

**IN THE HIGH COURT OF FIJI**  
**WESTERN DIVISION**  
**AT LAUTOKA**

**CIVIL JURISDICTION**

**CIVIL ACTION NO. HBC 206 of 2015**

**BETWEEN** : **HARI PRASAD** of 610A Mt Wellington Hwy, Mt Richmond 1062,  
Auckland, New Zealand.

**PLAINTIFF**

**AND** : **MIRA SAMI, RAM RAJ, RITESH MANI** and other occupants of  
the premises all of Naisosovou, Nadi.

**DEFENDANTS**

**Mr. Dorsami Naidu for the Plaintiff**  
**Mr. Simione Valenitabua for the Defendants**

**Date of hearing : - 11<sup>th</sup> October 2016**  
**Date of ruling : - 15<sup>th</sup> December 2016**

**RULING**

**(A) INTRODUCTION**

- (1) The matter before me stems from the Plaintiff's Originating Summons, dated 23<sup>rd</sup> November 2015, made pursuant to **Section 169** of the **Land Transfer Act**, for an Order for Vacant Possession against the Defendants.
  
- (2) The Defendants are summoned to appear before the Court to show cause why they should not give up vacant possession of the Plaintiff's property comprised in **Certificate of Title No. 19443, Lot 1 on DP 4497 situated in the district of Ba on the Island of Viti Levu and having an area of 20A 2R and 36P and known as "Naisosovou" (part of).**

- (3) The Originating Summons for eviction is supported by an affidavit sworn by Lalita Wati, the Attorney of the Plaintiff.
- (4) The Originating Summons for eviction is strongly contested by the Defendants.
- (5) The Second Defendant filed an 'Affidavit in Opposition' on behalf of all the Defendants opposing the application for eviction.
- (6) The Plaintiff and the Defendants were heard on the 'Originating Summons'. They made oral submissions to Court. In addition to oral submissions, Counsel for the Plaintiff filed a careful and comprehensive written submission for which I am most grateful.

**(B) THE LAW**

- (1) In order to understand the issues that arise in the instant case, I bear in mind the applicable law and the judicial thinking reflected in the following judicial decisions.
- (2) Sections from 169 to 172 of the Land Transfer Act (LTA) are applicable to summary application for eviction.

**Section 169 states;**

*“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) .....
- (c) ...

**Section 170 states;**

*“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.”*

**Section 171 states;**

*“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.*

**Section 172 states;**

*“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, mortgage 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 judge shall dismiss the summons.*

[Emphasis provided]

- (3) The procedure under Section 169 was explained by Pathik J in **Deo v Mati** [2005] FJHC 136; HBC0248j.2004s (16 June 2005) as follows:-

*The procedure under s.169 is governed by sections 171 and 172 of the Act which provide respectively 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.”*

*It is for the defendant to ‘show cause.’*

- (4) The Supreme Court in considering the requirements of Section 172 stated in **Morris Hedstrom Limited v. Liaquat Ali** (Action No. 153/87 at p2) as follows and it is pertinent:

*“Under Section 172 the person summoned 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.”*

- (5) The requirements of Section 172 have been further elaborated by the Fiji Court of Appeal in **Azmat Ali s/o Akbar Ali v Mohammed Jalil s/o Mohammed Hanif** (Action No. 44 of 1981 – judgment 2.4.82) where it is stated:

*“It is not enough to show a possible future right to possession. That is an acceptable statement as far as it goes, but the section continues that if the person summoned does show cause the judge shall dismiss the summons; but then are added the very wide words “or he may make any order and impose any terms he may think fit” These words must apply, though the person appearing has failed to satisfy the judge, and indeed are often applied when the judge decides that an open court hearing is required. We read the section as empowering the judge to make any order that justice and the circumstances require.”*

**(C) THE FACTUAL BACKGROUND**

- (1) What are the facts here? It is necessary to approach the case through its pleadings/affidavits, bearing all those legal principles uppermost in my mind.
- (2) The Plaintiff's Attorney in her '**Affidavit in Support**' deposed *inter alia*;

- Para 1. (a) *THAT I am the attorney for the Plaintiff under a general power of attorney executed on the 12<sup>th</sup> day of May 2015 by the Plaintiff in my favour and which was registered with the Registrar of Titles on the 15<sup>th</sup> day of May 2015 (annexed herein and marked as annexure "LW1" is a copy of the said Power of Attorney).*
- (b) *THAT I am the niece of the Plaintiff and have lived in Nadi all my life and used to be in employment as a legal executive with a law firm in Nadi prior to my retirement.*
- (c) *THAT I have personal knowledge of issues relating to the property of my uncle the Plaintiff more particularly in relation to the land being Certificate of Title No. 19443 Lot 1 on DP 4497 situated in the district of Ba on the island of Viti Levu and having an area of 20A 2R and 36P and known as "Naisosovou" (part of).*
- (d) *THAT I have personal knowledge of the occupation on the said property by the Defendants.*
2. *THAT in so far as the content of this Affidavit is within my personal knowledge it is true in so far as it is not within my personal knowledge, it is true to the best of my knowledge information and belief.*
3. *THAT the Plaintiff is the registered proprietor of all that piece and parcel of land comprised in contained in Certificate of Title No. 19443 Lot 1 on DP 4497 situated in the district of Ba on the island of Viti Levu and having an area of 20A 2R and 36P and known as "Naisosovou" (part of) (annexed herein and marked as annexure "LW2" is a certified true copy of the said Certificate of Title referred to as the "said property").*
4. *THAT the occupation by the Defendants and other occupants is without any consent and/or authority of Plaintiff.*
5. (a) *THAT on the 4<sup>th</sup> day of November, 2014, the Plaintiff through his solicitors issued notices on the Defendants to give up vacant possession as the Plaintiff is the last registered proprietor of the property, and the said Notices were served on the Defendants and other occupants of the premises on 5<sup>th</sup> November, 2014. (Annexed herein as copies of the Affidavits of Service with notices attached, and marked as annexure:*

