

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

HBC No. 320 of 2013A

IN THE MATTER of the Land Transfer Act
(Cap 131).

AND

IN THE MATTER of an application pursuant to
Section 169 of the Land Transfer Act for vacant
possession.

BETWEEN : (1) ASHWIN LAL

(2) ROSELYN RENUKA PRASAD both of Narere, Nasinu, Supervisor
and Machinist respectively.

PLAINTIFFS

AND : ALIVETA DRAVEURU aka ANA of Lot 7, Narere Subdivision,
Stage 4, Narere, Nasinu, Domestic Duties.

DEFENDANT

BEFORE: Acting Master Vishwa Datt Sharma.

COUNSELS: Mr. Nand for the Plaintiff.
Mr. Tuberi for the Defendant.

Date of Hearing: 21st April, 2015

Date of Decision: 4th August, 2015

RULING

INTRODUCTION

1. The Plaintiff filed an Originating Summons on 08th November, 2013 and sought for the following orders-
 - (a) That the Defendant to show cause why an Order for immediate vacant possession of the land in Native Lease No. 22493, Narere Subdivision Stage 4 Lot 7 as shown Lot 7 on SO 419 located in the District and Province of Naitasiri containing an area of 450 square meters in the Republic of Fiji, of which the Plaintiffs are the registered Lessees, should not be made against her upon the grounds set forth in the affidavit of Ashwin Lal and Roselyn Renuka Prasad.
2. This application is supported by a joint affidavit of Ashwin Lal and Roselyn Renuka Prasad sworn and filed on 08th November, 2013.
3. The application is made pursuant to *Section 169 of the Land Transfer Act, Cap 131*.
4. The Defendant was personally served with this application on 21st November, 2013 and an affidavit of service to this effect has been filed into court.
5. The Counsel representing the Defendant was granted 14 days time to file and serve his affidavit in opposition on 02nd December, 2013.
6. The case was adjourned for hearing on 18th February, 2014.

7. The Defendant filed an Ex-Pate Notice of Motion on 10th February, 2014 seeking an order for the vacation of the court hearing date of 18th February, 2014 which was finally granted but eventually heard on 9th February, 2015.
8. This case proceeded to hearing on a **defended basis** and both parties to the proceeding were represented by Counsels at the hearing.
9. 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]*.

PLAINTIFFS AFFIDAVIT IN SUPPORT OF APPLICATION

10. Both Plaintiffs deposed as follows-

- (i) *We are the Plaintiffs in this action.*
- (ii) *The Defendant is the occupant currently occupying the property being Native Lease No. 22493, Narere Subdivision Stage 4 Lot 7 as shown Lot 7 on SO 419 located in the District and Province of Naitasiri containing an area of 452 m² in the Republic of Fiji, (hereinafter referred to as 'property').*
- (iii) *We bought the said property from Chandra Deo Singh. A copy of the Native Lease NO. 22493 of the said property is annexed and marked 'A'.*
- (iv) *We were informed by Chandra Deo Singh that he and the Defendant would vacate the property as soon as settlement is effected.*
- (v) *That after the settlement was effected on 03rd September, 2013 we went to take possession of the property but found out that the Defendant was occupying the property and was refusing to move out.*
- (vi) *That on or about 21st October, 2013 our Solicitors Nands Law issued and served a notice to vacate dated 18th October, 2013 to the Defendant to provide vacant possession. (a copy of notice with affidavit of service is annexed and marked 'B'.)*
- (vii) *The Defendant has not vacated the said property as requested and does not appear to be making any effort to vacate the said property and are occupying the property illegally,*
- (viii) *We intend to carry out developments on the said property but are unable to do so because the Defendant's presence on the said property.*

- (ix) *We pray that an order be made requiring the Defendant to give up immediate vacant possession of the property to us.*

