

IN THE HIGH COURT OF FIJI
AT LABASA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 18 OF 2013

IN THE MATTER of Section 169 of the
Land Transfer Act.

BETWEEN : **NASARAWAQA CO-OPERATIVE LIMITED** a body
incorporated under the Co-operatives Act.

PLAINTIFF

AND : **HARI CHAND aka VILIAME KINIKINILAU** Selesele,
Lekutu, Bua,

DEFENDANT

Appearances: Mr. Sharma of Samusamuvodre & Sharma of Labasa for the
Plaintiff.

Mr. Ram of Gibson & Co for the Defendant.

RULING

Introduction

1. This is an application for vacant possession made under Section 169 of the Land Transfer Act and under Order 113 of the High Court Rules. By summons dated the 17 June 2013 the Defendant is to show cause why he should not give up vacant possession of the Plaintiff's portion of land known as Selesele in the Tikina of Bua which is comprised in the

Instrument of Tenancy iTLTB No: 4/2/23598 and registered in IT Book 2012 Folio 11824.

The Application

2. The summons was supported by an affidavit of one Apisalome Muri Tavuki of Nasarawaqa Village, Lekutu, Bua, the Chairman of the Plaintiff company who deposed so far as is relevant the following:-
 - (i) That the Plaintiff is a a land owning co-operative comprising of the members of the Mataqali, CARAKINAYAGI of the Yavusa DRAKANIWAI living in Nasarawaqa village, Lekutu, Bua who have leased mataqali land previously leased by other tenants. That he is the Chairman of the Nasarawaqa Co-operative Limited, a co-operative registered under the *Co-operatives Act 1996* and is duly authorized to swear this affidavit on its behalf. Attached hereto and marked with the letter "A" is a copy of th "Certificate of Registration" of the said co-op.
 - (ii) That the Plaintiff is the registered owner of an Instrument of Tenancy No. 11824 under the Agricultural Landlord and Tenant Act of the land known as SELESELE in Nasarawaqa, in the Tikina of Lekutu in the Province of Bua containing an area of approximately 464.3568 hectares. Attached hereto and marked with the letter "B" is a copy of the said lease.
 - (iii) That the Defendant is illegally occupying a house site on the said land including about 50 acres on which he is raising some cattle.
 - (iv) That the western boundary of the said land comprises Selesele River and the southern boundary is a well-known track. The Eastern boundary is a freehold land that is clearly marked on the ground. The northern boundary of the land is the coast. The land illegally occupied by the Defendant is within the said boundaries and at its closest, it is about two hundred meters from the southern boundary described above. To the south of our lease is native land belonging to our Mataqali which was previously leased to one Shiu Prasad who has abandoned the lease with unpaid arrears of rental.
 - (v) That the late Ratu Julian Toganivalu leased the land now known as SELESELE on 1st October 1964 and one of his caretakers was

SHIU LAL s/o Bigan. Shiu Lal is the father of the Defendant who came onto the land with his father.

- (vi) That when Ratu Julian Toganivalu died sometime in the 1980s, his estate did not continue the lease payments and the then Native Land Trust Board repossessed the land. Our Mataqali, who are the native landowners, formed the Plaintiff co-operative and leased the land from the iTLTB with effect from 1st July 2011.
 - (vii) That I am reliably informed that after Ratu Julian Toganivalu died, the Defendant applied to the Agricultural Tribunal for a Declaration of Tenancy in ND 10/94 over the land he was occupying. The Application was dismissed by the Tribunal on 29th August 1996. Attached hereto and marked with the letter "C" is a copy of the said decision.
 - (viii) That on the 31st day of December 2012, I approached the Defendant, showed him our lease and asked him to vacate the land. The Defendant then thanked me for approaching him civilly and promised me that he would vacate the land within one month. On the 1st of February 2013, the Defendant came home and asked for an extension as he had problems moving so I gave him until the end of February to move. At the of February, he had still not moved and I then approached the iTLTB and spoke to one Sainimelia of the Legal Department and she advised me that we had power as lessees to evict him.
 - (ix) That I then informed the Police in Lekutu and later took some of the villagers to dismantle the Defendant's house but the Police intervened. I then went to my Solicitors who issued a Notice to Quit, a copy of which is attached hereto and marked with the letter "D".
3. The Defendant after at least two appearances then engaged the current solicitors to appear on his behalf. In his affidavit in opposition he deposes as follows:-
- (i) That he is the defendant in the above matter and that he is aware that the Plaintiff is the lessee under the *Instrument of Tenancy No. 11824* filed at the Registrar of Deeds on 29th November 2012.
 - (ii) That before he was born his late father, Shiu Lal, occupied the subject land. For 46 years, he has occupied the same portion of

