

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 73 of 2017

IN THE MATTER of an
application section 169 of the Land
Transfer Act (Cap 131)

BETWEEN : **JAI DEEP SINGH** of Unit 3/95 Cuthbert Street, Broadmeadows,
Victoria - 3047, Australia, Airlines Services Operator.

Plaintiff

AND : **YONEET KAVIN SINGH** of Tuvu, Ba.

Defendant

Before : Master U.L. Mohamed Azhar

Appearance : Ms. A. Swamy for the plaintiff
The Defendant in person

Date of Judgment : 08th February 2019

JUDGMENT

01. The plaintiff took out the summons for ejectment from this registry on 04.05.2017, pursuant to section 169 of the Land Transfer Act Cap 131 against the defendant, and sought an order on the defendant to deliver vacant possession of all that land comprised in Certificate of Title No. 41277 part of that piece of land known as "Tauarau" and containing in area of 23ha 7852m² in the District of Ba, in the island of Viti Levu, and being Lot 7, on DP No. 10394. The summons was supported by an affidavit sworn by the plaintiff himself. A copy of Certificate of Title certified by the Registrar of Titles is marked as "A" and annexed together with the 'Eviction Notice' sent by the solicitors of the plaintiff, which is marked as "B".
02. The defendant upon service of the above summons appeared in person and filed his affidavit in opposition. He attached documents marked as "A" to "G" with his affidavit and opposed the summons filed by the plaintiff, while moving the court to dismiss the same with the cost. The annexure "A" is the copy of the cane grower's registration. The annexure "B" is the copy of the Transfer registered on 09.05.2000 at the Office of Registrar of Deeds. The annexure "C" is the copy of the Death Certificate of the father of the defendant. The annexure "D" is the copy of the Certificate of the Marriage of

defendant's parents. The annexure "E" is the copy of the letter sent by the defendant in response to the eviction notice sent by the solicitors of the plaintiff. The annexure "F" is the copy of the letter sent by the defendant to one Sunil Dip Singh and the annexure "G" is copy of the letter sent by the Legal Aid Commission to the defendant on his application for legal aid in this case. The plaintiff thereafter filed his affidavit in reply and attached four more documents marking as "A" to "D" again. The annexure "A" is the copy of the letter sent by the Sugar Industry Tribunal to the solicitors of the plaintiff. The annexure "B" is the copy of Instrument of Tenancy No. 3213 registered on 12.01.1989 at the Office of Registrar of Deeds. The annexure "C" is the copy of the letter sent by the plaintiff to the father of the defendant to vacate the land and premises in dispute and the annexure "D" is the copy of the reply sent by the father of the defendant to the plaintiff requesting 4 weeks to vacate the said premises.

03. At the hearing of the summons the counsel for the plaintiff made oral submission and tendered the written submission attaching some authorities on the law and the facts of the case. On the other hand, the defendant appearing in person made oral submission on his defence. The court was minded to grant him further time to file his written submission as he was appearing in person. However, he filed a handwritten submission and confirmed it being sufficient for his defence.
04. The summary procedure under the Land Transfer Act Cap 131, to promptly and speedily restore the registered proprietor to the possession of the subject property when the occupier is unable to show his or her right to possess the particular land, stems from the cardinal principle of the statute that, the register is everything and in the absence of any fraud, the registered proprietor has an indefeasible title against the entire world. This principle was well explained by the Fiji Court of Appeal in Subaramani v Sheela [1982] 28 FLR 82 (2 April 1982) which held that:

The indefeasibility of title under the Land Transfer Act is well recognised; 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. The 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."

05. The relevant provisions of the Land Transfer Act Cap 131 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 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. 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.

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.

