

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 117 of 2020

IN THE MATTER of application under section 169 of Part XXIV of the Land Transfer Act, Cap 131 for an Order for immediate vacant possession

BETWEEN : **PETER CHARLES THAYER** and **SAMSHUN NISHA THAYER** both of 6/7/46 Pasadena, California, United States of America, Carpenter and Domestic Duties.

Plaintiffs

AND : **JAMES ROBERT CARNEY** of 2360 Keneke St, Kilauea, Hawaii, Retired and currently residing at Momi Bay, Nadi, Fiji.

Defendant

Before : Master U.L. Mohamed Azhar

Counsels : Ms. A. Swamy for the Plaintiffs
Ms. A. Ali for the Defendant

Date of Judgment : 06.06.2023

JUDGMENT

01. The plaintiffs summoned the defendant pursuant to section 169 of the Land Transfer Act (Cap 131) to show cause why he should not give up immediate vacant possession to the plaintiffs of all that land comprised in Certificate of Title Number 17666 being Lot 13 on Deposited Plan Number 2051 containing six acres, one rood and nine perches, situated in the District of Nadroga, in the Island of Vitilevu known as “Gusunagaga” (**the subject property**). The summons is supported by an affidavit sworn by both the plaintiffs. The plaintiffs also annexed a certified true copy of the Certificate of Title No. 17666 and a copy of the letter sent by their solicitors to the defendant to vacate the subject property.
02. The defendant opposed the summons and filed the affidavit in opposition. The defendant then filed a supplementary affidavit in opposition with the leave of the court and annexed

Exhibits from 1 to 11. The plaintiff was given an opportunity to respond to the supplementary affidavit of the defendant. At hearing of the summons, the counsel for the plaintiffs tendered the written submission in addition to her oral submission.

03. The plaintiffs in their affidavit that supports the summons stated that they are the registered proprietors of the subject property and annexed the copy of the Certificate of Title for the proof of their locus to summon the defendant. The copy of the Certificate of Title is duly certified by the Registrar of Title and it is conclusive evidence as per the section 18 of the Land Transfer Act. The plaintiffs averred that, the defendant illegally occupies a portion of the subject property. The plaintiffs also claimed that, the defendant has no right to remain on the portion of the subject property, nor he has any interest over it. On this ground, the plaintiffs invoked the jurisdiction of the court to order the defendant to vacate the portion of the subject property occupied by him.
04. The defendant, on the other hand, does not dispute the locus of the plaintiffs, but admits in his both affidavits that, the plaintiffs are the registered owners of the subject property. The defendant also admits that, he has been occupying the said portion of the subject property. However, the defendant states that, the plaintiff obtained the title to the subject property by fraud and he (defendant) is the beneficial owner of the portion occupied by him as he paid Vicky Yarberry and built a holiday home on the said portion.
05. The defendant further elaborated his position in his supplementary affidavit filed on 15.04.2021. The averments in the supplementary affidavit span over 61 paragraphs and substantiate his right to remain in the portion of the subject property until the issues between the plaintiffs and the defendant are adjudicated in trial proper. It is not necessary to bring the each and every averment here, but suffice to say that, there had been an arrangement, among a group of people which included the first plaintiff and others mentioned in the supplementary affidavit and of course all of them are foreign nationals at all times material (**the purchasers**), to buy a piece of land in Fiji and get it sub-divided into several individual lots to each of them for their holiday and recreation.
06. The first plaintiff was entrusted by the others to do all needful until the separate title is issued to each and every purchaser. It took quite long time to complete the process and in the meantime, some purchasers passed away and some assigned their interest over the subject property to third parties. The plaintiff is the one who purchased the interest of one of the purchasers, namely Victoria Yarberry. The exhibits annexed with supplementary affidavit and especially the e-mail correspondence between the plaintiffs and other purchasers including the defendant clearly shows the arrangement among them in acquiring a portion of land, the various steps taken by the plaintiffs with the assistance of some solicitors and the disputes and concerns that arose among themselves in relation to,


inter alia, sub-division and obtaining separate Certificate of Titles to each and every purchaser.

