

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

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 227 OF 2020

BETWEEN : **YANKTESH PERMAL REDDY** of Auckland, New Zealand, Company
Director.

PLAINTIFF

AND : **BEN PADARATH** of 6 Savala Place, Lautoka, Fiji, Businessman.

DEFENDANT

Appearance : **Mr Shelvin Singh for the plaintiff**
Mr Salvin Nand for the defendant

Hearing : **Monday, 01st March, 2021 at 2.30 pm.**

Decision : **Monday, 15th March, 2021 at 9.00 am.**

DECISION

(A) INTRODUCTION

- (1) The matter before me stems from the plaintiff's originating summons, dated 23rd September 2020, made pursuant to **Section 169** of the **Land Transfer Act**, for an Order for vacant possession against the defendant.
- (2) The defendant is summoned to appear before the Court to show cause why he should not give up vacant possession of the plaintiff's property comprised in Certificate of Title No. 12221 being Lot 14 on DP No. 3123.
- (3) The originating summons for eviction is supported by an affidavit sworn by the plaintiff on 10th September, 2020

- (4) The originating summons for eviction is strongly contested by the defendant.
- (5) The defendant filed an ‘affidavit in opposition’ opposing the application for eviction followed by an ‘affidavit in reply’ thereto.
- (6) The plaintiff and the defendant were heard on the ‘originating summons’. They made oral submissions to Court.

(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, 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.

[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.”

It is for the defendant to ‘show cause.’

- (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:

¹ [2005] FJHC 136; HBC0248].2004s (16 June 2005)

² Action No. 153/87 at p2

“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) The requirements of Section 172 have been further elaborated by the Fiji Court of Appeal in **Azmat Ali s/o Akbar Ali v Mohammed Jalil s/o Mohammed Hanif**³ 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 uppermost in my mind.
- (2) The plaintiff in his affidavit in support deposed *inter-alia* that;
- (1) *I am the plaintiff in this matter.*
 - (2) *I am the registered proprietor comprised in Certificate of Title No. 12221 being Lot 14 on DP No. 3123 (‘the said property’).*
 - (3) *The defendant is a tenant in the said property.*

³ Action No. 44 of 1981 – judgment 2.4.82

- (4) *By notice dated 16th July, 2020, the plaintiff sought vacant possession of the property from the defendant to be given on or before 16 August 2020.*
- (5) *The said Notice was served on the defendant on 16 July 2020.*
- (6) *Despite the said Notice, the defendant has failed to vacate the property and continues to occupy the same.*
- (7) *I therefore ask the Honourable Court for an Order that the Defendant and all the occupants of the property do give me immediate vacant possession of the property.*

[Emphasis added]

- (3) The defendant for his part in seeking to show cause against the summons, filed an affidavit in opposition which is substantially as follows;

- (1) *That I am the defendant in this matter.*
- (2) *That in so far as the contents of this affidavit is within my knowledge, it is true and in so far as it is not within my personal knowledge, I believe the same to be true to the best of my knowledge, information and behalf.*
- (3) *I am a Tenant of the plaintiff's property comprised of Certificate of Title No. 1221 being Lot 14 on DP No. 3123 (the said property).*
- (4) *Upon becoming a tenant of the plaintiff as the Landlord, I had made payment in the sum of \$4000.00 **[FOUR THOUSAND DOLLARS]** being amount for bond and first month's rent to the plaintiff.*
- (5) *That I had been in default of my rental payment in the sum of \$8,214.45 **[EIGHT THOUSAND TWO HUNDRED AND FOURTEEN DOLLARS FORTY FIVE CENTS]** to which I have made the necessary arrangement to pay off. Annexed hereto and marked "**BP-1**" is a copy of the receipt as proof of my payment.*
- (6) *I had made proposals to the plaintiff of my intention of purchasing the said property which I am still willing to go ahead with if the plaintiff agrees.*
- (7) *That since I moved into the plaintiff's property as a Tenant on June 2020, I am willing to make advanced rental payment to the plaintiff till June 2021.*

- (8) *That my family and I have no place to stay if we are ordered to vacate the said property.*
- (9) *I humbly pray to the honorable court to grant me an order to continue to occupy the said property as I am willing to make a one year rental payment to the plaintiff.*

