**IN THE HIGH COURT OF FIJI**
**WESTERN DIVISION**
**AT LAUTOKA**

**CIVIL JURISDICTION**

**CIVIL ACTION NO. HBC 178 of 2013**

**BETWEEN** : **AISHA BEGUM** formally of Mulomulo, Nadi

**PLAINTIFF**

**AND** : **ABBAS ALI** of Meiganyah, Nadi.

**DEFENDANT**

**Mr. Eroni Maopa for the Plaintiff.**
**Mr. Vikrant Chandra for the Defendant.**

**Date of Hearing : - 11th November 2016**
**Date of Ruling : - 24th February 2017**

# RULING

## (A) INTRODUCTION

(1) The matter before me stems from the Plaintiff's Originating Summons, dated 25th September, 2013 made pursuant to **Section 169** of the **Land Transfer Act**, for an Order for Vacant Possession against the Defendant.

(2) The Defendant is summoned to appear before the Court to show cause why he should not give up vacant possession of the Plaintiffs property comprised in **Native Lease No- 25341 Lot 01 ND 3015 Nawaka, province of Ba, area of 14 acres, 1 rood and 32 perches.**

(3) The Originating Summons for eviction is supported by an affidavit sworn by the Plaintiff on 07th April 2013.

(4) The Originating Summons for eviction is strongly contested by the Defendant.

(5) The Defendant filed an 'Affidavit in Opposition' opposing the application for eviction followed by an 'Affidavit in Reply' thereto.

(6) The Plaintiff and the Defendant were heard on the 'Originating Summons'. They made oral submissions to Court. In addition to oral submissions, Counsel for the Plaintiff filed a careful and comprehensive written submission for which I am most grateful.

## (B) THE LAW

(1) In order to understand the issues that arise in the instant case, I bear in mind the applicable law and the judicial thinking reflected in the following judicial decisions.

(2) Sections from 169 to 172 of the **Land Transfer Act (LTA)** are applicable to summary application for eviction.

**Section 169 states;**

> *"The following persons may summon any person in possession of land to appear before a judge in chambers to show cause why the person summoned should not give up possession to the applicant:-*
>
> (a) **the last registered proprietor of the land;**
> (b) .....;
> (c) ...

**Section 170 states;**

> *"The summons shall contain a description of the land and shall require the person summoned to appear at the court on a day not earlier than sixteen days after the service of the summons."*

**Section 171 states;**

> *"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.*

**Section 172 states;**

> *"If the 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;*
> *Provided that the dismissal of the summons shall not prejudice the right of the plaintiff to take any other proceedings against the person summoned to which he may be otherwise entitled:*
> *Provided also that in the case of a lessor against a lessee, if the lessee, before the hearing, pay or tender all rent due and all costs incurred by the lessor, the judge shall dismiss the summons.*
>
> [Emphasis provided]

(3) The procedure under Section 169 was explained by Pathik J in **Deo v Mati** [2005] FJHC 136; HBC0248j.2004s (16 June 2005) as follows:-

> *The procedure under s.169 is governed by sections 171 and 172 of the Act which provide respectively 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."*

*It is for the defendant to 'show cause.'*

(4) The Supreme Court in considering the requirements of Section 172 stated in **Morris Hedstrom Limited v. Liaquat Ali** (Action No. 153/87 at p2) 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."*

(5) The requirements of Section 172 have been further elaborated by the Fiji Court of Appeal in **Azmat Ali s/o Akbar Ali** v **Mohammed Jalil s/o Mohammed Hanif** *(Action No. 44 of 1981 – judgment 2.4.82)* where it is stated:

> *"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."*

## (C) THE FACTUAL BACKGROUND

(1) What are the facts here? It is necessary to approach the case through its pleadings/affidavits, bearing all those legal principles uppermost in my mind.

(2) The Plaintiff in her **'Affidavit in Support'** deposed *inter alia;*

*Para 1.* *That I am the Plaintiff in this action herein.*

*2.* *In so far as the contents of this affidavit are 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 registered lessee of the Native Lease No. 25341 Lot 1 ND 3015, Nawaka, Nadi, province of Ba, area of 14 acres 1 root and 32 perches (said property).*
*Annexed herein a copy of Native Lease marked as annexure AB 1.*

*4.* *The Defendant is my brother.*

*5.* *My late mother Khairul Nisha died on 18th April 2012. Pursuant to her last WILL and Testament the said property has to be disposed to me. I annexed herein a copy of Probate with WILL annexed marked as annexure AB2.*

*6.* *THAT notice to vacate dated 17th June 2013, through my Solicitors was served on the Defendant to vacate the said property but he failed to do so. Annexed is copy of Notice to Vacate and Affidavit of Service marked as annexure AB3.*

*7.* *That the Defendant and / or his family have been occupying the said property unlawfully and illegally. They failed to do any work on the land or cultivate for sugar cane farming.*

*8.* *That I want to continue cultivate the land with sugar cane farming as my brother refused to work on the farm.*

*9.* *That the Defendant has no legal right whatsoever to occupy the said premises.*

*10.* *That I humbly pray to this Honourable Court for Orders in terms of the Summons filed herein.*

(3) The Defendant for his part in seeking to show cause against the Summons, filed an **"Affidavit in Opposition"**, which is substantially as follows;

Para 4. *THAT I do not agree with Plaintiff in its paragraph 2 of the Affidavit in support as I am the eldest Brother of the Plaintiff and she knew very well that since my birth I am on the same farm land NLTB lease No. 25341 for past 65 long years and cultivating the same land for past 50 years. Yet she has given my address as of Meigunyah and pretends not to know my occupation. Annexed hereto and marked with letters "A" is the true copy of letter by our village Advisory Councillor dated 25th day of June, 2013.*

5. *THAT as to paragraph 3 of the Affidavit in support the Plaintiff cheatingly became the owner of the said property when the lease expired our mother told me to pay $3,000.00 being the cost of new lease which I did gave to our mother, the same was taken by the Plaintiff (my sister) and our mother to make a new lease at NLTB and the Plaintiff has entered her name in the said lease instead of my name.*

6. *THAT I admit paragraph 4 of the Affidavit in support.*

7. *THAT as to paragraph 5 of the Affidavit in support I contest the will and I believe and know that our mother would not make any will to the Plaintiff or anyone else as I was looking after my mother and none of us were aware of any such dealing if she had made one until probate was issued.*

