

**IN THE HIGH COURT OF FIJI**  
**(WESTERN DIVISION) AT LAUTOKA**  
**[APPELLATE JURISDICTION]**

**CIVIL ACTION NO. HBC 54 OF 2013**

**IN THE MATTER** of an application  
under section 169 of Part XXXIV

**BETWEEN** : **MANJIT KAUR** of Votua, Ba, Domestic Duties.

**PLAINTIFF**

**A N D** : **SARJEET SINGH** of Lot 18, Votua, Ba.

**DEFENDANT**

**Counsel** : Mr Roopesh Singh for plaintiff  
Mr S K Ram for defendant

**Date of Hearing** : 20 January 2017

**Date of Ruling** : 21 August 2017

## **R U L I N G**

### **Introduction**

[01] The plaintiff brought eviction proceedings against the defendant under section 169 of the Land Transfer Act (“LTA”) to eject the defendant from the land comprised in Crown Lease Number 18854 (“*the land*”).

[02] The learned Master of the High Court (“*the Master*”) heard the application. By order of 13 April 2016, the Master, without considering the merits of the matter, dismissed and struck out the application on the ground that the plaintiff had failed to file an affidavit of service. The plaintiff appealed the Master's order to the judge of the High Court. I, hearing the appeal by my judgment dated 10 August 2016, set aside the Master’s order. Both parties then consented that I might hear the section 169 application. Accordingly, I heard the matter afresh.

[03] In support of his application, the plaintiff filed his affidavit. He also filed an affidavit in reply to the affidavit of the defendant filed in opposition. The defendant opposes the application. He filed his affidavits in opposition. I have considered several affidavits filed by both parties.

[04] At the hearing, both parties orally argued the matter. In addition, they also tendered the written submission. I am grateful for their useful submission.

### **The Facts**

[05] Manjit Kaur, the appellant filed an Originating Summons dated 3 April 2013 (*the application*) under section 169 of the LTA against Sarjeet Singh, the defendant seeking vacant possession of the land. The defendant occupies a portion of that land together with the plaintiff.

[06] The plaintiff is the registered proprietor of the land. The defendant refuses to deliver up possession to the Plaintiff.

### **The Law applicable**

[07] The applicable law includes sections 169-172 (inclusive) of the LTA. These sections provide, so far as material, as follows:

*“Ejectors*

**169.** *The following persons may summon any person in possession of land to appear before 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)** *... (Emphasis added).*

*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 16 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 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 summons.”*

### **Discussion and decision**

[08] As the last registered proprietor of the land, the plaintiff applies for vacant possession of the land. The plaintiff states that he is the registered lessee of the land comprised in Crown Lease No.18854, part of Nanunu & Nareba in the Province of Ba containing an area of 1 Rood and 1 perches (“PE-A”) and that the defendant is illegally occupying a portion of the said land. The plaintiff is entitled to seek such an order pursuant to section 169A of the LTA. She has summoned the defendant who is in possession of the land to appear before a judge to show cause why he (the defendant) should not give up possession to the plaintiff.

[09] The summons (“*the application*”) contains sufficient description of the land and it requires the defendant to appear at the court on a day not earlier than 16 days after the service of the application. By doing so, the plaintiff has complied with section 170 of the LTA. There has been no dispute in this regards.

#### *Show cause*

[10] For refusing to give possession to the plaintiff, the defendant in his show cause affidavit states:

“The Director of lands has represented that a lease is being processed in his name. He applied for this lease for the place he is occupying.

“The Director of lands may have been negligent in the issuance of the lease in the name of the plaintiff because the lease may cover the portion he

applied for and was in occupation of. This issue is the subject of separate proceedings.

"The plaintiff obtained the lease by fraud and misrepresentation and this also is the subject of another proceeding where oral evidence will be heard and the Director of lands is a party."

"He does not agree that his house falls within the lease of the plaintiff."

[11] The application could be dismissed if the defendant proves to my satisfaction a right to possession of the land (see section 172 of the LTA).

[12] In order to satisfy myself whether the defendant has proved a right to possession of the land, I will consider the affidavits filed by the defendant.

[13] The plaintiff is the last registered proprietor of the land in dispute. The Crown Lease executed on 12 April 2012 and registered on 20 April 2012 under Crown Lease No. 18854 shows the plaintiff is the registered proprietor of the land. This lease is a protected lease under the State Lands Act. The Director of Lands has given his consent to initiate eviction proceedings against the defendant.

