**IN THE HIGH COURT OF FIJI (AT SUVA)**
**APPELLATE JURISDICTION**

**Civil Action No. 13 of 2019**

**BETWEEN** : **MAUREEN ARUNA YOUNG** aka **MAUREEN ARUNA VERMA** and **USHA REAMS** aka **USHA VERMA** aka **USHA FRANCES REAMS** of Catalina Street, Laucala Bay, Suva and 90 Shakespeare Ct, Tracy, California 95376, USA, both retired

APPELLANTS/(ORIGINAL PLAINTIFFS)

**AND** : **LINDA VERMA** of 5 Kings Road, Nasinu, Occupation Unknown

FIRST RESPONDENT/(ORIGINAL FIRST DEFENDANT)

**AND** : **ROBERTA TUIVUNILAGI** of 5 Kings Road, Nasinu, Occupation Unknown

SECOND RESPONDENT/(ORIGINAL SECOND DEFENDANT)

**AND** : **FRANCES VERMA** of 5 Kings Road, Nasinu, Occupation Unknown

THIRD RESPONDENT/(ORIGINAL THIRD DEFENDANT)

**AND** : **FRANCES TUIVUNILAGI** of 5 Kings Road, Nasinu, Occupation Unknown

FOURTH RESPONDENT/(ORIGINAL FOURTH DEFENDANT)

**AND** : **TREVINA TUIVUNILAGI** of 5 Kings Road, Nasinu, Occupation Unknown

FIFTH RESPONDENT/(ORIGINAL FIFTH DEFENDANT)

BEFORE : Justice M. Javed Mansoor

COUNSEL : Mr S. Parshotam and Mr E. Kumar with him for the Plaintiff

: Mr. G. O'Driscoll for the Defendant

Date of Hearing : 17 May 2019

Date of Judgment : 14 June 2019

## JUDGMENT

LAND TRANSFER ACT: ejectment – originating summons – Leave to Appeal the Master's Order – when to show cause – defendant must prove right to possession of land – summary procedure – object of legislation – practice before court in S.169 proceedings - matters on record before court

References:

Legislation:

Land Transfer Act, Sections 38, 169, 170 & 172

Cases:

1. Shakuntala Devi v Hari Krishna Thakorlal Narsey HBC 94 of 2018
2. Harakh Narayan v Chotu Bhai Patel, Civil Appeal No.26 of 1985
3. Morris Hedstrom Limited v Liaquat Ali, Action No.153 of 1987
4. Suva City Council v Suva City Council Staff's Association, [1995] FJHC 169
5. Vivek Prasad v. Ram Sundar, CA 788/ 76 (unreported)
6. Dinesh Jamnadas and another v Honson Limited, [1985] 31 FLR 62
7. Kendall v Hamilton [1879] 4 AC 504

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1. The Appellants made an application dated 15 January 2019 in terms of Section 169 of the Land Transfer Act (the Act), praying for orders that the Defendants show cause why they should not give up immediate vacant possession of the property situated at King's Road, Nasinu, comprised in certificate of title No.8297, being Lot 5 on deposited plan No.1888, and that the Respondents give up immediate vacant possession of such property.

2. The Originating Summons required the parties to attend the Master in Chambers on 28 February 2019. It was not taken up on that day, as the matter was vacated two days previously and re-listed for mention before the Master on

7 March 2019. When the matter came up in Court on that day, the Master directed the Respondents to file affidavits in opposition within 21 days, the Appellants to reply within 14 days and the parties to file written submission 21 days thereafter. The hearing was fixed for 20 June 2016. It is these time-lines laid down by the Master that is the subject of the Appellants' complaint.

3. On 9 May 2019, when this matter came up for hearing of the application for leave to appeal the order of the Master, counsel for the Respondents, Mr. G. O Driscoll, consented to leave being granted to the Appellants on the ground that the decision appealed was a matter that raised an important question of law that needed to be settled by Court.

