

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

**Civil Action No. HBC 81 of 2013**

**BETWEEN** : **FLORENCE ANITA PRASAD** of 1145 S.36<sup>th</sup> Pl, Renton WA 98055, United States of America, Businesswoman.

**PLAINTIFF**

**AND** : **SUNITA DEVI** of Nakaulevu, Navua, in the Republic of Fiji, Massager.

**DEFENDANT**

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

**COUNSEL** : **Mr. Ronal Singh** for the Plaintiff  
**Mr. S. Chandra** for the Defendant

**Date of Hearing** : **20<sup>th</sup> & 21<sup>st</sup> November, 2013**

**Date of Ruling** : **21<sup>st</sup> February, 2014**

## **JUDGMENT**

### **A. INTRODUCTION**

1. The Plaintiff instituted this action by way of Originating Summons dated 26<sup>th</sup> of March 2013 seeking an order under section 169 of the Land Transfer Act that the Defendant do give immediate vacant possession to the Plaintiff of all the land occupied by the Defendant and comprised and described in Certificate of Title No 39529 being Lot 1 on Deposited Plan No 9650 known as Block 2 Deuba (Part of) in the District of Serua in the Island of Vitilevu.
2. The Defendant upon being served with this Summons filed his affidavit in opposition which was followed by the reply affidavit of the Plaintiff. The Defendant was given

permission to file a supplementary affidavit which she filed accordingly. The Plaintiff was then allowed to file a reply in affidavit for the said supplementary affidavit. Subsequently, this matter was set down for hearing on the 20<sup>th</sup> and 21<sup>st</sup> of November 2013. Learned Counsel for the Plaintiff and the Defendant made their oral arguments and submissions during the hearing. Both counsel then submitted their written submissions at the conclusion of the hearing

3. Having considered the Summons, respective affidavits and written and oral submissions of the parties, I now proceed to pronounce my judgment as follows.

## **B. BACKGROUND**

### *Plaintiff's case,*

4. The Plaintiff claims that she is the last registered proprietor of the property comprised in Certificate of Title No 39529 being Lot 1 on Deposited Plan No 9650 known as Block 2 Deuba (Part of) in the District of Serua in the Island of Vitilevu. The Plaintiff marked and tendered a copy of the said Certificate of Title No 39529 as annexure "A" to her affidavit in Support. She deposed that the Defendant is illegally/ unlawfully and without any colour of right occupying a piece and parcel of the said land and has built a house on the property. The Plaintiff further stated that the Defendant was served with a notice to vacate the said land and give vacant possession to the Plaintiff which the Defendant failed.

### *Defendant's Case.*

5. The Defendant vehemently denies the Plaintiff's claim and contended that the Plaintiff became the registered proprietor of this land by fraudulently obtaining the title of this land from her step – father Chandra Bhan. She deposed in her detailed, but rather disorganized affidavit in response that her late mother Vidya Wati had earlier owned undivided quarter (1/4) share of this main land. However it was fraudulently transferred

into the name of Chandra Bhan, the step father of the Plaintiff sometimes in 1995. The Defendant's late mother subsequent to that fraudulent act of Mr. Bhan instituted a civil action No 276 of 1997 claiming that Chandra Bhan has fraudulently obtained her undivided quarter share to the main land in the Certificate of Title No 4053. Upon the death of her mother, the Defendant and her sister were substituted as the Plaintiff in that civil action as they are the trustees of their late mother's estate.

6. The defendant further deposed that they managed to reach to a settlement with Mr. Bhan in that civil action and a consent order was entered accordingly on the 1<sup>st</sup> of May 2007. According to the consent order, Mr. Bhan agreed to develop and subdivide the main land. Once the approval of subdivision is granted, Mr. Bhan agreed to transfer 3 defined and adjacent lots to the Defendant and to the estate of their late mother. Upon entering of the said consent order, parties had been exchanging in a series of correspondence and meetings to identify the correct three lots for the Defendant. Mr. Bhan through his solicitors agreed in a letter dated 9<sup>th</sup> of July 2007, to transfer three lots and one of them is currently occupied by the Defendant. The Defendant further claimed that her late mother erected a dwelling house on this land and they have been living on this land since her birth.
7. Having outlined the back ground of this dispute, the defendant stated that Mr. Bhan has fraudulently transferred the piece of land which is occupied by them to the Plaintiff while the parties were negotiating to formalize the consent order entered in the Civil Action 276/97. In the meantime the Defendant had filed notice of motion dated 24<sup>th</sup> of October 2011 to correct the mistakes and enforce the consent order in Civil Action 297/97. The said motion was adjourned in order to accommodate the parties to negotiate a settlement. The Defendant claims that Mr. Bhan fraudulently transferred this land to the Plaintiff while such negotiation and court proceedings were pending in respect of this land.

***Plaintiff's reply.***

8. The Plaintiff in her reply affidavits stated that she was not a party or aware of any dealing or negotiation between the Defendant and Mr. Bhan. She claimed that she is the last

registered proprietor of this land and there was no encumbrance against the title of this land at the time she purchased it.

### **C. THE LAW**

9. I now turn to briefly review the laws pertaining to the application under section 169 of the Land Transfer Act (hereinafter mentioned as “the Act”).

10. Sections 169 to 172 of the Act stipulate the procedure for the application in this nature. 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 the person who is in possession of the land without a right to the possession.