(4) The Plaintiff filed an affidavit in rebuttal deposing *inter-alia* that;

- (1) *I am the plaintiff in this action.*
- (2) *I have read what appeared to be the affidavit in opposition of **Ben Padarath**, sworn on 04 February, 2021 and filed on 10 February 2021 (“the said affidavit”).*
- (3) *Where I have not responded to a particular paragraph or matter, that is not to be taken as an admission by me.*
- (4) *I refer to paragraph 3 of the said affidavit and say that the defendant’s tenancy has been terminated by my (lawyers) notice to vacate dated 16 July 2020.*
- (5) *I refer to paragraph 4 of the said affidavit and admit that the sum of \$4,000 was paid by the defendant when he took up the lease of my property in May 2020.*

Annexed hereto and marked “A” is a copy of the Lease agreement with the defendant.

- (6) *I refer to paragraph 5 of the said affidavit and say that the defendants statement that he owed me only \$8,214.45 is false. No rent was paid by the defendant from 17 June 2020. After payment of the sum of \$8,214.45, the defendant owes me rent in the sum of \$7,785.55.*

Annexed hereto and marked “B” is a copy of the statement of account.

- (7) *I refer to paragraph 6 of the said affidavit and say that I have no interest in selling my property to the defendant. While this is something that I do not want to think about but the Defendant cannot pay rent and how does he think I can allow him to talk to me about selling my property to him.*
- (8) *I refer to paragraph 7 of the said affidavit and say that it has taken the defendant about 5 months to clear his rental default. I am not willing to give my property to the defendant any more for rent and I am sure he can*

take up the lease of some other property with the advance payments he want to do.

- (9) *I refer to paragraph 8 of the said affidavit and say that I need my property back from the defendant. With advance rent of \$12,000 that the defendant wants to pay, he can find any property in Lautoka to rent.*
- (10) *I respectfully seek that the defendant gives up vacant possession of the property as claimed in the proceedings filed herein.*

[Emphasis added]

(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.

- (2) 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.*

- (3) **I ask myself, under which limb of Section 169 is the application being made?**

Reference is made to paragraph (02) and (03) of the affidavit in support of the Originating Summons.

Para (2) I am the registered proprietor comprised in Certificate of Title No. 12221 being Lot 14 on DP No. 3123 ('the said property').

(3) The defendant is a tenant in the said property.

(4) The application cannot be made under the first limb of Section 169 since the plaintiff is the lessor. There is a relationship of landlord and tenant between the plaintiff and the defendant. The application should come under the third limb of Section 169.

(05) Turning to next point, 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.**

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

(07) **I ask myself, are these requirements sufficiently complied with by the plaintiff?**

(08) 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 in full.

ORIGINATING SUMMONS

*LET ALL PARTIES concerned attend before the Master in Chambers at the High Court, on the 23rd day of October, 2020 at 8.30am o'clock on the hearing of an application by the above named plaintiff **FOR AN ORDER.***

- A. *That the defendant gives up immediate vacant possession to the plaintiff of the **property comprised in Certificate Title No. 12221 being Lot 14 on DP No. 3123** which the plaintiff is the registered proprietor of which the defendant occupies; and*
- B. *That the costs of this application be paid by the defendant to the plaintiff.*

This application is made under Section 169 of the Land Transfer Act and the inherent jurisdiction of this honourable court.

DATED this 23rd day of September, 2020.

[Emphasis added]

- (09) 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.
- (10) Now comes a most relevant and, as I think, crucial second mandatory requirement of Section 170 of the Land Transfer Act.
- (11) The originating summons was returnable on 23rd October 2020. According to the affidavit of service filed by the plaintiff, the originating summons was served on the defendant on 28th September 2020.
- (12) Therefore, the defendant is 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 has been complied with.
- (13) 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 spelt out in Section 169 and 170 of the Land Transfer Act. **The plaintiff has established a prima facie right to possession.**
- (14) **Now the onus is on the defendant to establish a lawful right or title under which he is entitled to remain in possession.**

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

(16) In the case of Vana Aerhart Raihman v Mathew Chand⁴, 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.”

(17) In the case of Morris Hedstrom Limited –v- Liaquat Ali⁵, 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.**”*

[Emphasis is mine]

(18) 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”.

