

IN THE HIGH COURT OF FIJI
AT LABASA
CIVIL JURISDICTION

CIVIL ACTION NO: HBC 63 OF 2014

BETWEEN : **JEMMY MOHAMMED YUNUS** of 11895 Forrest
Park LN, Victorville CA 92392, USA

PLAINTIFF

AND : **YOGESH & RUKSHANA** of Nawi, Bua

DEFENDANTS

Counsels: Mr. A Kohli of Kohli & Singh for the Plaintiff
Mr. Sharma of SS Law for the Defendants

R U L I N G

Introduction

1. By summons dated the 3 October 2014 the plaintiff sought vacant possession from the defendant of all that piece of land described in Certificate of Title No. 27587A as Lot 1 on Deposited Plan 6000 and

known as "Nawi" with an area of Fourteen Hectares, six hundred and seventy four square metres.

2. The summons was supported by an affidavit sworn by the plaintiff, which states that he is the last registered proprietor of the said piece of land and that the defendant is residing on the land without any colour of right. Annexed to this affidavit was a copy of the certificate of title which showed that the plaintiff was the registered proprietor of the land through a transfer registered on the 27 June 2005. At this juncture I must add that all copies of titles of property annexed to affidavits in support of all applications for vacant possession must be certified as true copies. This was not the case here.
3. The plaintiff further states that an eviction notice was given to the defendant but the defendant did not vacate the land. That the plaintiff has entered into a contract with a third party for the removal of gravel on his property for use on the construction of the highway and presumably is unable to honour the contract due to the defendant's occupation.

The Defendant's Position

4. The Summons and affidavit in support was served on the Defendants 21 October 2014. In the defendant's affidavit in opposition sworn by Yogesh he states firstly that he is authorised to swear the affidavit on behalf of both of them and that so far as is relevant :-
 - (1) He was brought to the land by the last registered proprietor (Nasru Din) with the full knowledge of the plaintiff in 2005;
 - (2) That he was given verbal assurance from the plaintiff's father to remain on the property and if the property was to be sold that he was to be given first option;
 - (3) That he has been cultivating approximately 3 to 4 acres of the land by carrying out cash crops farming and producing fruit and vegetables;
 - (4) That he has made an application to the Agricultural Tribunal for a declaration of tenancy and;

- (5) That on the basis of assurance given to him and his wife by Mr. Nasiru Din he has carried out substantial improvement on the property.

Plaintiff's Affidavit in Reply

5. The plaintiff in reply to the affidavit in opposition states that he denies that the defendant was authorised by his father to remain on the property. Further that he was not aware that the defendants were on the property until February 2014 and that his father Nasiru Din has not been in Fiji since 2005. That it was on his last trip to Fiji in 2014 that he found the defendant and ten (10) members living on the property and that due to their aggressive behaviour the plaintiff had to call the police to try to remove the squatters. The plaintiff further states that if the plaintiff were cultivating the land or made any improvements then they have done so without any authority from the plaintiff. The plaintiff denies that the defendants were brought to the property by his father Nasiru Din.

Submissions

6. The matter was concluded on affidavit evidence and both parties were ordered to provide simultaneous submissions within 14 days. To date no submission was received from the plaintiff. The plaintiff however has conceded that he is unlikely to get the order sought given that the defendant has made an application to the Agricultural Tribunal for a declaration of tenancy. This is so because in most applications under Section 169 of the Land Transfer Act it appears that an application for a declaration of tenancy acts as a stay until that application for tenancy is determined.
7. Two observations in this particular case is worth noting, the first is that, the application for vacant possession under section 169 seems to act as the impetus to make an application under the Agricultural Land and Tribunal Act. The defendant was served with the Summons on the 21 October 2014 and the application for a declaration of a tenancy under the ALTA was made on the 6 November 2014, some three weeks after. During this period the Counsel for the defendant has asked for and granted an extension of time to file an affidavit in opposition. Whether

the application to grant an extension of time to file the affidavit in opposition was designed to suit the application for a declaration of tenancy is unclear but the timing seems to raise doubt on the integrity of both applications.