land. Ratu Julian Toganivalu held the lease from Native Land Trust Board (now known as iTaukei Land Trust Board – TLTB) allowed his late father to occupy and cultivate the subject land which he now cultivates and occupy.

- (iii) That when the Ratu died and subsequently the land lease expired my late father continued occupying and cultivating the subject land. My late father and then myself continued occupation and cultivation of the subject land. Since that day until today, I have had uninterrupted occupation of the land during which time I made an application to iTLTB on 28th February 2011 to formally lease the subject land.
- (iv) That my application was accepted and I was told to pay the lease processing fee by Mr. Naiduki of TLTB. Annexed and marked “A” is a copy of an acknowledgement letter from TLTB. I paid the lease processing fee of \$1,150.00 and annexed and marked “B” is a copy of the receipt. I then waited for the lease to be processed by iTLTB.’
- (v) That unknown to me iTLTB took the money from me for the lease but subsequently leased the land to the Plaintiff.
- (vi) That I am in the process of instituting a high court claim against iTLTB and the Plaintiff for a declaration and injunction that the lease be granted to me.
- (vii) That the Plaintiff has a Deeds registered contract which is an instrument of tenancy and the said tenancy is not protected by the indefeasibility provisions of the *Land Transfer Act*.
- (viii) That I have in all these years of occupation developed the property. My father and I have built a 4 bedroom house with a dining room and sitting room. This structure is made of concrete and wood. I have fenced 20 acres of the subject land wherein enclosed are 6 cattle and 7 horses. Also, I have planted 10 acres of taro and cassava, 8 – 10 acres of rice and 5 acres of watermelon.
- (ix) That my family live with me on the same property. I am married with 7 children, 5 boys and 2 girls of which 4 are currently

attending school at Dreketi Secondary and Nasarawaqa Primary School. Together with my family, my younger brother also resides with us. I have invested so much money in the subject land and I have nowhere else to go.

- (x) That I have been cheated by TLTB and TLTB has fraudulently and/or in breach of contract and without cause, given the land to the Plaintiff who is now using the TLTB's illegal act to benefit itself.
 - (xi) That iTLTB has not returned my money that was paid for the lease processing fee. TLTB still has the money and has given the land to someone else.
4. The second half of the Defendant's affidavit in opposition relates to his complaint against a solicitor who had first acted for him and the Plaintiff and the conflict of interest arising from such a relationship. The solicitor later withdrew from acting for the Plaintiff and this issue has no relevance to this application.

Hearing

5. At the hearing on the 28 February the parties provided useful submissions although the Plaintiff was given further 7 days to amend his as it referred to a different portion of land. Both parties relied on their submissions.

The Plaintiff's submission

6. Very briefly the Plaintiff submits that the Plaintiff is the last registered proprietor of the land. He relies on the decision in **Habib -v- Prasad** (2012) FJHC 22 in respect of the registration of ALTA leases as giving him the right to bring an action under section 169 of the Land Transfer Act in particular the courts view that:-

"The word registered is making reference to registration of land and not the nature of land. If the land is registered either in Registrar of Titles Office or in the Deeds Office, it is still registered land. This land has been registered on 4th March, 2004 and is registered at the Registrar of Deeds office, it is still registered land. The registration is

sufficient to meet the definition of registered in the Interpretation Act Cap. 7:-

"Registered" used with reference to a reference to a document or the title to any immovable property means registered under the provision of any written law for the time being applicable to the registration of such document or title".

