

IN THE HIGH COURT OF FIJI  
AT SUVA  
CIVIL JURISDICTION

HBC No. 370 of 2011

BETWEEN : SHAKUNTALA KUMARI SINGH of Aidney Road, Suva, Domestic Duties, AVENDRA SINGH of Level 42, 2 Park Street, Sydney, NSW 2000, Australia, Solicitor and ANENDRA VIJAI SINGH of 1007 Gordon Road, Hastings, New Zealand, Journalist, as Executors(ix) and Trustees of the Estate of Atendra Singh late of 24 Aidney Road, Suva, Fiji, Deceased, Testate.

PLAINTIFFS

AND : SITIVENI HOIT of Waivoloa Tailevu, Occupation not known to the Plaintiff.

1<sup>ST</sup> DEFENDANT

AND : JOSESE NULULOA of Waivoloa Tailevu, Occupation not known to the Plaintiff.

2<sup>ND</sup> DEFENDANT

AND : KATAKI TUKUTALO of Waivoloa Tailevu, Occupation not known to the Plaintiff.

3<sup>RD</sup> DEFENDANT

AND : JOELI RAIKANAWA of Waivoloa Tailevu, Occupation not known to the Plaintiff.

4<sup>TH</sup> DEFENDANT

AND : EPELI LEWALEWA of Waivoloa Tailevu, Occupation not known to the Plaintiff.

5<sup>TH</sup> DEFENDANT

AND : PENIASI MATEO of Waivoloa Tailevu, Occupation not known to the Plaintiff.

6<sup>TH</sup> DEFENDANT

AND : SAVIRIO GASAI NO. 2 of Waivoloa Tailevu, Occupation not known to the Plaintiff.

7<sup>TH</sup> DEFENDANT

AND : MAIKALI LAGO of Waivoloa Tailevu, Occupation not known to the Plaintiff.

8<sup>TH</sup> DEFENDANT

AND : JONE NAVAIA of Waivoloa Tailevu, Occupation not known to the Plaintiff.

9<sup>TH</sup> DEFENDANT

AND : IKAVOTE VANANALAGI of Waivoloa Tailevu, Occupation not known to the Plaintiff.

10<sup>TH</sup> DEFENDANT

AND : WAKINITA K KATAKI of Waivoloa Tailevu, Occupation not known to the Plaintiff.

11<sup>TH</sup> DEFENDANT

AND : ABOROSIO MARIKA of Waivoloa Tailevu, Occupation not known to the Plaintiff.

12<sup>TH</sup> DEFENDANT

AND : PATRICIA QUAI HO of Waivoloa Tailevu, Occupation not known to the Plaintiff.

13<sup>TH</sup> DEFENDANT

AND : TIMOCI KAWA of Waivoloa Tailevu, Occupation not known to the Plaintiff.

14<sup>TH</sup> DEFENDANT

AND : MIRIAMA DREU of Waivoloa Tailevu, Occupation not known to the Plaintiff.

15<sup>TH</sup> DEFENDANT

AND : IOWANE WAN SOONG of Waivoloa Tailevu, Occupation not known to the Plaintiff.

16<sup>TH</sup> DEFENDANT

AND : IOAPE DAINI of Waivoloa Tailevu, Occupation not known to the Plaintiff.

17<sup>TH</sup> DEFENDANT

AND : PENIASI MATEO of Waivoloa Tailevu, Occupation not known to the Plaintiff.

18<sup>TH</sup> DEFENDANT

AND : SAVIRIO GASAI of Waivoloa Tailevu, Occupation not known to the Plaintiff.

19<sup>TH</sup> DEFENDANT

AND : EREMASI RASIGA of Waivoloa Tailevu, Occupation not known to the Plaintiff.

20<sup>TH</sup> DEFENDANT

AND : STEVEN H. KATSUKI of Waivoloa Tailevu, Occupation not known to the Plaintiff.

21<sup>ST</sup> DEFENDANT

AND : PETERO O. NATAVAYA of Waivoloa Tailevu, Occupation not known to the Plaintiff.

22<sup>ND</sup> DEFENDANT

AND : ALL OTHER OCCUPIERS of Waivoloa Tailevu, Occupation not known to the Plaintiff.

