

**IN THE HIGH COURT OF FIJI**  
**NORTHERN DIVISION**  
**AT LABASA**  
**CIVIL JURISDICTION**

Civil Action No. HBC 73 of 2025

In the Matter of an Application by the Plaintiff under section 169 of the Land Transfer Act.

**BETWEEN:**

**ABDUL MUNAF**  
**PLAINTIFF**

**AND:**

**TAZIM KHAN**  
**DEFENDANT**

**BEFORE:**

Acting Master L. K. Wickramasekara

**COUNSELS:**

John Prasad Lawyers for the Plaintiff  
Jiten Reddy Lawyers for the Defendant

**Date of Hearing:**

By way of Written Submissions

**Date of Ruling:**

01<sup>st</sup> April 2025

# JUDGMENT

01. The Plaintiff brought this Originating Summons against the Defendant seeking an order for vacant possession of the premises located on 'Native Lease No. 29041, known as "Vatia (PT of) Formerly (PT of) Bal M 1915 Showing Lot 3 on Plan No. SO 5180 containing an area of 1.4015 HA, situated in the province of Macuata in the District of Labasa' along with the costs of this action. The Originating Summons has been filed pursuant to section 169 of the Land Transfer Act 1971 on 12/12/2024.
02. Pursuant to the Affidavit in Support as filed by the Plaintiff on 12/12/2024, it is submitted that the Plaintiff is the registered proprietor of the said land, and a duly certified copy of the Native Lease No. 29041 has been annexed to the affidavit marked as 'A'.
03. The Plaintiff has claimed that the Defendant is occupying the said land on a verbal agreement between the Defendant and the Plaintiff's late father. The date from which the Defendant was in occupation of the said land has not been stated in the Affidavit.
04. It is further submitted, that the Plaintiff had become the registered lessee of the said land on 07/07/2009 and the Defendant was requested by way of a letter by the Plaintiff to express his interest to buy the said land on 30/09/2024, a copy of which is annexed to the Affidavit marked as 'B'.
05. The Plaintiff has further claimed that the Defendant failed to respond to this letter and as such the Plaintiff issued a Notice to Vacate, a copy of which is annexed at 'C'.
06. The Defendant, as per the Plaintiff has no lawful right to continue the occupation of the subject land and thus the Plaintiff seeks orders in terms of his Originating Summons along with a cost of \$ 4000.00.
07. The Defendant filed an Affidavit in Opposition as sworn by him on 11/02/2025. As per this Affidavit, the Defendant claims that the Plaintiff's late father somewhere in December 2000, requested him to move to Siberia, Labasa and to work for the company owned by the late father of the Plaintiff.
08. Accordingly, it is claimed that the Defendant moved to Siberia and the Plaintiff's late father had requested him to build a house on a vacant piece of land (which is, in fact, the subject land in this matter), for the Defendant to reside with his family and to work for the Plaintiff's late father. As per this agreement, the Defendant claims that the Defendant was to reside in the said land indefinitely.

09. The Defendant further submits that since December 2000, he occupied only a half Acre of land and with assistance from the late father of the Plaintiff build a house and spent a substantial amount of money in developing the said land and is in continuous occupation of this land for over 20 years.
10. The Defendant further claims that whilst working for the company owned by the late father of the Plaintiff, on 06/11/2007, he had met with an accident and thereafter could not work as a manual labourer. He claims that it was after this accident that the Plaintiff started making demands to pay for electricity and other expenses for the said land.
11. It is also submitted that the Plaintiff was fully aware of the agreement between the Defendant and the Plaintiff's late father regarding the said land and that though the Defendant responded to the Plaintiff's offer regarding the purchase of the said land, that didn't work put as the land was given free to the Defendant.
12. The Defendant further claims in his Affidavit that the Plaintiff has failed to disclose material facts relevant to this dispute as per the agreement between the Defendant and the Plaintiff's late father for the Defendant to occupy the said land indefinitely, and all the improvements made to the said land by the Defendant whilst bearing substantial costs.
13. The Plaintiff in reply to the Affidavit in Opposition filed an Affidavit in Reply on 12/02/2025. As per this Affidavit, the Plaintiff has admitted that pursuant to the agreement between the Defendant and the Plaintiff's late father, the Defendant was permitted to reside on the subject land in lieu of the Defendant's employment with the Plaintiff's late father's company, Karim's Earthmoving, an entity which is no longer in existence.
14. More importantly, the Plaintiff, at averment number 6 of the said Affidavit, submits as follows,

