

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 218 of 2015

BETWEEN : **FUN WORLD CENTRE (FIJI) LIMITED** a limited liability company having its registered office at Messers Vijay Naidu & Associates, 1 Valetia Street, Lautoka.

PLAINTIFF

AND : **BASIC INDUSTRIES LIMITED** a limited liability Company having its registered office at Lot 1, Jai Hanuman Road, Vatuwaqa

DEFENDANT

Mr. Wasu Sivanesh Pillay for the Plaintiff
(Ms). Ulamila Kunatuba for the Defendant

Date of Hearing : - 14th October 2016
Date of Ruling : - 20th January 2017

RULING

(A) INTRODUCTION

- (1) The matter before me stems from the Plaintiff's Originating Summons, dated 02nd December 2015, made pursuant to Section 169 of the 'Land Transfer Act', Cap 131, for an Order for vacant possession against the Defendant.
- (2) The Defendant is summoned to appear before the Court to show cause why it should not give up vacant possession of the Plaintiff's property comprised in Crown Lease No:- 17832 Part of Nasou in the Tikina of Nadi Province of Ba.
- (3) The Summons for eviction is supported by an Affidavit sworn by 'Mohammed Iqbal', the General Manager of the Plaintiff Company.

- (4) The Summons for eviction is strongly contested by the Defendant.
- (5) The Defendant filed an 'Affidavit in Opposition' opposing the application for eviction followed by an 'Affidavit in Reply' thereto.
- (6) The Plaintiff and the Defendant were heard on the Summons. They made oral submissions to Court. In addition to oral submissions, Counsel for the Defendant filed a careful and comprehensive written submission for which I am most grateful.

(B) THE FACTUAL BACKGROUND

- (1) What are the circumstances that give rise to the present application?
- (2) To give the whole picture of the action, I can do no better than set out hereunder the averments/assertions of the pleadings.
- (3) Mohammed Iqbal, the General Manager of the Plaintiff Company in his Affidavit in Support deposed *inter alia*;

- Para 1. THAT I am the General Manager of the above-named Plaintiff Company in the within action.*
- 2. THAT I am an authorised officer of the Plaintiff Company and have been duly authorised by the Company by virtue of the Resolution of Directors annexed herein to depose evidence on its behalf. Annexed and marked "A" is a copy of the minutes of meeting and resolution of the Plaintiff Company authorizing me to depose evidence in the within proceedings.*
- 3. THAT I depose to the facts herein as within my own knowledge and that acquired by me in the course of administering the Plaintiff Companies affairs save and except where stated to be on information and belief and where so stated, I verily believe to be true.*
- 4. THAT the Plaintiff is the registered proprietor of Crown Lease No. 17832 Part of Nasou in the Tikina of Nadi Province of Ba (hereinafter "the Property"). Annexed and marked "B" is a copy of the certified true copy of the lease of the Property.*
- 5. THAT the Defendant has been and at all material times are in occupation of the Property. The said occupation to my understanding is a monthly tenancy being held over by the Defendant from its tenancy with the previous proprietor of the Property under the then Crown Lease No. 6819. Annexed and marked "C" is a copy of the certified true copy of the previous lease of the Property*
- 6. THAT the Defendant has had possession of the Property without any formal sub-leasing documentation and/or the consent of the head lessor the Director of Lands.*

7. *THAT I have been informed by my Counsel and do believe that since the Director of Lands has not endorsed its consent on the Lease Agreement the Defendants occupation of the Property is unlawful.*
8. *THAT I am further informed and do believe that the Defendant has no legal or equitable right to remain on the property.*
9. *THAT the Plaintiff now intends to take vacant possession of the property.*
10. *THAT therefore I respectfully seek the leave of this Honourable Court for an Order for ejectment and/or vacant possession against the Defendant and/or any other occupants of the Property.*
11. *THAT furthermore I pray for Order in Terms of the Summons filed herein.*

(4) 'Mosese Volavola', the General Manager of the Defendant Company, filed an Affidavit in Opposition, which is substantially as follows;

- Para 1. THAT I am the General Manager for the above-named Defendant Company and I am duly authorised to make this Affidavit on its behalf.*
2. *THAT I depose to the following information on the basis of my personal knowledge and employment and that acquired from my involvement in the matter contained herein and I verily believe such information to be true.*
 3. *THAT I oppose the Summons for Ejectment and the Affidavit in Support filed by the Plaintiff against the Defendant on 6 October 2015 for the following reasons.*

