

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Action No. HBC 105 of 2008

IN THE MATTER of an Application under
Section 169 of Part XXIV of the Land Transfer
Act, Cap. 131 for and Order for immediate
vacant possession

BETWEEN: **TULIA RASILA TUIDAMA**

Plaintiff

AND: **SHAKUNTALA DEVI**

Defendant

Coram: **Hickie, J**

Dates of Hearing: **6 and 19 November 2008**

Appearances: **Ms S.Rakai for the Plaintiff**
 Mr S. Chandra for the Defendant

Date of Decision: **18 February 2009**

JUDGMENT

1. THE APPLICATION

[1] This is an application by **TULIA RASILA TUIDAMA** pursuant to Section 169 of Part XXIV of the *Land Transfer Act*, Cap. 131 for an Order for vacant possession of the property comprised and described in Certificate of Title No.25783 being all that portion of the freehold land described more particularly as Lot 4 on Deposited Plan No.6377 known as “Nabati” and containing an area of 1804 square metres presently occupied by the Defendant of which the Plaintiff is the registered proprietor.

[2] The Summons filed on 7 April 2008 on behalf of the Plaintiff sought that the Defendant **SHAKUNTALA DEVI** show cause why an order for vacant possession of the said

property should not be made against her upon the grounds set forth in the Affidavit of **TULIA RASILA TUIDAMA**.

- [3] The hearing of the Summons came before the Master on 28 April, 19 June, 1 August and 22 September 2008, before it was transferred before to me on 6 and 14 October 2008 whereupon I set the matter down for hearing on 6 November 2008.
- [4] On 6 November 2008, the hearing commenced and was then adjourned part-heard to 19 November 2008 so as to allow Counsel for the Plaintiff to obtain instructions on whether to withdraw the application and, if so instructed, then also as to the question of costs.
- [5] On 19 November 2008, Counsel for the Plaintiff conformed that she had obtained instructions and they were that the Plaintiff “*wishes to leave it to the Court to decide*”.

2. BACKGROUND

- [6] The Plaintiff, **TULIA RASILA TUIDAMA**, is the Registered Proprietor of the said land comprised in Certificate of Title No.25783, Lot 4 on Deposited Plan No.6377.
- [7] The Plaintiff inherited the said property from her father, **RAM DAYAL**. The Transmission by Death was registered in March 2007.
- [8] Counsel for the Plaintiff has relied upon two Affidavits of **TULIA RASILA TUIDAMA** to satisfy the requirements of Section 169:
- (a) The first Affidavit was sworn on 4 April 2008 and filed on 7 April 2008 and contains two annexures:
- (i) Annexure “TRT 1” is a certified true copy of the said Certificate of Title No.25783 showing the Transmission by Death and the Plaintiff as the current Registered Proprietor; and
- (ii) Annexure “TRT 2” is a copy of a “Notice to Quit” the said premises dated 16 January 2008 which was served upon the Defendant on 19 January 2008;

(b) The second Affidavit was sworn on 29 July 2008 and filed on 30 July 2008 which states:

(i) That the Plaintiff is unaware of the allegations made by the Defendant as to the purported Sale and Purchase Agreement concerning the said land including the erection of a dwelling upon it; and

(ii) That, in any event, the said agreement was not completed and thus the said sale and purchase has lapsed.

[9] In light of the above, Counsel for the Plaintiff has submitted that the Plaintiff has thus fulfilled the criteria pursuant to s. 169 of the *Land Transfer Act*, that is, for the Defendant to show cause why she should not give up possession of the land to the Plaintiff, and accordingly, if she so fails, to obtain an Order from the Court for immediate vacant possession.

[10] By contrast, Counsel for the Defendant relies upon the Affidavit of **SHAKUNTALA DEVI**, sworn on 27 June 2008 and filed on 30 June 2008, to satisfy the requirements of Section 172 of the *Land Transfer Act*, that is, that she can show cause why she refuses to give up possession such that the Court should dismiss the summons with costs.

