

IN THE HIGH COURT OF FIJI
IN THE WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

Civil Action No. HBC 42 of 2020

IN THE MATTER of an application under
Section 169 of the Land Transfer Act, 1971

BETWEEN : **PARBHAKARAN** of Solovi, Nadi.

PLAINTIFF

AND : **JOHN CHRISTOPHER** of Solovi, Nadi.

FIRST DEFENDANT

AND : **ALIVERETI WAQABULI** of Solovi, Nadi.

SECOND DEFENDANT

Appearances : (Ms.) Janet Nitika Raman for the plaintiff.
The defendants are absent and unrepresented

Hearing : Thursday, 16th July, 2020.

Decision : Friday, 24th July, 2020.

DECISION

[A] INTRODUCTION

- (01) The matter before me stems from the plaintiff's Originating Summons, dated 20th February, 2020, made pursuant to Section 169 of the Land Transfer Act, for an order for vacant possession against the defendants.
- (02) The defendants are summoned to appear before the Court to show cause as to why they should not give up vacant possession of the plaintiff's property comprised in Instrument

of Tenancy No. 10860, being Vatukosoro (part of) in the Tikina of Nawaka in the Province of Ba and having an area of approximately 7.5108 hectares.

- (03) The application for eviction is supported by an Affidavit sworn by the plaintiff on 18th February, 2020.

[B] THE LAW

- (1) In order to understand the issues that arise in the instant case, I bear in mind the applicable law and the judicial thinking reflected in the following judicial decisions.
- (2) Sections from 169 to 172 of the **Land Transfer Act (LTA)** are applicable to summary application for eviction.

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)
- (c)

Section 170 states:

“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. “

Section 171 states:

“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.

Section 172 states:

“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, mortgage 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.

[Emphasis provided]

- (3) The procedure under Section 169 was explained by Pathik J in **Deo v Mati**¹ as follows:-

The procedure under s.169 is governed by sections 171 and 172 of the Act which provide respectively 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."

- (4) The Supreme Court in considering the requirements of section 172 stated in **Morris Hedstrom Limited v. Liaquat Ali**² as follows and it is pertinent:

"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

¹ [2005] FJHC 136; HBC0248J ,2004s (16 June 2005)

² Action No. 153/87 at p2

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.”

- (5) The requirements of Section 172 have been further elaborated by the Fiji Court of Appeal in Azmat Ali s/o Akbar All v Mohammed Jalii s/o Mohammed Hanif³ where it is stated:

“It is not enough to show a possible future right to possession. That is an acceptable statement as far as it goes, but the section continues that if the person summoned does show cause the judge shall dismiss the summons; but then are added the very wide words “or he may make any order and impose any terms he may think fit” These words must apply, though the person appearing has failed to satisfy the judge, and indeed are often applied when the Judge decides that an open court hearing is required. We read the section as empowering the judge to make any order that justice and the circumstances require.

(C) **THE FACTUAL BACKGROUND**

- (1) What are the facts here? It is necessary to approach the case through its pleadings/affidavits, **bearing all those legal principles in my mind.**
- (2) To give the whole picture of the action, I can do no better than set out hereunder the **averments/assertions of the Pleadings/Affidavits.**
- (3) The Plaintiff in his Affidavit in Support deposed *inter alia*;

I am the above-named plaintiff and I depose to the facts herein as within my knowledge and wherein the facts are not known to me personally, I have ascertained its truths and verily believe the same to be true.

*I am the last registered proprietor of the land comprised in and prescribed in the instrument of Tenancy No. 10860 known as Vatukosoro (Part of) in the Tikina of Nawaka, in the Province of Ba and having an area approximately 7,5108 hectares (hereto referred to as “**the subject property**”). Annexed hereto and marked ‘PK1’ is a copy of the said lease.*

³ Action No. 44 of 1981 - Judgment 2.4.82

The defendants, their servant and agents and other occupants currently occupy the subject property as my tenants.

On or about February 2019, I asked the respondents to vacate the subject property as they were not making rental payments. However, despite numerous reminders, the defendants, their servants, agents and other occupants still fail to do so to date.