DEFENDANT'S AFFIDAVIT IN OPPOSITION

- (i) *That I have read through the affidavit sworn by the Plaintiffs on the 7th day of November, 2013 (herein referred to as "the affidavit") and I crave leave of the Honorable Court to answer the same.*
- (ii) *That I admit paragraph (1) of the said affidavit.*
- (iii) *That in reply to paragraph (2) of the said affidavit I say that I am not an ordinary occupant of the property known as Native Lease No. 22493, Narere Subdivision Stage 4 Lot 7 as shown on SO419 in the District of and Province of Naitasiri (herein after referred to as "the property"). I am occupying the said property, which is our matrimonial property.*
- (iv) *That further to my reply to paragraph (2) of the said affidavit, I married the registered proprietor of the said property, CHANDRA DEO SINGH on 12th day of February, 2002 in Suva. A copy of our Marriage Certificate is annexed herewith and marked Annexure "AD1". I am advised that by virtue of my marriage to Chandra Deo Singh (herein after referred to as "Singh". I have an interest which I can enforce in the matrimonial property under the provisions of section 160 and section 161 of the Family Law Act 2003.*
- (v) *That in reply to paragraph (3) of the said affidavit I say that the Plaintiffs bought the said property from Singh in circumstances including fraud, deception and neglect. Neglect was shown by the Plaintiffs when they failed to check whether I was occupying the said property legally. I am legal wife of Singh living in the matrimonial property. Fraud is committed Singh when he failed to inform the Plaintiffs about myself living in the said property and that while we were still living together he filed for divorce in Nasinu court claiming that we have been separated. Again deception by Singh in his representations to the Plaintiffs and failing to inform the court about his real situation when applying for divorce.*
- (vi) *That further to support my allegation to fraud and of Singh I annex herewith a copy of the Decree Nisi (Conditional Order of Dissolution of Marriage) which is marked Annexure "AD2" and a copy of the Decree Absolute (Certificate of Full Dissolution of Marriage) marked Annexure "AD3". The dissolution of marriage resulted from Singh's deception and fraud to the Family Court in Nasinu and a copy of Singh's application for divorce on the grounds of separation is annexed and marked "AD4". These occurred in the year 2011 when Singh was still living with me as husband and wife in the said matrimonial property.*
- (vii) *That also annexed are the Sales and Purchase Agreement between the Plaintiff and Singh dated the 23rd day of April, 2013 and the same is marked Annexure "AD5". Also annexed is a copy of the Transfer of Native Land Lease dated 27th day of May, 2013 and the same is marked "AD6". During*

the sale of the property as shown above I was staying at the said matrimonial home without my knowing the same nor my giving my consent to the transactions.

- (viii) *That I have been advised and verily believe that the Section 169, processing is not suitable for the issues involved and that Singh does not contribute to the same and I am further advised that the issues raised herein should be dealt with and a Writ of Summons will allow Singh to be a arty and evidence could be attained verbally during the hearing of the same.*
- (ix) *That in reply to paragraph (4) of the said affidavit I say that the Plaintiffs have been fooled by Singh because he did not tell them the real situation about his position as the Vendor. I further say that I cannot vacate the property because of my interests as described aforesaid.*
- (x) *That in reply to paragraph (5) of the said affidavit I say that on the 3rd day of September, 2013, I was still living together with Singh and I further say that the Plaintiffs should have satisfied themselves first by visiting the said property before buying it. It was their negligence in verifying the information given to them by Singh which I am advised do not qualify them as bona fide purchasers according to the records. The Plaintiffs live in Narere and they could have easily satisfied themselves about my status in regard to the said property.*
- (xi) *That in reply to paragraph (7) of the said affidavit I say that I did not vacate the property because of my rights to the same as discussed above.*
- (xii) *That in paragraph (8) of the said affidavit that the purposed development of the property be the Plaintiffs cannot be done because I am occupying our matrimonial property which is my only secured home.*
- (xiii) *That in reply to paragraph (9) I say that the Plaintiffs are not entitled to the prayer that I give up possession of the said property I have a superior claim on the same.*
- (xiv) *That further in support of my affidavit I refer to the contents of my Statement of Claim in the Writ of Summons I have filed because the same clearly sets out the issues regarding the purported sale of the said matrimonial property.*
- (xv) *That I pray that the Plaintiffs' application for an order for one to vacate the said property be dismissed with costs in favour of me.*

THE LAW

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

12. 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."

13. 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)

14. 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."