7. That the Defendant has not shown any right of possession to the land. That the Defendant's application to iTLTB for a lease and the acceptance by iTLTB of the processing fee does not give him any right but he will have to seek his remedy from iTLTB.
8. In respect of the Defendant's occupation or possession of land without iTLTB's consent the Plaintiff relies on the reasoning in **Nand -v- Kumar** 2012) FJHC 266 in which the Defendant carried out improvements on the property without the consent of the Plaintiff or the Director of Land as required by the Crown Lands Act. The Plaintiff filed a Section 169 Notice of the Defendant to vacate the promises. The issue before the Court was whether the Defendant had established a right to possession claiming equitable remedy since he had improved the property. The court, applying **Carmers v Pardoe** said:

"The court cannot override express provision of law and sanction the possession of the Defendant as a person who has a right to possession in terms of Section 172 of Land Transfer Act."
9. In respect of the Defendant's continued possession and cultivation the Plaintiff submits that such occupation is illegal and in breach of section 12 of the iTLTB Act. In this respect the Plaintiff relies on the case of **Ram Narayan v Moti Ram** Civil Appeal No.16 of 1983 where the Court considered very similar issues to those in the present case and said:

"Even conceding, by way of assumption that the respondent was entitled to succeed... the respondent would still be left to surmount the provisions of the Native Land Trust Ordinance. It is common ground that no consent of the NLTB was obtained to the transaction of gift. It is common ground that the transaction was implemented to the full by the respondent going into possession of the land and building a house upon it. These are the very circumstances which have been held, where no consent

has been obtained, to constitute a dealing in land contrary to Section 12 of the Act and thereby unlawful, null and void in terms of the section.

10. The Plaintiff therefore concludes that the Defendant has not shown any right of any right to possession of the property under section 172 of the Land Transfer Act and that he should be evicted from the subject land with costs.

The Defendant's Submission.

11. The Defendant through his counsel submits that the Plaintiff's title is not registered under the Land Transfer Act and therefore section 169 is not a suitable to summons for the possession of land. He is not a registered proprietor for the purposes of the Land Transfer Act. It relies on the high court decision in Sharma v Tabuela [2004] FJHC 193; HBC0026.2004 (15 March 2004) Justice Jiten Singh when dismissing a similar application stated:

"The registered proprietor must be someone whose interest on the land is registered with the Registrar of Titles under the provisions of Land Transfer Act. A person cannot be registered as a proprietor of a piece of land under the provisions of the Land Transfer Act unless the land has been surveyed."

12. Secondly that the instrument of tenancy is registered under the provisions of the Registration Act and not the Land Transfer Act. That the title does not comply with the requirements of section 21 of the Land Transfer Act. The judgment of Singh J *supra* clearly sets out the reasoning behind the fact that section 169 applications are for titles registered under the LTA.
13. Thirdly that the Land Transfer Act cannot regulate other types of titles for example approval notices, agreement for lease, instrument of tenancy and like agreements as such. These agreements give title but the document itself is registered in the Deeds Registry and therefore the Plaintiff is barred from bringing this action to this Court as he is not the last registered proprietor.
14. Finally paragraph 19 of the instrument of tenancy is subject to the Agricultural and Landlord and Tenant Act and therefore any disputes in respect of the contract must be decided under the provisions of that act.

15. In respect of whether the Defendant has cause to remain the Defendant submits that there are tri-able issues that needs to be determined by further evidence. He relies on the High Court's decision in **Kuar v Prasad** [2005] FJHC 137; HBC 0270j.2004s (16 June 2005) where it was held by Pathic J:

"Section 169 is a summary procedure. It is available in straightforward cases where there are no disputes as to facts. Where triable issues are raised the Court will not in the interest of justice and in the exercise of its discretion under 172 grant the application.