On the 23rd of November, 2019 the defendants were served with a Notice to Vacate giving the defendants thirty (30) days to vacate the subject property and the defendants acknowledged receipt of the same. Annexed hereto and marked 'PK2' is a copy of the said Notice to Vacate.

The Notice to Vacate has since expired and the defendants, their servants, agents and other occupants has failed to vacate the subject property and continue to reside on the subject property without any consent or permission.

Their continuous occupation of the subject property deprives me of my enjoyment of my ownership right.

I therefore, ask this Honourable Court for an order that the defendants their servants, agents and other occupants do give up vacant possession of the subject property.

(D) ANALYSIS

- (1) This is an application brought under Section 169 of the Land Transfer Act, [Cap 131]. Under Section 169, certain persons may summon a person in possession of land before a judge in chambers to show cause why that person should not be ordered to surrender possession of the land to the Claimant.

For the sake of completeness, Section 169 of the Land Transfer Act, is reproduced below;

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.*

I ask myself, under which limb of Section 169 is the application being made?

Reference is made to paragraph (2) of the affidavit in support of the Originating Summons.

Para 2 I am the last registered proprietor of the land comprised in and described in the Instrument of Tenancy No. 10860 known as Vatukosoro (Part of) in the Tikina of Nawaka, in the province of Ba and having an area of approximately 7,5108 hectares (hereto referred to as “the subject land”). Annexed hereto and marked ‘PK1’ is a copy of the said lease.

Section 169 (a) of the Land Transfer Act, Cap 131, requires the Plaintiff to be the last **registered proprietor** of the land.

The term “**proprietor**” is defined in the Land Transfer Act as “*the registered proprietor of land, or of any estate or interest therein*”.

The term “**registered**” is defined in the **Interpretation Act**, Cap 7, as “*registered used with reference to a document or the title to any immovable property means registered under the provisions of any written law for the time being applicable to the registration of such document or title*”

- (2) According to the Instrument of Tenancy No. 10860 (**‘PK-1’**), the plaintiff is the Tenant of the subject land. The Instrument of Tenancy for the subject land was issued to the plaintiff for a term of thirty (30) years commencing on the 01st July, 2008 at the yearly rental of \$500.00. The Instrument of Tenancy was registered with the Registrar of Deeds on 12/08/2008.

In **Habib v Prasad**⁴, Hon. Madam Justice Anjala Wati said;

“The word registered is making reference to registration of land and not the nature of land. If the land is registered either in the Registrar of Titles Office or in the Deeds Office, it is still registered land. This land has been registered on 4th March, 2004 and is registered at the Registrar of Deeds Office, it is still

⁴ [2012] FJHC 22

registered land. The registration is sufficient to meet the definition of registered in the Interpretation Act Cap 7:-

“Registered” used with reference to a document or the title to any immovable property means registered under the provision of any written law for the time being applicable to the registration of such document or title”.

Applying the aforesaid principles to the instant case, I am driven to the conclusion that the Plaintiff is the last registered proprietor of the land comprised in Instrument of Tenancy No. 10860.

(3) Pursuant to Section 170 of the Land Transfer Act;

(1) **the Summons shall contain a “description of the Land”**

AND

(2) **shall require the person summoned to appear in the court on a day not earlier than “sixteen days” after the service of Summons.**

The interval of not less than 16 days is allowed to give reasonable time for deliberations and to prevent undue haste or surprise.

I ask myself, are these requirements sufficiently complied with by the Plaintiff?

The Originating Summons filed by the Plaintiff does contain a description of the subject land. The subject land is sufficiently described. For the sake of completeness, the Originating Summons is reproduced below.

ORIGINATING SUMMONS

Let all parties concerned attend before the Judge in Chambers at the High Court at Lautoka on Friday the 20th day of March, 2020, at 10.30am on the hearing of an application by Parbhakaran that:

That the Defendants to show cause on why they should not give up possession to the above named Plaintiff over the property described as Instrument of Tenancy No. 10860 known as Vatukosoro (Part of) in the Tikina of Nawaka, in the Province of Ba and having an area of approximately 7,5108 hectares

[Emphasis added]

In light of the above, I have no doubt personally and I am clearly of opinion that the first mandatory requirement of Section 170 of the Land Transfer Act has been complied with.

