

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No: HBC 39 of 2019
IN THE MATTER of an
application under section 169 of
the Land Transfer Act (Cap 131)

BETWEEN : **SHAIENDRA KUMAR** of Nabele, Sabeto, Nadi, Farmer.
Plaintiff

AND : **JONE NATOU** of Nabelo, Sabeto, Nadi, Labourer.
1st Defendant

AND : **RATU ERONI NAIKERE** of Korobebe, Sabeto, Nadi
2nd Defendant

AND : **JONE NATOU JUNIOR** of Nabelo, Sabeto, Nadi, Labourer
3rd Defendant

Before : Master U.L. Mohamed Azhar

Counsels : Ms. L. Koroitamudu for the plaintiff
Ms. J. Naidu for all defendants

Date of Judgment : 30.11.2021

JUDGMENT

01. The plaintiff took out the summons pursuant to section 169 of the Land Transfer Act (Cap 131), against all the defendants to show cause why they should not vacate and deliver up immediate possession to the plaintiff of the property situated on the Native Lease No 28564 (iTLTB Reference : 50039098) being Lot 1 on ND 4561 known as Dakunibeto in the Tikina of Sabeto and in the Province of Ba containing an area of 15 Acres and 2 Roods 00 Perches situated at Sabeto being residential property (hereinafter referred to as 'the subject property'). The plaintiff had sworn the supporting affidavit and annexed three documents marking as "SK 1" to "SK 3".

02. The defendants, upon service of the above summons, appeared through their solicitor and an affidavit sworn by the 2nd defendant was filed in opposition of the summons. The

defendant did not annex any documents with their affidavit. The plaintiff thereafter filed the affidavit in reply and annexed a copy of his lease which is certified by the Registrar of Title as the true copy. The initial copy of the lease annexed with the supporting affidavit was not certified by the Registrar of Title. At hearing of summons, both counsels made oral submission and later filed their respective written submission.

03. The special procedure to recover the vacant possession of the land is set out in sections 169 to 172 of the Land Transfer Act. The *locus standi* of the person who seeks order for eviction is set out in section 169 and it provides for the three categories of the persons who can invoke the jurisdiction of this court under that section. The requirements of an application, namely the description of land and the time period to be given to the person so summoned, are mentioned in section 170. The other two sections namely 171 and 172 provide for the powers that the court may exercise in the applications under the section 169. The burden to satisfy the court on the fulfillment of the requirements under section 169 and 170 is on the plaintiff and once this burden is discharged, it then shifts to the defendant to show his or her right to possess the land. The exercise of court's power, either to grant the possession to the plaintiff or to dismiss the summons, depends on how the said burden is discharged by respective party to the proceedings. However, 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. Likewise, 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 summons shall be dismissed by the court.
04. The plaintiff asserted that, he is the last registered proprietor of the subject property and annexed a true copy of the lease marking as "SK 1". It is duly certified by the Registrar of Title. According to "SK 1" the subject property contains an arear of 15 Acres and 2 Roods 00 Perches. It was registered on 06.06.2008 and took effect from 03.06.2008. The section 18 of the Land Transfer Act provides that, the duly authenticated Instrument of title to be conclusive proof of the particulars contained in or endorsed upon such instrument unless the contrary is proved. The said section is as follows:

Instrument of title to be evidence of proprietorship

18. Every duplicate instrument of title duly authenticated under the hand and seal of the Registrar shall be received in all courts as evidence of the particulars contained in or endorsed upon such instrument and of such particulars being entered in the register and shall, unless the contrary be proved by the production of the register or a certified copy thereof, be conclusive evidence that the person named in such instrument or in any entry thereon as seized of or as taking an estate or interest in the land described in such instrument is seized or possessed of such land for the estate or interest so specified as from the date of such certificate or as from the date from which such estate or interest is expressed to take effect.

