

IN THE HIGH COURT OF FIJI AT LABASA

APPELLATE JURISDICTION

CASE NUMBER: **HBC 18 OF 2013**

BETWEEN: **HARI CHAND aka VILIAME KINIKINILAU**

APPELLANT

AND: **NASARWAQA CO-OPERATIVE LIMITED**

RESPONDENT

Appearances: ***Mr. Adrian Ram for the Appellant.***

Mr. Sunil Sharma for the Respondent.

Date/Place of Hearing: ***Friday 13 February 2015 at Labasa.***

Date/Place of Judgment: ***Tuesday 17 February 2015 at Suva.***

Coram: ***The Hon. Madam Justice Anjala Wati.***

JUDGMENT

Catchwords:

APPEAL – Master’s Decision – Instrument of Tenancy registered under ALTA in Register of Deeds – does the owner obtain locus to bring an action for ejectment under s. 169 (a) of the LTA – equitable remedy not available where statute is a bar- expenditure on land unlawful – solicitors who withdrew because of conflict of interest need not withdraw papers filed in Court on behalf of the client- no triable issues raised-appeal dismissed.

Cases Referred To:

1. ***Tilak Ram Sharma v. Peniasi Rabesa Tabuela [unreported] Fiji High Court Civil Case Number 26 of 2004.***

Legislation:

The Agricultural Landlord & Tenant Act Cap. 270 (“ALTA”): s. 8(3) (b).

The Indemnity, Guarantee and Bailment Act Cap. 232 (“IGBA”): s. 59 (d).

The Interpretation Act. Cap. 7 (“IA”).

The ITaukei Land Trust Act (“ITLTA”): ss. 10(2); 12 (1).

The Land Transfer Act Cap. 131 (“LTA”): ss. 5; 169 (a).

Registration Act Cap. 224.

The Cause

1. Pursuant to an application for vacant possession under s. 169 of the LTA, the appellant was ordered to give vacant possession of the property within one month from 25 April 2014 and to pay costs of the proceedings in the sum of \$500 within 14 days.
2. The property is described as a portion of the land known as Selesele in the Tikina of Bua and comprised in the Instrument of Tenancy No. 4/2/23598 and registered in IT Book 2012 Folio 11824.
3. The appellant having obtained a stay of the execution of the orders of the Court on 15 August 2014 has appealed against the decision of the Master on various grounds.

Parties Background

4. Initially one Ratu Julian Toganivalu had been given the lease of the land by ITLTB for 30 years beginning 1 October 1964. Ratu Julian Toganivalu allowed the appellant’s father Shiu Lal to occupy and cultivate the said land.
5. The defendant was born on the same land.

6. Sometimes in the 1980's, Ratu Julian Toganivalu died. Mr. Shiu Lal continued to farm the land and applied to the Agricultural Tribunal for a declaration of tenancy which was given a reference 30/86. The lease to Ratu Julian Toganivalu expired on 1 October 1994.
7. The matter was still pending when Mr. Shiu Lal died in March 1994. After his death, the beneficiaries of Mr. Lal withdrew the reference with the view of filing separate applications. The appellant then filed an application for declaration of tenancy against the ITLTB. The application was refused on the grounds that there was no relationship of Landlord and Tenant between the parties and that the Tribunal on that basis did not have jurisdiction to hear the case.
8. On 28 February 2011, the appellant made a formal application to ITLTB for a lease of the subject land. He paid the fee of \$1,150 on 4 April 2011 on his application for a lease. The monies were paid pursuant to a letter by ITLTB of 28 February 2011.
9. The letter reads as follows:

“ Application to Lease

We acknowledge receipt of your application to lease dated 28 February 2011.

Please be advised that the lease processing fee of \$1,150 is payable before we issue the lease offer to you.

We hope that you will consider the above and should you fail to contact us within six (6) weeks from the date of this letter, we shall accept that you're no longer interested in the subject land and we shall cancel your application accordingly...”

