

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 114 of 2017

BETWEEN: **WININA LIMITED** a duly incorporated company having its registered office at 290 Waimanu Road, Suva, Fiji.

PLAINTIFF

AND: **M. BHAGWAN & COMPANY LIMITED** a duly incorporated company having its registered office at Shop 125 Mark Street, Suva, Fiji.

DEFENDANT

BEFORE: Master Vishwa Datt Sharma

COUNSELS: Mr. Tikoisuva - for the Plaintiff
Ms. Mohini Pillay - for the Defendants

Date of Ruling: 09th April, 2018

RULING

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

A. INTRODUCTION

1. This is the Plaintiff's application seeking for the following Orders:

- (i) The Defendant Show to cause as to why it and its invitees should not give up immediate vacant possession of the property situate at Ground Floor, Winina Arcade, Winina Building, N6 Pater Road, Nausori, Fiji, being the land and building described in Crown Lease No.11844 Lot 1 Lot 11 R.1764, Nausori Town, of which the Plaintiff is the registered proprietor and which the Defendant now unlawfully occupies.
- (ii) The costs of this application to be paid by the Defendant to the Plaintiff.

2. The Plaintiffs' application is made pursuant to *Section 169 of the Land Transfer Act*.
3. The Originating Summons and Affidavit in Support has been served on the Defendant who has opposed the application and thereafter filed and served his respective affidavits.
4. There are three (3) Affidavits filed before this court.
 - (i) Plaintiff's Affidavit in Support deposed by Keith Williams.
 - (ii) Defendant's Affidavit in Opposition deposed by Bhupendra Kumar.
 - (iii) Plaintiff's Affidavit in Reply to the Defendant's Affidavit deposed by Keith Williams.

B. PRACTICE and PROCEDURE

5. The Plaintiff has filed this application pursuant to *Section 169 of the Land Transfer Act 1978, Cap 131*.
6. 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)*.
7. Pursuant to *Section 172 of the Act*, the onus is on the Defendant to show cause why they are refusing to give up possession to the Plaintiff and why an order for possession should not be made against the Defendant.
8. The Plaintiff is the registered proprietor in this instance as can be ascertained from the Crown Lease No. 11844. The term "proprietor" is defined as the registered proprietor of land, or of any estate or interest therein in the Land Transfer Act. Hence the term "proprietor" follows within the ambit of the *Section 169 application*.
9. *"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."*

10. 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 immediate vacant possession should not be made against him.
11. *Section 13 of the Crown Lands Act Cap 132* deals with "Protected Lease" and states as follows-

"Protected leases

13.-(1) whenever in any lease under this Act there has been inserted the following clause:-

"This lease is a protected lease under the provisions of the Crown Lands Act"

(hereinafter called a protected lease) it shall not be lawful for the lessee thereof to alienate or deal with the land comprised in the lease of any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever, nor to mortgage, charge or pledge the same, without the written consent of the Director of Lands first had and obtained, nor, except at the suit or with the written consent of the Director of Lands, shall any such lease be dealt with by any court of law or under the process of any court of law, nor, without such consent as aforesaid, shall the Registrar of Titles register any caveat affecting such lease.

Any sale, transfer, sublease, assignment, mortgage or other alienation or dealing effected without such consent shall be null and void.

(2) On the death of the lessee of any protected lease his executors or administrators may, subject to the consent of the Director of Lands as above provided, assign such lease.

(3) Any lessee aggrieved by the refusal of the Director of Lands to give any consent required by this section may appeal to the Minister within fourteen days after being notified of such refusal. Every such appeal shall be in writing and shall be lodged with the Director of Lands.

*(4) Any consent required by this section may be given in writing by any officer or officers, either solely or jointly, authorised in that behalf by the Director of Lands by notice published in the Gazette. The provisions of subsection (3) shall apply to the refusal of any such officer or officers to give any such consent.
(Inserted by 21 of 1959, s. 2)*

(5) For the purposes of this section "lease" includes a sublease and "lessee" includes a sublessee.