8. *THAT I admit paragraph 6 of the Affidavit in support and further state it was my parents property and I have sweated on the said property for 50 long years.*

9. *THAT as to paragraph 7 of the Affidavit in Support I deny the same and further state that I am born and staying on NLTB Lease No. 25341 for past 65 years and cultivated it for past 50 years as it was my parent's property. Annexed and marked with letter "B" is the true copy of the letter by our gang Sardar dated 25th day of June, 2013.*

10. *THAT as to paragraph 8 of the Affidavit in Support Plaintiff is the Citizen of New Zealand and resides in New Zealand for past 8 years. She never worked on the said farm when she uses to stay in Fiji now she is New Zealand Citizen how will she cultivate from New Zealand.*

11. *THAT the Plaintiff had stopped me from farming when our mother died and Plaintiff manages to get probate on her name on 29th June 2012, within a month of my mother's death while we were still mourning over the sudden death of our mother.*

12. *THAT as to paragraph 9 of the Affidavit in support I have constructed four bedroom house on the said land which cost me approximately $45,000.00 now market value would be not less than*

*$80,000.00. And I have been staying there for past 65 years and cultivating it from last 50 years, paid all the land rent levy and all other relevant fees and cost, which were paid from the proceeds of the sugar cane cultivated by me in respect of the said land and I have used all my lives earning to upgrade the said property. Annexed hereto and marked with letter "C" is the true copy of the petition signed by 20 peoples of my village.*

12. *THAT I further state if the Plaintiff wants me to vacate the said property. Therefore I claim Plaintiff to compensate me in the sum of $10,000.00 per year for 13 years in the total sum of $130,000.00 plus $3,000.00 being for new lease and $80,000.00 for the house and as I was cultivating and harvesting 14 acres of sugar cane land and 1 root 32 perches where compound and house was upgraded and constructed by me.*

13. *THAT our mother Khairul Nisha had made full Power of Attorney on my name in 1983 which was valid till her death in 2012 and which was never contested by the Plaintiff even though she managed to get her name included together with our mothers name in the new lease made in 2000, I could have transferred the whole property on my name but I did not. Annexed hereto and marked with letter "D" is the true copy of the Power of Attorney No.11353.*

14. *THAT the Plaintiff migrated to New Zealand in 2005 and is a Citizen of New Zealand and she never raised any concern about the said property until our mother died in 2012.*

(4) The Plaintiff filed an **Affidavit in rebuttal** deposing *inter alia*;

*Para 4.* *As to paragraph 4 of the Defendant's affidavit, I state that I along with my other sibling stayed with our parents on the NLTB leasehold land no. 25341. The lease was under my father's name initially. The sugar cane contract was also under his name. The Defendant has not lived on this land for the past 65 years. The Defendant had moved out of my father's land in 1998/9 to his 300 plus acre land at Kachangari that my father has purchased for the Defendant and my other brother. The Defendant was in fact staying on this 300 plus acre land and was cultivating it. When the Defendant was evicted by his own two sons from his land at Kachangari the Defendant came for shelter into the house owned by my mother and me. He stayed on after the funeral rite of my mother was over. The Defendant was employed as a bus driver and later as truck driver and had his own private business when he moved to his 300 plus acre land in Kachangari. The Village advisory member's letter does not have legal basis for the Defendant to occupy the land or do any farming on it.*

*The Defendant was just bare licensee to stay on my land. The licence has clearly been revoked by me and he should have moved out. The house on the property belongs to me. The Defendant is just a licence occupant. He has got no tenancy or any authority to cultivate my*

*land. I was the sole beneficiary of my mother's WILL. The house now occupied by the Defendant was built by my father in his life time.*

5. *I continue to work on the farm. The sugar cane contract is under my name. I employed a worker on my farm and he lives on my property. The Power of Attorney (if there was one) does not appear to be genuine. The Declaration by the attesting witness is not completed and there is no stamp of the attesting witness on the copy. If there was a Power of Attorney, it is clearly not operative after the death of the person making the Power of Attorney document. There was no financial made by the Defendant on the sugar cane cultivation and related works on the farm. The sugar cane contract was not under his name. The other signatories on attached letter to the Defendants affidavit do not add any authority to his claim on my lease hold property.*

6. *As to paragraph 5 of the said affidavit, I state that the Defendant made no payments either to my mother or to me for the lease application with NLTB.*

7. *As to paragraph 7 of the said affidavit, I state that my mother did make her WILL. The Defendant may not have been aware of when the WILL was made. There was no challenge and no contest against the WILL by the Defendant or anyone else. I admit that the property was in the name of our parents but it is now legally owned by me.*

8. *As to paragraph 8 of the said Affidavit, I state that if the Defendant was born on the Native Lease no. 25341, this does not create a birth right for him to claim the ownership right on this property which I legally own at present. The Defendant has not lived on the land for full 65 years. He had moved to other farm. The letter of support from the gang sardar does not authenticate any right of claim by the Defendant on my NLTB Lease No. 25341, the dwellings and the sugar cane crop.*

9. *As to paragraph 10 of the affidavit, I state that I did work and still manage the cultivation of my farm on NLTB Lease No. 25341. I also employed a fulltime farm worker to work on my sugar cane farm. He lives on my farm property. I am a citizen of Fiji and I am domiciled in Fiji. I do have permanent residence status in New Zealand.*

10. *As to paragraph 11 of the Defendant's affidavit, I state that the Defendant never cultivated sugar cane farm. Whatever work he may have done on the farm, he was duly paid in cash by my parents for his tasks on contract basis. He never works on my farm.*

11. *That as to paragraph 12 of the affidavit, I state that the house occupied by the Defendant was built by my parents and all the maintenance was done by my parents. The house does not belong to the Defendant. The property is under my name and it was legally transferred to me. The sugar cane contract was never under the Defendant's name and he made no personal financial contribution towards the house maintenance or the lease payments. The petition signed by 20 or so people does not give any legitimacy to the*

*Defendant's claim on my property. The Defendant has physically assaulted me causing injuries to me. Police has laid criminal charges against him. The case is still pending in Nadi Magistrates Court.*

