

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

**Civil Action No. HBC 356 of 2013**

**IN THE MATTER** of an application under section 169 of Part XXIV of the Land Transfer Act, Cap 131 for an Order for vacant possession.

**BETWEEN :** **SEMI LEWANIRABE AND TULIANA MASIBALAVU LEWANIRABE** of Lot 5 Mataiva Road, Caubati Nasinu.

**PLAINTIFFS**

**AND :** **ACA TIKOMAI SOLOMONE** of Lot 5 Mataiva Road, Caubati, Nasinu, Bus Driver

**DEFENDANT**

**BEFORE :** **Master Thushara Rajasinghe**

**COUNSEL :** **Mr. Rayawa** for the Plaintiff  
**Mr. Tuifagalele** for the Defendant

**Date of Hearing :** **3<sup>rd</sup> June, 2014**

**Date of Judgment :** **8<sup>th</sup> September, 2014**

**JUDGMENT**

**A. INTRODUCTION**

1. The Plaintiffs filed this Summons for Possession pursuant to section 169 of the Land Transfer Act seeking an order of immediate vacant possession of the demised premises known as Lot 5 on DP 7421, Mataiva Road, Caubati Housing Sub-Division, of which the Plaintiffs are the registered proprietor.

2. The Plaintiffs and the Defendant were given directions to file their respective affidavits when this summons was called before me, which they filed accordingly. Subsequently, this Summons was set down for hearing on the 3<sup>rd</sup> of June 2014, where the counsel for both parties agreed to conduct the hearing by way of written submissions. I accordingly invited them to file their respective written submissions, which they filed. Having considered the Summons, respective affidavits and written submissions, I now proceed to pronounce my judgment as follows.

**B. BACKGROUND,**

3. The Plaintiffs claim that they are the last registered proprietors of this lease No 379329 and the property as described in the Summons. The Defendant has been living in this property as a tenant. They further stated that the Defendant has been defaulting the payment of rent, wherefore they served him a notice to quit. However, the Defendant refused to vacate the property as demanded by the notice to quit.
4. The Defendant meanwhile, contented that he was invited by the Plaintiffs when they were migrating to Australia to look after this property and live on it. Upon that invitation, the Defendant moved into this property and categorically denied that they are the tenant as claimed by the Plaintiffs.
5. The Defendant further deposed that he was subsequently asked by the Plaintiffs to help them in repayment of their mortgage to the Fiji Development Bank. Moreover, the Defendant has paid money to the children of the Plaintiffs on their request at several occasions. Having stated their objections, the Defendant submitted that they have an equitable right to the possession of this property pursuant to the principle of promissory estoppel.

**C. THE LAW,**

6. The procedure for the application in this nature has been stipulated under sections 169 to 172 of the Land Transfer Act. In view of the section 169 of the Act, the last

registered proprietor of the land and/or a lessor with power to re-enter where the lessees or tenant is in arrear for such period and/or a lessor who has issued a legal notice to quit or the term of the lease has expired are allowed to institute proceedings under section 169 of the Act to evict a person who is in possession of the land without a right to the possession.

7. Section 171 and 172 of the Act deal with the scope of the hearing and the burden of prove of the parties. Section 171 states that ;

*“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.”*

8. Section 172 states that

*“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;*

9. The scope of the hearing of the application under section 169 constitutes two main limbs. The first is the onus of the Plaintiff to satisfy the court that he is the last registered proprietor or the lessor as described under the section 169 (b) and (c) of the Act. Once the Plaintiff satisfies it, the burden will shift on the Defendant to satisfy the court that he has a right to the possession of the land. The scope of the Defendant’s burden of prove of a right to the possession of the land has discussed in **Morris Hedstrom Limited-v- Liaquat Ali** CA No: 153/87 , where it was held that

*“Under Section 172 the person summonsed 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."*

Accordingly, the defendant is only required to present some tangible evidence to establish a right to the possession or the existence of an arguable case for such right to defeat the Plaintiff's claim.

#### **D. ANALYSIS**

10. This Summons is founded on the ground that the Defendant is the tenant and refused to vacate the property after he was served a notice to quit on the ground of the rent arrears. Accordingly, this dispute falls within the scope of section 169 (b) and (c) of the Land Transfer Act. Hence, the Plaintiffs are first required to satisfy the court that they are the lessor to this alleged tenant agreement and the Defendant has defaulted his rent payment.
11. The Plaintiffs have not provided any other material evidence rather than deposing in their affidavit in support that the Defendant has been staying on this property as a tenant. There is no specific evidence of the terms and conditions of this alleged tenancy agreement or of this alleged default of rent payment.
12. Meanwhile, the Defendant has also merely deposed in his affidavit in opposition that he was invited by the Plaintiffs to look after the property when they migrated. Moreover, he assisted the Plaintiffs in their mortgage repayment. However, there is no any other material evidence to substantiate that claim. In fact, the onus is on the Defendant to satisfy the court that he has a right to the possession of this land, but that does not relieve the Plaintiffs of their burden of satisfying the court that they are the lessor as they claim in this Summons. The Plaintiffs have established that they are the

last registered proprietors of this property which did not dispute by the Defendant. However, their application is founded on the ground of tenancy agreement. In the circumstances as of this case, the Plaintiffs are required to satisfy the court that they are the lessor, and not necessarily the last registered proprietor which in my opinion the Plaintiffs failed to satisfy.

13. In view of the reasons set out above, I find that the court is not in a position to properly determine the terms and conditions of this alleged tenancy and on what grounds and conditions the Defendant has entered in and occupies this property on the affidavits alone. It indeed requires a proper hearing to determine the contrasting contentions of the parties. Accordingly, I make following orders that;

- i. The Summons for Possession dated 24<sup>th</sup> of December 2013 is hereby refused and dismissed,
- ii. The Defendant is awarded \$750 cost assessed summarily,

Dated at Suva this 8<sup>th</sup> day of September, 2014



R.D.R. Thushara Rajasinghe  
Master of High Court, Suva