

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 356 of 2015

BETWEEN: **ORGANIC EARTH (FIJI) LIMITED** a company having its registered office at
1 Taramati Street, Vatuwaqa, Suva.

PLAINTIFF

AND: **ROSALIA CHUTE** currently living at Lot 2, Isa Lei Road, Lami.

DEFENDANT

BEFORE: **Master Vishwa Datt Sharma**

COUNSELS: **Ms. Babara Malimali** - for the Plaintiff
Mr. Devanesh Sharma - for the Defendant

Date of Hearing: 30^h March, 2015

Date of Ruling: 25th July, 2016

RULING

*(Application seeking Vacant Possession pursuant to
s169 of the Land Transfer Act Cap 131)*

INTRODUCTION

1. The Plaintiff by the Originating Summons dated 19th November, 2015 seeks for the following orders:
 - (a) That the Defendant give up immediate vacant possession of to the Plaintiff of the premises located at Lot 2 Isalei Road Lami comprised and described in Certificate of Title No. NL 16044 being Lot 2, 3 Matmakita Subdivision, Lami which the Plaintiff is the registered proprietor of which the Defendant now occupied.
 - (b) That the cost of this application be paid by the Defendant to the Plaintiff.

2. There are 2 (Two) affidavits filed before the Court:
 - a) Affidavit in Support of Samara Prasad sworn on 19th November, 2015 (**"Plaintiffs Affidavit"**);
 - b) Affidavit in Response of Rosalia Chute sworn on 12th January, 2016 (**"Defendant's Affidavit"**);
3. This case proceeded to hearing on a **defended basis** and both parties to the proceeding made oral/written submissions at the hearing.
4. 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]**.

THE LAW

5. 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."*

6. Pursuant to **section 172 of the Act** the onus is on the **Defendant to show cause** why he refuses to give up possession to the Plaintiff and why an order for possession should not be made against him.
7. The Plaintiff is the **registered Lessee** or a **proprietor** in this instant case. The term "**Lessee**" is defined as proprietor of a Lease or sub lease in the Land Transfer Act. Therefore, the term "**Lessee**" follows within the ambits of **section 169** application.
8. 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."

9. 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."

(Underline is mine for emphasis)

10. 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."

11. 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)

12. 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 -

'Under Section 172 of the Act the Judge is required to dismiss the summons if the respondent proves to his satisfaction a right to possession ...'

13. Under **Section 172 of the Act** the judge is empowered to dismiss the summons if the respondent proves to his satisfaction that she 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.
14. 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.'

Plaintiff's Case

15. **The Plaintiff's Affidavit filed in this case deposed as follows:**
- (i) That the company, *Organic Earth (Fiji) Limited* is the registered lessee or proprietor of all that piece of land described in Native Lease No. 16044 being Lot 2, 3 Matamakita Subdivision situated at Lot 2 Isa Lei Road, Lami. Annexed hereto and marked "SP 2" is a copy of the aforesaid lease.
 - (ii) The property was bought from another company, called **ROSEWOOD LIMITED**, and transferred to the Plaintiff on 3rd August, 2015.
 - (iii) Due to the fact that it is a Native Lease, the consent of the ITLTB was sought and obtained.

