IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 14 of 2016

BETWEEN : **WILLIAM MESAKE TAMATA** of Nadi,

PLAINTIFF

A N D : **PAUL and LESLIE** and other occupants of ATS Subdivision, Votualevu, Nadi.

DEFENDANTS

Mr. Dorsami Naidu for the Plaintiff
Mr. Saimoni Nacolawa for the Defendants

Date of Hearing : - 18th July 2016
Date of Ruling : - 07th October 2016

RULING

(A) INTRODUCTION

(1) The matter before me stems from the Plaintiff's Originating Summons made pursuant to **Order 113 of the High Court Rules, 1988 for an Order for Vacant Possession** against the Defendants.

(2) The Defendants are summoned to appear before the Court to show cause as to why they should not give up vacant possession of the Plaintiff's property comprised in **Native Lease No:- 19251** known as "Naqelebulu and Nacava", Lot 36 on ND 5913 having an area of 32 perches.

(3) The application for eviction is supported by an Affidavit sworn by the Plaintiff on 02nd February 2016.

(4) The application for eviction is strongly contested by the Defendants.

(5) The Second Defendant filed an Affidavit in Opposition on behalf of the Defendants opposing the application for eviction. The Plaintiff did not file an Affidavit in Reply.

(6) The Plaintiff and the Defendants were heard on the Originating Summons. They made oral submissions to Court. In addition to oral submissions, Counsel for the Plaintiff and the Defendants filed a careful and comprehensive written submissions 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) The Plaintiff in his Affidavit in support deposes *inter alia*;

Para *1.* *THAT I am the Plaintiff in the action herein.*

2. *THAT in so far as the content of this Affidavit is within my personal knowledge it is true in so far as it is not within my personal knowledge, it is true to the best of my knowledge and information and belief.*

3. *THAT I am the last registered proprietor of the property comprised in Native Lease No. 19251 known as Naqelebulu and Nacava Subdivision, Lot 36 on ND 5913 having an area of 32 perches. (Annexed herein and marked as "**WMT1**" is a certified true copy of the certificate of the Native Lease hereinafter referred to as the said property).*

4. *THAT I purchased the property under mortgagee sale through the Fiji Development Bank on the 27th March 2015.*

5. *THAT on the 29th of April 2015, a notice to vacate was served on the defendants which they acknowledged and by letter dated 2nd June 2015 they agreed to vacate on or before 9th June 2015 by 4pm and the same was witnessed by the bailiff, Mr Ramanjalu Naicker and the Manager, Mr Aisake Radu from FDB but despite this they have ignored the same and refuse to vacate the property. (Annexed herein and marked as "**WMT2**" is a copy of the same).*

6. *THAT the defendants have continued residing on the said property and have not made any attempt to move despite several reminders but has instead continued to occupy the property with her family and other occupants without my knowledge or consent.*

7. *THAT despite the numerous requests, the defendants have failed to give up vacant possession and continue to reside on the property as squatters without payment of any rental whatsoever.*

8. *THAT the defendants are in illegal occupation of the property and do not have the consent of i-taukei land trust board to occupy the same nor of any other person. I have never agreed to nor given my consent to the occupation of the property by the Respondents.*

9. *THAT I seek an order for vacant possession against the defendants and any other occupant.*

(4) The Defendants for their part in seeking to show cause against the Summons, filed an Affidavit in Opposition sworn by the Second Defendant, which is substantially as follows;

Para 1. *THAT I am the 2nd named Defendant in this action.*

2. *THAT I have been authorised by the first named Defendant to swear this Affidavit on our behalf.*

3. *THAT I depose to the facts herein as within my personal knowledge and as regards to other information not within my personal knowledge they are equally there to the best of my information and belief.*

HISTORY OF OCCUPATION

4. *THAT the Defendants are husband and wife and have been in occupation of Lot 36 ATS Quarters, Title No NL 19251 for over 25 years, commencing from 1999.*

5. *THAT through a Sales and Purchase Agreement the Defendants family in 1989 entered into agreement with the owner Viliame Niumataiwalu to purchase the above property for the total sum of $37,000.00 (Thirty Seven Thousand Dollars) (The said Agreement).*

6. *THAT the said Agreement, provided for immediate occupation by the Plaintiff subject to an annual payment of $2,400.00 (Two Thousand & Four Hundred Dollars) payable at the rate of $200.00 (Two Hundred Dollars) a month.*

7. *THAT the said purchase price was to be paid off in 20 years that is by 2009 by which time the owner Mr. Niumataiwalu was obliged to transfer the same to the Defendants.*

8. *THAT the Defendants honoured the agreement through their payment of $200.00 a month to the owner's agent, one Saula Tabalili, until 1997 at the death of the said agent Mr. Tabalili.*

9. *THAT at the death of the agent Saula Tabalili, the Defendant looked for the owner to continue the payment but the owner Mr. Niumataiwalu then had absconded to the US on declaration of his bankruptcy.*

10. *THAT the Plaintiff's continued to live on the property until in 2011 the Defendants were informed that the Development Bank held a mortgage on the property and that it had taken over the said property (FDB)*
*(Attached is a copy of the letter from FDB marked "**LHB 1**")*

11. *THAT the 2nd Defendant's late father attended to the FDB to arrange repayment but was advised to remain on the property.*
*(Attached is a copy of the letter dated 3/11/11 from Mrs Buadromo to FDB marked "**LHB 2**")*

12. *THAT the Defendants continued to insist on the FDB that they had made considerable payments over the said property and they need to complete their payment as per their agreement.*
*(Attached is a copy of the letter dated 3/6/14 from the Defendant addressed to FDB marked "**LHB 3**")*

13. *THAT through the involvement of one Bank official Suresh, the Defendants were informed to remain on the property and that financial arrangement would be made for the Defendant to make or continue the payment.*
*(Attached is a copy of the letter dated 15/5/15 from the Defendant to FDB marked "**LHB 4**")*

14. *THAT through one Mr. Rakai, the FDB's Officer a letter was given to the Defendants dated 14th October 2011, stating that ownership would be given to them once they agree to the new financial arrangements made with FDB and fully paid the balance.*

15. *THAT financial arrangement never eventuated until 2015 when the Defendant finally received the notice that the said property had been transferred to the Plaintiff William Mesake Tamata.*
*(Attached herein is a copy of the Notice from FDB marked "**LHB 5**")*

16. *THAT the direct result of the Notice was our visit to the PM's Office seeking his assistance to intervene on our behalf.*
*(Attached is a copy of the PM's letter dated 9/6/15 addressed to FDB marked "**LHB 6**")*

RESPONSE TO THE PLAINTIFF'S AFFIDAVIT

17. *THAT as to paragraphs 1 and 2 of the Plaintiff's Affidavit, the Defendant admits the contents therein- (the said Affidavit)*

18. *THAT as to paragraph 3 of the said Affidavit the Defendant rejects the contents therein and further says as follows:*

    (a) *That the Plaintiff is holding the said land as Trustee for himself and the Defendants herein*
    (See LBH 7 annexure)

    (b) *Alternatively the Defendants say that they have been living on the said land since 1989 and accordingly the Plaintiff is*

not entitled take any eviction order to evict them under the Limitation Act particularly Section 4.

(c) *The Defendants say that the Plaintiff is estopped from denying the rights and/or claims of the Plaintiff as referred to in paragraph 5 to 15 above.*

19. *THAT as to paragraph 4 of the said Affidavit the Defendant rejects the contents therein and further says:*

(i) *That paragraph 18 above is repeated herein.*

20. *THAT as to paragraph 5 of the said Affidavit the Defendants repeats paragraph 18 above.*
*(See **LHB 7** generally)*

21. *THAT as to paragraph 6 of the said Affidavit the Defendants are exercising their rights of occupation based on their financial and equitable interests on the said land.*

22. *THAT as to paragraph 7 of the said Affidavit the Defendant rejects the contents therein and repeat paragraph 18 above.*

23. *THAT as to paragraph 8 of the said Affidavit the Defendant reject the contents therein and further say that the transfer of the said property to the Plaintiff is holding it on trust for himself and the Defendant's herein*
*(Attached is a copy of the Statement of Claim of the Defendant's against the FDB and the Plaintiff's marked as "**LHB 7**")*

24. *THAT by reason of the above the Plaintiff's application be dismissed with costs to the Defendant.*

(C) THE LAW

(1) Against this factual background, it is necessary to turn to the applicable law and the judicial thinking in relation to the principles governing summary application for eviction under **Order 113 of the High Court Rules, 1988.**

(2) Rather than refer in detail to various authorities, I propose to set out hereunder important citations, which I take to be the principles in play.

(3) **Order 113 of the High Court Rules, 1988** provides a summary procedure for possession of Land.

Order 113 provides;

"Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who

entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this Order."