12. *That as to paragraph 13 I stated that the Power of Attorney (if there was one made) had lapsed when my mother died, or it would have lapsed if it was revoked by my mother in her life time. The Power of Attorney, if it was valid, then any power under it only would have related to my mother's authority in relation to her share in the NLTB leasehold No. 25341. The NLTB lease was issued under the joint name of my mother and my name. When mother died the lease was transferred under my name. The transfer has been completed by NLTB and this endorsed on the Title Lease No. 25341.*

13. *That as to paragraph 14, I state that I did not migrate to New Zealand in 2005. I am a citizen of Fiji first but I have permanent residency in New Zealand. I am domiciled in Fiji. There was no need on my part to raise any concern with any person regarding the joint ownership of the NLTB Lease No. 25341. The Defendant was just a mere licencee on the leasehold land presently owned by me He has attacked and caused injuries and I want him to just move out.*

14. *That the Defendant is not entitled to any payment from me.*

15. *Till 23rd September 1999, the said land was belong to my parents but after that my mother and I renewed the said Lease. I state that it is no longer an estate land.*

## (D) ANALYSIS

(1) This is an application brought under **Section 169 of the Land Transfer Act, [Cap 131]**.

Under Section 169, certain persons may summon a person in possession of land before a judge in chambers to show cause why that person should not be ordered to surrender possession of the land to the Claimant.

For the sake of completeness, **Section 169 of the Land Transfer Act**, is reproduced below;

> **169.** *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 arrears 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 arrears for one month, whether there be or be not sufficient distress found on the premises to countervail such rent and whether or not any previous demand has been made for the rent;*

(c) *a lessor against a lessee or tenant where a legal notice to quit has been given or the term of the lease has expired.*

**I ask myself, under which limb of Section 169 is the application being made?**

Reference is made to paragraph (03) of the affidavit in support of the Originating Summons.

*Para 3.* *That I am the registered lessee of the Native Lease No. 25341 Lot 1 ND 3015, Nawaka, Nadi, province of Ba, area of 14 acres 1 rood and 32 perches (said property). Annexed herein a copy of Native Lease marked as annexure AB 1.*

Section 169 (a) of the Land Transfer Act, Cap 131, requires the Plaintiff to be the last **registered proprietor** of the land.

The term "**proprietor**" is defined in the Land Transfer Act as "*the registered proprietor of land, or of any estate or interest therein*".

The term "**registered**" is defined in the **Interpretation Act**, Cap 7, as "*registered used with reference to a document or the title to any immovable property means registered under the provisions of any written law for the time being applicable to the registration of such document or title*"

The land in question in this case is 'Native Land' within the meaning of Native Land Trust Act. The land is leased by the Native Land Trust Board to the Plaintiff and her late mother (Khairul Nisha) on 01st January 2000 for a term of 30 years at yearly rental of $600.00 (Annexure marked AB-1 and referred to in the Affidavit of Aisha Begum sworn on 07th April 2013).

The Plaintiff became the sole owner of Native Lease No. 25341 on 06th March 2013 when her late mother's share in the property was transferred to her in accordance with the provisions of the Will.

The Lease granted to the Plaintiff was registered with the Registrar of Titles on 05th September 2000. The effect of registration of Native Lease with the Registrar of Titles is that upon registration it becomes subject to the Land Transfer Act. Section 10 (2) of the Native Land Trust Act, Cap. 134 states

> *"(2) When a lease made under the provisions of this Act has been registered it shall be subject to the provisions of the Land Transfer Act, so far as the same are not inconsistent with this Act, in the same manner as if such lease has been made under that Act, and shall be dealt with in a like manner as a lease so made."*

Thus, it seems tolerably clear that the Plaintiff holds a registered lease and could be characterised as the last registered proprietor.

On the question of whether a **lessee** can bring an application under Section **169 (a) of the Land Transfer Act**, if any authority is required, I need only refer to the sentiments expressed by Master Robinson in "**Michael Nair v Sangeeta Devi**", Civil Action No: 2/12, FJHC, decided on 06.02.2013. The learned Master held;

> *"The first question then is under which ambit of section 169 is the application being made? The application could not be made under the second or third limb of the section since the applicant is the lessee and not the lessor as is required under these provisions. But is the applicant a registered proprietor? A proprietor under the Land Transfer Act means the registered proprietor of any land or of an estate or interest therein". The registration of the lease under a statutory authority, the iTLTB Act Cap 134, creates a legal interest on the land making the applicant the registered proprietor of the land for the purposes of the Land Transfer Act. He can therefore make an application under section 169 of the Land Transfer Act".*

The same rule was again applied by the learned Master in "**Nasarawaqa Co-operative Limited v Hari Chand**", Civil Action No: HBC 18 of 2013, decided on 25.04.2014. The learned Master held;

> *"It is clear that the iTLTB as the Plaintiff's lessor can take an action under section 169 to eject the Plaintiff. This is provided for under paragraphs [b] &[c]. For the lessor to be able to eject the tenant or*

*the lessee it must have a registered lease. It is not in dispute that the Plaintiff holds a registered lease, the lease is an "Instrument of Tenancy" issued by the iTLTB under the Agricultural Landlord and Tenancy Act. It is for all intents and purposes a native lease and was registered on the 29 November 2012 and registered in book 2012 folio 11824. It is registered under the register of deeds. There is nothing in section 169 that prevents a lessor ejecting a lessee from the land as long as the lease is registered. How will the lessee then eject a trespasser if the lessor in the same lease can use section 169? The lessee under section 169 can eject a trespasser simply because the lessee is the last registered proprietor. The Plaintiff does not have to hold a title in fee simple to become a proprietor as long as he/she is the last registered proprietor. A proprietor is defined in the Land Transfer Act as "proprietor" means the registered proprietor of land or of any estate or interest therein". The Plaintiff has an interest by virtue of the instrument of tenancy and therefore fits the above definition and can bring the action under section 169."*

A somewhat similar situation as this was considered by His Lordship Justice K.A. Stuart in **Housing Authority v Muniappa** (1977, FJSC.) His Lordship held that the Plaintiff Housing Authority holds a registered lease therefore it could be characterized as the last registered proprietor.

In **Habib v Prasad** [2012] FJHC 22, Hon. Madam Justice Angala Wati said;

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

*Act Cap 7:-*

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

Applying the aforesaid principles to the instant case, I am driven to the conclusion that the Plaintiff is the last registered proprietor of the land comprised in Native Lease No. 25341. One word more, the registration of the lease under a statutory authority, the iTLTB Act Cap 134, creates a legal interest on the land making the Plaintiff the registered proprietor of the land for the purposes of the Land Transfer Act. The Plaintiff is entitled to make an application under Section 169 (a) of the Land Transfer Act.

