

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 06 of 2016

BETWEEN: **SNEH LATA AND DEO DUTT** both of 15 Reagan Road, Manukau, Auckland, New Zealand, Chef and Unemployed respectively.

PLAINTIFF

AND: **FRANCIS DOBUI** of Lot 13 Cakacaka Road, Caubati, Nasinu.

DEFENDANT

BEFORE: **Master Vishwa Datt Sharma**

COUNSELS: Mr. Kumar P - for the Plaintiff
Ms. Malani - for the Defendant

Date of Hearing: 28th June, 2016

Date of Ruling: 05th October, 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 14th January, 2016 seeks for the following orders:

- (a) That the Defendant Francis Dobui do show cause why an Order for immediate vacant possession of the land comprised Lease No. 227366, Lot 13 DP 6018 located at Lot 13, Cakacaka Road, Caubati, Nasinu containing an area of 950 sqm in the Republic of Fiji, of which the Plaintiffs are the registered Lessees, should not be made against her upon the grounds set forth in the Affidavit of Sneh Lata and Deo Datt.
2. There are 3 (Three) affidavits filed before the Court:
- a) Affidavit in Support of Sneh Lata and Deo Datt sworn on 25th November, 2015 ("Plaintiffs Affidavit");
- b) Affidavit in Opposition of Francis Dobui sworn on 01st April, 2016 ("Defendant's Affidavit"); and
- c) Affidavit in Response of Sneh Lata sworn on 18th April, 2016 ("Plaintiff'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 **Plaintiffs** are the **registered Lessees** or **proprietors** in this instant case of the property comprised in Lease No. 227366, Lot 13 DP 6018 located at Lot 13, Cakacaka Road, Caubati, Nasinu. 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 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 be 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 they are the registered Lessees of a property comprised in Lease No. 227366, Lot 13 DP 6018 located at Lot 13, Cakacaka Road, Caubati, Nasinu

(hereinafter referred to as 'the property'). A copy of the Lease No. 227366 is annexed hereto and marked as annexure "SD1".

- (ii) That the Defendant has been occupying the said property as tenant from 30th March, 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 Defendant will reside on the property as a tenant and will pay rental on a monthly basis till we locate a buyer as they had for sometime looking for purchasers to purchase the property.
- (iv) That on 30th June 2015, they entered into a Sale and Purchase Agreement (referred to as the Agreement) with a prospective Purchaser for Sale of the said property for a consideration sum of \$202,000.00. A copy of the said Sale and Purchase Agreement dated 30th June, 2015 is annexed hereto and marked as annexure "SD2".
- (v) On 19th May, 2015 their solicitors Messrs Nands Law of Suva issued and served a Eviction Notice to the Defendant dated 13th May, 2015 to give Vacant possession within one month from the date of receipt of the notice. A copy of the Eviction Notice dated 13th May, 2015 is annexed hereto and marked with letter "SD3".
- (vi) That on or about 11th June 2015 the Defendant wrote to their lawyers seeking time till 30th September 2015 to vacate the property. A copy of the letter dated 11th June 2015 is annexed hereto and marked with letter "SD4".
- (vii) That upon enquiry they found out that the Defendant is still occupying the property and refuses to give vacant possession.
- (viii) That they have given the Defendant more than enough time to locate another property but the Defendant it seems is not making genuine attempts and continues to occupy their property.
- (ix) That the Defendants do not have any legal or equitable right to continue occupying the property as the property was given to her to reside as a tenant.
- (x) That Defendant's refusal to vacate the property is prejudicial to them as they do not want to lose the current buyer who has paid a deposit of \$50,000.00 towards the property and furthermore they are in urgent need of funds to meet some commitments, hence this is one other reason that we seek for the Orders as per the Summons filed herein.

Defendant's Case

16. **The Affidavit in Opposition deposed by the Defendant states as follows:**
- (i) *The Defendant makes this affidavit in opposition to the Plaintiff's application for his eviction under S 169 of the Land Transfer Act.*
 - (ii) *That he makes this affidavit from personal knowledge, from advice and from information coming to his possession and to those extent he eerily believe that the facts he depose here are true and correct.*
 - (iii) *That he admits paragraphs 3 and 4.*
 - (iv) *That as for paragraph 5 he accepts that he agree that he is a Tenant on a monthly basis, he denies the remainder of that paragraph.*
 - (v) *That he makes no replies to paragraphs 1, 2, 6 and admits paragraphs 7 and 8 of the said affidavit.*
 - (xi) *That as for paragraph 9 he admits he is still occupying the premises and he says that his occupation is lawful and he is continuing to pay his rent. The agreed method of payment between him and the Plaintiffs has been that he pays direct to their account and to date he is continuing to do this and he annexed here marked "FD1" a true copy of the latest receipts.*
 - (xii) *That he denies paragraphs 10, 11 and 12 and he says that there is currently another action between the parties and FEA that is pending at the Magistrates Court with an interim Order that the Defendants quite enjoyment is not to be disturbed. I annexed here marked "FD2" a true copy Order sealed by the Magistrates Court.*

ANALYSIS and DETERMINATION

17. **The question for this court to determine is whether the Plaintiff is entitled to the vacant possession of the property comprised in Residential Lease No. 227366, Lot 13 DP 6018 located at Lot 13, Cakacaka Road, Caubati, Nasinu containing an area of 950 sqm in the Republic of Fiji, of which the Plaintiffs are the registered proprietors or Lessees 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 plaintiffs are the last registered proprietors and Lessees of the said property** described hereinabove.