OTHER DEFENDANTS

BEFORE: Master Vishwa Datt Sharma

COUNSELS: Mr. Karl Jamnadas for the Plaintiff

Ms. Lagilevu for the 1<sup>st</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup>, 20<sup>th</sup>  
and 22<sup>nd</sup> Defendants.

2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Defendants- Pending case before Agricultural  
Tribunal.

Date of Hearing: 07<sup>th</sup> April, 2015

Date of Decision: 22<sup>nd</sup> November, 2016 at 11.30 am

## RULING

*[An amended application for ejectment pursuant to section 169 of the Land  
Transfer Act Cap 131 and Order 113 of the High Court Rules, 1988]*

1. On the outset, this Court will only determine the case against the following Defendants: -  
1<sup>st</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup>, 20<sup>th</sup> and 22<sup>nd</sup> who are  
represented by Counsel Ms. Lagilevu.
2. Order in terms of the Plaintiff's application was made against Defendants 8<sup>th</sup>, 15<sup>th</sup>, and  
21<sup>st</sup> on 09<sup>th</sup> March, 2015.



3. This Court was asked by the Plaintiff's Counsel not to determine the case against 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Defendants who were represented by Mr. Bukarau since their cases are still impending before the Agricultural Tribunal.
4. Further, this Court notes that by Notice of Motion dated 03<sup>rd</sup> November, 2014, an order to allow the Plaintiff to amend its s. 169 of the Land Transfer Act application to include an application under Order 113 of the High Court Rules, 1988 was granted.

### INTRODUCTION

5. The Plaintiff filed an **Amended Originating Summons** on 07<sup>th</sup> January, 2015 and sought for the following orders-
  - (a) That the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup>, 20<sup>th</sup>, 21<sup>st</sup>, 22<sup>nd</sup>, and other Defendants and their families to give vacant possession to the Plaintiff's property situated at Waivola, Tailevu being parts they occupy of that piece and parcel of land containing three hundred and seventy nine acres one road and thirty eight perches situated in the district of Tailevu in the island of Viti Levu and being Lot 1 on the Deposited Plan No. 4287 and comprised and described in Certificate of Title No. 17196 of which the Plaintiff is the registered proprietor, presently occupied by the Defendants and their family.
  - (b) That the cost of this application be paid by the Defendants to the Plaintiff.
6. The Plaintiff will rely on the Affidavit of Atendra Singh and the Supplementary Affidavit of Avendra Singh filed herein.
7. The application is made pursuant to *Section 169 of the Land Transfer Act, Cap 131 and Order 113 of the High Court Rules, 1988.*
8. Defendants 1<sup>st</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup>, 20<sup>th</sup> and 22<sup>nd</sup> were represented by Ms. Lagilevu and opposed the Plaintiff's application.

### PLAINTIFF'S CASE

9. The Plaintiff relies on the Affidavits deposed by **Atendra Singh** and **Avendra Singh**:

In summary Atendra Singh stated:

- (i) *As per the Certificate of Title No. 17196, he is the registered proprietor of all that piece and parcel of land containing three hundred and seventy nine acres one road and thirty eight perches be the same a little more or less and situated in the district of Tailevu in the island of Viti Levu and being Lot 1 on Deposited Plan No. 4267 and comprised in Certificate Title No. 17196. A certified true copy of the Certificate of Title is annexed herewith and marked 'AS-1'.*
- (ii) *That he required the property for his own use and served notices to quit on the Defendants giving them 6 months to vacate the premises since all were squatters without any lease or permission from him or any other body. The Defendants never approached him for any lease or made any rental payments.*
- (iii) *That despite service of the said Notices to vacate on the Defendants, the Defendants are still in occupation of the said property and refuse or neglect to quit from there and continue to be in wrongful and unlawful occupation thereof.*
- (iv) *That the 1<sup>st</sup> to the 8<sup>th</sup> Defendants have a house on the land occupied by themselves and other family members.*
- (v) *The 9<sup>th</sup> Defendant he is planting on the land and had been given 6 months notice to harvest and remove his plantation therefrom as per annexure 'AS-10' hereof.*