*"6. **That** as to the contents of paragraphs 7 to 20 of the said Affidavit, I say as follows,*

- a. **The said land was acquired by me in 2009. My late father did not own the land prior to the lease being issued under my name in the year 2009.***  
(Emphasis Added)
- b. Any agreement prior to the lease being freshly issued to me in 2009 is irrelevant to these proceedings.*
- c. The Defendant was given various verbal notices to move out of the property however he refused to do the same.*

*d. I deny being present when any agreement was made between my father and the Defendant.”*

15. As per the directions of the Court, both parties have filed comprehensive written submissions on the matter and agreed to have the Court rule upon the application on written submissions.
16. The counsel for the Plaintiff in his written submissions claims that besides any oral agreement between the Defendant, and the late father of the Plaintiff, the Defendant’s occupation of the subject land is illegal as pursuant to Sec. 12 of the Native Land Trust Act, no consent was obtained from the Native Land Trust Board for the Defendant’s occupation of the said land.
17. Counsel for the Plaintiff has also relied on Sec. 59 (d) of the Indemnity Guarantee and Bailment Act to advance the argument that any oral agreement on land is not valid in an action, unless such an agreement is in writing and signed by the parties.
18. Counsel for the Defendant, on the other hand, has argued that the Defendant has a valid defence against the Plaintiff’s Summons and that the Defendant’s occupation of the subject land is valid and legitimate on three main grounds,
  - I. That the Defendants occupation is valid under the provisions of Sec. 78 of the Land Transfer Act and thus it must be construed as ‘adverse possession’, since the Plaintiff and/or his late father had no claim over the subject land as they were not the registered lessees of the said land by the time the defendant came into occupation of the said land in the late 2000.
  - II. That the Plaintiff had committed fraud by obtaining a registered lease over the whole of the subject land whilst the Plaintiff was fully aware that the Defendant was in occupation of part of the said land. The Defendant further claims that the Plaintiff has obtained an agricultural lease over the land whereas the Defendant has built and was living at a residential house in part of the said leased land.
  - III. That the Defendant’s occupation of the subject land is also protected under the equitable right of ‘*Rights in Personam*’.
19. I shall now move to consider the relevant legal provisions regarding an application for vacant possession land. Summons under the Land Transfer Act for vacant possession, which is known as “169 procedure”, is a speedy procedure for obtaining possession when the occupier fails to show cause why an order should not be made (**Jamnadas v Honson Ltd** [1985] 31 FLR 62 at page 65).