[11] The reasons why the Defendant says she can show cause as to why she has refused to give up possession are:

(a) That the Plaintiff's father, **RAM DAYAL**, allegedly sold the said land to the Defendant's husband, **RAM CHANDAR**, as per a "Sale and Purchase Agreement" dated 9 December 1986;

(b) That the Plaintiff's father, **RAM DAYAL**, failed to provide to the Defendant's husband, **RAM CHANDAR**, the land unencumbered so that the agreement could be finalised;

(c) That, in the meantime, the Defendant and her said husband built a substantial dwelling on the said land on the assurance that it would be rezoned from Agricultural, subdivided and transferred to the Defendant's husband, **RAM CHANDAR**, which has not occurred;

(d) That the Plaintiff's father, **RAM DAYAL**, filed two previous applications in the High Court (being Civil Action No.94 of 1990 and No.331 of 2002) seeking to evict the Defendant without success;

(e) That the Defendant's husband, **RAM CHANDAR**, died on 9 September 1988 intestate with letters of administration of his estate being granted to the Defendant on 23 April 1992.

[12] Counsel for the Defendant filed written submissions on 27 August 2008, highlighting four main points:

(a) That in a previous Affidavit by the Plaintiff's father, **RAM DAYAL**, on 24 September 2002 (as part of action no.331 of 2002), he conceded that he had been unable to comply with one of the conditions of the "Sale and Purchase Agreement", that is, to have the subdivision approved and separate certificates of title issued for the lots;

(b) That "the Plaintiff ought to have at least constructive notice of the presence of the Defendant" and is estopped from issuing this summary application by virtue of the fact that if her father had rectified his breach, then the Defendant would now have legal title;

(c) That the Defendant has an equitable interest in the said property -

(i) ***Inwards v Baker*** [1965] 2 QB 29 [citation amended by Court];

(ii) ***Emblem Investments Ltd v Atlas Trading Company Ltd*** [1994] FJCA 37 (Paclii: <http://www.paclii.org/fj/cases/FJCA/1994/37.html>); (Unreported, ABU0001J of 1994, 11 November 1994, Tikaram P, Thompson and Hillyer JJA) [citation amended by Court]; and

(iii) ***Chand & Others v Chandar & Others*** [2003] FJCA 10 (Paclii: <http://www.paclii.org/fj/cases/FJCA/2003/10.html>); Unreported, ABU0021U of 2000, 28 February 2003, Reddy P, Kapi and Sheppard JJA);

(d) That the Defendant is a widow who has expended a substantial sum of money to develop the property which must be taken into account by the Court: ***Deo v Mati*** [2005] FJHC 136 (Paclii: <http://www.paclii.org/fj/cases/FJHC/2005/136.html>); (Unreported HBC0248J of 2004, 16 June 2005, Pathik J) [citation amended by Court].

- [13] Counsel for the Plaintiff filed written submissions in reply on 5 September 2008. The thrust of those submissions was:
- (a) That the onus is on the Defendant to show a right to possession to the satisfaction of the Court;
 - (b) That the Defendant must be able to show cause as to why possession should not be delivered to the Plaintiff, that is, “some tangible evidence establishing a right or supporting an arguable case”: ***Morris Hedstrom Limited v Liaquat Ali***, (Unreported, Civil Action No.153 of 1987 at page 2);
 - (c) That a registered instrument should be conclusive proof of title: section 39 of the *Land Transfer Act (Cap.131)*;
 - (d) That the Defendant has to show cause as to a right of possession to the property in issue: ***Ali v Jalil*** (Unreported, Civil Action No.44 of 1981);
 - (e) That the fact that the Defendant has carried out improvements without consent does not give her a right to continue in occupation if the Plaintiff is otherwise lawfully entitled to it: ***Chand & Others v Chandar & Others*** (supra);
 - (f) That the Plaintiff was not privy to the said Sale and Purchase Agreement between her late father, **RAM DAYAL**, and the Defendant’s late husband, **RAM CHANDAR**;
 - (g) That estoppel cannot be pleaded by the Defendant as she too was not privy to the said “Sale and Purchase Agreement” between **RAM DAYAL** and **RAM CHANDAR**;
 - (h) That as the Defendant did not make any claim on the estate of the Plaintiff’s late father, **RAM DAYAL**, when probate was granted in 2004, then why should the Court entertain such an application now?
- [14] At the hearing, Counsel for the Plaintiff stressed that settlement was to have been in 1989 when the balance should have been paid and therefore some 22 years later the said “Sale and Purchase Agreement” must have lapsed.
- [15] Counsel for the Defendant submitted in Reply that:
- “This Application is premature. Instead the Applicant should be proceeding by way of Writ of Summons and Statement of Claim. Two previous s.169 applications have been dismissed.”*