"LW3" for MIRA SAMI  
"LW4" for RAM RAJ  
"LW5" for RITESH MANI

- (b) THAT the defendants have not responded to the notices.
6. THAT the Plaintiff had earlier instituted legal action under Order 113 by civil action No. HBC 05 of 2015 against the defendants and the same was set for hearing on the 17<sup>th</sup> day of July 2015 but due to the non appearance of Counsel for the Plaintiff and Plaintiff the matter was struck out with costs against the Plaintiff (Annexed herein and marked "LW6" is a copy of the Order).
7. I am informed by Counsel for the Plaintiff Mr Dorsami Naidu that he arrived several minutes late due to traffic but that matter had already been struck out due to the absence and non-representation of the Plaintiff.
8. THAT the defendants had only after the issue of the application applied for a vesting order but the same has not been determined by the Registrar of Titles and in any event is wrong in law.
10. THAT despite numerous verbal and written requests the Defendants have refused to give up vacant possession of the land.
11. THAT I therefore pray for the following Orders:-
- (a) Order in terms of this application for immediate vacant possession of the land.
- (b) Costs on a solicitors/client indemnity basis.
- (3) The Second Defendant in seeking to show cause against the Summons on behalf of all the Defendants, filed an "**Affidavit in Opposition**", which is substantially as follows;

- Para 1. THAT I am one of the Defendants and as such I am an authorised to depose of matters herein on the basis of my own personal knowledge and those acquired by me during our uninterrupted stay and usage of Naisovusovu for more than 20 years now [the said property] unless I say that I am advised and/or informed and that I believe such advice and/or information to be true.
2. THAT I have read the Plaintiff's Affidavit and I am aware of the contents therein. I depose of matters herein in a representative capacity for and on behalf of the other Defendants and a copy of their authorisation is appended hereto marked "A".

3. IN reply thereto I say as follows:-

- (a) *The proceedings have been wrongly brought against the Defendants under Section 169 of the Land Transfer Act. I am legally advised by my solicitors believing the same to be true that the Plaintiff has come under the wrong or incorrect provision of the Act, as we were never their tenant nor their predecessor's tenant or generally holding over in the said property.*
- (b) *We can show cause or have the right to remain in occupation of the Naisovusovu since the Defendants including I had lodged an application for vesting order of CT 19443 being Lot 1 on DP No. 4497, Land known as "Naisovusovu" (part of). Appended hereto marked "B" is a copy of the lodgement slip number 342204 in respect of the same and Receipt (RR) No. 550296 for \$23.00 issued by the Registrar of Titles as lodgement fee.*
- (c) *Our vesting order application is still on foot and is currently at a stage where the Solicitor General's office is finalising their legal opinion on the same. Our solicitors are presently handling the matter.*
- (d) *The Plaintiff filed these ejectment proceedings on 20<sup>th</sup> November 2015 while we lodged our vesting order application on 22<sup>nd</sup> January 2015. This shows that we lodged our vesting order application first before the Plaintiff filed ejectment proceedings against us.*
- (e) *Alternatively, the Notice to Vacate annexed to the Affidavit of the Plaintiff, is illegal, null and void because it was a Notice to Quit used in Civil Action No. HBC 05 of 2015, which was struck out with, costs to us of \$250.00.*
- (f) *We have not been paid the costs ordered by this Honourable Court in Civil Action No. HBC 05 of 2015 so the Plaintiff has come to Court seeking orders with unclean hands.*

4. *In the circumstance, I pray that the Plaintiff's application for vacant possession be refused and that the Plaintiff pays the Defendant's costs to be summarily assessed at \$2,000.00 if not agreed.*

**(D) ANALYSIS**

- (1) This is an application brought under **Section 169 of the Land Transfer Act, [Cap 131]**.

Under Section 169, certain persons may summon a person in possession of land before a judge in chambers to show cause why that person should not be ordered to surrender possession of the land to the Claimant.

For the sake of completeness, **Section 169 of the Land Transfer Act**, is reproduced below;

**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.*

**I ask myself, under which limb of Section 169 is the application being made?**

Reference is made to paragraph (3) of the affidavit in support of the Originating Summons.

3. ***THAT*** *the Plaintiff is the registered proprietor of all that piece and parcel of land comprised in contained in Certificate of Title No. 19443 Lot 1 on DP 4497 situated in the district of Ba on the island of Viti Levu and having an area of 20A 2R and 36P and known as "Naisosovou" (part of) (annexed herein and marked as annexure "LW2" is a certified true copy of the said Certificate of Title referred to as the "said property").*

(Emphasis added)



Section 169 (a) of the Land Transfer Act, Cap 131, requires the Plaintiff to be the last **registered proprietor** of the land.

The term “**proprietor**” is defined in the Land Transfer Act as “*the registered proprietor of land, or of any estate or interest therein*”.