20. The *Locus Standi* of a person who can invoke the jurisdiction of this court under this procedure is set out in section 169. Three people named in that section have *locus* to invoke the jurisdiction of this court under this procedure.
21. Section 170 requires the summons to give full description of the subject property and to serve the summons on the defendant to appear at the court on a day not earlier than sixteen days after the service of the summons.
22. Sections 171 and 172 provide for the two powers that the court may exercise in dealing with the applications under section 169. The consent of the Director of Land is not necessary as settled by His Lordship the Chief Justice Anthony Gates (as His Lordship then was) in **Prasad v Chand** [2001] FJ Law Rp 31; [2001] 1 FLR 164 (30 April 2001).
23. The burden to satisfy the court on the fulfillment of the requirements, under sections 169 and 170, is on the Plaintiff and once this burden is discharged, it then shifts to the Defendant to show his or her right to possess the land.
24. When the Plaintiff satisfactorily discharges its burden under the Act then the duty is shifted to the Defendants to show-cause why the vacant possession of the properties should not be handed over to the Plaintiff. This, however, does not mean that the Defendants are to produce any final or incontestable proof of their right to remain in the property, but to adduce some tangible evidence establishing a right or supporting an arguable case for their right to remain in possession of the property in dispute.
25. The above position in the law has been well settled in the Supreme Court case of **Morris Hedstrom Limited –v- Liaquat Ali** CA No: 153/87. Though the Defendant in such a situation may fail to satisfy the Court of a right to remain in possession of the property, pursuant to the decision in **Morris Hedstrom Limited –v- Liaquat Ali** (Supra); the Court may still dismiss the Summons if it decides that an open court hearing is required (**Ali v Jalil** [1982] 28 FLR 31) to decide the serious questions between the parties.
26. When exercising the Court's power, granting possession to the Plaintiff or dismissing the Summons, what matters is how the said burden is being discharged by the respective party to the proceedings. In any event, dismissal of a Summons shall not prejudice the right of a Plaintiff to initiate any other proceedings to which he or she may be otherwise entitled against any Defendant.
27. The *locus* of the Plaintiff in this matter is not disputed by the Defendant, in the sense, that the Plaintiffs name appears as the registered lessee of the subject land as per the Native Lease No. 29041. There is no dispute over the description of the subject property either.

28. As such the Defendant were given sufficient time to provide a valid defence against this Summons. As such in the strict sense, the onus is now on the Defendant to show some tangible evidence to remain in possession of the premises, and/or to satisfy the Court that an open court hearing is necessary to adjudicate the complicated issues in this matter.
29. In view of the affidavit evidence as submitted by the Defendant in his affidavit in opposition, and as highlighted in the written submissions for the Defendant, the Defendant has clearly resorted to an allegation of fraud against the Plaintiff's obtaining an agricultural lease over the full subject land including the half acre of land on which the Defendant's dwelling was situated and where the Defendant was residing with his family since December 2000.
30. The Plaintiff in his affidavit evidence has not contradicted the fact that the Defendant had built a house and had been occupying the same with his family since late 2000. The Plaintiff had, in his affidavit evidence, further admitted the fact that the Defendant had come into occupation of the said portion of the land as a result of a verbal agreement between the Defendant and the Plaintiff's late father. He has also admitted the fact that the portion of land the Defendant had built his house and was in possession of was, in fact, not being leased by his late father or by himself, unless and until the Plaintiff managed to obtain the agricultural lease from the Native Land Trust Board in 2009 over the subject land.
31. It is therefore evident that, whilst being fully aware of the Defendant's occupation of part of the subject land, the Plaintiff had obtained an agricultural lease over the full portion of the land. There is no valid explanation in the affidavit evidence before this Court as to how the Plaintiff managed to obtain an agricultural lease over the subject land when part of it was occupied by the Defendant with his family and that the Defendant had built a residential house on the same. The allegation of fraud therefore has a *prima facie* basis and in Court's considered view, requires proper evidence brought before an appropriate legal tribunal to be duly adjudicated upon.
32. I shall now consider the Defendant's reliance on Section 78 of the Land Transfer Act which provides for the adverse possession. Section 78 of the Land transfer Act reads as follows,

*"78(1) Where—*

*(a) Any person is in possession of any land subject to the provisions of this Act, for which a certificate of title has been issued or a State grant registered under the provisions of this Act; and*

*(b) such possession has been continuous for a period of not less than 20 years, and is such that he or she would have been entitled to an estate in fee simple in the land on the ground of possession if the land had not been subject to the*

