and substantive matter, saying that I would deliver a ruling on both subsequently.

The preliminary objection

4. The Defendant takes issue with the manner in which these proceedings were instituted. Reliance is placed on Order 5 rule 6 (1) and (2) of the High Court Rules (the HCR), with the Defendant submitting that the rules require a person suing in their personal capacity to institute proceedings by a barrister and solicitor or in person.
5. Sub-rule (2) precludes a body corporate from beginning or carrying on proceedings otherwise than by a barrister and solicitor. In this case, the Housing Authority, a body corporate, instituted proceedings against the Defendant though they were not a party thereto. According to the Defendant, the institution of proceedings by the Authority, a corporate body, in this manner, breached Order 5 rule 6 (1) and (2). Counsel added that Ms. Panikar could not bring these proceedings for the Authority since she was an employee thereof.

6. In answer to the preliminary objection, the Plaintiff submitted that the Originating Summons was filed by one Christina Panikar, a legal counsel with the Authority. Ms. Panikar is a barrister and solicitor and it was she, not the Housing Authority that had filed the summons.
7. In reply, Ms. Colavanua submitted that Ms. Panikar was employed by the Authority and is therefore precluded from filing this summons for the corporate body she was working for.

On instituting and continuing proceedings

8. Order 5 rule 6 (1) allows any person to begin and carry on proceedings either in person or by a barrister and solicitor.
9. Sub-rule 2 precludes a body corporate from beginning or carrying on proceedings otherwise than by a barrister and solicitor, unless expressly provided by or under any enactment.
10. The Housing Authority was established under section 3 (1) of the Housing Act, Cap 267 and by section 6 of the same Act, accorded authority to be a corporate body with perpetual succession, common seal, and to hold land for the purposes related to the administration of the Act.
11. In this case, Ms. Panikar, legal counsel for the Housing Authority, instituted these proceedings for the Plaintiff, Sanjay Prasad, by filing the originating summons and affidavit in support.
12. The question is, does this breach Order 5 rule 6 (1) (2)?
13. I do not consider that it does. The Plaintiff is Sanjay Prasad, not the Housing Authority. Ms. Panikar, who is legal counsel for the Authority is

no less a barrister and solicitor because of this. Under Order 5 rule 6 (1), the Plaintiff is free to begin and carry on proceedings in person or by a barrister and solicitor. These proceedings were instituted by a barrister and solicitor, for the Plaintiff who is a bank officer and not a corporate body.

14. Even if these proceedings were instituted by Ms. Panikar for the Authority on behalf of the plaintiff, there is in my opinion, nothing irregular in this. Under rule 9.2 of the Rules of Professional Conduct and Practice, made pursuant to section 129 of the Legal Practitioners Decree 2009, it is "...proper for a practitioner to be the employee of a person or corporation and to act as practitioner for his or her employer."
15. There are two other relevant considerations. Firstly, Order 2 rule 1 of the HCR contains the general rule that non-compliance with the rules shall be treated as an irregularity and shall not nullify the proceedings.
16. Secondly, Order 2 rule 2 requires that an application to set aside for irregularity must be made within reasonable time and before the party making the application takes any further steps in the proceedings. In this case, the first time that the Defendant raised objection was in its letter dated 4 November 2014 seeking an adjournment of the hearing set for 5 November 2014, and well after the filing of its affidavit in opposition on 1 August 2014. That letter was not received by the registry until 04 February 2015.
17. The objection was raised belatedly by letter more than three months after the filing of the affidavit in reply, and not made in Court until day of the hearing.

18. In any event, I have found the objection to be without merit and, not being satisfied that there has been a contravention of Order 5 rule 6 (1) (2), I accordingly dismiss the preliminary objection.

