

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

**Civil Action No. HBC 290 of 2012**

**BETWEEN:** LEVANI VULALIMA of Wailea Settlement, Vatuwaqa,  
Suva in the Republic of Fiji Islands.

**PLAINTIFF**

**A N D :** SALANIETA COKANASIGA of Lot 51, Vosavosa Road,  
Vatuwaqa, Suva in the Republic of Fiji Islands.

**DEFENDANT**

**BEFORE** : Hon. Justice Kamal Kumar

**COUNSEL** : Mr. A. Naco for the Plaintiff  
Ms S. Waqabitu for the Defendant

**DATE OF HEARING** : 2 October 2013

**DATE OF RULING** : 10 June 2014

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**JUDGMENT**

**(Application to Re-instate Action and for Vacant Possession)**

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**1.0 Introduction**

- 1.1 On 18 October 2012, Plaintiff caused Summons for Vacant Possession to be issued against the Defendant pursuant to Section 169 of Land Transfer Act Cap 131 for Defendant to show cause why an order for immediate vacant possession of the land known as HA Sub Lease No. 263420 Lot 51 on DP 4931 (hereinafter referred to as “**the subject property**”) of which the

Plaintiff is the registered proprietor should not be made against the Defendant.

- 1.2 On 7 November 2012, being the returnable date of the Summons, Plaintiff was directed to re-serve the Summons and Affidavit within 21 days and this matter was adjourned to 21 July 2013.
- 1.3 On 18 January 2013, Plaintiff filed Affidavit of Service.
- 1.4 On 21 January 2013, the Summons was struck out by Master Amaratunga (as he then was) due to failure by Plaintiff to file Affidavit of Service and non-appearance of Plaintiff or his Counsel.
- 1.5 On 18 March 2013, Plaintiff filed Application to re-instate the Summons on the grounds set forth in the Affidavit of Akuila Naco sworn on 5 March 2013.
- 1.6 The Application for re-instatement was called on various occasions before Master of the Court before this matter was referred to this Court.
- 1.7 On 13 August 2013, the Plaintiff or his Counsel failed to appear when this matter was adjourned to 6 September 2013 for Notice of Adjourned Hearing to be served on the Plaintiff's Solicitors.
- 1.8 On 6 September 2013, by consent:-
  - (i) Plaintiff was granted time until 13 September 2013 to file Affidavit in Response.
  - (ii) Both parties were directed to file Submissions on Application for Re-instatement and Application for Vacant Possession.
  - (iii) The matter was adjourned to 3 October 2013, at 9.30 am for hearing.
- 1.9 On 3 October 2013, Counsel for Plaintiff and Defendant informed Court that they both rely on Submissions filed in respect to Application for Re-instatement and Application for Vacant Possession and agreed for Ruling to be delivered on Re-instatement Application and if matter is re-instated the for Court to rule on the Application for Vacant Possession on the basis of Affidavits and Submissions filed.

## **2.0 Background Facts**

- 2.1 Varasiko Livai Qaqa also known as Varasika Livai, ("**Deceased**") at all material time was registered lessee of the subject property.
- 2.2 Upon death of the said Varasiko Livai Qaqa also known as Varasika Livai, Letters of Administration was granted in favour of Merewalesi Nai as the Administratrix.

- 2.3 On or about 30 June 2011, the said Merewalesi Nai transferred the subject property to her and then to the Plaintiff.
- 2.4 It is noted that all documents from Transmission of Death, Discharge of Housing Authority's Mortgage given by the Deceased, Withdrawal of Suva City Counsel's Caveat, Transfer of subject property to Merewalesi Nai and then to Plaintiff were registered on 30 June 2011.
- 2.5 On or about 26 April 2012, Plaintiff caused Notice to Quit to be served on the Defendant.

