

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

{CIVIL JURISDICTION}

Civil Action No. HBC 170 of 2016

IN THE MATTER of section 169
of the Land Transfer Act (Cap 131)

BETWEEN : **ADIAMMA** formally of Malolo, Nadi but now of Horokiwi Road
West, Newluden, Wellington, New Zealand.
Plaintiff

AND : **KESHO DAYAL** of Malolo, Nadi.
Defendant

Before : Acting Master U.L. Mohamed Azhar

Counsels : Ms. M. Vanua of *Young & Associates* for the plaintiff
The Defendant in person

Date of Judgment : 04th October 2017

JUDGMENT

01. The above named plaintiff filed the Originating Summons under section 169 of the Land Transfer Act Cap 131 against the defendant and sought an order on the defendant to deliver vacant possession of all that piece or parcel of land comprised in Crown Lease No. 13411(a protected lease under the terms of the State Lands Act Cap 132 formerly Lot 54 on ND 5163 in the Province of Ba and in the District of Nadi, containing an area of 1448 m² upon which there is a residential dwelling together with all improvement thereon. The summons is supported by an affidavit sworn by the plaintiff herself. The certified true copy of the Crown Lease No 13411 is marked as "A 1" and annexed together with the written notice sent by the solicitors of the plaintiff, which is marked as "A 2".
02. The defendant upon service of the above originating summons, appearing in person filed his affidavit in opposition and admitted that the plaintiff is the owner of the property. However, he claimed that the plaintiff consented and authorized his occupation to the land. The defendant further stated that, the plaintiff initially filed a claim in the Small Claims Tribunal and obtained an order against him for sum of \$ 3,500 being the unpaid rental together with the bailiff charges for execution of distress. He appealed to the Magistrate's Court and Learned Magistrate had allowed the appeal and sent back the case for re-hearing.

However, it was withdrawn by the representative of the plaintiff. The plaintiff in her affidavit in reply states that, she withdrew the claim in Small Claims Tribunal after she sought the legal advice from her solicitors. Basically, the defendant is seeking an equitable remedy though he did not specify the same in his affidavit.

03. At the hearing of the summons both parties, submitted written submissions and relied on their respective affidavits. The procedure under the section 169 of the Land Transfer Act Cap 131 is a summary procedure to promptly and speedily restore the registered proprietor to the possession of the subject property when the occupier is unable to show his or her right to possess the particular land. This section provides a speedy procedure for obtaining possession where the occupier can show no cause why an order should not be made: Mishra JA in Jannadas v Honson Ltd [1985] 31 FLR 62 at page 65. The rationale for this speedy remedy available for the registered proprietors stems from the cardinal principle of the statute that, the register is everything and in the absence of any fraud, the registered proprietor has an indefeasible title against the entire world. The Fiji Court of Appeal in Subaramani v Sheela [1982] 28 FLR 82 (2 April 1982) held that:

The indefeasibility of title under the Land Transfer Act is well recognised; and the principles clearly set out in a judgment of the New Zealand Court of Appeal dealing with provisions of the New Zealand Land Transfer Act which on that point is substantially the same as the Land Transfer Act of Fiji. The case is Fels v. Knowles 26 N.Z.L.R. 608. At page 620 it is said:

"The cardinal principle of the statute is that the register is everything, and that, except in case of actual fraud on the part of the person dealing with the registered proprietor, such person, upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against all the world."

04. The relevant provisions of the Land Transfer Act Cap 131 are as follows;

169. 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) a lessor against a lessee or tenant where a legal notice to quit has been given or the term of the lease has expired.

Particulars to be stated in summons

170. The summons shall contain a description of the land and shall require the person summoned to appear at the court on a day not earlier than sixteen days after the service of the summons

Order for possession

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.

Dismissal of summons

172. If the 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;

Provided that the dismissal of the summons shall not prejudice the right of the plaintiff to take any other proceedings against the person summoned to which he may be otherwise entitled:

Provided also that in the case of a lessor against a lessee, if the lessee, before the hearing, pay or tender all rent due and all costs incurred by the lessor, the judge shall dismiss the summons.

05. To put it in simple language, the sections 169 and 170 set out the requirements for the applicant or the plaintiff and the requirements of the application respectively. The *Locus Standi* of the person who seeks order for eviction is set out in section 169 and the requirements of the application, namely the description of land and the time period to be given to the person so summoned, are mentioned in section 170. The other two sections namely 171 and 172 provide for the two powers that the court may exercise in the applications under the section 169. The burden to satisfy the court on the fulfillment of the requirements under section 169 and 170 is on the plaintiff and once this burden is discharged, it then shifts to the defendant to show his or her right to possess the land. The exercise of court's power either to grant the possession to the plaintiff or to dismiss the summons depends on how the said burden is discharged by respective party to the proceedings.