**In summary Avendra Singh stated:**

- (i) *That he together with his mother, Shakuntala Singh and his brother, Anendra Vijai Singh is an executor of the estate of his late father Atendra Singh, who was the registered proprietor of the property the subject of these proceedings being CT 17196 Lot 1 in DP4287 at Waivola, Tailevu; also known as Waivola.*
- (ii) *In or about 1983, his grandfather transferred the ownership of Waivola to his father, Atendra Singh.*
- (iii) *That various attempts were made by his grandfather and subsequently by his father to evict people from Waivola property. Some of these people obtained deemed tenancies under ALTA however none of them to my knowledge have conducted any commercial graded cultivation of the land at any time.*
- (iv) *After his father died in or about July 2012, he took over the administration of his affairs which included the conduct of various pieces of litigation in this court as well as ALTA.*
- (v) *That he was aware that his father did not know who all were currently the occupants on the Waivola property and all apart from Mr. Hoyt they were unknown to him as well. It has always been his father's position that he did not invite people on to the property nor did they have any legal basis for continuing to reside upon it. The same is also the position of the Trustees.*
- (vi) *None of the occupants have sought his or any other executor and Trustees permission to be on the property. Nor does he recognize that they are on the property conducting any legitimate cultivation of the land. There appears to be many of these unauthorized and unlawful occupants of the land who they have not been able to identify.*
- (vii) *That he has recently obtained a report from a qualified landscaper and agricultural consultant which identify a total lack of any commercial cultivation of the land. Rather, it appears that a group of persons have settled on these lands with no intention other than habitation which has been authorized by neither their late father nor any of the Trustees or Executors. They do not have their permission to be on the land and have ignored notices to quit served upon them.*
- (viii) *Furthermore, the occupants of the land have begun to call themselves the "Waivola Settlement". The creation of a settlement on or land is unauthorized and inconsistent with the intention of both his father and the current trustees to use the land for commercial purposes.*



- (ix) *It has come to his attention that the occupants have been approaching and seeking assistance from NGOs and the Australian government as squatters in need of assistance. There is a sign erected on the main road to this effect. This activity appears to include the building of road access and a piggery.*
- (x) *That he has spoken to representatives of both Community Support Network as well as AUSAID. Annexed and marked with the letters "AS 1" is an email that I sent to the Fiji-based director of AUSAID which is a minute of the discussion that I had with their representatives. It was also copied to those who attended the meeting with me.*
- (xi) *The continued presence of these unauthorized occupants on the land is preventing his brother and him from conducting a number of commercial operations on that land such as cultivation of crops for export as well as potentially ecotourism. Additionally, the expert advice they have received is that they are indulging in land use practices that are detrimental to the value and future use of the land.*
- (xii) *That he prays for Orders of Eviction in terms of the Plaintiffs Amended Summons for Eviction.*

**Defendant's Case** (1<sup>st</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup>, 20<sup>th</sup> and 22<sup>nd</sup>)

10. In summary, **Iowane Wan Soong** (16<sup>th</sup> Defendant), on behalf of the remaining Defendants (1<sup>st</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup>, 20<sup>th</sup> and 22<sup>nd</sup>), deposed in his Affidavit in Response as follows:

- (i) *That their families have been living on 'Waivola' since the early 1950's where their great grandfathers, grandfathers, fathers and themselves have farmed the land commercially for their livelihood and in order to financially support their families.*
- (ii) *That the said piece of land was previously owned by the late Plaintiff's father, Sam Kaur Singh.*
- (iii) *That in 1971, his father, On Choy and several others applied to the Agricultural Tribunal for a Declaration of Tenancy and this was granted on 25<sup>th</sup> August 1971 to operate and exist from 31<sup>st</sup> December 1969. Attached herein and marked as "Annexure A" is a copy of the decision of the Tribunal.*
- (iv) *That despite the decision of the tribunal and repeated requests by their fathers and grandfathers, the late Plaintiff's father never complied with the orders of the Tribunal in "Annexure A".*
- (v) *That had the above said instruments of tenancy been issued to their families as per the orders of the Court on 25<sup>th</sup> August 1971, they would have had the opportunity to further renew or seek extension after expiration under the Agricultural Landlords and Tenants Act (hereinafter referred to as ALTA), Cap 270.*
- (vi) *That the Tribunal's orders marked as "Annexure A" are relevant to the current defendants and proceedings in the following manner:*
  - (a) *Petero Nacolatabua is the grandfather of the 6<sup>th</sup> Defendant;*
  - (b) *On Choy is my father and I am the 16<sup>th</sup> Defendant;*
  - (c) *Savirio Gasai is the father of the 6<sup>th</sup> Defendant, that the 6<sup>th</sup> Defendant is the father-in-law of the 20<sup>th</sup> Defendant;*
  - (d) *Suliasi Nala is the father of the 22<sup>nd</sup> Defendant.*
- (vii) *That the Plaintiff has named the 6<sup>th</sup> Defendant as also being the 18<sup>th</sup> Defendant.*