05. The "SK 1" is conclusive evidence to the fact that the plaintiff is seized or possessed of such land for the estate or interest so specified, which contains an area of 15 acres, 2 roods and 00 Perches, as from 03.06.2008. If the defendants dispute this conclusive evidence, they should produce the Register or Certified Copy thereof as provided in the

above section. Instead of producing the evidence as required by the above section, the defendants stated in paragraph 8 of their affidavit that, ½ of that 15 acres belongs to Mataqali Natubakitoga and the Tokatoka Betobalavu and they (defendants) did not consent for sale of 7 ½ acres to the plaintiff and nor they were informed by the iTLTB in relation to sale of the land to the plaintiff. The defendants put forward two propositions in this paragraph 8 of their affidavit. First is that, the land belongs to their Mataqali. By this assertion, they claim ownership of portion of the subject property they have been occupying. Second is that, they did not consent to iTLTB to grant the whole area (15 acres, 2 roods and 00 perches) to the plaintiff. By this assertion, the defendants claim that, they retain the area which they did not consent and therefore, they are entitled to occupy the same. the defendants took the same defence in other paragraphs (namely 18 and 19) of their affidavit too. In fact, these assertions indicate their defence and or right to remain possession of the portion of the subject property occupied by them. As such I will discuss them later in this judgment, when considering the onus casted on them under this procedure.

06. At this stage, it is suffice to say that, the plaintiff has tendered the conclusive evidence to prove that he is the last registered proprietor of the subject property. The section 170 provides for the two requirements of the application, namely the description of land and the time period to be given to the person so summoned. In facts, these are the technical requirements. However, there is no dispute here in relation to the description of the subject property as the defendants are fully aware of it. Further, sufficient time was given to the defendants even after the summons returnable date for them to prepare their defence or right to remain in possession of the subject property. As the result, the plaintiff has passed the thresholds under both sections 169 and 170 of the Land Transfer Act (Cap 131).
07. The next is the section 171 of the Land Transfer Act (Cap 131) which empowers the court to make order for possession. However, the said section 171 provides that the court should be satisfied with the consent if any such consent is necessary. This matter has been settled by the Former Chief Justice His Lordship Anthony Gates (as His Lordship then was) in **Prasad v Chand** [2001] FJLawRp 31; [2001] 1 FLR 164 (30 April 2001). His Lordship held that:

*"At first sight, both sections would seem to suggest that an Applicant should first obtain the Director's written consent prior to the commencement of section 169 proceedings and exhibit it to his affidavit in support. However I favour Lyons J.'s approach in **Parvati Narayan v Suresh Prasad** (unreported) Lautoka High Court Civil Action No. HBC0275 of 1996L 15th August 1997 at p 4 insofar as his Lordship found that consent was not needed at all since the:*

"section 169 application (which is the ridding off the land of a trespasser) is not a dealing of such a nature as requires the Director's consent."

This must be correct for the Director's sanction is concerned with who is to be allowed a State lease or powers over it, and not with the riddance of those who have never applied for his consent. With respect I was unable to

adopt the second limb of Lyons J's conclusion a few lines further on where his lordship stated that the order could be made conditional upon the Director's consent. For if the court's order of ejectment was not "a dealing" then such order would not require the Director's consent and the court would not be subject to section 13. The court is not concerned with the grant of or refusal of, consent by the Director, provided such consent is given lawfully. Consent is solely a matter for the Director. The statutory regime appears to acknowledge that the Director's interest in protecting State leases is supported by the court's order of ejectment against those unable to show cause for their occupation of the land which is subject to the lease. The court is asked to make an order of ejectment against a person in whose favour the Director either, has never considered granting a lease, or has never granted a lease. The ejectment of an occupier who holds no lease is therefore not a dealing with a lease. Such occupier has no title. There is no lease to him to be dealt with. The order is for his ejectment from the land. There is no need for a duplicating function, a further scrutiny by the Director, of the Plaintiff's application for ejectment either before or after the judge gives his order".

