THE HIGH COURT OF FIJI AT LABASA
CIVIL JURISDICTION

CIVIL ACTION No. HBC 35 of 2015

BETWEEN	:	**RONEETA DEVI** of Vunimoli Road, Labasa.
		PLAINTIFF
A N D	:	**JAGDISH PRASAD** of Naodamu, Labasa.
		DEFENDANT
COUNSEL	:	**Mr. A. Sen for the Plaintiff** **No appearance for the Defendant**
Date of Hearing	:	**07th March, 2016**
Date of Judgment	:	**31st March, 2016**

JUDGMENT

[01] The plaintiff instituted these proceedings seeking an order on the defendant directing him to handover the vacant possession of the land known as Housing Authority Sub-Lease No. 270266 being lot 26 on DP No. 4882 containing 23.4 perches situated in the District of Labasa in the island of Macuata, immediately and for summarily assessed costs in a sum of $3000.00.

[02] The plaintiff's position is that she purchased this property through a mortgage sale and she was registered as the owner of the property on 30th June 2015 which fact is borne out by the copy of the registered lease annexed to the supporting affidavit. It is also the position of the plaintiff that the defendant has no right

whatsoever to be in occupation of this property. The defendant had been given notice to vacate on 21st July 2014 but to no avail.

[03] The defendant's position is that he and his late father Chandrika Prasad were the co-owners of this property and after the demise of the father he and his brothers and sisters became the beneficiaries of the father's estate. One of the brothers of the defendant has already filed and action in respect of the same property against another brother, Kishor Kumar, the Registrar of Title and the Attorney General alleging that the 1st defendant had fraudulently got this property transferred in his name and later mortgaged it to the Bank of South Pacific.

[04] When this matter came up for hearing before this court on 07th March 2016 the defendant was absent and unrepresented.

[05] 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:-
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> (a) the last registered proprietor of the land;
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> (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.

[06] Section 172 of the said Act provides that if the person summoned appears he may show cause why he refuses to give possession of such land and, if he proves to the satisfaction of the judge a right to the possession of the land, the judge shall

dismiss the summons with costs against the proprietor, mortgagee or lessor or he may make any order and impose any terms he may think fit.

[07] Since the plaintiff has become the proprietor of the property in question the burden of proving to the satisfaction of the court that the defendant has a right to be in possession of the property is on him.

[08] In the case of **Morris Hedstrom Limited v Liaquat Ali f/n Wahid Ali Action No. 153 of 1987** the Supreme Court held:

> Under section 172 the person summonsed may show cause why he refuses to give possession of the land and if he proves to the satisfaction 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 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 some tangible evidence establishing a right or supporting an arguable case for such a right, must be adduced.

[09] In **Prasad v Hamid [2004] FJCA 10; ABU0059.2003 (19 March 2004)** it was held:

> As has been remarked in other cases, provisions of this kind are common in many common law countries. There is a substantial amount of authority dealing with them and with the principles which apply when the procedure of summary judgment is invoked. The all important question always is whether the Defendant can prove to the satisfaction of the judge a right to the possession of the land. These words have been the subject of some judicial gloss both in Fiji and elsewhere. For present purposes it is sufficient to refer to a decision relied upon by the primary judge in Morris Hedstrom Limited v. Liaquat Ali (Action No. 153/87) where the Supreme Court said (at p.2) that under s.172 the person summoned may show cause why he refuses to give up 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 Court added that that was not to say that final or incontrovertible proof of a right to remain in possession must be adduced. What was required was that some tangible evidence establishing a right or supporting an arguable case for such a right, must be adduced. What we have called the gloss on the section derives from the summary nature of the proceedings instituted under s.169. Courts are always reluctant to give summary judgment in cases where a Defendant shows that he has some reasonably arguable defence or case which requires to be heard at a proper trial of the proceedings.

[10] The defendant claims title to the land. The plaintiff has tendered in evidence documentary proof of her title and as against the paper title of the plaintiff the only evidence the defendant has adduced is his bare statement in the affidavit that he was one of the co-owners of the land and a letter given by two people who claim to be the children of Chandrika Prasad.

[11] When the plaintiff through her solicitors served on the defendant the notice requiring him to vacate the property he replied by his letter dated 14th August 2014, the 1st and the 3rd paragraphs of which read as follows;

> For your information I am the occupier of the above dwelling house and also previous owner as I had transferred the property to my youngest brother, after 30 years of living and paying due to financial constraint. Without my knowledge he had obtained a loan from BSP and the facts are well known to you.
>
> ..... I humbly request and plead that time be given to me until 30/11/14. Whereby I will be able to sell all the remaining items and repair the boat and the rest of the items if not sold will be moved to a suitable location. I assure you I will move on or before 30/11/14.

[12] The facts contained in this letter are quite contrary to the depositions in the affidavit of the defendant. If there was a fraud perpetrated on him by his brother from whom the plaintiff acquired title there was no reason for him not to mention it in this letter. According to the letter he had already transferred his interests in the land to his youngest brother and by seeking time to leave the property shows that he had no interest in it and also that he admitted the title of the plaintiff in the property.

[13] From the above it is clear that the defendant has failed to establish that he has any right in the property in question to remain in possession and that there is any triable issue which requires the attention of the court.

[14] For the reasons set out above I make the following orders.

ORDERS.

1. The defendant is ordered to vacate the property in question immediately.
2. The defendant is also ordered to pay $3000.00 to the plaintiff as costs (summarily assessed) of these proceedings.

Lyone Seneviratne

JUDGE

31st March 2016.