The term “**registered**” is defined in the **Interpretation Act**, Cap 7, as “*registered used with reference to a document or the title to any immovable property means registered under the provisions of any written law for the time being applicable to the registration of such document or title*”

According to the Certificate of Title No. 19443 (annexure marked “LW 2” referred to in the Affidavit of Lalita Wati, sworn on 19<sup>th</sup> November 2015) the Plaintiff obtained registered title on 06<sup>th</sup> November 1985. There is no dispute between the parties as to the “*locus standi*” of the Plaintiff. The Plaintiff is the last registered proprietor of the subject land. There is no controversy as to this in the Affidavit. Since 06<sup>th</sup> November 1985, the Plaintiff has been the registered proprietor of the subject land, and he exhibited a certified copy of the Certificate of Title No: 19443 showing registration in his name memorialized in the title.

(2) Pursuant to Section 170 of the Land Transfer Act;

(1) **the Summons shall contain a “description of the Land”**

AND

(2) **shall require the person summoned to appear in the court on a day not earlier than “sixteen days” after the service of Summons.**

The interval of not less than 16 days is allowed to give reasonable time for deliberations and to prevent undue haste or surprise.

**I ask myself, are these requirements sufficiently complied with by the Plaintiff?**

The Originating Summons filed by the Plaintiff does contain a description of the subject land. The subject land is sufficiently described. For the sake of completeness, the Originating Summons is reproduced below in full.

*LET ALL PARTIES concerned attend before a Master in Chambers at the High Court, Lautoka on the 18<sup>th</sup> day of January 2016 at 8.30 o'clock in the forenoon on the hearing of AN APPLICATION by the above named Plaintiff that:-*

1. *The Defendants to show cause why they should not give up immediate vacant possession to the Plaintiff of that portion of all that piece and parcel of land comprised in Certificate of Title No. 19443 Lot 1 on DP 4497 situated in the district of Ba on the island of Viti Levu and having an area of 20A 2R and 36P and known as "Naisosovou" (part of) which the Defendants are occupying.*
2. *An order that the Defendants give immediate vacant possession to the Plaintiff of that portion of all the piece and parcel of land comprised in Certificate of Title No. 19443 Lot 1 on DP 4497 situated in the district of Ba on the island of Viti Levu and having an area of 20A 2R and 36P and known as "Naisosovou" (part of) which the Defendants are occupying.*
3. *Costs on a solicitor/client indemnity basis.*

(Emphasis Added)

In light of the above, I have no doubt personally and I am clearly of opinion that the first mandatory requirement of Section 170 of the Land Transfer Act has been complied with.

- (3) Now comes a most relevant and, as I think, crucial second mandatory requirement of Section 170 of the Land Transfer Act.

The Originating Summons was returnable on 18<sup>th</sup> January 2016. According to the Affidavit of Service filed by the Plaintiff, the Originating Summons was served on the Defendants on 1<sup>st</sup> December 2015.

Therefore, the Defendants are summoned to appear at the Court on a date not earlier than "sixteen days" after the Service of Summons. Therefore, the second mandatory requirement of Section 170 of the Land Transfer Act has been complied with.

- (4) To sum up; having carefully considered the pleadings, evidence and oral submissions placed before this Court, it is quite possible to say that the Plaintiff has satisfied the

threshold criteria spelt out in Section 169 and 170 of the Land Transfer Act. **The Plaintiff has established a prima facie right to possession.**

**Now the onus is on the Defendants to establish a lawful right or title under which they are entitled to remain in possession.**

In the context of the present case, I am comforted by the rule of law expounded in the following judicial decisions.

In the case of **Vana Aerhart Raihman v Mathew Chand**, Civil Action No: 184 of 2012, decided on 30.10.2012, the High Court held;

*“There is no dispute between parties as to the locus standi of the Plaintiff, and once this is established the burden of proof shifted to the Defendant to prove his right to possession in terms of the Section 172 of the Land Transfer Act.”*

In the case of **Morris Hedstrom Limited –v- Liaquat Ali** CA No: 153/87, the Supreme Court said that:-

*“Under Section 172 the person summoned 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.”*

(Emphasis is mine)

Also it is necessary to refer to **Section 172 of the Land Transfer Act**, which states;

*“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, mortgage 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 judge shall dismiss the summons”.*

[Emphasis provided]

- (5) What are the Defendants reasons refusing to deliver vacant possession?

Reference is made to paragraph 3(b) to 3(f) of the Defendants Affidavit in Opposition

- 3(b) *We can show cause or have the right to remain in occupation of the Naisovusovu since the Defendants including I had lodged an application for vesting order of CT 19443 being Lot 1 on DP No. 4497, Land known as “Naisovusovu” (part of). Appended hereto marked “B” is a copy of the lodgement slip number 342204 in respect of the same and Receipt (RR) No. 550296 for \$23.00 issued by the Registrar of Titles as lodgement fee.*
- (c) *Our vesting order application is still on foot and is currently at a stage where the Solicitor General’s office is finalising their legal opinion on the same. Our solicitors are presently handling the matter.*
- (d) *The Plaintiff filed these ejectment proceedings on 20<sup>th</sup> November 2015 while we lodged our vesting order application on 22<sup>nd</sup> January 2015. This shows that we lodged our vesting order application first before the Plaintiff filed ejectment proceedings against us.*
- (e) *Alternatively, the Notice to Vacate annexed to the Affidavit of the Plaintiff, is illegal, null and void because it was a Notice to Quit used in Civil Action No. HBC 05 of 2015, which was struck out with, costs to us of \$250.00.*
- (f) *We have not been paid the costs ordered by this Honourable Court in Civil Action No. HBC 05 of 2015 so the Plaintiff has come to Court seeking orders with unclean hands.*

- (6) Thus, there are two issues to be decided before the Court rule as to whether the Plaintiff is entitled to summary possession of the land in question.

