

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 47 of 2017

IN THE MATTER of an application
for possession of land under Section
169 of Part 24 of the Land Transfer
Act.

BETWEEN: KAMLESH CHANDRA of Aidney Road, Raiwaqa, Suva, Fiji Islands, Businessman.

PLAINTIFF

AND: SUREND PRASAD a.k.a. DEWAN CHAND of Waila, Nausori, Fiji Islands, occupation
unknown to the Plaintiff.

DEFENDANT

BEFORE: Master Vishwa Datt Sharma

COUNSELS: Mr. Filipe - for the Plaintiff
Ms. Mishra - Defendant

Date of Ruling: 24th July, 2018 @ 9am

RULING

*[Application seeking Vacant Possession pursuant to Section 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 he should not give up immediate vacant possession to the Plaintiff of all the freehold property vested in the Plaintiff which the Defendant is unlawfully occupying being the land comprised and described in Certificate of Title No. 49732 being Lot 1 on Deposit Plan No. 9454 situated at Waila, Nausori, Fiji Islands of which the Plaintiff is the registered proprietor.
 - (ii) The costs of this application be summarily assessed and paid by the Defendant to the Plaintiff within a prescribed time.
2. The Plaintiffs' application is made pursuant to *Section 169 of the Land Transfer Act and under the Inherent Jurisdiction of this Honourable Court.*
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 deposited by Kamlesh Chandra.
 - (ii) Defendant's Affidavit in Opposition deposited by Surend Prasad.
 - (iii) Plaintiff's Affidavit in Reply to the Defendant's Affidavit deposited by Kamlesh Chandra.

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 he is 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 Certificate of Title No 40732 filed as annexure "KC2". 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.

C. BRIEF BACKGROUND

11. The Plaintiff is the registered proprietor of all the freehold property comprised and described in the Certificate of Title No. 40732 being Lot 1 on Deposit Plan No. 9454 situated at Waila, Nausori. The Plaintiff served an Eviction Notice dated 21st December, 2016 on the defendant for the defendant to quit and deliver vacant possession of the land that he was purported to be illegally occupying.
12. The Defendant contends that in 2004, the Plaintiff asked him to manage and tend his farm in Nausori and that he was provided with a farm house to reside on for free.
13. The Defendant also states that he was never paid any wages for the work he would do for the Plaintiff rather he states that sometime in 2005, the Plaintiff visited him and promised the Defendant that he would give his farm house to him for free or he (the Plaintiff) would buy the Defendant a block of land for free.
14. The Plaintiff denies making such a promise to the Defendant. However, he suggests that sometime in 2005, he had informed the Defendant that he could continue to stay on the land on a temporary basis and that no such promise as the Defendant contends was ever made.

ANALYSIS AND DETERMINATION

15. 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?*

16. 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)

17. 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)

18. In the instant case, **the first limb of s169 applies**. The Plaintiff's action falls under **Section 169 (a)** and the Certificate of Title No. 40732 confirms that the Plaintiff is the **last registered proprietor** of the same.
19. 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 the Certificate of Title No. 40732. Therefore, this action has been rightfully commenced by the Plaintiff against the Defendant.
20. **After the Plaintiff** has established the first limb test of section 169, then the Defendant bear the **onus of showing cause** as to why **immediate vacant possession** should not be granted by the Defendant to the Plaintiff.
21. 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).

22. 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).
23. The **Defendant** does not **dispute** the fact that the **Plaintiff** is the current **registered proprietor** of the said **property** herein.
24. The **Defendant's** contention is "*whether the Defendant has a right to continue occupation of the said property?*"
25. **The Defendant's** argument is that the defendant is relying on the **promise** made to him by the Plaintiff sometime in 2005 wherein he was **promised** to be given the farm house or the Plaintiff would buy him a block of land for free. That after the Plaintiff had made the promise to the Defendant, the Defendant would ask him over the years when he would transfer the farm house to him. The Plaintiff would always reply that he would do so in the future. Therefore, it is as per the **Plaintiff's promise** that the Defendant continued to stay on the said property and refuses to give vacant possession to the Plaintiff.
26. From the **Defendant's** argument hereinabove, it can be ascertained clearly that he is raising the **Defence of Promissory and Proprietary Estoppel**.

