

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CIVIL JURISDICTION**

**Civil Action No. HBC 227 of 2014**

**IN THE MATTER** of Section 169 of  
the Land Transfer Act [Cap 131] for an  
order of vacant possession.

**BETWEEN : WALENA WHITE** of 299 Princess Road, Suva in the Republic of Fiji,  
Housewife.

**PLAINTIFF**

**AND : JOSEFA GONEWAI** of Lot 2, Block 50, Narai Lane, Raiwaqa, Suva in  
the Republic of Fiji.

**DEFENDANT**

**BEFORE: Master Vishwa Datt Sharma**

**COUNSELS: Mr. Shazran Lateef** - for the Plaintiff.  
**Mr. Rayawa** - for the Defendant.

**Date of Hearing: 30<sup>h</sup> March, 2015**

**Date of Ruling: 26<sup>th</sup> April, 2016**

**RULING**

*(Application seeking Vacant Possession pursuant to  
s169 of the Land Transfer Act Cap 131)*

**INTRODUCTION**

1. The Plaintiffs by their Originating Summons dated 12<sup>th</sup> August, 2015 are seeking immediate vacant possession of all that premises comprised in **Housing Authority Sub Lease No. 168211 Lot 2 on DP 3720** together with costs of this action.
2. There are 3 (Three) affidavits filed before the Court:

- a) Affidavit in Support of Walena White sworn on 12<sup>th</sup> August, 2014 (**"Plaintiffs Affidavit"**);
  - b) Supplementary Affidavit in Support of Walena White sworn on 29<sup>th</sup> October, 2014 (**"Plaintiffs Supplementary Affidavit"**);
  - c) Affidavit in Opposition of Tomasi Koroitamana sworn on 26<sup>th</sup> February, 2015 (**"Defendants Affidavit"**).
3. This case proceeded to hearing on a **defended basis** and both parties to the proceeding made oral/written submissions at the hearing.
  4. This court has a duty to determine the pending issue before the court in a just and fair manner in terms of the laws provided for in **ss169, 171 and 172 of the Land Transfer Act [Cap 131]**.

#### **THE LAW**

5. The application is filed in terms of **s.169 of the Land Transfer Act [Cap 131]** which provides as follows:

*"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) *lessor against a lessee or tenant where a legal notice to quit has been given or the term of the lease has expired."*
6. Pursuant to **section 172 of the Act** the onus is on the Defendant to show cause why he refuses to give up possession to the Plaintiff and why an order for possession should not be made against him.
  7. The Plaintiff is the **registered owner** as a **Lessee** in this instant case. The term "**Lessee**" is defined as proprietor of a Lease or sub lease in the Land Transfer Act. Therefore, the term "**Lessee**" follows within the ambits of **section 169** application.

8. In the case of **Ram Narayan v Moti Ram (Civ. App. No. 16/83)** Gould J.P. said-

*"... the summary procedure has been provided in the Land Transfer Act and, where the issues involved are straightforward, and particularly where there are no complicated issues of fact, a litigant is entitled to have his application decided in that way."*

9. The procedure under **s.169** is governed by **sections 171 and 172 of the Land Transfer Act (Cap 131)** respectively which stipulates 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."*

**(Underline is mine for emphasis)**

10. As far as the requirements in terms of **section 172** are concerned, the Supreme Court in the case of **Morris Hedstrom Limited v. Liaquat Ali (Action No. 153/87** at p2) said 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."*

11. The requirements of **section 172** have been further elaborated by the Fiji Court of Appeal in **Ajmat Ali s/o Akbar Ali v Mohammed Jalil s/o**

**Mohammed Hanif (Action No. 44 of 1981 – judgment 2.4.82)** where the court said:

*"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. There is accordingly nothing in section 172 which requires an automatic order for possession unless "cause" is immediately shown.*

*(Emphasis added)*

12. In **Premji v Lal [1975] FJCA 8; Civil Appeal No 70 of 1974 (17 March 1975)** the Court of Appeal said:

*'These sections and equivalent provisions of the Land (Transfer and Registration) Ordinance (Cap. 136-1955 Laws of Fiji) have been considered in a number of cases in this court and the Supreme Court. In Jamnadas & Co. Ltd. v. Public Trustee and Prasad Studios Ltd. (Civil Appeal No. 39 of 1972 - unreported) this court 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 ...'*

13. Under **Section 172 of the Act** the judge is empowered to dismiss the summons if the respondent proves to his satisfaction that she has a valid defence, a right to possession, locus standi and or a licence. It further provides that a judge may make any order and impose any terms that he may think fit. The dismissal of the summons is not to prejudice the right of a **Plaintiff** to take any other proceedings to which he may be otherwise entitled.

