

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action HBC No. 227 of 2022

BETWEEN: **LESIA VANAWALU** and **RUCI ROKO LEBA RASEA- VANAWALU** of Lot 75, Wainivula Road , Nasinu, LTA officer, Fijian Teachers Officer, and **ILIESA VANAWALU** of Lot 75, Waivula Road, Nasinu, Unemployed.

PLAINTIFFS

AND: **VALEIANA JIOJE; AISEA VILIAME** and **THE OCCUPANTS** of iTaukei Lease No. 31221 known as Lomaivuna Subdivision Showing Lot 55 Plan R 1837 IN THE Tikina of Viria, in the Province of Naitasiri with respective area of 10a or 38p situated at Lomaivuna, whosoever and howsoever employed.

DEFENDANTS

Before: Hon. Mr. Justice Deepthi Amaratunga

Counsel: Mr. Rokodreu V for the Plaintiffs
Non- Appearance for the Defendants
Mr. Prasad A (Legal Aid)

Date of Hearing: 17.06.2024

Date of Judgment: 20.06.2024

JUDGMENT

INTRODUCTION

- [1] This is an action by way of originating summons for eviction in terms of Section 169 of Land Transport Act 1971 (LTA). Plaintiffs are the last registered proprietors of the land comprised in iTaukei Lease No. 31221(The Land).They became registered proprietors on 15.3.2022, pursuant to mortgagee sale by the mortgagors of the land at that time. Mortgagee is not a party to this action as the mortgagee sale was conducted on the basis as the land was and no vacant possession granted to the purchasers, who are the Plaintiffs in this action to evict the occupants of the land upon registration as proprietors. Second named Defendant had filed an affidavit in opposition on 23.10.2023, and had denied execution of documents of mortgagee of the land by himself, but a bare denial is not sufficient to defeat the indefeasibility of the title of the proprietors to establish a right to remain in possession of the land in terms of Section 172 of LTA and also enjoy the benefits of it while the last registered proprietor is kept high and dry for more than two years.
- [2] Plaintiffs are granted possession of the land, but having considered time taken and nature of the land which is agricultural Defendants are granted two months to uproot and or harvest any crops to minimize unjust enrichment and reduce waste.

ANALYSIS

- [3] The Land is an Agricultural Land under Agricultural Land and Tenant Act 1966(ALTA) and the lease was issued in terms of Section 58(f) of ALTA.
- [4] In the case of Lotan v Garrick [1984] FJCA 7; Civil Appeal No 45 of 1984 (24 November 1984) Fiji Court of Appeal dealt with jurisdiction of Tribunal established under ALTA and jurisdiction in terms of LTA for eviction and held,
- 'Nevertheless, and contrary to the view which some counsel have expressed in other cases, the Tribunals do not have exclusive jurisdiction in respect of agricultural land. Its powers are set out in Section 22.'* (emphasis is mine).
- [5] It was also held in the said Lotan case (supra) that the provisions contained in the LTA prevails over any other law in terms of the Section 3 of LTA Act. It was held further

'The power to apply to the Court independently of ALTA is preserved in Section 169 (summarily) and in the first proviso to Section 172 (by writ). And under Section 3 the Land Transfer Act prevails over any other Act inconsistent therewith. Yet in Soma Raju v. Bhajan Lal F.C.A. Civil Appeal 48/1976[1] this Court held that the indefeasibility provisions did not mean that registration under the Act extinguished an ALTA tenancy: an example of special provisions prevailing over general.'

