

JUDGEMENT

(SUMMONS FOR VACANT POSSESSION)

PART A - BACKGROUND

1. This is an application by way of Originating Summons seeking for the Defendant to give up possession of the property registered and described as Certificate of Title No 44800 on Lot 1 DP No. 8935 in the district of Naitasiri, in Viti Levu.
2. The Second lot which was sub-divided and issued with a new title is CT 44801 which was later sold to Dahamendra Kumar.
3. This property is a new sub-division from the property previously known as Lot 3 on DP 2110 on CT 8937 (Head title) and on proposed Lot 2 and 3 on proposed DP 7724 owned by the Estate of Mutta Sami Goundan aka Muttasami Goundan.
4. The Plaintiffs are the Executor and Trustees for the Estate of Muttu Sami, aka Muthusam Goundan, and the registered proprietor of the Certificate of Title No 44800 on Lot 1 DP No. 8935 in the district of Naitasiri, in Viti Levu.
5. The Will of the late Estate of Mutta Sami Goundan aka Muthasam Goundan empowers the Executors to complete the sale of the property registered as part of Lot 1 in DP 7724 on CT 31622 to Sushila Chetty, Dharmendra Kumar and Ram Vikash according to the scheme plan of the subdivision submitted by the Lands Department for approval and issuance of new titles in respect of the house site area where his dwelling is situated on the property.
6. The Will also bequeathed the residue of the property to the wife of the Testator, Ms Saras Wati Gounder.
7. The Defendant is the sole Executrix and Trustee of the Estate of Sushila Chetty, one of the recipients of the sale and purchase of the piece of land which is part of Lot 3 on DP 2110 on CT 8937 and on proposed Lot 2 and 3 on proposed DP 7724.
8. The Sale and Purchase Agreement was entered between the late Mutta Sami Goundan aka Muttasami Goundan and the late Sushila Chetty on 30 January 2001 valued at \$24,000.

9. From this Agreement, the Defendant has paid \$6,500 as deposit and the sum of \$17,500 remains unpaid to date. Excerpts of the Sale and Purchase Agreement in clauses (a) and (b) is cited below:

“NOW THEREFORE THIS AGREEMENT WITNESSETH

The full purchase price of the said property shall be sum of \$24,000.00 (twenty four thousand dollars only). The said sum shall be paid and satisfied by the Purchaser to the Vendor as follows:

- a) By a deposit of \$6,500.00 (Six Thousand Five Hundred Dollars) upon execution hereof this agreement to be paid to the vendor directly.
 - b) The balance sum of namely \$17,500.00 (Seventeen Thousand Five Hundred Dollars) shall be paid by the purchaser on the date of settlement that being on the date the vendor provides a separate title to the purchaser.
2. The said property is sold free of leases, mortgages, charges and encumbrances.
 3. The Vendor shall hand over to the Purchaser receipts (or show sufficient evidence of payment) of all rent, town rates, telephone, electricity and water charges paid up to the date of settlement (or such of them as are applicable).
 4. It is further agreed that, the Vendor shall give possession of the said Property on execution of the Agreement being on the 30th January 2001.
 5. That the Vendor declares he is the sole owner of the piece of the land, which he shall hand over to the purchaser today.”
10. In the Will, the Testator had directed the Executor and Trustees to comply with the Sale and Purchase Agreement and subdivide the lots on Lot 1 DP 7724 on CT 31622 with completion of the sales of the said properties.
11. The Defendant alleges that the Executors and Trustees have not complied with the Will of the Testator and the Sale and Purchase Agreement regarding his property.
12. I cite excerpts from the Will of Muthi Sami Goundon aka Muthisami Goundan executed on the 6th day of August 2012 as follows –

“I direct my trustees to complete the survey and subdivision of my freehold property known as ‘Davuilevu’ part of Lot 1 on DP 7724 comprised on CT No 31622 and complete sales of the respective lots sold by me to Sushila Chetty, Dhamendra Kumar and to Ram Vikash and his family at the purchase price and on the terms and conditions of the sale agreed between me and the said Sushila Chetty, Dharmendra Kumar and Ram Vikash and his family according to the scheme plan submitted to the Lands Department for its approval and to obtain a separate new title in respect of the house site area where my dwelling is situated on the said property.”