(2) Pursuant to Section 170 of the Land Transfer Act;

(1) **the Summons shall contain a "description of the Land"**

AND

(2) **shall require the person summoned to appear in the court on a day not earlier than "sixteen days" after the service of Summons.**

The interval of not less than 16 days is allowed to give reasonable time for deliberations and to prevent undue haste or surprise.

**I ask myself, are these requirements sufficiently complied with by the Plaintiff?**

The Originating Summons filed by the Plaintiff does contain a description of the subject land. The subject land is sufficiently described. For the sake of completeness, the Originating Summons is reproduced below in full.

> *LET ALL PARTIES CONCERNED attend before the Master in Chambers at the High Court of Fiji at Lautoka on* ***Thursday the 24th day of October 2013*** *at 8.30 o'clock in the forenoon on the hearing of AN APPLICATION by the above named Plaintiff that the Defendant do show cause why he should not give up immediate vacant possession to the Plaintiff of all that land comprised in the* ***Native Lease No. 25341 being Lot 1 ND 3015, Nawaka of Nadi, province of Ba, area of 14 acres 1 rood and 32 perches*** *and for an order that the Defendant pays costs of this application on an indemnity basis.*
>
> (Emphasis added)

In light of the above, I have no doubt personally and I am clearly of opinion that the first mandatory requirement of Section 170 of the Land Transfer Act has been complied with.

(3) Now comes a most relevant and, as I think, crucial second mandatory requirement of Section 170 of the Land Transfer Act.

The Originating Summons was returnable on 24th October 2013. According to the Affidavit of Service filed by the Plaintiff, the Originating Summons was served on the Defendant on 02nd October 2013.

Therefore, the Defendant is summoned to appear at the Court on a date not earlier than "sixteen days" after the Service of Summons. Therefore, the second mandatory requirement of Section 170 of the Land Transfer Act has been complied with.

(4) To sum up; having carefully considered the pleadings, evidence and oral submissions placed before this Court, it is quite possible to say that the Plaintiff has satisfied the threshold criteria spelt out in Section 169 and 170 of the Land Transfer Act. **The Plaintiff has established a prima facie right to possession.**

**Now the onus is on the Defendant to establish a lawful right or title under which he is entitled to remain in possession.**

In the context of the present case, I am comforted by the rule of law expounded in the following judicial decisions.

In the case of **Vana Aerhart Raihman v Mathew Chand**, Civil Action No: 184 of 2012, decided on 30.10.2012, the High Court held;

> *"There is no dispute between parties as to the locus standi of the Plaintiff, and once this is established the burden of proof shifted to the Defendant to prove his right to possession in terms of the Section 172 of the Land Transfer Act."*

In the case of **Morris HedstromLimited –v- Liaquat Ali** CA No: 153/87, the Supreme Court said that:-

> *"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."***

(Emphasis is mine)

Also it is necessary to refer to Section 172 of the Land Transfer Act, which states;

*"If the 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,*** *mortgage or lessor or he may make any order and impose any terms he may think fit; Provided that the dismissal of the summons shall not prejudice the right of the plaintiff to take any other proceedings against the person summoned to which he may be otherwise entitled:*
*Provided also that in the case of a lessor against a lessee, if the lessee, before the hearing, pay or tender all rent due and all costs incurred by the lessor, the judge shall dismiss the summons".*

[Emphasis provided]

(5) Let me now move to consider the Defendant's reason refusing to deliver vacant possession.

The Plaintiff is the biological sister of the Defendant. The Defendant says in his Affidavit in Opposition that he was born on the land and he has lived there all his life. He asserted that he has been cultivating the land for past 50 years. He also asserted that he has expended money in constructing a house on the land which cost him approximately $45,000.00. Moreover, he says that he paid all the land rent and other relevant fees from the proceeds of the sugar cane cultivation.

My first observation is that this is a bare assertion. The Defendant has not annexed proof of expenditure.

A bare assertion is not sufficient. See; **Bidder v Bridges, 1884, Ch.D Vol. 26, Page 01.**

It is not in dispute that the improvements carried out by the Defendant including contributions made towards the development of the property lacked the knowledge and the prior consent of the Native Land Trust Board. Thus, the issue of compensation from improvements cannot justify continual occupation of the property. Any prejudice to the Defendant from the improvements to the land he has made can be dealt with by way of a separate action against the landlord seeking compensation for those improvements.

The Fiji Court of Appeal in **Ram Chand v Ram Chandar, Appeal No:- ABU 0021, 2002** observed that the mere fact that a tenant carries out improvements without the consent of his or her landlord does not give him a right to continue occupation of the land, if the landlord is otherwise lawfully entitled to it. The fact that improvements are made is not really an answer to a landlord's application for possession.

I note annexure marked with letter 'D', the copy of the Power of Attorney No:- 52814.

The Defendant asserted that his mother allowed him to work on the farm. He says that his late mother appointed him Attorney for her.

I perused the Power of Attorney.

It is observed that the duties imposed by the Power of Attorney No:- 52814 completely nullifies the Defendant's assertion of cultivation, occupation and / or any arrangement he may have had with late Khairul Nisha (late mother).

Thus, I am not at all persuaded by the submission of the Defendant.

This brings me to the next submission. The Defendant asserted that the Plaintiff is guilty of fraud in acquiring the registered titles in Native lease No:- 25341 in the year 2000.

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 **"Eng Mee Young and Others (1980) AC 331** is apt and I adopt 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 Dharam Sheela & 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.**

The Defendant merely alleged fraud. This was denied by the Plaintiff. I find nothing but perfectly general and vague allegation of fraud. No single material fact is condescended upon in a manner which would enable the Court to understand what it was that was alleged to be fraudulent. 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.

(6) To sum up, for the reasons which I have endeavoured to explain, it is clear beyond question that the Defendant has failed to show cause to remain in possession as required under Section 172 of the Land Transfer Act.

