

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 217 of 2015

BETWEEN : VINDRA WATI aka VINDRA SHARMA of 48 Quintinia Street, Algester, QLD
4115, Australia, Nurse.

PLAINTIFF

AND : ELVIN ARVINDRA PRASAD and SHIRLEY PRASIKA PRASAD both of Lot 9
Mokosoi, Pacific Harbour, Deuba, General Manager and Company Director respectively.

DEFENDANT

BEFORE: Master Vishwa Datt Sharma

COUNSELS: Mr. Nand for the Plaintiff
Mr. Samad for the Defendants

Date of Hearing: 18th November, 2015

Date of Ruling: 09th December, 2016

RULING

[Vacant possession pursuant to section 169 of the Land Transfer Act, Cap 131]

INTRODUCTION

1. The Plaintiff filed an Originating Summons on 25th June, 2015 and sought for the following order-
 - (a) That the Defendant Elvin Arvindra Prasad and Shirley Prasika Prasad do show cause why an Order for immediate vacant possession of the land comprised in Housing Authority Sub Lease No. 247993 being Lot 9, DP 5595, and located at Lot 9, Mokosoi, Pacific Harbour, Deuba, Fiji, of which the Plaintiff is registered Lessee, should not be made against them upon the grounds set forth in the Affidavit of Vindra Wati Sharma aka Vindra Sharma.

2. This application is made in support of an affidavit deposed by Vindra Wati Sharma aka Vindra Sharma, sworn and filed on 25th June, 2015.
3. The application is made pursuant to *Section 169 of the Land Transfer Act, Cap 131*.
4. This case proceeded to hearing on a **defended** basis and both parties to the proceeding were represented by Counsels at the hearing.
5. 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 *ss. 169, 171 and 172 of the Land Transfer Act [Cap 131]*.

Plaintiff's Case

6. In summary the Plaintiff in her Affidavit states as follows-
 - (i) *That she is the registered proprietor of the property comprised in Housing Authority Sub Lease No. 247993 being Lot 9, DP 5595, and located at Lot 9, Mokosoi, Pacific Harbour, Deuba, Fiji.*
 - (ii) *That the Defendants have been occupying the said property as a tenant from January 2012 at a rental of \$400.00 per month.*
 - (iii) *That no tenancy agreement was signed between the parties but it was agreed that the Defendants would deposit the rental monies basis to my housing loan account at Home Finance Company Limited.*
 - (iv) *That on 28th June, 2013 she entered into a Sale and Purchase Agreement with the Defendants as Purchasers for Sale of the said property for a consideration sum of \$83,000.00.*
 - (v) *That clause 7 of the said Agreement stipulated that possession of the said property is currently with the Purchaser (Defendants) as tenants however in the event the Purchasers are unable to secure finance and or are in breach of the agreement, the Purchasers are to vacate the property immediately.*
 - (vi) *That the agreement inter alia was also subject to the following condition as stipulated under clause 22 (c):*

"Finance approved to the Purchaser from its ANZ Bank within 30 days from the date of signing of this agreement, if this condition is not fulfilled within the time frame as stated herein, then this agreement shall be terminated and cancelled and each party shall have no obligations against each other, furthermore the Purchaser agrees to vacate the property."
 - (vii) *That after the agreement was signed; she followed up with the Defendants to update her on the progress of the approval of their loan to purchase the property.*

- (viii) That the Defendants kept her advising that their loan is in the process of being approved however the Defendants at no stage showed her any documents to confirm that their loan has been approved.
- (ix) That in February 2015 she came to Fiji and upon carrying out inspection of the property she saw that the property was in a deteriorating state and required a lot of maintenance work.
- (x) That she then decided that she needs to carry out maintenance works urgently and thereafter utilise the property for her own use instead of renting it out as she was nearing retirement age and wished to spend her retirement in Fiji.
- (xi) That on 25th February 2015 she then through her issued a Notice to vacate on the Defendants which was served on the Defendants on 3rd March 2015.
- (xii) She gave the Defendants 3 months to vacate the property but the Defendants failed to give Vacant possession and continued to occupy the property illegally.
- (xiii) That the Defendants continuous occupation of the property is prejudicial to her as she believes the property will deteriorate further and will require additional monies to carry out the maintenance works if the repair works are not carried out soon.
- (xiv) That the Defendants do not have any legal or rights to continue occupying the equitable property as the property was given to them to reside as a tenant.
- (xv) The Defendants are refusing to vacate the property hence she seek for the Orders as per the Summons filed herein.