Let me now move to consider the first ground of objection raised by the Defendants.

The crux of Mr. Valenitabua’s, Counsel for the Defendants, argument is that their application for Vesting Order is under process at Solicitor General’s Office and

therefore they have a right to possession of the land. (I find this argument completely unconvincing).

In *adverso*, Counsel for the Plaintiff asserted that the application for a Vesting Order will not assist the Defendants. (I consider this as a correct view.)

Let me now move to consider the objection.

Section 78 of the Land Transfer Act deals with Vesting Orders.

I should quote **Section 78 of the Land Transfer Act** which provides;

“(1) *Where –*

(a) *Any person is in possession of any land subject to the provisions of this Act, for which a certificate of title has been issued or a Crown grant registered under the provisions of this Act; and*

(b) *such possession has been continuous for a period of not less than twenty years, and is such that he would have been entitled to an estate in fee simple in the land on the ground of possession if the land had not been subject to the provisions of this Act,*

*He may apply to the Registrar in the manner hereinafter provided for an order vesting the land in him for an estate in fee simple or for such other estate or interest as may be claimed by him:-*

*Provided that, unless such person has been in possession of such land for a continuous period of not less than thirty years, no such application may be made in respect of any land or any part thereof, if the registered proprietor of, or any person appearing by the register to be entitled to the benefit of, any estate or interest therein is under any disability.*

(2) *For the purpose of this part, possession of any land by any other person through or under whom any person making application under the provisions of this section (hereinafter in this part referred to as “the applicant”) claims, shall be deemed to be possession by the applicant.”*

The language of Section 78 is unmistakably clear to me.

**This section does not make provision for automatic vesting orders upon completion of twenty years possession. It only permits the possessor to make an application to the Registrar of Titles seeking a vesting order. The possessor becomes the registered owner only upon the making of a vesting order.**

I place greater weight upon the requirements of the law as laid down in Section 172 of the Land Transfer Act. Section reads;

*“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, mortgage 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 judge shall dismiss the summons”.*

[Emphasis provided]

The wording of Section 172 is unmistakably clear to me, i.e; *“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,...”*

Under Section 172, the onus is upon the Defendants to show cause why they refuse to hand over vacant possession and they must prove to the satisfaction of the Court a **present right to possession.**

It is not enough to show a **possible future right to possession.**

(See; Azmat Ali v Mohammed Jalil, Fiji Court of Appeal decision No. 44 of 1981, decided on 02<sup>nd</sup> August 1982.)

**In my opinion, the Defendants application for a Vesting Order is a possible future right to possession and is not a present right to possession.**

Therefore, I do not attach importance to the Defendants application for a Vesting Order.

**I do not uphold the first ground of objection. The first ground of objection lacks merits.**

(7) I now turn to the **second ground of objection.**

The objection is this;

*“Alternatively, the Notice to Vacate annexed to the Affidavit of the Plaintiff, is illegal, null and void because it was a Notice to Quit used in Civil Action No. HBC 05 of 2015, which was struck out with, costs to us of \$250.00.”*

Section 169 of the Land Transfer Act lists among the persons who may avail themselves of the summary procedure “a lessor against a lessee or tenant where a legal notice to quit has been given.”

As far as Section 169 (b) and (c) are concerned they apply where there is a landlord and tenant relationship.

Section 169 (b) and (c) do not apply in the case before me since the Defendants are not the Plaintiff’s tenant who are in arrears and/or the terms of the lease has expired.

Therefore, in the instant case, the first limb of Section 169 applies.

It is admitted, as well as established affirmatively by evidence that the Plaintiff is the last registered proprietor of the subject land to qualify as a person who may issue the Summons [Section 169 (a)].

In my opinion, that in a case such as the present case the Notice to quit is not necessary.

I find considerable support for my view in the High Court decision **Gulam Mohammed Properties Ltd v Patel (1994) FJHC 66.**

**Therefore, the second ground of objection fails.**

(8) To sum up, for the reasons which I have endeavoured to explain, it is clear beyond question that the Defendants have failed to show cause to remain in possession as required under Section 172 of the Land Transfer Act.

At this point, I cannot resist in reiterating the judicial thinking reflected in the following judicial decisions;

In the case of Morris Hedstrom Limited v Liaquat Ali, CA No, 153/87, the Supreme Court held,

*“Under Section 172 the person summonsed may show cause why he refused to give possession of the land 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 a right must be adduced.”*

(Emphasis is mine)

In Shankar v Ram, (2012) FJHC 823; HBC 54.2010, the Court held;

*“What the Defendant needs to satisfy is not a fully – fledged right recognized in law, to remain possession but some tangible evidence establishing a right or some evidence supporting an arguable case for such a right to remain in possession. So, even in a case where the Defendant is unable to establish a complete right to possession, if he can satisfy an arguable case for a right still he would be successful in this action for eviction, to remain in possession.”*

Being guided by those words, I think it is right in this case to say that the Defendants have failed to adduce some tangible evidence establishing a right or supporting an arguable case for such a right. It is not disputed that at the time the Plaintiff commenced the proceedings he was the last registered owner of the property comprised in Certificate of Title No. 19443. Under Section 169, the Plaintiff is entitled to seek possession of the property on the **strength of his title**. His right to possession depends on his **registered ownership**.