C. Plaintiff's Case

- (i) The Plaintiff is the registered proprietor of all that land and building comprised and described in Crown Lease No. 11844 Lot 1, Lot 11 R.1764 Nausori Town.
- (ii) In or around 1st September 2007 the Plaintiff leased Block A, shop 1 on the Ground Floor of Winnina Arcade, Winina Building on the property to the Defendant on a monthly rent of \$1,534.10.
- (iii) The Director of Lands had consent to the lease and the said consent was stamped onto the Lease Agreement.
- (iv) The Defendant has defaulted in rent payments and despite several warnings and requests for payment, has failed to pay up rent arrears.

- (v) On or about 21st August 2015, the Plaintiff wrote to Bhupendra Kumar, a Director of the Defendant Company at his new address, terminating the lease agreement for failure to pay rent and requested vacant possession of the property by the 30th of September 2015. On 10th February 2016 another Notice to vacate was given to the same Bhupendra Kumar.
- (vi) Despite the service of two letters to the Defendant Company, the defendant has refused to deliver vacant possession and pay rent arrears to the Plaintiff.
- (vii) Since service of the Notice to Quit the Defendants continue to occupy the property and refuse to vacate and deliver up possession to the Plaintiff.
- (viii) The Defendant and his invitees no longer have the authority of the Landlord to occupy the property.
- (ix) The defendant and his invitees are occupying the property unlawfully and without any authority and that they are presently trespassing on the property despite the said notice to quit.

D. Defendant's Case

- (i) That consent has been given to evict M. Bhagwan & Company and not the Defendant.
- (ii) That the Defendant did not enter into any lease agreement with the Plaintiff.
- (iii) The Defendant is a limited liability company.
- (iv) That he has viewed the lease agreement and on its face it seems that the Director of Lands did consent to the lease agreement which is not with the Defendant.
- (v) That he denies having any agreement for payment of rent to the Plaintiff.
- (vi) That the Defendant is not liable for any rental arrears to the Plaintiff.
- (vii) No invoice has been raised on the defendant for it to respond adequately.
- (viii) He denied Paragraphs 12, 13, 14 and 15 of the Plaintiff's Affidavit in Support.
- (ix) He is asking Court to dismiss the Plaintiff's action with costs on an indemnity basis awarded to the Defendant.

ANALYSIS AND DETERMINATION

12. 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?

13. 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)

14. 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)

15. In the instant case, the first limb of s169 applies. The Plaintiff's action falls under *Section 169 (a)* and Crown Lease No. 11844 confirms that the Plaintiff is the last registered proprietor of the same.
16. Further, the Defendant has admitted that the Plaintiff is the current registered proprietor of the property and there cannot be any dispute that the Plaintiff is the registered proprietor of Crown Lease No. 11844. Therefore, this action has been rightfully commenced by the Plaintiff against the Defendant.
17. After the Plaintiff has established the first limb test of section 169, then the Defendants bear the onus of showing cause as to why immediate vacant possession should not be granted by the Defendant to the Plaintiff.
18. 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).
19. 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).
20. The Defendant does not dispute the fact that the Plaintiff is the current registered proprietor of the said property herein.