06. The plaintiff in a very short affidavit, which supports her originating summons, averred her locus standi to file this summons against the defendant, where she states that she is the registered proprietor of the land described in her summons. For the proof of the said averment she annexed the Certified True Copy of the Crown Lease No 13411 registered on

08.10.1998 at the office of Registrar of Titles. Apparently, the defendant in paragraph 2 of his affidavit admitted this title, though he is giving more details of the dwelling situated in the land.

07. The second requirement is the particulars to be stated in the summons, which is description of the land as required by the section 170. The fact that, the application for ejection involves with the property right of a citizen and the order for possession deprives him from his right, which has more effect on his social and economic wellbeing, the courts in all jurisdictions had a tendency to be little tough on the applicant, especially in relation to compliance and the technicalities of the respective statute. This resulted in the judgement of Atunaisa Tavuto v Sumeshwar Singh HBC 332/97L and the court held that, in application such as under section 169 of Land Transfer Act, the technicalities are strictly construed, because of the drastic consequences that follow for one of the parties upon the relief sought being granted. That was a case where an application for vacant possession was sought, however, the applicant failed to give the particulars such as Crown Lease number, lot number and the situation of land, though the Housing Authority Lease number was correctly mentioned. The court dismissed the summons stating that, it behoved the plaintiff and his counsel to have exercised more diligence in that regard.
08. The above case, however, was distinguished by Prakash J, in Wafi v Vinod [2000] 1 FLR 263 (20 October 2000) and it was held that:

"The Court has not been provided nor able to locate any authorities to suggest that "a description" as per section 170 means a full description of the land. The Act itself does not specify what a description of the land entails. What is adequate or full description? What is a sufficient description? The purpose is clearly for the parties to be informed as to what land the application relates to. This is clear from the supporting affidavit. In this regard I cannot concur with the sentiments of my brother Justice Madraiwiwi in Atunaisa Tavuto v Sumeshwar Singh (Civil Action No. HBC0332 of 1997L) submitted by the Defence Counsel in support of his argument on s.170. It is not clear what Justice Madraiwiwi had meant in stating that "The Summons is defective in not properly describing the subject property" (emphasis added). It is not clear whether "a description means full or proper description. Further, the Supreme Court in the case of Ponsami v Dharam Lingam Reddy (Appeal No. 1 of 1996) was dealing with the need for compliance with the Supreme Court Rules not a statutory provision such as Section 170. The statute does not clearly specify what "a description" requires. In Vallabh Das Premiji v. Vinod Lal, Nanki and Koki (Civil Appeal 70 of 1974) the Court of Appeal had accepted a description as in the present summons as sufficient".

09. Seemingly, the view of Prakash J is based on the plain and unambiguous meaning of the statute which does not specify what description of land entails and what is adequate or full description of the land. It is not the duty of the court to impose more conditions and restrict the interpretation of a statute when the wording is clear and unambiguous. What is actually required by the statute is whether the person, so summoned to appear, had the full knowledge, without any misunderstanding, of the land and premises from which he ought to be evicted. If there is any misunderstanding of premises which is the subject matter of

the proceeding, it should be brought by the person who is so summoned to show cause and in the absence of any such misunderstanding, the description given by any applicant seems to be sufficient and adequate under the section 170 of the Land Transfer Act. This was the view is supported by the Court of Appeal in Premji v Lal [1975] FJCA 8; Civil Appeal No 70 of 1974 (17 March 1975). It is incumbent on the court to consider the property right of the person so summoned under this application. However, the more emphasis should not be given to such property rights, at the expense of a registered proprietor of a land, who has indefeasible title against the entire world by *Torrens system* of land registration. Accordingly, the reasoning of Prakash J in Wati v Vinod (supra) seems to be more rational than the view of Madraiwiwi J in Atunaisa Tavuta v Sumeshwar Singh (supra). These two judgments are from the High Court and in same footing. Therefore, for better reasoning I prefer the view of Prakash J over the other. Accordingly, if an applicant can give the description of a land or premises which can give clear understanding for the persons so summoned under this section, the former is deemed to have discharged his duty under this section.