06. The clear and unambiguous language in sections 169 and 170 sets out the requirements for the applicant or the plaintiff and the requirements of the application respectively. The *locus standi* of the person who seeks order for eviction is set out in section 169 and it provides for the three categories of the persons who are entitled to invoke the jurisdiction of this court under that section. The requirements of an application, namely the description of land and the time period to be given to the person so summoned, are

mentioned in section 170. The other two sections namely 171 and 172 provide for the powers that the court may exercise in the applications under the section 169. The burden to satisfy the court on the fulfillment of the requirements under section 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. 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 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. Likewise, 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 summons shall be dismissed by the court.

07. The plaintiff in paragraph 3 of his affidavit, which supports his summons for ejectment, averred his locus standi to file this summons against the defendant, where he states that he is the registered proprietor of the land described in his summons. The Exhibit "A" of his affidavit is the copy of Certificate of Title No 41277, which has been certified by the Registrar of Titles as true copy. According to the said Exhibit, the plaintiff is the last proprietor of the land described therein and he became the proprietor by virtue of a Transfer registered on 17.08.2015. The defendant in paragraph 1 of his affidavit opposing the summons stated that, he strongly disputes the paragraph 3 of the plaintiff's affidavit. By saying so, the defendant brings his right to possess the portion of the land from which the plaintiff is trying to evict the former. The right of the defendant, as claimed by him, to possess the portion of land in dispute will be discussed later in this judgment. However, the defendant's claim to possess part of the land does not affect the fact that, the plaintiff is the last proprietor of the entire land as evidenced by the true copy of the Certificate of Title as certified by the Registrar of Titles, because the Instrument of title to be evidence of proprietorship, unless the contrary is proved, as per the section 18 of the Land Transfer Act Cap 131 which reads as follows;

Every duplicate instrument of title duly authenticated under the hand and seal of the Registrar shall be received in all courts as evidence of the particulars contained in or endorsed upon such instrument and of such particulars being entered in the register and shall, unless the contrary be proved by the production of the register or a certified copy thereof, be conclusive evidence that the person named in such instrument or in any entry thereon as seized of or as taking an estate or interest in the land described in such instrument is seized or possessed of such land for the estate or interest so specified as from the date of such certificate or as from the date from which such estate or interest is expressed to take effect.

08. The second requirement is the particulars to be stated in the summons, which is description of the land as required by the section 170. The fact that, the application for ejectment involves with the property right of a citizen and the order for possession deprives him from his right, which has more effect on his social and economic wellbeing, the courts in all jurisdictions had a tendency to be little tough on the applicant, especially in relation to compliance and the technicalities of the respective statute. This resulted in the judgement of Atunaisa Tavuto v Sumeshwar Singh HBC 332/97L and the court held that, in application such as under section 169 of Land Transfer Act, the technicalities are strictly construed, because of the drastic consequences that follow for one of the

parties upon the relief sought being granted. That was a case where an application for vacant possession was sought, however, the applicant failed to give the particulars such as Crown Lease number, lot number and the situation of land, though the Housing Authority Lease number was correctly mentioned. The court dismissed the summons stating that, it behoved the plaintiff and his counsel to have exercised more diligence in that regard.

09. The above case, however, was distinguished by Prakash J, in **Wati v Vinod** [2000] 1 FLR 263 (20 October 2000) and it was held that:

*"The Court has not been provided nor able to locate any authorities to suggest that "a description" as per section 170 means a full description of the land. The Act itself does not specify what a description of the land entails. What is adequate or full description? What is a sufficient description? The purpose is clearly for the parties to be informed as to what land the application relates to. This is clear from the supporting affidavit. In this regard I cannot concur with the sentiments of my brother Justice Madraiwiwi in **Atunaisa Tavuto v Sumeshwar Singh** (Civil Action No. HBC0332 of 1997L) submitted by the Defence Counsel in support of his argument on s.170. It is not clear what Justice Madraiwiwi had meant in stating that "The Summons is defective in not properly describing the subject property" (emphasis added). It is not clear whether "a description means full or proper description. Further, the Supreme Court in the case of **Ponsami v Dharam Lingam Reddy** (Appeal No. 1 of 1996) was dealing with the need for compliance with the Supreme Court Rules not a statutory provision such as Section 170. The statute does not clearly specify what "a description" requires. In **Vallabh Das Premiji v. Vinod Lal, Nanki and Koki** (Civil Appeal 70 of 1974) the Court of Appeal had accepted a description as in the present summons as sufficient".*