10. Then the ITLTB issued an eviction notice against the appellant on 11 November 2011 on the grounds that the appellant was occupying the property unlawfully without the consent of the ITLTB.
11. An instrument of tenancy for the same property was subsequently issued to the respondent for 30 years with effect from 1 July 2011. The Instrument of tenancy was registered on 29 November 2012 with ITLTB Reference Number 4/2/23598 and registered in the Register of Deeds.

12. The respondent then applied for vacant possession which order was granted and is subject to this appeal.

Grounds of Appeal

13. The appellant avers that the Master erred in law and in fact:

- *in holding that s. 169 of the LTA was applicable to an instrument of tenancy registered with the Deeds Registry.*
- *in holding that a registered lease meant a lease under any Act.*
- *in holding that the title registered in the Deeds Office is indefeasible.*
- *in not following Tilak Ram Sharma v. Peniasi Rabesa Tabuela [unreported] Fiji High Court Civil Case Number 26 of 2004.*
- *in holding that it was immaterial when using s. 169 of the LTA whether the lease was registered under the Registrar of Deeds office or the Registrar of Titles.*
- *in holding that the instrument of tenancy fell within the definition of s. 5 of the LTA.*
- *in interpreting s. 10 of the ITLTA.*
- *in holding that the instrument of tenancy complied with the requirements of the LTA.*
- *in holding that there were no triable issues when:*
 - a. *the respondent had constructive knowledge of the appellant's equity in the land;*
 - b. *the appellant was entitled to the lease before the respondent had applied for the same;*

c. the appellant had substantially improved the property; and

d. s. 169 application was taken through a counsel who had imputed knowledge of the events.

- **in holding that s. 169 application was appropriate to conclude the matter.**

Appellant's Submissions

14. Grounds 1 to 8 and 10 can be summarized as one issue which is whether the respondent having held an instrument of tenancy registered as a Deed in the Register of Deeds entitled to bring an action for ejectment under s. 169 (a) of the LTA.
15. Mr. Ram argued that s. 169 (a) of the LTA gives locus to the “*last registered proprietor*” of the land to bring an action for ejectment. He says that since the application is made under s. 169 (a) of the LTA, the last registered proprietor must have his land registered under the LTA and not any other written law.
16. In the present case there is an Instrument of tenancy in favour of the respondent which has been registered under s. 8(3) (b) of the ALTA and not LTA.
17. Since this land is not registered under the LTA, the Court does not have jurisdiction to hear the case for ejectment brought under the Land Transfer Act.
18. The case of ***Tilak Ram Sharma v. Peniasi Rabesa Tabuela (supra)*** was relied on to substantiate the argument. It was argued that in that case ***Singh J. J;*** had found that the registered proprietor must be someone whose interest on the land is registered with the Registrar of Titles under the provisions of the LTA.
19. It was contended that the preamble of the LTA also assists and substantiates the argument that the registered proprietor must be one whose land is registered under the LTA. The preamble states “***An Act to amend the law relating to the transfer of Land and to the registration of title to land***”. This according to Mr. Ram means those titles registered under the provisions of the LTA.

