

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No: HBC 170 of 2014

BETWEEN: **SARJU PRASAD HOLDINGS LIMITED**

PLAINTIFF

A N D: **MARY JOAN NELSON**

DEFENDANT

Before: Master Thushara Rajasinghe

Counsel: Mr. Lajendra N with Ms. Vasiti M for the Plaintiff
 Ms. Tuiketei for Defendant

Date of Hearing: 16th October 2014

Date of Ruling: 30th January 2015

JUDGMENT

A. INTRODUCTION

1. This Originating Summons dated 18th of March 2014 was filed by the Plaintiff pursuant to section 169 of the Land Transfer Act (hereinafter referred as “the Act”) seeking an order for immediate vacant possession of the property more fully described in Certificate of Title register Vol. 56 Folio 5558 being Allotment 1 of Section 12 containing an area of 1 rood 7 perches and situated in the town of Suva in the island of Viti Levu. This Summons was supported by an affidavit of Mr. Shalesh Chandra Prasad who is the Company Director of the Plaintiff.
2. Upon being served with this Summons, the Defendant filed her affidavit in opposition which was followed by the Plaintiff’s reply affidavit. Subsequently, this Summons was set down for hearing on the 16th of October 2014, where the counsel for the Plaintiff and the Defendant made their respective oral arguments and submissions. At

the conclusion of the hearing, the counsel for the Plaintiff tendered his written submissions. Having carefully considered the respective affidavits and the submissions of the parties, I now proceed to pronounce the judgment as follows.

B. BACKGROUND

Plaintiff's case,

3. The Plaintiff claims that they are the registered proprietors of the property as described in the Summons. The Defendant has been occupying the property as a monthly tenant and was served by the Plaintiff a notice to quit dated 9th of January 2014. However, the Defendant failed to vacate the property and continues to occupy illegally.

Defendant's Case.

4. The Defendant in her affidavit in opposition deposed that the Plaintiff is in breach of the oral agreement made between the parties where the Plaintiff is required to compensate the expenses incurred by the Defendant for the renovation and development carried out on the property. She did not dispute the registered proprietorship of the Plaintiff. Alternatively she proposed to vacate the property in six months' time if she is paid the said compensation.
5. The Plaintiff in their affidavit in reply denied such liability and stated that as per the clause 2 (i) (iii) of the Tenancy Agreement entered between the parties on 8th of December 2008, the Plaintiff is not required to compensate for any renovation or development carried out on the property by the Defendant. Moreover, the Plaintiff contended that the claim of compensation for the renovation or development of the property does not constitute any right to the possession of the property.

C. THE LAW

6. Sections 169 to 172 of the Act have stipulated the procedure for the application in this nature. In view of the section 169 of the Act, the last registered proprietor of the land and/or a lessor with power to re-enter where the lessees or tenant is in arrears for such period and/or a lessor who has issued a legal notice to quit or the term of the lease has been expired are allowed to institute proceedings under section 169 of the Act.
7. Sections 171 and 172 of the Act deal with the scope of the hearing and the burden of prove of the parties. Section 171 states that ;

“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.”

8. Section 172 states that

“If the 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;

9. The scope of the hearing of the application under section 169 constitutes two main components. The first is the onus of the Plaintiff to satisfy the court that he is the last registered proprietor or the lessor as described under the section 169 (b) and (c) of the Act. Once the Plaintiff satisfies it, the burden will shift on the Defendant to satisfy the court that he has a right to the possession of the land. The scope of the Defendant’s burden of prove of a right to the possession of the land has discussed in **Morris Hedstrom Limited-v- Liaquat Ali** CA No: 153/87, where it was held that

"Under Section 172 the person summonsed 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."

Accordingly, the defendant is only required to present some tangible evidence to establish a right to the possession or the existence of an arguable case for such right to defeat the Plaintiff's claim.

10. I now turn to this instance case. The Defendant's main objection for this application is founded on her claim for compensation for the renovations and developments she has done on the property over the years of her lease period. Accordingly the main dispute in this case is to determine whether such claim of compensation for the renovation and development carried out on the rented property by the Defendant constitute a right to the possession of the land pursuant to section 172 of the Act.
11. As correctly submitted by the learned counsel for the Plaintiff in his submissions, Justice Amaratunga in **Umaria Holdings Limited v Jayanthi Umaria** (Civil Action No HBC 60 of 2011) has held that the claim of compensation for renovation and development on the lease property does not form a right to the possession in an action instituted under section 169 of the Land Transfer Act. Justice Amaratunga has observed that

"...that on the evidence contained in the Defendant's affidavit before the court, the Defendant has done nothing more than make an allegation that he carried out certain repairs on the property without

any credible evidence whatsoever to support that claim. Such a claim depends upon the provision of sufficient and credible evidence which has not been produced. It is no more, than a mere statement. The Defendant has offered no convincing evidence. There are several cases on this point which state that they building a home on another's property or by carrying our repairs/ renovation on another's property the tenant cannot claim to have a right to possession of that property. In BS Shankar & Co. Limited v Nur Ahmed & Co Limited, Suva High Court Civil Action No 181 of 2006 the Defendant who was in the hardware and timber business made substantial improvement to the property. Vacant possession was ordered. His Lordship Justice Pathik at page 4 said....

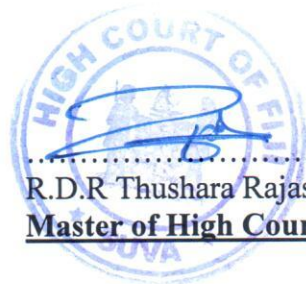
"...the fact that a tenant carries out improvement without the consent of the his or her landlord does not give him a right to continue in the occupation of the land if the landlord is otherwise lawfully entitled to it. On the other hand, if improvement are carried out, pursuant to some understanding, however, loose, it may be that in some cases rights till be conferred on tenants at lease to purchase the land if a price can be agreed upon. One cannot lay down any hard and fast rule. Every case will depend upon its own facts".

12. Fiji Court of Appeal in **Ram Chand and Others v Ram Chandar and others** (Civil Appeal No ABU 0021 of 2002S and Civil Appeal No ABU 0022 of 2002S) held that;

"...in all the circumstances we have reached the conclusion that the evidence led by or on behalf of the respondents was not sufficient to raise triable issues in the ejectment actions. We agree that the respondent may be entitled to compensation for the improvements which they have made over the years. These may have to be valued. But we are unable to understand how it is that; if that is the real question, that matter cannot be dealt with in proceedings other than the ejectment actions. As we have said, the fact that improvement were made is not really an answer to the appellant's case".

13. It appears that in view of these above mentioned judicial precedents, the claim of compensation for the renovations and development carried out by the Defendant does not constitute a right to the possession of the land pursuant to section 172 of the Act. There is no clear evidence that these alleged renovation were carried out with the consent of the Plaintiff. It appears that the Defendant has agreed in the tenancy agreement entered by the parties in 2008 that the Plaintiff is not required to compensate the Defendant for the renovations and developments carried out on the property by the Defendant. Under such circumstances, it is my opinion that the Defendant claim for compensation for the renovation and the developments carried out on the property does not constitute a right to the possession of the land.
14. Having considered the reasons set out above; I hold that the Defendant had failed to satisfy the court that she has a right to the possession of the property more fully described in the Summons. I accordingly make following orders that;
- i. The Plaintiff is granted vacant possession of the Land more fully described in the Originating Summons,
 - ii. The Plaintiff is granted a cost of \$ 1000 assessed summarily,

Dated at Suva this 30th day of January, 2015



R.D.R Thushara Rajasinghe
Master of High Court, Suva