10. In the instant case, the plaintiff in her supporting affidavit sought an order on the defendant to deliver vacant possession of all that piece or parcel of land comprised in Crown Lease No. 13411 (a protected lease under the terms of the State Lands Act Cap 132) formerly Lot 54 on ND 5163 in the Province of Ba and in the District of Nadi containing an area of 1448 m² upon which there is a residential dwelling together with all improvement thereon. In my view this is adequate and full description as required by the section. The said summons was served and the defendant was given time more than what is required by the section. Accordingly, the plaintiff has discharged the onus casted by the section on her in this application.
11. The section 171 requires the proof and production of consent if any such consent is necessary. The question is therefore, whether any consent from the Director of land is necessary for an application under 169. This matter has been settled by His Lordship the Chief Justice Anthony Gates (as His Lordship then was) in Prasad v Chand [2001] FJLawRp 31; [2001] 1 FLR 164 (30 April 2001). His Lordship held that:

"At first sight, both sections would seem to suggest that an Applicant should first obtain the Director's written consent prior to the commencement of section 169 proceedings and exhibit it to his affidavit in support. However I favour Lyons J.'s approach in Parvati Narayan v Suresh Prasad (unreported) Lautoka High Court Civil Action No. HBC0275 of 1996L 15th August 1997 at p 4 insofar as his Lordship found that consent was not needed at all since the:

"section 169 application (which is the ridding off the land of a trespasser) is not a dealing of such a nature as requires the Director's consent."

This must be correct for the Director's sanction is concerned with who is to be allowed a State lease or powers over it, and not with the riddance of those who have never applied for his consent. With respect I was unable to adopt the second limb of Lyons J.'s conclusion a few lines further on where

his lordship stated that the order could be made conditional upon the Director's consent. For if the court's order of ejectment was not "a dealing" then such order would not require the Director's consent and the court would not be subject to section 13. The court is not concerned with the grant of or refusal of, consent by the Director, provided such consent is given lawfully. Consent is solely a matter for the Director. The statutory regime appears to acknowledge that the Director's interest in protecting State leases is supported by the court's order of ejectment against those unable to show cause for their occupation of the land which is subject to the lease. The court is asked to make an order of ejectment against a person in whose favour the Director either, has never considered granting a lease, or has never granted a lease. The ejectment of an occupier who holds no lease is therefore not a dealing with a lease. Such occupier has no title. There is no lease to him to be dealt with. The order is for his ejectment from the land. There is no need for a duplicating function, a further scrutiny by the Director, of the Plaintiff's application for ejectment either before or after the judge gives his order".

12. The section reads as '*...if any consent is necessary..*' and the above authority clearly states that, the consent of the Director for the application under 169 is not necessary. Thus, the question of consent does not arise in applications under section 169.
13. As pointed out above, the locus standi of the plaintiff is not disputed by the defendant and in fact, he admitted in his affidavit. The description of the land and premises as per the summons is adequate to give full understanding of it to the defendant. It follows that, the plaintiff has fulfilled the requirements under sections 169 and 170. Thus, the onus now shifts to the defendant to show his right to possess the land and premises in dispute in this application. The Supreme Court in the case of Morris Hedstrom Limited -v- Liaquat Ali CA No: 153/87 said that:

"Under Section 172 the person summonsed may show cause why he refused to give possession of the land 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." (Emphasis added)

14. The duty on the defendant is now not to produce any final or incontestable proof of his right to remain in the property, but to adduce some tangible evidence establishing a right or supporting an arguable case for his right. Generally, the defences available for a defendant in this application are the equitable rights and the adverse possession. The section 78 of the Land Transfer Act provides for the adverse possession. If one looks to the possession of the occupier and finds that his occupation, his right to occupation is derived from the owner in the form of permission or agreement or grant, it is not adverse, but if it is not so

derived, then it is adverse. Adverse possession must be open, not secret; peaceful, not by force; and adverse, not by consent of the true owner: **Sir Nigel Bowen CJ** in *Mulcahy v Curramore Pty Ltd* [1974] 2 N.S.W.L.R. 464 at 475.

15. Romer LJ in *Moses v Lovegrove* [1952] 2 Q.B 533 stated at 544:

"It seems to me that one can, in addition to looking at the position and rights of the owner, legitimately look also at the position of the occupier for the purpose of seeing whether his occupation is adverse. In my opinion, if one looks to the position of the occupier and finds that his occupation, his right to occupation, is derived from the owner in the form of permission or agreement or grant, it is not adverse, but if it is not so derived, then it is adverse, even if the owner is, by legislation, prevented from bringing ejection proceedings".

16. Slade LJ in *Buckinghamshire County Council v Moran* [1989] 2 ALL E.R. 225 at 232-233 stated:

"Possession is never 'adverse' within the meaning of the Act if it enjoyed under a lawful title. If, therefore, a person occupies or uses land by licence of the owner with the paper title and his licence has not been duly determined, he cannot be treated as having been in 'adverse possession' as against the owner with the paper title".