10. Seemingly, the view of Prakash J is based on the plain and unambiguous meaning of the statute which does not specify what description of land entails and what is adequate or full description of the land. It is not the duty of the court to impose more conditions and restrict the interpretation of a statute when the wording is clear and unambiguous. What is actually required by the statute is whether the person, so summoned to appear, had the full knowledge, without any misunderstanding, of the land and premises from which he ought to be evicted. If there is any misunderstanding of premises which is the subject matter of the proceeding, it should be brought by the person so summoned to show cause, and in the absence of any such misunderstanding, the description given by any applicant seems to be sufficient and adequate under the section 170 of the Land Transfer Act. This was the view that is supported by the Court of Appeal in **Premji v Lal** [1975] FJCA 8; Civil Appeal No 70 of 1974 (17 March 1975). It is incumbent on the court to consider the property right of the person so summoned under this application. However, the more emphasis should not be given to such property rights, at the expense of a registered proprietor of a land, who has indefeasible title against the entire world by *Torrens System* of land registration. Accordingly, the reasoning of Prakash J in **Wati v Vinod** (supra) seems to be more rational than the view of Madraiwiwi J in **Atunaisa Tavuto v Sumeshwar Singh** (supra). These two judgments are from the High Court and in same footing. Therefore, for better reasoning I prefer the view of Prakash J over the other.

Accordingly, if an applicant can give the description of a land or premises which can give clear understanding for the persons so summoned under this section, the former is deemed to have discharged his duty under this section.

11. In the instant case, the plaintiff in his supporting affidavit sought an order on the defendant to deliver vacant possession of all that land comprised in Certificate of Title No. 41277 part of that piece of land known as "Tauarau" and containing in area of 23ha 7852m² in the District of Ba, in the island of Viti Levu, and being Lot 7, on DP No. 10394. In my view this is an adequate and full description as required by the section. Furthermore, the defendant does not dispute description of the land in dispute and he too confirmed the same stating that, he is entitled to possess part of it. The said summons was served and the defendant was given time more than what is required by the section. Accordingly, the plaintiff has fulfilled the requirements imposed by the section 169 and 170 of the Land Transfer Act Cap 131, in this case.
12. The section 171 requires the proof and production of consent if any such consent is necessary. The question is therefore, whether any consent from the Director of land is necessary for an application under 169. This matter has been settled by His Lordship the Chief Justice Anthony Gates (as His Lordship then was) in **Prasad v Chand** [2001] FJLawRp 31; [2001] 1 FLR 164 (30 April 2001). His Lordship held that:

*"At first sight, both sections would seem to suggest that an Applicant should first obtain the Director's written consent prior to the commencement of section 169 proceedings and exhibit it to his affidavit in support. However I favour Lyons J's approach in **Parvati Narayan v Suresh Prasad** (unreported) Lautoka High Court Civil Action No. HBC0275 of 1996L 15th August 1997 at p 4 insofar as his Lordship found that consent was not needed at all since the:*

"section 169 application (which is the ridding off the land of a trespasser) is not a dealing of such a nature as requires the Director's consent."

This must be correct for the Director's sanction is concerned with who is to be allowed a State lease or powers over it, and not with the riddance of those who have never applied for his consent. With respect I was unable to adopt the second limb of Lyons J's conclusion a few lines further on where his lordship stated that the order could be made conditional upon the Director's consent. For if the court's order of ejectment was not "a dealing" then such order would not require the Director's consent and the court would not be subject to section 13. The court is not concerned with the grant of or refusal of, consent by the Director, provided such consent is given lawfully. Consent is solely a matter for the Director. The statutory regime appears to acknowledge that the Director's interest in protecting State leases is supported by the court's order of ejectment against those unable to show cause for their occupation of the land which is subject to the lease. The court is asked to make an order of ejectment against a person in whose favour the Director either, has never considered granting

a lease, or has never granted a lease. The ejection of an occupier who holds no lease is therefore not a dealing with a lease. Such occupier has no title. There is no lease to him to be dealt with. The order is for his ejection from the land. There is no need for a duplicating function, a further scrutiny by the Director, of the Plaintiff's application for ejection either before or after the judge gives his order".