- (viii) *That the Defendants are direct descendants of the Applicants who were awarded instruments of tenancy in 1971 as per "Annexure A".*
- (ix) *That in 2010, the Defendants engaged the legal services of a solicitor namely Mr. Tevita V. Q. Bukarau, Principal of Muskits Law to apply formally to the Agricultural Tribunal for their Declaration of Tenancy for the benefit of the Defendants over Waivola.*
- (x) *That a disagreement as to the legal fees arose where the Defendants refused to pay more than that which Mr. Bukarau had initially agreed that they would pay.*
- (xi) *That on 11<sup>th</sup> December 2012, Mr. Bukarau, through letters to the Agricultural Tribunal, to the Defendants and to Opposing Counsel Mr. Gavin O'Driscoll withdrew the entire Defendants' cases from the Tribunal instead of the appropriate action of withdrawing only his services for the purpose of legal representation. Attached herein and annexed with letters "B1" and "B2" are the said letters.*
- (xii) *That the Defendants have since lodged a complaint against Mr. Bukarau to the Legal Practitioner's Unit (LPU) regarding this very matter. Attached herein and marked as "Annexure C" is the said complaint dated 13<sup>th</sup> February 2015.*
- (xiii) *That had Mr. Bukarau not withdrawn our cases before the Agricultural Tribunal, the Plaintiffs would not have been able to pursue this Section 169 Application.*
- (xiv) *That the Defendants wholly and firmly object to the application made b the Plaintiff in this matter and consider the same to be an attempt to benefit from an illegal act which was the failure of the Plaintiff's grandfather to comply with the order of the Agriculture Tribunal as per "Annexure A".*
- (xv) *That the Defendants choose to contest this application in its entirety on the above basis and intends to call witnesses to give material evidence to support its case.*
- (xvi) *That this application ought to be dismissed as there are clearly issues herein that cannot be resolved by affidavit evidence and ought to be decided by way of a trial.*

In addition to the above, the Defence also raised the following **Preliminary issues**:

- (i) *The Supplementary Affidavit of Avendra Singh is defective as it does not comply with Order 41 Rule 9 (2). As such, the leave of the Court should be sought if the Applicant wishes to rely on the Affidavit. [No date on the Jurat].*
- (ii) *The Supplementary Affidavit of Avendra Singh does not express that he has the authority to depose the affidavit on behalf of the other two Executors and Trustees of the Estate of the Estate of Atendra Singh.*
- (iii) *Peniasi Mateo, the 6<sup>th</sup> Defendant is also named as to why this is so even though it was addressed in the Affidavit in Opposition of Iowane Wan Soong [paragraph 9 of Opposing Affidavit]. (Highlighted parts are mine for deliberation).*

## THE LAW

11. **Section 169 of the Land Transfer Act [Cap 131] provides as follows:**



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

12. In the case of **Ram Narayan v Moti Ram (Civ. App. No. 16/83)** Gould J.P. said-

*"... the summary procedure has been provided in the Land Transfer Act and, where the issues involved are straightforward, and particularly where there are no complicated issues of fact, a litigant is entitled to have his application decided in that way."*

13. The procedure under **s.169** is governed by **sections 171 and 172** of the **Land Transfer Act (Cap 131)** respectively which stipulates as follows:-

*"s.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."*

*s.172. If a 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. **Order 113, R.1. of the High Court Rules, 1988** provides a summary procedure for possession of land to be brought by Originating Summons and states as follows-

*"Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this Order"*.