20. He further relied on s. 2 of the LTA: the definitions section. He pointed my attention to the definition of the words “**instrument**”, “**instrument of title**”, “**lessee**”, “**lessor**”, “**proprietor**”, “**register**”, and “**Registrar**”. He says that the definition of all these words make a reference to the Land Transfer Act and not any other Act.
21. The Court therefore must confine the definition of registered proprietor to registration under the LTA. It need not go outside the Act to find the definition.
22. Mr. Ram stated that s. 21 of the LTA states how a property can be registered under the provisions of the LTA. Notably, he said, that this property does not comply with s. 21 of the LTA.
23. He further argued that Master Robinson relied on s. 5 (c) of the LTA to say that LTA applies to all leases of native land granted pursuant to the ITLTA. Mr. Ram said that s. 5 (c) of the LTA uses the word “leases” and not “instruments of tenancy”. He further contended that a “lease” would be headed a “lease” and not an “instrument of tenancy”.
24. He argued that under the LTA, there is a specific provision for “Leases” and that is s. 54 of the LTA. Under s. 54 the lease is in a prescribed form and registered under the provisions of the LTA. The lease also has a definite boundary.
25. In this case, neither is the lease in the prescribed form, nor is it registered under the provisions of the LTA. The land does not even have a definite boundary as the area leased is described as an approximate area. In the case of **Tilak Ram Sharma v. Peniasi Rabesa Tabuela (supra)** Justice Singh had mentioned that for a person to be registered as the proprietor of the land, his land must be surveyed.
26. The instrument of tenancy in this case gives title to the respondent but the boundaries are not surveyed and marked so it is not registered under the LTA.
27. On the question of triable issues, Mr. Ram raised 3 points. Mr. Ram said that where there are triable issues raised, the Court will not grant an order for vacant possession. It is only granted in straightforward cases.

28. The first triable issue is professed to be that before the respondent was issue with an instrument of tenancy, the ITLTB, on the application of the appellant for lease, asked the appellant to pay the lease processing fee of \$1,150. Having taken that money for processing the lease, the ITLTB had to give a lease to the appellant but instead of doing that they gave a lease to the respondent. How did the respondent become a tenant of the ITLTB instead of the appellant when he was to be given a lease and he had paid for the lease? These are complicated questions of fact and ought to be determined in an open court where the ITLTB has to be made a party to the case.
29. The second triable issue that was raised was that the respondent had explicit knowledge that the property in question was occupied by the appellant and his family for the past 50 years and that he had made substantial developments on the land.
30. The members of the Nasarwaqa Co-operative Limited had knowledge of the occupation of the property by the appellant's ancestors. Nasarwaqa Co-operative Limited consists of the mataqali and since Mataqali had knowledge of occupation and expenditure of land, they ought to have carried out the eviction long time ago. The respondent's must thus be estopped from bringing this action against the appellant.
31. The appellant has incurred expenditure in building a house and livestock on the property. The appellant at least has a right to purchase the property.
32. The third triable issue was that the application for ejectment was filed by Mr. Lomaloma who in fact had acted for the appellant before the filing of the application. He had made representations to ITLTB when the appellant was given notice to vacate and when Mr. Lomaloma came to Court he withdrew from the case. Mr. Lomaloma had knowledge of the appellant's situation and yet filed an application for his ejectment. The new counsel who has taken over the brief is using the same documents especially the affidavit filed by Mr. Lomaloma and so in effect the conflict still remains.

Respondent's Submissions

33. Mr. Sharma for the respondent stated that the word “**registered**” in s. 169 (a) refers to registration of land and not the nature of the land. If the land is registered in the Deeds office, it is still registered. The registration is sufficient to meet the definition of registered in the IA which states that “**registered used with reference to a document or title to any immoveable property means registered under the provision of any written law for the time being applicable to the registration of such document or title**”: *Mohammed Habid v. Janki Prasad [unreported] Fiji High Court Case Number 24 of 2010.*
34. Mr. Sharma argued that since the land in question is registered, that makes the respondent the registered proprietor of the land irrespective of the fact that it is not registered under the LTA. The respondent therefore has a right to make an application for ejectment of the appellant under s 169 (a) of the LTA.
35. The defendant has not made any application for a tenancy under the ALTA and neither has he filed any action challenging the validity of the Instrument of Tenancy. He therefore has no right to stay on the property.
36. If the appellant has any issues why ITLTB acted the way it did, the cause of action lies against the ITLTB and not the respondent. Until today, no proceedings have been instituted against ITLTB for relief against it.
37. The appellant states that he and his father had occupied the land for ages and cultivated the same. That occupation was unlawful as it contravened s. 12 (1) of the ITLTA. In a case where statute has been breached, proprietary estoppel cannot be successfully pleaded. Mr. Sharma relied on the case of *Vishwa Nand v. Rajendra Kumar [unreported] Fiji High Court Case Number 271 of 2012.* In that case the Court had clearly stated that equity cannot assist where the statute has been breached.
38. The cause to occupy the land has not been shown and therefore the appellant ought to comply with the orders for vacant possession.