(4) Justice Pathik in "**Baiju v Kumar (1999) FJHC 20; HBC 298 J.98**, succinctly stated the scope of the order as follows;

> *"The question for (the) Courts determination is whether the plaintiff is entitled to possession under this Order. To decide this Court has to consider the scope of the Order. This aspect is covered in detail in the Supreme Court Practice, 1993 Vol 1, O.113/1-8/1 at page 1602 and I state hereunder the relevant portions in this regard:*
>
> *"This Order does not provide a new remedy, but rather a new procedure for the recovery of possession of land which is in wrongful occupation by trespassers.*

As to the application of this Order it is further stated thus:

> *The application of this order is narrowly confined to the particular circumstances described in r.1 i.e. to the claim for possession of land which is occupied solely by a person or persons who entered into or remain in occupation without the licence or consent of the person in possession or of any predecessor of his. The exceptional machinery of this Order is plainly intended to remedy an exceptional mischief of a totally different dimension from that which can be remedied by a claim for the recovery of land by the ordinary procedure by writ followed by judgment in default or under O.14. The Order applies where the occupier has entered into occupation without licence or consent; and this Order also applies to a person who has entered into possession of land with a licence but has remained in occupation without a licence, except perhaps where there has been the grant of a licence for a substantial period and the licensee hold over after the determination of the licence (**Bristol Corp. v. Persons Unknown**) [1974] 1 W.L.R. 365; [1974] 1 All E.R. 593.*

(5) This Order is narrowly confined to the particular remedy stated in r.1. It is also to be noted, as the White Book says at p.1603:

> *this Order would normally apply only in virtually uncontested cases or in clear cases where there is no issue or question to try i.e. where there is no reasonable doubt as to the claim of the plaintiff to recover possession of the land or as to wrongful occupation on the land without licence or consent and without any right, title or interest thereto.*

I have carefully considered all the affidavits evidence adduced in this case and the written and oral legal submissions from both counsel.

...

The facts do not reveal that the defendant is a trespasser on the land. He continued living there as a licensee ...

On the facts of this case, the cases to which I refer to hereafter do not make the defendant a trespasser or a squatter.
Order 113 is effectively applied with regard to eviction of squatters or trespassers. In ***Department of Environment v James and others*** *[1972] 3 All E.R. 629 squatters and trespassers are defined as:*

He is one who, without any colour of right, enters on an unoccupied house or land, intending to stay there as long as he can .....

Goulding J. said that:

.....where the plaintiff has proved his right to possession, and that the defendant is the trespasser, the Court is bound to grant an immediate order for possession .....

Another definition of "trespasser" is as set out in Clerk & Lindsell on Torts (15th Ed. 1982) page 631:

A trespasser is a person who has neither right nor permission to enter on premises.

Also as was said by Lord Morris of-Both-Y-Gest in ***British Railways Board v. Herrington*** *[1972] A.C. 877 at 904:*

The term 'trespasser' is a comprehensive word; it covers the wicked and the innocent; the burglar, the arrogant invader of another's land, the walker blindly unaware that he is stepping where he has no right to walk, or the wandering child – all may be dubbed as trespassers."

(6) I refer to Sir Frederick Pollock's statement in the case of **Browne v. Dawson (1840) 12 Ad. & El 624** where his Lordship said;

"..... A trespasser may in any case be turned off land before he has gained possession, and he does not gain possession until there has been something like acquiescence in the physical fact of his occupation on the part of the rightful owner....."

(D) ANALYSIS

(1) Before passing to the substance of the Plaintiff's Originating Summons for vacant possession, let me record that Counsel for the Plaintiff and the Defendants in their written submissions have done a fairly exhaustive study of the judicial decisions and other authorities which they considered to be applicable.

I interpose to mention that I have given my mind to the oral submissions made by Counsel for both parties as well as to the written submissions and the judicial authorities referred to therein.

(2) Now let me proceed to examine the substance of the Plaintiff's application bearing the aforementioned factual background and the legal principles uppermost in my mind.

(3) After an in-depth analysis of the totality of the affidavit evidence in this case, I now summaries my understanding of the salient facts as follows;

- The land in dispute is "Native Land" within the meaning of "Native Land Trust Act" and any dealing with it requires the prior consent of the Native Land Trust Board. (Annexure WMT-1)
- The Defendants are husband and wife.
- In 1989, the second Defendant's family entered into an **agreement** with one "**Viliame Niumataiwalu**" to purchase the property for a sum of FJ$37,000.00. The Purchase price is to be paid off in 20 years by an annual payment of FJ$2,400.00.
- As evidenced by a certified true copy of Native Lease No:- 19251 (Annexure WMT-1), the said "**Viliame Niumataiwalu**" has no legal interest in the land.
- The said **agreement** bestowed right to possession upon an annual payment of $2400.00 payable at the rate of $ 200.00 per month. This does not provide any time to apply for written consent of the Native Land Trust Board.
- The second Defendant's family entered into possession of the property in 1989 by virtue of the said agreement
- The Defendants have been in possession and occupation of the land since 1989 and still enjoying the same right.
- The prior consent of the Native Land Trust Board has not been obtained to the said agreement.
- The property was mortgaged to **Fiji Development Bank** by the said Viliame Niumataiwalu.
- On 14th October 2011, the Defendants were informed by the Fiji Development Bank regarding the mortgage over the land. Moreover, the Defendants were

informed that the bank as mortgagee will soon be advertising the land for sale on Tender as part of its recovery process. The first chance to retain ownership of the same was offered to the Defendants. (Annexure LHB-1).

- The Plaintiff purchased the property on 27th March 2015 through a mortgagee sale.
- The Plaintiff is the last registered proprietor of the property as evidenced by a Certified true copy of Native Lease No:- 19251.
- A Notice was served on the Defendants on 29th April 2015 to provide vacant possession and they agreed to vacate on or before 09th June 2015.
- However, the Defendants have refused to provide vacant possession.

(4) **What is the scope of Order 113 of the High Court Rules, 1988 ?**

Scope of **Order 113** of the High Court Rules is discussed in **The Supreme Court Practice, 1993 Volume 1, 0,113/1 – 8/1 at page 1602.** The relevant paragraph is as follows:

> *"The application of this Order is narrowly confined to the particular circumstances described in r.1. i.e. to the claim for possession of land which is occupied solely by a person or persons who entered into or remain in occupation without the licence or consent of the person in possession or of any predecessor of his. The exceptional machinery of this Order is plainly intended to remedy an exceptional mischief of a totally different dimension from that which can be remedied by a claim for the recovery of land by the ordinary procedure by writ followed by judgment in default or under O.14. The Order applies where the occupier has entered into occupation without licence or consent; and* ***this Order also applies to a person who has entered into possession of land with a licence but has remained in occupation without a licence,*** *except perhaps where there has been the grant of a licence, except perhaps where there has been the grant of a licence for a substantial period and the licence holds over after the determination of the licence (Bristol Corp. v. Persons Unknown) [1974] 1 W.L.R. 365; [1974] 1 All E.R. 593."*
>
> (Emphasis added)

The Court in "**Ralinalala v Kaicola**" **(2015) FJHC 66** said;

> *"Order 113 of the High Court Rules provides a summary procedure for possession of land, where it states that:*
>
> *"Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any*

predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this Order".

In view of Order 113, a person who has a legal right to claim the possession of a land could institute an action, claiming the possession of said land against a person who has entered into or remains in occupation without his licence or consent or that of any predecessor in title.

The main purpose of Order 113 is to provide a speedy and effective procedure ***for the owners of the lands*** *to evict persons who have entered into and taken the occupation of the land without the owner's licence or consent. They can be defined as trespassers or illegal occupants. These trespassers or illegal occupants have sometimes been referred to as squatters. In* ***Mcphail v Persons unknown, (1973) 3 All E.R. 394)*** *Lord Denning has observed "the squatter" as a person who without any colour of right, enters into an unoccupied house or land and occupies it. His Lordship found that in such instances, the owner is not obliged to go to Court to regain his possession and could take the remedy into his own hands, which indeed, recommended as an unsubstantial option. Therefore, Order 113 has* ***provided the owners*** *a speedy and effective procedure to recover the possession instead of encouraging them to take a remedy of self-help.*

The proceedings under ***Order 113 encompass*** *two main limbs.* ***The first is the onus of the Plaintiff. The Plaintiff is first required to satisfy that he has a legal right to claim the possession of the land. Once the Plaintiff satisfies the first limb, the onus will shift towards the defendant, where the Defendant has burdened with to satisfy the Court that he has a licence or consent of the owner to occupy the land."***

(Emphasis added)

When reduced to its essentials, the law in relation to Order 113 as I understand from the aforesaid is this;

- A person who has a legal right to claim the possession of a land could institute an action under Order 113 against a person who has entered into or remains in occupation without his licence or consent or that of any predecessor in title.