15. 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)

16. 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 -*

17. 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.
18. It is for the defendant to 'show cause' why she refuses to give vacant possession of the residential leasehold property to the Plaintiff as sought for by the Plaintiff.
19. 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.*'

ANALYSIS and DETERMINATION

20. The question for this court to determine is whether the Plaintiffs are entitled to the possession of the land in Native Lease No. 22493, Narere Subdivision Stage 4 Lot 7 as shown Lot 7 on SO 419 located in the District and Province of Naitasiri containing an area of 450 square meters in the Republic of Fiji, of which the Plaintiffs are the registered proprietors and or Lessees in terms of s169 of the Land Transfer Act [Cap 131]?
21. In this case, the Plaintiffs must first comply with the requirements of section 169 of the Land Transfer Act cap 131, which are stated hereunder as follows-
- (a) *The first requirement or the first limb of section 169 is that the applicant must be the last registered proprietor of the subject land.*
 - (b) *The second is that the applicant be a lessor with power to re-enter where the lessee or tenant is in arrears; and*
 - (c) *The third is where a lessor against a lessee or tenant where a legal notice has been given or the term of the lease has expired. The second and third limb of section 169 does not appear to apply in that the defendant is not the plaintiff's tenant who is in arrears and/or the term of the lease has expired.*
22. In this instance, the first limb of s169 applies; the plaintiff is the last registered proprietor of the Native lease No.22493. In this respect the plaintiff has annexed in his affidavit a certified true copy of Native Lease No. 22493 which shows clearly that the land was transferred to the Plaintiff on 03rd September 2013 at 2:16 PM under transfer

number 786032. The Plaintiffs are for the purposes of section 169 the last registered proprietor of the said Native Lease No.22493.

23. 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. (Case of 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 p 620 refers).
24. In Subramani (supra) the Fiji Court of Appeal (per Gould V.P.' Marsack, J.A., and Spring J.A.) states as follows-

'The indefeasibility of title under the Land Transfer Act is well recognized; 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 the 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."

25. Bearing the above in mind, I find that the Plaintiff has the locus standi to bring this action against the Defendant in this case.
26. After the Plaintiffs have established the first limb test of section 169 that is that the Plaintiffs are the registered proprietors of the subject Native Lease No. 22493, then the Defendant bears the onus of showing cause as to why vacant possession should not be granted to the Plaintiffs.
27. Pursuant to section 172 of the Land Transfer Act Cap 131. The Defendant needs to satisfy this court on affidavit evidence that she has a right to possession. (Case of Muthusami v Nausori Town Council F.C.A. 23/86 refers).
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. (Case No. 152 of 1987- Morris Hedstrom Ltd v Liaquat Ali refers).

29. The Defendant was served with the Plaintiff's application seeking vacant possession on 21st November, 2013 and filed her affidavit in opposition on 28th May, 2014.
30. I have very carefully perused the entire affidavit in opposition filed by the Defendant in the within action and it can be summarized as follows-
- (a) *That the Defendant was married to Chandra Deo Singh and said the property is a matrimonial property in which the Defendant continues to occupy and live till the present time. Further, she is not an ordinary occupant; therefore, she has an interest which can be enforced in the matrimonial property under the provisions of section 160 and 161 of the Family Law Act 2003.*
 - (b) *That the Plaintiff's bought the said property From Chandra Deo Singh in circumstances including fraud.*
 - (c) *That dissolution of their marriage resulted from Chandra Deo Singh's deception and fraud to the Family Court in Nasinu.*
 - (d) *That a sale and purchase agreement executed between the Plaintiffs and Chandra Deo Singh is annexed which was signed and without the Defendant's knowledge or consent for transaction.*
 - (e) *That she cannot vacate the said property because of her interest in the said property.*
 - (f) *That she refused to vacate the premises because she was exercising her rights to the said property which according to her is a matrimonial property.*
31. The annexed native lease does not show that the defendant was at any stage the registered proprietor of the said lease. Prior to the Plaintiffs becoming the registered proprietors of the lease, the said lease proves that Chandra Deo Singh was the registered proprietor which was transferred and registered to him on 12th December, 2007 by transfer no. 697518. The Native lease No.22493 does not show any evidence that the Defendant was the proprietor of the said lease at any time.
32. I have taken into consideration what materials the Defendant had deposed in her affidavit in opposition, in particular, as summarized at paragraphs 30 (a) to (f) inclusive hereinabove. The parties were granted with conditional order for the

dissolution of marriage on 25th August, 2011 as per case No. 11/NAS/0277, and the conditional order became final on 26th September, 2011.