- [6] The Plaintiff had instituted this action for eviction in terms of Section 169 of LTA he had obtained the rights of the property from the mortgagee of the land at that time(the Mortgagee) through a mortgagee sale.
- [7] There is no application before in terms of Tribunal under ALTA for obvious reasons, but for completeness the legal provision discussed. The Mortgagee had registered its rights over the Land and had exercised its rights for the sale the land and Plaintiffs were the purchasers of the Land through mortgagee sale.
- [8] Plaintiffs filed affidavit in support on along with the originating summons for eviction on 1.8.2022. The affidavits of service were filed for first named Defendant and also for another occupant Stino Savivio as one of the 'occupants'.
- [9] After that this action was struck off by Master on 12.12.2022, due to non-appearance of Plaintiff's solicitors.
- [10] Summons for reinstatement was made and it was served to Teresia Leba, daughter of first name Defendant after consulting with the parents and the action was reinstated by the Master on 21.2.2023.
- [11] There is a supplementary affidavit of service filed 23.2.2023 and another affidavit of service filed on 6.6.2023. This confirms service of the affidavit in support of the originating summons along with the said summons to first named Defendant and another affidavit in support on 10.8.2023 to second named Defendant.
- [12] Affidavit in opposition filed by second named Defendant on 23.10.2023 and a reply to this was filed on 31.10.2023. Then, the action was allocated to me for hearing.
- [13] At the hearing counsel for Legal Aid appeared to assist the court on behalf of second named Defendant.
- [14] Plaintiffs had served the originating summons and the affidavit in support of this application to both Defendants.
- [15] The Land is an agricultural land and the agricultural lease was for thirty years with half yearly payments of rentals.
- [16] The Plaintiffs are the last registered proprietor of the Land in issue. They had obtained the title from the Mortgagees of the Land on 15.3.2022 and the transfer was registered on the title.

[17] Under Torrens system registration is everything, except for the exclusions contained in LTA. For example if there is a fraud or mistake or error on the record.

[18] In Fels and another v Knowles and another ([1907](#)) [26 NZLR 604](#) Stout C.J (dissenting judgment) at p 613 in the interpretation of the New Zealand [Land Transfer Act](#), which is based on Torrens system, held follows

'If the words of a statute in their ordinary meaning are clear, effect must be given to them, however inequitable they may be, and however they may infringe private rights. But the meaning must be clear.'

[19] The [Land Transfer Act](#) 1971 (LTA) is based on the same principles and provisions are analogous as both are based on Torrens system. The language contained in LTA and the provisions relating to indefeasibility of the title and the meaning is clear. The advent of Torrens system and need for such system was explained in Fels and another v Knowles and another (supra) in the joint majority judgment (delivered by Edwards J) at p 619 as follows:

'In the course of centuries of our English history there had grown up a complicated system of rules regulating dealings with and transfer of real property. The result was that every dealing necessitated a minute and careful inquiry into the preceding title, attended by great expense, and never resulting in absolute certainty to title. More especially the rules affecting the administration of trusts and the fact that notice, direct or constructive, of a breach of trust might result in grievous loss to wholly innocent persons were felt to bear very hardly, without sufficient compensating advantages. Impressed by this view of the matter, it occurred, now many years ago, to an ingenious gentleman in South Australia, Mr. Torrens, that the Merchant Shipping Acts supplied a model for which a scheme of land registration could be devised, by which all trusts should be excluded from the register, and under which a person dealing honestly with the registered proprietor should not be called upon to look further than the register, and should be entirely unaffected by any breach of trust committed by the registered proprietor with whom he dealt. From this genesis sprang the system of land registration which now prevails in all the Australian Colonies and is now represented in this colony by "The Land Transfer Act 1885" and its amendments.'

[20] The above brief history and the reason behind the Land Transfer Act in Australia and New Zealand is equally applicable to Fiji as LTA, which came in to operation on 1st August 1971 in Fiji is based on Torrens system and provisions in issue are analogous to the Land Transfer Act in New Zealand and Australia at that time.

[21] In Fels and another v Knowles and another (supra) further at p 620 the following appears:

'The cardinal principle of the statute is that the register is everything, and that, except in case of actual fraud on the part of the person dealing with the registered proprietor, such person, upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against all the world. Nothing can be registered the registration of which is not expressly authorized by the statute.'

[22] The Section 2 of the Land Transfer Act defines the word 'instrument of title' as follows:

"instrument of title" includes a certificate of title, Crown grant, lease, sublease, mortgage or other encumbrance as the case may be.

[23] The indefeasibility can be attached to any instrument if it is allowed to be registered in terms of the LTA. The instruments that attains indefeasibility are the instruments allowed under Section 38 of LTA.

[24] Indefeasibility of title is not something explicitly found in the statute books, but a term coined by the courts, based on the principles contained in Section 38 of LTA.

[25] As stated earlier the registration of the title is everything under the Torrens system and the exceptions to this rule is Fraud. There is no definition of fraud contained in LTA but are to dealt in Sections 39, 40 and 41 of the LTA.