17. It is abundantly clear that, the defendant cannot rely on the defence of adverse possession according to the above authorities. He stated in his affidavit that, he entered the property in year 2013 and has been in occupation to date with the consent and authority given by the plaintiff. He deems to be claiming the equitable rights over the property. It could be either promissory estoppel or proprietary estoppel. *Snell's Principles of Equity* (28th Edition 1982) at page 556 state the rule of promissory estoppel as follows

"Where by his words or conduct one party to a transaction freely makes to the other an unambiguous promise or assurance which is intended to affect the legal relations between them (whether contractual or otherwise) a, and before it is withdrawn, the other party acts upon it, altering his position to his detriment, the party making the promise or assurance will not be permitted to act inconsistently with it. It is essential that the representor knows that the other party will act on his statement. Yet the conduct of the party need not derive its origin only from the encouragement of representation of the first; the question is whether it was influenced by such encouragement or representation". (Emphasis added)

18. The conditions for the promissory estoppel are; (a) word or conduct which can freely make an unambiguous promise, (b) intention to affect the legal relations and (c) other party's action altering position before withdrawal of promise. The defendant annexed a document marked "A" with his affidavit, which he claims to be an authority by the plaintiff to occupy the property. The letter is reproduced below;

2nd April, 2013

**A CONCERN/AUTHORITY
TO WHOM IT MAY CONCERN**

This is to certify that I Adiamma of Wellington, New Zealand hereby give my concern/authority to Kesho Dayal of Malolo Nadi to occupy my residential property at Malolo Nadi being Crown Lease No. 13411. That Kesho Dayal shall occupy the said property free of charges/rental. He should look after the said property from time to time as it may require, and I shall reimburse him once I visit him he should pay water and Fiji electricity bill and land rent from time to time. That I do not intend to return back to Fiji, that should I need the property back from Kesho Dayal I shall compensate him as a caretaker for the number of years and also refund all the monies that he has spent on my said property together with the losses/damages that he may suffer.

*Signature of
Adiamma
Phone No. 00-64-4-2949036 (NZ)*

19. The above authority is challenged by the plaintiff in her affidavit in reply. She denied the signature there and produced a copy of her passport and the medical reports to rebut the fact that she signed the said document. There seems to a slight difference in both signatures. In addition, the plaintiff states in her affidavit in reply that, the said authority was not produced at the Small Claims Tribunal when she filed the claim in 2014, though it was allegedly signed and given to the defendant in year 2013. She also denied giving the keys to the defendant. The main question is why the defendant did not produce the said authority before the Small Claims Tribunal. This raises serious concern on the authenticity of the said letter. Supposing the alleged authority had been signed by the plaintiff, it is not sufficient to qualify to a promise or conduct that can create an estoppel. The very reason is that, the defendant was retained, according to the said letter, as the caretaker for the property and was promised to be compensated for whatever cost incurred to him. Thus, he cannot say it was an unambiguous promise or assurance which can allow him to alter his position. This letter was in year 2013 as alleged by the defendant and the proceedings in Small Claim Tribunal started in the following year. That means the dispute started in the following year and the defendant could not have altered his position from a caretaker to a genuine possessor within this shorter period which is less than a year. Furthermore, the affidavit of the defendant is notable for its omission of evidence for such alteration of his position so as to create an estoppel.
20. The other equitable remedy is the proprietary estoppel. *Snell's Principles of Equity* (28th Edition 1982) at page 558, expound the rule on proprietary estoppel. It states:

"Proprietary estoppel is one of the qualifications to the general rule that a person who spends money on improving the property of another has no claim to reimbursement or to any proprietary interest in the property. Proprietary estoppel is older than promissory estoppel. It is permanent in its effect, and it is also capable of operation positively so as to confer a right of action. The term "estoppel", though often used, is thus not

altogether appropriate. Yet the equity is based on estoppel in that one is encouraged to act to his detriment by the representation or encouragement of another so that it would be unconscionable for another to insist on his strict legal rights".