08. The section reads as '*...if any consent is necessary...*' and the above authority clearly states that, the consent of the Director for the application under 169 is not necessary. Thus, the question of consent does not arise in applications under section 169. The summary of above discussion is that, the plaintiff has passed threshold under this procedure and he is entitled for an order for eviction of the defendants, unless they discharge their burden under this procedure.

09. The section 172 provides that, if the person so summoned (the defendant) 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. The Supreme Court in **Morris Hedstrom Limited –v- Liaquat Ali** CA No: 153/87 explained the nature of duty casted upon a defendant under section 172 and held that:

"Under Section 172 the person summonsed may show cause why he refused to give possession of the land 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 added)

10. Furthermore, if the court finds that, an open court hearing is required it shall also dismiss the summons. This was held by the Fiji Court of Appeal in **Ali v Jalil** [1982] FJLawRp 9; [1982] 28 FLR 31 (2 April 1982) where the court explained the nature of the orders a court may make in terms of the phrase used in section 172 of the Land Transfer Act,

which says “*he (judge) may make any order and impose any terms he may think fit*”. The Court held that:

“..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”. (Emphasis added).

11. As mentioned in the preceding paragraphs, all the defences taken by the defendants are twofold. First is that, the subject property or portion of it belongs to their Mataqali and therefore, they have the right to occupy the same. Second is that, they did not consent to iTLTB to lease the entire subject property to the plaintiff. In other words, the iTLTB failed to obtain their consent before leasing the subject property to the plaintiff. Each defence needs separate analysis.
12. The pertinent question that arises out of the first defence of the defendants is whether the members of Mataqali can establish any right over the land belongs to their Mataqali. It is settled law that, members of Mataqali cannot establish any right over such land. They are like the shareholders and directors of a company who cannot establish any right over the property belongs to the company. The court had clearly settled this in **Patel vs. Prasad** [1976] 22 FLR 210 (13 December 1976) in which Stuart J held at page 214 that:

To my mind it makes clear that individual members of a mataqali cannot establish any rights in respect of mataqali land. Nor can a shareholder in a company or even a director of a company establish any right to company land. Still less of course, can a member of a club or other unincorporated body establish a right to club property.
13. The rationale for the above proposition is that, it is the Mataqali or other division that is the native owners of the native lands. The section 2 of the iTaukei Lands Trust Act clearly defines the phrase “native owners” and states that, “native owners” means the Mataqali or other division or subdivision of the natives having the customary right to occupy and use any native land. It is the Mataqali or other division that has customary right to occupy and use any native land. Being a member of a Mataqali or other division will not give any right to any member to individually own or use any portion of a land belongs to his or her Mataqali, unless the Mataqali itself decides that, any portion of land to be beneficially occupied by iTaukei owners. As a result, the defendants cannot claim the right to occupy or use a portion of the subject property on the basis that it belongs to their Mataqali. Therefore, the defendants’ first defence to be in possession of portion of the subject property has no merit and is misconceived.
14. The second defence of the defendants is that, iTLTB failed to obtain the consent of their Mataqali and Tokatoka when it leased the subject property to the plaintiff. According to them, the portion of the subject property belongs to their Mataqali and they do not need the consent from either the plaintiff or iTLTB to occupy the same. The section 4 (1) of iTaukei Land Trust Act provides that, the control of all iTaukei land is vested in iTLTB and it is entrusted to administer all such land for the benefits of iTaukei owners. The

iTaukei Land Trust Act further provides in section 8 (1) that, it shall be lawful for the iTLTB to grant leases or licences of portions of native land not included in a native reserve for such purposes and subject to such terms and conditions as to renewals or otherwise as may be prescribed. The only condition, as per section 9, is that the iTLTB should be satisfied that the land proposed to be made the subject of such lease or licence is not being beneficially occupied by the iTaukei owners, and is not likely during the currency of such lease or licence to be required by the iTaukei owners for their use, maintenance or support. In order to satisfy these requirements, the iTLTB obtains the consent of majority members of a Mataqali, namely 60 percent of them before leasing any iTaukei land to anyone. If any lease is executed under the seal of the iTLTB, all courts of law and persons acting judicially shall take judicial notice of the common seal of the Board when affixed to any document and shall presume that it was duly affixed (section 3 (8) of the iTaukei Land Trust Act).

