

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CIVIL JURISDICTION

CASE NUMBER:

HBC 437 OF 1999L

BETWEEN:

NADI BAY BEACH CORPORATION LIMITED

PLAINTIFF

AND:

SAKINA AND AHMED as executors and trustees of the  
Estate of Gul Mohammed AND MOHAMMED HANIF

DEFENDANTS

Appearances:

Ms. V. Patel for the Plaintiff.

Dr. Sahu Khan for the defendants.

Date / Place of Judgment:

Friday 04 October, 2013 at Suva.

Judgment of:

The Hon. Justice Anjala Wati.

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## JUDGMENT

CATCHWORDS:-

APPLICATION FOR VACANT POSSESSION UNDER S. 169 OF THE LAND TRANSFER ACT- ORIGINAL LEASE ISSUED AND EXPIRED-STATUTORY EXTENSION GRANTED BY THE COURT BY A CIVIL EXTENSION FOR 20 YEARS- DEFENDANTS' SAY THAT THEY ARE ENTITLED TO ANOTHER EXTENSION FOR 20 YEARS UNDER THE AMENDED S. 13(1) OF THE ALTA AND THAT THE FIRST EXTENSION WAS GRANTED UNDER S. 13 OF ALTO- ALTA IN FORCE WHEN CASE ARGUED AND ORDER MADE-ARE THE DEFENDANTS' NOW ESTOPPED FROM ASSERTING THEIR RIGHTS UNDER S. 13 (1) OF THE AMENDED LEGISLATION BEING ALTO- WHETHER THE NOTICE TO VACATE WAS IN PROPER ORDER FOR AN APPLICATION FOR S. 169 TO STAND.

LEGISLATION:

LAND TRANSFER ACT, CAP. 131: S. 169.

AGRICULTURAL LANDLORD AND TENANT ORDINANCE CAP 242: S. 13.

AGRICULTURAL LANDLORD AND TENANT CAP. 270: S. 13.

CASES:

ORD V. ORD [1923] 2 KB 432.

HENDERSON V. HENDERSON 67 E.R. 313.

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*The Cause*

1. The plaintiff seeks an order for vacant possession against the defendants' of all that freehold property being 14 acres 3 roods and 5 perches comprised in Certificate of Title No. 13234, known as "Cawa" (part of) situated in the Tikina of Nadi. The application is made pursuant to s. 169 of the Land Transfer Act.

*The Grounds*

2. The plaintiff says that it is the registered proprietor of the subject property. The defendants' were in occupation of the said land as tenant under the Agricultural Landlord and Tenant Act Cap. 270 ("ALTA") for a term of 20 years commencing 1 January 1977. The annual rental payable under the tenancy was \$147 which rental was not increased during the term of the said tenancy. The term under the said tenancy was a statutory extension of the term under the provisions of the ALTA and was so ordered by the Lautoka High Court in Action No. 153 of 1977.
3. The Court had ordered that the defendants' were "*entitled to a statutory renewal of lease under a tenancy agreement dated the 26<sup>th</sup> day of March, 1957 for a further period of 20 years with effect from the 1<sup>st</sup> day of January, 1977...*".
4. The defendants' have been in occupation of the said land and have failed to pay any rental at all since the extension of the term in 1977. The tenancy as extended under the provisions of ALTA expired on 31 December 1996. The defendants' have continued to occupy the said land since the expiry of their tenancy and have failed to vacate the same.

5. By a letter dated 30 June 1999 the plaintiff caused a notice to be served on the defendants' reminding them that their tenancy had expired and required them to vacate the land within 21 days from the date of service of the said notice. The defendants' failed to comply with the notice to vacate. The defendants' have instead taken out an application to the Agricultural Tribunal being reference No. 18 of 1999 wrongly claiming a tenancy until 1 January 2007. The defendants' quite clearly have no existing tenancy and are not entitled to a renewal of tenancy under the provisions of ALTA.

### *Grounds in Opposition*

6. The defendants' say that the original tenancy in respect of the subject land between the predecessor in title of the plaintiff as the landlord and the defendants' as the tenant under a tenancy agreement dated 26 March 1957 was for a period of 21 years commencing 1 January 1956. On the expiration of the said tenancy on 1 January 1957, the plaintiff refused to grant a further statutory extension of the said tenancy under the provisions of ALTA. The defendants' thus made an application to the High Court of Fiji for an order that the defendants' were entitled to a statutory extension of the said tenancy under the provisions of ALTA. The defendants' have been in continuous occupation and cultivation of the said land at all material times but deny that they failed to pay the rent as alleged.
7. Through their solicitor, the defendants' had sent the rent to Munro Leys and Company who were then the solicitors for the plaintiff. They refused to accept the same. The defendants' made attempt to pay rent to Mr. Boris Ganke, the director of the plaintiff company but he also refused to accept the same.
8. The Court ordered extension of tenancy expired on 31 December 1996. The defendants' did not vacate the said land as they are entitled to remain in occupation and possession of the said land as they are entitled to a statutory extension of the said lease for a further period of 20 years from 1 January 1997.
9. The Notice served by the plaintiff is defective as it could not terminate the tenancy of the defendants'.

