

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 08 of 2022

BETWEEN : **ASHNEEL PRASAD** of New Town, Nadi.

Plaintiff

AND : **DINESH DUTT** and **SANDHAYA SHOBNA DUTT** both
of Enamanu Road, Nadi.

Defendants

Before : Master U.L. Mohamed Azhar

Counsels : Mr. S. Nand and Ms. F. Chand for the Plaintiff
Ms. S. Veitokiyaki and Mr. Bauleka for the Defendants

Date of Judgment : 18 July 2024

JUDGMENT

01. The plaintiff summoned the defendants pursuant to section 169 of Land Transfer Act. The summons seeks the following orders from the court;
- a. An order that the defendants do forthwith give vacant possession of all that piece of property occupied by them upon Certificate of Title No 37747 known as “Cawa, Salawaru and Enamanu” (part of) being Lot 3 on DP 9398 consisting as area of one hectare five thousand six hundred and twenty eight square metres (**the property**),
 - b. That all costs incurred by the Plaintiff in this action be borne by the defendants on a Solicitor/Client basis, and
 - c. Such further and or other relief as this Honourable Court deems just and expedient.

02. The plaintiff deposed the supporting affidavit and the affidavit in reply. The affidavit in opposition is deposed by the second named defendant. At hearing of the summons, the counsels for the parties made oral submission and filed their respective submissions with relevant authorities.
03. The procedure under Part XXIV of the Land Transfer Act which is known as “169 procedure” is a speedy procedure for obtaining possession when the occupier fails to show cause why an order should not be made (**Jamnadas v Honson Ltd** [1985] 31 FLR 62 at page 65). The *Locus Standi* of a person who can invoke the jurisdiction of this court under this procedure is set out in section 169. Three persons named in that section have locus to invoke the jurisdiction of this court under this procedure. The section 170 requires the summons to give full description of the subject property and to serve the summons on the defendant to appear in the court on a day not earlier than sixteen days after the service of the summons.
04. The sections 171 and 172 provide for the two powers that the court may exercise in dealing with the applications under section 169. The consent of the Director of Land is not necessary as settled by His Lordship the former Chief Justice Anthony Gates (as His Lordship then was) in **Prasad v Chand** [2001] FJLawRp 31; [2001] 1 FLR 164 (30 April 2001). The burden to satisfy the court on the fulfillment of the requirements, under sections 169 and 170, is on the plaintiff and once this burden is discharged, it then shifts to the defendant to show his or her right to possess the land.
05. The duty on defendants in this application is not to adduce any final or incontestable proof of their right to remain in the properties, but to adduce some tangible evidence establishing a right or supporting an arguable case for their right to remain in possession of the properties in dispute. This was laid down by the Supreme Court in the often cited decision of **Morris Hedstrom Limited –v- Liaquat Ali** CA No: 153/87. Even the person appearing has failed to satisfy the court as per the above decision; the court can dismiss the summons if it decides that an open court hearing is required (**Ali v Jalil** [1982] 28 FLR 31).
06. The exercise of court’s power, either to grant the possession to the plaintiff or to dismiss the summons, depends on how the said burden is discharged by respective party to the proceedings. However, dismissal of a summons shall not prejudice the right of a plaintiff to take any other proceedings to which he or she may be otherwise entitled, against any defendant. Likewise, in the case of a lessor summoning a lessee for default of rentals, if the lessee, before hearing of the summons, pays or tenders all rent due and all costs incurred by the lessor, the summons shall be dismissed by the court.

07. The plaintiff and the second named defendant are brother and sister. The first named defendant is the husband of the second named defendant and the brother in law of the plaintiff. The plaintiff annexed the copy of the Certificate of Title No. 37747 duly certified by the Registrar of Title to prove his locus to summon the defendants. The plaintiff claims that, the property belonged his late father who bequeathed it to his wife (mother of the plaintiff). The mother thereafter transferred it to him. He is the last proprietor. The plaintiff further stated that, his late father – Mahendra Prasad brought the defendants to stay on the property. They have been illegally occupying the same.
08. On the other hand, the second named defendant stated that, the property belonged to the mother and they were not aware that it was transferred to the plaintiff. Concurring with the plaintiff, the second defendant stated that, her father brought them to the property and provided them a plot of land to build a house for them. They built their house and had been occupying till 2010. In 2010, they rented their house as the first named defendant started a business. Only in 2021, they conducted a search and found that, the property was transferred to the plaintiff. The defendants denied carrying out illegal renovations. They built their house 20 years ago. The defendants further alleged that, the mother was under undue influence by the plaintiff to transfer the property to the plaintiff. The defendants also stated that, the sub-division was carried out by the father. However, it was not completed after his death.
09. The plaintiff did not deny that, the defendants were brought by his father. Nor did he deny that, the defendants built their house. In paragraph 8 of his supporting affidavit the plaintiff admitted that, the house belongs to the defendants, because he stated that, “.....started to renovate and extend **their house** encroaching my property”. Further in paragraph 6 of his affidavit in reply he dispute the costs of building the house by the defendants. Impliedly, he admitted that, the house was built by them.
10. The defendants claimed that, they acquired right in personam in respect of the property due to the dealing they had with father of plaintiff and second named defendant. Conversely, the plaintiff asserted in his affidavit that, all agreements made by his father either orally or written became null and void after the property had been transferred to him.
11. The evidence adduced by both the parties reveals that, firstly, the property belonged to the father of the plaintiff and the second named defendant. Secondly, the father brought the defendants to the property and allowed them to build a separate house for them within the property. Thirdly, the defendants built their house on the property with the permission of the father, long before the plaintiff became the registered proprietor. Fourthly, the father started the sub-division of the property; however it was not completed after his death.

Fifthly, the property was transferred by the mother to the plaintiff only without sub-division whilst the defendants had been occupying the house they built on the property.

12. There is no evidence before the court as to the terms of the agreement between the father of the plaintiff and the defendants. It is only stated that, the father invited the daughter and gave a piece of land to build her house. There is no evidence as to why the sub-division was not completed after death of the father. Did the defendants acquire right in personam? On what terms, they were allowed to build their house? Why the entire property was transferred to the plaintiff when the father had already given a portion to the defendants to build their house? Why should the agreements be considered as null and void? These are the complicated issues that are to be determined in this matter. They cannot be determined in this summary procedure. They require a trial.
13. It is settled law that, complicated facts cannot be investigated and determined on the affidavits only in a summary procedure (Lal v Schultz [1972] FJLawRp 27; [1972] 18 FLR 152 (30 October 1972); Devi v Sharma [1985] FijiLawRp 3; [1985] 31 FLR 130 (1 January 1985); Wati v Vinod [2000] FijiLawRp 56; [2000] 1 FLR 263 (20 October 2000);
14. The above analysis reveals that, the plaintiff is the last registered proprietor of the subject property in this matter and there is no dispute on the proprietorship of the plaintiff. However the affidavits filed by both the plaintiff and the defendants clearly indicate that, there are many complicated issues that are to be determined in this matter. These issues cannot adequately be investigated and dealt with on a summary proceeding in Chambers. A trial proper is necessary in this case for adjudicating all the complicated issues, as it is not safe to determine this matter on affidavits in chambers.
15. In result, I make the following orders:
 1. The summons filed by the plaintiff is dismissed, and
 2. The parties to bear their own costs for this case.

At Lautoka
18.07.2024




U.L. Mohamed Azhar
Master of the High Court