[26] Section 41 of LTA, deals with fraudulent entries to the land registrar and it has no application to the present appeal. Section 40 of LTA deals with fraud, and this is an exception that one can find in LTA, which vitiates the rights derived from the registration of the title. Sections 39, 40 and 41 of the Land Transfer Act states as follows:

"Estate of registered proprietor paramount, and his title guaranteed

39-Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the registered proprietor of any land subject to the provisions of this Act, or of any estate or interest therein, shall, **except in case of fraud**, hold the same subject to such encumbrances as may be notified on the folium of the register, constituted by the instrument of title thereto, but absolutely free from all other encumbrances whatsoever except-

(a) the estate or interest of a proprietor claiming the same land, estate or interest under a prior instrument of title registered under the provisions of this Act; and

(b) so far as regards any portion of land that may by wrong description or parcels or of boundaries be erroneously included in the instrument of title of the registered proprietor not being a purchaser or mortgagee for value or deriving title from a purchaser or mortgagee for value; and

(c) any reservations, exceptions, conditions and powers contained in the original grant.

Subject to the provisions of Part XIII, no estate or interest in any land subject to the provisions of this Act shall be acquired by possession or user adversely to or in derogation of the title of any person registered as the proprietor of any estate or interest in such land under the provisions of this Act.'

Purchaser not affected by notice

40. Except in the case of **fraud**, no person contracting or dealing with or taking or proposing to take a transfer from the proprietor of any estate or interest in land subject to the provisions of this Act shall be required or in any manner concerned to inquire or ascertain the circumstances in or the consideration for which such proprietor or in any previous proprietor of such estate or interest is or was registered, onto see to the application of the purchase money or any part thereof, or shall be affected by notice, direct or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding, and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as **fraud**.

Instrument etc, void for fraud

41-Any instrument of title or entry, alteration, removal or cancellation in the register procured or made by **fraud** shall be void as against any person defrauded or sought to be defrauded thereby and no party or privy to the fraud shall take any benefit therefrom." (emphasis added)

[27] Assets Co Ltd v Mere Roihi (Consolidated Appeals) ([\[1905\] AC 176](#)) the principles contained in Sections 39, 40 and 41 of the LTA (in the said case analogous provisions in NZ Land Transfer Act were dealt, as opposed to indigenous people's rights to land in terms of the said Act) were described as 'unimpeachability' of the title. The same principles are most commonly described as 'indefeasibility' of title, too. In Frazer v Walker and Others [\[1967\] 1 All ER 649](#) the word 'indefeasibility' was dealt by the Privy Council as regard to the analogous provisions contained in the Land Transfer Act of New Zealand and the earlier decision of Assets Co Ltd v Mere Roihi (Consolidated Appeals) ([\[1905\] AC 176](#)) was also considered in this later decision. In the said decision

it was held that this concept of 'indefeasibility' is central to the system of registration found in the Land Transfer Act. In Fraser v Walker and Others (supra) at page 652 the following appears:

*"It is these sections which, together with those next referred to, confer on the registered proprietor what has come to be called "indefeasibility of title". **The expression, not used in the Act itself, is a convenient description of the immunity from attack by adverse claim** to the land or interest in respect of which he is registered, which a registered proprietor enjoys. This conception is central in the system of registration. It does not involve that the registered proprietor is protected against any claim whatsoever; as will be seen later, there are provisions by which the entry on which he relies may be cancelled or corrected, or he may be exposed to claims in personam. These are matters not to be overlooked when a total description of his rights is required; but as registered proprietor, and while he remains such, no adverse claim (except as specifically admitted) may be brought against him.*

*Those sections of the Land Transfer Act, 1952, which state the effect of the certificate of title. The principal section on this subject is s 75. The certificate, unless the register shows otherwise, is to be conclusive evidence that the person named in it is seized of or as taking estate or interest [sic] in the land therein described as seized or possessed of that land for the estate or interest therein specified and that the property comprised in the certificate has been duly brought under the Act. This section is of a similar character to those last discussed; it creates another--a probative--aspect of "**indefeasibility**", none the less effective though, as later provisions show, there are means by which the certificate may be cancelled or its owner compelled to hold it on trust or to deliver it up through an action in personam." (Emphasis is mine)*

- [28] So, the indefeasibility of the title or unimpeachability of the title are the same principles that are commonly contained in the LTA that grants the impunity to the title of the land upon the registration of the instruments recognized in LTA.
- [29] The rights derived from the registration of such instruments are absolute subject to fraud and mistake or error in terms of Sections 40 and 41 of LTA.
- [30] Assets Co Ltd v Mere Roihi (Consolidated Appeals) ([\[1905\] AC 176](#)) it was held that the fraud needs to be on the part of the registered owner whose right is to be impeached or to his or her agent in order to vitiate the title or the interest registered on the instrument.