13. The section reads as '*...if any consent is necessary..*' and the above authority clearly states that, the consent of the Director for the application under 169 is not necessary. Thus, the question of consent does not arise in applications under section 169.
14. As discussed above, the locus standi of the plaintiff has been established and the description of the land and premises is not in dispute as it is adequate to give full understanding of it to the defendant. It follows that, the plaintiff has fulfilled the requirements under sections 169 and 170. Thus, the onus now shifts to the defendant to show his right to possess part of the land and premises in dispute in this application. The Supreme Court in **Morris Hedstrom Limited -v- Liaquat Ali** CA No: 153/87 succinctly explained what is required from a person who is summoned under section 169 of the Land Transfer Act and held that:

"Under Section 172 the person summonsed may show cause why he refused to give possession of the land if he proves to the satisfaction of the Judge a right to possession or can establish an arguable defence the application will be dismissed with costs in his favour. The Defendants must show on affidavit evidence some right to possession which would preclude the granting of an order for possession under Section 169 procedure. That is not to say that final or incontrovertible proof of a right to remain in possession must be adduced. What is required is that some tangible evidence establishing a right or supporting an arguable case for such a right must be adduced." (Emphasis added)

15. The duty on the defendant is now not to produce any final or incontestable proof of his right to remain in the property, but to adduce some tangible evidence establishing a right or supporting an arguable case for his right. The defendant claims that, his father one Yogesh Singh was the lessee of 10 acres of land covered under the Cane Contract No. 8529, a copy of which is marked as "A" and annexed with his affidavit, on the Certificate of Title No. 7736. The defendant further stated in his affidavit that, his grandfather Ram Nand transferred the lease to his father Yogesh Singh and attached a copy of the Transfer marked as "B" with his affidavit. The defendant claims that, since his father Yogesh Singh passed away on 08.02.2017, his mother is entitled to take out the Letter of Administration of his late father's interest on the Certificate of Title No. 7736.
16. In essence, the claim of the defendant is based on the Lease given to his grandfather Ram Nand and which was later transferred to his father Yogesh Singh. The defendant submitted the copy of Transfer executed by his grandfather in favour of his father. On perusal of copy marked as "B", it reveals that, the said Transfer was registered on 09.05.2000 at the Office of Registrar of Deed and Ram Nand, grandfather of the defendant, transferred all his interest acquired through the Instrument of Tenancy No.

3213 to Yogesh Singh – father of the defendant. The Transfer also refers to the Instrument of Tenancy No 3213 and the previous Certificate of Title 7736. It also reveals from the said Transfer that, the previous Certificate of Title for the land in dispute was CT No. 7736. In fact, the present Certificate of Title No. 41277, by which the plaintiff became the registered proprietor, also has reference to the previous Certificate of Title No. 7736. Hence, the Instrument of Tenancy No. 3213, by which defendant claims the right to possess portion of the disputed land, not only seems clearly to predate the present Certificate of Title No. 41277 of the plaintiff, but also stems from the previous Certificate of Title No. 7736. The question is therefore, whether the defendant can claim the right to possess the portion of the land in dispute, based on the said Instrument of Tenancy No. 3213? However, the defendant did not submit the copy of the said Instrument of Tenancy No. 3213, though he traced back his claim to that instrument. On the hand, the plaintiff in his affidavit in reply has attached the copy of the said Instrument of Tenancy No.3213.