*provisions of this Act, he or she may apply to the Registrar in the manner hereinafter provided for an order vesting the land in him or her for an estate in fee simple or for such other estate or interest as may be claimed by him or her, provided that, unless such person has been in possession of such land for a continuous period if not less than 30 years, no such application may be made in respect of any land or any part thereof, if the registered proprietor of, or any person appearing by the register to be entitled to the benefit of, any estate or interest therein is under any disability.*

(2) *For the purposes of this Part, possession of any land by any other person through or under whom any person making application under the provisions of this section (hereinafter in this Part referred to as “the applicant”) claims, shall be deemed to be possession by the applicant.*

33. In carefully considering the provisions in the above section, it can be safely construed that if one looks to the possession of the occupier and finds that his occupation and/or his right to occupation is derived from the owner in the form of permission or agreement or grant, it shall not be adverse. However, if it is not so derived, then it is adverse.

34. Adverse possession must be open, not secret; peaceful, not by force; and adverse, not by consent of the true owner: **Sir Nigel Bowen CJ** in *Mulcahy v Curramore Pty Ltd [1974] 2 N.S.W.L.R. 464 at 475.*

35. Romer LJ in *Moses v Lovegrove [1952] 2 Q.B 533* states at 544,

*“It seems to me that one can, in addition to looking at the position and rights of the owner, legitimately look also at the position of the occupier for the purpose of seeing whether his occupation is adverse. In my opinion, if one looks to the position of the occupier and finds that his occupation, his right to occupation, is derived from the owner in the form of permission or agreement or grant, it is not adverse, but if it is not so derived, then it is adverse, even if the owner is, by legislation, prevented from bringing ejectment proceedings”.*

36. **Slade LJ** in *Buckinghamshire County Council v Moran [1989] 2 ALL E.R. 225 at 232-233* stated,

*“Possession is never ‘adverse’ within the meaning of the Act if it enjoyed under a lawful title. If, therefore, a person occupies or uses land by license of the owner with the paper title and his license has not been duly determined, he cannot be treated as having been in ‘adverse possession’ as against the owner with the paper title”.*

37. Pursuant to the above understanding of the provisions in Section 78 of the Land Transfer Act and the decided case authorities as cited above, the possession of the Defendant in this case could reasonably be argued as adverse since the Plaintiff nor his late father had

any title or lease over the said portion of land when the Defendant came into occupation of the same. As such it could thus be argued that the Defendant's occupation was open and not as of consent or license from the Plaintiff and/or his late father.

38. The Defendant has also been occupying the said portion of the land for over 24 years. Even upon the Plaintiff acquiring an agricultural lease over the said land there appears to be no consent or license expressly granted to the Defendant by the Plaintiff to occupy the said land. Moreover, it is evident that although the Plaintiff had been demanding the Defendant pay for utilities and/or to buy the said portion of the land for monetary consideration, the Defendant had been occupying the land in adverse to such demands for over 15 years from the time the Plaintiff obtained the agricultural lease over the said land in July 2009.
39. In consideration of the above facts and circumstances, I find that it is arguable that the Defendant's possession could be considered adverse pursuant to Sec. 78 of the Land Transfer Act. This position too, therefore, requires proper evidence brought before an appropriate legal tribunal to be duly adjudicated upon.
40. Lastly, I shall consider the claim by the Defendant for occupation of the subject land on equitable grounds, specifically, pursuant to the principle of '*Rights in personam*'.
41. The equitable right over a property for a long time was believed to be either on promissory estoppel or on proprietary estoppel. *Snell's Principles of Equity* (28th Edition 1982) at page 556 states the rule of promissory estoppel as follows.