The Defendants application for “Vesting Order” is of no consequence to the claim by the Plaintiff based on his being the last registered proprietor.



- (9) Finally, the Plaintiff moved for **'indemnity costs'**.

It is necessary to turn to the applicable law and the judicial thinking in relation to the principles governing **"indemnity costs"**.

**Order 62, Rule (37) of the High Court Rules** empower courts to award indemnity costs at its discretion.

For the sake of completeness, Order 62, Rule (37) is reproduced below.

**Amount of Indemnity costs (O.62, r.37)**

37.- (1) *The amount of costs to be allowed shall (subject to rule 18 and to any order of the Court) be in the discretion of the taxing officer.*

**G.E. Dal Pont, in "Law of Costs", Third Edition**, writes at Page 533 and 534;

**'Indemnity' Basis**

*"Other than in the High Court, Tasmania and Western Australia, statute or court rules make specific provision for taxation on an indemnity basis. Other than in the Family Law and Queensland rules – which define the 'indemnity basis' in terms akin to the traditional 'solicitor and client basis' – the 'indemnity basis' is defined in largely common terms to cover all costs incurred by the person in whose favour costs are ordered except to the extent that they are of general law concept of 'indemnity costs'. The power to make such an order in the High Court and Tasmania stems from the general costs discretion vested in superior courts, and in Western Australia can arguably moreover be sourced from a specific statutory provision.*

*Although all costs ordered as between party and party are, pursuant to the 'costs indemnity rule', indemnity costs in one sense, an order for 'indemnity costs', or that costs be taxed on an 'indemnity basis', is intended to go further. Yet the object in ordering indemnity costs remains compensatory and not penal. References in judgments to a 'punitive' costs order in this context must be seen against the backdrop of the reprehensible conduct that often justifies an award of indemnity costs rather than impinging upon the compensatory aim. Accordingly, such an order does not enable a claimant to recover more costs than he or she has incurred."*

Now let me consider what authority there is on this point.

The principles by which Courts are guided when considering whether or not to award indemnity costs are discussed by Hon. Madam Justice Scutt in “**Prasad v Divisional Engineer Northern** (No. 02)” (2008) FJHC 234.

As to the “General Principles”, Hon. Madam Justice Scutt said this:

- *A court has ‘absolute and unfettered’ discretion vis-à-vis the award of costs but discretion ‘must be exercised judicially’: Trade Practices Commission v. Nicholas Enterprises (1979) 28 ALR 201, at 207*
- *The question is always ‘whether the facts and circumstances of the case in question warrant making an order for payment of costs other than by reference to party and party’: Colgate-Palmolive Company v. Cussons Pty Ltd [1993] FCA 536; (1993) 46 FCR 225, at 234, per Sheppard, J.*
- *A party against whom indemnity costs are sought ‘is entitled to notice of the order sought’: Huntsman Chemical Company Australia Limited v. International Cools Australia Ltd (1995) NSWLR 242*
- *That such notice is required is ‘a principle of elementary justice’ applying to both civil and criminal cases: Sayed Mukhtar Shah v. Elizabeth Rice and Ors (Crim Appeal No. AAU0007 of 1997S, High Court Crim Action No. HAA002 of 1997, 12 November 1999), at 5, per Sir Moti Tikaram, P. Casey and Barker, JJA*
- *‘... neither considerations of hardship to the successful party nor the over-optimism of an unsuccessful opponent would by themselves justify an award beyond party and party costs. But additional costs may be called for if there has been reprehensible conduct by the party liable’: State v. The Police Service Commission; Ex parte Beniamino Naviveli (Judicial Review 29/94; CA Appeal No. 52/95, 19 August 1996), at 6*
- *Usually, party/party costs are awarded, with indemnity costs awarded only ‘where there are exceptional reasons for doing so’: Colgate-Palmolive Co. v. Cussons Pty Ltd at 232-34; Bowen Jones v. Bowen Jones [1986] 3 All ER 163; Re Malley SM; Ex parte Gardner [[2001] WASCA 83; SDS Corporation Ltd v. Pasonnay Pty Ltd & Anor [2004] WASC 26 (S2) (23 July 2004), at 16, per Roberts-Smith, J.*
- *Costs are generally ordered on a party/party basis, but solicitor/client costs can be awarded where ‘there is some special or unusual feature of the case to justify’ a court’s ‘exercising its discretion in that way’: Preston v. Preston [1982] 1 All ER 41, at 58*
- *Indemnity costs can be ordered as and when the justice of the case so requires: Lee v. Mavaddat [2005] WASC 68 (25 April 2005), per Roberts-Smith, J.*