Promissory and Proprietary Estoppel

27. The **Defendant** raised the **Defence of Promissory and Proprietary Estoppel** stating the following-

"The defendant is relying on the **promise** made to him by the Plaintiff sometime in 2005 wherein he was **promised** to be given the farm house or the Plaintiff would buy him a block of land for free. That after the Plaintiff had made the promise to the Defendant, the Defendant would ask him over the years when he would transfer the farm house to him. The Plaintiff would always reply that he would do so in the future. Therefore, it is as per the **Plaintiff's promise** that the Defendant continued to stay on the said property and refuses to give vacant possession to the Plaintiff.

28. However, the Counsel for the Plaintiff submitted that the Plaintiff is the registered proprietor of the land **comprised and described in Certificate of Title No. 49732 being Lot 1 on Deposit Plan No. 9454 situated at Waila, Nausori** and not the Defendant. Therefore, the Defendant does not hold any legal rights to occupy the land.
29. Proprietary estoppel used to be called '*estoppel by acquiescence*' (*Lord Denning, The Discipline of Law, Butterworths, New Delhi, Aditya Books, 1993 at page 216*).

In **Denny v Jessen [1977] 1 NZLR 635 at 639** Justice White summarized **proprietary estoppel** as follows:

"In Snell's Principles of Equity (27th Ed) 565 it is stated that proprietary estoppel is "... capable of operating positively so far as to confer a right of action". It 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. In Plaimmer v Wellington City Corporation (1884) 9 App CAS 699; NZPCC 250 it was stated by the Privy Council that "...the equity arising from expenditure on land need not fail merely on the ground that the interest to be secured has not been expressly indicated."(ibid, 713, 29). After referring to the cases, including Ramsden v Dyson (1866) LR 1 HL 129, the opinion of the Privy Council continued, "In fact the court must look at the circumstances in each case to decide in what way the equity can be satisfied" (9 App Cas 699, 714; NZPCC 250, 260). In Chalmers v Pardoe [1963] 1WLR 677; [1963] 3 All ER 552 (PC) a person expending money was held entitled to a charge on the same principle. The principle was again applied by the Court of Appeal in Inwards v Baker [1965] 2 QB 29; [1965] 1 All ER 446. There a son had built on land owned by his father who died leaving his estate to others. Lord Denning MR, with whom Danckwerts and Salmon L JJ agreed, said that all that was necessary;

"... is that the licensee should, at the request or with the encouragement of the landlord, have spent the money in expectation of being allowed to stay there. If so, the court will not allow that expectation to be defeated where it would be inequitable so to do." (ibid, 37,449).

(Underline is mine)

30. Reference is made to the case of *Wilfred Thomas Peter v Hira Lal and Frasiko*; HBC 40 of 2009 where Her Ladyship Justice Wati stated:

'I must analyse whether the four conditions have been met for the defense of proprietary estoppel to apply. The four conditions are:

- i. An expenditure;*
- ii. A mistaken belief*
- iii. Conscious silence on the part of the owner of the land; and*
- iv. No bar to the equity*

31. In order to satisfy this court with the Four (4) conditions of the proprietary test, the Defendant has not addressed this court on every conditions hereinabove rather reiterated the same argument in general terms "that the defendant is relying on the promise made to him by the Plaintiff sometime in 2005 wherein he was promised to be given the farm house or the Plaintiff would buy him a block of land for free. The Defendant stated that he was never paid any wages for the work he would do for the Plaintiff. That after the Plaintiff had made the promise to the Defendant, the Defendant would ask him over the years when he would transfer the farm house to

him. The Plaintiff would always reply that he would do so in the future. Therefore, it is as per the **Plaintiff's promise** that the Defendant continued to stay on the said property and refuses to give vacant possession to the Plaintiff".

On the other hand, the Plaintiff submitted "that the Defendant cannot rely on the principles of equity given that he has not provided any evidence of expenditure or a mistaken belief or conscious silence on the part of the owner of the land. The Defendant as he has admitted was just there to look after the farm. There is no evidence simply to support any conditions of proprietary estoppel. Further there is no written Agreement or contract between the parties in this case for any such promise of transfer and which does not comply with section 59 (d) of the indemnity Guarantee and Bailment Act.

