

IN THE HIGH COURT OF THE REPUBLIC OF FIJI

(WESTERN DIVISION) AT LAUTOKA

[EXTENDED CIVIL JURISDICTION]

Civil Action HBC No. 202 of 2013

BETWEEN : **KAUSALYA DEVI** of Solosolo, Veisaru Ba, Domestic Duties

PLAINTIFF

A N D : **DIVENDRA KUMAR** of Solosolo, Veisaru Ba, Farmer

DEFENDANT

Counsel:

Mr V Sharma for Plaintiff

Mr Samuel K Ram with Mr Dayal for Defendant

Date of Hearing : 1 August 2014

Date of Judgment : 9 February 2015

JUDGMENT

Introduction:

- [1] This is an application for possession of land.
- [2] By originating summons dated 11 November 2013 plaintiff seeks an order that the Defendant, their agents, servants or others do forthwith give immediate vacant possession of the property described in Instrument of Tenancy NO: 6606 known as Lot 1 on Mavua Subdivision situated in the district (part of) of Bulu in the Island of Vitilevu, NLTB

Reference number 4/1/899 comprising an area of 8.0910 hectares together with all improvements thereon ('the property').

- [3] This application is made pursuant to Section 169 of the Land Transfer Act ('LTA'), Order 113 of the High Court Rules 1988 and pursuant to the Inherent Jurisdiction of the Court.
- [4] The plaintiff filed three affidavits in support of his application while the defendant two affidavits in opposition.
- [5] At hearing, both parties made oral submissions and the plaintiff also tendered written submissions.

Background

- [6] The background facts, according to the plaintiff, are as follows. She is the registered proprietor of the property and became the registered owner of the Property when the Last owner (her late husband) transferred the property to her in December, 2011. The instrument of transfer was accordingly registered. The defendant is occupying the said property without her consent. She verbally notified the defendant on various occasions to vacate the property. Afterwards she, through her solicitor, issued a notice to vacate on the defendant on 16 September, 2013. The defendant failed to deliver up possession to the plaintiff. So, she commenced these proceedings to recover possession from the defendant.
- [7] The defendant's story is as follows. His father died on 2 July 2012. He has been living on the subject land since he was born. He was working on the farms with his late father, cutting cane during the crushing season. He got married sometimes in 1982 and after his marriage he resided with his parents on the subject land. Thereafter, sometime in 1989 he shifted to Namada, where his father had another land. His mother passed away in 1987 and his father got married the Plaintiff sometime in 1990. His late father told him that he should not buy another land and invited him to move back with him and verbally

allocated him 5 acres of land and a house site. He built a house on the allocated site. This verbal arrangement was made in front of many people. It was a family arrangement, as his father did not want him to be homeless. His step mother (plaintiff) opposed this. As a result, his father only allocated him the house site and promised him that the 5 acres of land will be given after everything got settled. Subsequently, he constructed a house on the allocated site and also installed the necessary utilities. Sometimes in 2004, his house was burnt down and he wanted to move out of the property and rebuilt a house somewhere else. However, his late father insisted that he stay on the subject property and rebuild his home. Despite the plaintiff's objection, he built his house relying on his father's word. His late father fell ill sometime in 2010 and was admitted in hospital occasionally. The Plaintiff on occasions prevented him from seeing his father. Prior to death his father had verbally reassured him that he (his father) will give him the area of land as he promised, informed his step mother to do the same and told him not to leave. Thereafter, sometime in 2011 that land was assigned to the plaintiff which he was unaware of. He only came to know this when the plaintiff informed him that the property was transferred over to her when asked for extract probate. He was even unaware of when his father died. He only came to know from the family friends and relatives.

The Law

- [8] Sections 169-172 of the LTA are applicable to this application. These sections provide:

Ejectors

169. *(So far as relevant) 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) ... ;
- (c) ... (*Emphasis added*)

Particulars to be stated in summons

170. *The summons shall contain a description of the land and shall require the person summoned to appear at the court on a day not earlier than sixteen days after the service of the summons.*

Order for possession

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.*

Dismissal of Summons

172. *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, mortgage or lessor or he may make any order and impose any terms he may think fit;*

Provided that the dismissal of the summons shall not prejudice the right of the plaintiff to take any other proceedings against the person summoned to which he may be otherwise entitled:

Provided also that in the case of a lessor against a lessee, if the lessee, before the hearing, pay or tender all rent due and all costs incurred by the lessor, the judge shall dismiss the summons.

Determination

- [9] The plaintiff seeks to recover possession of the property from the defendant. She has made this application as the last registered proprietor of the property. He makes this application pursuant to s.169 (a) of LTA.
- [10] The originating summons states that this application is made pursuant to Section 169 of LTA, Order 113 of the High Court Rules 1988 (HRC) and pursuant to the Inherent Jurisdiction of the Court. Nonetheless, at hearing, the matter was argued as an application filed under s.169 (a). I would therefore deal with the application on the basis that it has been made pursuant to s.169 (a).
- [11] The summons (application) giving description of the land requires the defendant to appear before a judge in chambers and show cause why he should not give up possession to the plaintiff. The summons was served on the defendant on 14 November 2013, being returnable day more than 16 days after the service of the summons. All the requirements stipulated in section s.170 have been complied with.
- [12] The defendant refuses to give possession of the property to the plaintiff. S.172 then becomes applicable in this case. He must show cause why he refuses possession to the plaintiff. If he proves to my satisfaction a right to possession the plaintiff's application will be dismissed with costs against him.
- [13] Before I find out whether the defendant has a right to possession, I must see whether the plaintiff is the last registered proprietor of the property so as to qualify to bring these proceedings under s.169 (a).
- [14] Whether the plaintiff is the last registered proprietor for the purpose of these proceedings. Mr Ram, counsel for the defendant advanced

argument that the plaintiff is not the registered proprietor as the transfer has no stamp of the Registrar of Tile.

