

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

CIVIL ACTION NO.: HBC 03 of 2018

BETWEEN : **LISA BERNADETTE VERMANDE and BRYCE SERU**
PLAINTIFFS

AND : **JOELI DAVETA**
DEFENDANT

APPEARANCES/REPRESENTATION

PLAINTIFF : Ms Jackson [Jackson Bale Lawyers]

DEFENDANT : Mr Lanyon [Law Solutions]

JUDGMENT OF : Acting Master Ms Vandhana Lal

DELIVERED ON : 21 January 2019

JUDGMENT

[Section 169 application for vacant possession]

1. This is the Plaintiff's originating summons seeking orders for the Defendant to immediately give up vacant possession to the Plaintiff of all the land comprised and described in Certificate of Title Number 23137 being Lot 13 on Deposited Plan Number 4671 situated at 13 Damu Place, Tamavua, Suva.

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

The Plaintiffs have filed an Affidavit of Bryce Seru in Support of the Application.

2. The Defendant on 15 February 2018 filed his Affidavit in Opposition to the application.

Subsequently the Plaintiff filed a reply on 16 March 2018.

3. According to the Plaintiffs, they are the registered proprietors of the property referring to annexure BS 1 the copy title.

Both Plaintiffs' hold one undivided half shares each as follows:

Lisa one undivided half share in the Interest of V. Rene whilst Bryce Seru hold one undivided half share in the interest of Elina Bulousivo.

According to the Plaintiffs, the defendant and his family are illegally occupying the property as well as the conducting illegal business activities on the premises. They have further failed to remove all debris and vehicles from the property.

Via a letter of 16 November 2017 Defendant was asked to quit and deliver up vacant possession but has failed and/or neglected to vacate the property.

Plaintiffs deny allegation of fraud, forgery and deception in having their names registered as owners.

4. According to the Defendant, his wife Elina Daveta and her former husband Rene Vermande are the registered owners.

Elina Daveta got half share on the property being share in matrimonial property as per a Court Order in action MDP 0495 of 1994.

Lisa Bernadette Seru is the daughter of Elina. Upon her marriage to Bryce Seru, Vermande Rene transferred half of his share to her name.

Bryce Seru by deception transferred Elina's half share in the \$500,000 value property to his name for \$6,000 as consideration sum. Out of this \$6,000, Elina only received \$1,000.

Defendant alleges that Elina was made to sign documents in favour for Bryce Seru as she was explained that it was for easement of transfer and authorisation of Fiji National Provident Fund assistance.

Defendant denies illegally occupying the property but claims to be residing on the property with Elina Daveta since 1995.

5. The Plaintiffs in reply stated that Bryce Seru purchased his half undivided share for \$41,000.

Elina agreed to use the \$41,000 as follows:

- i.* \$5,244.59 to pay Suva City Council outstanding rate; and
- ii.* \$29,755.41 to settle debt with Bank of South Pacific.

However the \$29,755.41 was used to renovate the house whilst Lisa Vermande and Bryce Seru took over the loan with Bank of South Pacific Limited which was refinanced by way of a mortgage.

\$6,000 was paid to Elina.

Vermande Rene, Lisa's father had transferred his share in the property to Lisa by way of love and affection.

6. There are certain annexures in the Affidavit in Opposition which are letters from Elina Daveta addressed to Court.

The letter is undated and Ms Daveta claim and alleges fraud/deception by the Plaintiffs in having the property transferred.

This is not a proper form to bring such evidence before the Court.

Evidence should be in the form of an Affidavit sworn by Ms Daveta.

Accordingly I will not consider the said annexure 3 in the Affidavit in Opposition when making my determination.

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."

9. The Supreme Court in considering the requirements of Section 172 in **Morris Hedstrom Limited v. Liaquat Ali (Action No. 153/87 at p2)** stated as follows:

"Under Section 172 the person summoned may show cause why he refused to give possession of the land and if he proves to the satisfaction of the judge a right 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 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 that some tangible evidence establishing a right or supporting an arguable case for such a right, must be adduced."

10. In **Sigatoka Builders Ltd v Pushpa Ram & Ano. (unreported) Lautoka High Court Civil Action No. HBC 182.01L, 22 April 2002** the Court held;

*"Though evidence of fraud and collusion is often difficult to obtain, the evidence here fails a good way short of a standard requiring the court's further investigation. In **Darshan Singh v Puran Singh [1987] 33 Fiji LR 63** at p.67 it was said:*

"There must, in our view, be some evidence in support of the allegation indicating the need for fuller investigation which would make Section 169 procedure unsatisfactory. In the present case the appellant merely asserted that he had paid the money for the purchase of the property. This was denied by both Prasin Kuar and the respondent. There was nothing whatsoever before the learned judge to suggest the existence of any evidence, documentary or oral, that might possibly assist the appellant in treating the case as falling within the scope of Section 169 of the Land Transfer Act and making an order for possession in favour of the respondent."

The High Court further went to say that *"that a bare allegation of fraud did not amount by itself to a complicated question of fact, making the summary procedure of Section 169 in appropriate see too **Ram Devi v Satya Nand Sharma & Anor [1985] 31 Fiji LR 130** at p.135A. A threshold of evidence must be reached by the Defendant before the Plaintiff can be denied his summary remedy. In **Wallingford v Mutual Society [1880] 5 AC 685** at p. 697 Lord Selbourne LC said:*

"With regards to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice. And here I find nothing but perfectly general and vague allegations of fraud. No single material fact is condiscended upon, in a manner which would enable any Court to understand what it was that was alleged to be fraudulent."

11. The transfer was done in 2013 and until now the Defendant or Elina Daveta failed to make any application to the Court to have the same declared void.
12. Neither has Police in the last two years since complaint being lodged charged the Plaintiffs for forgery.

13. Annexure BS 1 to the Affidavit of Bryce Seru in reply shows consideration sum for the transfer of Elina's share in the property was \$41,000.

As per the sales and purchases agreement the Vendor Elina will pay Bank of South Pacific, City rates to Suva City Council from the sales proceeds and \$6,000 will be for her use.

As per the payment authority \$29,755.41 was paid to the Plaintiffs for renovations which facts has not been disputed by the Defendant.

14. Upon considering the contents of the Defendant's affidavit in opposition, I find that there is no basis to say that the transfers were done fraudulently. There is nothing in the affidavit to establish any resemblance of fraud.
15. In the circumstances, I shall make an order in favour of the Plaintiffs.
16. Joeli Daveta is to give immediate possession to the Plaintiff of property comprised in Certificate of Title Number 23137 being Lot 13 on deposited Plan number 4671 situated at Damu Place, Tamavua, Suva.
17. There shall be cost awarded in favour of the Plaintiffs which cost is summarily assessed at \$1,000 and is to be paid in 14 days.




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