-
- (iv) On 14/10/2015, a Notice to Quit was issued to the Defendant, Ms Rosalia Chute, giving her 7 days to give up vacant possession. Annexed hereto and marked "SP 3" is a copy of the notice.
- (v) The Notice was served on Ms Chute and it was also faxed to her.
- (vi) The Notice to Quit was sent to Ms Chute, about 2 months after the transfer from Rosewood Limited to Organic Earth (Fiji) Limited.
- (vii) On 19/10/2015, a letter was received from R Patel Lawyers informing their lawyers that Ms Rosalia Chute will not be moving out because of some supposed right that she thinks she has in the property. Annexed hereto and marked "SP 4" is a copy of the reply from R Patel Layers.
- (viii) On 21/10/2015, a reply was sent to R Patel Lawyers informing them that whatever issues that Ms Chute had has nothing to do with the Plaintiff. Annexed hereto and marked "SP 5" is a copy of the letter by Pacific Chambers to R Patel Lawyers.
- (ix) On 23/10/2015, a letter was sent to R Patel Lawyers informing them that the 7 days time period had expired and advising them that if their client wanted further time, then they were to let our lawyers know. Annexed hereto and marked "SP 6" is a copy of the letter by Pacific Chambers to R Patel Lawyers.
- (x) On 26/10/2015, in a long letter to R. Patel Lawyers, our lawyers informed them that their client was to vacate and that we may institute proceedings pursuant to s 169 (a) and (c) of the Land Transfer Act (Cap 131). Annexed hereto and marked "SP 7" is a copy of the letter by Pacific Chambers to R Patel Lawyers.
- (xi) On 12/11/2015, in a letter to R Patel Lawyers, our lawyers informed them that Ms Chute is now illegally occupying our premises and needs to vacate forthwith. Annexed hereto and marked "SP 8" is a copy of the letter by Pacific Chambers to R Patel Lawyers.
- (xii) No response was received to our lawyers' subsequent letters dated 21 /10/2015, 23/10/2015, 26/10/2015 and 12/11/2015.
- (xiii) In the meantime, the Plaintiff gave a grace time of about a month from the date of or first letter before they initiated legal proceedings, in the hope that the Defendant Ms Chute would vacate our premises, without much ado.
- (xiv) Ms Chute has also not offered to pay any rent for occupying their company's premises.
- (xv) Whilst Ms Chute is living on their premises, they were not getting any rent for it, yet the company, has to make loan repayments to the bank.

- (xvi) *Since Ms Chute has not vacated the premises, the Plaintiff instructed their solicitor to institute these proceedings pursuant to s 169 (a) and (c) of the Land Transfer Act (Cap 131).*
- (xvii) *Whilst the Plaintiff understands that Ms Chute will try and turn this into a complicated matter involving other cases, I pray that the Court will look only at what the law states and that is Organic Earth (Fiji) Limited is the current registered lessee, and that the previous lessee was Rosewood Limited.*
- (xviii) *The Plaintiff would like to make clear that whatever case the Defendant, Ms Chute has with Rosewood Limited or with its Directors is a matter for her and Rosewood to deal with and it should not interfere with the rights of the Plaintiff, who is the current registered lessee.*
- (xix) *The Defendant, Ms Chute was never a lessee of this property nor does she have a registered interest in the title or the lease.*
- (xx) *The Defendant, Ms Chute has refused to vacate and neither has she offered to pay any rent for the premises.*
- (xxi) *The Defendant, Ms Chute is now occupying these premises illegally.*
- (xxii) *The Plaintiff prays to this Honourable Court for an order for eviction against the Defendants with Mense Profits and costs*
- (xxiii) *The Plaintiff pray for an order for immediate Vacant Possession of the piece of land described in Native Lease No. 16044 being Lots 2 & 3 Matamakia Subdivision situated at Lot 2 Isa Lei Road, Lami.*

Defendant's Case

16. **The Affidavit in Response deposed by the Defendant states as follows:**

- (i) *The Defendant objects to the Summons and the Affidavit and she now shows cause for such objection.*
- (ii) *As to paragraph 1, she however takes objection to the matters deposed in the said paragraph on the following factual basis:*
 - (a) *She notes that there is no copy of any resolution from the Plaintiff Company authorising this action.*
 - (b) *There is no evidence to show that Ms Sangeeta Reddy is in fact a Director of the Plaintiff and is authorised to delegate authority to someone like Ms Sangeeta.*