3. THE LAW

- [16] In the present case, the Registered Proprietor has summoned the Defendant (who has been in possession of the land pursuant to a Sale and Purchase Agreement dated 9 December 1986) **to show cause why she should not give up possession of the land to the Plaintiff in light of her being the registered proprietor since March 2007.** Thus once Counsel for the Registered Proprietor has satisfied the Court as to their title and service of their Notice to Quit upon the Defendant, the onus is on the Defendant to:
- (a) Prove to the satisfaction of the Court “***a right to the possession of the land***”; or
 - (b) **Seek an Order for compensation** to be paid by the Plaintiff to the Defendant for the alleged improvements to the land.
- [17] It is noted that in relation to **the “Notice to Quit”, it is presumed that it was validly served** upon the Defendant on 19 January 2008 even though there is no Affidavit as to such actual service other than a statement in the Plaintiff’s Affidavit filed on 7 April 2008 containing annexure “TRT 2” which is a copy of a “Notice to Quit” the said premises dated 16 January 2008 which the Plaintiff says was served upon the Defendant on 19 January 2008 by letter from the Plaintiff’s lawyers. The Defendant did not question this at the hearing.
- [18] As the Plaintiff is the Registered Proprietor, she would normally be entitled to possession of the said land unless the Defendant can show some right to refuse possession pursuant to Section 172.
- [19] The Defendant has shown a possible action she may have for specific performance against the estate of the Plaintiff’s father for bequeathing the said property to the Plaintiff as beneficiary under his will in full knowledge that the Defendant’s husband was a bona fide purchaser (who had entered onto the said land and built a dwelling with the consent of the Vendor) pending settlement of the “Sales and Purchase Agreement” entered into on 9 December 1986.
- [20] The problem for the Defendant is that not only did she do nothing about obtaining an order for specific performance of the agreement, there are virtually no details as to the

previous legal proceedings involving the Defendant and the Plaintiff's late father. In addition, there is much force to two of the submissions of Counsel for the Plaintiff :

(a) That there the Plaintiff now holds an indefeasible title; and

(b) That as the Defendant did not make any claim on the estate of the Plaintiff's late father when probate was granted in 2004, then why should the Court entertain such an application now?

- [21] Thus the major problem for the Defendant is that she will need to challenge the Plaintiff's indefeasible title by showing fraud. As Singh J held in *Chandar Bhan v Sandhya Sahaye* [2002] FJHC 228 (Paclii: <http://www.paclii.org/fj/cases/FJHC/2002/228.html>); (Unreported, HBC0215 of 2002, 4 October 2002) at page 2:

"There is no dispute that the plaintiff is the last registered proprietor of the land in question. As such he is entitled to bring these proceedings.

Once a summons is served on the defendant, Section 172 imposes an onus on the defendant to show cause why he should not give possession. In JAMNADAS & CO. LTD. V. PUBLIC TRUSTEE AND PRASAD STUDIOS Civil Appeal 39 of 1972 the Fiji Court of Appeal said:

'Under Section 172 of the Act the Judge is required to dismiss the summons if the respondent proves to his satisfaction a right to possession'

... The principle of indefeasibility of title is well explained by Edwards J. in FELS v. KNOWLES (1906) 26 NZLR 604 at 620 as follows:

*'The cardinal principle of the statute is that the register is everything, and that, except in cases 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.**'*

*So in the absence of fraud the transferee gets an indefeasible title. There are no particulars of fraud given in the affidavit filed on behalf of the defendant. **The defendant is not even a party to the other proceedings ... I therefore find that this ground fails.**" (My emphasis)*