15. Pursuant to **Order 113**, a person who has a legal right to claim possession of a land could institute an action, claiming the possession of the said land against a person who has



- entered into or remains in occupation without his licence or consent or that of any predecessor in title.
16. The main purpose of **Order 113** is to provide a speedy and effective procedure for the owners of the land to evict persons who have entered into and taken the occupation of the land without the owners licence or consent. [*Case of Ali's Engineering Ltd-v- Mala [2014] FJHC 579, HBC81.2014 (8 August 2014).*]
  17. The proceedings under **Order 113** encompass two main limbs. The First Limb places the burden on the Plaintiff. The Plaintiff is first required to satisfy that he has a legal right to claim the possession of the land. Once the Plaintiff satisfies the First Limb, the onus will shift towards the Defendant, where the Defendant is burdened with to satisfy the Court that he has a licence or consent of the owner to occupy the land. [*Case of Ali's Engineering Ltd-v- Mala [2014] FJHC 579, HBC81.2014 (8 August 2014).*]
  18. **Order 113** is effectively applied with regard to eviction of squatters or trespassers. [*Case of Department of Environment -v- James and others [1972] 3 All E.R. 629 squatters and trespassers are defined as: ' he is one who, without any colour of right, enters on an unoccupied house or land, intending to stay there as long as he can...'*]

#### ANALYSIS and DETERMINATION

19. The substantive question or issue for this court to determine is **whether the Plaintiff is entitled to the vacant possession by the Defendants and their family members of the property situated at Waivola, Tailevu being parts they occupy of that piece and parcel of land containing three hundred and seventy nine acres one road and thirty eight perches situated in the district of Tailevu in the island of Viti Levu and being Lot 1 on the Deposited Plan No. 4287 and comprised and described in Certificate of Title No. 17196 of which the Plaintiff is the registered proprietor, presently occupied by the Defendants and their family members?**
20. It is noted that the application for vacant possession is sought pursuant to **section 169 of the Land Transfer Act, Cap 131 and Order 113 of the High Court Rules, 1988.**
21. The question that comes to mind is **whether the Plaintiff can file and seek orders for vacant possession under two distinct laws, section 169 of the Land Transfer Act, Cap 131 and Order 113 of the High Court Rules, 1988 in the same Court file?**

In terms of **section 169 of the LTA**, the last registered proprietor of the land, a lessor with power to re-enter where the lessee or tenant is in arrear and a lessor against a lessee or tenant where a

legal notice to quit has been given or the term of the lease has expired; 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.

Whereas, *Order 113 of the High Court Rules, 1988*, allows a person claiming possession of land which he alleges is occupied solely by a **person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his**, may bring proceedings by originating summons against him in accordance with the provisions of this Order. This Order would normally apply only in virtually uncontested cases or in clear cases where there is no issue or question to try, i.e. where there is no reasonable doubt as to the claim of the plaintiff to recover possession of the land or as to wrongful occupation on the land without licence or consent and without any right, title or interest thereto.

22. I have carefully considered all the affidavit evidence filed in this case and the written and oral legal submissions from both counsels.
23. The **Plaintiff's contention** is that *Atendra Singh is the registered proprietor of all that piece and parcel of land containing three hundred and seventy nine acres one road and thirty eight perches be the same a little more or less and situated in the district of Tailevu in the island of Viti Levu and being Lot 1 on Deposited Plan No. 4267 and comprised in Certificate Title No. 17196. A certified true copy of the Certificate of Title is annexed herewith and marked 'AS-1'.*
24. In or about 1983, the ownership of the said "Waivola" property was transferred to the Plaintiff Atendra Singh.
25. It has always been the Plaintiff's position, including the Executors and Trustees, that they **did not invite** these people on to the property nor did the Defendants have any **legal basis** for continuing to reside upon it. Many of these **unauthorized and unlawful occupants** cannot be identified.
26. That the **Defendants** occupying the property were **all squatters without any lease or permission from the Plaintiff** or any other body. These Defendants never approached the Plaintiff for any **lease or made any rental payments**.
27. That various attempts were made to evict the people from Waivola property and some of them have **obtained deemed tenancies under ALTA**, however none of them to his knowledge have conducted any commercial graded cultivation of the land at any time.
28. That the **Defendants** are still in occupation of the said property and refuses or neglects to quit from there and continue to be in **wrongful and unlawful occupation** thereof despite being served with Notices to vacate.