At this point, I cannot resist in reiterating the judicial thinking reflected in the following judicial decisions;

In the case of **Morris Hedstrom Limited v Liaquat Ali,** CA No, 153/87, the Supreme Court held,

> *"Under Section 172 the person summonsed may show cause why he refused to give possession of the land 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 a right must be adduced."***
>
> (Emphasis is mine)

In **Shankar v Ram,** (2012) FJHC 823; HBC 54.2010, the Court held;

> *"What the Defendant needs to satisfy is not a fully – fledged right recognized in law, to remain possession but some tangible evidence establishing a right or some evidence supporting an arguable case for such a right to remain in possession. So, even in a case where the Defendant is unable to establish a complete right to possession, if he can satisfy an arguable case for a right*

*still he would be successful in this action for eviction, to remain in possession."*

Being guided by those words, I think it is right in this case to say that the Defendant has failed to adduce some tangible evidence establishing a right or supporting an arguable case for such a right. It is not disputed that at the time the Plaintiff commenced the proceedings she was the registered owner of the **Native Lease No-25341 Lot 01 ND 3015 Nawaka, province of Ba, area of 14 acres, 1 root and 32 perches.** Under Section 169, the Plaintiff is entitled to seek possession of the property on the **strength of her title**. Her right to possession depends on her **registered ownership**.

**Thus, I disallow the grounds adduced by the Defendant refusing to deliver vacant possession.**

(7) Finally, the Plaintiff moved for **'indemnity costs'.**

It is necessary to turn to the applicable law and the judicial thinking in relation to the principles governing **"indemnity costs"**.

**Order 62, Rule 37 of the High Court Rules** empowers courts to award indemnity costs **at its discretion.**

For the sake of completeness, Order 62, Rule 37 is reproduced below.

**Amount of Indemnity costs** (O.62, r.37)

*37.- (1) The amount of costs to be allowed shall (subject to rule 18 and to any order of the Court) be in the discretion of the taxing officer.*

**G.E. Dal Pont, in "Law of Costs", Third Edition**, writes at Page 533 and 534;

***'Indemnity' Basis***

*"Other than in the High Court, Tasmania and Western Australia, statute or court rules make specific provision for taxation on an indemnity basis. Other than in the Family Law and Queensland rules – which define the 'indemnity basis' in terms akin to the traditional*

*'solicitor and client basis' – the 'indemnity basis' is defined in largely common terms to cover all costs incurred by the person in whose favour costs are ordered except to the extent that they are of general law concept of 'indemnity costs'. The power to make such an order in the High Court and Tasmania stems from the general costs discretion vested in superior courts, and in Western Australia can arguably moreover be sourced from a specific statutory provision.*

*Although all costs ordered as between party and party are, pursuant to the 'costs indemnity rule', indemnity costs in one sense, an order for 'indemnity costs', or that costs be taxed on an 'indemnity basis', is intended to go further. Yet the object in ordering indemnity costs remains compensatory and not penal. References in judgments to a 'punitive' costs order in this context must be seen against the backdrop of the reprehensible conduct that often justifies an award of indemnity costs rather than impinging upon the compensatory aim. Accordingly, such an order does not enable a claimant to recover more costs than he or she has incurred."*

Now let me consider what authority there is on this point.

The principles by which Courts are guided when considering whether or not to award indemnity costs are discussed by Hon. Madam Justice Scutt in "**Prasad v Divisional Engineer Northern** (No. 02)" (2008) FJHC 234.

As to the **"General Principles"**, Hon. Madam Justice Scutt said this;

- *A court has 'absolute and unfettered' discretion vis-à-vis the award of costs but discretion 'must be exercised judicially': **Trade Practices Commission v. Nicholas Enterprises** (1979) 28 ALR 201, at 207*
- *The question is always 'whether the facts and circumstances of the case in question warrant making an order for payment of costs other than by reference to party and party': **Colgate-Palmolive Company v. Cussons Pty Ltd** [1993] FCA 536; (1993) 46 FCR 225, at 234, per Sheppard, J.*
- *A party against whom indemnity costs are sought 'is entitled to notice of the order sought': **Huntsman Chemical Company Australia Limited v. International Cools Australia Ltd** (1995) NSWLR 242*
- *That such notice is required is 'a principle of elementary justice' applying to both civil and criminal cases: **Sayed Muklitar Shah v. Elizabeth Rice and Ors** (Crim Appeal No. AAU0007 of 1997S, High Court Crim Action No. HAA002 of 1997, 12 November 1999), at 5, per Sir Moti Tikaram, P. Casey and Barker, JJA*
- *'... neither considerations of hardship to the successful party nor the over-optimism of an unsuccessful opponent would by themselves justify an award*

*beyond party and party costs. But additional costs may be called for if there has been reprehensible conduct by the party liable': **State v. The Police Service Commission; Ex parte Beniamino Naviveli** (Judicial Review 29/94; CA Appeal No. 52/95, 19 August 1996), at 6*

- *Usually, party/party costs are awarded, with indemnity costs awarded only 'where there are exceptional reasons for doing so': **Colgate-Palmolive Co. v. Cussons Pty Ltd** at 232-34; **Bowen Jones v. Bowen Jones** [1986] 3 All ER 163; **Re Malley SM; Ex parte Gardner** []2001] WASCA 83; **SDS Corporation Ltd v. Pasonnay Pty Ltd &Anor** [2004] WASC 26 (S2) (23 July 2004), at 16, per Roberts-Smith, J.*
- *Costs are generally ordered on a party/party basis, but solicitor/client costs can be awarded where 'there is some special or unusual feature of the case to justify' a court's 'exercising its discretion in that way': **Preston v. Preston** [1982] 1 All ER 41, at 58*
- *Indemnity costs can be ordered as and when the justice of the case so requires: **Lee v. Mavaddat** [2005] WASC 68 (25 April 2005), per Roberts-Smith, J.*
- *For indemnity costs to be awarded there must be 'some form of delinquency in the conduct of the proceedings': **Harrison v. Schipp** [2001] NSWCA 13, at Paras **[1], [153]***
- *Circumstances in which indemnity costs are ordered must be such as to 'take a case out of the "ordinary" or "usual" category ...":**MGICA (1992) Ltd v. Kenny & Good Pty Ltd (No. 2)** (1996) 140 ALR 707, at 711, per Lindgren J.*
- *'... it has been suggested that the order of costs on a solicitor and client basis should be reserved to a case where the conduct of a party or its representatives is so unsatisfactory as to call out for a special order. Thus, if it represents an abuse of process of the Court the conduct may attract such an order': **Dillon and Ors v. Baltic Shipping Co. ('The Mikhail Lermontov')**(1991) 2 Lloyds Rep 155, at 176, per Kirby, P.*
- *Solicitor/client or indemnity costs can be considered appropriately 'whenever it appears that an action has been commenced or continued in circumstances where the applicant, properly advised, should have known ... he had no chance of success': **Fountain Selected Meats (Sales) Pty Ltd v. International Produce Merchants Ltd & Ors**[1988] FCA 202; (1998) 81 ALR 397, at 401, per Woodward, J.*
- *Albeit rare, where action appears to have commenced/continued when 'applicant ... should have known ... he had no chance of success', the presumption is that it 'commenced or continued for some ulterior motive or ... [in] willful disregard of the known facts or ... clearly established law' and the court needs 'to consider how it should exercise its unfettered discretion': **Fountain Selected Meats**, at 401, per Woodward, J.*
- *Where action taken or threatened by a defendant 'constituted, or would have constituted, an abuse of the process of the court', indemnity costs are appropriate: **Baillieu Knight Frank (NSW) Pty Ltd v. Ted Manny Real Estate Pty Ltd** (1992) 30 NSWLR 359, at 362. per Power, J.*
- *Similarly where the defendant's actions in conducting any defence to the proceedings have involved an abuse of process of the court whereby the court's time and litigant's money has 'been wasted on totally frivolous and*