8. In applications under ALTA the onus is on the Landlord (assumed to mean the proprietor) to prove that the occupation was without his consent. Under section 169 the onus is on the “*tenant*” (defendant) to show cause.
9. In this instance the “landlord” lived overseas and the defendant is alleged to have brought in ten other people as his tenants. The plaintiff states in his affidavit that due to the aggressive nature of the tenants towards him, the police had to be called and their advice to the plaintiff was to issue the trespassers with a notice to vacate. These matters no doubt will be the subject of any further proceedings.
10. Notwithstanding the above the defendant has provided enough tangible evidence (at least from the ALTA application) to prevent the plaintiff from obtaining vacant possession. His right to refuse to give possession arises from the yet to be determined application for tenancy under ALTA. This is sufficient in my view to show that he has cause to remain on the property as is required under Section 172 of the Land Transfer Act.
11. It is therefore prudent in the circumstances to deny the application pending the determination of the Agricultural Tribunal. This position is further fortified by the decisions of the Court of Appeal in *Soma Raju –v- Bhajan Lal (1976) 22 FLR 163* in which it was held that the Agricultural Landlord and Tenant Ordinance (now the Agricultural Landlord and Tenant Act) prevailed against the plain terms of the Land Transfer Act.

Conclusion

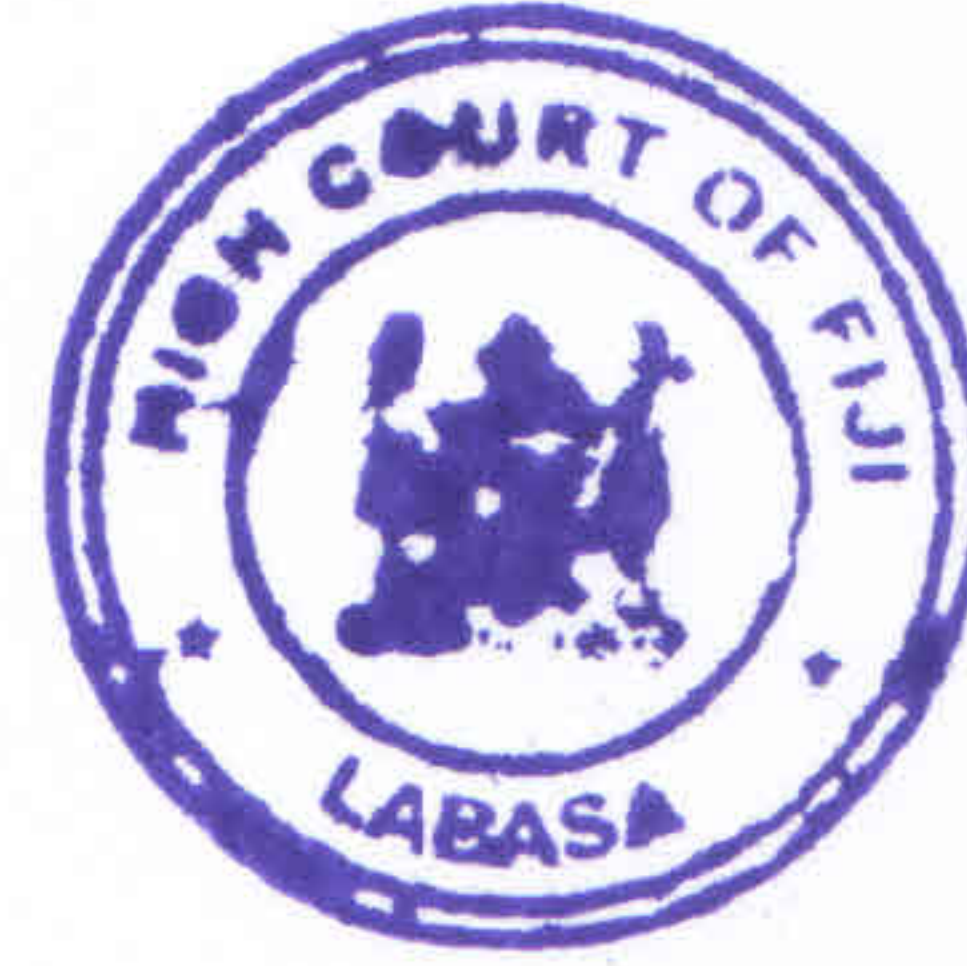
12. In my view there is no need to go any further given the plaintiff’s concession. This matter however needs to be determined as soon as possible and the onus is on the plaintiff to move the matter further. Under section 172 the Court is allowed to make further orders dismissing the summons but not prejudicing the right of the plaintiff to make any further applications. For that reason I make the following orders:-

1. The application for vacant possession under section 169 is denied;
2. The plaintiff is to proceed with a further application by means of a writ action; and
3. Each party is to pay their own costs.



H A ROBINSON

MASTER, HIGH COURT, LABASA



1 JULY 2015