

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No: HBC 03 of 2016

IN THE MATTER of an application
by CLEMENCE PATTERSON aka
CLEMENCE SATEKI NAUFANU
PATTERSON aka CLEMENCE
NAUFAU PATTERSON

AND

IN THE MATTER of Sections 87
and 164 of the Land Transfer Act
[Cap 131]

BETWEEN:

CLEMENCE PATTERSON also known as CLEMENCE SATEKI
NAUFANU PATTERSON also known as CLEMENCE NAUFAU
PATTERSON

PLAINTIFF

AND:

THE REGISTRAR OF TITLES

DEFENDANT

Coram : The Hon. Mr Justice David Alfred

Counsel : Mr R. Singh for the Plaintiff
Mr A. Prakash with Ms. L Ramoce for the Defendant

Date of Hearing : 20th July, 2016

Date of Judgment : 18th January, 2017

JUDGMENT

1. This is an Originating Summons (O.S) filed by the Plaintiff in which he seeks the following Orders:

- (1) That the Registrar of Titles (Registrar) (Defendant) do grant the Plaintiff's Vesting Order application (application) in respect of Certificate of Title No. 15639 (title).
- (2) A Declaration that the Registrar had erred in Law in declining the application.

2. The application is made pursuant to section 164 of the Land Transfer Act Cap 131 (LTA). It is supported by the affidavit of the Plaintiff. In this he says the following:

- (a) He has been in possession of the property held under the title (property) for the previous 25 years. The property is registered in the name of Chan Hon Lum, and there is no one in Fiji to execute documents on his behalf and he has no servant and / or agent in Fiji.
- (b) The Registrar advertised a Notice in the Fiji Sun newspaper of the Plaintiff's application.
- (c) The Registrar informed the Plaintiff's solicitors that the application was on hold as he was not staying on the property.
- (d) The Registrar finally informed the Plaintiff's Solicitors that the application was declined because the Plaintiff was not occupying the property but only maintaining it and had therefore not satisfied the requirements of section 78 of the LTA.

3. The Registrar in her affidavit in response makes the following statements:

- (a) The property was inspected by one of her officers who noted there was no one occupying it.
- (b) It is for the Court to determine whether the Registrar's decision to decline the application was wrong in law or not.

4. At the hearing Counsel for the Plaintiff made an oral submission and also provided a written submission.
5. Counsel for the Registrar provided a written submission and also submitted orally. He said physical custody of the property was necessary and this meant physical occupation. Here there was no occupation of the property, when the inspection was done. The shed was not on it but on the adjoining lot. There was no physical activity on the property.
6. Counsel continued that the Registrar objected to the 2 Statutory Declarations as these had been declared before the Plaintiff's own solicitor and the Court could not consider them. The advertisement in the newspaper and the gazette were merely publication for public notice but not acquiescence or acceptance of the application. It was a statutory requirement under section 80 of the LTA to publish a notice but that did not mean the Vesting order was granted.
7. Counsel also submitted that in Fiji physical possession is required and here there was no actual physical custody of the property.
8. Plaintiff's Counsel replied he would not reply on why the statutory declarations had been witnessed by his fellow solicitor and not by an independent person.
9. At the conclusion of the arguments, I informed I would take time to consider my decision. Having done so I now proceed to deliver my judgment.
10. The sole issue before me is whether the Plaintiff has to be in actual physical possession or occupation of the property to be entitled to have its ownership vested in him.

11. At the outset, I shall rule that the 2 statutory declarations declared before the Plaintiff's solicitor shall not be received in evidence in this O.S as it is trite law that a declaration or an affidavit to be used in court proceedings has to be declared or affirmed before an independent person (barrister, solicitor or commissioner for oaths) and NOT before that party's solicitor.
12. Considering the applicable legislation, I note that section 78 of the LTA has 2 pre-conditions to be satisfied before any person can apply for an order to vest any land in him for any estate or interest.

These are:


- (a) That person is in possession of the land; and
 - (b) such possession has been continuous for not less than twenty years
13. I see from the Plaintiff's affidavit in support (paragraph 3) that he asserts he has been in possession for 25 years. This therefore requires me to judicially construe possession". I can do no better than to adopt the words of Lord Browne – Wilkinson in: *JA Pye (Oxford) Ltd and another v Graham and another* [2002] 3 All ER 876. He said there are two elements necessary for legal possession: (1) a sufficient degree of physical custody and control (factual possession); (2) an intention to exercise such custody and control on one's own behalf and for one's own benefit (intention to possess). What is crucial is to understand that, without the requisite intention, in law there can be no possession.
14. In *Powell v McFarlane* (1997) 38 P & CR 452, Slade J said he would regard "possession" "as bearing the traditional sense of that degree of occupation or physical control, coupled with the requisite intention commonly referred to as *animus possidendi*, that would entitle a person to maintain an action of trespass in relation to the relevant land".

15. Osborn's Concise Law Dictionary (7th edition) defines "occupation" as "the exercise of physical control or possession of land; having the actual use of land".
16. This is the onus that the Applicant has to discharge on the balance of probability to satisfy me that he has a right to possession, of the property.
17. Here, the Applicant has not provided any cogent evidence, for the Court to consider, that he had or has occupation or physical control of the land which is the sine qua non for the application to succeed.
18. Going through the affidavit in support of the Plaintiff which is the only admissible evidence before me, I am unable to discern an iota of evidence that the Plaintiff had satisfied the requirements of section 78 of the ITA.
19. I also refer to the Defendant's affidavit in response where she deposes that when the land was inspected, her officer noted there was no one occupying it.
20. In any event, even if the 2 statutory declarations (SD) were received in evidence, they would not have bolstered the Plaintiff's case. In the Plaintiff's SD, throughout he merely says that he "maintained the property". Even the temporary dwelling on it was removed by him circa 2013 and building materials purchased were used elsewhere. The SD of Iliesa Tomiki the caretaker says he did maintenance and grass cutting work etc on the property.
21. None of the above, in my opinion showed that the Plaintiff had the requisite intention to possess, the property.

22. In the result, I find and I so hold that the Applicant has failed to discharge the onus cast upon him and I therefore dismiss the Originating Summons filed on 8 January 2016 decline to grant the Order and Declaration sought therein and order the Plaintiff to pay the Defendant costs which I summarily assess at \$1,250.00.

Delivered at Suva this 18th day of January, 2017.




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David Alfred
JUDGE of the High Court, Fiji.