29. On the other hand, the **Defendants contentions** are that they have *resided on the property ever since the early 1950's when their great grandfathers first settled on the property* and the property has been farmed commercially for the livelihood of the said Defendants in order to financially support their families ever since the said Defendants great grandfathers had settled on the said property. In addition, Iowane Wan Soong, the 16<sup>th</sup> Defendant's father amongst others was granted **Declaration of Tenancies** by the Agricultural Tribunal on 25<sup>th</sup> August 1971.
30. That **Defendant Nos. 6, 16, and 22** are the direct descendants of the persons that were awarded **Declaration of Tenancies** and by *virtue of this Declaration of Tenancies, the persons including their families have the right to occupy and farm the said property for commercial activities.*
31. The **Plaintiffs** as the Landlord in this case were required to provide **Instruments of Tenancy to the successful applicants** as per the order of the Tribunal dated 25<sup>th</sup> August, 1971 but despite repeated requests by the successful applicants, the Plaintiffs late father never complied with the orders of the Tribunal.
32. It can now be very clearly ascertained from the **Plaintiff's contention** that the **Defendants** are **squatters, not invited onto the property** by the Plaintiff, and have **no legal basis** to remain in occupation of the property. Therefore, the Plaintiff's application falls within the category of **Order 113 of the High Court Rules, 1988** and not section 169 of the Land Transfer Act Cap 131. The Plaintiff cannot commence eviction proceedings on both provisions of the Law confined to one particular Civil Court file in terms of **Order 113 and Section 169.**
33. I am now satisfied that this application needs to be determined in terms of **Order 113 of the High Court Rules, 1988.**
34. Therefore the question now for Court's determination is whether the **Plaintiff is entitled to possession under this Order.** To decide this, the Court has to consider the 'scope' of the Order. This aspect is covered in detail in **The Supreme Court Practice, 1993 Vol 1, O.113/1-8/1** at page 1602 and I state hereunder the relevant portions in this regard:
- "This Order does not provide a new remedy, but rather a new procedure for the recovery of possession of land which is in wrongful occupation by trespassers."*
35. In terms of the application of this Order it further provides as follows:
- "The application of this Order is narrowly confined to the particular circumstances described in r.1. i.e. to the claim for possession of land which is occupied solely by a person or persons who*



*entered into or remain in occupation without the licence or consent of the person in possession or of any predecessor of his. The exceptional machinery of this Order is plainly intended to remedy an exceptional mischief of a totally different dimension from that which can be remedied by a claim for the recovery of land by the ordinary procedure by writ followed by judgment in default or under O.14. The Order applies where the occupier has entered into occupation without licence or consent; and this Order also applies to a person who has entered into possession of land with a licence but has remained in occupation without a licence, except perhaps where there has been the grant of a licence for a substantial period and the licensee holds over after the determination of the licence (Bristol Corp. v. Persons Unknown) [1974] 1 W.L.R. 365; [1974] 1 All E.R. 593."*

36. This Order is narrowly confined to the particular remedy stated in r.1. The **White Book** provides at p.1603 as follows:

*"this Order would normally apply only in virtually uncontested cases or in clear cases where there is no issue or question to try, i.e. where there is no reasonable doubt as to the claim of the plaintiff to recover possession of the land or as to wrongful occupation on the land without licence or consent and without any right, title or interest thereto."*

37. The main purpose of **Order 113** is to provide a speedy and effective procedure for the owners of the land to evict persons who have entered into and taken the occupation of the land without the owners licence or consent. [*Case of Ali's Engineering Ltd-v- Mala [2014] FJHC 579, HBC81.2014 (8 August 2014).*]
38. **Order 113** is effectively applied with regards to eviction of squatters or trespassers. [*Case of Department of Environment -v- James and others [1972] 3 All E.R. 629* squatters and trespassers are defined as: ' *he is one who, without any colour of right, enters on an unoccupied house or land, intending to stay there as long as he can...*']
39. The proceedings under **Order 113** encompass two main limbs. The First Limb places the burden on the Plaintiff. The Plaintiff is first required to satisfy that he has a legal right to claim the possession of the land. Once the Plaintiff satisfies the First Limb, the onus will shift towards the Defendant, where the Defendant is burdened with to satisfy the Court that he has a licence or consent of the owner to occupy the land. [*Case of Ali's Engineering Ltd-v- Mala [2014] FJHC 579, HBC81.2014 (8 August 2014).*]
40. Bearing in mind the **two limb test** as stated hereinabove, the Plaintiff has established the **first limb test** that he is the **Registered Proprietor** of all that piece and parcel of land containing three hundred and seventy nine acres one road and thirty eight perches be the same a little more or less and situated in the district of Tailevu in the island of Viti Levu and being **Lot 1 on Deposited Plan No. 4267 and comprised in Certificate Title No. 17196**. A certified true copy of the Certificate of Title is also annexed herewith and marked 'AS-1" to confirm the same.