14. Reference is made to the case authorities of **Caldwell v. Mongston (1907) 3 F.L.R. 58 and Perrier Watson v. Venkat Swami (Civil Action 9 of 1967 - unreported)** wherein the **Supreme Court** held-

*'that if the proceedings involve consideration of complicated facts or serious issues of law, it will not decide the cases on summary proceedings of this nature, but will dismiss the summons without prejudice to the Plaintiff's right to institute proceedings by Writ of Summons.'*

**Plaintiffs Case****15. The Plaintiff's Affidavit filed in this case deposed as follows:**

- (i) That the Plaintiff is the registered owner of Lease No. 168211 Lot 2 on DP 3720 and have its authority to swear this Affidavit on its behalf.
- (ii) She deposes to the facts herein as within her personal knowledge and that acquired by her in the course of her duties save and except where stated to be on information and belief and where so stated, she verily believes to be true.
- (iii) The Defendants are currently occupying the above property without her knowledge and authority (hereinafter referred to as "**the property**"). A true copy of the said Lease is annexed hereto and marked "**A**".
- (iv) That an eviction notice dated 10<sup>th</sup> March 2014 was served by a bailiff on the Defendants on 15<sup>th</sup> March 2014. A true copy of the eviction notice and the bailiff's affidavit of service is annexed hereto and marked "**B**" and "**C**" respectively.
- (v) The property is situated at Lot 2 Block 50, Nairai Lane, Off Nairai Road Raiwaqa, Suva and was transferred to her by her uncle on 30<sup>th</sup> May 2001 on the understanding that he could remain residing on the said property rent free for the rest of his life with a cousin of her at that time.
- (vi) However her uncle has passed away and her cousin has emigrated. When her cousin left Fiji, he was unable to contact her and left the house key to the said property with another relative who claims to have ownership of the said property. The said cousin has then passed the property to another family of which they were not related to.
- (vii) That despite the said Notice to Vacate the Defendants have failed and/or refuse to vacate and are still occupying the property. Attached herein the said Notice of Vacation.
- (viii) To the Plaintiff's knowledge the following person(s) is in possession of the said property:
  - (1) **Josefa Gonewai**
  - (2) **Elenoa** 2<sup>nd</sup> name not known to us)
- (ix) She believes that there is a real likelihood that the improvements and fixtures on the property may be removed or damaged by the Defendants due to their refusal to give up vacant possession.
- (x) The Plaintiff hereby gives and undertaking as to damages for issuance of any injunction under this application and being a substantial Bank is able to satisfy any such damages awarded (if any).
- (xi) The Plaintiff now seeks an Order that the Defendants or any other occupants of the property forthwith deliver up possession and vacate the said property and for an injunction restraining the Defendants from interfering with the

improvements and/or fixtures on the property in any way together with the other Orders sought in the Originating Summons herein.

### **Defendant's Case**

16. **The Affidavit deposed by Tomasi Koroitamana on behalf of the Defendant states as follows;**

- (i) That **Tomasi Koroitamana** have been authorised by the Defendant to swear this affidavit on his behalf from information personally known to him and those made available to him by parties who had an interest in this case.
- (ii) That he had received instructions from the real owner of the house Mr Josefa Tikoinamuamua to arrange for the transfer of the subject property to his son Josefa Tikoinamuamua Jnr. **Annexure marked "TK-1"** is a letter written to the General Manager of the Housing Authority by Josefa Tikoinamuamua asking that the property be transferred to his son and that he be the caretaker until his son reaches the age of majority. He is also known as Tomasi Koro.
- (iii) That Josefa Tikoinamuamua Jnr is now residing in Australia and he remembers the solution about outstanding City Rates, which **WALENA WHITE** was asked to clear. Ms White brought home a piece paper for Josefa Tikoinamuamua Snr to sign before the city rates were to be cleared. According to Josefa Tokoinamuamua Jnr no lawyer was present when Josefa Snr signed those documents. No one informed Josefa Snr that he was transferring the property. Please find attached as annexure marked "TK-2" is a letter sent to our lawyer explaining in details the account witnessed by Josefa Jnr.
- (iv) That there is now a Police Report registered and the police are now investigating the complaint filed by him on behalf of Josefa Tikoinamuamua Jnr. **Annexure marked "TK-3"** is the copy of the police statement. The police enquiry No. Is PEP 134/14 and the Investigating Officer name is Detective Corporal 3064 Samuela.
- (v) That they verily and reasonably believe that Josefa Tikoinamuamua would never have deprived his own son from ownership of the family home.
- (vi) That we humbly request that this application filed by **WALENA WHITE** be struck out and that a full investigation by the police be allowed to take its course in the circumstances surrounding the alleged transfer of the subject property to WALENA WHITE.
- (vii) That Ms White has already been interviewed under caution by the police and that he has been reliability informed that she has made some statement in that police caution statement. He requests this Honourable Court to issue orders for the police to release a copy of Walena White's Caution Statement to this Honourable Court in the greater interest of justice.