AND

- This Order also applies to a person who has entered into possession of land with a licence but has remained in occupation without a licence.

- To evict an occupant, the applicant must show better title than the respondent.

Applying these principles to the case before me, what do we find?

The Plaintiff purchased the land in question on 27th March 2015 through a mortgagee sale. The transfer was registered in his favor. The Plaintiff is the registered proprietor of the whole of the lease as evidenced from the Native Lease No:- 19251. (Annexure WMT-1)

Therefore, I am satisfied that the Plaintiff has a legal right to claim the possession of the land, pursuant to Order 113 of the High Court Rules, 1988.

Now the onus will shift towards the Defendants, where the Defendants are burdened with to satisfy the Court that they have a licence or consent of the owner or of any predecessor of the title of the owner to occupy the land.

(5) What is the Defendants reason refusing to deliver vacant possession? The application for vacant possession is opposed by the Defendants on various reasons expressly set out in the Affidavit in Opposition. There is a considerable amount of overlap between one reason and another and that it is more likely to be helpful for them to be looked at cumulatively rather than separately. The reasons fall within a very small compass. I confess that the Defendants reasons raise the questions of "indefeasibility of title", "equitable interest" and "constructive Trust". Thus, I approach the matter as follows;

Ground (01) ⟶ Reference is made to paragraph 5, 6, 7 and 8 of the Defendants Affidavit in Opposition.

Para 5. *THAT through a Sales and Purchase Agreement the Defendant's family in 1989 entered into agreement with the owner Viliame Niumataiwalu to purchase the above property for the total sum of $37,000.00 (Thirty Seven Thousand Dollars) (The said Agreement).*

6. *THAT the said Agreement, provided for immediate occupation by the Plaintiff subject to an annual payment of $2,400.00 (Two Thousand & Four Hundred Dollars) payable at the rate of $200.00 (Two Hundred Dollars) a month.*

7. *THAT the said purchase price was to be paid off in 20 years that is by 2009 by which time the owner Mr. Niumataiwalu was obliged to transfer the same to the Defendants.*

8. *THAT the Defendants honoured the agreement through their payment of $200.00 a month to the owner's agent, one Saula Tabalili, until 1997 at the death of the said agent Mr. Tabalili.*

Ground (02) ⟶ Reference is made to paragraph (12) and (21) of the Defendants Affidavit in Opposition.

Para 12. *THAT the Defendants continued to insist on the FDB that they had made considerable payments over the said property and they need to complete their payment as per their agreement.*
*(Attached is a copy of the letter dated 3/6/14 from the Defendant addressed to FDB marked "**LHB** 3")*

21. *THAT as to paragraph 6 of the said Affidavit the Defendants are exercising their rights of occupation based on their financial and equitable interests on the said land.*

Ground (03) ⟶ Reference is made to paragraph (18) and (23) of the Defendants Affidavit in Opposition

Para 18. *THAT as to paragraph 3 of the said Affidavit the Defendant rejects the contents therein and further says as follows:*

(a) *That the Plaintiff is holding the said land as Trust for himself and the Defendants herein (See LBH 7 annexure)*

(b) *Alternatively the Defendants say that they have been living on the said land since 1989 and accordingly the Plaintiff is not entitled take any eviction order to evict them under the Limitation Act particularly Section 4.*

(c) *The Defendants say that the Plaintiff is estopped from denying the rights and/or claims of the Plaintiff as referred to in paragraph 5 to 15 above.*

23. *THAT as to paragraph 8 of the said Affidavit the Defendant reject the contents therein and further say that the transfer of the said property to the Plaintiff is holding it on trust for himself and the Defendant's herein*
*(Attached is a copy of the Statement of Claim of the Defendant's against the FDB and the Plaintiff's marked as "**LHB** 7")*

Ground (04) ⟶ Reference is made to paragraph 18 (b) of the Defendants Affidavit in Opposition

Para 18 (b) Alternatively the Defendants say that they have been living on the said land since 1989 and accordingly the Plaintiff is not entitled take any eviction order to evict them under the Limitation Act particularly Section 4.

(6) Based on above grounds in opposition, there are seven (07) problems that concern me. As I see it, seven (07) questions lie for determination by the Court. They are;

(1) Is the Defendants entry and occupation of the land by virtue of an Agreement entered in 1989 with "Viliame Niumataiwalu", 'dealing in land' within the meaning of Section 12 of the Native Land Trust Act?

(This relates to the **first ground** adduced by the Defendants)

(2) Whether the said Agreement is in breach of Section 12 of the Native Land Trust Act?

(This also relates to the **first ground** adduced by the Defendants)

(3) Is there any equitable estoppel or lien arising in the Defendants favour on the land for the money expended on the land by the Defendants i.e. annual payment of $2,400.00 from 1989 to 1997?

To be more precise, whether the said Agreement is enforceable either at law or in equity to grant a legal right or interest?

(This relates to the **second ground** adduced by the Defendants)

(4) Is the occupation of the property by the Defendants for whatever length of time, a circumstance giving rises to any form of proprietary estoppel or equity?

(This relates to the **fourth ground** adduced by the Defendants)

(5) Whether a Court of equity will impose a "**constructive trust**" on the Plaintiff for the benefit of the Defendants?

To be more precise, whether the Plaintiff would, on ordinary principles, be guilty of the act of interference with existing Contractual rights if he is to evict the Defendants? (**This**

relates to the third ground adduced by the Defendants). This relates to an argument concerning equitable interests and rights in *personam* notwithstanding the indefeasibility provisions of Land Transfer Act.

(6) Whether the Plaintiff holds an **indefeasible title?**

(7) Whether the pendency of the Civil Action, (viz, HBC 33 of 2016,) is enough to sustain a right to possession for the time being, in the Defendants?

(7) I propose to examine the **first and the second question** posed at paragraph six (06) jointly.

The Land in question in this case is Native Land within the meaning of Native Land Trust Act. Therefore it is necessary to examine Section 12 of the Native Land Trust Act.

I should quote Section 12 of the Native Land Trust Act which provides;

> *"12.-(1)Except as may be otherwise provided by regulations made hereunder, it shall not be lawful for any lessee under this Act to alienate or deal with the land comprised in his lease or any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever without the consent of the Board as lessor or head lessor first had and obtained. The granting or withholding of consent shall be in the absolute discretion of the Board, and any sale, transfer, sublease or other unlawful alienation or dealing affected without such consent shall be null and void:*
>
> *Provided that nothing in this section shall make it unlawful for the lessee of a residential or commercial lease granted before 29 September 1948 to mortgage such lease."*

Reading as best, as I can, between the Sections of Native Land Trust Act, it seems to me that Section 12 prohibits any 'dealing with the land' which is comprised in Native Lease without the consent of the Board as lessor.

Moreover, unlawful occupation of Native Land is an offence under Section 27 of the Native Land Trust Act.

On a strict reading of Section 12 and 27, it is perfectly clear that the two Sections are clearly designed for the control and protection of the Native Land. The language of Section 12 and 27 are precise and clear.

In **Reddy v Kumar [2012] FJCA 38, ABU 0011.11 (8 June 2012)** Fiji Court of Appeal held that any dealing in respect of a **Government land** effected without the consent of the Director of Lands shall be considered *ab-intio* void and has no effect or force in the eyes of the law. **It is further stated in the said Judgment that the consent of the Director under the Crown Lands stands as a mandatory requirement before any transaction or similar dealing is affected in respect of a leasehold Government land.**

In paragraph (9) and (10) of the Judgment, his Lordship Chirasiri J. Stated as follows:

> *"9. The above section of the Crown Lands Act clearly stipulates that it is unlawful to alienate or deal with a land comprising a lease unless the written consent of the Director of Lands first had obtained. It is further stated that any sale or transfer or other alienation or any dealing affected in respect of such land without the consent of the Director of Lands shall be null and void. Accordingly, a statutory bar is being imposed for the transactions or dealings affecting Government land or part thereof which is subjected to a protected lease unless and until the consent for such a transaction is obtained from the Director of Lands beforehand. **Therefore, if any dealing in respect of a Government land is affected without the consent referred to above, such a transaction shall be considered ab-intio void and has no effect or force in the eyes of the law."***
>
> *"10. When looking at the said Section 13, it seems that the consent of the Director referred to therein should be given by him only upon considering the totality of the provisions contained in the Crown Lands Act. That power of the Director cannot be exercised by a person functioning in another capacity than of the Director of Lands. [Section 13 (4) of the Act]. However, it must be noted that it does not mean that the right to review decisions of the Director or the Minister, if there had been an appeal under **Section 13 (3)**to the Minister, is taken away from the jurisdiction of Courts but of course subject to the provisions of the law prevailing in Fiji. **Hence, the requirement to have the consent of the Director under the Crown Lands Act stands as a mandatory requirement before any transaction or similar dealing is affected in respect of a leasehold Government land."***
>
> (Emphasis added)

In **Raliwalala v Kaicola (2015) FJHC 66,** a similar situation arose involving **Native Land** whereby the Defendants were trying to justify its position of occupation by virtue of an agreement with the previous owner. The court in that instance stated:

> *"The main issue to be determined in this application is that whether such an arrangement entered between the previous tenant and the Defendant constitutes a consent or licence to occupy the land. Indeed it is an arrangement entered between the tenant and a third party to settle loan arrears with the bank. In order to legitimize such a transfer of property by the tenant, he is required to obtain the*

consent of the Native Land Trust Board which has not been obtained. In the meantime, the previous tenant deposed in his annexed affidavit that he was forcefully evicted from the land and the Defendant was demanding the money back, which he paid to the bank. Under such circumstances, it appears that the dispute between the previous tenant and the Defendant does not relate to the occupation of the land. The Defendant may have a claim "in personam", but not for the possession of the land. Accordingly, it is my opinion that the Defendants have not obtained consent or a licence to occupy or remain in occupation of this land.