- [22] An issue not raised at the hearing of the Section 169 Application was that once the “Sale and Purchase Agreement” was entered into on 9 December 1986, then arguably the Vendor **RAM DAYAL** held the property as trustee for the Purchaser, **RAM CHANDAR**. Therefore, on the one hand the Vendor was trustee for the Purchaser pending transfer of the property and then, on the other, arguably acting against that trust when not only did he fail to meet the conditions of the “Sale and Purchase Agreement” such that the property could not be transferred but he also acted against that trust when he left the said property in his will naming his daughter as the beneficiary. How the Vendor could stand as both trustee for the Purchaser as well as leaving the said property in his will naming his daughter as beneficiary may be a matter for the parties respective legal advisers to consider. It might also become part of any subsequent legal proceedings as to whether it amounts to fraud.
- [23] As I have discussed in a number of recent cases, it is my view that for indemnity costs to be awarded, there would need to be conduct which could be pointed to by the Defendant whereby the Plaintiff “had acted wholly unreasonably in connection with the hearing” and **such conduct would need to be “reprehensible conduct”** to signify the Court’s condemnation as to the way the Plaintiff has conducted the litigation: see **Singh v Naupoto** (Unreported, High Court of Fiji at Suva, Civil Action No: HBC199 of 2008, 8 August 2008, Hickie J – costs); Paclii [2008] FJHC 193, <http://www.paclii.org/fj/cases/FJHC/2008/193.html>); and **Rokotuiviwa v Seveci**, (Unreported, High Court of Fiji at Suva, Civil Action No: HC374 of 2007, 12 September 2008, Hickie J); Paclii: [2008] FJHC 221; <http://www.paclii.org/fj/cases/FJHC/2008/221.html>) citing **Police Service Commission v Naiveli** (1995) HBJ 029 of 1994, 4 September 1995, Scott J; and Civil Appeal No. ABU0052 of 1995S, 16 August 1995, Casey, Ward and Handley JJA); see also **Dewa v University of the South Pacific** (Unreported, High Court of Fiji at Suva, No.HBJ0007J of 1994, 4 July 1996, Pathik J) (Paclii: [1996] FJHC 125, <http://www.paclii.org/fj/cases/FJHC/1996/125.html>); **Heffernan v Byrne & Ors**, (Unreported, HBM 105 of 2007, 24 October 2007, Pathik J - Application for Recusal dismissed for want of prosecution) (Paclii: [2007] FJHC 138, <http://www.paclii.org/fj/cases/FJHC/2007/138.html>); and 11 April 2008 (Application to

Strike Out Motion for Constitutional Redress granted) (Paclii: <http://www.paclii.org/fj/cases/FJHC/2008/154.html>; and *Heffernan v Byrne & Ors*, Civil Appeal No.ABU0027 of 2008, Hickie JA, 29 May 2008 (Application for Leave to Appeal withdrawn) (Paclii: [2008] FJCA, <http://www.paclii.org/fj/cases/FJCA/2008/7.html>).

- [24] As I noted in *Rokotuiviwa v Seveci* (supra), citing *Carvill v HM Inspector of Taxes* (Unreported, United Kingdom Special Commissioners of Income Tax, 23 March 2005, Stephen Oliver QC and Edward Sadler) (Bailii: [2005] UKSPC SPC00468, <http://www.bailii.org/cgi-bin/markup.cgi?doc=/uk/cases/UKSC/2005/SPC00468.html>) , two separate considerations are required (at paragraph 11):

*"The party's conduct must be unreasonable, but with the further characteristic that it is **unreasonable to an extent or in a manner that it earns some implicit expression of disapproval or some stigma.**"*

- [25] Although the Plaintiff's Counsel was aware of the potential problems with this Section 169 Application once the Defendant had filed her Affidavit annexing the "Sale and purchase Agreement" from 9 December 1996, on another view she still had two strong arguments to place before the Court as I have noted above. That is, the Defendant had taken no action in over 20 years to seek specific performance of the said agreement and, most importantly, on its face the Plaintiff holds indefeasible title. Even though I have found that these are matters which are going to require, as Counsel for the Defendant has submitted, the filing of a Writ of Summons and Statement of Claim, I do not find any evidence that the Plaintiff "acted wholly unreasonably in connection with the hearing" of this Section 169 Application.

- [26] In view of the above, the Court makes the following findings:
1. That the Defendant has shown cause on affidavit evidence pursuant to Section 172 of the *Land Transfer Act* as to some right to possession which would preclude the granting of an order for possession in favour of the Plaintiff as the Registered Proprietor;

2. That there is no basis for an Order for indemnity costs.

ORDERS

[26] Accordingly, the Court makes the following Orders:

1. That the Plaintiff's application for immediate vacant possession of the property comprised and described in Certificate of Title No.25783 being all that portion of the freehold land described more particularly as Lot 4 on Deposited Plan No.6377 known as "Nabati" and containing an area of 1804 square metres presently occupied by the Defendant of which the Plaintiff is the registered proprietor, is dismissed.
2. That the Defendant's application for indemnity costs is dismissed.
3. That the Court shall summarily fix costs to be paid by the Plaintiff to the Defendant on a party to party basis.

I will now hear the parties as to the amount of those party to party costs.

Thomas V. Hickie

Judge

Solicitors:

Jamnadas & Associates, Barristers & Solicitors, Suva, for the Plaintiff

MC Lawyers, Barristers & Solicitors, Suva, for the Defendant