

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No 247 of 2024

IN THE MATTER of an application under
section 169 of the Land Transfer Act, 1971

BETWEEN : **BABU LAL** of Jalim Avenue, Waila, Nausori, Carpenter

Plaintiff

AND : **KRISH CHAND & OCCUPANTS** of Jalim Avenue, Waila,
Nausori. Warehouse Manager.

Defendants

Coram : **Banuve, J**

Counsels : Anil Chand Lawyers for the Plaintiff
Sunil Kumar Esquire for the Defendants.

Date of Hearing : 21 February 2025

Date of Judgment : 28 February 2025

JUDGMENT

A. INTRODUCTION

1. An Originating Summons was filed on 4 September 2024, pursuant to section 169 of the *Land Transfer Act* 1971 seeking vacant possession of land described as CT 46952, comprising of eight hundred and twenty two square metres, at Jalim Avenue, Waila, Nausori.
2. An Affidavit in Support sets out the following;
 - (i) The Plaintiff is the registered owner of the land described on CT 46592;
 - (ii) The land had been purchased from a Vishnu Deo and Hira Lal covered by CT 20814;
 - (iii) The previous owners were Vishnu Deo, the Plaintiff's father-in-law and Hira Lal, his brother.
 - (iv) The Defendant is Vishnu Deo and Hira Lal's sister's son and the Plaintiff's brother-in-law.
 - (v) When the Plaintiff bought the subject land, the Defendant had a lean to house on it and was aware that the land was being bought.
 - (vi) The Plaintiff had informed the Defendants that he was buying the land.
 - (vii) The Plaintiff had engaged a surveyor to carry out the subdivision on or about 13 years ago and finally this year got the first lot of titles.
 - (viii) The Defendant's house is on CT 46592 and a notice to vacate was served on them by his solicitors as he intended to sell the land and from the funds realized further subdivide the remainder on the land on CT 20814.
 - (ix) Despite the service of the notice the Defendant has not vacated the land nor made any offer to buy the same.

- (x) After obtaining ownership of the land the Plaintiff has not permitted the Defendant to further build on the land nor has he entered into any form of agreement with him to remain on the land.
- (xi) The Plaintiff has never held out any promise or undertaking in any form to the Defendant that they could remain indefinitely on the land.
- (xii) After obtaining the separate title for CT 46592 the Plaintiff orally informed the Defendant that he would be selling the land.
- (xiii) Due to the Defendant's non-compliance with the Notice the Plaintiff is incurring expenses in bringing the application to Court.
- (xiv) Further subdivision work is being delayed.

3. The Defendant opposes the Summons and has filed an Affidavit in Opposition on 12 December 2024 wherein he deposes;

- (i) That the Defendant notes that the Plaintiff is the registered proprietor of CT 46952.
- (ii) That the Defendant has been living on CT 20814 which falls under Lot 3 on CT 46592 , DP 10670 consisting of 820 square metres in the District of Naitasiri since 1950s.
- (iii) The Defendant's grandparents were brought from Sauniwaqa, 9 Miles, Nakasi to Jalim Avenue, Waila, Nausori by Vishnu Deo, Lallu Latchman and Shiu Lal and settled on the said property after selling family land and constructing their house on it.
- (iv) The previous owner promised my mother Ram Kali, a portion of the land and the Plaintiff knew of this promise. Relying on this promise the Plaintiff and the family spent a lot of money in constructing and maintaining the house.
- (v) Prior to the Plaintiff buying the property there was a scheme plan prepared in 1987 on which there was a Note that 'a House Site be given to Mrs Ram Kali f/n Jalim Chaudhary by Bisun Deo (also known as Vishnu Deo) f/n Jalim Chaudhry.
- (vi) The Scheme Plan is also registered with the Town and Country Planning Department on 17 June 1987, and with the Nausori Rural Local Authority on 23 June 2007.

- (vii) There is also a Site and Locality Plan within which 1 rood of Lot 1 is allocated to the Defendant's mother .
- (viii) The Notice to Vacate dated 3 June 2024 is defective in that the description of the property in it, does not match with the description of the property in CT 46592.
- (ix) The said Notice is issued on a 'Without Prejudice' basis therefore it ought not be adduced by the Plaintiff in his affidavit, as it is a privileged document.
- (x) It was Vishnu Deo's duty to sub-divide and give the Defendant a piece of land on which his house is on, pursuant to an agreement he had with my grandparents and my mother.
- (xi) The Plaintiff has the onus of investigating the title to the subject land and whether anyone had any entitlements to the property.
- (xii) The Plaintiff bought the property in 2008 and did not take any immediate steps to have the Defendant leave the property until the filing of the Originating Summons which is acknowledgment that the Plaintiff was aware that the Defendant has equitable right over the property.
- (xiii) The act of Vishnu Deo transferring his share of the said property to the Plaintiff without subdividing it and delivering on his promise of giving a share of the property to the Defendant's mother amounts to fraudulent and deceitful conduct, and the Plaintiff knowing full well of the Defendant's entitlement went ahead and bought the property and is therefore bound by that promise.
- (xiv) The Defendant's family has lived on the said property for over 4 generations.

