

**IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION**

CIVIL ACTION NO.: HBC 133 of 2017

BETWEEN : **MOHAMMED FAROOQ** aka **MOHAMED FAROOD**
PLAINTIFF

AND : **MAINMUN NISHA** aka **MEHMUN NISHA**
DEFENDANT

APPEARANCES/REPRESENTATION

PLAINTIFF : Ms J Lal [Neel Shivam Lawyers]

DEFENDANT : Mr K Chang [Legal Aid Commission]

RULING OF : Acting Master Ms Vandhana Lal

DELIVERED ON : 04 October 2018

JUDGMENT

[Section 169 application for vacant possession]

INTRODUCTION

1. The Plaintiff is seeking orders for vacant possession of property comprised in Certificate of Title No. 17598 being Lot 21 on Deposit Plan Number 4257 also known as Flat Number 2 situated in the District of Naitasiri in the Island of Viti Levu.

Said application is made pursuant to Section 169 of the Land Transfer Act.

He has filed an affidavit in support of the application.

2. The Defendant is opposing the application and has filed an affidavit in opposition sworn on 2 August 2017.
3. A reply to the aforementioned affidavit was filed on 23 August 2017.
4. Both Counsels at hearing relied on the written submission filed on behalf of respective parties.

PLAINTIFF'S CASE

5. Plaintiff claims to be the registered proprietor of the aforementioned property.

He acquired the said property through his father's will.

On 5 November 2013, he obtained a grant of probate.

On 24 May 2014, the said property was transferred to him by way of administration and pursuant to probate number 54585.

The Defendant is his younger sister and their late father had allowed her to stay on the property when he was alive.

As per their father's will, the Estate was bequeathed to him. The Defendant was to be given \$1,000 from the Estate.

By a letter dated 22 October 2016 he had informed the Defendant of his intention to renovate the property and made request for her to vacate.

His Counsel also effected service of Notice to Quit demanding immediate vacant possession.

However the Defendant has not vacated the property and continues to occupy the same.

According to the Plaintiff, on or about 1998 the Defendant approached their father informing she did not have a place to stay as she was evicted from her property. For this reason their father allowed her to stay on the property.

This was a temporary arrangement until the Defendant found a place to stay.

When the Defendant and her family moved on the property this was a single storey building with 5 bedroom having two flats. The front portion was on rent.

There were few maintenance works which Defendant carried out with the Plaintiff's consent and approval. There are no concrete laid on the driveway as claimed by Defendant. Only few bedroom were tiled and not the whole house. The fence remains the same with the roof on the terrace hanging and not changed as claimed by the Defendant.

The Plaintiff claims to have shown the Defendant their father's last will and testament dated 10 August 1998 and that the Defendant was aware of the fact that the Plaintiff inherited the said property.

DEFENDANT'S CASE

6. She has been residing on the property with her husband and children with her father for 20 years.

Prior to her and husband moving on the property, her two children lived on the property with her father whilst she would go to do house work and work for her elderly father.

On the Plaintiff's insistence she moved on to the property with her husband. This was a verbal arrangement.

At this time this was a single storey building with 05 bedrooms, 1 toilet and bathroom, 1 kitchen and 1 living and dining area.

Subsequently she and her husband fenced the front of the property, laid concrete on the whole of the driveway, tiled the whole house, built a master bedroom, changed the roof in the terrace. These maintenance works were carried out as the property was not fit to be occupied.

Additional extension was done made of corrugated iron and timber, made a kitchen, toilet and bathroom, living and dining area. The total amount spent is estimated at \$40,000.

They are still making repayments to Carpenters Finance for materials purchased. She has also made payment to Nasinu Town Council for outstanding town rates.

She had informed the Plaintiff of the maintenance work and extension carried out on the property and was never informed not to do so. Nor was she informed of the Will.

When their father was alive, he had expressly stated that the said property belonged to her living a Will dated 17 April 2012 wherein he bequeathed said property to her.

