

**IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION**

Civil Action No. HBC 301 of 2024

IN THE MATTER of Section 169 of the
Land Transfer Act.

BETWEEN: **SABRINA EVELYN ALPORT WISHART and FRANK ALPORT
RYAN** as executors and trustees of the Estate of Evelyn May Barker.

PLAINTIFF

AND: **TEVITA TUINALELE and ALL OTHER OCCUPIERS** and/or their
agents and/or servants and/or invitees in occupation of the land comprised
in certificate of Title No. 19604 located on Lot 6 on Deposit Plan No.
2307 situated at 12 Crawford Avenue, Nasese, Suva.

DEFENDANTS

Representation:

Plaintiff: Mr. S. A. Koya & Mr. K. Chang (Howards Lawyers).

Defendants: Mr. I. Betakula (Inia & Associates).

Date of Hearing: 10th February 2025.

Ruling

- [1] The Plaintiffs have filed originating summons seeking that the Defendants show cause as to why they and/or their agents and/or servants and/or invitees in occupation of land comprised in Certificate of Title No. 19604 located on Lot 6 on Deposit Plan No. 2307 situated at 12 Crawford Avenue, Nasese, Suva to provide immediate vacant possession to the Plaintiff.
- [2] An affidavit of the plaintiffs accompanies the summons. The Defendants were served on 7th November 2024. A affidavit in response of Tevita Tuinalele was filed on 8th January 2025. An affidavit in reply of the 1st Plaintiff was filed on 17th January 2025.
- [3] Section 169 of the Land Transfer Act 1971 provides "*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)"

- [4] Section 170 of the Land Transfer Act 1971 requires the particulars be stated in the summons and that "*the summons 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.*" Section 171 of the Land Transfer Act 1971 dealing with order of possession states that "*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.*"
- [5] Section 172 of the Land Transfer Act 1971 provides that "*if the person summoned appears he may show cause why 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, mortgage 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.*"
- [6] **Morris Hedstrom Ltd v. Liaquat Ali (SBC 153/87S) Supplementary FLR Volume 1 (Civil) 1887-2000) 141, Gurdial Singh v Shiu Raj (ABU 44/82) Supplementary FLR Volume 1 (Civil) 1887-2000, 84, Shyam Lal v Eric Martin Schultz (1972) 18 FLR 152 and Azmat Ali v. Mohammed Jalil (1982) 28 FLR 31** are relevant cases that have dealt with Section 169 Land Transfer Act 1971 applications. These and a number of other cases have set out the procedure for dealing with Section 169 Applications.
- [7] Section 169 (a) of the Land Transfer Act, requires the Plaintiff to be the **last registered proprietor** of the land. The term "**proprietor**" is defined in the Land Transfer Act as "*the registered proprietor of land, or of any estate or interest therein*". The term "**registered**" is defined in the Interpretation Act, as "*registered used with reference to a document or the title to any immovable property means registered under the provisions of any written law for the time being applicable to the registration of such document or title*".
- [8] The Plaintiff are registered on the Titles as Trustees of the Estate of Evelyn May Barker. Section 93 (3) of the Land Transfer Act 1971 provides that "*... the person so registered shall hold such estate or interest subject to all equities affecting the same, but for the purpose of any dealing therewith shall be deemed to be the absolute proprietor thereof.*" *(my underlining)* By virtue of Section 93 (4) of the Land Transfer Act the title is deemed in law to be vested in the Trustees from the date of the death of the deceased proprietor. The Plaintiff have locus to seek vacant possession in this matter.
- [9] Section 172 of the Land Transfer Act 1971 shifts the burden upon the Defendants to establish their right to remain on the subject property. It is upon the Defendants in this application to adduce some tangible evidence establishing a right or supporting an arguable case for such a right for them to remain on the property. Final or incontrovertible proof of right to remain in possession need not be adduced (**Morris Hedstrom Ltd v. Liaquat Ali**). If the Defendants do show cause the Judge shall dismiss the Summons (**Azmat Ali v. Mohammed Jalil**).

- [10] The Defendants position is that they have a right of renewal of lease for a further term of 21 years upon expiry of the lease on 30th June 2020. This position of the Defendant is not in line with the Lease covenants. Lease No. 66485 was registered on 2nd December 1957. It was for a term of 21 year from 1st July 1957. Covenant 3 of the lease provided for a further term of 21 years upon expiration of the lease. On 15th July 1960 the lease was varied and Covenant 3 was deleted and new clause 3 was inserted. The new clause gave a term of renewal for a term of 42 years.
- [11] From 1st July 1978 the lease was renewed for a term of 42 years. It expired on 1st July 2020. Once Covenant 3 was deleted and new clause 3 inserted it gave a renewal for a term of 42 years. There was no extension thereafter. At the time of the expiry of the lease the Defendants had the first option to purchase the property. There were some discussions on the sale. It did not eventuate. The Defendant informed the Plaintiff's lawyers that he did not have the funds to proceed to purchase the property.
- [12] The defendants are seeking compensation for the building. Covenant 5 of the lease provided that the lessors shall not be liable in any manner to pay for or give compensation for any improvements of any kind made to or erected upon the said land, provided that the Defendants were up to date with all rent and monies, they could remove the buildings erected by them during the month prior to the expiry of the lease.
- [13] Vacant possession is granted to the Plaintiff. The Defendants are restrained from damaging or interfering with the improvements and/or fixtures on the property. The Plaintiffs are awarded \$1000.00 as costs. The costs have been summarily assessed.

Court Orders

- (a) The Defendants and/or their agents and/or servants and/or invitees in occupation of the land comprised in Certificate of Title No. 19604 located on Lot 6 on Deposit Plan No. 2307 situated at 12 Crawford Avenue, Nasese, Suva to provide immediate vacant possession to the Plaintiff.
- (b) The Defendants and/or their agents and/or servants and/or invitees in occupation of the land comprised in Certificate of Title No. 19604 located on Lot 6 on Deposit Plan No. 2307 situated at 12 Crawford Avenue, Nasese, Suva are restrained from damaging or interfering with the improvements and/or fixtures on the property.
- (c) The Defendants are to pay the Plaintiffs \$1000.00 as costs. The costs have been summarily assessed. The costs are to be paid with 30 days.

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Chaitanya S.C.A Lakshman
Puisne Judge

27th February 2025