10. The defendants' have made an application to the Agricultural Tribunal under the provisions of ALTA for relief against eviction or forfeiture. In that application, the defendants' have inadvertently stated that the tenancy expires on 1 January 2007 but it should have been 1 January 2017.
11. The defendants' refute that they are to give vacant possession of the land to the plaintiff.

### ***Plaintiff's Submissions***

12. The plaintiff's counsel basically reiterated the contents of the affidavit and said that the defendants' have already had an extension under s. 13 of the ALTA. They asked for a 20 year extension from the Court and they got one. They cannot say that they got that extension under s. 13 of ALTO, as extension under ALTO is for a period of 10 years. If the defendants' thought that they are entitled to a renewal under ALTO and ALTA both, they should have sought an extension for 30 years and since they did not assert their right on an application for extension of tenancy they are now stopped from claiming that they have a right for extension under the ALTA.

### ***Defendants' Submissions***

13. The defendants' counsel submitted that the defendants' initial right was under the Agricultural Landlord and Tenant Ordinance Cap 242 ("ALTO") which is now the Agricultural Landlord and Tenant Act ("ALTA"). The tenancy of the defendants' must be seen in its proper perspective particularly having regard to the rights of extension of tenancy under the original s. 13 and the amendment thereof.
14. The defendants' counsel stated that the original tenancy agreement dated 26 March 1957 registered a lease No. 2076 for a period of 21 years from 1 January 1956. ALTO was passed in 1966. By s. 13 of ALTO, a tenant, upon expiration of the tenancy, was entitled to be granted not more than two extensions of his contract of tenancy and each extension was to be for a period of not less than 10 years. Upon expiration of the original tenancy on 1 January 1977, the plaintiff refused to provide a statutory extension and by a High

Court decision, they obtained a 20 year extension. That extension was granted under s. 13 of ALTO. In the meantime ALTO was amended in s. 13 and replaced by a new s. 13 of ALTA. This new s. 13 of ALTA did not come in force until 1 September 1977.

15. Under new s. 13 of ALTA, the defendants' are entitled to further extension of 20 years.
16. The defendants also argued that the notice to vacate is defective because under ALTA, before a tenancy can be terminated, the landlord has to give notice to quit under s. 37 ( 1 ) ( c ) of the ALTA, if rent is owing in respect of 3months or more, by giving 3 months notice to quit. It is the plaintiff who refused to accept rent and so they cannot terminate the tenancy on this ground and further if that is the ground relied upon than the requisite 3 months notice period has not been complied with. Now the plaintiff's want to forfeit the property and the defendants' have filed an action against forfeiture which should be allowed to be disposed at the Agricultural Tribunal.
17. The defendants' have shown a right to occupy the land and must not be forced to evict the same by the plaintiff or by an order of the Court.

### ***The Law and the Analysis***

18. In Civil Action 153 of 1997 the defendants' filed an action for extension of tenancy. The Court stated in the third last paragraph of the ruling that the *"plaintiffs are entitled to a statutory renewal of his lease under the provisions of s. 13 of the Agricultural Landlord and Tenant Ordinance"*.
19. Although the Court mentions that the extension was granted under s. 13 of the ALTO, in fact the Court deduces the right for an extension under the amending legislation of s. 13 of ALTA. The reference is made at page 3 of the judgment of his Lordship Justice Dyke.
20. It is thus clear that the defendants' have exhausted their right for statutory extensions under ALTA and are not entitled to any more statutory extension.
21. The defendants' say that the Court granted extension was under s. 13 of ALTO and that since s. 13 of ALTO has been amended, it is proper that the extensions due under ALTA be granted to the defendants'.

22. It has become pertinent for me to recite the relevant provisions of ALTO and ALTA. ALTO came in existence first. S. 13 of this ALTO reads:

*" 13 (1) Subject to the provisions of this Ordinance relating to the termination of a contract of tenancy, a tenant shall be entitled to be granted not more than two extensions of his contract of tenancy, each extension to be for a period of not less than ten years, if during the term of the original contract or first extension, as the case may be, the tenant has-*

- (a) cultivated the land subject of the contract in a manner consistent with the practice of good husbandry;*
- (b) committed no breach of the provisions of the contract of tenancy which has not been waived or condoned by the landlord,*

*Unless a written notice of termination has been served on the tenant at least one year prior to the expiry of the term of the tenancy or of the first extension as the case may be, on one or more of the following grounds:-*

- (i) That the landlord (...) requires the land for his use and occupation and that greater hardship would be caused by granting an extension than by refusing it;*
- (ii) that refusal to grant an extension would be in the interests of good husbandry;*
- (iii) that such refusal is in the interest of sound estate management;*
- (iv) that the land is required on reasonable grounds for agricultural research or education..."*