It should not be taken for granted that because the applicants are the registered proprietors it automatically follows that an order for possession will be made. The defendant under section 172 'may show cause why he refuses to give possession of such land, if he proves to the satisfaction of the judge a right of possession'.

16. The first issue is that the Defendant had applied to iTLTB for a lease to the subject land on the 28 February 2011 and on the same day received "an offer letter from iTLTB signed by one Mr. Naiduki acknowledging receipt of his application". He was advised to pay \$1,500:00 as lease processing fee. The Defendant then waited for the issue of the lease but the lease was issued to the Plaintiff. That the iTLTB had accepted the Defendant's processing fee without being issued a lease. The question that should be answered then, "is the Defendant entitled to a lease of Instrument of Tenancy of TLTB No. 4/2/23598" this question could not be decided by affidavit evidence.
17. The second issue is that the Plaintiff knows about the Defendant's occupation of the land but did nothing to evict him. It submits that the Plaintiff knew of the Defendant's occupation of the land when his father was the caretaker to the previous lessee Ratu J Toganivalu since the 1960's. That the Plaintiff still had knowledge of his occupation after the iTLTB took possession of the land after the demise of Ratu J Toganivalu in the 1980's. That the Plaintiff was only issued the instrument of tenancy in November 2012. That the plaintiff knew of the Defendant's occupation for 33 years but did nothing to evict him. This issue need to be determined in open court.
18. The third issue raised by the Defendant is that he has incurred expenditure on the land. He has built a 4 bedroom house and enclosed livestock within 50 acres of land. In this respect the Defendant relies on the Court of Appeal decision in **Ram Chand and Other v Ram Chandra**

(Civil Appeal No. 21/02S) quoted by Pathik J. in ***Kuar v Prasad*** (*supra*) in which he states:

"The fact that a tenant carries out improvements without the consent of his or her landlord does not give him a right to continue in the occupation of the land if the landlord is otherwise lawfully entitled to it. On the other hand, if improvements are carried out pursuant to some understanding, however loose, it may be conferred on tenants at least to purchase the land if a price can be agreed upon. One cannot lay down any hard and fast rule. Every case will depend upon its own facts"

19. That the Defendant's children also live on the property and are attending school nearby at Dreketi and Nasarawaqa and that the Plaintiff knows of all this issues even to the extent that they admitted the same in their affidavits.
20. The last point raised by the Defendant is that the fact that there was a conflict of interest between arising earlier between him and his solicitor and the fact that the same documents were used by the current solicitor the conflict of interest still remains. That this solicitor had imputed knowledge of facts but still advised the Defendant.

Determination

21. Is Section 169 of the land Transfer Act the right vehicle to institute these proceedings given that the Plaintiff holds a native lease issued under the Agriculture Landlord and Tenancy Act? 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) 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.

22. It is clear that the iTLTB as the Plaintiff's lessor can take an action under section 169 to eject the Plaintiff. This is provided for under paragraphs (b) & (c). For the lessor to be able to eject the tenant or the lessee it must have a registered lease. It is not in dispute that the Plaintiff holds a registered lease, the lease is an "*Instrument of Tenancy*" issued by the iTLTB under the Agricultural Landlord and Tenancy Act. It is for all intents and purposes a native lease and was registered on the 29 November 2012 and registered in book 2012 folio 11824. It is registered under the register of deeds. There is nothing in section 169 that prevents a lessor ejecting a lessee from the land as long as the lease is registered. How will the lessee then eject a trespasser if the lessor in the same lease can use section 169? The lessee under section 169 can eject a trespasser simply because the lessee is the last registered proprietor. The Plaintiff does not have to hold a title in fee simple to become a proprietor as long as he/she is the last registered proprietor. A proprietor is defined in the Land Transfer Act as "*proprietor*" means the registered proprietor of land, or of any estate or interest therein". The Plaintiff has an interest by virtue of the instrument of tenancy and therefore fits the above definition and can bring the action under section 169.
23. In ***Mohammad Habib -v- Janki Prasad*** the Court came to the conclusion that instruments of tenancy issued by the iTLTB under ALTA and which was registered under the Register of Deeds can be dealt with under section 169. This is because the word registration refers to the registration of the land not the nature of land. Hence if the land is registered in either the Register of Titles or the Register of Deeds it is still registered land. I am of the view that this is the correct position for the following reasons. In the first instance the torren's system of land ownership is a system of ownership by registration. It is the registration which defines ownership and makes the title indefeasible subject of course to certain exceptions. What the system does is to protect the registered proprietor of any estate or interest in land recorded in a folio of the register. In this matter the Plaintiff's derived his proprietorship from the registration of the instrument of tenancy in the Register of Deeds book 2012, folio 11824. The indefeasibility of his title is conferred to him as the registered proprietor of the land as the lessee, this is what the registration is protecting.
24. His Lordship Justice K A Stuart in ***Housing Authority -v- Muniappa*** (1977) FJSC states that section 169 of the Land Transfer Act speaks of those who may apply for relief against any person in possession of land. They include the last registered proprietor of the land, that is, the land of which the person summoned is in possession. The Plaintiff Housing