Returning to the present case, on the question as to whether the Defendants entry and occupation of the land by virtue of an Agreement, can be "dealing in land" within the meaning of Section 12 of the Native Land Trust Act, if any authority is required, I need only refer to the rule of law enunciated by the Privy Council in **Chalmers v Pardoe (1963) 3 A.E.R. 552,** where a somewhat relevant situation was considered.

In that case, Mr. Pardoe was the holder of a lease of Native Land. **The Native land is subject to Section 12 (1) of the Native Land Trust Act which is in the exact same terms as Section 13 of the Crown Lands Act.** Section 12 (1) provides;

"Except as may be otherwise provided by regulations made hereunder, it shall not be lawful for any lessee under this Act to alienate or deal with the land comprised in his lease or any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever without the consent of the Board as lessor or head lessor first had and obtained. The granting or withholding of consent shall be in the absolute discretion of the Board, and any sale, transfer, sublease or other unlawful alienation or dealing affected without such consent shall be null and void ...."

The leading case upon the interpretation of Section 12 of the Native Land Trust Act is **Chalmers v Pardoe** *(supra).* Mr. Pardoe was the holder of a lease of Native Land. By a "friendly arrangement" with Mr Pardoe, Mr Chalmers built a house on a part of the land and entered into possession. The consent of the Native Land Trust Board was never obtained. **The rule of law enunciated by the Privy Council was that the transaction amounted to an agreement for a lease or sublease but even regarding it as a licence to occupy coupled with possession and that "dealing" with the land took place.**

As to whether the "friendly arrangement" amounted to "dealing" with native land within the meaning of s.12 of the Ordinance, Sir Terence Donovan, in delivering the speech of the Privy Council in **Chalmers v Pardoe** *(supra),* explained it as follows:

"Repeating this term, but without necessarily adopting it, the Court of Appeal held, as their lordships have already indicated, that the least effect which could be given to the "friendly arrangement" was that of a licence to occupy coupled with possession. Their lordships think the matter might have been put higher. "I gave him

the land for nothing" said Mr Pardoe. Again, "He could get anything – a sublease or a surrender, which was perfectly correct..." And so on. In their lordships view an agreement for a lease or sublease in Mr Chalmers' favour could reasonably be inferred from Pardoe's evidence.

Even treating the matter simply as one where a licence to occupy coupled with possession was given, all for the purpose, as Mr Chalmers and Mr Pardoe well knew, of erecting a dwelling-house and necessary buildings, it seems to their lordships that, when this purpose was carried into effect, a "dealing" with the land took place. On this point their lordships are in accord with the Court of Appeal: and since the prior consent of the Board was not obtained, it follows that under the terms of s.12 of the ordinance, cap 104, this dealing with the land was unlawful. It is true that in Harman Singh and Backshish Singh v Bawa Singh [1958-59] FLR 31, the Court of Appeal said that it would be an absurdity to say that a mere agreement to deal with land would contravene s.12, for there must necessarily be some prior arrangement in all such cases. Otherwise there would be nothing for which to seek the Board's consent. In the present case, however, there was not merely agreement, but, on one side, full performance: and the Board found itself with six more buildings on the land without having the opportunity of considering beforehand whether this was desirable. It would seem to their lordships that this is one of the things that s.12 was designed to prevent. True it is that, confronted with the new buildings, the Board as lessor extracted additional rent from Mr Pardoe: but whatever effect this might have on the remedies the Board would otherwise have against Mr Pardoe under the lease, it cannot make lawful that which the ordinance declares to be unlawful."

In the context of the present case, I am mindful of the rule of law enunciated in the following decisions;

Henry J.P. in **Phalad v Sukh Raj** (1978) 24 FLR 170 said;

> *"The cases already cited show that the Courts have held that the mere making of a contract is not necessarily prohibited by section 12. It is the effect of the contract which must be examined to see whether there has been a breach of section 12. The question then is whether, upon the true construction of the said agreement the subsequent acts of appellant, done in pursuance of the agreement, "alienate or deal with the land, whether by sale transfer or sublease or in any other manner whatsoever" without the prior consent of the Board had or obtained. The use of the term "in any other manner whatsoever" gives a wide meaning to the prohibited acts. For myself I have no doubt but that the true construction of the said agreement and the said agreement and the substantial implementation of such an agreement for sale and purchase, under which possession is completely parted with to the purchaser and immediate mutual rights*

and liabilities are created in respect of such exclusive possession, is a breach of section 12 if done before the consent is obtained."

The words "alienate" and "deal with" as elaborated in section 12, are absolute and do not permit conditional acts in contravention. If before consent, acts are done pending the granting of consent, which come within the prohibited transactions, then the section has been breached and later consent cannot make lawful that which was earlier unlawful and null and void. This does not cut across the cases already cited which deal with the formation of the contract as contrasted with an immediately operative agreement and substantive acts in performance thereof."

Gould V.P in **Jai Kissun Singh v Sumintra**, 16 FLR p 165 said;

". . . .it is not necessary that the agreement between the parties ***should have progressed to a stage at which formal documents of lease or assignment has been executed before the transaction became a dealing requiring prior consent.*** *That, having regard to the objects of the section, is only common sense. Otherwise, a purchaser under agreement could remain indefinitely in possession and control, exercising the rights of full ownership and even protecting himself by caveat. If an agreement is signed and held inoperative and inchoate while the consent is being applied for I fully agree that it is not rendered illegal and void by section 12. Where then, is the line to be drawn? I think on a strict reading of section 12 in the light of its object, an agreement for sale of native land would become void under the section as soon as it was implemented in any way touching the land, without the consent having been at least applied for ... ..."*

(Emphasis Added)

In **Chalmers v Pardoe** (*supra*) said moreover,

"But even treating the matter simply as one where a licence to occupy, coupled with possession was given, all for the purpose, as Chalmers and Pardoe well knew, of erecting a dwelling house and accessory buildings it seems to their Lordships that when this purpose was carried into effect a "dealing" with the land took place."

Returning to the present case, acting on the strength of the authority in the aforementioned cases, I hold that the Defendants entry and occupation of the land by virtue of an Agreement is "dealing in land" within the meaning of Section 12 of the Native Land Trust Act and the said Agreement is in breach of Section 12 of the Native Land Trust Act, due to the following reasons;

- The Agreement bestowed a right to possession upon an annual payment of $2400.00 payable at the rate of $200.00 per month.

- This does not provide any time to apply for written consent of the Native Land Trust Board.

- The second Defendant's family entered into possession of the property by virtue of an agreement entered between the second Defendant's family and one Viliame Niumataiwalu

- The said Agreement was implemented to the fullest by touching the land i.e. by letting the second Defendant's family into possession of the land.

Therefore, dealing with the Native Land had taken place without the written consent of the Native Land Trust Board and the dealing is illegal and void by Section 12 of the Native Land Trust Act. Thus, the said agreement is null and void *ab initio* and has no effect or force in the eyes of the law.

The consent of the Native Land Trust Board under the Native Land Trust Act stands as a mandatory requirement before any transaction or similar dealing is affected in respect of a Native Land.

Given the above, I am constrained to answer the first and second question posed at paragraph six (06) in the affirmative. Therefore, the first ground fails.

Suffice it to say that the Defendants stance will not stand as, Section 59 (d) of the 'Indemnity, Guarantee and bailment Act' (Cap 232) states that no action shall be brought upon **any contract or sale of lands or any interest** in them unless the agreement upon which such action is brought or a memorandum thereof is in writing. Quite plainly this provision is designed to prevent fraud.

No such writing is in evidence in the present case. There is no shred of evidence tending to establish such writing.

For the sake of completeness, Section 59 (d) of the act is reproduced below.

59. *No action shall be brought-*

(a) .....

(b) .....