The Law and Analysis

39. The first issue for me to determine is whether the respondent had a locus standi to bring an action for ejectment under s. 169 (a) of the LTA when the instrument of tenancy was registered in the Register of Deeds. Determination of this issue will effectively cover grounds 1 to 8 and 10 of the appeal.
40. Master Robinson found that there is nothing in s. 169 (a) that precludes a registered proprietor of an instrument of tenancy to bring an action for ejectment otherwise there is no other law to summarily evict the trespassers.
41. The Master found that the LTA defined a “**proprietor**” to mean “**registered proprietor of land or of any estate or interest therein**” which includes the appellant.
42. Master Robinson had considered the case of ***Tilak Ram Sharma v. Peniasi Rabesa Tabuela (supra)*** and distinguished it from the facts of that case in that, in that case the title was not registered at all either under the LTA or the ALTA.
43. Master Robinson also based his finding pursuant to s. 5(c) of the LTA and s. 10 (2) of the ITLTA. S. 5 (c) states what lands are subject to the LTA and it includes all leases of native land granted under the provisions of the ITLTA. Master Robinson remarked that this particular land is lease of a native land granted under the ITLTA and so the LTA applies.
44. S. 10(2) states that “**when a lease made under the provisions of this Act has been registered it shall be subject to the provisions of the Land Transfer Act, so far as the same are not inconsistent with this Act, in the same manner as if such lease has been made under that Act, and shall be dealt with in a like manner as a lease so made**”.

Using that legislative provision Master Robinson found that the lease was issued pursuant to the ITLTA and registered under the Register of Deeds. That lease therefore under the provisions of the ITLTA can be dealt with under the LTA.

45. I find that Master Robinson has not made an error of law when he used the various case authorities and different legislative provisions to arrive at an answer to the issue of locus standi of the respondent to bring an action for ejectment under the LTA.
46. s. 169 of the LTA spells out the persons who can bring a summary action for ejectment. s. 169 (a) is one of the provisions which identifies such persons. It says that the “*last registered proprietor*” can bring an action for ejectment. Does the proprietor have to be owner of the land registered under the LTA? I find the answer in the negative. The provision does not state that the person must be the last registered proprietor under the LTA. It just says the “*last registered proprietor of the land*”. If the legislature meant that the last registered proprietor must be the proprietor registered under the LTA then it would have specifically mentioned that but the provision only says “*last registered proprietor of the land*”. I am thus bound to interpret the provision widely to say that the word registered does not make reference to the nature of land. It makes reference to registration of land.
47. Mr. Ram’s argument that since 1.169 appears in the LTA, the land has to be registered under the LTA is a very narrow interpretation of the provision.
48. The definitions section of the LTA states that “*proprietor*” means the “*registered proprietor of land, or of any estate or interest therein*”. The word registered is not defined in The LTA and so the IA should be used to find the definition. The word registered is defined as:
- “ Registered” used with reference to a document or title to any immovable property means registered under the provision of any written law for the time being applicable to the registration of such document or title”.**
49. Using the definition of registered from the IA and the definition of proprietor from the LTA, it is clear that the words combined means that a person who is registered as the owner of land or any estate or interest therein under the provisions of any written law is the registered proprietor for the purposes of the LTA.