⁴ Civil Action No: 184 of 2012, decided on 30.10.2012,

⁵ CA No: 153/87

(19) Let me now move to consider the defendant's reason refusing to deliver vacant possession. The defendant states in his affidavit; (reference is made to paragraph (5) to (8) of the defendant's affidavit sworn on 04-02- 2021).

- (5) *That I had been in default of my rental payment in the sum of \$8,214.45 [EIGHT THOUSAND TWO HUNDRED AND FOURTEEN DOLLARS FORTY FIVE CENTS] to which I have made the necessary arrangement to pay off. Annexed hereto and marked "BP-1" is a copy of the receipt as proof of my payment.*
- (6) *I had made proposals to the plaintiff of my intention of purchasing the said property which I am still willing to go ahead with if the plaintiff agrees.*
- (7) *That since I moved into the plaintiff's property as a Tenant on June 2020, I am willing to make advanced rental payment to the plaintiff till June 2021.*
- (8) *That my family and I have no place to stay if we are ordered to vacate the said property.*

(20) In reply, the plaintiff states in his affidavit in reply; (reference is made to paragraph (04) to (09) of the plaintiff's affidavit sworn on 27-02-2021).

- (4) *I refer to paragraph 3 of the said affidavit and say that the defendant's tenancy has been terminated by my (lawyers) notice to vacate dated 16 July 2020.*
- (5) *I refer to paragraph 4 of the said affidavit and admit that the sum of \$4,000 was paid by the defendant when he took up the lease of my property in May 2020.*

Annexed hereto and marked "A" is a copy of the Lease agreement with the defendant.

- (6) *I refer to paragraph 5 of the said affidavit and say that the defendant's statement that he owed me only \$8,214.45 is false. No rent was paid by the defendant from 17 June 2020. After payment of the sum of \$8,214.45, the defendant owes me rent in the sum of \$7,785.55.*

Annexed hereto and marked "B" is a copy of the statement of account.

- (7) *I refer to paragraph 6 of the said affidavit and say that I have no interest in selling my property to the defendant. While this is something that I do not want to think about but the Defendant cannot*

pay rent and how does he think I can allow him to talk to me about selling my property to him.

- (8) *I refer to paragraph 7 of the said affidavit and say that it has taken the defendant about 5 months to clear his rental default. I am not willing to give my property to the defendant any more for rent and I am sure he can take up the lease of some other property with the advance payments he want to do.*
- (9) *I refer to paragraph 8 of the said affidavit and say that I need my property back from the defendant. With advance rent of \$12,000 that the defendant wants to pay, he can find any property in Lautoka to rent.*

(21) The facts which form the basis of the case may be shortly set out as follows. The plaintiff is the registered proprietor of the property comprised in Certificate of Title No.12221 being Lot 14 on DP No. 3123. The defendant came into possession of the property pursuant to a Tenancy Agreement dated 12-05-2020. The term of tenancy is three years commencing from 17-05-2020 at a monthly rental of \$2,000.00.

(22) A notice to vacate dated 16-07-2020 was given to the defendant. The receipt of this notice is not disputed. As such, I shall set it out the material part in full;

16th July, 2020

*Mr Ben Padarath
6 Savala Place
LAUTOKA.*

***Yanktesh Permal Reddy
NOTICE TO VACATE – Certificate of Title No. 12221, Lot 14 on DP 3123***

1. *We act for Mr Yanktesh Permal Reddy, the registered proprietor of the mentioned property.*
2. *We are instructed that you are occupying the said property as a Tenant.*
3. *Under instructions of our client, we hereby give you notice to quit and deliver up on or before the expiration of one month from the service upon you of this notice the vacant possession of the aforesaid property.*
4. ***TAKE NOTICE that unless vacant possession is given to our client as***

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aforsaid, our instructions are to institute legal proceedings against you in the High Court of Fiji at Lautoka for your eviction from the property without any further notice or warning, in which event you will be held liable for all legal and court costs incurred.

5. *You are also required to handover the property in a clean and tidy condition as was handed to you.*
6. *Please contact the writer should there be any queries on this notice or generally in relation to this matter.*

Yours faithfully,
SHELVIN SINGH LAWYERS

[Emphasis added]

(23) The notice seeks only one act from the defendant – vacant possession on or before the expiration of one month from the date of service of the notice.