(c) .....

(d) *upon any contract or sale of lands, tenements or hereditaments or any interest in or concerning them; or*

(e) .....

Unless the agreement upon which such action is to be brought or some memorandum or note thereof is in writing and signed by the party to be charged there or some other person thereunto by him lawfully authorised.

(Emphasis added)

(8) Let me now move to examine the **third question** posed at paragraph six (06);

The Defendants contend that there is an equity arising out of the expenditure of money on land. The Defendants say that they honoured the agreement by payment of $2,400.00 annually for the period of 1989 to 2011. The Defendants simplistically submit that they paid the purchase price by an annual payment of $2400.00 in the expectation and belief that the said "Viliame Niumataiqalu" will transfer the property to them.

The submission requires some examination of the law regarding **"Promissory or equitable estoppel."**

Spry in his "Principles of Equitable Remedies" 4th Edition 1990 page 179 sets out the basic principles of equitable proprietary estoppel as follows:

- *The Plaintiff assumed that a particular legal relationship then existed between the plaintiff and the defendants or expected that a particular legal relationship would exist between them and, in the latter case that the defendant would not be free to withdraw from the expected legal relationship.*
- *The Plaintiff has induced the defendant to adopt that assumption or expectation.*
- *The Plaintiff acts or abstains from acting in reliance on the assumption or expectation.*
- *The defendant knew or intended him to do so.*
- *The Plaintiff's action or inaction will occasion detriment if the assumption or expectation is not fulfilled.*
- *The defendant has failed to act to avoid that detriment whether by fulfilling the assumption or expectation or otherwise.*

Lord Kingsdown in the case of **Ramsden v Dyson** (1865) L.R. 1 H.L. 129 said at p. 140;

> *"If a man under a verbal agreement with a landlord for a certain interest in land or what amounts to the same thing under the*

expectation created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land with the consent of the landlord, and upon the faith of such promise or expectation with the knowledge of the landlord and without any objections by him, lays out money upon the land, a Court of Equity will compel the landlord to give effect to such promise or expectation."

Also at p. 140 Lord Cransworth L.C. said:

"If a stranger begins to build on any land supposing it to be his own and I perceiving his mistake, abstain setting him right, and leave him to persevere in his error, a court of equity will not allow me afterwards to assert my title to the land in which he had expended money on the supposition that the land was his own."

Promissory or equitable estoppel is described in Halsburys Laws of England, Fourth Edition, Volume 16, at paragraph 1514:

"When one party has, by his words or conduct, made to the other a clear and unequivocal promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced."

Snell's Equity (13th Ed), at para 39 – 12 states that:

"Proprietary estoppel is one of the qualifications to the general rule that a person who spends money or improving the property of another has no claim to reimbursement or to any proprietary interest in the property".

Proprietary estoppel, unlike promissory estoppel, is permanent in its effect. It is capable even of conferring a right of action. For it to apply there must exist essential elements or conditions. The Court, in Denny v. Jensen [1977] NZLR 635 identified four conditions namely, as p.638.

"There must be expenditure, a mistaken belief, conscious silence on the part of the owner of the land and no bar to the equity".

Megarry J in In re Vendervell's Trust (No. 2) [1974] CH 269 describes the essential elements this way, at p. 301,

> *"... the person to be estopped (I shall call him O, to represent the owner of the property in question), must know not merely that the person doing the acts (which I shall call) was incurring the expenditure in the mistaken belief that A already owned or would obtain a sufficient interest in the property to justify the expenditure, but also that he, O, was entitled to object to the expenditure. Knowing this, O nevertheless stood by without enlightening A. The equity is based on unconscionable behaviour by O; it must be shown by strong and cogent evidence that he knew of A's mistake, and nevertheless dishonestly remained wilfully passive in order to profit by the mistake".*

In **Denny v. Jensen [1977]** 1 NZLR 635 at 639, Justice White very aptly summarised the doctrine as follows:-

> *"In Snell's Principles of Equity (27 Ed) 565 it is stated that proprietary estoppel is" ... capable of operating positively so far as to confer a right of action". It is "one of the qualifications" to the general rule that a person who spends money on improving the property of another has no claim to reimbursement or to any proprietary interest in that property. In **Plimmer v Willington City Corporation** (1884) 9 App Cas 699; NZPCC 250 it was stated by the Privy Council that"... the equity arising from expenditure on land need not fail merely on the ground that the interest to be secured has not been expressly indicated" (ibid, 713, 29). After referring to the cases, including Ramsden v Dyson (1866) LR 1 HL 129, the opinion of the Privy Council continued, " In fact, the court must look at the circumstances in each case to decide in what way the equity can be satisfied" (9 App Cas 699), 714; NZPCC 250, 260). In **Chalmers v Pardoe** [1963] 1 WLR 677; [1963] 3 All ER 552 (PC) a person expending money was held entitled to a charge on the same principle. The principle was again applied by the Court of Appeal in **Inwards v Baker** [1965]2 QB 29; [1965] 1 All ER 446. There a son had built on land owned by his father who died leaving his estate to others. Lord Denning MR, with whom Danckwerts and Salon LJJ agreed, said that all that was necessary:*
>
> *"... is that the licencee should, at the request or with the encouragement of the landlord, have spent the money in expectation of being allowed to stay there. If so, the court will not allow that expectation to be defeated where it would be inequitable so to do". (ibid, 37, 449).*
>
> (Emphasis Added)

Hon. Mr Justice Deepthi Amaratunga observed in **Vishwa Nand v Rajendra Kumar** (Civil Action HBC 271 of 2012) that;

> *"The general rule, however is that "liabilities are not to be forced upon people behind their backs" and four conditions must be satisfied before proprietary estoppel applies.* ***There must be an expenditure, a mistaken belief, conscious silence on the part of the owner of the land and no bar to the equity."***
>
> (Emphasis Added)

Hon. Madam Justice Anjala Wati in **Wilfred Thomas Peter v Hira Lal and Farasiko** (Labasa HBC 40 of 2009) held that;

> *"I must analyse whether the four conditions have been met for the defence of proprietary estoppel to apply. The conditions are:*
>
> *i. An expenditure*
> *ii. A mistaken belief*
> *iii. Conscious silence on the part of the owner of the land*
> *iv. No bar to the equity*

The entry of the Sale and Purchase Agreement over the native land and the subsequent occupation and possession of the land by the Defendants lacked the consent of the Native Land Trust Board. Therefore, the Agreement is implicitly prohibited by Section 12 (1) of the Native Land Trust Act. Thus, the provisions of Section 12 of the Native Land Trust Act have been breached. The Agreement is null and void *ab initio*.

The agreement is null and void *ab initio* and has no effect or force in the eyes of the law.

The doctrine of estoppel cannot be invoked to render valid, a transaction which the legislature has enacted to be invalid. [**Chand v Prakash**, 2011, FJHC 640, HB169. 2010]

Therefore, the agreement is not enforceable either at law or in equity to grant a legal right to the Defendants.

The Defendants get no equity by reason of their expenditure on the land due to the illegality in the agreement.

His Lordship Gates considered somewhat a similar situation in "**Indar Prasad and Bidya Wati v Pusup Chand**" (2001) 1 FLR 164 and said;

"Section 13 of the State Lands Act would appear to be a complete bar to any equitable estoppel arising in the Defendant's favour."

"**Estoppel against a statute**" is discussed as follows in Halsbury's, Laws of England, 4th Edition, Volume 16, at paragraph 1515,

> *"The doctrine of estoppel cannot be invoked to render valid a transaction which the legislature has, on grounds of general public policy, enacted is to be invalid, or to give the court a jurisdiction which is denied to it by statute, or to oust the court's statutory jurisdiction under an enactment which precludes the parties contracting out of its provisions. Where a statute, enacted for the benefit of a section of the public, imposes a duty of a positive kind, the person charged with the performance of the duty cannot be estopped be prevented from exercising his statutory powers. A petitioner in a divorce suit cannot obtain relief simply because the respondent is estopped from denying the charges, as the court has a statutory duty to inquire into the truth of a petition."*

In **Chalmers v Paradoe** *(supra)* the court held;

> *"The friendly arrangement entered into between the respondent and the appellant amounted to granting the appellant permission to treat a certain portion of the land comprised in the lease as if the appellant were in fact the lessee. Under this arrangement the respondent gave the appellant possession of part of the land. He granted to the appellant permission to enjoy exclusive occupation of that portion of the land, and to erect such buildings thereon as he wished. Such an arrangement could we think be considered an alienation, as was argued in* ***Kuppan v Unni****. Whether or not it was an alienation it can, we think, hardly be contended that it did not amount to a dealing in land with the meaning of section 12. It is true that the 'friendly arrangement' did not amount to a formal sublease of a portion of the land or to a formal transfer of the lessee's interest in part of the land comprised in the lease. The least possible legal effect which in our opinion could be given to this arrangement would be to describe it as a licence to occupy coupled with possession, granted by the lessee to the appellant. In our opinion, the granting of such a licence and possession constitutes dealing with the land so as to come within the provisions of section 12, Ca. 104. The consent of the Native Land Trust Board was admittedly not obtained prior to this dealing, which thus becomes unlawful and acquires all the attributes of illegality. An equitable charge cannot be brought into being by an unlawful transaction and the appellant's claim to such a charge must therefore fail."*

On the strength of the authority in the above cases, I think it is quite possible to say that the mandatory requirement of Section 12 of the Native Land Trust Act and the legal consequences that flow from non-compliance defeat the Defendants claim for an equitable charge or lien over the land for the sum expended on the property.