*"Where by his words or conduct one party to a transaction freely makes to the other an unambiguous promise or assurance which is intended to affect the legal relations between them (whether contractual or otherwise) a, and before it is withdrawn, the other party acts upon it, altering this position to his detriment, the party making the promise or assurance will not be permitted to act inconsistently with it. It is essential that the representor knows that the other party will act on his statement. Yet the conduct of the party need not derive its origin only from the encouragement of representation of the first; the question is whether it was influenced by such encouragement or representation"*. (Emphasis added)
42. Accordingly, the conditions for the promissory estoppel can be identified as follows,
  - (a) word or conduct which can freely make an unambiguous promise,
  - (b) intention to affect the legal relations and

(c) other party's action altering position before withdrawal of promise.

43. The other equitable remedy is the proprietary estoppel. *Snell's Principles of Equity* (28th Edition 1982) at page 558, expounds the rule on proprietary estoppel. It states:

*“Proprietary estoppel 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 the property. Proprietary estoppel is older than promissory estoppel. It is permanent in its effect, and it is also capable of operating positively so as to confer a right of action. The term "estoppel", though often used, is thus not altogether appropriate. Yet the equity is based on estoppel in that one is encouraged to act to his detriment by the representation or encouragement of another so that it would be unconscionable for another to insist on his strict legal rights”.*

44. At pages 560 and 561 the conditions for the proprietary estoppel have been explained with the illustrations as follows.

- (1) *Expenditure.* In many cases A has spent money on improving property which in fact belongs to O, as by building a house on O's land, or by doing repairs to O's house and paying mortgage instalments and other outgoings, or by contributing to a joint venture to be carried out on O's land, or by paying premiums required to maintain O's life insurance policy.
- (b) *Expectation or belief.* A must have acted in the belief either that he already owned sufficient interest in the property to justify the expenditure or that he would obtain such an interest. But if A has no such belief and improves land in which he knows he has no interest or merely the interest of a tenant (or licensee), he has no equity in respect of his expenditure.
- (c) *Encouragement.* A's belief must have been encouraged by O or his agent or predecessor in title. This may be done actively, as where a father persuades his son to build a bungalow on the father's land, or a mother assures her daughter that she will have the family home for her life, or a man assures his former mistress that the house in which they lived together is hers.
- (d) *No bar to the equity.* No equity will arise if to enforce the right claimed would contravene some statute or prevent the exercise of a statutory discretion or prevent or excuse the performance of a statutory duty.

45. The Plaintiff in his Affidavit in Reply has not denied or challenged the averments made by the Defendant in respect of the building of the house or the occupation of the said house by the Defendant. But the absence of the fact that the current owner had made any promise or encouragement to the Defendant in that regard, which would have given rise for operation of a promissory or proprietary estoppel, may limit the application of such equitable right in this matter.
46. However, pursuant to the recent Supreme Court decision in *Raj Datt v Sunil Datt & Others; Civil Petition No. CBV 0008 of 2020 (30 June 2023)*, as relied upon by the counsel for the Defendant, the right of equity pursuant to “*rights in personam*” has been recognized by their Lordships as an exception to indefeasibility of the title. Their Lordships in the Supreme Court held as follows.

“*Rights in personam*”

*[48] In the absence of sufficient evidence of fraud on the part of the First Respondent or on the part of his mother Sheela Wati before him the First Respondent’s title to land lease 14796 may be defeated by the “rights in personam” exception to indefeasibility. In Wati v Kumar (supra) Keith J at para 45 acknowledged that section 39 of the Land Transfer Act did not defeat the creation of a beneficial interest in equity. Keith J continued in paragraph 45:*

*“In brief the ‘rights in personam exception’ arises where (a) the registered proprietor knew of the factor which gave rise to someone else having an equitable interest in the land and (b) he proceeded to register his title to the land despite that in circumstances in which it would be unconscionable for him to retain his registered interest in the land.”*

47. Further, their Lordships went on to hold in this case that considering the knowledge of the current owner of the rights of the occupier, the title obtained by the current owner is not indefeasible.