41. The **second limb test** requires the **Defendants** to satisfy to the Court that they have a licence or consent of the owner to occupy the land or the property.
42. The **Defendants** are alleging that they have *resided on the property ever since the early 1950's when their great grandfathers first settled on the property and the property has been farmed commercially*. Therefore they maintain all along that they have the right to stay on the land whereas the Plaintiff disputes it.
43. The Defendants further state that Iowane Wan Soong, the 16<sup>th</sup> Defendant's father amongst others was granted **Declaration of Tenancies by the Agricultural Tribunal on 25<sup>th</sup> August 1971**. (*Reference is made to paragraph 5, Annexure A in the Affidavit in Opposition filed herein*).
44. They further allege that as per the order of the Agricultural Tribunal, the Landlord who is the Plaintiff herein, were required to provide the **Instruments of Tenancy** to the successful applicants and despite repeated requests, the Plaintiff's late father never complied with the orders of the Tribunal. (*Reference is made to paragraph 6 of the Affidavit in Opposition filed herein*).
45. I also note from the Affidavit deposed by the **Executor Trustee, Avendra Singh** wherein he states "that various attempts were made to evict the people from Waivola property and some of them have **obtained deemed tenancies under ALTA, however none of them to his knowledge have conducted any commercial graded cultivation of the land at any time**."
46. Taking into consideration what the **Defendants** have raised hereinabove coupled with the admission from the Executor and Trustee, **Avendra Singh** in his Affidavit that "**some of the Defendants have obtained deemed tenancies under ALTA, however none of them to his knowledge have conducted any commercial graded cultivation of the land at any time**", I find that all these tantamount to tribal issues and these cannot be resolved in a summary manner by affidavit alone. These issues ought to be heard and determined on a full hearing. The conduct of the full hearing will allow the evidence of the parties to the proceedings and the witnesses' to be tested out coupled with any of the documentary evidence which would then be tendered into evidence for Court's consideration and eventual determination.
47. In conclusion, for the aforementioned reasons, in particular, because of the dispute as to possession between the parties to this proceedings, it is not possible to make the order sought in the summons by the Plaintiff against the Defendants **1<sup>st</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup>, 20<sup>th</sup> and 22<sup>nd</sup>** without going to a full trial.

48. Further, this Court was asked by the Plaintiff's Counsel not to proceed with the hearing of the case of the remaining Defendants 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> since their cases were still impending determination before the Agricultural Tribunal.
49. It has become appropriate now and it will be logic in the circumstances of my finding against the other Defendants 1<sup>st</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup>, 20<sup>th</sup> and 22<sup>nd</sup>, the Plaintiff's counsel is therefore at liberty either to await the decision of the Agricultural Tribunal and/or join the Defendants 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> with Defendants 1<sup>st</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup>, 20<sup>th</sup> and 22<sup>nd</sup> in a fresh Writ action to allow Court to determine the substantive issue of the vacant possession against the Defendants accordingly.
50. I now proceed to make the following orders.

#### ORDERS

- (i) The Plaintiff's Applications seeking Orders for vacant Possession against the Defendants 1<sup>st</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup>, 20<sup>th</sup> and 22<sup>nd</sup> are hereby Dismissed accordingly.
- (ii) The Plaintiff is at liberty to join the remaining Defendants 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> with Defendants 1<sup>st</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup>, 20<sup>th</sup> and 22<sup>nd</sup> in a fresh Writ Action if he opts to take this cause of action.
- (iii) Cost is summarily assessed at \$750 against the Plaintiff.

Dated at Suva this 22<sup>nd</sup> day of November, 2016



  
VISHWA DATT SHARMA  
Master of High Court, Suva