

IN THE HIGH COURT OF FIJI  
AT SUVA  
CIVIL JURISDICTION

Civil Action No. HBC 280 of 2015

IN THE MATTER of an application  
under Section 169 of Part XXIV of  
Land Transfer Act, Cap 131.

**BETWEEN:**       **SUJEN KUMAR** of Lot 4 Lakena Hill No. 2, Nausori, Farmer, Primary School Teacher.

PLAINTIFF

**AND:**           **HIRAMANN** of Buiduna Road, Verata, Farmer.

1<sup>ST</sup> DEFENDANT

**AND:**           **HEM NAND** of Buiduna Road, Verata, Occupation Unknown.

2<sup>ND</sup> DEFENDANT

**BEFORE:**       **Master Vishwa Datt Sharma**

**COUNSELS:**    **Ms. Mishra** - for the Plaintiff  
                  **Mr. A. Nand** - for the Defendants

**DATE OF RULING:** 14<sup>th</sup> September, 2017

**RULING**

*(Application seeking Vacant Possession pursuant to  
S.169 of the Land Transfer Act Cap 131)*

## INTRODUCTION

1. The Plaintiff by his Originating Summons dated 11<sup>th</sup> November, 2016 is seeking immediate vacant possession of the property being all the land comprised and described in the iTaukei Land Trust Board (iTLTB) Agreement for Lease No. 4/14/50034789 being Waikula No. 3 situated in the Tikina of Nausori and Province of Tailevu of which the Plaintiff is the legal owner.
2. There are 3 (Three affidavits filed before the Court:
  - a) Affidavit in Support of Suken Kumar filed on 11<sup>th</sup> November, 2016 ("Plaintiff's Affidavit");
  - b) Affidavit in Opposition of Hem Nand filed on 08<sup>th</sup> March, 2017 ("Defendant's Affidavit In Opposition"); and
  - c) Affidavit in Response of Suken Kumar filed on 11<sup>th</sup> April, 2017 ("Plaintiff's Affidavit").

## PRACTICE and PROCEDURE

3. The Plaintiff has made his application pursuant to *Section 169 of Part XXIV of the Land Transfer Act 1978, Cap 131*.
4. A Section 169 application is a summary procedure for possession which enable various categories of persons to call upon a person in possession of a property to show cause why he or she should not give up possession. One such category, specified in paragraph (a) of the section is '*the last registered proprietor of the land*'. (*The Plaintiff falls under this category*).
5. Pursuant to *Section 172 of the Act*, the onus is on the Defendant to show cause why he is refusing to give up possession to the Plaintiff and why an order for possession should not be made against him.
6. The Plaintiff is the registered owner is a Lessee in this instance. The term "Lessee" is defined as proprietor of a lease or sub lease in the Land Transfer Act. Hence the term "Lessee" follows within the ambit of the *Section 169 application*.
7. "*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."
8. Pursuant to **section 172 of the Act** the onus is on the Defendants 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.

#### ANALYSIS AND DETERMINATION

9. The First question for this court to determine is whether the Plaintiff has satisfied to this Court the pre-requisites of section 169 and 170 of the Land Transfer Act, Cap 131.

If, the answer to the above question is in affirmative, then the burden shifts to the Defendants where they are required to show cause in terms of their right to remain on the Plaintiff's property and whether the Defendants have any arguable case before this Court, in terms of **s.172 of the Land Transfer Act Cap 131?**

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."*

*(Underline is mine for emphasis)*

11. 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.

(Underline for emphasis)

12. In the instant case, the first limb of s169 applies.
13. However, the Defendants in their Affidavit in Opposition makes reference to the annexure marked "SK1" within the Affidavit in Support of the Plaintiff and states that it is an Agreement for Lease standing in the name of Jitendra Kumar Mohan and not Sujen Kumar as indicated by him. Further, the name of the Plaintiff does not appear in the memorial of the Agreement for Lease as it is not a registered Lease. Therefore, the Plaintiff does not have a Locus to institute this action as the Plaintiff do not have the Registered Lease of the property as it is mandatory.
14. The Defendants further submitted that the property which has been transferred by the previous owner Jitendra Kumar Mohan to the Plaintiff is the property comprised in Waikula No. 3 whereas, the Defendants reside on Waikula No.2. In order to substantiate their claim, the Defendants made reference to iTLTB Notice dated 25<sup>th</sup> March, 2013 marked as annexure "D" within their Affidavit in Support.
15. Upon the perusal of the Plaintiff's and the Defendant's annexures marked "SK1" and "D" within their respective affidavits filed herein, there clearly appears to be a dispute between the parties to this proceedings with regards to the ownership of the property. The question which arises in mind is whether the previous owner Jitendra Kumar Mohan was the proprietor and Lessee of the property comprised and described as Waikula No. 2 or Waikula No. 3? The Agreement for Lease confirms the property being Waikula No. 3 whereas the Notice issued by iTLTB confirms Waikula No. 2.
16. The Court further makes a notation that the Transfer of Lease upon which the Plaintiff derives and bases his Locus Standi to institute and commence