21. At pages 560 and 561 the conditions for the proprietary estoppel have been explained with the illustrations as follows:

- (1) *Expenditure.* In many cases A has spent money on improving property which in fact belongs to O, as by building a house on O's land, or by doing repairs to O's house and paying mortgage instalments and other outgoings, or by contributing to a joint venture to be carried out on O's land, or by paying premiums required to maintain O's life insurance policy.
- (b) *Expectation or belief.* A must have acted in the belief either that he already owned a sufficient interest in the property to justify the expenditure or that he would obtain such an interest. But if A has no such belief, and improves land in which he knows he has no interest or merely the interest of a tenant (or licensee), he has no equity in respect of his expenditure.
- (c) *Encouragement.* A's belief must have been encouraged by O or his agent or predecessor in title. This may be done actively, as where a father persuades his son to build a bungalow on the father's land, or a mother assures her daughter that she will have the family home for her life, or a man assures his former mistress that the house in which they lived together is hers.
- (d) *No bar to the equity.* No equity will arise if to enforce the right claimed would contravene some statute, or prevent the exercise of a statutory discretion or prevent or excuse the performance of a statutory duty

22. There is nothing to show in the affidavit of the defendant that he spent money in improving the property or paying for repairs or paying mortgages within the said one year period. The defendant annexed a copy of a letter marked "E" purported to be an agreement for the repair of the property. The said letter is a handwritten letter signed by the defendant and one Manoj Kumar. In that letter, it was agreed that the later agreed to do work for sum of \$ 2,985.75 and the payment to be made in three instalments. At the outset, I am unable to rely on this letter for many reasons. Firstly, it does not specify what works were agreed upon. Secondly, it lacks the details and capacity of the said Manoj Kumar, whether he was a builder or a carpenter or a contractor. Thirdly, it does not state the site of proposed repairs, whether it was the same property or another as the said letter lacks any such information. In any event, it cannot be considered as evidence for the alleged improvement, because it failed to state whether any such improvement was done or any amount was paid by the defendant to the said Manoj Kumar. The defendant annexed the bill of Fiji Electricity Authority and Water Authority bill and claims that both had been

transferred to his name. This is a declined argument, because, generally, the Electricity and Water Bill are transferred even to the name of tenants for the convenience so that the payment may not be missed out resulting in disconnection of such utilities. This, therefore, cannot be considered as the expenditure which is the first condition for the proprietary estoppel.

23. It is interesting to note that, the defendant had sent a letter dated 20.02.2016 to the solicitors for the plaintiff, in reply to the letter dated 09.02.2016 sent by the said solicitors. The defendant did not attach the said letter with his affidavit. However, the plaintiff attached the same in her affidavit in reply. The defendant in that letter stated that, he spent more than ten thousands on the property and claimed a compensation of \$ 50,000.00 to vacate the property. Had he really spent more than ten thousands on the property, he should have attached that letter with the details of the expenditures. He did not attach the said letter for the reasons best known to him. On the other hand, he attached the said document marked as "E" referred to in the above paragraph, the purported agreement and claimed that, he spent a sum of \$ 2,985.00 on the property. Both the letters, the one he sent to the solicitors of the plaintiff and this document marked as "E" is contradicting each other and as a result both fail.
24. Likewise, defendant annexed a receipt for the payment of rental to the Government. The payment was made in the name of the plaintiff. There is no proof that the said payment was made by him. It could have been paid by the defendant or another person in plaintiff's name. Thus, it cannot be considered as his own expenditure.
25. The defendant must show that he must have acted in the belief either that he already owned a sufficient interest in the property to justify the expenditure or that he would obtain such an interest. He entered the property as caretaker and therefore, he could not have had any belief that, he will have sufficient interest in the property. If he has no such belief, and improves land in which he knows he has no interest or merely the interest of a tenant (or licensee), he has no equity in respect of his expenditure. In this case, neither the belief nor the expenditure is shown by the defendant. The other condition is encouragement of the belief. The defendant must have had a belief that, the defendant had been encouraged by the plaintiff or his agent or predecessor in title. The defendant states in his affidavit that, the brother in law of the defendant one Muttu Swamy Gounder promised him to get the crown lease in his name. I am unable to give probative value to this averment as it lacks any supporting evidence of such promise, because anyone can aver in an affidavit of any promise by any person claiming that person is an agent or representative of the owner. In the absence any such supporting evidence this averment lacks the weight. Though there is no bar for equity in a situation like this, the court cannot hold that the defendant is entitled for equity as the other three conditions have not been met. As such neither the promissory nor the proprietary estoppel can help the defendant to possess the property in this case.
26. For the above reasons, I am of view that the defendant failed to adduce any tangible evidence establishing the right to possess the said property. It follows that, he must be ordered to immediately deliver the vacant possession of the property to the plaintiff who is the registered proprietor of the same. In addition, the plaintiff should be entitled for reasonable cost for defending her indefeasible title to the property.

27. Accordingly, I make following final orders:

- a. The defendant is ordered to deliver the vacant possession of the property described in the summons to the plaintiff,
- b. The defendant is further ordered to pay a summarily assessed cost of \$ 500.00 to the plaintiff within a month from today.



At Lautoka
04/10/17


U.L. Mohamed Azhar
Acting Master