23. The above was amended by s. 13 of ALTA:

- “ 13 (1) Subject to the provisions of this Act relating to the termination of a contract of tenancy, a tenant holding under a contract of tenancy created before or extended pursuant to the provisions of this Act in force before the commencement of the Agricultural Landlord and Tenant (Amendment ) Act, 1976, shall be entitled to a single extension (or further extension, as the case may be) of his contract of tenancy for a period of twenty years, unless-*
- (a) during the term of such contract the tenant has failed to cultivate the land in a manner consistent with the practice of good husbandry; or*
  - (b) the contract of tenancy was created before the commencement of this Act and has at the commencement of the Agricultural Landlord and Tenant (Amendment) Act, 1976 an unexpired term of more than thirty years...”*

24. If the Court granted extension under ALTO, then the extension could not have been for more than 10 years in light of the refusal by the plaintiff to grant any extension. The Court ought to have granted one extension of 10 years only. The Court could not have granted a 20 year extension because that would have jeopardised the plaintiff's right to give one years' notice before the first extension to require the land for its own use or for any other reason stipulated in the section.
25. When the matter was heard and the order granted, the amending legislation was already in force, and no extension had been granted under ALTO, so by s. 13(1) of the amending legislation, the defendants' were entitled to only a single extension and not a further extension.
26. Moreover, since there was never any statutory extension granted before the hearing or when the orders were made, the defendants' could not possibly assert their rights under both the legislation. They chose to argue an extension based on the new legislation and they are now bound by their application and the orders. If they thought that they ought to have had extensions under ALTO and ALTA both, they ought to have argued that in the civil case they brought for extension. They refused to raise the point and now they ought to be estopped from raising this point again. The issue on extension is now res judicata.

27. In *Ord v. Ord* [1923] 2 KB 432 at 439 *Lush, J* said:

*"The words "res judicata" explains themselves. If the res-the thing actually or directly in dispute-has been already adjudicated upon, of course by a competent Court, it cannot be litigated again. There is a wider principle, ...often treated as covered by the plea of res judicata, that prevents a litigant from relying on a claim or defence which he had an opportunity of putting before the Court in the earlier proceedings and which he chose not to put forward..."*

28. In *Henderson v. Henderson* 67 E.R. 313 *Wigram, V,-C.*, stated as follows:

*" I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the same time.*

29. The issue before the Court was at all times on the period of extension that the defendants were entitled to. The new amending legislation was in force at the time the matter was then argued in Court. It was then for the defendants' to properly argue the period for which they were entitled to an extension and the legislation under which they asserting their rights. The defendants ' cannot argue their case on piece meal basis. The Court will not allow that. Notwithstanding the issue of res judicata, but on merits, I am reinforced



by Hansard when I hold the view that s. 13 of the amending legislation allows for only one extension because there was no extension under ALTO when the case was determined.

30. The Hansard report reads:

*"...the existing 10 year leases granted under ALTO will continue as 10 year leases and will not be converted to a 30 year term but will instead receive the automatic 20 year extension...It was not the intention that existing 10 year leases should effectively be converted to 50 year leases, and this amendment is, of course, consistent with the 30 year leases that will be granted hereafter..."*

*What Government is now proposing, having taken into account all that we have heard over these past weeks, is that the contracts of tenancy that now exist will be entitled to a single extension of 20 years unless the tenant has failed to cultivate the land in a manner consistent with the practice of good husbandry, or unless the contract of tenancy was created before A.L.T.O and at the date of the passing of this present Bill there still remains 30 years unexpired. Thus in no case will there be a right to more than one extension although it is of course possible that some pre A. L.T. O leases have received a first extension of 10 years under the present provisions of the Ordinance. The leases that have been so extended will be eligible for this further extension of 20 years..."*

31. I now turn to the argument raised by the defendants' that the notice to vacate does not comply with the statutory provisions of three months notice to terminate tenancy. I must say that the tenancy has expired and thus there is no need to give three months notice to terminate tenancy. What is needed is a notice to vacate the premises and the plaintiff has quite appropriately served that notice on the defendants'.

32. The defendants' have also raised the issue that the application was filed at the Agricultural Tribunal seeking relief against forfeiture. I do not know what has happened to that matter but that does not preclude me from deciding the existing application for

vacant possession. What I however fail to understand is that when the defendants' wanted an extension of the tenancy, they applied to High Court and failed to argue the provisions of ALTO and ALTA. Now they have gone to the Agricultural Tribunal seeking an extension when a higher court has decided the fate. The subsequent application to the Agricultural Tribunal was definitely to avoid being caught up with the problem of "*res judicata*".

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### ***Final Orders***

33. On the above premises, I find that the defendants' have not shown cause why they should not give up immediate vacant possession and I therefore order they so do within 1 month of the date of judgment. The 1 month period is to allow for relocation.
34. The plaintiff is entitled to costs of the proceedings in the sum of \$ 1, 500 to be paid within 28 days. The defendants' are jointly and severally liable for the payment of costs.

**Anjala Wati**

**Judge**

**04.10.2013**

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To:

1. *Vasantika Patel, Solicitors for the Plaintiff.*
2. *Sahu Khan & Sahu Khan, Solicitors for the Defendants'.*
3. *File: HBC 437 of 1999L.*