proceedings against the Defendants, was in fact registered under the Registrar of Deeds on 27<sup>th</sup> September, 2010 and not under the Registrar of Titles. There is a difference herein when a Transfer is registered under the Registrar of Deeds and the Registrar of Titles. If it is registered under the Registrar of Deeds then it means it is for Safe keeping purposes of the records otherwise when it is registered under the Registrar of Titles then it confirms that the iTLTB who is the custodian of all iTaukei land in Fiji Jurisdiction has issued the Agreement of Lease to the Lessee and/or the proprietor which is then registered with the Registrar of Titles.

17. This is not the case here. The Plaintiff Sujen Kumar does not have a Registered Transfer of Lease issued by the iTLTB and therefore, I hold that the Plaintiff does not have the Locus Standi to bring this action against the Defendants.

He will only be able to institute and commence proceedings once he has been issued with a proper and an Official Transfer of Lease by the ITLTB accordingly.

18. It is important and appropriate at this instance that I make reference to Section 18 of the Land Transfer Act, Cap 131 also which stipulates as follows-

*Instrument of title to be evidence of proprietorship*

18. Every duplicate instrument of title duly authenticated under the hand and seal of the Registrar shall be received in all courts as evidence of the particulars contained in or endorsed upon such instrument and of such particulars being entered in the register and shall, unless the contrary be proved by the production of the register or a certified copy thereof, be conclusive evidence that the person named in such instrument or in any entry thereon as seized of or as taking an estate or interest in the land described in such instrument is seized or possessed of such land for the estate or interest so specified as from the date of such certificate or as from the date from which such estate or interest is expressed to take effect. (Underline mine for deliberation)

19. A careful reading of Section 18 hereinabove makes it very clear that every duplicate and/or copy of title needs to be endorsed with a seal of the Registrar of Titles and can then only be admitted to prove as conclusive evidence unless the Register is produced into Court to prove the Instrument and/or a certified true copy of the Title/Lease is filed with the Court.
20. The Agreement for Lease (Residential purposes) in the present case filed by the Plaintiff seeking an eviction order stands in the previous owners name Jitendra Kumar Mohan and is



neither signed, under the hand and seal of the Registrar nor it is certified as a True Copy of the Original Agreement for Lease in terms of **Section 18 of the Land Transfer Act, Cap 131**.

Further, the Transfer of Lease Registered with the Registrar of Deeds is also not signed, under the hand and seal of the Registrar of Deeds nor it is certified as a True Copy of the Original copy of the Transfer of Lease.

21. The Counsel representing the Plaintiff whilst arguing her case before this Court was apprised with this fact that the Plaintiff has not complied with the requirements of **Section 18 of the Land Transfer Act, Cap 131**. Instead she submitted that the Transfer of Lease filed by the Defendant's within their Affidavit in Opposition was sufficient compliance to admit the Transfer of Lease to prove into evidence and grant the order for eviction as sought by her.
22. Therefore, the defect in the Plaintiff's case cannot be cured by the usage of the Defendant's copy Transfer of Lease annexed within their affidavit. The Plaintiff is required to file the Agreement for Lease which should now be obtained from the iTLTB upon application and register the same with the Registrar of Titles that will give effect to his Proprietorship entitled accordingly.
23. In absence of any evidence of the Agreement for Lease by and in the name of the Plaintiff, the Court will not be able to ascertain the legal Registered Proprietorship and/or Lessee of the said property under contention, which is the first requirement in terms of **Section 169 of the Land Transfer Act, Cap 131** which the Plaintiff must prove to Court.
24. In the circumstances, the Plaintiff's case is fatal and cannot be taken any further to determine the substantive issue of Vacant Possession as sought herein.
25. Counsels and litigants must always ensure that they file applications within the ambits of the Rules and Laws and are in compliance of every procedure set down by the Rules and Laws so that the Courts are able to deal with their applications in an expeditious, just and fair manner.
26. In Conclusion, for the aforesaid rational ,I have no other alternative but to make the following final Orders-

**FINAL ORDERS**

- A. The Plaintiff's Originating Summons seeking immediate vacant possession of the property comprised and described in iTaukei Land Trust Board (ITLTB) Agreement for Lease No. 4/14/50034789 being Waikulua No.3 situated in the Tikina of Nausori and Province of Tailevu, fails and is hereby Dismissed.
- B. There will be no order as to Costs at the discretion of the Court bearing in mind that the Plaintiff is represented by the Legal Aid Commission.

DATED AT SUVA THIS 14<sup>TH</sup> DAY OF SEPTEMBER 2017.



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

cc: Legal Aid Commission, Suva.  
Kholi & Singh Lawyers, Suva.