(24) In his affidavit in opposition, the defendant says that;

(5) *That I had been in default of my rental payment in the sum of \$8,214.45 [Eight thousand two hundred and fourteen dollars forty five cents] to which I have made the necessary arrangement to pay off. Annexed hereto and marked “BP-1” is a copy of the receipt as proof of my payment.*

(25) In reply, the plaintiff says that;

(6) *I refer to paragraph 5 of the said affidavit and say that the defendant’s statement that he owed me only \$8,214.45 is false. No rent was paid by the defendant from 17th June, 2020. After payment of the sum of \$8,214.45, the defendant owes me rent in the sum of \$7,785.55.*

(26) **The notice to quit was served on the defendant on 16-07-2020. The notice to quit attempted to terminate tenancy from 15-08-2020 but a sum of \$8,000.00 has been accepted as being rent for the period 17-07-2020 to 17-10-2020. [See Magistrate’s Court of Lautoka, Civil Action No. 179 of 2020]. The money was credited to the plaintiff’s account on 28-01-2021. The plaintiff has accepted rent in respect of the period 16-08-2020 to 17-10-2020 namely, in respect of two months after the purported termination of the tenancy.**

Section 100 (2) of the Property Law Act states:

“After the giving of a notice to quit acceptance of rent expressed to be without prejudice to the notice shall not operate as a waiver of the right to enforce the notice or create or revive a tenancy.”

- (27) The receipt for rent not having been produced, I am left to decide this matter on basis of common law. **In Clarke v. Grant**⁶ Lord Goddard expressed the position as follows:

“Therefore when a landlord has brought a tenancy to an end by mean of a notice to quit, a payment of rent after that date will only operate in favour of the tenant if it can be shown that the parties intended that there should be a tenancy The question therefore is, qui animo the rent was received, and what the real intention of both parties was.”

- (28) That intention would be the intention at the time of the receipt of rent not at time of filing of this application. The Court would need to know what was said before and after rent was rendered and accepted to get at the real intention of parties.

- (29) In **Maganlal Ramabhai Patel v. Native Land Trust Board** – Fiji Court of Appeal 40 of 1976 the following passage from **Central Estates (Belgravia) Ltd. v. Woolgar No.2**⁷ was accepted as correctly expressing the law on receipt of rent after notice.

“If the landlord by word or deed manifests to the tenant by an unequivocal act a concluded decision to elect in a particular manner, he will be bound by such an election. If he chooses to do something such as demanding or receiving rent which can only be done consistently with the existence of a certain state of affairs, namely, the continuance of the lease or tenancy in operation, he cannot thereafter be heard to say that that state of affairs did not exist. If at the time of the act he had a right to elect whether to forfeit the lease or tenancy or to affirm it, his act will unequivocally demonstrate that he has decided to affirm it. He cannot contradict this by saying that his act was without prejudice to his right of election continuing or anything to that effect. In this respect his act speaks louder than his words, because the act is unequivocal; it can only be explained on the basis that he has exercised his right to elect. The motive or intention of the landlord, on the one hand, and the understanding of the tenant, on the other, are equally irrelevant to the quality of the act.”

[Emphasis added]

- (30) The plaintiff’s acknowledged acceptance of rent for September and October, 2020 is clear evidence that in those months a tenancy existed and it can only be a new tenancy since the former tenancy has been terminated on 15-08-2020. The plaintiff cannot be permitted to allege the tenancy was legally terminated and to accept rent for periods after the termination, i.e, September and October, 2020. Acceptance of rent for any period after the determination created a new tenancy and a further notice determining the new

⁶ (1950) 1 KB 104 at 105

⁷ (1972) 3 ALL ER 610

tenancy would have to be given before the plaintiff can seek an order for possession. I am of the considered view that the receipt of rent for September and October, 2020 with the knowledge of notice to quit did constitute a waiver of that notice and the landlord had elected to let the tenancy continue.

I am satisfied that the defendant has shown cause to the satisfaction of the court that he has a right to remain in possession of the premises.

ORDERS:

- (01) The application for vacant possession is dismissed.
- (02) There will be no order as to costs.


Jude Nanayakkara
[Judge]

High Court – Lautoka
Monday, 15th March, 2021