07. In this background, the defendant initially sued the plaintiffs in Civil Action Number 166 of 2018 and prayed for, inter alia, declaration that, he (defendant) is the beneficial owner of the portion of subject property occupied by him; declaration that he has equitable interest over the portion of the subject property; and order on the plaintiffs to sub-divide the subject property and give portion of the subject property to him. The defendant also sought injunction against the plaintiffs restraining them from interfering with his peaceful occupation of the portion of the subject property. The judge having heard the application for interim injunction restrained the plaintiffs and their agents and servants from interfering with the defendant and his right to use and enjoy the portion of the subject property occupied by the defendant. This injunction was granted till determination of that matter. The judge also stated that, the above injunction was not a bar for the plaintiffs to institute proceedings for recovery of possession.
08. The affidavit in reply filed by the plaintiffs not only contains bare denial of the defendant's averments, but also suggests that, there are several disputed issues between the plaintiffs and the defendant in relation to the portion of the subject property.
09. The defendant thereafter withdrew the above Civil Action No.166 of 2018 and the permanent injunction granted by the judge was dissolved. However, the defendant together with some of other purchasers or the persons claiming to have interest on the certain portion of the subject property sued the plaintiffs in a new Civil Action No. 341 of 2022. In this latter case, the defendant and other interested persons pleaded the same arrangement among them as the defendant pleaded in his supplementary affidavit filed in this matter. The defendant and other purchasers in that latter action prayed the court for, inter alia, declaration that, the plaintiffs hold the subject property as the constructive trustees for them and for order on the plaintiffs to subdivide the subject property and give separate Lot to each of them as per the initial arrangement among the purchasers.
10. The above examination reveals several important facts in this matter, Firstly, even though the judge in Civil Action No. 166 of 2018 stated that, the permanent injunction was not a bar for proceedings for recovery of possession, he was of the view that, the defendant should not be evicted until determination of the issues in that matter and then granted the permanent injunction. Secondly, the complicated issues between the plaintiffs and the defendant in relation to the arrangement among the purchasers are revealed by affidavits filed by both the plaintiffs and the defendant. Thirdly, the pleadings in that latter Action' (341 of 2022) are evident that, more issues among all the stakeholders to be determined in relation to the subject property.

11. Accordingly, the supplementary affidavit filed by the defendant and the facts pleaded in that latter Action brought against the plaintiffs demonstrate that, the defendant not only showed some tangible evidence establishing a right or supporting an arguable case for his right to remain in possession of the subject property in this matter, but also proved that, there are complicated issues between the plaintiffs and the defendant which cannot be decided in summary procedure by way of the affidavit evidence.
12. The duty of any defendant in an application under section 169 of the Land Transfer Act is not to produce any final or incontestable proof of the right to remain in the subject property, but to adduce some tangible evidence establishing a right or supporting an arguable case for the right to remain in possession of the subject property (**Morris Hedstrom Limited –v- Liaquat Ali** CA No: 153/87). Besides, it is the settled law that, order for vacant possession should not be granted in cases where complicated matters need to be determined by the court in an open court trial. (**Lal v Schultz** [1972] 18 FLR 152 (30 October 1972); **Devi v Sharma** [1985] 31 FLR 130 (1 January 1985); **Wati v Vinod** [2000] 1 FLR 263 (20 October 2000).
13. In this circumstance, it is proper for the parties to resolve their complicated issues in a proper trial as they cannot be summarily determined by way of affidavits only. The court can dismiss the summons if it decides that an open court hearing is required (**Ali v Jalil** [1982] 28 FLR 31).
14. In addition, the e-mail correspondence annexed with the supplementary affidavit shows that, the plaintiffs brought this summons completely suppressing all these arrangements and the issues regarding the subject property, which require full trial. The conduct of the plaintiffs in this regard is unacceptable and therefore this matter warrants the cost on high scale if not on indemnity basis.
15. In result, I make the following orders:
 1. The summons filed by the plaintiffs is dismissed, and
 2. The plaintiffs should pay summarily assessed costs in sum of \$ 5000 to the defendant within a month from today.

At Lautoka
06.06.2023




U.L.Mohamed Azhar
Master of the High Court