*Allegation of fraud in separate action*

[14] The defendant submits that the plaintiff's registered proprietorship is in question and is being challenged in a separate civil action No. 158 of 2015, where the defendant alleges that the plaintiff obtained the lease (CL 18854) by fraud in that she misrepresented to the Director of Lands (the head lessor) that the land upon which she was applying for a lease was vacant when she knew that the defendant was in occupation of it.

[15] A pending separate action between the parties in respect of the land will not prevent the court from proceeding with a section 169 application in respect of the same land (see *Abdul Hamid v Hardeo Prasad* (Civil Action No. HBC 31 of 2002)).

[16] In Abdul Hamid's case (above), the High Court said:

*"The defendant has raised the point that because the said action is pending before this Court involving the defendant in relation to the land this Summons for possession should not be heard. It should be noted that the pendency of the action is no bar to my hearing the summons for possession and this proposition has support in the Fiji Court of Appeal case of Dinesh Jamnadas already referred to hereabove."*

*Further on the high Court held that;*

*"The defendant alleges 'fraud' on the part of the plaintiff that he conspired with the Director of Lands in acquiring the lease of the land. It is clear from the affidavit evidence before me that as required by law no particulars of alleged 'fraud' have been given. They are just wild and general allegations. As against these allegations, the court has before it the plaintiff as the registered proprietor holding a registered lease over the land. Even in the said civil action 89/94 wherein there is allegation of 'fraud', the issue has been decided for that act is lying dormant for some unknown reason. The plaintiff in the present action cannot be expected to wait for the outcome of the decision in that case. In any case, this is a S169 application which be dealt with independently of the other case".*

[17] Bare allegation of fraud would not necessarily mean that there is a complicated question of fact. Fraud, if established, can affect the indefeasibility of title (see section 40 and 41 of the LTA).

[18] Fiji Court of Appeal in *Singh v Singh* [1987] Fiji LawRp 12; [1987] 33 FLR 63 (25 September 1987), where the appellant contended, as he did in the lower Court, that where an allegation of fraud is made summary procedure provided by section 169 of the land Transfer Act becomes inappropriate and the application should, therefore, have been dismissed without prejudice to the respondent's right to institute proceedings by writ. In support of his submission referred to *Shyam Lal v. Eric Martin Schultz* (18 FLR 152 at 154) where dismissing the appeal Gould V. P. said:-"I would only add, on the argument that the procedure authorised by section 169 of the Land Transfer Act, 1971, was not appropriate, that I am in sympathy with the proposition that complicated questions of fact (particularly where there are allegations of fraud) cannot adequately be investigated and dealt with on a summary proceeding in Chambers.", held that:

*"...We do not consider Gould V. P.'s dictum to mean that a bare allegation of fraud would, by itself, amount to a complicated question of fact..."*

*"There must, in our view, be some evidence in support of the allegation indicating the need for a fuller investigation which would make section 169 procedure unsatisfactory."*

[19] The defendant in his affidavit states that the plaintiff knew the extent of the interest of the defendant and knowing that interest the plaintiff misrepresented to the Director of Lands that the land was vacant.

[20] In *Prasad v Hamid* [2004] FJCA 10; ABU0059.2003 (19 March 2004), dealing with the issue of fraud, knowledge of adverse interest and discretion of the Director of Lands, Fiji Court of Appeal observed:

*"Whether this case is disposed of in a summary way as his Lordship thought it should be or whether it goes to trial and is fully heard, that seems to be the ultimate question which will need to be answered. The matter*

needs to be decided with it in mind **that section 40 of the Act provides that knowledge that any such unregistered interest is in existence shall not of itself be imputed as fraud.** That puts it rather more positively than does the evidence in this case because it is apparently not fraud even if there is knowledge of an unregistered interest. Objectively speaking we know from the evidence that there was no unregistered interest. The Appellant may have had some right arising from his payment of rent until 1973 to occupy the land. He certainly had the permission of the relevant authorities to build the house which is in question but that cannot be determinative of the outcome of the case. If one were to accept Hamid's evidence about his conversations with officers of the Department of Lands many years ago about there actually being a lease which he could pick up but which was never available, one might take the view that he had had a raw deal from the Department of Lands. We could not make that finding in this summary proceeding.

