

IN THE HIGH COURT OF FIJI
AT SUVA
CENTRAL DIVISION
CIVIL JURISDICTION

Civil Action No. HBC 204 of 2023

BETWEEN: **SULIA ADITOMU NAKABEA (TRUSTEE AND**
ADMINISTRATIX) OF THE LATE TEVITA
TALEMAIKADAVU NAKABEA

PLAINTIFF

AND: **VIDYA WATI**

FIRST DEFENDANT

AND: **KUSUM LATA**

SECOND DEFENDANT

AND: **SUMAH LATA**

THIRD DEFENDANT

Date of Hearing : **18 March 2024**
For the Plaintiff : **Not Present**
For the Defendant : **Ms Maharaj. V**
Date of Decision : **07 June 2024**
Before : **Waqainabete-Levaci, SLTT Puisne Judge**

JUDGEMENT

(TRIAL TO PROVE COUNTERCLAIM)

PART A - BACKGROUND

1. This is an application by way of Counter Claim for the relief of Vacant possession pursuant to section 169 of the Land Transfer Act against the Plaintiff.
2. The Plaintiff had initially filed an amended Writ of Summons seeking for declarations that the property was transferred to the Defendants by fraud and by undue influence and sort for specific performance i.e. for the transfer of the property by virtue of the Sale and Purchase Agreement to the Plaintiff.
3. The Plaintiff had entered into an Agreement with Shiu Kumar on 18 April 2006 for the property known as Lot 1 DP 9779 in Naisoqo, a partial block in the whole property of CT 20833 on Lot 3 of DP 4185 containing one hundred and eighty nine acres and one rod and twenty four perches.
4. Shiu Kumar is the second youngest son of Ram Sharan and second youngest brother of Raj Bali and Ram Deo, the registered proprietors of the said whole property and who are now deceased.
5. The parties agreed that the property would be sub-divided and a purchase price of Fifty Thousand Dollars (\$50,000) would be paid with a deposit of Four Thousand Dollars (\$4,000) to be paid on execution of the Agreement, Ten Thousand Dollars (\$10,000) was to be paid on 3rd June 2006 and Seventeen Thousand Dollars (\$17,000) on 10th May 2007.
6. The Plaintiff resided on the property and gave Three Thousand Dollars (\$3000) worth of traditional gifts as well as Twenty Five Thousand Eight Hundred Dollars (\$25,800) in improvements over the property.
7. Raj Bali made a Will appointing his brother Shiu Raj as executor and trustee of his estate in probate number 32209.
8. Shiu Kumar died and left a Will appointing the wife, Lalita Wati aka Leeta Wati as the executrix and trustee of his estate.

9. An eviction notice was served on the plaintiff on 29th December 2021 by lawyers for the Defendants as daughters of the late Raj Bali. The property registered as Lot 1 DP 9779 of Naisoqo, Viria had been transferred to the three defendants.
10. The Plaintiff claimed that the transfer of the property was done under undue influence, inducement and fraudulent conversion of the property as Laleeta Wati was blind and could not see the document, let alone place her thumbprint, the other two executed documents of transfer without their knowledge or concurrence. This was done by Shalen Kumar, the son of Raj Deo, deceased and also a previous proprietor.
11. In Defence the Defendants argued that the property was transferred to Ram Sharan and Sons Ltd. By Deed of Property Settlement which was made between Ram Sharan And Sons Limited and executors and trustees of the estate of the deceased shareholders of the company. That in the Deed, it was agreed to transfer and convey Lot 1 DP 9779 (which is CT 44590) Laleeta Wati (as executor and trustee) was to transfer property to all the beneficiaries i.e. the Defendants who were neither proprietors of the property in 2006.
12. The Defendants were unaware of the Sale and Purchase Agreement in 2006. They are the registered proprietors of the property.
13. They seek for vacant possession of the property.

PART B: LAW ON VACANT POSESSION

14. In section 169, 170, 171 and 172 of the Land Transfer Act provides as follows:

“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 who seeks to re-enter where the lessee or tenant is in arrear for such period as may be provided 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.

Particulars to be stated in summons

170. Therein 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.

Order for possession

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.

