

3. The application was heard on 11 November 2024 where both counsels made oral submissions and sought time to file written submissions. The Plaintiff filed its submissions on 22 November 2024. The Defendant however only filed submissions in reply on 17 February 2025.

Preliminary objection

4. During the hearing of this matter, counsel for the Defendant raised a preliminary issue that the Affidavit in Support of the Plaintiff was witnessed by a legal practitioner, who was employed by the Plaintiff's counsel, and as such the said Affidavit should be struck out.
5. This Affidavit in Support was witnessed by the said legal practitioner on 17 October 2022.
6. The Defendant's Affidavit in Opposition has annexed a list of "*Legal practitioners with valid Practising Certificate as at 24th April 2023 for the period 1st March 2023 to 29th February 2024*". The source of this list is unknown. The legal practitioner's name is on the said list as employed by the Plaintiff's counsel, which would be for the period 1 March 2023 to 29 February 2024.
7. The Plaintiff in their Affidavit in Reply disputed this and stated that the said legal practitioner was unemployed in 2022 and joined the Plaintiff's counsel's firm in 2023.
8. There has been no evidence put before this Court to confirm that the legal practitioner was in fact employed by the Plaintiff's counsel at the time of witnessing the Plaintiff's Affidavit in Support.
9. Therefore, I dismiss the preliminary objection raised by the Defendant's counsel.

Relevant law and analysis

10. The relevant provisions of the Land Transfer Act 1971 are as follows.

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 arrear for such period as may be provided in the lease and, in the absence of any such provision therein, when the lessee or tenant is in arrear for one month, whether there be or be not sufficient distress found on the premises to countervail such rent and whether or not any previous demand has been made for the rent;

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

Particulars to be stated in summons

170. *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.*

Order for possession

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.*

Dismissal of summons

172. *If the person summoned appears he or she may show cause why he or she refuses to give possession of such land and, if he or she 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 or she may make any order and impose any terms he or she 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 or she 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.*

11. The process outlined in section 169 of the LTA is a summary procedure designed to swiftly return possession of a property to a registered proprietor when an occupant fails to demonstrate a lawful right to possess that specific property (see ***Jamnadas v Honson Ltd*** [1985] 31 FLR 62 (at page 65)).
12. The onus lies with the plaintiff to convince the court that the requirements under sections 169 and 170 of the LTA have been met. Once this burden has been met, it shifts to the defendant to demonstrate their right to possess the land. A Court's decision to either grant possession to the plaintiff or dismiss the summons depends on how effectively each party discharges their respective burden in the proceedings.
13. In such proceedings, a defendant's obligation is not to present conclusive proof of their right to stay on the property, but rather to provide some evidence establishing a right or supporting a plausible case for their right to remain in possession of the disputed property. This principle was

established by the Supreme Court in the well-known case of ***Morris Hedstrom Limited v. Liaquat Ali*** CA No: 153/87.

14. Furthermore, as outlined in ***Ali v. Jalil*** [1982] 28 FLR 31, even if a defendant fails to satisfy a Court according to the above decision, the Court has the discretion to dismiss the summons if it determines that an open court hearing is necessary.
15. In this matter, the Defendant does not dispute that the Plaintiff is the last registered proprietors of the Property. Thusly, the requirement under section 169 is met.
16. The second requirement pursuant to section 170 of the LTA is for the summons to contain a description of the land and to require the person summoned to appear in court. The Plaintiff's Summons describes the land as "Freehold land number 38573, being Lot 2 on Qaloa Nadi containing an area of 2,450 square meters situated at Qaloa Nadi, in the Republic of Fiji Islands". While the Property has not been fully described as per the copy of the Certificate of Title annexed to the Plaintiff's Affidavit in Support, LTA does not specify what description is needed for this purpose but necessitates determining whether the summoned individual was fully aware of the specifications of the land or property they were directed to vacate, ensuring there was no confusion or misunderstanding regarding it (see ***Lal v Chand*** [2019] FJHC 538).
17. In the current matter, there is no dispute in relation to the description of the Property. Therefore, the requirement under section 170 has also been fulfilled by the Plaintiff as the description given in the Summons appears adequate for the purpose of this section.
18. Since the Plaintiff has satisfied the requirements of sections 169 and 170 of the LTA, the burden now shifts onto the Defendant to demonstrate its right to occupy the Property.
19. The Defendant avers the following in his Affidavit in Opposition and Supplementary Affidavit in Opposition:
 - (a) that he has been living on the Property since his birth which is 26 May 1947;
 - (b) the Plaintiff acquired the Property on 30 May 2022;
 - (c) the Defendant and his brother Elikisanita Caga (**Eliki Snr**) acquired the head title being Certificate of Title Folio No. 261 Volume XI/05 on DP 7409 (**Head title**) in equal shares from their mother Emily Lewatu;
 - (d) In 1976 the Head title was mortgaged to Bank of New South Wales;
 - (e) In 1984 a second mortgage was taken from Bank of New South Wales and in 1986 the said bank was intending to seize the Head title;
 - (f) The Defendant then took another mortgage from National Bank of Fiji (**NBF**) for \$33,786.52 and Eliki Snr agreed with the Defendant that

Eliki Snr would pay the NBF loan and the Defendant would transfer his half undivided share in the Head title to Eliki Snr;

(g) It was also agreed that the Defendant would then pay Eliki Snr \$300.00 until the amount of \$33,786.52 was paid in full and then Eliki Snr would transfer back to the Defendant his half undivided share in the Head title;

(h) On 23rd August 1993, the Defendant and Eliki Snr entered into a Sale & Purchase Agreement (**Agreement**) that contained the following clauses:

a. Clause 8 – upon satisfaction of the whole debt (consideration) the Purchaser (being Eliki Snr) shall transfer the Lot with improvements i.e. Home site to the Vendor (being the Defendant in the current application);

b. Clause 10 – the Purchaser shall keep the improvements on the property fully insured including cyclone seasons; and

c. Clause 11 – the Purchaser agrees that should we need to encumber the property for any advances exceeding the debt amount he shall always keep the Vendor informed of any such advances.