17. According to the said Instrument of Tenancy No. 3213, registered on 12.01.1989, one Ram Nand was given tenancy over all that piece or parcel of land containing ten (10) acres being part of freehold land comprised in Certificate of Title No. 7736 for the period of twenty (20) years commencing from 01.06.1984 at the yearly rental of \$ 130.00. This was an agricultural tenancy in terms of Agricultural Landlord and Tenant Ordinance as it is stated in the said Instrument. This tenancy ended on 31.05.2004 on completion of twenty (20) years. However, on 18th April 1997, the said Ram Nand had transferred this tenancy to his son Ogesh Singh and the that Transfer was registered on 09.05.2000, four (4) years before the expiry of the tenancy given for the period of twenty (20) years. There is nothing to say when Ram Nand died. However, Ram Nand did not have any authority whatsoever to transfer and or alienate the said Tenancy to anyone as the Covenant 10 of the said Instrument clearly prohibits all kinds of the alienation and dealing with the said Tenancy without the written consent of the landlord. The said Covenant 10 reads as follows;

The tenant shall not alienate or deal with the land hereby leased or any part thereof whether by sale transfer or sub-lease or in any other manner whatsoever without the consent in writing of the landlord first had and obtained.

18. The tenancy given to Ram Nand was only for him personally and it was non-transferable as per the clear covenants of the instrument. The father of the defendant Ogesh Singh might have been cane farming in the said land as the Cane Farm Contract which attached with the affidavit of the defendant indicates his name. However, he (Ogesh Singh) did not have tenancy right over the portion of the land claimed by the defendant. Furthermore, the Instrument of Tenancy No 3213 had already expired during the lifetime of the defendant's father, let alone his right to tenancy which never existed.
19. The defendant also relied on the document marked as "A" with his affidavit for his right to possess the portion of land he claims. The said document is the copy of Cane Growers Registration as stated above. The registered grower as per the said document is Ogesh Singh f/n Ram Nand and the Registration No. is 111/08529. It refers to the Instrument of Tenancy No 3213 as well. It is evident from this document that, father of the defendant had cane farming based on the Instrument of Title No. 3213. However, the plaintiff in his affidavit in reply has attached a copy of letter dated 28.07.2017 and issued by Sugar

Industry Tribunal addressing the solicitors of the plaintiff. The Registrar of the Tribunal has confirmed by the said letter that, the Registration No. 111/08529 has been cancelled on 19.07.2005 due to expiry of the Lease. This further confirms that, even the sugar can registration of defendant's father also was cancelled in year 2005, almost twelve (12) years before his death, as he died in February 2017. It follows from the above discussion that, neither the defendant nor his mother could have got any right whatsoever to possess the 10 acres land claimed by the defendant.

20. Apart from the above position taken by the defendant in his affidavit, he did not advance any argument in relation to general defences available for a defendant in this application such as equitable rights and the adverse possession. At the hearing of the summons, the defendant in his handwritten submission sought further time to retain a lawyer. The defendant was given enough opportunity to retain a lawyer after his application for legal aid was rejected. However, he was ready to for hearing when the matter was fixed for hearing. Furthermore, he submitted photocopies of 4 photos depicting a house. He claimed that, the house built by him on the property. However, there is nothing to show in his affidavit of the defendant that he spent money in improving the property or paying for repairs or making other payment in respect of the property. He did not even attach those photographs or their copies with his affidavit. Since those photographs were submitted with the submission, I am unable to give any evidentiary value for the same.
21. For the above reasons, I am of view that the defendant failed to adduce any tangible evidence establishing the right to possess the said property. It follows that, he must be ordered to immediately deliver the vacant possession of the property to the plaintiff who is the last registered proprietor of the same. In addition, the plaintiff should be entitled for reasonable cost for defending his indefeasible title to the property.
22. Accordingly, I make following final orders:
 - a. The defendant is ordered to immediately deliver the vacant possession of the property described in the summons to the plaintiff,
 - b. The defendant is further ordered to pay a summarily assessed cost of \$ 500.00 to the plaintiff within 14 days from today,



At Lautoka
08/02/2019


U.L.Mohamed Azhar
Master of the High Court