50. Neither the preamble nor the definitions of other words in the LTA are of any assistance in determining this issue at hand.
51. Mr. Ram also used s. 21 of the LTA to argue that the registration of the land did not comply with s. 21. I fail to fathom why Mr. Ram is confusing himself. This is not a lease issued under the LTA so it need not comply with s. 21 of the LTA. The issue is not whether this is a lease under LTA but is whether the lease issued under ALTA can be dealt under the LTA.
52. For that issue to be resolved Master Robinson was very correct in using s. 5 (c) of the LTA. It specifically states by s. 5(c) that all leases of native land granted pursuant to the provisions of the ITLTA are subject to the LTA. The term “*leases of native land*” does not mean that the title has to be “*headed*” a “*lease*”. The definition of lease here means the renting of the land. The instrument of tenancy indicates in its body that the land has been leased to the respondent. The term lease is used in several places in the instrument of tenancy.
53. Further s. 10 (2) of the ITLTA states that all leases issued under the ITLTA is subject to the provisions of the LTA as if the lease had been issued under the LTA. This section specifically targets leases issued under the provisions ITLTA and registered under the provisions of other written law. It recognizes the fact that leases can be issued under the provisions of ITLTA and registered under provision of other written law.
54. All the above provisions are necessary to determine whether this land in question can be dealt under the LTA. Mr. Ram’s contention that there is no need to look outside LTA is incorrect as this is not a lease under the LTA but issued under ITLTA and registered under ALTA. To determine the issue therefore all the statutory provisions have to be examined as the issue is not clear from the LTA itself.
55. Mr. Ram perhaps finds this other statute difficult to reconcile and so he chooses to ignore the provisions of the various other written laws.
56. On the same issue, I need to analyse the case of ***Tilak Ram Sharma v. Peniasi Tabuela (supra)***. In that case Hon. Justice Jiten Singh was not faced with this question of whether a lease issued

under the provisions of the ITLTA and registered under ALTA can be dealt as a lease issued under the LTA.

57. If his Lordship was faced with a similar issue and all the provisions of the various Acts were brought to his attention, I find that his Lordship could not have deviated from the findings that the Master has arrived at.

58. Hon. Justice Singh made the finding he did only because there was no registered title to the land in an application for ejectment. He therefore made the comments confining the word registered to the LTA. The following is relevant:

“ The plaintiff in the present case hold no registered title. He says he is the proprietor of Lot 39 on Certificate of Title 18548. CT 18548 has an area of 8 acres 3 roods 11 perches. The last registered proprietor of that is HIMALAYA PARVAT COMPANY LIMITED not the plaintiff. It appears that some form of subdivision has been carried out on the entire land and lots sold to various people. It is not clear whether the subdivided lots have been surveyed or whether it is merely a paper subdivision. In any event Ms. Vaurasi could not point out where Lot 39 on the plan was. The court is not even aware of the area of Lot 39”.

59. The other ground of appeal is in regards the triable issues. The first triable issue is that the mataqali of the respondent company were aware of the occupation of the land and expenditures made on it. The mataqali refused to take any action and so they must be estopped from evicting the appellant.

60. In respect of the first triable issue Master Robinson found that the appellant’s application for a declaration of tenancy was refused and the respondent did not gain any status until November 2012 when the lease was issued to it to find an action for ejectment. Since the application for declaration of tenancy was refused, the appellant had no rights to occupy the property.

61. Master Robinson also found that if anything, the appellant is entitled to compensation for the expenditures made on the land but does not have a proprietary interest by virtue of occupying the land for so long unlawfully.