*thoroughly unjustified defences': **Baillieu Knight Frank**, at 362, per Power, J.*

- *Indemnity costs awarded where 'the defendant had prima facie misused the process of the court by putting forward a defence which from the outset it knew was unsustainable ... such conduct by a defendant could amount to a misuse of the process of the court': **Willis v. Redbridge Health Authority** (1960) 1 WLR 1228, at 1232, per Beldam, LJ*
- *'Abuse of process and unmeritorious behaviour by a losing litigant has always been sanctionable by way of an indemnity costs order inter parties A party cannot be penalised [for] exercising its right to dispute matters but in very special cases where a party is found to have behaved disgracefully or where such behaviour is deserving of moral condemnation, then indemnity costs may be awarded as between the losing and winning parties': **Ranjay Shandil v. Public Service Commission** (Civil Jurisdiction Judicial Review No. 004 of 1996, 16 May 1997), at 5, per Pathik, J. (quoting Jane Weakley, 'Do costs really follow the event?' (1996) **NLJ** 710 (May 1996))*
- *'It is sufficient ... to enliven the discretion to award [indemnity] costs that, for whatever reasons, a party persists in what should on proper consideration be seen to be a hopeless case': **J-Corp Pty Ltd v. Australian Builders Labourers Federation Union of Workers (WA Branch)(No. 2)** (1993) 46 IR 301, at 303, per French, J.*
- *'... where a party has by its conduct unnecessarily increased the cost of litigation, it is appropriate that the party so acting should bear that increased cost. Persisting in a case which can only be characterised as "hopeless" ... may lead the court to [determine] that the party whose conduct gave rise to the costs should bear them in full': **Quancorp Pty Ltd &Anor v. MacDonald &Ors**[1999] WASC 101, at Paras **[6]-[7]**, per Wheeler, J.*
- *However, a case should not be characterised as 'hopeless' too readily so as to support an award of indemnity costs, bearing in mind that a party 'should not be discouraged, by the prospect of an unusual costs order, from persisting in an action where its success is not certain' for 'uncertainty is inherent in many areas of law' and the law changes 'with changing circumstances': **Quancorp Pty Ltd &Anor v. MacDonald &Ors** [1999] WASC 101, at Paras **[6]-[7]**, per Wheeler, J.*
- *The law reports are replete with cases which were thought to be hopeless before investigation but were decided the other way after the court allowed the matter to be tried: **Medcalf v. Weatherill and Anor** [2002] UKHL 27 (27 June 2002), at 11, per Lord Steyn*
- *Purpose of indemnity costs is not penal but compensatory so awarded 'where one party causes another to incur legal costs by misusing the process to delay or to defer the trial and payment of sums properly due'; the court 'ought to ensure so far as it can that the sums eventually recovered by a plaintiff are not depleted by irrecoverable legal costs': **Willis v. Redbridge Health Authority**, at 1232, per Beldam, LJ*
- *Actions of a Defendant in defending an action, albeit being determined by the trial judge as 'wrong and without any legal justification, the result of its own careless actions', do 'not approach the degree of impropriety that needs to be*

*established to justify indemnity costs ... [R]egardless of how sloppy the [Defendant] might well have been in lending as much as $70,000 to [a Plaintiff], they had every justification for defending this action ... The judge was wrong to award [indemnity costs] in these circumstances. He should have awarded costs on the ordinary party and party scale': **Credit Corporation (Fiji) Limited v. Wasal Khan and Mohd Nasir Khan** (Civil Appeal No. ABU0040 of 2006S; High Court Civil Action No. HBC0344 of 1998, 8 July 2008), per Pathik, Khan and Bruce, JJA, at 11*

***Defining 'Improper', 'Unreasonable' or 'Negligent' Conduct in Legal Proceedings as Guide to Indemnity Costs Awards:*** *Cases where 'wasted costs' rules or 'useless costs' principles have been applied against solicitors where their conduct in proceedings has led to delay and/or abuse of process can provide some assistance in determining whether conduct in proceedings generally may be such as to warrant the award of indemnity costs. These cases specifically relate to solicitors' conduct rather than directly touching upon the indemnity costs question; nonetheless the analysis or findings as to what constitutes conduct warranting an award of costs can be helpful. See for example:*

- ***Ridehalgh v. Horsefield and Anor*** *[1994] Ch 205*
- ***Medcalf v. Weatherill and Anor*** *[2002] UKHL 27 (27 June 2002)*
- ***Harley v. McDonald*** *[2001] 2 AC 678*
- ***Kemajuan Flora SDN Bh v. Public Bank BHD &Anor*** *(High Court Malaya, Melaka, Civil Suit No. 22-81-2001, 25 January 2006)*
- ***Ma So So Josephine v. Chin Yuk Lun Francis and Chan Mee Yee*** *(FACV No. 15 of 2003, Court of Final Appeal Hong Kong Special Administrative Region, Final Appeal No. 15 of 2003 (Civil)(On Appeal from CACV No. 382 of 2002, 16 September 2004)*
- ***SZABF v. Minister for Immigration (No. 2)*** *[2003] FMCA 178*
- ***Heffernan v. Byrne*** *[2008] FJCA 7; ABU0027.2008 (29 May 2008)*