Authority holds a registered lease therefore it could be characterized as the *last registered proprietor*. His Lordship therefore came to the conclusion that the Housing Authority can bring the action under section 169. The Defendant relies on the decision of Justice Singh in **Sharma -v- Tabuela** (2004) FJHC 183 to confirm that registration must be under the Land Transfer Act before an action can be brought under section 169. I am not certain that Justice Singh used that as the basis upon which he made his decision, his decision is based on the fact that the Plaintiff in that case did not have a title to the land which is registered in any form sufficient for the Plaintiff to act as the last registered proprietor and therefore bring the action. The Supreme Court decision in the **Housing Authority -v- Muniappa** (Supra) that those who could use section 169 as the vehicle for seeking relief are those which include the last registered proprietor and those who hold a registered lease can be characterized as the last registered proprietor. Whether it was registered under the Register of Deeds Office or the Register of Titles Office was immaterial, what was important is that the title giving right to proprietorship must be registered with a book and folio number identifying the Plaintiff as the last registered proprietor. That is exactly the same as proprietorship by registration or title by registration.

25. The Defendant is, in my view, also wrong in assuming that the registered instrument of tenancy granted to the Plaintiff does not fall within the ambit of the Land transfer Act. Section 5 of the Land Transfer Act is clear as to which land is subject to it, this provision states:-

What lands subject to Act

The following freehold and leasehold land shall be subject to the provisions of this Act:-

(a) all land which has already in any manner become subject to the provisions of the Land (Transfer and Registration) Ordinance;

(Cap. 136.) (1955 Edition)

(b) all land hereafter alienated or contracted to be alienated from the Crown in fee;

(c) all leases of Crown land granted pursuant to the provisions of the Crown Lands Act, all leases of native land granted pursuant to the provisions of the Native Land Trust Act (iTLTB) and all mining leases, special mining leases,

special site rights and road access licences granted pursuant to the provisions of the Mining Act;

(d) ...

26. Clearly this land falls under paragraph (c). It is firstly a native lease granted by the iLTB to the Plaintiff to be used for agricultural purposes (hence the ALTA requirement). If it was a mining lease the provisions of instrument of tenancy will be guided by the requirement of the Mining Act but it still is a native lease and therefore is subject to the Land transfer Act.
27. To further bring this instrument of tenancy within the Land Transfer Act Section 10 of the Native Land Trust Act provides that all native leases shall be recorded by the Register of Titles in a Register of Native Leases. Section 10(2) provides:-

*When a lease made under the provisions of this Act has been registered it shall be subject to the provisions of the **Land Transfer Act**, so far as the same are not inconsistent with this Act, in the same manner as if such lease has been made under that Act, and shall be dealt with in a like manner as a lease so made"(my emphasis)*

28. The subject lease is titled "Instrument of Tenancy" granted by the Native Land Trust Board to the Plaintiff. The Land Transfer Act defines an "instrument" to include every document registered or capable of registration under this Act or in respect of which any memorial is by this Act directed, required or permitted to be entered in the Register Book or endorsed on any registered instrument. At the bottom right hand corner of the instrument of tenancy is the detail of registration including the date of registration, the Book and the folio number. By virtue of its registration and its eventual entry in the Register Book it has complied with the requirement of the Land Transfer Act. I am therefore satisfied that the Plaintiff can bring the action under section 169 of the Land Transfer Act.