The substantive matter

19. The substantive matter is an application pursuant to section 169 of the Land Transfer Act. It is supported by an affidavit sworn by the Plaintiff on 28 May 2014, wherein he deposes that he is the registered lessee of all that residential leasehold property known as Lot 09 on SO 1669, situate at Marshall Place, Cunningham Stage 4, Tacirua, comprised in Native Lease No. 23204. A copy of the said lease is annexed to his affidavit and confirms transfer by mortgagee sale, registered on 06 February 2014 under the Plaintiff's name.
20. Erected on the said property is a single bedroom property occupied by the Defendant and her family without licence, right or consent from him. He had never at any time agreed to lease the said leasehold property to the Defendant, or authorise anyone else to collect rent for the said property in his behalf.
21. A notice to quit dated 11 April 2014 was served on the Defendant on 15 April 2014 but the Defendant has failed to deliver vacant possession of the said property and continues in occupation of it.

The Defendant's response

22. In reply, the Defendant deposes that the property had been sold illegally to the Plaintiff by the Housing Authority and that she has lodged complaints about this case with FICAC, the Ministry of Local Government and the Prime Minister's Office.

23. She bought the property on 27 October 1995 for \$13,400 and annexes a receipt from the Housing Authority bearing the said date, for the sum of \$13,400. She had not taken a loan to purchase the land and had informed the Authority of this on many occasions.
24. The first time she had taken a loan from the Authority was sometime around 1999 when she borrowed \$1000 for her children's education. Repayments were made by way of direct deductions from her weekly wages, through cheques issued by the accounts section of the Water Authority where she worked. These cheques were picked up by the Housing Authority every week. She does not think she owes any money to the Housing Authority and believes the house has been fraudulently sold to the Plaintiff.
25. She deposes that whatever personal loans or soft loans she had taken have been repaid through direct deductions from her wages. She does not know anything about the three accounts under her name with the Housing Authority and does not know why her house was sold to the Plaintiff. She paid cash in the sum of \$20,430 for the land and building in 1995 and is of the opinion the Authority has made a mistake in respect of her account and has misled the Court in this case.

The law

26. Under section 169 (a) of the LTA, the Plaintiff is required to prove that he is the last registered proprietor.
27. Thereafter, the Defendant bears the onus of showing cause as to why vacant possession should not be granted. Pursuant to section 172 of the LTA, she needs to satisfy the Court that she has a right to possession. This she must do on affidavit evidence. (Muthusami v Nausori Town Council F.C.A. 23/86).

28. There is no need to prove conclusively a right to possession and it is sufficient for the Defendant to prove that there is some tangible evidence establishing the existence of a right or of an arguable defence. (*Morris Hedstrom Ltd v Liaquat Ali* (Action No. 153 of 1987).

Analysis

29. In this case, the Plaintiff is the last registered proprietor of the property in question. The copy of Native Lease No. 23204 annexed to his affidavit in support shows his name memorialized on 06 February 2014.
30. Pursuant to sections 39 – 42 of the Land Transfer Act, and under the Torrens system of land registration which operates in Fiji, the title of the registered proprietor is indefeasible unless actual fraud is proved. (See *Subramani v Sheela* [1982] FJCA 11; [1982] 28 FLR 82 (2 April 1982); *Assets Company Ltd v Mere Roihi* [1905] AC 176 at p.210; *Fels v. Knowles* 26 N.Z.L.R. 608, at page 620)
31. In *Subramani* (supra) the Fiji Court of Appeal (per Gould V.P., Marsack, J.A., and Spring J.A.) stated:

The indefeasibility of title under the Land Transfer Act is well recognised; and the principles clearly set out in a judgment of the New Zealand Court of Appeal dealing with provisions of the New Zealand Land Transfer Act which on that point is substantially the same as the Land Transfer Act of Fiji. The case is *Fels v. Knowles* 26 N.Z.L.R. 608. At page 620 it is said:

"The cardinal principle of the statute is that the register is everything, and that, except in case of

actual fraud on the part of the person dealing with the registered proprietor, such person, upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against all the world."