*Some of the matters referred to include:*

- *At the hearing stage, the making of or persisting in allegations made by one party against another, unsupported by admissible evidence 'since if there is not admissible evidence to support the allegation the court cannot be invited to find that it has been proved, and if the court cannot be invited to find that the allegation has been proved the allegation should not be made or should be withdrawn: **Medcalf v. Weatherill and Anor**, at 8, per Lord Bingham*

- *At the preparatory stage, in relation to such allegations – not necessarily having admissible evidence but there should be 'material of such a character as to lead responsible counsel to conclude that serious allegations could properly be based upon it: **Medcalf v. Weatherill and Anor**, at 8, per Lord Bingham*

- *Failures to appear, conduct which leads to an otherwise avoidable step in the proceedings or the prolongation of a hearing by gross repetition or extreme slowness in the presentation of evidence or argument are typical examples of wasting the time of the court or an abuse of its processes resulting in excessive or unnecessary costs to litigants:* ***Harley v. McDonald****, at 703, Para* ***[50]*** *(English Privy Council)*
- *Starting an action knowing it to be false is an abuse of process and may also involve knowingly attempting to mislead the court:* ***Ma So So Josephine v. Chin Yuk Lun Francis and Chan Mee Yee*** *(FACV No. 15 of 2003, Court of Final Appeal Hong Kong Special Administrative Region, Final Appeal No. 15 of 2003 (Civil)(On Appeal from CACV No. 382 of 2002, 16 September 2004), at Para* ***[43]****, per Ribeiro, PJ (Li, CJ, Bokhary and Chan, PJ and Richardson, NPJ concurring)*
- *Lending assistance to proceedings which are an abuse of the process of the court – using litigious procedures for purposes for which they were not intended, 'as by issuing or pursuing proceedings for reasons unconnected with success in the litigation or pursuing a case known to be dishonest' or evading rules intended to safeguard the interests of justice 'as by knowingly failing to make full disclosure on ex parte application[s] or knowingly conniving at incomplete disclose rue of documents':* ***Ridehalgh v. Horsefield*** *[1994] Ch 205, at 234, per Bingham, MR*
- *Initiating or continuing multiple proceedings which amount to abuse of process:* ***Heffernan v. Byrne*** *[2008] FJCA 7; ABU0027.2008 (29 May 2008), per Hickie, J.*

***Specific Circumstances of Grant/Denial Indemnity Costs:*** *Specific instances supporting or denying the award of indemnity costs include:*

- *Indemnity costs follow per a '****Calderbank*** *offer', that is, where a party makes an offer or offers prior to trial, which is/are refused, and that party succeeds at trial on a basis which is better than the prior offer:* ***Calderbank v. Calderbank****[1975] 3 WLR 586*
- *However, no indemnity costs awarded where* ***Calderbank*** *letter contains no element of compromise, making it not unreasonable for the party not to accept the offer. The question is '... whether the offeree's failure to accept the offer, in all the circumstances, warrants departure from the ordinary rule as to costs ...':* ***SMEC Testing Services Pty Ltd v. Campbelltown City Council*** *[2000] NSWCA 323, at Para[37], per Giles, JA Hence, if the* offer is not a genuine offer of compromise and/or there is no appropriate opportunity provided to consider and deal with it, then no indemnity costs follow: **Richard Shorten v. David Hurst Constructions P/L; D. Hurst Constructions v. RW Shorten** [2008] Adj LR 06/17 (17 June 2008), per Einstein, J. (NSW Supreme Court, Equity Division T&C List);

**Leichhardt Municipal Council v. Green** [2004] NSWCA 341, at Paras**[21]-24], [36]**, per Santow, JA, Stein, JA (concurring); **Herning v. GWS Machinery Pty Ltd (No. 2)** [2005] NSWCA 375, at Paras**[4]-[5]**, per Handley, Beazley and Basten, JJA; **Elite Protective Personnel v. Salmon** [2007] NSWCA 322, at Para **[99]; Donnelly v. Edelsten**[1994] FCA 992; [1994] 49 FCR 384, at 396

- *Indemnity costs awarded:*
  - *upon a winding-up petition's being presented on a debt known to the petitioner to be genuinely disputed on substantial grounds;*
  - *the clearly established law being that a winding up order will not be granted in such circumstances, meaning that the petitioner 'had no chance of successfully obtaining a winding up order';*
  - *where in these circumstances the filing of the petition 'constituted a deliberate tactical manipulation of the winding up process by the [petitioner, the State Government Insurance Commission 'SGIC'] for the purposes of bringing very substantial pressure to bear' on Bond Corp Holdings 'BCH';*
  - *this in the circumstances meant that the 'filing of the petition was an abuse of process of the court in the true sense of that expression';*
  - *the discretion to stay the petition should not be exercised because this would 'cause BCH serious harm' meaning it would be 'extremely difficult for BCH to be able to conduct its business normally if the petition [were] not dismissed': citing* ***Re Lympne Investments*** *[1972] 1 WLR 523, at 527, per Megarry, J.; also* ***Re Glenbawn Park Pty Ltd****[1977] 2 ACLR 288, at 294, per Yeldham, J.*
  - *an abuse of process 'having been established in the circumstances outlined, justice requires the award of solicitor and client, or, rather, "indemnity" costs' so that 'the SGIC should be ordered to pay all the costs incurred by BCH except insofar as they are of an unreasonable amount or have been unreasonably incurred, so that, subject to [these] exceptions, BCH be completely indemnified by the SGIC for its costs', citing* ***Foundation Selected Meats (Sales) Pty Ltd v. International Produce Merchants*** *[1988] FCA 202; (1988) 81 ALR 397, at 410, per Woodward J.:* ***Re Bond Corp Holdings Ltd*** *(1990) 1 ACSER 350, at 13, per Ipp, J.*

