

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 118 of 2016

IN THE MATTER of Land Transfer
Act, Cap 131 and under Section 169
of Land Transfer Act, Cap 131.

BETWEEN: PETER PAUL also known as PETER RAMAYA of Samabula, Suva as the Executor and
Trustee of the Estate of Kupamma.

PLAINTIFF

AND: JAMESH VENKATAIYA of 7 Aiwa Street, Samabula, Suva.

DEFENDANT

BEFORE: Master Vishwa Datt Sharma

COUNSELS: Mr. Suresh Chandra - for the Plaintiff
Mr. Kunal Singh - for the Defendant

Date of Ruling: 16th November, 2017

RULING

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

A. INTRODUCTION

1. The Plaintiff by his *Originating Summons* dated 18th May, 2016 is seeking an order under the *Land Transfer Act Cap, 131* for the vacant possession of the land and building comprised in *Crown Lease No. 1970* being *Lot 16 Section 33 Samabula North* situated in the City of Suva in the Island of Vitilevu.
2. The application is made pursuant to *the Land Transfer Act, Cap 131*.
3. There are 2 (Two) affidavits filed before the Court:
 - a) Affidavit in Support of Peter Paul filed on 18th May, 2016 ("**Plaintiff's Affidavit**");
 - b) Affidavit in Opposition of James Venkataiya filed on 11th October, 2016 ("**Defendant's Affidavit In Opposition**"); and
4. This case proceeded to hearing on a **defended basis** and both parties to the proceeding were represented by Counsels at the hearing.
5. 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 *ss. 169, 171 and 172 of the Land Transfer Act [Cap 131]*.

PRACTICE and PROCEDURE

6. The Plaintiff has made his application pursuant to *Section 169 of the Land Transfer Act 1978, Cap 131*.
7. 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*).
8. 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.
9. The Plaintiff is the registered proprietor in his capacity as an **Executor and Trustee** in this instance.

10. *"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."*
11. 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.

PLAINTIFF'S CASE (In Summary)

12. The Plaintiff is the registered proprietor as executor and trustee of the land comprised in Crown lease No. 1970 being Lot 16 section 33, Samabula North of the estate of Kupamma.
13. The Defendant was an intended purchaser of the property and upon failure to make all arrangements to purchase the property, the arrangement was cancelled.
14. The Defendant has been living on the property without payment of any rent and on 17th February, 2016, the Plaintiff's lawyers obtained consent to evict the Defendant.
15. On 15th March, 2016, the Defendant was given Notice to Quit but to date he has failed and/or neglected to deliver vacant possession.
16. The Plaintiff filed his written submissions.

DEFENDANT'S CASE (In Summary)

17. The Defendant filed its Affidavit in Opposition and prima facie submitted as follows-
- *Originating Summons doesn't say against whom the order is sought;*
 - *The Certificate of Title is not certified true copy by the Registrar of Titles;*

- The consent obtained from the Director of Lands to proceed with vacant possession is given against James David and not Jamesh Venkataiya. James David took demise in 2002;
- Therefore, the consent becomes null and void;
- If the Defendant is a trespasser then commence with Order 113 application;
- The Notice to Quit gives 7 days' timeframe to vacate when the Law requires 28 days;

ANALYSIS AND DETERMINATION

7. 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?

8. 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)

9. 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)

10. In the instant case, the first limb of s169 applies. However, the Defendants contention is that the Plaintiff is not the registered proprietor of the property. The Plaintiff has only registered the transmission by death as the Executor and Trustee and the property has not been transferred.
11. Upon the perusal of the Plaintiff's and the Defendant's annexures marked "A" and "C" within their respective affidavits filed herein, there cannot be any dispute that the Plaintiff is Registered on the *Crown Lease No. 1970* as the Executor and Trustee. This authority empowers the Plaintiff in his capacity as the Executor and Trustee to carry out necessities and responsibilities to administer the Estate of Kupamma dealing with the Crown Lease No. 1970 only.

CROWN LEASE No. 1970 NOT CERTIFIED TRUE COPY:

12. It has now become appropriate that I make reference to *Section 18 of the Land Transfer Act, Cap 131* 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)

13. 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.
14. The **Crown Lease No. 1970** in the present case filed by the Plaintiff seeking an eviction order is neither signed, under the hand and seal of the Registrar or it is certified as a **True Copy** of the Original Crown Lease No. 1970 in terms of **Section 18 of the Land Transfer Act, Cap 131**.
15. Therefore, the **Crown Lease No. 1970** cannot be admitted into evidence and the Court will not be able to ascertain the legal Registered Proprietor which is the first requirement in terms of **Section 169 of the Land Transfer Act, Cap 131**.

CONSENT:

16. The consent of the Director of Lands confirms that the Plaintiff can issue legal proceedings for eviction against James David and not Jamesh Venkataiya. Therefore the consent issued is null and void.

Whether Originating Summons issued against the Defendant?

17. May be that the contents of the Summons does not mention that the 'Defendant' is required to give vacant possession but the Plaintiff has issued the Originating Summons against the Defendant, Jamesh Venkataiya. In terms of Order 2 of the High Court Rules, 1988 the same can be regularised accordingly.

WHETHER THIS APPLICATION SHOULD BE FILED PURSUANT TO ORDER 113?

18. The Plaintiff has proceeded with this application pursuant to S. 169 of Land Transfer Act, Cap 131 and the Plaintiff has established this burden.

NOTICE TO QUIT

19. The Notice to Quit issued and served on the Defendant in fact gave the Defendant short notice of 7 days and is not in conformity with the Law and Rules.
20. In the circumstances, for the aforesaid rational, the Plaintiff's case is fatal and cannot be taken any further to determine the substantive issue of **Vacant Possession**.

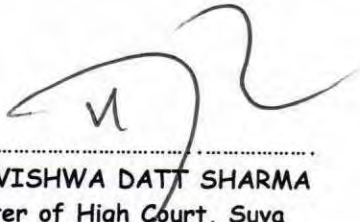
21. Counsels and litigants must always ensure that they file applications within the ambits of the Rules and Laws and are in compliance of every procedure set down by the Rules and Laws so that the Courts are able to deal with their applications in an expeditious, just and fair manner.
22. In **Conclusion**, 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 an order for vacant possession of the land and building comprised in Crown Lease No. 1970 being Lot 16 Section 33 Samabula North situated in the City of Suva in the Island of Vitilevu of which the Plaintiff is the registered proprietor of fails.
- B. The Plaintiff is ordered to pay costs to the Defendant summarily assessed at \$500 (Five hundred dollars) and the same to be paid within 14 days.
- C. Orders accordingly.

DATED AT SUVA THIS 16TH DAY OF NOVEMBER, 2017




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MR VISHWA DATT SHARMA
Master of High Court, Suva

cc: M.C. Lawyers, Suva.
K.S. Law, Nausori.