- For indemnity costs to be awarded there must be 'some form of delinquency in the conduct of the proceedings': **Harrison v. Schipp** [2001] NSWCA 13, at Paras [1], [153]
- Circumstances in which indemnity costs are ordered must be such as to 'take a case out of the "ordinary" or "usual" category ...': **MGICA (1992) Ltd v. Kenny & Good Pty Ltd (No. 2)** (1996) 140 ALR 707, at 711, per Lindgren J.
- '... it has been suggested that the order of costs on a solicitor and client basis should be reserved to a case where the conduct of a party or its representatives is so unsatisfactory as to call out for a special order. Thus, if it represents an abuse of process of the Court the conduct may attract such an order': **Dillon and Ors v. Baltic Shipping Co. ('The Mikhail Lermontov')** (1991) 2 Lloyds Rep 155, at 176, per Kirby, P.
- Solicitor/client or indemnity costs can be considered appropriately 'whenever it appears that an action has been commenced or continued in circumstances where the applicant, properly advised, should have known ... he had no chance of success': **Fountain Selected Meats (Sales) Pty Ltd v. International Produce Merchants Ltd & Ors** [1988] FCA 202; (1998) 81 ALR 397, at 401, per Woodward, J.
- Albeit rare, where action appears to have commenced/continued when 'applicant ... should have known ... he had no chance of success', the presumption is that it 'commenced or continued for some ulterior motive or ... [in] willful disregard of the known facts or ... clearly established law' and the court needs 'to consider how it should exercise its unfettered discretion': **Fountain Selected Meats**, at 401, per Woodward, J.
- Where action taken or threatened by a defendant 'constituted, or would have constituted, an abuse of the process of the court', indemnity costs are appropriate: **Baillieu Knight Frank (NSW) Pty Ltd v. Ted Manny Real Estate Pty Ltd** (1992) 30 NSWLR 359, at 362. per Power, J.
- Similarly where the defendant's actions in conducting any defence to the proceedings have involved an abuse of process of the court whereby the court's time and litigant's money has 'been wasted on totally frivolous and thoroughly unjustified defences': **Baillieu Knight Frank**, at 362, per Power, J.
- Indemnity costs awarded where 'the defendant had prima facie misused the process of the court by putting forward a defence which from the outset it knew was unsustainable ... such conduct by a defendant could amount to a misuse of the process of the court': **Willis v. Redbridge Health Authority** (1960) 1 WLR 1228, at 1232, per Beldam, LJ
- 'Abuse of process and unmeritorious behaviour by a losing litigant has always been sanctionable by way of an indemnity costs order inter parties A party cannot be penalised [for] exercising its right to dispute matters but in very special cases where a party is found to have behaved disgracefully or where such behaviour is deserving of moral condemnation, then indemnity costs may be awarded as between the losing and winning parties': **Ranjay Shandil v. Public Service Commission** (Civil Jurisdiction Judicial Review No. 004 of 1996, 16 May 1997), at 5, per Pathik, J. (quoting Jane Weakley, 'Do costs really follow the event?' (1996) NLJ 710 (May 1996))

- 'It is sufficient ... to enliven the discretion to award [indemnity] costs that, for whatever reasons, a party persists in what should on proper consideration be seen to be a hopeless case': **J-Corp Pty Ltd v. Australian Builders Labourers Federation Union of Workers (WA Branch)(No. 2)** (1993) 46 IR 301, at 303, per French, J.
- '... where a party has by its conduct unnecessarily increased the cost of litigation, it is appropriate that the party so acting should bear that increased cost. Persisting in a case which can only be characterised as "hopeless" ... may lead the court to [determine] that the party whose conduct gave rise to the costs should bear them in full': **Quancorp Pty Ltd & Anor v. MacDonald & Ors** [1999] WASC 101, at Paras [6]-[7], per Wheeler, J.
- However, a case should not be characterised as 'hopeless' too readily so as to support an award of indemnity costs, bearing in mind that a party 'should not be discouraged, by the prospect of an unusual costs order, from persisting in an action where its success is not certain' for 'uncertainty is inherent in many areas of law' and the law changes 'with changing circumstances': **Quancorp Pty Ltd & Anor v. MacDonald & Ors** [1999] WASC 101, at Paras [6]-[7], per Wheeler, J.
- The law reports are replete with cases which were thought to be hopeless before investigation but were decided the other way after the court allowed the matter to be tried: **Medcalf v. Weatherill and Anor** [2002] UKHL 27 (27 June 2002), at 11, per Lord Steyn
- Purpose of indemnity costs is not penal but compensatory so awarded 'where one party causes another to incur legal costs by misusing the process to delay or to defer the trial and payment of sums properly due'; the court 'ought to ensure so far as it can that the sums eventually recovered by a plaintiff are not depleted by irrecoverable legal costs': **Willis v. Redbridge Health Authority**, at 1232, per Beldam, LJ
- Actions of a Defendant in defending an action, albeit being determined by the trial judge as 'wrong and without any legal justification, the result of its own careless actions', do 'not approach the degree of impropriety that needs to be established to justify indemnity costs ... [R]egardless of how sloppy the [Defendant] might well have been in lending as much as \$70,000 to [a Plaintiff], they had every justification for defending this action ... The judge was wrong to award [indemnity costs] in these circumstances. He should have awarded costs on the ordinary party and party scale': **Credit Corporation (Fiji) Limited v. Wasal Khan and Mohd Nasir Khan** (Civil Appeal No. ABU0040 of 2006S; High Court Civil Action No. HBC0344 of 1998, 8 July 2008), per Pathik, Khan and Bruce, JJA, at 11

**Defining 'Improper', 'Unreasonable' or 'Negligent' Conduct in Legal Proceedings as Guide to Indemnity Costs Awards:** Cases where 'wasted costs' rules or 'useless costs' principles have been applied against solicitors where their conduct in proceedings has led to delay and/or abuse of process can provide some assistance in determining whether conduct in proceedings generally may be such as to warrant the award of indemnity costs. These cases specifically relate to solicitors' conduct rather than directly touching upon the indemnity

costs question; nonetheless the analysis or findings as to what constitutes conduct warranting an award of costs can be helpful. See for example:

- *Ridehalgh v. Horsefield and Anor* [1994] Ch 205
- *Medcalf v. Weatherill and Anor* [2002] UKHL 27 (27 June 2002)
- *Harley v. McDonald* [2001] 2 AC 678
- *Kemajuan Flora SDN Bh v. Public Bank BHD & Anor* (High Court Malaya, Melaka, Civil Suit No. 22-81-2001, 25 January 2006)
- *Ma So So Josephine v. Chin Yuk Lun Francis and Chan Mee Yee* (FACV No. 15 of 2003, Court of Final Appeal Hong Kong Special Administrative Region, Final Appeal No. 15 of 2003 (Civil) (On Appeal from CACV No. 382 of 2002, 16 September 2004)
- *SZABF v. Minister for Immigration (No. 2)* [2003] FMCA 178
- *Heffernan v. Byrne* [2008] FJCA 7; ABU0027.2008 (29 May 2008)

Some of the matters referred to include:

- At the hearing stage, the making of or persisting in allegations made by one party against another, unsupported by admissible evidence 'since if there is not admissible evidence to support the allegation the court cannot be invited to find that it has been proved, and if the court cannot be invited to find that the allegation has been proved the allegation should not be made or should be withdrawn: *Medcalf v. Weatherill and Anor*, at 8, per Lord Bingham
- At the preparatory stage, in relation to such allegations – not necessarily having admissible evidence but there should be 'material of such a character as to lead responsible counsel to conclude that serious allegations could properly be based upon it: *Medcalf v. Weatherill and Anor*, at 8, per Lord Bingham
- Failures to appear, conduct which leads to an otherwise avoidable step in the proceedings or the prolongation of a hearing by gross repetition or extreme slowness in the presentation of evidence or argument are typical examples of wasting the time of the court or an abuse of its processes resulting in excessive or unnecessary costs to litigants: *Harley v. McDonald*, at 703, Para [50] (English Privy Council)
- Starting an action knowing it to be false is an abuse of process and may also involve knowingly attempting to mislead the court: *Ma So So Josephine v. Chin Yuk Lun Francis and Chan Mee Yee* (FACV No. 15 of 2003, Court of Final Appeal Hong Kong Special Administrative Region, Final Appeal No. 15 of 2003 (Civil) (On Appeal from CACV No. 382 of 2002, 16 September 2004), at Para [43], per Ribeiro, PJ (Li, CJ, Bokhary and Chan, PJ and Richardson, NPJ concurring)
- Lending assistance to proceedings which are an abuse of the process of the court – using litigious procedures for purposes for which they were not intended, 'as by issuing or pursuing proceedings for reasons

*unconnected with success in the litigation or pursuing a case known to be dishonest' or evading rules intended to safeguard the interests of justice 'as by knowingly failing to make full disclosure on ex parte application[s] or knowingly conniving at incomplete disclosure of documents': **Ridehalgh v. Horsefield** [1994] Ch 205, at 234, per Bingham, MR*

- *Initiating or continuing multiple proceedings which amount to abuse of process: **Heffernan v. Byrne** [2008] FJCA 7; ABU0027.2008 (29 May 2008), per Hickie, J.*

*Specific Circumstances of Grant/Denial Indemnity Costs: Specific instances supporting or denying the award of indemnity costs include:*

- *Indemnity costs follow per a 'Calderbank offer', that is, where a party makes an offer or offers prior to trial, which is/are refused, and that party succeeds at trial on a basis which is better than the prior offer: **Calderbank v. Calderbank**[1975] 3 WLR 586*
- *However, no indemnity costs awarded where Calderbank letter contains no element of compromise, making it not unreasonable for the party not to accept the offer. The question is '... whether the offeree's failure to accept the offer, in all the circumstances, warrants departure from the ordinary rule as to costs ...': **SMEC Testing Services Pty Ltd v. Campbelltown City Council** [2000] NSWCA 323, at Para[37], per Giles, JA Hence, if the offer is not a genuine offer of compromise and/or there is no appropriate opportunity provided to consider and deal with it, then no indemnity costs follow: **Richard Shorten v. David Hurst Constructions P/L; D. Hurst Constructions v. RW Shorten** [2008] Adj LR 06/17 (17 June 2008), per Einstein, J. (NSW Supreme Court, Equity Division T&C List); **Leichhardt Municipal Council v. Green** [2004] NSWCA 341, at Paras[21]-[24], [36], per Santow, JA, Stein, JA (concurring); **Herning v. GWS Machinery Pty Ltd (No. 2)** [2005] NSWCA 375, at Paras[4]-[5], per Handley, Beazley and Basten, JJA; **Elite Protective Personnel v. Salmon** [2007] NSWCA 322, at Para [99]; **Donnelly v. Edelsten**[1994] FCA 992; [1994] 49 FCR 384, at 396*
- *Indemnity costs awarded:*
  - *upon a winding-up petition's being presented on a debt known to the petitioner to be genuinely disputed on substantial grounds;*
  - *the clearly established law being that a winding up order will not be granted in such circumstances, meaning that the petitioner 'had no chance of successfully obtaining a winding up order';*
  - *where in these circumstances the filing of the petition 'constituted a deliberate tactical manipulation of the winding*



*have the Plaintiff's claim struck out as an abuse of process: Cooperative Bulk Handling Ltd v. Australian Manufacturing Workers Union (WA Branch)(Unreported, WASC, Lib. No. 970190, 30 April 1997), per Wheeler, J.*