Dismissal of summons

172. 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.”

15. In Jamnadas -v- Honson Ltd [1985]FjLwRp 13; [1985] 31 FLR 62 (20 July 1985) Speight V.P of CA, Mishra J.A and Roper J.A stated –

“On 1st February, 1985 the respondent applied to a judge in chambers for immediate vacant possession under section 169 of the Land Transfer Act, which provides a speedy procedure for obtaining possession where the occupier can show no cause why an order should not be made. Where, however, he can show an arguable defence the application is dismissed without prejudice to the applicant's right to proceed by way of writ.”

16. In this instance, the Defendant/Applicant has sort this relief by way of a Counter-claim seeking the Courts orders for Vacant possession.

17. According to the law, the Applicant/Defendant is required to show Court that he is a registered proprietor and that due notification was made for the Respondent/Plaintiff to vacate the premises.
18. The Respondent/Plaintiff had claimed for fraud as one of the causes of breach of contract seeking reliefs for declaration and specific performance.
19. In his Ruling on 6 October 2023, the Master had struck out the Claim as well as the Reply to Defence and Defence to Counter-claim on the basis that the subject land the Plaintiff claimed for was different to that which was transferred to the Defendants.
20. Secondly, the Plaintiff, the late Mr Tevita Nakabea, was acting as an Attorney of Mr Waisea Makalou Nakabea, and not in his personal capacity. Therefore the current Plaintiff, who is the Executor and Trustee of the late Mr Tevita Nakabea, is representing the personal property of the deceased. These were not averred not pleaded in the Statement of Claim.
21. Lastly, Leela Wati, who was alleged to have been unduly influenced and fraudulently surrendered her rights, did not hold that Leela was a party to the proceedings nor pleaded any claim against her.

PART C: EVIDENCES

22. The Defence called Ms Suman Lata, for Formal Proof Hearing. She is the sister of Kusum Lata the third named Defendant and Vidya Wati who is also her sibling is residing overseas. She had authorized the witness to given her testimony on their behalf. She confirmed they were all registered owners of the property registered as CT 44590 in Lot 1 of DP 9779 and confirmed the title containing their names marked as **P-Exh 1** and **P-Exh 2**. There is a double-storey building and a photo to confirm this marked as **P-Exh 3**. A notice to vacate was served on the Plaintiffs on 29th December 2021 and tendered as **P-Exh 4**. Again, after their Claim was struck out including their Defence to Counterclaim and Reply to Defence, a letter was sent to the Plaintiff's counsel to vacate premises on 13 October 2023 tendered as **P-Exh 5**. Costs also of \$5000 awarded by Master had not yet been paid.

PART D: ANALYSIS

23. From the evidences of the Defendant, the property is located in CT 44590 in Lot 1 of DP 9779 for which was transferred on 25 November 2021 to Viday Wati, Kusum Lata and the Defendant's witness. There is uncontested evidence established that by virtue of the transfer, they are now the registered proprietors of the property.

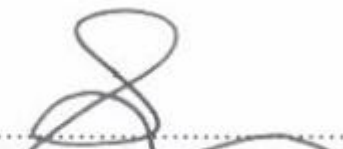
24. The Court is satisfied that the Defendants have proven their ownership of the property. They have also shown proper notification and service of notice to the Plaintiff.
25. The Plaintiff has, by virtue of the striking out of their claim and reply to defence and defence to counterclaim, not established any evidence of their interest on the property.
26. The Court therefore finds that there is sufficient evidence to establish that the Respondent/Plaintiffs have not shown any interest in order to enable them to remain in the property.
27. The Defendant has proven their Counter Claim and orders for Vacant Possession will be granted accordingly.

Orders of the Court:

28. **The Court orders as follows:**

- (a) *That the Orders for Vacant Possession be granted and that the Plaintiff and its Occupiers of the property located at CT 44590 on Lot 1 DP Plan 9779 located in Sawani, Naitasiri be ordered to vacate and give up possession of the abovementioned property to the Defendant within 30 days from today;*
- (b) *Costs of \$800 imposed against the Plaintiff.*




Ms Senileba LTT Waqainabete-Levaci
Puisne Judge