11. 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”.*

12. In view of the section 171 of the Act, the onus is on the plaintiff to prove his title of proprietorship in order to obtain a judgment for vacant possession inter alia requirements stipulated in section 171.

13. Section 172 deals with the Defendant’s burden of prove where it 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”.*

14. Moreover, the first proviso to the section 172 states that the dismissal of the summons shall not prejudice the right of the Plaintiff to take any other proceedings against the Defendant to which he is otherwise entitled.
15. In view of sections 171 and 172 of the Act, the purpose of this special proceedings under section 169 is to provide a summary procedure for the registered proprietor and/ or the lessor to eject the occupiers from the land who either occupy the same without any legal right to possession or breach of tenant or lease agreement. Accordingly the proceedings under this summary procedure constitutes two main limbs. The first is that the onus of the Plaintiff to satisfy the court that he is the last registered proprietor or a lessor defined under section 169 (a), (b) and (c) of the Act. Once the Plaintiff satisfied the first limb, the burden will shift on the Defendant to prove that he has a right to possess of the land.
16. In pursuant of section 172 of the Act, the Defendant is not required to prove his title against the title of the Plaintiff . He is only required to satisfy the court a right to the possession of the land. The Defendant’s burden of prove under section 172 was 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 adduce some tangible evidence to establish a right of possession or the existence of an arguable case for such right to dismantle the Plaintiff's claim.

**D. ANALYSIS,**

17. Having reviewed the laws pertaining to the application in this nature under section 169 of the Act, I now turn to analyse the evidence presented before me by the parties with those mentioned legal principles and provisions.
18. I do concur with the contention of the learned counsel of the Plaintiff that the affidavit in opposition filed by the Defendant consists of many anomalies and misrepresentations. However, I find that the defendant's main contention is founded on the ground that the land in question in this instance case was agreed to be transferred into her and her late mother's estate by Mr. Bhan pursuant to the consent order entered in Civil Action 267/97.
19. In view of the affidavits in opposition and the documents annexed therein, it is apparent that the Defendant has given three separate references to identify the land she claims. She contended that the confusion of identification of the correct lot in the draft sub division plans was a common mistake of the parties.
20. Upon careful perusal of the correspondences exchanged between the Defendant's solicitors and Mr. Bhan's solicitors which were annexed to the Defendant's affidavits, I am satisfied that the Defendant has continuously been claiming the land where her late mother erected a dwelling house as one of the three lots agreed to be transferred pursuant to the consent order. In the meantime, the Plaintiff claims that the Defendant is illegally/unlawfully occupying the land described in Certificate of Title No 39529 being Lot 1 of DP No 9650. In view of these findings, I am satisfied that Lot 1 of DP 9650 described in Certificate of Title No 39529 is the piece of land that the Defendant has been claiming to be transferred into her and her late mother's estate pursuant to the consent order entered in Civil Action 297/97.

21. I had an opportunity to peruse the case record of Civil Action No 276/1997 where I found that the Defendant has already moved the court by way of a motion filed on 24<sup>th</sup> of October 2011 to correct and enforce the consent order dated 1<sup>st</sup> of May 2007. I further found that said motion was adjourned pending the determination of action 143 of 2013 filed by the Defendant against Mr. Bhan and the Plaintiff in this action.
  
22. In the meantime, I am mindful of the contention of the Plaintiff, that she was not a party to any proceedings and negotiations between the Defendant and Mr. Bhan. She claims that she is the last registered proprietor of the land and entitles to obtain an order of eviction against the Defendant. In view of section 169 and 172 of the Act and the Judicial precedence enunciated in Morris Hedstrom case (supra), the mere establishment of the last registered proprietorship does not necessarily guarantee an order of eviction against the Defendant. The Defendant is only required to show cause to satisfy the court that she has a right of possession or some tangible evidence to establish the existence of an arguable case for such a right of possession.
  
23. The Defendant presented evidence that her late mother had owned undivided quarter share of the main land and that was subsequently transferred to Mr. Bhan fraudulently. She further presented evidence that her late mother instituted a civil action No 276 of 1997 seeking an order to reclaim her share of the land. The evidence presented by the Defendant established that the Defendant and Mr. Bhan have entered a consent order and the Defendant was agreed to transfer three lots including the lot they are currently occupying in the Civil Action 276/97. The enforcement of that consent order is still pending before the High Court pursuant to the motion filed by the Defendant on 24<sup>th</sup> of October 2011. Moreover, the Defendant has instituted another action No 143 of 2013 to revoke the said consent order which is also pending at the moment. In view of these evidence presented by the Defendant, it is adequate to establish the required standard of show cause, that the Defendant has an arguable case for right of the possession of this land pursuant to section 172 of the Act.

**E. CONCLUSION,**

24. Having considered the reasons discussed above, I am satisfied that the Defendant has successfully satisfied the court that she has an arguable case for right of the possession of this land which is already pending before the High Court for final determination.. I accordingly make following orders that;

- i. The Originating Summons filed by the Plaintiff on the 26<sup>th</sup> of March 2013 is refused and dismissed accordingly,
- ii. The Defendant is granted a cost of \$ 2000 assessed summarily,

Dated at **Suva** this **21<sup>st</sup>** day of **February, 2014**.

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