Therefore, I am constrained to answer the third question earlier posed at paragraph six (06) negatively. Therefore, the second ground fails.

In the context of the present case, I am mindful of the rule of law enunciated in the following decisions;

In **MISTRY AMAR SINGH v KULUBYA** 1963 3 AER p.499, a Privy Council case, it was held that a registered owner of the land was entitled to recover possession because his right to possession did not depend on the illegal agreements in that case but rested in his registered ownership and as the person in possession could not rely on the agreements because of their illegality he could not justify his remaining in possession. That case "concerned an illegal lease of 'Mailo' land by an African to a non-African which was prohibited by a Uganda Statute except with the written consent of the Governor. No consent was obtained to the lease. After the defendant had been in possession for several years the plaintiff gave notice to quit and ultimately sued him for recovery of the lands. He succeeded.

Also in **RAM KALI** f/n Sita Ram and SATEN f/n Maharaj (Action No. 93/77) **KERMODE J**. expressed a similar view:-

> *"It is not necessary to determine whether there was an alleged sale as the defendant contends or a tenancy as the plaintiff alleges. Either transaction was illegal without the consent of the Director of Lands. ... While the plaintiff did disclose the illegal tenancy her claim for possession is based on the independent and untainted grounds of her registered ownership and she does not have to have recourse to the illegal tenancy to establish her case."*

(9) Let me now move to examine the **fourth question** posed at paragraph six (06)

The point raised by the Defendants is that they have been living in the land since 1989 and they are not trespassers.

I ask myself, is this, a circumstance capable of giving rise to any form of "proprietary estoppel"?

The answer to this question is obviously "No"

I echo the words of Fatiaki J in **Wati v Raji** (1996) FJHC 105;

> *"Turning finally to the question of **'proprietary estoppel'**. **Suffice it 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', proprietary or otherwise, nor in my view is any 'equity' created hereby which the court would protect.***
>
> (Emphasis added)

On the strength of the authority in the above case, I am constrained to answer the fourth question earlier posed at paragraph six (06) negatively. Therefore, the fourth ground fails.

(10) Now let me move to examine the **fifth question** raised at paragraph six (06).

I do not forget what was said in argument by Mr Nacolawa, Counsel for the Defendants, in relation to **Constructive Trust**. Counsel asserted;

- *THAT the 2nd Defendants family together with their late father who died in 2010 moved into the subject property in 1989 under a sales and purchase agreement to purchase the property for the sum of thirty seven thousand dollars ($37,000.00) from one Mr. Viliame Niumataiwalu.*
- *THAT the said sale and purchase agreement provided for immediate occupation subject to an annual payment of $2,400.00 payable at the rate of $200.00 per month.*
- *THAT the purchase price was to be paid off in 20 years, that is by 2009, and Viliame Niumataiwalu was obliged to transfer the same to the 2nd Defendants family.*
- *THAT the 2nd Defendants family honoured the agreement by paying $200.00 a month to Viliame's clerk, one Saula Tabalili who arrived monthly to collect.*
- *THAT the said Saula Tabalili collected on a monthly basis until 1997 when he died.*
- *The 2nd Defendants family looked for Viliame Niumataiwalu to continue payment but he had then absconded to the US on declaration of his bankruptcy.*
- *In 2000 the 2nd Defendants family was informed by the Fiji Development Bank, by one of its officers named 'Suresh' that the*

Bank has a mortgage over the property and that it had taken over the property.

- *The 2nd Defendants late father attended the Fiji Development Bank in 2002 and he was advised that his family can remain on the property but no insistence was made by the Bank on the Payment of any sum by the Defendants*

- *The 2nd Defendants family returned to the Fiji Development Bank in 2003 on the need to secure their interest on the property and insisted to meet Mr. Suresh but were advised that Suresh was transferred.*

- *Nothing further happened until 2011 when the Fiji Development Bank, through its officer one Mr. Paula Rakai attended to the 2nd Defendants family to hand deliver a letter dated 14th October 2011.*

- *The said letter, dated 14th October 2011, offered the 2nd Defendants family to retain ownership of the property subject to informing the Fiji Development Bank within 21 days confirming intention or financial arrangement.*

- *That the Defendants all sat and discussed with Mr. Paula Rakai at their home and verbally agreed to the offer and further query what to do when Mr. Rakai verbally advised them an option that the property to be transferred to one of the children.*

- *The Defendants say that the mortgagee sale by the Fiji Development Bank to the Plaintiff was made in breach of the agreement to sell the property made by Viliame Niumataiwalu and Fiji Development Bank.*

- *Entering into such agreement created a trust which Viliame Niumataiwalu and Bank held on constructive trust for the Defendants.*

- *The Plaintiff was aware of this dealing after he enquired with Fiji Development Bank. Despite that the Plaintiff entered into new dealings with the Fiji Development Bank knowing about the existence of the trust and by accepting the transfer of the land defeats the unregistered interest of the Defendant.*

- *The Plaintiff is therefore not buyer without Notice and such dealings amounts to fraud and his title could be impeached*

At this stage I ask myself, "What is the nature of the Defendants interest in the land?"

Is it such as to avail them against the Plaintiff (Purchaser) who took with full notice of it?

Did the Plaintiff take the land on **"constructive trust"** to permit the Defendants to stay there for their life time or for long as they wished?

What is meant by the phrase "**Constructive Trust**"?

A "**Constructive Trust**" is a trust imposed by law. A Constructive Trust arises by operation of law. A Constructive Trust is an equitable remedy and they are discretionary in nature. (See; **Re Polly Peck International PLC (in administration) v MacIntosh (1998) 3 All E.R. 512 and 825.**

In a broad sense, the Constructive Trust is both an institution and a remedy of the law of equity. Please see; **Muschinski v Dadds (1985) 160 C.L.R. 583.**

Constructive Trusts are not always subject to the requirement of certainty of subject matter. In "**Giumelli v Giumelli (1999) 196 C.L.R. 101 at 112 Gleeson C.J., McHugh, Gummon and Callinan JJ,** found that some Constructive Trusts create or recognize no proprietary interest but rather impose a personal liability to account for losses sustained by constructive beneficiaries. In that situation there is no identifiable Trust property.

During the 1970's the United Kingdom's Court of Appeal, led by Lord Denning MR, adapted a free-ranging remedial basis for constructive trusts and came to the view that a constructive trust is "**imposed by law whenever justice and conscience require it**"; **Hussey v Palmer (1972) 3 All E.R. 744.**

Therefore, the law as I understand is this;

- As a species of Trust, Constructive Trusts inherently create equitable proprietary interests in favour of identifiable beneficiaries.
- Constructive Trust is a liberal process, founded upon large principles of equity.

Applying those principles to the case before me, what do we find?

The Agreement entered between the Defendants and Viliame Niumataiwalu in relation to the Native lease is illegal due to want of consent from the Native Land Trust Board. Therefore, the agreement is incapable of enforcement. The agreement is void for want of consent from the Native Land Trust Board.

The Defendants entry and occupation of the land by virtue of Agreement is illegal and is in breach of Section 12 of the Native Land Trust Act.

I hold that no Constructive Trust can be created in relation to a Native lease without the prior written consent of the Native Land Trust Board.

Breach of Section 12 of the Native Land Trust Act is a complete bar to any equitable estoppel arising in the Defendant's favour. (See; **Indra Prasad and Bidya Wati v Pushp Chand (2001) 1 F.L.R. 164**).

It is quite possible to say that the mandatory requirement of Section 12 of the Native Land Trust Act and the legal consequences that flow from non-compliance defeats the Defendants claim for an equitable charge or Constructive Trust over the land. The situation in the case before me does not give rise to a Constructive Trust since the Defendants do not have an equitable interest in the land due to breach of Section 12 of the Native Land Trust Act.

I am clearly of the opinion that a Court of equity will not impose on the Plaintiff (Purchaser) a Constructive Trust in favour of the Defendants, since the Defendants entry and occupation of the land is illegal and is in breach of Section 12 of the Native Land Trust Act. The Defendants have no equity against the Plaintiff. The Plaintiff is not bound by the Notice of any illegal Agreement affecting the Native Land or an agreement which is not enforceable either at law or in equity granting a legal right. There is no valid contract binding the Plaintiff. Therefore, no Constructive Trust could be imposed on the Plaintiff in favour of the Defendants.