Defendants Case

7. The Affidavit was deposed by the First Defendant and on an authority of the Second Defendant which can be summarised as follows-
- (i) That both parties have entered into Sale & Purchase Agreement dated 28th June, 2013. He has been living on the said property since January 2012.
 - (ii) That they were never tenants on the said property since January, 2012. Moreover there was never any consent to sublet taken by the Plaintiff for the said property.
 - (iii) That he took over the payments of the Plaintiff and started to pay off her loan. He paid a sum of \$16,806.00 to Home Finance.
 - (iv) That he agrees that no tenancy agreement was signed or consent to sublet given by Housing Authority to sublet the said property and further says that the Plaintiff and he decided that when the Plaintiff would come to Fiji then both parties would proceed with the transfer of the said property.
 - (v) That a sale and purchase was entered into the dated 28th June 2013.
 - (vi) That he disagrees to paragraph 7 of Vindra's Affidavit and further says that he was ready to proceed with the transfer and settle the matter upon the arrival of the Plaintiff

to into the country. The Plaintiff reneged by not executing the transfer documents thus the transfer process could not proceed.

- (vii) That the Plaintiff never executed any transfer document. Furthermore, the property was in a derelict condition and the Plaintiff agreed that he be allowed to do renovations on the said property. That with the acquiescence of the Plaintiff, he has done renovations on the said property for sum of \$17,200.00.
- (viii) That the Plaintiff had agreed to come to Fiji to execute the transfer document. He had funds arranged with Active Construction & Joinery Limited.
- (ix) That it was agreed that the transfer process would proceed upon the Plaintiff coming to Fiji.
- (x) That he has proprietary interest in the property as he has spent \$17,200.00 and the Plaintiff is aware of this.
- (xi) That he was ready to settle the matter and was waiting for the Plaintiff to come to Fiji and proceed with the transfer documentation.
- (xii) That the said property is in a very good condition and does not need any maintenance works as all the maintenance works has been already done by me.
- (xiii) That a notice to vacate was received but he has interest in the said property as he has spent money to renovate the property with the full knowledge of the Plaintiff.
- (xiv) That if the Plaintiff had the intention of retiring then what was the reason to sell the property.
- (xv) That he has been staying on the said property with his family since January, 2012 and have kept the property in a very good condition as he was purchasing the property.

THE LAW

8. 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."*

9. 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."
10. 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)*
11. 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."*
12. 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)

13. 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 -*

14. 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.
15. It is for the defendants to 'show cause' why they are refusing to give vacant possession of the land comprised in Housing Authority Sub Lease No. 247993, DP 5595 located on Lot 9, Makosoi, Pacific Harbour, Deuba, as sought for by the Plaintiff.
16. 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

17. The question for this court to determine is whether the Plaintiff is entitled to the possession of the land comprised in Housing Authority Sub Lease No. 247993, DP 5595 located on Lot 9, Makosoi, Pacific Harbour, Deuba, in the Republic of Fiji,

of which the Plaintiff is the registered proprietor and or Lessees in terms of s169 of the Land Transfer Act [Cap 131]?

18. In this case, the Plaintiff 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.*
19. In this instance, the first limb of s169 applies. The annexure marked 'V 1' within the Affidavit in Support of Vindra Wati Sharma confirms that Vindra Wati Sharma and her Husband Devendra Sharma, are the last registered proprietors of the Housing Authority Sub Lease No. 247993, DP 5595 located on Lot 9, Makosoi, Pacific Harbour, Deuba. The Housing Authority Sub Lease at page 4 is neither clear nor legible and therefore it cannot be further ascertained from the 1st, 3rd and 5th Folios and entries' what transactions took place on this Sub Lease. Even the Plaintiff's Counsel has confirmed to this court upon enquiry that the copy of the sub lease on their file is also not very clear and was unable to confirm to Court the full ownership of the property on the Housing Authority Sub lease No.247993.

In this respect the certified true copy of the Housing Authority Sub Lease No. 247993 shows clearly that the sub lease to the land in question was granted to the Plaintiff Vindra Wati Sharma and her Husband Devendra Sharma on 26th February, 1985. The Plaintiff for the purposes of section 169 application is one of the last registered proprietors of the said Housing Authority Sub Lease No. 247993 and not the sole proprietor. It will be therefore incorrect for the Plaintiff to depose in her Affidavit in Support at paragraph 3 that 'she is the last registered proprietor of the property.'