20. In this respect the plaintiffs have annexed in their affidavit a **certified true copy of the Residential Lease No. 227366**.

The **Residential Lease No. 227366** clearly shows that the **Lease** was **transferred to the Plaintiff** on 08th September, 1998 by folio No.448792.

21. The **Plaintiffs** are for the purposes of **section 169** the **last registered proprietors and Lessees** of the aforesaid property.

22. After the **Plaintiffs** have established the **first limb test of section 169** that is that the **Plaintiffs** are the **registered proprietors and Lessees of the property**, then the **Defendant** bears the **onus of showing cause** as to why **vacant possession** should not be granted to the **Plaintiffs**.

23. Pursuant to **section 172 of the Land Transfer Act Cap 131**. The **Defendant** needs to satisfy this court on affidavit evidence that he 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 **Defendants** contention always has been that he has been a Monthly Tenant and continues to be so. That he admits occupying the premises of the Plaintiff, and that his occupation has been a lawful and a continuing one since he has been paying the monthly rental to the Plaintiffs. Further, he states that there was an agreed method of payment between him and the Plaintiffs and has been continuously paying the rental directly to the Plaintiff's account. He refers Court to the annexure marked 'FD1" a true copy of the latest rental payment. Also the Defendant stressed the point that despite the Plaintiff issued the notice to quit, the Defendant continued to pay the rental which the Plaintiff accepted. Therefore, it is a right of the Defendant to continue with the occupation and not give up vacant possession.
26. The Plaintiff in its Affidavit in Reply stated that the notice to quit was served on the Defendant giving him one (1) clear months' notice to vacate the Plaintiff's premises and thereafter, he ceased to be a Tenant and continues to occupy the property illegally.
27. Reference is made to the letter written by the Defendant to the Plaintiff's Solicitors, marked annexure 'SD4'. **He sought for the extension of time to vacate the property and suggested that he would be able to do so when he proceeds on annual leave in August, 2015 and would also then hand over the keys to the property to the Plaintiff's Law firm by the 30th September, 2015. He sought permission to stay on the property until the 30th September, 2015.**
28. I have perused the Affidavit in Opposition filed by the Defendant herein with some ANZ Bank deposit slips which does inform this Court that the payment of \$400 in each case was deposited into account No. 850785, the account holder being one Deo and Sheh Lata Datt. The Plaintiffs have admitted that the Defendant has been depositing the

rental into their account at the ANZ Bank but refuses the fact that he continued to remain their Tenant after the service of the Notice to Quit. The Defendant has failed to establish that the Plaintiffs had in fact agreed for the Defendant to continue with the occupation and that the money deposited had been remitted to the Plaintiff's account acted as a renewal of the new Tenancy altogether.

29. The defendant has failed to show any cause including *a right to possession* or has *tangible evidence establishing a right or supporting an arguable case for such a right that must be adduced in terms of section 172 of the Land Transfer Act Cap 131*.
30. There is accordingly nothing in *section 172* which requires an automatic order for possession unless "**cause**" is immediately shown.
31. For the aforesaid rational, I find that the **property comprised and described in Residential Lease No. 227366, Lot 13 DP 6018 located at Lot 13, Cakacaka Road, Caubati, Nasinu** was transferred to the Plaintiff on 08th September, 1998 as the lessees and the registered proprietors. Thus, the Plaintiffs are obviously the owners of the property in question for which vacant possession is sought.
32. Following are the final orders of this court.

FINAL ORDERS

- A. The Defendant to give vacant possession of the premises on the land comprised and described in Residential Lease No. 227366, Lot 13 DP 6018 located at Lot 13, Cakacaka Road, Caubati, Nasinu the Plaintiffs.
- B. The Defendant to deliver vacant possession to the Plaintiffs in one (1) months' time on or before 05th November, 2016 at 4 pm.

- C. Execution is hereby suspended till the 05th November, 2016 at 4 pm.
- D. There will be an order for Costs made against the Defendant summarily assessed at \$650 and to be paid within 14 days.

Dated at Suva this 05th day of October, 2016



MR VISHWA DATT SHARMA
Master of High Court, Suva

cc: Nands Law, Suva
Nawaikula Esquire, Suva