(i) On 22 June 1994, Eliki Snr transferred the Head title to one Lailun Nahar Khatoon and the Defendant only came to know of this transfer on 22 October 1996. The Defendant assumes that the signature of Eliki Snr was forged on the transfer by his son as they share the same signature;

(j) Eliki Snr did not know about the transfer and that is why he kept collecting rent from the Defendant till 1996;

(k) The Defendant has paid a substantial amount of money to Eliki Snr as per the Agreement and has made improvement to the house;

(l) Eliki Snr did not honour the Agreement;

(m) That the Defendant is entitled to adverse possession of the Property; and

(n) There are serious questions to be tried and this matter cannot be decided summarily.

20. The Defendant has also annexed a copy of the Agreement which confirms the existence of the same between the Defendant and Eliki Snr. The Plaintiff are the grand children of the said Eliki Snr and have acquired the Property through their father's beneficial interest in the Estate of Eliki Snr.

21. In response to the Defendant's averments, the Plaintiff in their Affidavit in Reply have simply denied the same and stated that they are the registered proprietors and have not consented to the Defendant and his family staying on the Property.

22. The dealings over the Head title are noted as follows:

(a) 5 June 1973 – transfer from Emily Lewatu to the Defendant and Eliki Snr;

- (b) 23 September 1993 – full transfer to Elik Snr; and
- (c) 22 June 1994 – transfer from Elik Snr to Lailun Nahaar Khatoon Khan

23. The dealings over Certificate of Title 38573 are noted as follows:

- (a) 1 February 2008 - Certificate of Title 38573 was issued to Aflail Investment Ltd;
- (b) Certificate of Title 38573 is from previous title C.T. XI/05 261, the Head title;
- (c) 19 April 2021 - transfer to 'Mikaele Elikisanita Caga Gaunavou as the Executor and Trustee of the Estate of Alikisanita Caga';
- (d) 22 April 2022 - transmission by death registered as 'Salote Lewatu Gaunavou, Mikaele Vosota Tuivuna Gaunavou and Elikiasanita Caga Gaunavou as administrators of the Estate of Mikaele Elikisanita Caga Gaunavou, the sole Executor/Trustee of Alikisanita Caga'; and
- (e) 30 May 2022 – transfer to Salote Lewatu Gaunavou, Mikaele Vosota Tuivuna Gaunavou and Elikiasanita Caga Gaunavou.

24. It is clear that Certificate of Title 38573 is derived from previous title C.T. XI/05 261, the Head title, after the Head title was subdivided into 3 Lots. Certificate of Title 38573 is Lot 2 of the said subdivision.

25. The evidence adduced by both parties reveals that firstly the Head title was owned by both the Defendant and Elik Snr and the Plaintiff has acquired the subdivided portion as beneficiaries of their fathers Estate who had acquired the same from the Estate of Elik Snr. Secondly, at the time title over the Property was issued to Aflail Investments Ltd, the plan over the Certificate of Title No. 38573 clearly shows two dwellings on the land that confirms the Defendants assertion that he has built a house on the Property. The evidence also confirms the existence of the Agreement that the Defendant and Elik Snr entered, and receipts of payment made by the Defendant to Elik Snr.

26. There is no evidence before the Court whether the Defendant had fully paid the sum of \$30,000.00 to Elik Snr thereby requiring Elik Snr to transfer to the Defendant his previous half undivided share over the Head title. There is no evidence as to why Elik Snr did not subdivide the Head title or transfer half undivided share to the Defendant. Why was the Head title transferred to Lailun Nahaar Khatoon Khan and thereafter subdivided and a lot transferred again to the Plaintiff's father as the Executor and Trustee of the Estate of Elik Snr? Is there unconscionable conduct on behalf of the Plaintiff? Did the Defendant acquire any right *in personam*?

27. These are complicated issues that are to be determined in this matter. They cannot be determined in this summary procedure and require inquiry at a trial proper.

28. Pursuant to the recent Supreme Court decision in ***Raj Datt v Sunil Datt & Others*** Civil Petition No. CBV 0008 of 2020 (30 June 2023), “**rights in personam**” has also 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.”

29. Further, it was held in this case that considering the knowledge of the ‘current owner’ of the rights of the occupier, the title obtained by him/her may not be 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)*

30. It is settled law that, complicated facts and issues cannot be investigated and determined only on affidavits at a summary proceeding [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)].

31. Therefore, I find that the Defendant has shown an arguable defence. There are complicated issues to be determined in this matter and as such the summons should fail and needs to be dismissed.

32. However, the dismissal of the summons shall not operate as a bar to the Plaintiff to commence other proceedings against the Defendant.

33. Accordingly, I make the following orders:

- (a) The application is dismissed; and
- (b) The parties shall bear their own costs for this proceeding.



P. Prasad
Master of the High Court

At Lautoka
4 April 2025



Solicitors:

Messrs Niudamu Lawyers for Plaintiff

Messrs Toganivalu Legal for Defendant