32. The issue then is whether any expenditure made by the Defendant in terms of the wages and/or work carried out on the farm and property gives rise to create any right to the land and Defendant's to remain in continuation occupation of the subject property.
33. It is also to be noted that there was no concrete written consent, promise or undertaking of any nature made by the Plaintiff to the Defendant. Further, no documentary evidence has been produced by the Defendant to this court.
34. In order to satisfy the court on **this limb**, the **onus is on the Defendant to prove that he had some sort of genuine belief that he allegedly owned the land he was living or had ownership rights to the land.**
35. I find that there is no evidence in terms of knowledge on the part of the owners of the land that the Defendant in occupation of the land had and was continuing to incur any expenditure and the owner/proprietor had nothing to stop him from doing so. The Defendant in his Affidavit in Opposition has stated that "he looked after, managed and tend to his farm in Nausori and was never paid any wages for the work he did on the farm, however, the Plaintiff provided him with a farm house to reside on for free which he occupies to date. If this did take place then it was just a verbal discussion and arrangement but no concrete commitment was made to see that the actual physical entitlement to transfer the ownership of the land was made to the Defendant. There is no such evidence tendered to court.
36. Reference is made to the case of *Tuidama v Prasad [2011] HBC 508 of 2007* Mutunayagaum J said;

"Snell's Equity, 29 Ed, page 576 provides that 'no equity will arise if it is to enforce the right claimed would contravene some statute.'

37. *Section 59 (d) of the Indemnity, Guarantee and Bailment Act (Cap 232) provides:*
No actions shall be brought-

(d) *Upon any contract or sale of lands, tenements or hereditaments or any interest in or concerning them unless the agreement upon which such action is to be brought or some memorandum or note thereof in writing.'*

38. In terms of the abovementioned Act, the Defendant has clearly not complied with the above **section 59 (d) of the Indemnity, Guarantee and Bailment Act (Cap 232)** provision. In that, there was no agreement entered into and therefore the Defendant has failed to prove the necessary premises of fact in order to found an application of the **equitable doctrine of proprietary estoppels**.
39. Bearing in mind the aforesaid arguments raised by both parties to the proceedings, the **Plaintiffs contention** all along has been that the Plaintiff is the registered proprietor of all that land comprised and described in Certificate of Title No. **49732 being Lot 1 on Deposit Plan No. 9454 situated at Waila, Nausori**. That the Defendant is not the registered proprietor of the land and do not hold any legal Title or legal rights to occupy the land. The Defendant's claim as to estoppels is misconceived and none of the test hereinabove has been satisfied by the Defendant in the instant case.
40. Whereas, the main **contention of the Defendant** is that the Plaintiff promised him that he would give his farm house to the Defendant for free or else the Plaintiff would buy him a block of land for free.
41. The Defendant has failed to furnish court with any agreements or other documentary written evidence in order to show to court that the proprietor and/or owner and the Defendant did enter into any sort of agreement which would be in conformity with the abovementioned Act. Rather, it was only the alleged promise of the Plaintiff that the Defendant relies on in this case to defend his case stating that as a result of that promise that the Defendant is entitled to continue with the current occupation of the property and not give up vacant possession as sought for herein.
42. Finally, the Defendant had knowledge that he had been in occupation of the said property in question for a number of years going back to 2005 when the Defendant alleges that the Plaintiff made the promise. Yet, the Defendant did not think appropriate and important that in the said circumstances he should have made an appropriate application for a '**Vesting Order**' and seek any **legal interest and entitlement to the property in occupation**, rather he thought fit and proper to continue with the occupation of the said premises in the manner that he did and is now faced with an application for vacant possession accordingly.
43. For the aforesaid rational, I find that the property comprised in **Certificate of Title No. 49732 being Lot 1 on Deposit Plan No. 9454 situated at Waila, Nausori, in the Republic of Fiji Islands** is registered in the name of the Plaintiff Kamlesh Chandra. Thus, the Plaintiff being the owners of the property in question.
44. The defendant has failed to show any cause including a *right to possession* or has *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*.

45. There is accordingly nothing in *section 172* which requires an automatic order for possession unless "cause" is immediately shown.
46. Further, the Defendant has failed to satisfy this court on the four (4) limb test for the proprietary estoppel which he raised in his Defence.
47. Following are the final orders of this court.

FINAL ORDERS

- A. The Defendant to give vacant possession of the land comprised in Certificate of Title No. 49732 being Lot 1 on Deposit Plan No. 9454 situated at Waila, Nausori, in the Republic of Fiji Islands, to the Plaintiff.
- B. The Defendant to deliver vacant possession to the Plaintiff in one (1) months' time on or before the 25th August, 2018 @ 4pm.
- C. Execution is hereby suspended till the 25th August, 2018 @ 4pm.
- D. There will be no order as to Costs made against the Defendant at Court's own discretion.

Dated at Suva this 24th Day of July, 2018



Master
VISHWA DATT SHARMA

CC: Haniff Tuitoga, Suva
Legal Aid Commission, Suva