21. The Defendant's contention is "*whether the Defendant has a right to continue occupation of the property?*"
22. Defence argument is that consent has been granted to evict Bhupendra Kumar and M. Bhagwan & Co and not the Defendant, M. Bhagwan & Company Limited. What is disputed is that neither the consent to the Agreement nor the consent to eviction was ever addressed to the Defendant.
23. The Defendant further submitted that "*there is no Company such as M. Bhagwan & Co. registered under the Companies Act. The Company that is registered is M. Bhagwan & Co. Limited and Bhupendra Kumar is the Director of the said Company. In this case, since a Crown Lease is involved, there needs to be consent from the Director of Lands. The Lands Department has given consent to Bhupendra Kumar and M. Bhagwan & Co and no consent was granted to M. Bhagwan & Co. Limited. Therefore there is no proper consent from the Lands Department and this action ought to be struck out with costs.*"
24. The Plaintiff submitted that the Defendant raises the *preliminary issue* that "*the Director of Lands consent is required for such proceedings and that it is not the party named in the Director of Land's consent which was obtained by the Plaintiff.*"
25. The Plaintiff further summarised the Defendant's contention as follows-
 - *Denies entering into a lease agreement with Plaintiff;*
 - *Denies being in occupation of the property; and*
 - *Denies owing any rent arrears to the Plaintiff.*
26. The Plaintiff has deposed otherwise insisting that the Defendant is in occupation and possession of the property for the following reasons-
 - *The Plaintiff leased Block A, Shop 1 on the Ground Floor of Winina Arcade which is situated on the property to the Defendant;*
 - *That Bhupendra Kumar, the deponent of the Defendant's affidavit signed the lease agreement which expired on 12th September, 2012;*
 - *That the officers of the Plaintiff have contacted the same Bhupendra Kumar face to face, by Telephone and by written correspondence demanding payment of rent arrears and on 21st August, 2015 vacant possession; and*
 - *That after service of the Notice to Quit, Bhupendra Kumar expressed to the Plaintiffs the Defendant's desire to settle the matter out of court, proposed a payment of rent arrears and current rent and wished to continue occupation of the property. The Plaintiff's refused the offer.*
27. I have perused the affidavits filed together with the written submissions and the arguments raised by the Counsels representing the parties to this proceedings.
28. It has become crystal clear from the affidavits, written submissions and the arguments raised that this case hinges on these issues-

- (a) *Whether on the protected lease, prior consent of the Director of Lands as lessor is required for current application made under section 169 of the Land Transfer Act as it is not a dealing of the land under section 13 of the Crown Lands Act?; and*
- (b) *Whether the Defendant has a right to continue occupation of the said property since the consent was not granted to the Defendant?*

29. I will now deal with both issues *whether prior consent is required in applications under section 169 of the Land Transfer Act and whether the Defendant has a right to continue occupation of the property in Question?*

The current case is seeking an order for vacant possession against the Defendant pursuant to *section 169 of the Land Transfer Act.*

The Defendant raised a Preliminary Issue that the Director of Lands consent is required for such proceedings and that it is not the party named in the Director of Lands consent which was obtained.

I now make reference to *section 13 of the Crown Lands Act Cap 132* which deals with *protected lease* and grant of *consent* from the Director of Lands.

Section 13 of the State Lands Act prohibits any dealing in land which is comprised in a State Lease, without the Director of Lands' consent. *Section 169 application* seeking the court's order for ejectment or vacant possession is not "a dealing" in Land of such a nature that would require the Director of Lands consent and therefore the court would not be subject to *section 13.*

It is noted from the court records in the current case before this court that the Affidavit on behalf of the Defendant was deposed by Bhupendra Kumar who happens to be the Director of the Defendant Company. The consent to institute legal proceedings given by the Director of Lands was issued in the name of Bhupendra Kumar and M. Bhagwan & Company. The Notice to Quit dated 20th February, 2016 was also served on Bhupendra Kumar.

Further, I note that the Commercial Agreement was also signed by Bhupendra Kumar which had expired on 14th September, 2012 and subsequently the Lease Agreement was terminated on 21st August, 2015 and he was accordingly advised in writing of the same. Therefore, it is obvious that Bhupendra Kumar was very much aware of this ejectment proceedings.

That being the case, the Defendant has now become a mere occupier of the Crown Lease No. 11844 without lease or rent agreement. Therefore, the Director of Lands' consent is not necessary in the current case for the Plaintiff to institute proceedings for ejectment and/or vacant possession under s. 169.