[31] This is important as mere fraud which does not involve the last registered proprietor or his agent allegation will not affect the indefeasibility of the title. This is the interpretation that can be given to Section 39 of LTA, in the light of provisions contained in Sections 40, and 41 of LTA.

[32] It was also held that fraud has to be actual and not constructive fraud. The last registered proprietor's right to the property in terms of LTA will not be affected by the conduct of the previous owner, unless the present owner willfully participated in the fraud. Then there is the issue of willful blindness of the purchaser and whether it can be included in the definition of fraud or whether it can be attributed to fraud in terms of LTA, so as to defeat the indefeasibility to the title. According to the affidavit in opposition there is no allegation of fraud by Plaintiffs.

[33] It was held in Assets Co Ltd v Mere Roihi (supra) that mere fact that more vigilance or more investigation or further inquiries would have revealed certain facts unknown to the registered proprietor would not prove be sufficient to consider as a fraud against such person. In Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd [\[1998\] 3 V.R 133](#) at 135- 136 Winneke P held:

"It is true, as the trial judge in this case found, that the appellant, through its officers and solicitors, was in possession of information which, if they had acted with due diligence, might have alerted them to the existence of Kandy's fraud. But a want of due diligence, resulting in a failure to make further inquiry, would not itself be sufficient to defeat the indefeasibility of the appellant's title: Vassos v State Bank of South Australia [\[1993\] VicRp 74](#); [\[1993\] 2 V.R. 316](#) at 332-3."

[34] According to the said judgment the threshold for willful blindness is high. Defendants are not alleging any fraud against the Plaintiffs in the affidavit in opposition filed by second named Defendant. He only stated that he did not execute a mortgage with the Mortgagee.

[35] Even a mere allegation of fraud is not sufficient to disallow eviction in terms of Section 172 of LTA , as stated by Gates J (as his lordship then was) in Prasad v Mohammed [\[2005\] FJHC 124](#); HBC0272J.1999L (3 June 2005). In that case it was further held:

'A threshold of evidence must be reached by the Defendant before the Plaintiff can be denied his summary remedy.'

[36] In this action second Defendant had denied that he had not executed any instrument with the Mortgagee, but this falls short of even denial of existence of such a mortgage. The fact that he did not execute any mortgage or denial of mortgage (which he had not sworn for obvious reasons) is not sufficient to

establish a right to remain in possession. On the title of the Land it is clear that the Mortgagee was registered prior to mortgagee sale and this registration is also indefeasible subject to exceptions contained in LTA. There was no evidence of fraud by the Mortgagee. In any event without evidence of fraud on the part of the Plaintiff the registered title cannot be disputed.

[37] Accordingly Plaintiffs had established their rights through proof of registration on the memorials of the Lease issued under ALTA which was registered under LTA.

[38] Defendants had failed to establish a right to possession through the affidavit in opposition filed by the second named Defendant, as required by section 172 of LTA.

[39] Plaintiffs are granted vacant possession of the Land more fully described in iTaukei Lease No 31221 granted under ALTA. Plaintiffs are bona fide purchasers and they were deprived of the enjoyment of the rights over the Land due to the continuous occupation of the Defendants through forming. The land is more than ten acres so in order to minimize unjust enrichment and also to avoid waste Defendants are allowed further two months to obtain any harvest on the land. So the Defendants can harvest any produce on or before 17.8.2024 and hand over the possession of entire land to Plaintiffs. Cost of this application is summarily assessed at \$2,000 considering the circumstances of the case.

FINAL ORDERS:

- a. Plaintiffs granted vacant possession of iTaukei Lease No. 31221.
- b. The execution is stayed till 17.8.2024.
- c. Cost of this action is summarily assessed at \$2,000 to be paid within 21 days by Defendants.



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Deepthi Amaratunga
Judge

At Suva this 20th day of June, 2024.

Solicitors

Redwood Law
Legal Aid Commission