62. In my finding “*proprietary estoppel*” is an equitable remedy which cannot assist the appellant as the appellant has breached s. 12 (1) of the ITLTA in that he is on the land which his father built on and cultivated without the consent of the ITLTB. The occupation and cultivation is a dealing in the land within the meaning of s 12 (1) of the ITLTA and is prohibited by the same section without the consent.
63. One area where equitable remedy cannot be applied is where there is a statutory bar and the appellant is faced with that hurdle.
64. The appellant had brought an action against the ITLTB under the provisions of ALTA for a declaration of tenancy. That application was dismissed and he accepted the decision that he was not a tenant in the land. He therefore cannot blame the mataqali for not evicting him. He stayed on the land at his peril when he had no status and he cannot use the equitable principles to ask for remedy that is barred by the statute.
65. I agree with Master Robinson that the respondent could not have brought an action under s. 169 before November 2012 as they were issued with the instrument of tenancy only in November 2012. It was sufficient for the ITLTB that the application for declaration of tenancy was made in their favour. That indicated that the appellant was a trespasser on the land and he should have vacated the property himself. He cannot take advantage of his wrongdoing. He was on the property wrongly and to assert a right on unlawful occupation is not properly founded under the statute or the principles of equity.
66. The second triable issue is the ITLTB having obtained monies for the lease processing fees and not having given him the lease as promised.
67. Master Robinson made a finding that the ITLTB had acknowledged that it had received the appellant’s application for a lease. The letter was not an offer to lease. The payment of the processing fee does not guarantee that the appellant will get a lease. Master Robinson also stated that this proceeding cannot be used to find a remedy against a third party.
68. I concur with Mr. Robinson on his finding. The monies that the appellant had paid were on his application for a lease. The ITLTB was to determine the application first upon payment of the

fees. If it was possible for the ITLTB to give a lease then the offer letter would have been issued to the appellant. There was no binding contract between the appellant and the ITLTB to issue a lease to the appellant. The payment of the fees does not guarantee anything.

69. Further this is a separate issue between the appellant and the ITLTB that needs to be tried if the appellant so wishes to litigate the issue. Whether the money was for the application or for issuance of lease is not what I can decide conclusively (except to make prima facie observation as above) and is not relevant for the purposes of the ejectment action. There is no impropriety alleged on the part of the respondent (except an assumption that the respondent may be a party to the crime) and as such the respondent must be given the protection as the registered proprietor of the lease.
70. A notice to vacate was given to the appellant by the ITLTB on 11 November 2011. Since then until now there is no evidence of any proceedings against the ITLTB for breaching their offer to issue a lease to the respondent. The current summons for ejectment was filed on 17 June 2013, some 19 months after the notice. If the appellant was interested in pursuing the issue, an action would have been laid without fail.
71. If any action is founded and the respondent is made a party to the proceedings, the appellant will definitely face another statutory hurdle which s. 59 (d) of the IGBA. I need not say more than this.
72. The third triable issue was conflict of interest. Mr. Ram also argued that when the notice to vacate the property was given to the appellant, Mr. Lomaloma acted for him and made representations to the ITLTB and later filed a summons for ejectment on behalf of the respondent. At the time Mr. Lomaloma filed the summons for ejectment he could not co-relate that the ejectment is against the same person for whom he had written a letter for against ITLTB. As soon as he realized the conflict he sought to withdraw from the matter and I gave him permission to do.
73. Mr. Ram says that since the summons for ejectment and the affidavit was filed by Mr. Lomaloma, the conflict continues against his client.

74. Master Robinson had made a finding that the issue of conflict of interest did not give the appellant cause to stay on the land.



75. What prejudicial effect arises out of the conflict has not been identified. I find Mr. Rams's argument that the summons should have been withdrawn and a fresh one filed to eradicate the conflict most astonishing. The application and the affidavit were filed on instructions of the respondent. Mr. Lomaloma did not file his own affidavit. If any other solicitor filed the case, I am most certain that the information in the affidavit would not have been any different. I see no prejudice suffered by the appellant in this aspect and in any event the conflict, even if it continues, does not, like Master Robinson found, give the appellant a cause to stay on the land.

Final Analysis

76. I find that the appeal does not have any merits and I thus dismiss the same.

77. I order that the appellant gives vacant possession of the property within 14 days of the date of this order.

78. There shall be costs against the appellant in the sum of \$1,500 which is assessed summarily to be paid within 21 days.



Anjala Wati
Judge
17.02.2015

To:

1. Gibson & Company for the Appellant.
2. Messrs Samusamuvodre Sharma Law for the Respondent.
3. File: Labasa HBC 18 of 2013.