

IN THE HIGH COURT OF FIJI AT LAUTOKA

APPELLATE JURISDICTION

Civil Action No. HBC 266 of 2019

IN THE MATTER of an Appeal from the decision of then Master of the
High Court of Fiji at Lautoka made on the 23rd of February, 2021 in
Civil Action No. HBC 266 of 2019.

BETWEEN

MASAKE TAQIRI of Koroipita Model Town, House 124,
Naikabula, Lautoka.

DEFENDANT- APPELLANT

AND

MODEL TOWN CHARITABLE TRUST a charitable organization duly
incorporated under the Charitable Trusts Act having its office at
Marine Drive, Lautoka.

PLAINTIFF – RESPONDENT

Counsel : Ms. Lidise V. for the Appellant
Ms. Ravuikadavu L. for the Respondent

Date of Hearing : 17th August 2023

Date of Judgment : 14th September 2023

JUDGMENT

- [1] This is an appeal from the judgment of the learned Master of the High Court delivered on 23rd February 2020.
- [2] The respondent filed an originating summons pursuant to section 169 of the Land Transfer Act 1971 (the Act) seeking the following orders:
- (a) An order that the defendant by himself, his agents, servants and family members do forthwith quit and deliver vacant possession of the property described in Native Lease No.29188 Lot 1 Koroipita stage 2 SO 5924 in the Province of Ba having an acre of 8.9784 hectares together with all the improvements thereon.
 - (b) That the defendant do not damage or remove any part of the property when vacating.
 - (c) Any further or other order this Honourable Court deem just.
- [3] The learned Master granted the orders sought in the originating summons without costs.
- [4] The appellant's appeal is based on the following grounds:
1. The Learned Master erred in law and in fact in ordering vacant possession in the face of there being no evidence of any breaches of the license to occupy the respondent's property and thereby causing a substantial miscarriage of justice.
 2. The Learned Master erred in law and in fact in ordering vacant possession by not evaluating the issue of estoppel against the respondent in that the appellant was entitled to uninterrupted occupation of the subject premises upon payment of the rental dues.

3. The Learned Master erred in law and in fact in ordering vacant possession in the absence of any justifiable reason which was tantamount to endorsing an arbitrary and unconscionable act on the part of the respondent.

[5] Section 169 of the Act provides:

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.

[6] Section 172 of the Act provides:

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.

[7] In the eviction notice dated 16th March 2019 the reason for eviction is that the son of the appellant was caught in possession several packets of Marijuana during

school hours. In response to this the appellant in his affidavit in response has stated that;

That in further response to paragraph 5, my son who had found a pencil case in school in-front of his classroom containing illicit drug i.e. marijuana was questioned by the school Vice Principal and the matter was also investigated by the Police.

That after investigation by the police, they found that my son had not brought the pencil case containing the drugs with him into the school premises but merely found it that morning in school and was not even his pencil case.

That the police did not charge my son nor has the school reprimanded my son because he did not commit any offence of the land.

[8] In response to these averments in the affidavit in response it is stated;

That save for admitting that the Trust was made aware that the defendant's son was caught in possession of some illicit drugs, the plaintiff is not aware of the other assertions made by the defendant in paragraph 5, 6, 7 and 8.

[9] Pursuant to Koroi-pita Occupation Licence Agreement and Commitment to Compliance to the Rules of Occupation, the appellant and the family have the right to be in occupation of the subject property. The learned Master of the High Court, in his judgment, states that the appellant had not adduced any physical evidence that is either real or demonstrative which can justify his possession.

[10] Applications under section 169 the Act are decided on affidavit evidence. In this case the position taken by the appellant in his affidavit in response has not been challenged by the respondent. The contents of an affidavit are sworn evidence and the court cannot disregard such evidence without giving any reason.

[11] It is also important to note that the negative cannot be proved by hard evidence. The burden is on the party who relies on a particular fact to establish it by evidence.

[12] Mere suspicion that the appellant's son had illicit drug in his possession does not make him an offender. Unless and until someone is convicted by the court that person is presumed to be innocence.

[13] For the above reasons the respondent has had no reasonable ground even to issue eviction notice on the appellant.

ORDERS

1. Appeal is allowed and the judgment of the learned Master is set aside.
2. Respondent's application is set aside.
3. There will be no order for costs.


Lyone Seneviratne



JUDGE

14th September 2023