4. The Appellants' grounds of appeal stated:

   A. The learned Acting Master erred in law and fact by failing to consider that on the hearing date of the application, the Defendants (Respondents) were to show cause why they ought not to give up immediate vacant possession of the property

   B. The Learned Acting Master erred in law and fact by directing a timetable for the filing of affidavits and written submissions by the Plaintiffs (Appellants) and the Defendants (Respondents)

   C. That the Learned Acting Master erred in law and fact by failing to determine the matter summarily.

5. Counsel for the Appellants tendered written submissions in addition to making oral submissions at the hearing. Counsel for the Respondents made oral submissions but did not tender written submissions.

6. Sections 169 and 172 of the Act are the sections relevant to this appeal. Section 169 states:

   "*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*".

7. The Appellants are the last registered proprietors of the land; an instrument registered under the Act confers conclusive evidence of title[1]. Such registration – which has been introduced under the Torrens system – grants a title recognised in law as unimpeachable or indefeasible[2]. Counsel for the Appellants submit that once the Appellants established the category under which they fall in terms of Section 169 of the Act, the onus is on the Respondents to show cause as to why he or she should not give up vacant possession of the property. Cause can be shown either by affidavits or through oral evidence.

8. Counsel for the Appellants submitted that the procedure envisaged in Section 169 of the Act was summary in nature and was meant for expeditious disposal of matters. The summons prescribed a period of not less than 16 days for the purpose of having the matter taken up for hearing in Court. However, it was submitted, that the Respondents had the benefit of 29 days to show cause, when the matter was eventually taken up on 7 March 2019, and that this should have given the Respondents sufficient time to instruct counsel and show cause to the Court. It was the counsel's contention that in terms of the statutory provision there was no automatic adjournment of the hearing and that some cause must be shown on the day fixed for showing cause. Counsel submitted that if the Defendant was not prepared or unable to show cause on the day fixed for showing cause, the Court may at its discretion grant time to the Respondents. A timetable, he contended, defeated the purpose of the legislation, which provided for expeditious relief to the categories mentioned in Section 169 of the Act.

9. Counsel for the Respondents raised a preliminary objection that the summons was served late on the Respondents. Mr. Parshotam submitted, for the Appellants, that the delay in service was due to administrative delays emanating from the court registry, and that summons was served on the Respondents as soon as they were available for service. In any event, this contention cannot succeed, with the Respondents not having complained about any such delay in service to the Master. Moreover, with the granting of leave to appeal the order, this question loses materiality.

[1] Section 38, Land Transfer Act
[2] Shakuntala Devi v Hari Krishna Thakorlal Narsey HBC 94 of 2018

10. Mr. Driscoll, however, agreed that cause must be shown on the date set in the summons for hearing, and that the hearing should be immediate in proceedings under Section 169 of the Land Transfer Act. However, he posited that the Respondents had shown cause to the Master. It was his position that Robert Verma had a valid claim on the property, and that upon this being brought to the Master's attention, the parties were directed to file affidavits.

11. The next contention on behalf of the Respondents was that the Appellants had not raised any objection before the Master when a timetable was directed to be followed, and that, therefore, this could not be objected to in appeal. This is not a case of Court admitting fresh evidence in appeal. Once the Master decided upon a timetable that could not have been objected to by the Appellants before the Master itself. That decision could only have been challenged before a superior court, which is what the Appellants have done. The Appellants are also entitled to raise a question of law in appeal even if such question as not been considered in the original court. With these preliminaries dealt with, the main issue which concerned both counsel can be considered.

12. Sections 170 and 172 of the Act are relevant to the conduct of proceedings for ejectment under the Act. Section 170 states, "*The summons …..shall require the person summoned to appear at the Court on a day not earlier than sixteen days after the service of the summons*". Summons in this case was served on the Respondents on 6 February 2019. It was contended on behalf of the Appellants that this was sufficient time for the Respondents to seek counsel and instruct them properly by the date fixed for showing cause on 7 March 2019.

13. Section 172 states:

> *"If the person summoned appears he or she 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, the Judge shall dismiss the summons with costs against the proprietor, mortgagee or lessor or he or she may make any order and impose any terms he or she 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 or she 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*".