- (viii) That Josefa Tokoinamuamua Jnr and he had jointly authorised Josefa Gonewai the Defendant to occupy the subject property on behalf of Josefa Tikoinamuamua Jnr until he returns from Australia.
- (ix) That Josefa Gonewai has the lawful authority of Josefa Tokoinamuamua Jnr and his authority as caretaker to look after the property.
- (x) That the Defendant denies all of the facts sworn by Walena White in both her affidavits.
- (xi) That he humbly pray that the Plaintiff's Summons be struck out with costs to be paid by the Plaintiffs to the Defendant.

*(Underline is mine for determination)*

### **ANALYSIS and DETERMINATION**

17. The question for this court to determine is **whether the Plaintiff is entitled to the vacant possession** of all that piece or parcel of land comprised in **Lease No. 168211 being Lot 2 on DP 3720** containing an area of 4.3 perches and situate in the province of Rewa together with all improvements and fixtures thereon, of which the **Plaintiff is the registered proprietor or Lessee of** in terms of **s.169 of the Land Transfer Act [Cap 131]**?
18. In this case, the Plaintiffs must first comply with the requirements of **section 169 of the Land Transfer Act cap 131**, which are stated hereunder as follows-
- (a) The **first requirement** or the first limb of section 169 is that the applicant must be the last registered proprietor of the subject land.
- (b) The **second** is that the applicant be a lessor with power to re-enter where the lessee or tenant is in arrears; and
- (c) The **third** is where a lessor against a lessee or tenant where a legal notice has been given or the term of the lease has expired. The second and third limb of section 169 does not appear to apply in that the defendant is not the plaintiff's tenant who is in arrears and/or the term of the lease has expired.
- (Underline for emphasis)*
19. In this instance, **the first limb of s169 applies; the plaintiff is the last registered proprietor and Lessee of all that piece or parcel of land comprised in Lease No. 168211 being Lot 2 on DP 3720 containing an area of 4.3 perches and situate in the province of Rewa.**

20. In this respect the plaintiff has annexed in her affidavit a certified true copy of the **Housing Authority Sub Lease No. 168211 being Lot 2 on DP 3720 containing an area of 4.3 perches and situate in the province of Rewa.**

The **Sub Lease No 168211** clearly shows that the **Sub Lease** was **transferred to the Plaintiff** on 04<sup>th</sup> October, 2001 at 12.20pm under transfer number 500863.

21. The Plaintiff is for the purposes of section 169 the **last registered proprietor and Lessee** of the said **Housing Authority Sub Lease No. 168211 being Lot 2 on DP 3720 containing an area of 4.3 perches and situate in the province of Rewa.**
22. After the Plaintiff has established the **first limb test of section 169** that is that the Plaintiff is the **registered proprietor and Lessee of all that piece or parcel of land comprised in Lease No. 168211 being Lot 2 on DP 3720**, then the **Defendant** bears the **onus of showing cause** as to why **vacant possession** should not be granted to the **Plaintiff**.
23. Pursuant to **section 172 of the Land Transfer Act Cap 131**. The **Defendant** needs to satisfy this court on affidavit evidence that she has a right to possession. (Case of **Muthusami v Nausori Town Council F.C.A. 23/86** refers).
24. There is no need to prove conclusively a **right to possession** and it is sufficient for the **Defendant** to prove that there is **some tangible evidence** establishing the existence of a right or of an **arguable defence**. (**Case No. 152 of 1987- Morris Hedstrom Ltd v Liaquat Ali** refers).
25. The **Defendant** has alleged **fraud** as can be ascertained from the **affidavit in opposition** wherein he alleges as follows-
- (i) *That Josefa Tikonamuamua Senior (Plaintiff's uncle), was going to be prosecuted by Suva City Council and with the help of the Plaintiff he was going to pay the city rates. However, the Plaintiff had the Defendant sign a Transfer document in the Plaintiffs favour to the disputed property and the transfer was allegedly not done in the presence of a Solicitor.*
  - (ii) *There is a signed letter (TK 1) from Josefa Tikonamuamua Senior, which states to Housing Authority General Manager that he intends to leave his nephew, the Defendant, as a caretaker*



*of the disputed property until his son Josefa Tikonamuamua Junior is able to look after his own welfare.*

(iii) *There is a signed letter (TK2) from Josefa Tikonamuamua Junior (Plaintiff's cousin) alleging that his father Josefa Tikonamuamua Senior was unaware of the Transfer documents that he was signing. The Defendant alleges that the Plaintiff obtained title wrongly.*