She was not aware of earlier Will until passing of her father.

She had instructed Nands Law to take out a Probate on said Will but this was not done due to certain issues.

Nands Law maintains they have returned the original Will to her but she has not received this. A complaint was lodged with the Legal Practitioners Unit.

Neither the Plaintiff nor her father informed her of the Will dated 10 August 1998. And the Plaintiff expressed same sentiment as her father for her to have the property.

She claims to have legal and equitable right to remain on the property.

LAW

7. Section 169 of the Land Transfer Act reads:

"The following persons may summons any person in possession of land to appear before a Judge in Chambers to show cause why the persons summoned should not give up possession to the applicant:

- a. the last registered proprietor of the land;*
- b. a lessor with the 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 no 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."*

8. Defence available under Section 172 is that:

“the person summoned may show cause why he or she refuses to give possession of such land and, if he or she proves to the satisfaction of the Judge a right to the possession of the land.”

DETERMINATION

9. There are no issues concerning the service of the application and affidavit.

Proof Of Ownership

10. Whilst proving his right to bring the proceeding, the Plaintiff has annexed copy of Transfer of Land in fee simple which document is not an original certified copy but copy stat of a certified copy. I again note that the copy stat, is not certified by the Registrar of Titles Office but by a private counsel.

11. Section 18 of the Land Transfer Act reads:

*“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 or such particulars being entered in the register. [emphasis mine]*

12. As such I cannot rely on the said document.

13. Furthermore I will not make reliance on the Probate marked as annexure MF2 to the Affidavit in Support for following reasons:

- It is not a certified true copy.
- The document is not annexed in its full form.

14. However in their Supplementary Affidavit filed on 18 April 2018 have annexed a certified copy of the title to Lot 1 number 17598 and as per the endorsement transmission by death was registered under Plaintiff's name on 17 February 2016 as sole executor and trustee of the Estate of Mohammed.

This gives him locus stand to bring the proceeding under Section 169.

15. A notice to quit was served on the Defendant which has been acknowledged by the Defendant in her affidavit in response.

Show Cause By Defendant

16. The Defendant now has to show that she has a right to occupy the premises or that there is a tribal issue.

Her claim is that she has been residing on the property with her father whom she looked after. She moved on the property on the insistence of the Plaintiff.

She and her husband have carried out certain improvement and renovation work on the property spending about \$40, 000. They are still repaying debt to Carpenters Finance.

She has also made payments for town rates.

The Plaintiff informed of the maintenance work and was never stopped by the Plaintiff.

Their father had left a Will dated 17 April 2012 bequeathing her the property.

She is not aware of the Will on which Probate has been granted.

She had engaged a Counsel to apply for Probate on the will of 17 April 2012 but this could not be done due to certain issues.

17. The Defendant has been residing on the property since 1998 as stated by the Plaintiff in his affidavit in reply.

There is dispute concerning how she came about living on the property but the fact remains she has been living there for some 20 odd years.

18. Plaintiff claims this was a temporary arrangement which I find hard to believe given the fact that the Defendant has been residing there for 20 odd years.

19. Their father passed away on 1 May 2012 and the Plaintiff again for last 5 years did not take any action against the Defendant.

20. There is some evidence to show the Defendant has spent money on the property and she claims to be in the property on the Plaintiff's insistence.

21. I find the Defendant has established proprietary estoppel over the property and there are issues to be tried under an action through a Writ.

22. For this reason, the originating summons is converted into a writ.


The Plaintiff is directed to file and serve a statement of claim in 14 days.

The Defendant is to file and serve her statement of defence in 14 days thereafter.

Reply if any by the Plaintiff in 07 days.

23. Further orders are that the Plaintiff pays cost to the Defendant in 14 days. Cost is summarily assessed at \$500.




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Vandhana Lal [Ms]
Acting Master
At Suva.