Justice Gates (as he then was) in *Prasad v Chand* (supra) held as follows-

"Director of Lands' consent is not necessary to institute proceedings for ejectment under Land Transfer Act section 169 of a mere occupier without lease as the lease is not a dealing with land, and the occupier has no title."

30. I find that the Bhupendra Kumar in his capacity as the Director of the Defendant Company was appropriately served with **Notice to Quit** on 10th February, 2016 and **Termination of Lease Agreement** on 21st August, 2015 respectively. Despite the Notice and Termination served, the Defendant has failed to give vacant possession of the property in question and continues to occupy the same to date.

It has been established and I am satisfied that the Plaintiff is the last registered proprietor of **Crown Lease No. 11844**. This has also been confirmed by the Defendant.

Further, I am also satisfied that **Section 169 application** seeking the court's order for ejectment or vacant possession is not "a dealing" in Land and would not require the Director of Lands' consent and therefore the court would not be subject to **section 13**.

31. It is for the **Defendant** to show **cause** why they are refusing to give immediate vacant possession of the land to the Plaintiff and must be able to show Court **some tangible evidence of their right to the possession** of the land, which I find the **Defendant** has failed to do so to the extreme.
32. I further find that the **Defendant** has failed to raise any triable issues nor does he have any legal right to continue occupying the Plaintiff's property whatsoever.

By simply appraising court that consent has been granted to evict Bhupendra Kumar and M. Bhagwan & Co and not the **Defendant, M. Bhagwan & Company Limited** and further stating that the dispute is that neither the consent to the Agreement nor the consent to eviction was ever addressed to the **Defendant** is not sufficient evidence per se to establish that the Defendant has a right to continue occupation of the Plaintiff's property in question.

This court needed some **tangible evidence of the Defendant's right to possession** of the Plaintiff's property on **Crown Lease No. 11844**.

33. I must reiterate and stress that the **summary procedure** has been provided in the **Land Transfer Act, Cap 131** 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.

This applies in the current case before the court and the **Plaintiff** is entitled to have his application decided **summarily** accordingly.

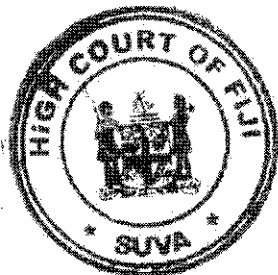
34. The **Plaintiff** is for the purposes of **section 169** the last registered proprietor and Lessee of the said property and accordingly has the **locus standi** to commence or bring in this proceeding against the **Defendant**.
35. I find that the **Defendant** has failed to show any cause including a **right to possession** or have **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**.
36. There is accordingly nothing in **section 172** which requires an automatic order for possession unless "cause" was immediately shown.
37. It has become appropriate now and I am inclined to order **costs** against the Defendant in this case bearing in mind the time spent in court in representation of the case, usage of court resources and time and so forth. Cost is summarily assessed at \$1,000 against the Defendant and to be paid within 14 days' time frame to the Plaintiff.


38. In Conclusion, for the aforesaid rational ,I have no other alternative but to make the following final Orders against the Defendant-

FINAL ORDERS

- A. An order that the Defendant give vacant possession of the Plaintiffs' property situated at Ground Floor, Winina Arcade, Winina Building, NG Pater Road, Nausori, Fiji, being the land and building described in Crown Lease No.11844 Lot 1 Lot 11 R.1764, Nausori Town, to the Plaintiff in one calendar months' time on or before 05th May, 2018 @ 4 pm.
- B. Execution is hereby suspended till the 05th May, 2018 @4pm.
- D. The Defendant to pay Costs to the Plaintiff summarily assessed at \$1,000 and to be paid within 14 days' time frame.
- E. Orders accordingly.

Dated at Suva this 09th day of April, 2018




VISHWA DATT SHARMA
Master

cc: Mitcheill Keil, Suva
Reddy & Nandan Lawyers, Suva