14. The Plaintiffs took out summons on 15 January 2019, and the matter was fixed for hearing of the application initially on 28 February 2019. It was re-listed for mention before the Master on 7 March 2019. The 4th Respondent was served papers on 6 February 2019 with copies of affidavits and originating summons for the 1, 2nd, 3rd and 5th Respondents left with the 4th Respondent. There is no controversy with regard to the service of process. From the date of service, the Respondents had 29 days – in excess of the 16 days provided by Section 170 - in which to show cause as called upon by the summons. I agree with the Appellants' contention that this was quite sufficient time to show cause and prove their right to possession of the land.

15. Counsel for the Appellants relied on the decisions in Harakh Narayan v Chotu Bhai Patel[3], Morris Hedstrom Limited v Liaquat Ali[4], and Suva City Council v Suva City Council Staff's Association[5], which have considered the nature of the proceedings instituted under Section 169 of the Act.

16. In Harakh Narayan v Chotu Bhai Patel, the Court of Appeal, which heard an appeal against an order for possession by the Supreme Court, stated, "*Counsel should be alert to the fact that in this procedure, they should, if they are appearing on the first day, be able to put some matter of weight forward to persuade the judge that an Order should not be made, or at least that something will be forthcoming so that adjournment is called for*" (emphasis added).

17. In that case, the Court of Appeal referred to the summary nature of the action in terms of Section 169, and refused the Appellant more time to show cause. The Court held, "*But it must be understood that this is a summary proceeding designed to avoid delay. It is not like a first call, or a day for mention, when a number of lengthy and defended cases are put into the list purely to make fixture for a future hearing. The Act is to be administered sympathetically but having due regard to the purposes for which the procedure was devised. One must pay regard to the phrase 'the defendant may show cause'*" (emphasis added). The order of the Court of Appeal read, "*Order as prayed. Adjournment refused*".

*18.* The Supreme Court, in Morris Hedstrom Limited v Liaquat Ali, stated, "*Under Section 172 the person summoned may show cause why he refuses to give possession of the land and if he proves to the satisfaction of the Judge a right*

[3] Civil Appeal No.26 of 1985
[4] Action No.153 of 1987
[5] [1995] FJHC 169

*to possession or can establish an arguable defence the application will be dismissed with costs in his favour. The defendants must show on affidavit evidence some right to possession which would preclude the granting of an order for possession under the Section 169 procedure. That is not to say that final or incontrovertible proof of a right to remain in possession must be adduced. What is required is some tangible evidence establishing a right or supporting an arguable case for such a right, must be adduced.*

*It is to be noted, however, that the date set for hearing of the summons is the day the defendant must show cause*" (emphasis added).

19. In Suva City Council v Suva City Council Staff's Association, the High Court quoted with approval the decision of the Court of Appeal in Harakh Narayan v Chotu Bhai Patel. The Court also agreed with the words of Stuart J. *(as he then was)* in Vivek Prasad v. Ram Sundar[6], where His Lordship described Section 169 proceedings in these terms: *'to provide a quick and relatively inexpensive summary method of finding out whether a person who is in possession had any legal right to be there.'*. In the Suva City Council case, the Court was mindful that the existence of other proceedings before the Court was not, in itself, a cause sufficient to resist an application under Section 169 of the Act[7].

20. The language in Section 172 of the Act is unambiguous in that a defendant named in a summons must show cause to remain in possession and defeat a plaintiff's application under the section. The phrase "he may show cause" in Section 172 would have mandatory force in the event a defendant is intending to resist a plaintiff's claim to possession of the land. Such defendant must prove to the satisfaction of the judge that he or she has a right to possession of the land, in which event the judge is required to dismiss the summons. Such dismissal though will not prejudice the right of the Plaintiff to bring fresh proceedings against a defendant named in such summons. The parties are clearly at variance as to whether cause was in fact shown in Court on behalf of the Respondents. Counsel for the Respondents submitted that his clients have a valid claim and that cause was shown to the Master. However, this is not on record, and the Appellants do not concede such cause was shown. Mr. Driscoll was also not present before the Master, and could not himself confirm the veracity of cause having been shown to the Master. That being the case, this Court will have to be guided by the matters on record before the Master.