26. **Sections 39-42 of the Land Transfer Act**, and under the **Torrens system** of land registration which operates in Fiji, the **title** of the registered proprietor is **indefeasible** unless **actual fraud** is proved. (Case of **Subramani v Sheela** [1982] FJCA 11; [1982] 28 FLR 82 (2 April 1982); **Assets Company Ltd v Mere Roihi** [1905] AC 176 at p. 210; **Fels v Knowles** 26 N.Z.L.R. 608, at p 620 refers).
27. In *Subramani* (supra) the Fiji Court of Appeal (per Gould V.P.' Marsack, J.A., and Spring J.A.) states as follows-

*'The indefeasibility of title under the Land Transfer Act is well recognized; and the principles clearly set out in a judgment of the New Zealand Court of Appeal dealing with provisions of the New Zealand Land Transfer Act which on that point is substantially the same as the Land Transfer Act of Fiji. The case is Fels v Knowles 26 N.Z.L.R. 608. At page 620 it is said;-*

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

28. It is well settled law that in the absence of fraud a person taking transfer from the proprietor of any estate or interest in the land subject to the Act will not have his Title defeated.
29. **Section 39(1) of the Land Transfer Act** simply states that a **registered title** is deemed paramount and is not affected or defeated by an unregistered interest except in case of **fraud**. There are **three (3) exceptions** to this section:
- (a) *'The estate or interest of a proprietor claiming the same land, estate or interest under a proper instrument of title registered under the provisions of this Act; and*

- (b) *So far as regards any portion of land that may be wrong description or parcel or of boundaries be erroneously included in the instrument of title of the registered proprietor not being a purchaser or mortgagee for value or deriving title from a purchaser or mortgagee for value; and*
- (c) *Any reservations, exceptions, conditions and powers contained in the original grant.'*

30. I find that none of the abovementioned three (3) exceptions are in anyway applicable to the present case.
31. The Defendant is alleging fraud, however this allegation is unsubstantiated. There must be proven facts of fraud to give any weight to the Affidavit evidence of the Defendant, specifically annexures TK1 and TK2 respectively.

Reference is made to the case of ***Prasad v Registrar of Titles [2011] FJHC 702; HBC 223.2008***, relied on the ratio stated ***Assets Co Ltd v. Mere Roihi (1905) AC 176, (Privy Council)*** in which **Lord Lindley** observed;

*'...the mere fact that he might have found out fraud if he had been more vigilant and had made further inquiries which he omitted to make does not of itself prove fraud on his part. But if it be shown that his suspicions were aroused and that he abstained from making inquiries for fear of learning the truth, the case is very different and fraud may be properly ascribed to him.'*

32. It is apparent from the Judgment in the abovementioned case that fraud must be proven to ***invalidate the title of a registered purchaser.***

***The question at this stage which comes to mind is whether the Defendant has produced any evidence to this effect to prove fraud on the part of the Plaintiff?***

The answer to this as I find is that no evidence has been substantiated and the Defendant's Affidavit evidence filed before this court merely alleges fraud which are just allegations and without any basis of any foundation so to say.

33. Bearing in mind the above, I find that the Plaintiff is the registered owner of the property described as **Housing Authority Sub Lease No. 168211 being Lot 2 on DP 3720 containing an area of 4.3 perches and situate in the province of Rewa.** The Defendant therefore has the locus standi to bring this action against the Defendant seeking an order for vacant possession.


34. The **Defendant** was served with a **Notice to Quit** and subsequently served with an **Originating Summons** seeking an order for **Vacant Possession** as per the requirement of the law.
35. The **Defendant** has failed to show any cause including *a right to possession* or has *tangible evidence establishing a right or supporting an arguable case for such a right* that must be adduced in terms of *section 172 of the Land Transfer Act, Cap 131*.
36. There is accordingly nothing in *section 172* which requires an automatic order for possession unless "**cause**" is immediately shown.
37. Following are the final orders of this court.

**FINAL ORDERS**

- A. **The Defendant** to give **vacant possession** of the property described as **Housing Authority Sub Lease No. 168211 being Lot 2 on DP 3720** containing an area of 4.3 perches and situate in the province of **Rewa** to the **Plaintiff**.
- B. **The Defendant** to deliver vacant possession to the **Plaintiff** in one (1) months' time on or before the 26<sup>th</sup> May, 2016.
- C. **Execution** is hereby suspended till the 26<sup>th</sup> May, 2016.
- D. **Cost** is summarily assessed at \$500 against the **Defendant**.

Dated at **Suva** this 26<sup>th</sup> day of **MAY**, 2016.



  
.....  
**MR VISHWA DATT SHARMA**  
Master of High Court, Suva

cc. **Mr. Shazran Lateef** of **Lateef & Lateef Lawyers, Suva.**  
**Mr. Rayawa** of **Rayawa Law, Suva.**