- *Indemnity costs are appropriate where an applicant (in an unfair dismissal):*

- *'insists' over a respondents' objections that an application should proceed to trial rather than await the outcome of other possible litigation (including a police investigation);*
- *fails repeatedly, despite allowances, to meet deadlines for lodgment of a witness statement;*
- *fails to advise her lawyers of her whereabouts so denying them of the ability to inform the court of reasons for seeking an unqualified adjournment less than a week prior to trial;*
- *fails to comply with directions to provide a current address, consult a medical specialist and obtain a report of fitness to attend the trial;*
- *fails to appear at the final hearing when on notice that the application will be dismissed in event of such failure:* ***Nicole Pender v. Specialist Solutions Pty Ltd*** *(No. B599 of 2004. 17 May 2005), per Bloomfield, Commissioner*

- *Indemnity costs denied as against a Plaintiff who discontinued a claim for a permanent injunction to restrain a Defendant's industrial action, where the Defendant had filed a chamber summons seeking to have the Plaintiff's claim struck out as an abuse of process:* ***Cooperative Bulk Handling Ltd v. Australian Manufacturing Workers Union (WA Branch)*** *(Unreported, WASC, Lib. No. 970190, 30 April 1997), per Wheeler, J.*

- *Indemnity costs cannot be awarded in a criminal appeal, albeit 'in criminal appeals, as in civil cases, unreasonable conduct by the unsuccessful party might increase a usual award':* ***Sayed Mukhtar Shah v. Elizabeth Rice and Ors*** *(Crim Appeal No. AAU0007 of 1997S, High Ct Crim Action No. HAA02 of 1997, 12 November 1999), at 4, per Sir Moti Tikaram, P., Casey and Barker, JJA*

- *Indemnity costs awarded then reversed on appeal where solicitor held liable for costs (under a 'wasted costs' order) in initiating action for clients where solicitor taken to have known that the basis of the clients' action was wholly false"*

I observed that the oral and written submissions of Counsel for the Plaintiff has not addressed why *'indemnity costs'* should be awarded **in the current proceedings for vacant possession.**

The Court has not been pointed to any "*reprehensible conduct*" in relation to the **current proceedings for vacant possession**. Indeed, as was set out by in ***Carvill v HM Inspector of Taxes*** (Unreported, United Kingdom Special Commissioners of Income Tax, 23 March 2005,Stephen Oliver QC and Edward Sadler)(Bailii:[2005]UKSPCSPC00468,http://www.bailii.org/cgibin/markup.cgi?doc

=/uk/cases/UKSC/2005/SPC00468.html),"*reprehensible conduct*" requires two separate considerations (at paragraph 11):

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

**I have not found, any evidence of "reprehensible conduct" by the Defendant in relation to the present proceedings before me.**

In my view, the Defendant has done no more than to exercise his legal right to contest the Plaintiff's Summons for vacant possession. This simply does not approach the degree of impropriety that needs to be established to justify indemnity costs. The Defendant is not guilty of any conduct deserving of condemnation as disgraceful or as an abuse of process of the court and ought not to be penalised by having to pay indemnity costs.

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

In **Ranjay Shandill v Public Service Commission** [Civil Jurisdiction Judicial Review No:- 004 of 1996] Pathik J held;

> *"[A party] cannot be penalised [for] exercising its right to dispute matters but in very special cases where a party is found to have behaved disgracefully or where such behaviour is deserving of moral condemnation, then indemnity costs may be awarded as between the losing and winning parties."*

In **Quancorp PVT Ltd &0020Anor v. MacDonald &Ors** [1999] WASC 101, Wheeler J held;

> *".... 'hopeless' too readily so as to support an award of indemnity costs, bearing in mind that a party 'should not be discouraged, by the prospect of an unusual costs order, from persisting in an action where its success is not certain' for 'uncertainty is' inherent in many areas of law' and the law changes' with changing circumstances"*

Furthermore, is it a correct exercise of the Court's discretion to direct the Defendant to pay costs on an indemnity basis to the Plaintiff because the Plaintiff had undergone hardships during the present proceedings for vacant possession?

The answer to the aforesaid question is in the negative which I base on the following judicial decisions;

- **Public Service Commission v Naiveli Fiji Court of Appeal decision, No: ABU 0052 11/955, (1996) FJCA 3**

- **Thomson v Swan Hunter and Wigham Richardson Ltd, (1954) ,( 2) AER 859**

- **Bowen Jones v Bowen Jones (1986) 3 AER 163**

In "**Public Service Commission v Naiveli**" ;(*supra*),The Fiji Court of Appeal held;

> ***"However, neither considerations of hardship to the successful party nor the over optimism of an unsuccessful opponent would by themselves justify an award beyond party and party costs.*** *But additional costs may be called for if there has been reprehensible conduct by the party liable – see the examples discussed in Thomson v. Swan Hunter and Wigham Richardson Ltd [1954] 2 All ER 859 and Bowen-Jones v. Bowen Jones [1986] 3 All ER 163."*
>
> (Emphasis added)

On the strength of the authority in the aforementioned three (03) cases, I venture to say beyond a per-adventure that neither considerations of hardship to the Plaintiff nor the over optimism of the unsuccessful Defendant would by themselves justify an award beyond party and party costs.

## (E) CONCLUSION

Having had the benefit of oral submissions for which I am most grateful and after having perused the affidavits, written submissions and the pleadings, doing the best that I can on the material that is available to me, I have no doubt personally and I am clearly of the opinion that the Defendant has failed to show cause to remain in possession as required under Section 172 of the Land Transfer Act.

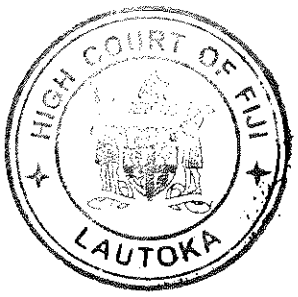
In these circumstances, I am driven to the conclusion that the Plaintiff is entitled to an order as prayed in Summons for immediate vacant possession.

## (F) ORDERS

(1) The Defendant is to deliver immediate vacant possession of the land comprised in **Native Lease No- 25341 Lot 01 ND 3015 Nawaka, province of Ba, area of 14 acres, 1 rood and 32 perches.**

(2) The Plaintiff's application for indemnity costs is refused.

(3) The Defendant is to pay costs of $1000.00 (summarily assessed) to the Plaintiff within 14 days hereof.




24/2/2017

.....

**Jude Nanayakkara**
**Master**

**At Lautoka**
**24th February 2017**