[6] CA 788/ 76 (unreported)
[7] Dinesh Jamnadas and another v Honson Limited [1985] 31 FLR 62

21. The relevant statutory provisions do not spell out a process for showing cause. As to how cause must be shown has been left to the discretion and the wisdom of the judge, and the Court must lay down a procedure that best serves the interests of justice in the particular circumstances. As observed by Lord Penzance in Kendall v Hamilton[8], the procedure laid down must not obstruct the course of justice: "*Procedure is but the machinery of law, after all the channels and means, whereby law is administered and justice reached. It strangely departs from its proper office when, in place of facilitating, it is permitted to obstruct, and even extinguish, legal rights and is thus made to govern where it ought to subserve*".

22. Therefore, it is necessary for Court to address its mind to the circumstances of the case and decide how best cause is to be shown by a named defendant, and whether, in view of the material before Court, the plaintiff should be allowed to reply. This discretion must be exercised having in mind the object of the legislation, which, in the words of Stuart, J (as quoted with approval in Harakh Narayan v Chotu Bhai Patel) *'to provide a quick and relatively inexpensive summary method of finding out whether a person who is in possession had any legal right to be there'*. One must be mindful that "*The Act is to be administered sympathetically but having due regard to the purposes for which the procedure was devised.*" (Harakh Narayan v Chotu Bhai Patel).

23. As regards the practice adopted in relation to proceedings filed under Section 169 of the Act, the Court of Appeal in Harakh Narayan observed: "*It was submitted that it is the invariable practice in such matters for the Supreme Court to grant an adjournment on request if counsel appears. We have listened to this submission and made enquiries as to recent practice. It certainly could not be the case that counsel could obtain an adjournment as of right by merely appearing, for, Section 172 indicates that if a person summoned appears, he may 'show cause'. It is accepted that in many cases counsel will not have had time to get complete instructions or to file any formal documents and it is not the case, as we understand, that judges have a fixed rule that an affidavit must be filed before the hearing date. Indeed there will be some cases where a defendant not knowledgeable in the law will appear in person, and we are confident that in either case counsel or defendant in person will be given a sympathetic hearing if he can indicate that there is an arguable defence available*". The line of reasoning of their Lordships is applicable to the present appeal, and binds this Court.

[8] [1879] 4 AC 504

24. The Master's record in these proceedings ought to have reflected that – to quote the Court of Appeal in Harakh Narayan v Chotu Bhai Patel – the Respondents should have put some matter of weight forward to persuade Court that an Order should not be made, or at least that something will be forthcoming so that adjournment is called for. They were obliged to show some right to possession or an arguable defence. The question is, 'has the defendant furnished any evidence of a right to possession worthy of evaluation by the Master?' Unfortunately, for the Respondents, the record before the Master does not bear that out.

25. The Appellants have annexed to their supporting affidavit notices to vacate dated 9 October 2017 and 27 November 2018 (paragraphs 8 & 10 of the Affidavit in Support filed by the 1st Plaintiff). The Appellants state that an action was filed for immediate vacant possession of the said property and hearing was fixed before the Master on 27 November 2018. That action was withdrawn as Robert Verma - the defendant named in the action - died a week before the hearing. This action was filed on 15 January 2019. Upon service of summons, the Respondents had 29 days in which to take steps and also to show cause prior to the hearing date of 7 March 2019.

26. The proceedings before the Master have been considerably delayed because of this appeal, and the Respondents have now received more time to prepare a show cause. Court will take that into account in making the orders set out below.

27. **Orders**:

    a. The decision of the Master dated 7 March 2019 is set aside;

    b. The Respondents are directed to show cause to the Master by 20 June 2019;

    c. There is no order as to costs in relation to this appeal.

Delivered at Suva this 14th day of June**, 2019**

HIGH COURT OF FIJI SUVA

Justice M. Javed Mansoor
Judge of the High Court