- (c) *There is nothing on the Authorisation to show that it is the Plaintiff that is giving such authorisation.*
- (iii) *As paragraph 2, she sighted the Annexure SP2 and confirmed that on 3rd August 2015 the said property was transferred to Organic Earth (Fiji) Ltd.*
- (iv) *The Defendant has no knowledge whether the said property was purchased from Rosewood Limited since no Sale and Purchase Agreement or Transfer is annexed. She is a Shareholder of Rosewood and she can say that at no stage was any Shareholder Resolution obtained to sell the property to Organic Earth (Fiji) Ltd. The other shareholders in Rosewood Limited are Kenneth Roberts and Benjamin Roberts. A copy of a Company Search showing the shareholders of Rosewood Limited is annexed hereto and marked as "RS-1".*
- (v) *The Defendant adds to her response to paragraph 3 that Rosewood Limited was no longer the beneficial owner of the property in NL 16044 since in 2009 the Fiji Court of Appeal had declared that the property was a matrimonial property and she was entitled to 50% equality in this said property and the other 50% was owned by her former husband Kenneth Roberts. A copy of the Court of Appeal judgment is annexed hereto and marked as "RS-2". The Orders made by the Court of Appeal are quite clear in that Kenneth Roberts was given 48 days to make certain payments to me in 2009 which he didn't do within that designed period. Kenneth Roberts is now in a defacto relationship with Sangeeta Reddy. Kenneth Roberts orchestrated the transfer of the property to the Plaintiff.*
- (vi) *The Defendant has caused some research to be done about the Transfer and annexed hereto and marked as "RS-3" is a copy of the Transfer which shows the following details:*
- (a) *Purchase price is \$220,000.00 under gross value.*
- (b) *Transfer is dated 24th June 2015.*
- (c) *Person who had CT been correct, is Ms Radhika Naidu, counsel for Mr. Kenneth Roberts in the contempt proceedings which is currently pending.*
- (vii) *As to paragraph 14, the Defendant has no knowledge of the same as she has not sighted any consent from the TLTB.*
- (viii) *The Defendant confirms paragraphs 5, 6, 7 and 8 and confirms that in response to the Notice to Quit her Solicitors responded to the same. Her interests in the property are quite clear and can be summarised as follows:*
- (a) *The property was declared to be a matrimonial property by the Court of Appeal.*

- (b) *She was allocated 50% equality in the said property.*
- (c) *She was in occupation of the said property when Kenneth Roberts tried to interfere with my occupation in 2015.*
- (d) *As a consequence of that she applied for a DVRO and the Family Court at Suva made an Order declaring her as a protected person and giving me the permission to continue my occupation of the said property without any inference by Kenneth Roberts. A copy of the said Order is annexed hereto and marked as "RS-4".*
- (e) *Kenneth Roberts, in defiance of that DVRO then went and transferred the property using Rosewood Limited to his girlfriend's company, the Plaintiff.*
- (f) *The DVRO action is still to be finalised so I am advised by my Solicitors that the issue about ownership and occupation of the property was still sub judice. The said action will be heard by the Court on 18th January 2016.*
- (g) *The Defendant therefore believes that the transfer to Organic Earth (Fiji) Ltd was fraudulent and only done to defeat the Defendants interest in the said property.*
- (h) *There is currently a Motion pending in the Court of Appeal relating to the same property. A copy of the Motion is annexed as "RS-5".*
- (ix) *The Defendant states that she has already made her position clear from the very outset. This was her matrimonial home and she has a DVRO which prevented Kenneth Roberts from interfering with occupation of the said property. Kenneth Roberts and Sangeeta Reddy then colluded to have the property transferred to the Plaintiff at a grossly undervalued price.*
- (x) *The Defendant states that she is not a tenant of the property. She has a half interest in the said property.*
- (xi) *The Defendant has not seen any evidence of any loan repayments and at the outset both Kenneth Roberts and Sangeeta Reddy planned this so as to try and defeat her interest in the property. She believes that they should now live with the consequence of their own deceit.*
- (xii) *The Defendant says she has not seen any resolution or authority given to Pacific Chambers to institute this action.*
- (xiii) *The Defendant says that is the truth which is backed up by the document that she has exhibited.*

- (xiv) *The Defendant does not agree with allegation at all since Sangeeta Reddy and Kenneth Roberts are in a relationship and have planned the transfer to defeat my interest. These issues are all entwined. In fact both Kenneth Roberts and Sangeeta Reddy are by this action defying the DVRO which made me a protected person who are entitled to live in the property at Lot 2 Isa lei Road. Whilst this Order was still current Kenneth Roberts transferred the property to the Plaintiff in total defiance of the DVRO.*
- (xv) *The Defendant was given a half share in the property because it was declared to be our matrimonial property.*
- (xvi) *The Defendant confirms that she is not obliged to pay rental or vacate the property. This is her matrimonial home. There is a DVRO that allows me to stay on the property and that matter is still pending in Court.*
- (xvii) *She denies paragraph 22 and says that she is legitimately occupying the said property.*
- (xviii) *She denies paragraphs 23 and 24 and ask that this Summons be dismissed forthwith with costs.*
- (xix) *She would like to say that this application was an abuse of process since the Plaintiff knew from the outset the basis on which she was in occupation of the property. I am advised by my Solicitors that for the Plaintiff to use section 169 to evict me is an abuse process because the Plaintiff always knew that I had cause.*