Tri-able Issues

29. The Defendant submitted that his application to the iLTB for a lease and its subsequent refusal is a tri-able issue that could only be

determined by further evidence. This submission totally missed the point. In the first instance the letter from iTLTB acknowledges that they have received his application for a lease. It was **not** an offer letter. Secondly the letter advised the Plaintiff that the lease processing fee was \$1,150:00 and that such fee is payable before a lease is issued. It did not at any point advise him that he will get a lease hence the payment of the processing fee does not guarantee a lease. And thirdly and perhaps more importantly for this action is that the Defendant cannot use this proceeding to seek a remedy from a third party. That is entirely between him and the iTLTB.

30. The second point considered by the Defendant to be tri-able is that the Plaintiff knows about the Defendants occupation of the land since the 1980's and did nothing about evicting him. This in its view needs to be determined by the Court. In my view this is not sufficient to give rise to a propriety right. In other words the length of occupation since the demise of the original lessee, for which the Plaintiff's father was the care taker, did not give the Defendant a propriety right. The Plaintiff had already applied for declaration of tenancy under ALTA in 1996 but was unsuccessful (see paragraph 7 of the affidavit in support). Further the Plaintiff obtained their lease in November 2012 and they did not have any right to eject the Defendant before that. In ***Wati -v- Raji*** (1996) FJHC 105 Justice Fatiaki when dealing with the issue of occupation as giving right to possession stated in the second last paragraph of his decision:-

*Turning finally to the question of "propriety estoppel". Suffice to say that the mere occupation of a piece of land on a yearly tenancy for whatever length of time, is **not** a circumstance capable of giving rise to any form of "estoppel", propriety or otherwise, **nor** in my view is any equity created thereby which the court would protect"*

31. I am therefore of the view that this issue need not be determined any further, the Defendant do not have any right of possession notwithstanding the length of time he has lived there.
32. The third point raised by the Defendant is that he has incurred expenditure on the land and that his children also live on the property. His counsel relies on the decision of Justice Pathik in ***Ram Chand and Other v Ram Chandra*** (Civil Appeal No. 21/02S) quoted by Pathik J. in ***Kuar v Prasad*** in which he states:

"the fact that a tenant carries out improvements without the consent of his or her landlord does not give him a right to continue in the occupation of the land if the landlord is

otherwise lawfully entitled to it. On the other hand, if improvements are carried out pursuant to some understanding, however loose, it may be conferred on tenants at least to purchase the land if a price can be agreed upon. One cannot lay down any hard and fast rule. Every case will depend upon its own facts"

33. I agree entirely in Justice Pathik's view but unfortunately the remedy available to the Defendant goes to compensation not propriety right and the compensation issue should be determined between the Defendant and the lessor or iTLTB.
34. The last point raised by the Defendant about the conflict of interest between him and his prior solicitor is not a matter giving rise to a right to remain on the property and need not be determined any further.

Conclusion

35. Given the above I am satisfied that the Plaintiff can bring this action under Section 169 of the Land Transfer Act. I am further satisfied that there are no tri-able issues raised by the Defendant which requires that this action be instituted in any other way. I am also satisfied that the Defendant has not shown sufficient cause under section 172 to remain in the property and therefore the orders sought should be granted.

Orders

36. I therefore order that the:-
- i) The Defendant give vacant possession within one month from the date of this order;
 - ii) That the Plaintiff be awarded costs of this action which is summarily assessed as \$500:00 to be paid within 14 days of this order.




H A ROBINSON

Master, LABASA HIGH COURT

25 April 2014