

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

CIVIL ACTION NO.: HBC 110 of 2018

IN THE MATTER of an application under Section 169 of Part XXIV of the Land Transfer Act, Cap. 131 for the Order for immediate vacant possession.

BETWEEN : **HENRY SEMITI ROGO**
PLAINTIFF

AND : **NEMANI KOBITI (JNR) and SERA KOBITI**
DEFENDANTS

APPEARANCES/REPRESENTATION

PLAINTIFF : Mr P Niubalavu [Oceanica IP]
DEFENDANTS : Ms Tikoisuvu [Togavivalu & Valenitabua]
JUDGMENT OF : Acting Master Ms Vandhana Lal
DELIVERED ON : 08 November 2019

JUDGMENT

[Section 169 – Vacant Possession]

1. The Plaintiff has filed an originating summons seeking orders that Defendants do show cause under Section 169 of the Land Transfer Act why an order for immediate vacant possession of the premises situated on Housing Authority No. 168215 described as Lot 111 on DP Plain No. 3876 should not be made against the Defendants.
2. The Plaintiff states to be the last registered proprietor of the land. He has to his affidavit annexed a copy of title certified by the Registrar of Titles.

The Defendants are said to have illegally occupied the property without the Plaintiff's consent.

The Defendants have been illegally renting out the premises to USP Students and illegally collecting rents.

On 5 November 2017 a notice was served on Gloreen Abiut [Annexure B to the Affidavit in Support].

The Defendants later took possession of the property hence the Plaintiff's solicitors issued to the Defendants an eviction notice dated 22 February 2018. The Defendants have failed to vacate the property.

The Plaintiff has consent from the Housing Authority to issue said proceeding.

3. The Defendants acknowledged service of the summons indicating their intention to contest the proceedings.

An affidavit in opposition was filed on 07 June 2018.

4. Sera Kobiti and Nemani Kobiti (Jnr) are mother and son.

The Plaintiff and Sera are step siblings from same mother. Sera being the eldest of the 5 siblings.

The Plaintiff is the biological son of late Tupou Liutai with late Semiti Rogo aka Rogo Semiti aka Semiti Rogoivoso aka Semiti Rogo Fakataukai.

The Plaintiff is said to be the administrator to the Estate of Tupou Liutai by Letter of Administration No. 54227.

The Plaintiff's father passed away intestate at that time survived by his wife Tupou and 4 children.

Semiti and Tupou had a property under their names being the property subject to these proceedings.

On 15 August 2012, their mother Tupou passed away. On 3 October 2013, the Plaintiff obtained a letter of administration for Estate of Tupou and later on 01 November 2013 he obtained Letters of Administration for the Estate of Semiti.

Being the eldest daughter Sera was close to her mother and normally cared for her until she passed away.

The Plaintiff always lived overseas and had limited contact with their mother except to call her on occasions and/or send her money.

Sometimes in 2003 and in 2012, the Plaintiff returned to Fiji for a short visit. Their mother lived with Sera at given time.

During this short visit to Fiji, the Plaintiff took their mother to a law firm and fraudulently misrepresented to her that she was signing some documents to ensure the property would be passed to her [Sera].

According to Sera, she has knowledge of this as she had asked her mother as to the nature of the visit to the town with the Plaintiff.

She had also asked the Plaintiff and was told that the Plaintiff had asked their mother to sign documents "to only manage the property".

According to Sera, the Plaintiff had invited her to a lunch and was informed at lunch that she need not worry as the Plaintiff was only looking after the property and advise her of any changes.

Between 2003 and 2008, she would visit her mother daily after work or bring her over to be with them for the day. Her mother had asked to move in with Sera and live with them.

Sera brought her mother to her house. Their nephew Michael Vakatoto and son Nemani Kobiti Junior resided on the property at the given time.

In 2010, the Plaintiff and Sera with two sisters Lisa and Kalo visited their mother for her 80th birthday.

During their visit to her mother, they tried to get some document signed which she refused to do so.