ANALYSIS and DETERMINATION

17. The question for this court to determine is **whether the Plaintiff is entitled to the vacant possession** of the premises located at Lot 2 Isalei Road Lami comprised and described in the Certificate of Title No. NL 16044 being Lot 2, 3 Matmakita Subdivision, Lami, of which the **Plaintiff is the registered proprietor or Lessee of in terms of s.169 of the Land Transfer Act [Cap 131]**?
18. 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.

(Underline for emphasis)

19. In this instance, **the first limb of s169 applies**; there is no dispute that **the plaintiff is the last registered proprietor of the property.**
20. In this respect the plaintiff has annexed in her affidavit a **certified true copy of the Memorandum of Native Lease No. 16044.**

The **Memorandum of Lease No 16044** clearly shows that the Lease was **transferred to the Plaintiff** on 03rd August, 2015.

21. The Plaintiff is for the purposes of **section 169** the **last registered proprietor and Lessee** of the said property.
22. After the Plaintiff has established the **first limb test of section 169** that is that the Plaintiff is the **registered proprietor and Lessee of the property**, then the **Defendant** bears the **onus of showing cause** as to why vacant possession should not be granted to the **Plaintiff.**
23. 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).
24. 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).

25. The **Defendant** has appraised Court with **an issue amongst other issues** in his written submissions in terms of the **requirements of section 170 of the Land Transfer Act Cap 131**.

Therefore, it is appropriate that I deal with **this issue** first and then decide whether I should proceed to write my ruling in respect of the substantive matter in its entirety.

The issue that he raised is as follows;-

- (a) The Originating Summons filed by the Plaintiff does not contain an accurate description of the subject land as per the requirement of **Section 170 of the Land Transfer Act**.

According to the Defence, the land is not contained in a **Certificate of Title**; it is contained in a document called a **Memorandum of Lease**. Further, the description of the land is not: Lot 2, 3 Matmakita Subdivision, Lami.

As far as this Court is concerned, the Plaintiff has not stated the correct description of the land at paragraph A of the Originating Summons in conformity with what the description is as per the annexure marked "SP2".

The correct description of the property should be;

Native Lease 16044 being Lots 2 and 3 Matamakita Subdivision, in the Tikina of Suva, in the Province of Rewa containing an area of 2 Roods 29.7 perches and owned by the Yavusa Naukuvatu, Nayavumata and Vatuwaqa.

The annexure marked "SP2" is evidence of a Memorandum of a Native Lease No. 16044 and not a Certificate of Title. There is a difference between a **Certificate of Title** and a **Lease** but both can be categorized as "instrument of Title" under the Land Transfer Act.

A **Certificate of Title** is issued to the owner or proprietor of the subject property in Freehold lands and Crown Grants. A **Certificate of Title** is an official land ownership record.

A Memorandum of Lease is issued to the proprietor or leaseholder of iTaukei land. This Lease is an official land ownership record of iTaukei land.


26. The Plaintiff Counsel was at liberty to seek for the amendment and or regularize the form or content or in any other respect the failure on her part when this issue was raised by the Defence Counsel.
27. The necessary application could have been made pursuant to *Order 2 Rule 1 (O.2, r.1), of the High Court Rules, 1988.*
28. The Counsel failed to do so for the reasons best known to her.
29. Since the hearing has now been concluded and the case is impending Court's Ruling, it is rather too late in the proceedings.
30. Therefore, I find that the Plaintiff has not complied with the requirements of Section 170 of the Land Transfer Act.
31. Accordingly, I order as follows:-

ORDERS

- (i) The substantive Originating Summons together with the Affidavit in Support is hereby Dismissed.
- (ii) Costs is summarily assessed at \$500 to the Defendant within 14 days.

Dated at Suva this 25th day of July, 2016




.....
MR VISHWA DATT SHARMA
Master of High Court, Suva

cc. Ms. Barbara Malimali of Pacific Chambers, Suva.
Mr. Devenesh Sharma of R.Patel Lawyers, Suva.