### **3.0 Preliminary Issue**

- 3.1 Before I deal with the Applications I wish to highlight the fact that none of the Affidavits filed by both the parties from commencement of this proceedings complied with Order 41 Rule 9(2) of the High Court Rules.
- 3.2 Current Chief Justice, His Lordship Justice Gates and other Judges of this Court have highlighted time and again the failure by parties in particular their Solicitors to comply with Order 41 Rule 9(2) of the High Court Rules 1988

Order 41 Rule 9(2) provides as follows:

***"Every Affidavit must be endorsed with a note showing on whose behalf it is filed and the dates of swearing and filing and an Affidavit which is not so indorsed may not be filed or used without the leave of the Court."***

- 3.3 In the matter of ***Kim Industries Ltd.*** (Unreported) Lautoka High Court Winding – Up Action No. HBF0036 of 1999L, his Lordship Justice Gates (as he then was), the Current Chief Justice stated as follows:

***"If any Affidavit bears an irregularity in its form such as the Omission of the endorsement note, leave must be obtained from the Court for it to be filed or used..."*** (page 3)

- 3.4 Similar comments were made by his Lordship in ***State v H.E. The President & Ors.*** (unreported) Lautoka High Court Judicial Review No. HBJ007 / 2000L 12 October 2000. ***Chandrika Prasad v Republic of Fiji*** (unreported) Lautoka High Court Action No. HBC0217 / 2000L [Ruling on Stay Application – 20 December 2000, Ruling on Joinder Application – 17 January 2001].
- 3.5 In ***Jokapeci Koroi & Ors. v Commissioner of Inland Revenue & Anor.*** (unreported) Lautoka High Court Action No. HBC179 / 2001L (24 August 2001) his Lordship Justice Gates (as then he was) and Current Chief Justice removed two (2) Affidavits filed on behalf of the Defendants from the Court

file for failure to comply with the order 41 Rule 9 (2) and ordered the Defendants file the said Affidavit with endorsement in compliance with Order 41 Rule 9(2) within 14 days. His Lordship at page 4 of the Judgement stated as follows:

***"These mistakes are of little consequence to the actual litigation but since the setting of the format of an Affidavit, vehicle for the presentation of sufficient evidence to the Court, is a relatively simple exercise, these errors should no longer persist."***

- 3.6 No leave has been sought by Counsel for the parties to use the Affidavits in this proceeding.
- 3.7 In view of the lapse of time since filing of the Summons and nature of the proceedings leave is granted for parties to rely on the Affidavits filed. **However the litigants and their Counsel should take note of the fact that failure to comply with Order 41 Rule 9(2) and failure to obtain Court's leave to utilise these Affidavits could result in the Affidavits being removed from the court file which of course will be fatal to their client's case.**

#### **4.0 Application for Re-instatement**

- 4.1 For the Summons to be re-instated, the delay in making the Application must not be inordinate, Plaintiff must explain the reason for non-appearance and the Defendant must not suffer any prejudice if the Summons is re-instated.
- 4.2 Summons to Re-instate was filed on 18 March 2013, even though the Summons is dated 5 March 2013, and Affidavit in Support was also sworn on 5 March 2013.
- 4.3 Akuila Naco in his Affidavit sworn on 5 March 2013, states that on 21 January 2013, he was appearing in the Supreme Court and as such was late in appearing in Court No. 9 where the Summons was being called.
- 4.4 He states that upon his arrival he discovered that the Summons for Ejectment had been called and struck out.
- 4.5 The explanation is not satisfactory and Counsel who double book themselves or is aware that they have matters called in two different Courts should make prior arrangements for someone to appear and make applications for matter to be stood down. Non-appearance in Court when dates are assigned well before the call date tantamounts to disrespect to the Court and professional misconduct. Legal practitioners should not take Court dates even if it is listed for mentions lightly and ensure that a Counsel is present

to either deal with the matter or apply to stand down the matter for the principal Counsel to attend to it.

- 4.6 Defendant is in occupation of the subject property and the Plaintiff who is the registered lessee of the subject property is seeking vacant possession. Therefore I cannot see any reason for Defendant to be prejudiced if the Application for Vacant Possession is re-instated.
- 4.7 In fact all Affidavits and Submissions filed relates to Application for Vacant Possession.
- 4.8 Therefore, despite the explanations given not being entirely satisfactory, in the interest of justice and to avoid unnecessary delay, I will re-instate the Application for Vacant Possession to the cause list.