13. A notice of vacant possession was issued on 10 October 2023 and served on Defendant on 27th October 2023.
14. That despite the notice of vacant possession, the Defendant has remained on the property and has not paid for their water and electricity bills. They have also invited others who have built on the property as well.
15. The Plaintiff deposes that the Defendant has no colour of right to remain in resident on the property.
16. The Defendant filed their Affidavit in opposition to show cause why they should remain on the property.
17. The Executrix of the Estate of Sushila Chetty admits that the amount of \$17,500 is owing and would be settled on the fulfilment of Clause 1 (b) of the Sale and Purchase Agreement.
18. Clause 1 (b) of the Sale and Purchase Agreement required that separate titles be issued for the two residential lots promised to the Estate of Sushila Chetty. Only one lot has been offered to them and not the second lot.
19. The Executrix of the Estate of Sushila Chetty also admits that consent to possess the sub-divided land was given by the late Testator on execution of the Agreement whilst awaiting the subdivision of the said lots with separate titles.
20. The two lots were issued on 8 December 2020 for residential lots CT 44800 and CT 44801. Both Certificate of Titles were registered under the name of the Plaintiffs as Executors’ and Trustees of the Estate of the Testator.

21. The Respondents had built a retaining wall on the adjoining land where the Testator's house was. The construction of the wall was not in the provisions of the Sale and Purchase Agreement.
22. An initial proceeding for the same application of vacant possession by the Plaintiff on the same issues seeking orders for vacant possession was struck off under Order 25 Rule 9.
23. There is an itaukei family residing on the piece of land at the consent of the late Respondent.

PART B: LAW ON VACANT POSSESSION

24. The provisions under section 169 of the Land Transport Act is a summary proceedings to restore the registered proprietor to their indefeasible title.
25. When expounding the meaning of registered proprietor in section 39 of the Land Transfer Act, it was stated in Subramani -v- Sheela [1982] 28 FLR 82 (2 April 1982) at page 65;

‘It is our opinion clear that the restriction of the definition of registered proprietor to purchaser for value applies only in the case specified, that is to say an erroneous description of the land concerned. There is nothing in subsection (b) to indicate that ‘registered proprietor’ in any other circumstances is to be interpreted only as ‘purchaser of value’. The indefeasibility of title under the Land Transfer Act is well recognized; and the principles clearly set out in a judgment of the New Zealand Court of Appeal dealing with provisions of the New Zealand Land Transfer Act which on that point is substantially the same as the Land Transfer Act of Fiji. This case is Fels -v- Knowles 26 N.Z.L.R 608. At page 620 it is said:

“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.”

The question of indefeasibility of title of the registered proprietor is fully examined and determined with authority by their Lordships of the Privy Council in Frazer -v- Walker, their judgment being set out in full in 1967 N.Z.L.R 1069. This Court must therefore hold that the title of the respondents are registered proprietors is not subject to any unregistered encumbrances such as those put forward on behalf of appellants. Accordingly this ground fails.”

26. 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.”

27. 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.”

28. In this instance, it is firstly the onus on the Plaintiff to show that they are the registered proprietor.

29. In Shayam Lal -v- Schultz [1972] FjLwRpt 72; [1972] 18 FLR 152 (30 October 1972) Gould V.P, Marsack J.A and Spring J.A held that a registered proprietor may be impeached on the proof of fraud against him:

“The third ground of appeal, in my opinion, can have no validity in view of the provisions of Section 39 of the Land Transfer Act. The only circumstance in which the title of the respondent could be impeached would be on proof of fraud, that is to say, fraud on the part of the registered proprietor. There is no evidence whatever that respondent had acquired his registered title to the land through fraud; and in fact no allegation of fraud has been made against him. That being so, I would

hold that the title of the respondent to the land is not subject to any interest, equitable or otherwise, of the appellant.”

30. Where the Plaintiff proves he is the registered proprietor, the law then requires the Defendant to show cause why he should not vacate the premises. The onus of proof shifts to the Defendant to show that he has a present and not future right to the possession of land.
31. The Court has the discretion to dismiss the summons or in accordance with the circumstances, make an order that is just. In Ali v Jalil [1982] FijiLawRp 9; [1982] 28 FLR 31 (2 April 1982):

“It is not enough to show a possible future right to possession. That is an acceptable statement as far as it goes, but the section continues that if the person summoned *does* show cause the judge shall dismiss the summons; but then are added the very wide words "or he may make any order and impose any terms he may think fit". These words must apply, though the person appearing has failed to satisfy the judge, and indeed are often applied when the judge decides that an open court hearing is required. We read the section as empowering the judge to make any order that justice and the circumstances require. There is accordingly nothing in section 172 which requires an automatic order for possession unless "cause" is immediately shown.”