- [15] The previous owner was the plaintiff's husband, Vijendra Kumar. He had transferred the property to the plaintiff on 23 September 2011. The transfer has been registered under the Registration Act ('RA'). The property is a lease property given under an Instrument of Tenancy issued under the Agricultural Landlord and Tenancy Act ('ALTA'), see annexure 'A'. The subsequent transfer to the plaintiff has been duly registered under RA. The plaintiff has provided a certified true copy of the Instrument. It has been issued by the Registrar of Tile on 12 August 2014. It is stamped by the Registrar of Tiles and by the Registrar of Deeds and it has folio number 6606. That document clearly shows that the transfer of the property to the plaintiff. The property which is the subject matter in this case is a lease property given under the provisions of ALTA. S. 8 (3) of that Act will apply to such property. That section provides:

"8 (3) Every instrument of tenancy shall be signed by the parties.

(A) If not registrable under provisions of the Land Transfer Act, shall, together with all dealing relating thereto, be registered as deeds under the provisions of the Registration Act"

- [16] The transfer of the Instrument of Tenancy affecting property has been properly executed by the previous owner in favour of the plaintiff. Further, it has been duly registered as required by section 8 (3) of the Registration Act. The plaintiff thereby has become the last registered proprietor of the property enabling her to initiate proceeding under s.169 (a) of LTA.

- [17] I now turn to the issue of whether the defendant has a right to possession of the property. In an application of this nature the defendant must satisfactorily prove that he has a right to possession.
- [18] The defendant's stance is that he has been living on the property since his birth, his late father promised to give 5 acres of land and a house site and he built a house. In essence, the plaintiff appears to rely on proprietary estoppel.
- [19] I note that the defendant has deposed in his affidavit in reply that, the house was burnt down in 2004 and he wanted to move out of the property, but his late father insisted that he stay on the subject property and he built the house.
- [20] Importantly, in 2011, the entire property was transferred in favour of the plaintiff by the defendant's late father. If his late father had minded to give him 5 acres of land, he had every opportunity to assign it to the defendant. But his late father did not do so. This clearly shows his late father did not intend to give any portion of the property to him.
- [21] The defendant could claim, if at all, proprietary estoppel against his father, but not against the plaintiff. The plaintiff will be not bound by the promise given to the defendant by his late father as the property has been transferred by the defendant's father when he was alive.
- [22] Moreover, the defendant himself states in the affidavit that, he rebuilt the house in 2012 after the house was burnt down in 2004 despite the plaintiff's objection. So, the defendant did not have consent of the proprietor to rebuild the house. He did not have TLTB's consent either.
- [23] The subject property is a leased property under ALTA. Clause 11 of the Instrument of Tenancy states that:

'The tenant shall not alienate or deal with the land hereby leased or any part thereof whether by sale, transfer or sub-lease or any other manner whatsoever without the consent in writing of the lessor first had and obtained'

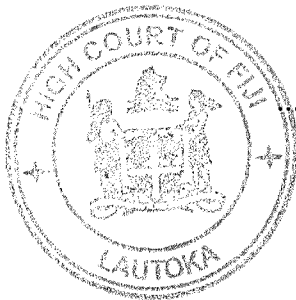
- [24] The defendant rebuilt the house despite the objection the plaintiff raised when he rebuild the house. He did not even obtain written consent of the lessor (TLTB) before building the house on the native land.
- [25] I was referred to the case authority of **Charmers v Pardoe** [1963] 1 WLR 677, where the Privy Council held that proprietary estoppel cannot be pleaded when it is clearly against the law requiring the consent of the NLTB (now iTLTB).

Conclusion

- [26] To conclude, I am satisfied that the plaintiff is the last registered proprietor of the property for the purpose of proceedings under s.169 (a) of LTA. This is a leased property under ALTA. The defendant built or rebuilt rather the house without the consent of the plaintiff or TLTB. Further, he has no consent of the plaintiff or TLTB to occupy the property. There is nothing before the court to show the property was ever assigned to the defendant. In the circumstances, the defendant cannot even establish an equitable right to possession. I would therefore conclude that the defendant has failed to satisfactorily prove a right to possession of the property. I accordingly enter judgment in favour of the plaintiff and order the defendant to forthwith deliver up possession of the property to the plaintiff. I would summarily assess costs of these proceedings at \$850.00 which the plaintiff is entitled to as a successful party.

Final Result

- (i) There will be judgment in favour of the plaintiff.
- (ii) The defendant will forthwith deliver up possession of the property to the plaintiff.
- (iii) The defendant will pay summarily assessed costs of \$850.00 to the plaintiff.
- (iv) There will be orders accordingly.



M H Mohamed Ajmeer

M H Mohamed Ajmeer

Puisne Judge

[Sitting as Master]

At Lautoka

9th February 2015