*“[49] Considering the facts that were not disputed and the totality of the evidence adduced at the trial by the Petitioner I have concluded that Sheela Wati and Sunil Datt were aware of the facts that gave rise to the Petitioner’s equitable interest in a one quarter share of lease 10093. They were aware of the existence of the Deed and its terms. They were aware of the arrangements that existed upon relocation. Upon the death of Rudra Datt, they had indicated that they had no objection to the Petitioner continuing to reside on the property. That remained the position until August 2002 when, having acquired a title to land lease 14796 following subdivision, Sunil Datt wrote to Raj Datt giving notice that the Petitioner was to vacate the quarter acre that he occupied and upon which (you) “have built your residence.” **It is in that context that I have concluded that it would be unconscionable for Sunil Datt to retain the legal title to all the land in lease 14796.***

*In my opinion Sunil Datt's title to land lease 14796 is not indefeasible.*" (Emphasis added)

48. The Defendant has claimed that he had been living in the said portion of land since the year 2000 on invitation and an offer made to him by the late father of the Plaintiff in view of the Defendant working for the company owned by the Plaintiff's late father. As per the Defendant, this offer was made in lieu of the offer of employment made by the late father of the Plaintiff. He also has referred to an oral agreement between him and the late father of the Plaintiff, which the current Plaintiff has not denied in its entirety.
49. The Defendant has also submitted that he has built and renovated the current dwelling on the land on his own account and has submitted alleged expenses in proof. He also claims that pursuant to the agreement between the Defendant and the late father of the Plaintiff, he was to occupy the said land indefinitely. These facts, however, are disputed by the Plaintiff. The Plaintiff has also claimed that the Defendant is not allowed to rely on a verbal agreement regarding the land pursuant to Sec. 59 (d) of the Indemnity Guarantee and Bailment Act. This, in fact, is a legal issue that needs to be argued and adjudicated before a proper legal tribunal and cannot be dealt with by way of affidavit evidence.
50. Pursuant to the above considerations by the Court, it is my considered view that even the issue of '*rights in personam*' with regard to the current matter at hand should need proper adjudication before an appropriate legal tribunal by way of *viva voce* evidence being led to that effect at a full-blown trial.
51. All in all, it is the view of this court that the grounds relied upon by the Defendant to show cause on his right to occupy the subject property, become issues that need to be thoroughly examined through proper evidence at a trial.
52. In view of the above discussion and findings of the Court, it is my considered view that there are more complicated facts that need to be determined in the dispute between the Plaintiff and the Defendant in this matter, which fortifies the view that an open court hearing is essential in this matter to duly adjudicate upon the rights of the parties. The serious questions that exist between the parties in this case are not at all possible to be determined through affidavit evidence.
53. It is well settled in law that complicated facts cannot be investigated and determined on the affidavits only in a summary procedure (*Lal v Schultz* [1972] FJLawRp 27; [1972] 18 FLR 152 (30 October 1972); *Devi v Sharma* [1985] FijiLawRp 3; [1985] 31 FLR 130 (1 January 1985); *Wati v Vinod* [2000] FijiLawRp 56; [2000] 1 FLR 263 (20 October 2000)).
54. Having thoroughly examined the affidavit evidence before this Court and considering the relevant legal principles and case authorities, it is the conclusion of this Court that there exist many complicated issues between the parties in this matter that need to be duly determined before an appropriate legal tribunal, prior to ordering one party to surrender

the vacant possession of the subject land to the other. These issues, in the Court's considered view, cannot adequately be investigated and dealt with by way of a summary proceeding in Chambers. A trial proper is, therefore, necessary in this case for adjudicating all the complicated issues, as it is not safe to determine this matter on untested affidavit evidence summarily before this Court.

55. In consequence, the following orders are made.

1. The Originating Summons filed by the Plaintiff on 12/12/2024 is refused and accordingly dismissed and struck out. The matter accordingly stands wholly dismissed.
2. The parties shall bear their own costs.

At Labasa  
01/04/2025



  
L. K. Wickramasekara,  
Acting Master of the High Court.