## **5.0 Application for Vacant Possession**

- 5.1 Plaintiff is the registered lessee and as such has locus to institute action for vacant possession pursuant to s169 of the Land Transfer Act, Cap 131.
- 5.2 Section 172 of the Land Transfer act Cap 131 provides as below:

***“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 judges shall dismiss the summons.”***

- 5.3 Defendant’s case is stated at paragraphs 5 to 13 of Defendant’s Affidavit sworn on 4 July 2013 which is summarised as follows:
- (i) Defendant is the only surviving beneficiary of the Deceased’s Estate who died on 21 December 2002;

- (ii) Letters of Administration number 48360 in respect of Deceased's Estate was granted in favour of Merewalesi Nai;
- (iii) Defendant became aware of the grant to Letters of Administration in early 2008;
- (iv) Merewalesi Nai fraudulently represented to authorities that she is the widow of the Deceased to obtain Letters of Administration, registering the Transmission by Death and Transfer;
- (v) Merewalesi Nai failed to disclose that her and the Deceased separated soon after their marriage in 1958 and their marriage was dissolved on 31 October 1966;
- (vi) Merewalesi Nai later married one Jope Naucabalavu and they are still married;
- (vii) Merewalesi Nai was charged by Fiji Police Force on Defendant's report;
- (viii) As a result, Merewalesi Nai's fraudulent representation, Defendant and her family have suffered and the Court, Registrar of Titles, Water Authority and Plaintiff have been deceived by her.

5.4 Gist of Defendant's opposition to Application for Vacant Possession is fraudulent misinterpretation by Merewalesi Nai, the predecessor on title.

## 6.0 **Indefeasibility of Title and Fraud**

6.1 Sections 39 (1), 41 and 42 of Land Transfer Act, Cap 131 provide as follows:

***"39(1) Notwithstanding the existence in any of the 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 of the register, constituted by the instrument of title thereto, but absolutely free from all other encumbrances whatsoever except –***

***a) The estate or interest of a proprietor claiming the same land, estate or interest under a prior instrument of title registered under the provisions of this Act; and***

- b) So far as regards any portion of land that may be wrong description or parcels or of boundaries be erroneously included in the instrument of title of the registered proprietor not being a purchaser or mortgagee for value or deriving title from a purchaser or mortgagee for value; and**
- c) Any reservations, exceptions, conditions and powers contained in the original grant.” (emphasis added)**

**“41. Any instrument of title or entity, alteration, removal or cancellation in the register procured or made by fraud shall be void as against any person defrauded or sought to be defrauded thereby and no party or privy to the fraud shall take any benefit therefrom.**

**42 (1) No action for possession, or other action for the recovery of any land subject to the provision of this Act, or any estate or interest therein, shall lie or be sustained against the proprietor in respect of the estate or interest of which he is registered, except in any of the following cases:-**

- a. the case of mortgagee as against a mortgagor in default;**
- b. the case of a lessor as against a lessee in default.**
- c. the case of a person deprived of any land, estate or interest by fraud, as against the person registered as proprietor of that land, estate or interest through fraud, or as against a person deriving otherwise than as a transferee bona fide for value from or through a person so registered through fraud;**
- d. the case of a person deprived of or claiming any estate or interest in land included in nay grant or certificate of title of other land by misdescription of that other land, or of its boundaries, as against the proprietor of any estate or interest in the other land, not being a transferee or deriving from or through a transferee thereof bona fide for value;**
- e. the case of a proprietor claiming under an instrument of title prior in date of registration, in any case in which two or more grants or two or more instruments of title, may be registered under the**

***provisions of this Act in respect of the same land, estate or interest.”***

- 6.2 The definition of fraud for the purpose of Land Transfer Act was stated by Privy Council in **Assets Company Limited v Mere Rohini** [1905] AC 176 at 210 as follows:

*“Passing now to the question of fraud, their Lordships are unable to agree with the Court of Appeal. Sects. 46, 119, 129, and 130 of the Land Transfer Act, 1870, and the corresponding sections of the Act of 1885 (namely, as 55, 56, 189, and 190) appear to their Lordships to shew that by fraud in these accounts 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 Land Acts, 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 of fraud if he honestly believes it to be a genuine document which can be properly acted upon.”*