To maintain the property Sera after consulting her mother rented the property from June 2011. The rental assisted towards the ground rent to Housing Authority, rates to the Suva City Council, water and electricity bills.

In August 2012, when their mother passed away she was surprised to find all documents that Plaintiff had threatened her with.

Their mother was 81 and said to be frail. Sera later came to know that her mother had allegedly signed a Will giving administrative powers to the Plaintiff and the Plaintiff would himself benefit from the property.

The Defendants alleges that the Plaintiff has fraudulently and deceptively misrepresented the nature of signing documents to their mother and that their mother did not sign the will understanding the contents and effects of it.

Further the Defendants allege that the signature on the Will and the signature on title of the property are different.

Sera claims to have been looking after the property since 2011, paying for the necessary bills and expenses of maintaining it. The Plaintiff is said to have never contributed.

Sera claims to have legitimate interest as a beneficiary of the property.

She has instructed his solicitors to challenge the validity of the Will and she also tried to sort the matter with the Plaintiff who has refused to do so.

5. The relevant provision in the Land Transfer Act relating to proceedings of this nature are sections 169 – 172 which is reproduced below:

Ejectors

169. 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) a lessor against a lessee or tenant where a legal notice to quit has been given or the term of the lease has expired.*

Particulars to be stated in summons

170. *The summons shall contain a description of the land and shall require the person summoned to appear at the court on a day not earlier than sixteen days after the service of the summons.*

Order for possession

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.*

Dismissal of summons

172. *If the 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;*

Provided that the dismissal of the summons shall not prejudice the right of the plaintiff to take any other proceedings against the person summoned to which he may be otherwise entitled;

Provided also that in the case of a lessor against a lessee, if the lessee, before the hearing, pay or tender all rent due and all costs incurred by the lessor, the judge shall dismiss the summons.

6. The sub-lease with Housing Authority is registered with the Registrar of Titles and the property was transferred to Henry Semiti Rogo on 16 June 2017.

The entry for transmission by death for Estate of Tupou and Semiti was done on 5 May 2015.

I find the Plaintiff is entitled to bring proceeding under Section 169 of the Act.

7. The property has been described in the summons hence I find the Plaintiff to be in compliance with Section 170
8. Pursuant to Section 172, the Defendants have to show cause why they refuse to give possession of the land and if they prove to the satisfaction of this court a right to the possession the summon shall be dismissed or any order may be made or terms imposed as is fit.

According to the Defendants, the property was owned by the Plaintiff and Second Defendants parents. Sera claims to have looked after their mother until her death and has continued to maintain the property.

The transfer so done by the Plaintiff was done fraudulently preventing the Defendant and other siblings from their interest in their property.

9. As per the last will of Tupou Liutai she had nominated the Plaintiff as sole beneficiary of her property.

A grant was obtained by the Plaintiff on 3 October 2013.

10. The Plaintiff obtained a grant to the Estate of Semiti Rogo on 01 November 2013.

The Defendants are not legal issues of Semiti Rogo hence the Plaintiff has priority of entitlement under the Succession, Probate and Administrative Act.

There are no evidence that the other two legal issues of Semiti – Elisa Ann and Kalolaine Toemu – o- Lotuma are challenging the grant.

11. As far as this court is concerned, a grant for Tupou's Estate was made in 2013 and still remains unchallenged.
12. What the Defendants have made are mere allegation of fraudulent transfer.
13. **Gates J. in Prasad v. Mohammed a Lautoka High Court Civil Action Number 272 of 1999 delivered on 3 June 2005 held:**
"A threshold of evidence must be reached by the Defendant before the Plaintiff can be denied his summary remedy".
14. I do not find the Defendants have met that threshold entitling them not give possession.
15. In the circumstance the Plaintiff is granted an order for immediate possession of the land on Housing Authority No. 168215 described as Lot 111 on DP Plain No. 3876.

The Defendants are ordered to pay cost summarily assessed at \$1,000. Said cost to be paid in 14 days.




.....
Vandhana Lal [Ms]
Acting Master
At Suva.