

IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

Action No. HBC 37 of 2020

IN THE MATTER of an application  
Under Section 169 of the Land  
Transfer Act.

BETWEEN: SHRI NEWAS CHAND formerly of Naitata, Navua, Fiji and now residing in 4  
Scott St, Kogarah, NSW 2217, Australia, Landlord.

PLAINTIFF

AND: PARMESH KUMAR and SHEEMA PRASAD both of Naitata, Navua.

DEFENDANTS

BEFORE Hon. Justice Vishwa Datt Sharma

COUNSEL: Mr. Singh A. for the Plaintiff

Mr. Singh S. for the Defendants

DATE OF DECISION: 19<sup>th</sup> October, 2023

DECISION

*[Section 169 - Vacant Possession]*

## Introduction

1. The Plaintiff filed an Originating Summons and sought for the following orders:
  - (i) That the Defendants give vacant possession of the land and premises comprised in the Certificate of Title no. 20200 known as Vuninokonoko being Lot 6 on DP No. 5005 containing an area of 17a3r16p situated in the Island of Vitilevu.
  - (ii) Costs.
2. The Plaintiff relies on the Affidavit filed in Support of this application by the Plaintiff.
3. The Defendants filed their Affidavit in Opposition on 08<sup>th</sup> February 2021 and refuses to give Vacant Possession of the property as sought for by the Plaintiff.

## The Law

4. This is a case involving Section 169 and 172 of the Land Transfer Act.
5. Section 169 and 172 of the Land Transfer Act
  - 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) & (c) not reproduced.*
  - 172. If the person summoned appears he or she may show cause why he or she refuses to give possession of such land and, if he or she 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...provided 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 or she may be otherwise entitled.*
6. Under section 169 what an applicant is required to prove is that he or she had been the last registered proprietor of the land. Once that is done the party noticed is required under section 172 to satisfy a right to possession. If the court is satisfied with regard to a right to possession

of the occupier the court has to dismiss the application for eviction. After dismissal the applicant is entitled to take any other remedy available.

### **Determination**

7. The Plaintiff seeks an order that the Defendants deliver Vacant possession of the property of Certificate of Title No. 20200 on Lot 6 on Deposit Plan No. 5005.
8. The Plaintiff stated and is in conformity with the fact that he is the registered proprietor of the aforesaid property of which Vacant Possession is sought against the Defendants.
9. The Plaintiff deposed that the Defendants have been occupying part of his Land as Trespasses.
10. Eviction notice was served onto them, and to date the Defendants have not vacated the property and is occupying the property illegally.
11. The Defendants in their Affidavit in Opposition admits that the Plaintiff is the registered owner and proprietor of the property.
12. However, they wish to show their interest in the property:
  - (a) The house on the property belongs to one Ambika Prasad;
  - (b) Ambika has built this house over 40 years ago.
  - (c) He was living on the property based on an arrangement between him and the previous owner, Mr. Hari Chand.
  - (d) They believe that Ambika Prasad who will file a separate affidavit in their proceedings has paid Mr. Hari Chand a sum of close to \$5,000 to reside on the property.
  - (e) Shri Newas Chand (Plaintiff) knew of the arrangements.
  - (f) The house is one half on the Plaintiff's Land and another half in another block of Land not owned by the Plaintiff.
  - (g) That they made improvements to the land with Plaintiff's concurrence.
  - (h) Their interest will be secured by a caveat that they intend to lodge.

13. The perusal of Court file does not show that Ambika Prasad has in fact filed any separate Affidavits to Support the Defendant's claim a raised in his Affidavit in Opposition.
14. The Defendants have deposed that they moved into the property with Mr. Ambika Prasad's permission as well as the Current Plaintiff's permission more than 15 years ago.
15. The perusal of the Certificate of Title states that the property was transferred to the Plaintiff on or about 2010, after the demise of Mr. Hari Chand. It shows that the Plaintiff has encouraged the Defendants to continue the occupation on the portion of his property.
16. The Defendants have deposed that they have spent considerable investment on the improvement of the house after they came into possession of it.
17. The Plaintiff has not denied the length of time in which the Defendant's current house has been situated on his property.
18. The Defendants house is only partially situated on the Plaintiff's property.
19. The Court now needs to determine whether an equitable interest arises or not.
20. As such the Affidavit evidence before Court is insufficient to grant an order for vacant possession against the Defendants and the issue of equitable interest needs to be tested by oral evidence. This is not a proper case for grant of orders in terms of summary proceedings.
21. The Plaintiff should have commenced proceedings by way of a Writ of Summons in order to allow for the witnesses to testify orally and be subjected to Cross Examination so that it allows this court to determine in a just fair, manner whether an order for vacant possession sought under s.169 of Land Transfer Act be acceded to or refused.

**Costs**

22. Although the matter proceeded to full hearing, it is only fair that each party to the proceedings bear their own costs at the court discretion.

**Orders**

A. The Plaintiff's originating summons is dismissed.

B. Each Party to bear their own costs.

Dated at Suva this 19<sup>th</sup> day of October, 2023.



Vishwa Datt Sharma

JUDGE

CC: KOHLI & SINGH, SUVA

SHELVIN SINGH LAWYERS, SUVA