20. Bearing in mind the above fact, and there exists a joint ownership of the Housing Authority Sub Lease No. 247993; the Plaintiff, Vindra Wati Sharma has failed to depose in her Affidavit in Support that her Husband Devendra Sharma is also a joint Sub Lease holder. The Plaintiff Vindra Wati Sharma should have then either joined Devendra Sharma as a second Plaintiff or obtained the authority from him and deposed the affidavit on his behalf.
21. That has not been done in this case. I therefore find that the Plaintiff alone and without obtaining the authority of the Husband Devendra Sharma could not have commenced this proceedings in this court against the Defendants anyway. The application is thus fatal in the given circumstances.
22. It will not be appropriate for me to stop here and not deal with the matter in its entirety, since the Defendants apprised Court of what had actually transpired between the Plaintiff and the Defendants and what made the Plaintiff commence proceedings and seek an order for vacant possession.
23. According to the Defendants, they entered into the Plaintiff's property with an intention to buy the property and agreed to take over the Mortgage debt owed by the Plaintiff with the Home Finance. The Defendants state they paid a sum of \$16,806 towards the Mortgage debt with Home Finance.
24. There is no dispute that the Plaintiff and the Defendants entered into and executed a Sale and Purchase Agreement on 28th June, 2013 for the purchase of the Plaintiff's property described as the Housing Authority Sub Lease No. 247993, DP 5595 located on Lot 9, Makosoi, Pacific Harbour, Deuba for a consideration sum of \$83,000.
25. The Defendants also state that they carried out renovation and maintenance works on the Plaintiff's property with the Consent of the Plaintiff and spent about \$17,200 of which the Plaintiff is aware of.
26. The Defendants are raising the defence of **Proprietary Estoppel** since they have proprietary interest on the Plaintiff's property.
27. The Plaintiff submitted that the Defendants occupied the property as a monthly tenant paying a monthly rental of \$400 and deposited the rental monies to the Plaintiff's Home Finance Company loan account.
28. The Plaintiff and the Defendants entered into a Sale and Purchase Agreement on 28th June, 2013 and referred Court to clause 7 of the Agreement which stipulated that the possession of the said property is currently with the Purchasers (Defendants) as tenants, however, in the event the Purchasers are not able to secure finance from the

ANZ Bank within 30 days from the date of the execution of the Agreement, as stipulated under clause 22 (c) and or are in breach of the Agreement, the Purchasers are to vacate the property immediately. The Plaintiff adds that no loan was approved and the Plaintiff issued a Notice to vacate the property.

29. The Plaintiff also raised a preliminary issue that the Defendants Affidavit in Opposition was defective since it lacked Indorsement in terms of Order 41 Rule 9 (2) of the High Court Rules, 1988. The 1st Defendant deposed the Affidavit in Opposition without attaching any authority from the 2nd Defendant.
30. This Court has perused the Defendant's Affidavit in Opposition and finds that at paragraph 2, the 1st Defendant deposes that he has the authority of the 2nd Defendant to depose this Affidavit but no written Authority has been attached to support the same.
31. I find that there are tribal issues and an arguable defence as to the proprietary interest since the parties to the proceedings also entered into a Sale and Purchase Agreement.
32. The tribal issues cannot be resolved in a summary manner by affidavits alone. These issues ought to be heard and determined on a full hearing. The conduct of the full hearing will allow the evidence of the parties to the proceedings and the witnesses' to be tested out coupled with any of the documentary evidence which would then be tendered into evidence for Court's consideration and eventual determination..
33. In conclusion, for the aforementioned reasons, in particular; to establish the locus standi, the Plaintiff needs to commence proceedings either by joining Devendra Sharma as a joint owner of the Housing Authority Sub Lease and or obtain his authority to depose the Affidavit on his behalf; arguable defence in terms of the Proprietary Interest and the tribal issues, it is not possible to make the order sought in the summons by the Plaintiff against the Defendants.
34. I proceed to make the following final orders of this court.

FINAL ORDERS

- A. The Plaintiff's Originating Summons seeking an order for Vacant Possession is hereby Dismissed.

- B. The Plaintiff is at liberty to commence a fresh Writ action to allow Court to determine the substantive issue of the vacant possession against the Defendants accordingly.
- C. Cost is summarily assessed at \$750 against the Plaintiff.

Dated at Suva this 09th day of December, 2016



VISHWA DATT SHARMA
Master of High Court, Suva

cc. Nands Law, Suva.
Samad Law, Suva.