BACKGROUND

4. *In 2006 the Defendant entered into a Lease Agreement with Rudra Nand and Guru Dayal, the previous owners of the land in dispute, for the land comprised in Crown Lease No. 6819 Lots 10 of Plan ND 5112, Lot 20 on Plan ND 5124 and Lot 3 on Plan ND 5130 ("Lease Agreement"). Attached herein and marked as Annexure MVI is a copy of the said Lease Agreement.*
5. *THAT the Lease Agreement was valid for a period of 15 years beginning from 2006 with an option to renew at the end of the term of the lease.*
6. *THAT the yearly rental was the sum of \$13,000.00 (Thirteen Thousand Dollars Only) inclusive of VAT per annum payable at the beginning of every month.*
7. *AS per the Lease Agreement, the rental was mutually fixed and was to be reviewed at the end of the tenancy. Rental, therefore, cannot be*

unilaterally changed until the end of the tenancy, which is 15 years from 2006 and which, therefore, is 2021.

8. *THAT the Lease Agreement created an interest in favour of the Defendant to occupy the land in dispute. The Defendant, therefore, has an interest in the land lawfully obtained.*
9. *THAT the Plaintiff, as the alleged new owners the land occupied by the Defendant company have become new owners subject to the existing Lease Agreement between the Defendant and the previous owners. The Plaintiff would have clearly been aware of the Defendant's occupation as they would have clearly seen the Defendants premises prior to purchasing the property.*
10. *I have been informed and advised by my Solicitor that "any dealing" with regards to State Land requires consent from the Director of Lands which includes instituting proceedings before any Court. There is no consent to lease the land nor to institute any proceedings shown by the Plaintiff in its affidavit.*
11. *THE Court therefore does not have jurisdiction to hear this matter as there is no evidence of any consent to proceed to litigate as is mandatorily required pursuant to Section 13 of the State Lands Act.*
12. *THAT there being no such consent to lease or to institute these proceedings the Plaintiff's action is void ab initio and should be dismissed forthwith.*
13. *THAT I therefore pray that this application be struck out with costs on an indemnity basis.*

- (5) Mohammed Iqbal, the General Manager of the Plaintiff Company, filed an "Affidavit in Reply" deposing *inter alia*;

- Para*
1. *THAT I am the General Manager of the above-named Plaintiff Company in the within action.*
 2. *THAT I am an authorised officer of the Plaintiff Company and have been duly authorised by the Company by virtue of the Resolution of Director annexed herein to depose evidence on its behalf. I refer to annexure marked "A" in my affidavit deposed on 25th November 2015 and filed on 1st December 2015 in support of this application.*
 3. *THAT I depose to the facts herein as within my own knowledge and that acquired by me in the course of administering the Plaintiff Companies affairs save and except where stated to be on information and belief and where so stated, I verily believe to be true.*
 4. *THAT I crave leave to refer to the affidavit of Mosese Volavola deposed on 16th March 2016 and filed on 17th March 2016 in opposition to our application to eject the Defendant (herein referred to as the "Defendant's Affidavit").*

5. *THAT I have no knowledge of the matters deposed in paragraph 1 of the Defendant's Affidavit therefore I do not comment to the same.*
6. *THAT I have no knowledge of the matters deposed in paragraph 2 of the Defendant's Affidavit therefore I do not comment to the same.*
7. *THAT I join issue with paragraph 3 of the Defendant's Affidavit.*
8. *THAT I have no knowledge of the matters deposed in paragraph 4 of the Defendant's Affidavit however I do say that the contract between the Defendant and the named third parties is a matter between themselves and not the Plaintiff Company which is the registered proprietor of the property which is currently occupied by the Defendant. I further say that the lease Agreement annexed and marked MV1 in the Defendant's Affidavit is an unsigned copy.*
9. *THAT I have no knowledge of the matters deposed in paragraph 5 of the Defendant's Affidavit however I repeat paragraph 8 herein.*
10. *THAT I have no knowledge of the matters deposed in paragraph 6 of the Defendant's Affidavit however I repeat paragraph 8 herein.*
11. *THAT I have no knowledge of the matters deposed in paragraph 7 of the Defendant's Affidavit however I repeat paragraph 8 herein.*
12. *THAT in response to paragraph 8 of the Defendant's Affidavit I say that the Defendant does not have an interest in Crown Lease No. 17832 as:*
 - (i) *The Defendant's current occupation of the Land is not in compliance with section 13 of the State Lands Act in that the Defendant does not have the consent of the Director of Lands to occupy Crown Lease No. 17832;*
 - (ii) *The Defendant does not have any legal arrangements with the Plaintiff to occupy Crown Lease No. 17832;*
 - (iii) *The Defendant's prior interest – if any- merged when the Plaintiff became the legal proprietor of Crown Lease No. 17832.*
13. *THAT in response to paragraph 9 of the Defendant's Affidavit I say that the Plaintiff's interest in Crown Lease No. 17832 is not subject to any prior arrangement between the Defendant and third parties. Furthermore the Crown Lease No. 17832 document is self-evident of the fact that the Defendant has no interest in Crown Lease No. 17832. I further repeat paragraph 12 herein.*
14. *THAT I accept paragraph 10 of the Defendant's Affidavit and say that I reserve my right to make legal submissions on the issue as the Plaintiff is not required to seek consent of the Director of Lands when the Defendant's occupation of the land is without the consent of the Director of Lands.*