32. I hold that under s. 169 (a) of the Land Transfer Act, the Plaintiff has locus to bring this action.
33. The Plaintiff having discharged his burden, the onus now shifts to the Defendant to show cause as to why she should not be made to give up vacant possession to the Plaintiff. I bear in mind the guidelines in the authorities above in my determination of this issue.
34. In the Defendant's answering affidavit, she deposes that she had purchased the property in question for \$13,400 on 27 October 1995. A copy of a receipt issued by the Housing Authority, bearing the said date and amount is annexed. She deposes she did not take a loan for the purchase of the property.
35. A letter dated 27 October 1995 from the Authority, signed by the Manager Sales for the Chief Executive, is annexed. The letter advises the Defendant that her application to purchase the property on SO 001669, Lot 009 at Tacirua for \$12,980 had been approved. It refers to the Defendant having opted to pay for the property by cash or otherwise, and sought confirmation of her acceptance of the Authority's offer by signing a form attached which was to be returned within 14 days.
36. The copy of another letter from the Authority dated 4 February 1997 in respect of account number 352373 (the same account number cited in the receipt in SAV 1 of the Defendant's affidavit) stated that the Defendant was entitled to a refund on this account.

37. The copy of a letter from the Authority's General Manager Lending to the Permanent Secretary Local Government, Urban Development, Housing and Environment dated 10 April 2014 and annexed as SAV 3 indicates that the Defendant's Home Account at that point had a balance of \$30,785.09, of which \$28,301.58 was in arrears.
38. Having perused the copies of the letter from the Authority, the receipt annexed to the Defendant's affidavit, both of which bear the same date of 27 October 1995, I am of the opinion that these lend some weight to the Defendant's claim that she had paid cash for the property, had not taken a housing loan from the Authority for it, and that the Authority had made an error in respect of the property and the subsequent sale of it to the Plaintiff, or alternatively, that there had been fraud involved in the mortgagee sale of her property to the Plaintiff.
39. I bear in mind that a "final or incontrovertible proof" is not the standard, and it is sufficient if there be "some tangible evidence" going to establishment of a right, or supporting an arguable case for such a right. (*MH Ltd v Liaquat Ali*, supra)
40. I consider there to be some tangible evidence in support of an arguable defence. I do not consider that the Defendant has made a "bare allegation" or bald assertion without some evidence. I feel that there is a need for a fuller investigation, and that the s. 169 LTA procedure is not adequate in the circumstances of this case.
41. In *Prasad v Prakash* [2002] FJHC 308; HBC0157.2000 (22 August 2002), the Court stated:

Where the basic facts in a Section 169 application are not in dispute, chambers proceedings are the appropriate forum for

dealing summarily with the action: **Shyam Lal v Schultz** [1972] 18 Fiji L.R. 152 at p 154. In **Ram Devi v Satya Nand Sharma and Another** ([1985] 31 Fiji L.R. 130 the Court of Appeal, in reversing the judge's decision to dismiss the summons, said at p 134 B:

“It is true that orders under that section will not be made on disputed facts or in complicated law situations - but that must mean *bona fide* fact disputes arising from the evidence, or legal points which could not be simply identified.”

42. The basic facts not in issue here are that the Plaintiff is now registered proprietor of the property, and the Defendant continues in occupation notwithstanding the notice to quit. Everything else is disputed, from the Defendant's acquisition of the property in 1995, the existence or not of a housing loan or mortgage on the property, to loan repayments. Having read the affidavit material and documents exhibited, I am not satisfied that the disputed facts here are “obviously specious” as found by the Court to have existed in *Ram Devi* (supra).
43. Unlike *Singh v Singh* [1987] FJCA 11; [1987] 33 FLR 63 (25 September 1987), where the Court found there to be

...nothing whatsoever before the learned judge to suggest the existence of any evidence, documentary or oral, that might possibly assist the appellant in treating the case as falling within the scope of section 169 of the Land Transfer Act and making an order for possession in favour of the respondent,


there is, in my opinion, some tangible evidence in this case in support of an arguable defence.

44. In light of my findings above, I dismiss the Plaintiff's summons for vacant possession.

45. Final Orders

1. The Plaintiff's application for immediate vacant possession is hereby dismissed.
2. The Plaintiff is to pay costs of \$300, summarily assessed.

Dated at SUVA this **29th day of April, 2015**


S. F. Bull
Acting Master of High Court