In the circumstances, i have to say, with the greatest respect to Counsel for the Defendants and with no pleasure that I totally disagree with his argument in relation to Constructive Trust. I must confirm that I am not aware of any authority for such an argument, and I do not think that his argument can be supported on principle. Anything more shadowy, anything more unsatisfactory, anything more unlikely to produce persuasion or conviction on the mind of the Court, I can scarcely imagine.

The imposing of a constructive trust is entirely in accord with the precepts of equity. As Cardoz J. once put it:

> *"A constructive trust is the formula through which the conscience of equity finds expression." See **Beauty v Gugggenheim Exploration Co.** (1919) 225 N.Y. 380, 386; or, as Lord Diplock put it quite recently in **Gissing v Gissing** (1971) A.C. 886, 905, a constructive trust is created "whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the **cestui que** trust a beneficial interest in the land acquires."*

Therefore, I am constrained to answer the fifth question earlier posed at paragraph (06) negatively. (Therefore, the third ground fails)

(11) Let me now proceed to the issue of **fraud.**

The Defendants contend that;

1. *The Plaintiff was aware of the agreement after he enquired with*

the Fiji Development Bank. Despite that the Plaintiff entered into new dealings with the Fiji Development Bank knowing about the existence of the trust and by accepting the transfer of the land defeats the unregistered interest of the Defendants.

2. *The Plaintiff is therefore not buyer without Notice and such dealings amounts to fraud and his title could be impeached.*

Sections 38 and 39 (1) of the Land Transfer Act, can be regarded as the basis of the concept of "indefeasibility of title" of a registered proprietor. Under Torrens System of land law the registration is everything and only exception is **fraud.**

I should quote Section 38 and 39 (1) of the **Land Transfer Act**, which provides;

Section 38 provides;

Registered instrument to be conclusive evidence of title

"38. No instrument of title registered under the provisions of this Act shall be impeached or defeasible by reason or on account of any informality or in any application or document or in any proceedings previous to the registration of the instrument of title.

Section 39 (1) provides;

"39-(1) Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the registered proprietor of any land subject to the provisions of this Act, or of any estate or interest therein, shall except in case of fraud, hold the same subject to such encumbrances as may be notified on the folium if the register, constituted by the instrument of title thereto, but absolutely free from all other encumbrances whatsoever except...

I am conscious of the fact that section 40 of the Land Transfer Act seeks to dispel Notice of a Trust or unregistered interest in existence in the following manner;

> *40.Except in the case of fraud, no person contracting or dealing with or taking or proposing to take a transfer from the proprietor of any estate or interest in land subject to the provisions of this Act shall be required or in any manner concerned to inquire or ascertain the circumstances in or the consideration for which such proprietor or in any previous proprietor of such estate or interest is or was registered, or to see to the application of the purchase money or any thereof, or shall be affected by notice, direct or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding, and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud."* (Underlining is mine).

With regard to the concept of "**indefeasibility of title of a registered proprietor**", the following passage from the case of **"EngMee Young and Others (1980) Ac 331** is apt and I adapt it here;

> *"The Torrens system of land registration and conveyanncing as applied in Malaya by the National Land Code has as one of its principle objects to give certainty to land and registrable interests in land. Since the instant case is concerned with Title to the land itself their Lordships will confine their remarks to this, though similar principles apply to other registrable interests. By s.340 the title of any person to land of which he is registered as proprietor is indefeasible except in cases of fraud, forgery or illegality and even in such cases a bond fide purchase for value can safely deal with the registered proprietor and will acquire from him on indefensible registered title."*

In "**Prasad v Mohammed**" **(2005) FJHC 124; HBC 0272J.1999L (03.06.2005) His Lordship Gates,** succinctly stated the principles in relation to **fraud** and **indefeasibility of title** as follows;

> *[13] In Fiji under the Torrens system of land registration, the register is everything: Subramani & Ano v DharamSheela & 3 Others [1982] 28 Fiji LR 82. Except in the case of fraud the title to land is that as registered with the Register of Titles under the Land Transfer Act [see sections 39, 40, 41, and 42]: Fels v Knowles [1906] 26 NZLR 604; Assets Co Ltd v Mere Roihi [1905] AC 176, PC. In Frazer v Walker [1967] AC 569 at p.580 Lord Wilberforce delivering the judgment of the Board said:*

> *"It is to be noticed that each of these sections except the case of fraud, section 62 employing the words "except in case of fraud." And section 63 using the words "as against the person registered as proprietor of that land through fraud." The uncertain ambit of these expressions has been limited by judicial decision to actual fraud by the registered proprietor of his agent: Assets Co Ltd v Mere Roihi.*
>
> *It is these sections which, together with those next referred to, confer upon the registered proprietor what has come to be called "indefeasibility of title.* ***"The expression, not used in the Act itself, is a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys. This conception is central in the system of registration."***
>
> *[14] Actual fraud or moral turpitude must therefore be sown on the part of the plaintiff as registered proprietor or of his agents Wicks v. Bennet [1921] 30 CLR 80; Butler v Fairclough [1917] HCA 9; [1917] 23 CLR 78 at p.97*
>
> (Emphasis Added)

In the case of **SHAH –v- FIFTA** (2004) FJHC 299, HBC 03292J, 2003S (23rd June 2004) the Court took into consideration Sections 38, 39 and 40 of the Land Transfer Act Cap 131. Under Section 38 of the Lands Transfer Act Cap 131 it states that;

> *"No instrument of title registered under the provisions of this Act shall be impeached or defeasible by reason of or an account of any informality or in any application or document or in any proceedings previous to the registration of the instrument of title".*

Pathik J in this case; **SHAH –v- FIFITA***(supra)* emphasised on section 40 of the Land Transfer Act Cap 131 as follows:

> *"Except in the case of fraud, no person contracting or dealing with or taking or proposing to take a transfer from the proprietor of any estate or interest in land subject to the provisions of this Act shall be required or in any manner concerned to inquire or ascertain the circumstances in or the consideration for which such proprietor or in any previous proprietor of such estate or interest is or was registered, or to see to the application of the purchase money or any part thereof, or shall be affected by notice, direct or constructive, of any trust or unregistered interest, any rules of law or equity to the contrary notwithstanding, and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud".*

Fraud for the purpose of the Land Transfer Act has been defined by the Privy Council in **Assets Company Ltd v Mere Roihi** [1905] AC 176 at p.210 where it was said:

> *".... by fraud in these Acts is meant actual fraud, i.e. dishonesty of some sort, not what is called constructive or equitable fraud – an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud. Further, it appears to their Lordships that the fraud which must be proved in order to invalidate the title of a registered purchaser for value, whether he buys from a prior registered owner or from a person claiming under a title certified under the Native Lands Act, must be brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. 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. A person who presents for registration a document which is forged or has been fraudulently or improperly obtained is not guilty or fraud if he honestly believes it to be a genuine document which can be properly acted upon."*

Fraud: Sufficiency of evidence;

In **Sigatoka Builders Ltd v Pushpa Ram & Ano**. (Unreported) Lautoka High Court Civil Action No. HBC 182.01L, 22 April 2002 the Court held in relation to "Fraud: sufficiency of evidence";

> *"Though evidence of fraud and collusion is often difficult to obtain, the evidence here fails a good way short of a standard requiring the court's further investigation. In* ***Darshan Singh v Puran Singh*** *[1987] 33 Fiji LR 63 at p.67 it was said:*
>
> *"****There must, in our view, be some evidence in support of the allegation indicating the need for fuller investigation which would make Section 169 procedure unsatisfactory****. In the present case the appellant merely asserted that he had paid the money for the purchase of the property. This was denied by both Prasin Kuar and the respondent.* ***There was nothing whatsoever before the learned judge to suggest the existence of any evidence, documentary or oral, that might possibly assist the appellant in treating the case as falling within the scope of Section 169 of the Land Transfer Act and making an order for possession in favour of the respondent."***
>
> *In that case it was also held that a bare allegation of fraud did not amount by itself to a complicated question of fact, making the summary procedure of Section 169 in appropriate see too* ***Ram Devi v Satya Nand Sharma & Anor****.*
> *[1985] 31 Fiji LR 130 at p.135A. A threshold of evidence must be reached by the Defendant before the Plaintiff can be denied his*

summary remedy. In ***Wallingford v Mutual Society****[1880] 5 AC 685 at p. 697 Lord Selbourne LC said:*

> *"With regards to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice. And here I find nothing but perfectly general and vague allegations of fraud. No single material fact is condescended upon; in a manner which would enable any Court to understand what it was that was alleged to be fraudulent."*
>
> (Emphasis Added)

It is clear from the above mentioned judicial decisions that a bare allegation of fraud does not amount by itself to a complicated question of fact, making the summary procedure inappropriate.