32. Counsel for the Plaintiff has correctly referred to this Court to Vanualevu Hardware Ltd -v- New World Ltd [2011] FJHC 496; Civil Action 09.2011 (1 September 2011) where Master Robinson (as he was then) opined:

“The defendant has to show cause as to why he should not give up vacant possession (section 172) and in this regard the Defendant must show on affidavit evidence why the Court should not make an order for vacant possession. He does not have to prove a conclusive right to remain in possession only some tangible evidence establishing a right or at least supporting an arguable case for such a right (see *Morris Hedstrom Limited -v Liaquat Ali (Action No: 153/87)*.

The phrase *tangible evidence* has often been used as a general criteria establishing a right or cause why the Court should not make an order for vacant possession under section 169. For the evidence to be tangible it must be real and capable to be established not a vague or an elusive perception of a right of possession. The matters raised, not only by the Defendant but by the Plaintiff as well in their respective affidavits and submissions conclusively shows that the question about the exercise of the optional clause needs to be determined by oral evidence.

33. In Vanualevu Hardware Ltd -v- New World Ltd [2011] FJHC 496; Civil Action 09.2011 the Court found that the exercise of the optional clause in the Tenancy Agreement required that the matter be heard and proved on evidence and that summary proceedings did not suffice.

PART C: ANALYSIS

34. In this case before this Court, the Applicant has sort for vacant possession of 2 properties i.e. Certificates of Title Numbers 44800 and 44801.
35. The current Certificate of title Number 44800 is registered under the Plaintiff's names as Executor and Trustee of the Estate of Muttu Sami Goundon aka Muthusami Goundan.
36. The Plaintiff has shown and proven that they own the property as Executor and Trustee of the said property.
37. The onus therefore shifts to the Defendant to show cause why he should remain in possession of the property he is in occupation over.
38. The Defendants, the Executor of the Estate of Sushilla Chetty argue that she is entitled to the two Lots allocated to her as per the the Will of the Estate of Muttu Sami Goundan aka Muthusami Goundan.
39. The Will directed the Executors to subdivide lots and to allocate lot to the Defendants Estate provided payment of consideration was completed.
40. The Defendant argues that she is entitled to remain on the property and admits there is also a pending related matter for civil claim against the Plaintiff regarding the Sale and Purchase Agreement.
41. The Defendants have partially paid for the property and awaits the finalization of the sub-division of the lots prior to full payment. She argues that the conditions in the Sale and Purchase Agreement have not been completed by the Plaintiff.
42. The Plaintiff argues otherwise and submits that the lots have been subdivided since 2020. The Defendants, however, have not acted in full intent on fulfilling the conditions of the Sale and Purchase Agreement.

43. In Subramani -v- Sheela [1982] 28 FLR 82, the Appellate Court dismissed the Appeal and upheld the decision of the Judge to grant vacant possession to the Respondent, grandson of the late Hubraji whose name was registered on the property. The Appellant verbally leased land from the son of Hubraji, he then built a house and paid rent until notification of vacant possession was issued. The judge was not satisfied that there was some beneficial interest for the Appellant to retain possession.
44. In this case, both the Will of the Estate of Muthisami Goundan and the Sale and Purchase Agreement referred to by both parties indicated to this Court the Estate's intention that the Respondents purchase lots on the property and be granted possession from when they executed the Sale and Purchase Agreement. The Defendant has already made partial payments as deposit and this is sufficient to establish their beneficial interest on the property.
45. The Court determines that there is some tangible evidence of the intentions of the late Muthu Sami Goundan in the Will to retain Sushila Chetty to remain on the lot apportioned to her as a purchaser. In his Will he had directed the Executors to complete the conditions referred to in the Sale and Purchase Agreement to subdivide the land to the Defendants.
46. Whether or not the parties have or have not complied with the conditions in the Sale and Purchase Agreement will be determined at full trial.
47. These contentious issues cannot be resolved at this summary proceedings and hence the Court finds reasons not to grant vacant possession.

Costs

48. Given that the Plaintiff has not succeeded, the Court will award the Defendants costs at \$800.

Orders of the Court

49. The Court orders as follows:

(a) That the Court will dismiss the application for vacant possession of CT 44800;

(b) Costs of \$800 awarded to the Defendants.




Ms Senileba LTT Waqainabete-Levaci
Puisne Judge