B. THE LAW

4. The relevant provisions of the Land transfer Act, 1971 are 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 with power to re-enter where the lessee or tenant is in arrear for such period as may be provided in 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 lease 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. *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 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 effect of and may be enforced as a judgement in ejectment.*

Dismissal of summons

172. *If the person summoned appears he or she may show cause why he or she refuses to give possession of such land and, if he or she 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 or she may make any order and impose any terms he or she 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 or she 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 petition.*

C. ANALYSIS

5. The process outlined in section 169 of the Act is a summary one, designed to return possession of a property to a registered proprietor, when an occupant fails to demonstrate a lawful right to possess that property – *Jamnadas v Honson Ltd* [1985] 31 FLR 62.

6. The onus lies with the Plaintiff to convince the Court that the requirements under sections 169 and 170 of the Act have been met, if so, the burden shifts to the Defendant to demonstrate their right to possess the land. A Court's decision to either grant possession to the Plaintiff or dismiss the summons hinges on how effectively each party discharges their respective burden in the proceedings.¹
7. The Defendant, in the Affidavit in Opposition filed on 12 December 2024 does not dispute that the Plaintiff is the last registered proprietor of the subject property.
8. It does however dispute that the description of the land provided by the Plaintiff in the Originating Summons filed on 4 September 2024 matches the description of the property in CT 46952. The Defendant asserts that the Plaintiff has not complied with the mandatory requirement of section 170 of the Act, as follows;
 - (i) The subject property is described in the Originating Summons as '*the land being CT 46592 comprising of eight hundred and twenty two square metres at Jalim Avenue, Waila, Nausori*' whereas its actual description on CT 46592 "*being that piece of land containing Eight hundred and twenty two square metres situate in the District of Naitasiri in the Island of Viti Levu being Lot 3 on Deposit Plan No 10670*"
 - (ii) The Originating Summons was dated 7 October 2024, and was served on 27 September 2024, meaning that the Defendant was summoned to appear in Court 10 days after it was served.² Section 170 mandates that the person summoned, appear in court on a day not earlier than sixteen days after service of the summons.
9. In *Deo v Ali*- Civil Action No. HBC 197 of 2014 (per Nayakkara J) the Court relied on a relevant passage from *Atunaisa Tavuto v Sumeshwar Singh* – Civil Action HBC 0332 of 1997L (per Madraiwiwi, J), about the effect of not complying with the mandatory requirement of section 170 of the Act;

¹ *Ratnam v Rtanam & Others* – Civil Action HBC 179 of 2022 (21 February 2025)(per Master Prasad) at paragraph 7

² Affidavit of Service filed on 4 September 2024.

“This application can be disposed of without the need to consider the parties substantive arguments. The summons is defective in not properly describing the subject property, although the Housing Authority Lease No 345322 was correctly stated, the Plaintiff failed to fully state the additional particulars being Crown Lease No. 10046 Lot 2 on DP 6420 in the Province of Ba, Tikina of Ba consisting of an area of 552square metres. If that were not enough the summons omitted the obligation that “the person summoned to appear on a day not earlier than sixteen days after the service of the summons” as mandated by section 170 of the Act. Their Lordships of the Supreme Court have emphasized the need to follow rules of the court and the consequences for not doing so Ponsamy v Dharam Lingam Reddy – Appeal No 1 of 1996 (SC) at 17. In applications such as this, the technicalities are strictly construed if only because of the drastic consequences that follow for one of the parties, upon the relief sought being granted. It behove the Plaintiff and his counsel to have exercised more diligence in this regard. Applying those principles to the instant case. I cannot resist in saying that the Plaintiff’s Originating Summons can go no further.”

10. As stated earlier, a Court’s decision to either grant possession to the Plaintiff or dismiss the summons hinges on how effectively each party discharges their respective burden in the proceedings. In this instance, the Plaintiff has not discharged the mandatory requirement prescribed by section 170 regarding the ‘description of the land’ and ‘service of the summons’ therefore the burden has not shifted to the Defendant to demonstrate its right to possess the land.’
11. In accordance with the ruling of this Court in *Atunaiso Tavuto v Sumeshwar Singh*-Civil Action HBC 0332 of 1997L as applied in *Deo v Ali* [2015] FJHC 689, the Plaintiff’s summons can go no further, and is dismissed.
12. Whilst not necessary, it would not be remiss for the Court to point out that had the Summons progressed to a substantive hearing it would have had some difficulty, given the nature of evidence provided by the Defendant, in dealing with the matter summarily under section 169 of the *Land Transfer Act, 1971*.

ORDERS:

1. The Originating Summons filed by the Plaintiff on 4 September 2024 is dismissed.
2. Costs to the Defendant summarily assessed at \$1000 to be paid within 14 days of this Judgment.



Savenaca Banuve
Savenaca Banuve
Judge

At Suva
28th February, 2025.