15. *THAT I oppose the assertions in paragraph 11 of the Defendant's Affidavit and say that I reserve my right to make legal submissions on the issue as the Plaintiff is not required to seek consent of the Director of Lands when the Defendant's occupation of the land is without the consent of the Director of Lands.*
16. *THAT I oppose the assertions in paragraph 12 of the Defendant's Affidavit and say that I reserve my right to make legal submissions on the issue as the Plaintiff is not required to seek consent of the Director of Lands when the Defendant's occupation of the land is without the consent of the Director of Lands.*
17. *THAT therefore I respectfully seek the leave of this Honourable Court for an Order for ejectment and/or vacant possession against the Defendant and/or any other occupants of the Property.*
18. *That furthermore I pray for Order in Terms of the Summons filed herein.*

(C) THE LAW

- (1) Against this factual background, it is necessary to turn to the applicable law and Judicial thinking in relation to the principles governing the exercise of the discretion to make the Order the Plaintiff now seeks.
- (2) Rather than refer in detail to the various authorities, I propose to set out, with only limited citations, what I take to be the principles remain in play.
- (3) Sections from 169 to 172 of the **Land Transfer Act (LTA)** are applicable to summary application for eviction.

Section 169 states;

“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) ...

Section 170 states;

“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 states;

“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.

Section 172 states;

“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, 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.

[Emphasis provided]

- (4) The procedure under Section 169 was explained by Pathik J in **Deo v Mati** [2005] FJHC 136; HBC0248j.2004s (16 June 2005) as follows:-

The procedure under s.169 is governed by sections 171 and 172 of the Act which provide respectively as follows:-

“s.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.”

“s.172. If a 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.”

It is for the defendant to ‘show cause.’

- (5) The Supreme Court in considering the requirements of Section 172 stated in **Morris Hedstrom Limited v. Liaquat Ali** (Action No. 153/87 at p2) as follows and it is pertinent:

“Under Section 172 the person summoned may show cause why he refused to give possession of the land and 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.”

- (6) The requirements of Section 172 have been further elaborated by the Fiji Court of Appeal in **Azmat Ali s/o Akbar Ali v Mohammed Jalil s/o Mohammed Hanif** (Action No. 44 of 1981 – judgment 2.4.82) where it is stated:

“It is not enough to show a possible future right to possession. That is an acceptable statement as far as it goes, but the section continues that if the person summoned does show cause the judge shall dismiss the summons; but then are added the very wide words “or he may make any order and impose any terms he may think fit” These words must apply, though the person appearing has failed to satisfy the judge, and indeed are often applied when the judge decides that an open court hearing is required. We read the section as empowering the judge to make any order that justice and the circumstances require.

(D) ANALYSIS

- (1) This is an application brought under Section 169 of the Land Transfer Act, [Cap 131].

Under Section 169, certain persons may summon a person in possession of land before a judge in chambers to show cause as to why that person should not be ordered to surrender possession of the land to the Claimant.

For the sake of completeness, Section 169 of the Land Transfer Act is reproduced below;

- 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.*

- (2) In all applications under Section 169 of the Land Transfer Act, the Plaintiff/Applicant must first comply with the requirement of the law.

The first requirement of Section 169 of the Land Transfer Act is that the Plaintiff must be the “**last registered proprietor**” or a “**lessor with power to re-enter where the lessee or tenant is in arrears**” or a “**lessor against the lessee or tenant where a legal Notice has been given or the term of the lease has expired.**”

I ask myself, under which limb of Section 169 is the application being made?

This is the threshold question.

As far as Section 169 (b) and (c) are concerned they apply where there is a landlord and tenant relationship.

Section 169 (b) and (c) do not apply in the case before me since the Defendant is not the Plaintiff’s Tenant who is in arrears and/or the term of the lease has expired.

