

IN THE SUPREME COURT OF FIJI

Civil Jurisdiction

ACTION NO. 1025 OF 1982

Between:

SOLOMONI RAHIM

Plaintiff

and

MITIELI MOTOTABUA

Defendant

Mr. H. M. Patel for the plaintiff.

Mr. S. M. Koya for the defendant.

D E C I S I O N

The plaintiff as lessee under Native Lease 16588 seeks possession of that portion of the leasehold occupied by the defendant. The application is pursuant to section 169 of the Land Transfer Act 1971 which requires the defendant to appear and show cause why an Order for possession should not be made against him.

The defendant has filed an affidavit setting out alleged facts in support of his opposition to the application.

The affidavit discloses that the plaintiff on 21st December 1981 instituted Civil Action No. 926 of 1981 seeking a declaration that the defendant is a trespasser on part of the said Native Leasehold. The defendant in that action has delivered a defence and instituted third party proceedings.

He mentions also a counterclaim for declarations.

The present proceedings have been commenced because at the time the plaintiff instituted Action 926 of 1981 he was not registered as proprietor as lessee of the Native Lease and could not then apply under section 169 of the Land Transfer Act.

The plaintiff has not discontinued Action 926 of 1981 and in my view it is an abuse of the powers of the court to have commenced these proceedings.

The defendant has shown cause why an Order for possession should not be made in these proceedings. His affidavit raises issues which cannot conveniently be considered in these proceedings. They are issues which have been raised in Action 926 of 1981 and in my view the plaintiff should proceed with that action.

The defendant has not satisfied me that he has a right, as against the plaintiff, to possession of the land which is in issue in Action 926 of 1981.

Accordingly I do not consider I should dismiss the application under section 172 of the Land Transfer Act. I would but for Action 926 of 1981 have ordered that the plaintiff file a statement of claim and the action proceed as if it were commenced by writ.

In the circumstances I adjourn this application sine die with no order as to costs. The plaintiff now has two actions pending and will have to elect which one he will proceed with.

*R. G. Kermod*  
(R. G. Kermod)  
JUDGE

SUVA,  
February, 1983.