15. Furthermore, it is presumed that, an official act is duly performed by the public officers unless proved otherwise. Willes J. in delivering the judgment of the Court of Exchequer Chamber in **Earl of Derby v The Bury Improvement Commissioners** (1869) LR 4 Ex 222, held at page 226 that:

In the absence of any proof to the contrary credit ought to be given to public officers, who have acted prima facie within the limits of their authority, for having done so with honesty and discretion.

16. In this case, the lease is issued to the plaintiff under the seal of iTLTB and this court should take judicial notice that, it was duly affixed. In addition, there is nothing to suggest that, the officers of iTLTB acted contrary to the powers vested in them by the iTaukei Land Trust Act. Mere allegation by few members of any Mataqali that, iTLTB acted without their consent, is not sufficient to rebut the presumption in relation to the due performance of public function by the officers at iTLTB. The iTLTB as a practice obtains consent of at least 60 percent of Mataqali members. Obviously, in some instances there will be some minority members who did not consent for any such lease, but the iTLTB will act according to view of majority and issue the lease to anyone as per the terms and conditions. In such a situation, the minority members cannot say that, the iTLTB failed to obtain their consent. Nor they can be allowed to occupy any portion of any land so leased by the iTLTB with the consent of majority members of the Mataqali. If the minority members, who did not consent, are allowed to occupy the portion of the land so leased by iTLTB with the consent of majority member, it would open the floodgates to a mayhem in administration of itaukei land and the iTLTB will not be able to discharge its duties as required by the statute. If the members of any Mataqali feel that, iTLTB failed to obtain their consent or it acted contrary to its statutory power, the remedy available for them is to sue iTLTB and challenge its decision in court of law. Certainly, it is not a remedy to occupy certain portion of land so leased by iTLTB. For these reasons, I find no merit in the defence taken up by the defendants to occupy the subject property or portion of it which was duly leased to the plaintiff.

17. The entire philosophy underlying the land transfer system (Torrens System) is to establish certainty of title based on registration, which can be taken as notice to the world of the identity and extent of interest of the person who is certified to be the owner

(Attorney General v Kumar [1985] 31 FLR 23). The Privy Council ruled in Frazer v Walker (1967) 1 AC 569 that, Torrens System of registration is of immediate indefeasibility. This concept confers on any bona fide registered proprietor or registered mortgagee all the benefits, rights and interests consequent upon registration, irrespective of any irregularity or error leading to the registration of the instrument, falling short of fraud on the part of the person seeking registration. There is nothing to show that, the plaintiff fraudulently obtained his lease to the subject property. Accordingly, the plaintiff must enjoy the benefit of the system that gives high priority to protection of the registered proprietor in the absence any fraud.

18. This makes the conclusion that, the plaintiff is the last registered proprietor and he followed all the procedural requirements in bringing the instant summons. On the other hand, the defendants failed to discharge their burden as required by the law in order to remain in possession of the subject property or portion of it. As the result, the plaintiff is entitled for an order for eviction of the defendants and all others who depend on the defendants.
19. In result, I make following final orders:
- a. The defendants are ordered to immediately hand over the vacant possession of the subject property mentioned in the summons to the plaintiff, and
 - b. The defendants are further ordered to jointly pay a summarily assessed cost of \$ 3,000.00 to the plaintiff within a month from today.

At Lautoka
30.11.2021




U.L.Mohamed Azhar
Master of the High Court