- *Indemnity costs cannot be awarded in a criminal appeal, albeit 'in criminal appeals, as in civil cases, unreasonable conduct by the unsuccessful party might increase a usual award': Sayed Mukhtar Shah v. Elizabeth Rice and Ors (Crim Appeal No. AAU0007 of 1997S, High Ct Crim Action No. HAA02 of 1997, 12 November 1999), at 4, per Sir Moti Tikaram, P., Casey and Barker, JJA*
- *Indemnity costs awarded then reversed on appeal where solicitor held liable for costs (under a 'wasted costs' order) in initiating action for clients where solicitor taken to have known that the basis of the clients' action was wholly false"*

I observed that the oral and written submissions of Counsel for the Plaintiff has not addressed why 'indemnity costs' should be awarded **in the current proceedings for vacant possession.**

The Court has not been pointed to any "reprehensible conduct" in relation to the **current proceedings for vacant possession.** Indeed, as was set out by in *Carvill v HM Inspector of Taxes* (Unreported, United Kingdom Special Commissioners of Income Tax, 23 March 2005, Stephen Oliver QC and Edward Sadler)(Bailii:[2005]UKSPCSPC00468,<http://www.bailii.org/cgibin/markup.cgi?doc=/uk/cases/UKSC/2005/SPC00468.html>), "reprehensible conduct" requires two separate considerations (at paragraph 11):

*"The party's conduct must be unreasonable, but with the further characteristic that it is unreasonable to an extent or in a manner that it earns some implicit expression of disapproval or some stigma."*

**I have not found, any evidence of "reprehensible conduct" by the Defendants in relation to the present proceedings before me.**

In my view, the Defendants have done no more than to exercise their legal right to contest the Plaintiff's Summons for vacant possession. This simply does not approach the degree of impropriety that needs to be established to justify indemnity costs. The Defendants are not guilty of any conduct deserving of condemnation as disgraceful or as an abuse of process of the court and ought not to be penalized by having to pay indemnity costs.



In the context of the present case, I am comforted by the rule of law enunciated in the following decisions;

In **Ranjay Shandill v Public Service Commission** [Civil Jurisdiction Judicial Review No:- 004 of 1996] Pathik J held;

*“[A party] cannot be penalised [for] exercising its right to dispute matters but in very special cases where a party is found to have behaved disgracefully or where such behaviour is deserving of moral condemnation, then indemnity costs may be awarded as between the losing and winning parties.”*

In **Quancorp PVT Ltd & 0020 Anor v. MacDonald & Ors** [1999] WASC 101, Wheeler J held;

*“.... ‘hopeless’ too readily so as to support an award of indemnity costs, bearing in mind that a party ‘should not be discouraged, by the prospect of an unusual costs order, from persisting in an action where its success is not certain’ for ‘uncertainty is’ inherent in many areas of law’ and the law changes’ with changing circumstances”*

Furthermore, is it a correct exercise of the Court’s discretion to direct the Defendants to pay costs on an indemnity basis to the Plaintiff because the Plaintiff had undergone hardships during the present proceedings for vacant possession?

The answer to the aforesaid question is in the negative which I base on the following judicial decisions;

- ❖ **Public Service Commission v Naiveli**  
**Fiji Court of Appeal decision, No: ABU 0052 11/955, (1996)**  
**FJCA 3**
- ❖ **Thomson v Swan Hunter and Wigham Richardson Ltd,**  
**(1954) ,( 2) AER 859**
- ❖ **Bowen Jones v Bowen Jones (1986) 3 AER 163**

In **“Public Service Commission v Naiveli”** ;(*supra*),The Fiji Court of Appeal held;

*“However, neither considerations of hardship to the successful party nor the over optimism of an unsuccessful opponent would by themselves justify an award beyond party and party costs. But additional costs may be called for if there has been reprehensible conduct by the party liable – see the*

*examples discussed in Thomson v. Swan Hunter and Wigham Richardson Ltd [1954] 2 All ER 859 and Bowen-Jones v. Bowen Jones [1986] 3 All ER 163.”*

(Emphasis added)

On the strength of the authority in the aforementioned three (03) cases, I venture to say beyond per-adventure that neither considerations of hardship to the Plaintiff nor the over optimism of the unsuccessful Defendants would by themselves justify an award beyond party and party costs.

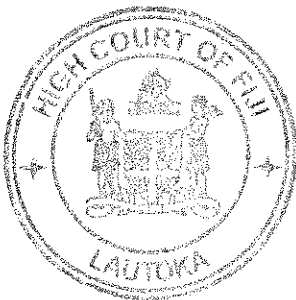
**(E) CONCLUSION**


Having had the benefit of oral submissions for which I am most grateful and after having perused the affidavits, written submissions and the pleadings, doing the best that I can on the material that is available to me, I have no doubt personally and I am clearly of the opinion that the Defendants have failed to show cause to remain in possession as required under Section 172 of the Land Transfer Act.

In these circumstances, I am driven to the conclusion that the Plaintiff is entitled to an order as prayed in Summons for immediate vacant possession.

**(F) ORDERS**

- (1) The Defendants to deliver immediate vacant possession of the land comprised in **Certificate of Title No. 19443, Lot-1 on DP 4497.**
- (2) The Plaintiff's application for indemnity costs is refused.
- (3) The Defendants to pay costs of \$1000.00 (summarily assessed) to the Plaintiff within 14 days hereof.



  
15/12/2016

**Jude Nanayakkara**  
**Master**

**At Lautoka**  
**15<sup>th</sup> December 2016.**