Therefore, in this instant case, the first limb of Section 169 applies.

Under Section 169 (a), the Plaintiff must be “**the last registered proprietor**” of the land in question.

Has the Plaintiff proved that it is the last registered proprietor of the land in question?

This is the pivotal question that awaits the determination by this Court.

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**, Cap 7, 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*”.

The Plaintiff says that it is the registered proprietor of Crown Lease No:- 17832.

For the sake of completeness, paragraph 4 of the Affidavit in Support of the Originating Summons is reproduced below in full.

***That** the Plaintiff is the registered proprietor of Crown Lease No.17832 Part of Nasou in the Tikina of Nadi Province of Ba (hereinafter “the Property”) Annexed and marked “B” is a copy of the certified true copy of the lease of the Property.*

The critical argument of the Defendant is that the Plaintiff has no ‘*locus standi*’ to bring this action.

Let me now move to consider the ‘*locus standi*’ of the Plaintiff.

As counsel for the Defendant correctly points out, the Defendant occupies the piece of land on which there is a building as contained in Crown Lease No. 6819 which is owned by a Rudra Nand and a Guru Dayal, being Lot 10 on ND 5112 Crown Lease No. 6819 (Annexure marked “C” referred to in the Plaintiff’s affidavit in support) . According to the memorial of the title, it is clear that Rudra Nand and Guru Dayal are the proprietors of the land as registered on 13/11/14. There is no indication of whatsoever that this Lease was cancelled and no evidence of cancellation has been adduced before the Court by the Plaintiff. Therefore, Crown Lease No. 6819 is still valid and the Plaintiff is not the Defendant’s landlord. Thus, the Plaintiff has no *locus standi*.

The Plaintiff has also annexed Crown Lease No. 17832 in its Affidavit in Support which is marked B. The last registered proprietor of that property is the Plaintiff and the Plaintiff has held a valid lease over the property since 01/01/07. Included in

Crown Lease No. 17832 is a piece of land demarcated as Lot 10 on ND 5112 which the Defendant leased and occupies part of.

As very correctly submitted by Counsel for the Defendant, the Defendant does not occupy the **whole property** contained in Crown Lease No. 17832 as stipulated by the Plaintiff in its Affidavit in Support. Rather, it occupies that portion of land demarcated as Lot 10 on ND 5112 which is contained in both Crown Lease No. 6819 and Crown Lease No. 17832 the ownership of which does not belong to the Plaintiff.

It seems to me clear beyond question that Rudra Nand and guru Dayal are the last registered proprietors of the land that the Defendant occupies. The Plaintiff's Crown Lease No. 17832 became effective on 01/01/2007 whereas Rudra Nand and Guru Dayal's legal rights and interest to Lot 10 on ND 5112 was endorsed on Crown Lease No. 6819 on 13/11/14.

It seems tolerably clear that the Plaintiff has no *locus standi* to bring an action under Section 169 of the Land Transfer Act against the Defendant as it is not the last registered proprietor of the land occupied by the Defendant.

Without the proof of registered interest the Plaintiff cannot succeed.

The provisions of Section 169 of the Land Transfer Act are mandatory and there is no discretion given to the Court as to the persons who might commence proceedings pursuant to that Section.

On the whole of the material disclosed in this case, it seems to me perfectly plain that the Plaintiff has no legal standing to bring this action. It is not competent for the Plaintiff to bring this action for vacant possession because the Plaintiff is not the registered proprietor of the land in question, a condition precedent for proceedings brought under Section 169 (a) of the Land Transfer Act. The Plaintiff falls at the first hurdle!

Accordingly, I have no alternate but to dismiss the Originating Summons.

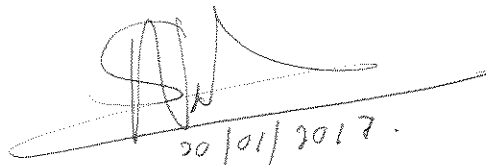
I cannot see any other just way to finish the matter than to follow the law.

In view of the approach I have adopted, I do not consider it necessary for me to express my views on the merits of the Defendant's arguments relating to its right to possession. It will be at best a matter of academic interest only or at worst an exercise in futility to discuss the merits of the Defendant's arguments relating to its right to possession.

(E) ORDERS

- (1) The Plaintiff's Originating Summons dated 02nd December 2015 for ejectment is dismissed.
- (2) The Plaintiff to pay costs of \$1000.00 (summarily assessed) to the Defendant within 14 days hereof.




20/01/2017.

Jude Nanayakkara
Master

At Lautoka
20th January 2017.