- (4) Now comes a most relevant and, as I think, crucial second mandatory requirement of Section 170 of the Land Transfer Act.

The Originating Summons was returnable on 20th March, 2020. According to the Affidavit of Service filed by the plaintiff, the Originating Summons was served on the first and second defendants on 04th March and 28th February, respectively.

Therefore, the defendants are summoned to appear at the Court on a date not earlier than “sixteen days” after the Service of Summons. Therefore, the second mandatory requirement of Section 170 of the Land Transfer Act too has been complied with.

To sum up; having carefully considered the pleadings, evidence and oral submissions placed before this Court, it is quite possible to say that the Plaintiff has satisfied the threshold criteria in Section 169 and 170 of the Land Transfer Act. **The Plaintiff has established a prima facie right to possession.** Now the burden of proof is shifted to the defendants.

Now the onus is on the Defendants to establish a lawful right or title under which they are entitled to remain in possession.

In the context of the present case, I am comforted by the rule of law expounded in the following judicial decisions.

In the case of Vana Aerhart Raihman v Mathew Chand⁵, the High Court held;

“There is no dispute between parties as to the locus standi of the Plaintiff, and once this is established the burden of proof shifted to the Defendant to prove his right to possession in terms of the Section 172 of the Land Transfer Act.”

In the case of Morris Hedstrom Limited –v- Liaquat Ali⁶, the Supreme Court said that:-

“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.”

⁵ Civil Action No: 184 of 2012, decided on 30.10.2012

⁶ CA No: 153/87

(Emphasis is mine)

Also it is necessary to refer to Section 172 of the Land Transfer Act, which states;

“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, mortgage 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”.

[Emphasis provided]

- (5) The defendants failed to enter an appearance on the day appointed for the hearing of the Summons. They failed to tender an affidavit to show some right to possession which would preclude the granting of an order for possession under Section 169 procedure.
- (6) The plaintiff has proved to the satisfaction of the Court the due service of the Originating Summons and the title. In paragraph 3, 4 and 5 of the supporting affidavit, the plaintiff says;
 - (3) *The defendants, their servant and agents and other occupants currently occupy the subject property as my tenants.*
 - (4) *On or about February 2019, I asked the respondents to vacate the subject property as they were not making rental payments. However, despite numerous reminders, the defendants, their servants, agents and other occupants still fail to do so to date.*
 - (5) *On the 23rd of November, 2019 the defendants were served with a Notice to Vacate giving the defendants thirty (30) days to vacate the subject property and the defendants acknowledged receipt of the same. Annexed hereto and marked ‘PK2’ is a copy of the said Notice to Vacate.*

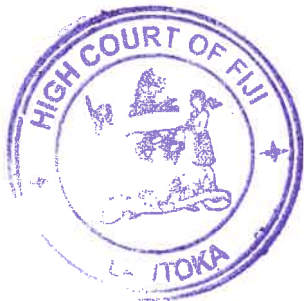
The land in question is Native Land and any alienation, sale or transfer is necessarily subject to the written consent of the iTLTB (See; clause 12 of the plaintiff’s Instrument of Tenancy and Section 12 of the iTaukei Land Trust Act.).


The defendants' occupation of the land is a dealing in the land within the meaning of Section 12(1) of the iTaukei Land Trust Act and is prohibited by the same Section without the written consent of the iTLTB.

No such written consent has been deposed to or produced by the defendants and accordingly, any occupation of any part of the plaintiff's leasehold by the defendants of whatever duration, must be considered null and void and incapable of being enforced as a matter of equity.

ORDER

I order that the defendants give vacant possession of the land described in Instrument of Tenancy No. 10860 within 14 days from the date of this decision.




24/07/2020
Jude Nanayakkara
[Judge]

At Lautoka
Friday, 24th July, 2020