- 6.3 In **Fels v Knowles** (1907) 26 NZLR 608 the Court of Appeal dealing with similar provisions and proceedings for setting aside of transfer stated as follows:

*“The cardinal principle of the statute is that the register is everything, and that, except in cases of actual fraud on the part of the person dealing with the registered proprietor, such person, upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against all the world. Nothing can be registered the registration of which is not expressly authorized by the statute. Everything which can be*



*registered gives, in the absence of fraud, an indefeasible title to the estate or interest, or in the cases in which registration of a right is authorized, as in the cases of easements or incorporeal rights, to the right registered”.*

See **Subarmani v Dharam Sheila** (1982) 28 FLR 82.

- 6.4 In **Wicks v Bennett** (1921 – 22) 30 CLR 80 their Honors Chief Justice Knox and Justice Rick at page 91 stated as follows:

*“Fraud in these sections mean something more than mere disregard of rights of which the person sought to be affected had notice. It imports something in the nature of personal dishonesty or moral turpitude (Butler v Fairclough).”*

- 6.5 The principle in **Assets Company Limited v Mere Rohini** was adopted and applied in **Liu Hong v Lee (FJHC 459; HBC 0147 J 2005)** which is referred to in Defendant’s Submission.

- 6.6 For Plaintiff’s title to be impeached pursuant to section 41 and 42 of Land Transfer Act, Cap 131 Defendant must provide evidence that the Plaintiff being last registered proprietor was privy to the alleged fraudulent acts of Merewalesi Nai (s41) or that the Plaintiff was not a bona fide purchaser (s42).

- 6.7 As stated at paragraph 5.3 of this Judgment all allegation of fraudulent representation is against Merewalesi Nai and not against the Plaintiff.

- 6.8 If, Merewalesi Nai obtained Letters of Administration and had the Transmission of Death and Transfer of the subject property to her name registered by fraudulent representation, then Defendant’s cause of action is against her as there is no duty cast on Plaintiff under Torres System of land registration to go beyond what is endorsed on the Title until Plaintiff had prior notice.

- 6.9 In **Mistry Amar Singh v Kulubuya** [1963] 3 ALLER 499 it was held

*“the appellant was not, and never had been in lawful occupation of lands and could not rely on the illegal agreements as justifying any right or claim to remain in possession, and without, doing so he could not defeat the respondent’s claim. The respondent required no aid from the illegal transactions to establish his case; it was sufficient for him to show that he was the registered proprietor of the lands and that the appellant, a non-African, was in occupation without the consent of the Governor, and accordingly had no right to occupy.”*

6.10 It is noted that Defendant after becoming aware in 2008 that Merewalesi Nai obtained Letters of Administration in respect to Deceased's estate failed to take any actions to revoke the grant in favour of Merewalesi Nai or obtain any Order restraining the said Merewalesi Nai from dealing with Deceased's property in any way whatsoever. Failure by the Defendant to have the grant to Merewalesi Nai revoked allowed the said Merewalesi Nai to represent to the whole world that she is the Administratrix of the Estate of Varasiko Livai Qaqa also known as Varasika Livai.

The report by Defendant to Fiji Police Force was not enough to relieve the said Merewalesi Nai of the powers of the Administratrix of the Deceased's estate.

6.11 Whilst this Court can sympathise with the Defendants' plight it cannot assist the Defendant in the absence of any tangible evidence of fraud on part of the Plaintiff in acquiring the subject property.

6.12 Therefore I hold that the Defendant has failed to show cause as why she should not deliver vacant possession of the subject property.

## **7.0 Conclusion**

7.1 I make following Orders:-

- (i) The Defendant to give immediate vacant possession of the property known as Lot 51 on Deposited Plan No. 4931 Province of Rewa City of Suva containing 10.1 perches comprised and described in Lease No. 263420;
- (ii) Defendant is to pay Plaintiff's cost assessed in the sum of \$500.00;
- (iii) Execution of the above Orders are stayed for thirty days from date of this Judgment.



  
Kamal Kumar  
**JUDGE**

At Suva  
10 June 2014

Solicitors for the Plaintiff: Naco Chambers  
Solicitors for the Defendant: Waqabitu Law