However, the Sale & Purchase agreement for the purchase of the Native Lease No. 22493, Narere Sub Division Stage 4, Lot 7 as shown Lot 7 on SO 419 was executed between the Plaintiffs and Chandra Deo Singh on 23rd April, 2013. The said land was transferred and registered into the Plaintiffs names (Ashwin Lal & Roselyn Renuka Prasad) on 03rd September, 2013. It is also noted from the Sale & Purchase agreement that the Native Lease No. 22493 was purchased by the Plaintiffs in the consideration sum of \$48,000. Further there was **no consent** required of the Defendant to be obtained in order to sell this Native Lease No.22493 since she was not the registered proprietor and or lessee as can be ascertained and confirmed from the memorandum of lease annexed hereto.

If the Defendant had any matrimonial property claim or intentions to claim any interest in the said Native Lease No 22493, the she should have filed in proceedings within the Family Division of the Magistrates Court to pursue her claim, rather than waiting for any relief to be finalized in her favour in this proceedings.

It is appropriate that I paraphrase what section 166 of the Family Law Act 18 of 2003 states as follows-

- (1) *Nothing in this Act allows a court to make an order alienating native land or any legal or equitable interest in it.*
- (2) *If a court is of the opinion that an interest in native land would have influenced or varied an order that the court would have made had it not been for subsection (1), the Court may make such order affecting other property of the parties or either of them as will compensate a party for the effect of subsection (1).*
- (3) *In this section "native land" has the meaning given to it by section 2 of the Native Lands Act, and includes land administered or regulated under the Banaban Lands Act and the Rotuma Land Act.*

Further, I have taken into consideration paragraphs 7 to 12 of the Defendant's affidavit in Opposition filed on 28th May, 2014. On the question of fraud raised by the Defendant that fraud is committed by Chandra Deo Singh, when he failed

to inform the Plaintiffs that the Defendant was living in the said property which is the subject matter of this case and went ahead and filed proceedings for a Dissolution of marriage application at the Nasinu Family Court.

The memorandum of Native Lease No. 22493 filed and marked as annexure "A" within the Plaintiff's affidavit in support establishes that the Native Lease No. 22493 which was initially registered only under Chandra Deo Singh was transferred and registered into the Plaintiff's name on 03rd September, 2013.

Also paragraph 4 states that the Plaintiffs were informed by Chadra Deo Singh that he and the Defendant will vacate the property as soon as settlement is effected. In fact settlement took place on 03rd September, 2013 as can be ascertained and is evident on the Memorandum of Lease No. 22493.

33. For the aforesaid rational, I find that the Plaintiffs are the bona fide purchasers and the rightful registered proprietors and or Lessees of the Native Lease No 22493.
34. The defendant has failed to show any cause including *a right to possession* or has *tangible evidence establishing a right or supporting an arguable case for such a right that must be adduced in terms of section 172 of the Land Transfer Act Cap 131*.
35. There is accordingly nothing in *section 172* which requires an automatic order for possession unless "cause" is immediately shown.
36. Following are the final orders of this court.

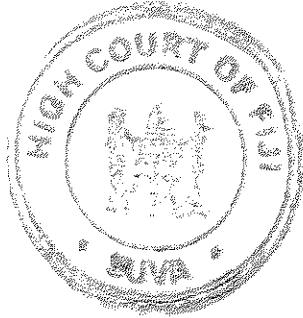
FINAL ORDERS


- A. The Defendant to give vacant possession of the land in Native Lease No. 22493, Narere Subdivision Stage 4 Lot 7 as shown Lot 7 on SO 419 located in the District and Province of Naitasiri containing an area of 450 square meters in the Republic of Fiji, to the Plaintiff, of which the Plaintiffs are the registered Lessees.

- B. The Defendant to deliver vacant possession to the Plaintiff in one (1) months' time on or before the 03rd September, 2015.

- C. Cost is summarily assessed at \$500 against the Defendant.

Dated at Suva this 4th day of August, 2015




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VISHWA DATT SHARMA
Acting Master of High Court, Suva