Therefore, in the "Torrens System" registered interests can be set aside if they have been procured by fraud, where fraud refers to active fraud, personal dishonesty or moral turpitude.

The well-known case of "**Frazel v Walker**" **(1967) 1 A.C. 569** held that apart from fraud, or from errors of misdescreption which can be rectified, the registered proprietor holds his title immune from attack by all the word, but claims in *personam* will still subsist.

In **Suttan v O'Kane 1973 2 N.Z.L.R. 204; Both the leading Judgments contain lengthy reviews of earlier cases of fraud in respect of a person who procures himself to be registered proprietor in cases where he then knows, or later becomes aware, of an unregistered interest.**

Richmond J. and Turner P. were in agreement that a person who knows of another's interest and procures registration which cheats the other of that interest is guilty of fraud and his title can be impeached:

> *"It is well settled that knowledge of a breach of trust or of the wrongful disregard and destruction of some adverse unregistered interest does itself amount to fraud. In* ***Locher v Howlett*** *it is said by Richmond J: 'It may be considered as the settled construction of this enactment that a purchaser is not affected by knowledge of the mere existence of a trust or unregistered interest, but that he is affected by knowledge that the trust is being broken, or that the owner of the unregistered interest is being improperly deprived of it by the transfer under which the purchaser himself is taking'.."*

per Salmod J. in **Waimiha Sawmilling Co. Ltd. v. Waione Timber Ltd 1923 NZLR 1137 at 1173 – N.Z. Court of Appeal, affirmed in the Privy Council 1926 A.C. 101.**

A few quotations from authorities relied on by the Lordships are relevant;

> *"If the defendant acquired the title, said Prendergast C.J. in* ***Merrie v McKay*** *(1897) 16 NZLR 124, "Intending to carry out the agreement with the Plaintiff, there was no fraud then; the fraud is in now repudiating the agreement, and in endeavoring to make use of the position he has obtained to deprive the Plaintiff of his rights, under the agreement. If the Defendant acquired his registered title with a view to depriving the Plaintiff of those rights, then the fraud was in acquiring the registered the title. Whichever view is accepted, he must be held to hold the land subject to the Plaintiff's rights under the agreement, and must perform the contract entered into by the Plaintiff's vendor'*

Merrie v McKay was cited with approval by Salmond J in **Wellington City Corporation v Public Trustee 1921 NZLR 423 at 433**. There Salmond J. said;

> *"It is true that mere knowledge that a trust or other unregistered interest is in existence it not of itself to be imputed as fraud. A purchaser may buy land with full knowledge that it is affected by a trust, and the sale may be a breach of trust on the part of the seller, but the purchaser has the protection of s. 197 unless he knew or suspected that the transaction was a breach of trust. Fraud in such a case consists in being party to a transfer which is known or suspected to be a violation of the equitable rights of other persons. Where, however, the transfer is not itself a violation of any such rights, but the title acquired is known by the purchaser to be subject to some equitable encumbrance, the fraud consists in the claim to hold the land for an unencumbered estate in willful disregard of the rights to which it is known to be subject. Thus in* ***Thompson v. Finlay*** *it was held that a purchaser of land breached the Land Transfer Act who takes with actual notice of a contract by the seller to grant a lease to a third person is bound by that contract. Willaims J. says "If there is a valid contract affecting an estate, and the interest is sold expressly subject to that contract, it would be a distinct moral fraud in the purchaser to repudiate the contract, and the Act does not protect moral fraud". Specific performance of the contract to lease was decreed against the purchaser accordingly."*

For a similar decision, see the decision by Prendergast, C.J. in

- **Finnovan v Weir**
  5 N.Z, S.C. 280 p.

- **Merrci v McKay**
  16 N.Z, L.R. 124 p

As I understand the law, the "**fraud**" in acquiring the registered title is this;

"**A purchaser is not affected by knowledge of the mere existence of a Trust or unregistered interest, but that he is affected by knowledge that the trust is being broken, or that the owner of the unregistered interest is being improperly deprived of it by the transfer under which the purchaser himself is taking.**"

The situation in the case before me is completely different.

As I said earlier, the Defendants in the case before me has no equitable interest and legal interest in the land due to breach of section 12 of the Native Land Trust Act. Therefore the Courts of equity will not impose a Constructive Trust on the Plaintiff for the benefit of the Defendants.

The Plaintiff obtained registration on 27th March 2015 and his title is not subject to an equitable claim or encumbrance, because at the time of registration there was no any legal agreement affecting the Native Land or an agreement which is enforceable either at law or in equity. There was no valid Contract/Agreement binding the Plaintiff, because the Defendants did not acquire legal interest or equity under the Agreement due to breach of Section 12 of the Native Land Trust Act.

A person who knows of another's legal interest and procures registration which cheats the other of that legal interest is guilty of fraud and his title can be impeached.

I have no doubt personally and I am clearly of the opinion that the Plaintiff is not guilty of fraud and her title cannot be impeached because;

- The Defendants have no equitable or legal interest in the land due to breach of Section 12 of the Native Land Trust Act.
- The Defendants did not acquire legal interest or equity under the Agreement due to its illegality.
- The Plaintiff's mere knowledge that there is an Agreement which is not enforceable either at law or in equity to grant a legal right is in existence, is not of itself to be imputed as fraud.
- The Plaintiff's registration of the transfer is not a violation of some equitable encumbrances, legal interest or valid legal contract of some other party.

Therefore, I am constrained to answer the sixth question earlier posed at paragraph six (6) in the affirmative.

(12) Let me now move to consider the **07th question** posed at para (6).

It appears that the Defendants have already instituted proceedings in the High Court alleging fraud against the Plaintiff and the Fiji Development Bank. (Lautoka High Court Civil Action No:- HBC 33 of 2016). The allegation is that the Plaintiff and the Fiji Development Bank intentionally and purposely colluded to transfer the subject land to the Plaintiff to deny the Defendants right and interest in the property.

The question I ask is whether or not the pendency of a civil claim is enough to sustain a right to possession for the time being in the defendants?

The Fiji Court of Appeal in **Dinesh Jamnadas Lalji and Anor v Honson Limited F.C.A Civ App. 22/85** as per Mishra J.A. said:

> *"At the hearing, the appellant's main submission was that, as proceedings relating to the same matter were already before the Supreme Court, the application should be dismissed. The learned Judge, quite correctly in our view, held that existence o such proceedings was, by itself, not a cause sufficient to resist an application under Section 169 of the Land Transfer Act".*

Also in **Muthsami s/o Ram Swamy v Nausori Town Council (Civ. App. No. 23/86 F.C.A.)** Mishra J.A. expressed the same view as above in the following words:

> *".... That mere institution of proceedings by Writ did not by itself shout out a claim under Section 169 of the Land Transfer Act in a proper case. It was for the appellant to show, on Affidavit evidence, some right to remain in possession which would make the granting of an Order under Section 169 procedure improper".*
>
> *Although the Defendant has alleged fraud, and which is also subject matter of the said action instituted by the Defendant, there are no complicated questions of fact to be investigated. The procedure under s 169 is most appropriate here. On this aspect in Ram Narayan s/o Durga Prasad v Moti Ram s/o Ram Charan (Civ. App. No. 16/83 FCA) Gould J.P. said:*
>
> > *"... the summary procedure has been provided in the Land Transfer Act and, where the issues involved are straight forward, and particularly where there are no complicated issues of fact, a litigant is entitled to have his application decided in that way". (My emphasis)*

Clearly, from these authorities, the pendency of related Writ proceedings is not by itself – sufficient to shut out a claim for vacant possession.

Therefore, I am constrained to answer the 07th question posed at paragraph (6) negatively.

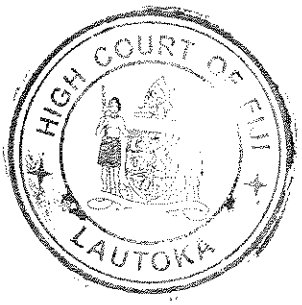
(E) CONCLUSION

For the reasons, which I have endeavored to explain, I venture to say beyond a per adventure that the facts and circumstances in this case do reveal that the Defendants are illegal occupants on the land. Therefore, I have no hesitation in reaching the conclusion that the Defendants have no right to claim possession.

(F) FINAL ORDERS

(I) The Defendants to deliver immediate vacant possession of the land described in the Originating Summons dated 04th February 2016.

(2) The Defendants to pay costs of $1,000.00 (summarily assessed) to the Plaintiff which is to be paid within 14 days hereof.



07/10/2016.

Jude Nanayakkara
Master

At Lautoka
7th October 2016