*"But that does not appear to us to be a reason why we should find that the learned judge fell into error. As was said Prasad may, in the 1994 proceedings, have cause for complaint against the Department of Lands.*

*"We make no comment about this because we have not the material before us which would enable us to do so. No more can be said than that about the case which Prasad proposes to make. The important point though is that the matter is between Prasad and the Department of Lands: it cannot concern Hamid. That is a point which the judge himself made very strongly.*

*"More importantly for present purposes, Hamid has not demonstrated that he has any interest in the land or reasonably arguable case that he has an interest in the land. The evidence points to he having never had any more than a periodic tenancy. The Department of Land's refusal of rent after 1973 suggests that it no longer recognized him as its tenant. Hamid brought the 1994 proceedings but he failed to provide satisfactory particulars of fraud. He has never done so. In short Hamid has not discharged the onus which rests on him under s.172 of the Act.*



*“It is a hard thing to contemplate a situation in which somebody who has occupied land for so many years, has built a house upon that land and, at least at one stage appears to have had some sort of tenancy, now to be faced with the prospect of having a significant part of his home demolished by the actions of Hamid. But Hamid has his rights. They are clear. The legislation is clear and the authorities under the legislation are also clear. In our opinion the Judge made no error in this case. It was one appropriate for summary dismissal.”*

[21] The land in dispute is a state land. It is governed by the State Lands Act (“SLA”). The defendant does not possess any document to show that he is in occupation of the land with the consent of the Director of Lands.

[22] In *Hamid’s*, Fiji Court of Appeal said that the court will not interfere with the Director of Lands’ discretion as to whom he intends to grant the lease of the land and that he (Director of Lands) is entitled to grant to whoever is most entitled or qualified.

[23] The Director of Lands might have thought that the plaintiff is the most qualified person to grant the lease for the land in question. This would mean that the defendant does not have consent of the Director of Lands to occupy the land.

[24] The defendant, on his affidavit, only asserts that the plaintiff misrepresented to the Director of Lands that the land in question was vacant knowing very well that the defendant was in possession of the land. It is noteworthy that, pursuant to section 40 of the Land Transfer Act, the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud. I would, therefore, assume for the present purpose that the lease was properly issued to the plaintiff by the Director of Lands

exercising his discretion and that the plaintiff is the last registered proprietor of the land.

*Show cause*

[25] I now turn to the issue of show cause. It is incumbent on the defendant to show cause why he refuses to give up possession of the land. Section 172 requires that the person summoned (the defendant) may show cause why he refuses to give up possession of the land and the summary application for eviction must be dismissed, if the defendant proves to the satisfaction of the court a right to possession of the land.

[26] In *Morris Hedstrom Limited v Liaquat Ali* (Civil Action No.153 of 1987), the then Supreme Court (equivalent to the present High Court) held:

*“... The defendants must show on affidavit evidence some right to possession which would preclude the granting 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.”*

[27] With regards to his right to possession, the defendant on affidavit states that the land belonged to Votua Women Club and that the Tagi Tagi Gurudwara Committee handed over the land in question to his father to look after.

[28] It seems that the defendant intends to prove that his interest in the land derives from the right of his father.

[29] The defendant fails to adduce any evidence establishing that Votua Women Club ever had a lease for the land or that the Tagi Tagi Gurudwara

Committee handed over the land to his father to look after. There is no tangible evidence before the court to prove that the defendant's father was ever issued a lease over the land, either.

### **Conclusion**

[30] On the defendant's affidavit evidence, I am not satisfied that the defendant has a right to remain in possession. I am also not satisfied that he has a reasonably arguable case for such a right. I would, therefore, order the defendant delivers possession of the land comprised in Crown Lease No.18854 to the plaintiff forthwith. I would also award costs to the plaintiff in the sum of \$1,500.00, which I summarily assess.

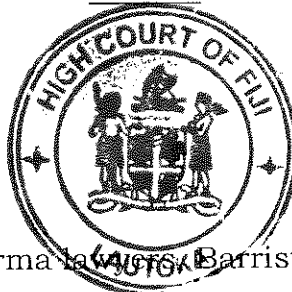
### **The outcome**

1. The defendant is to deliver up possession of the land comprised in Crown Lease No. 18854 to the plaintiff forthwith.
2. The plaintiff is entitled to summarily assessed costs of \$1,500.00.

*M. H. Mohamed Ajmeer* 21/8/17

**M. H. Mohamed Ajmeer**

**JUDGE**



**At Lautoka**

**21 August 17**

Solicitors

For plaintiff: M/s Patel & Sharma Lawyers Barristers & Solicitors

For defendant: M/s Samuel K Ram, Barrister & Solicitor