

IN THE HIGH COURT OF FIJI  
AT SUVA  
CIVIL JURISDICTION

Civil Action No. HBC 333 of 2014

**BETWEEN:**        **PUSHPA MUDALIAR** aka **PUSHPA WATI DEVI** of 9216 Sierra River Drive, Elk Grove CA 95624, USA, Supervisor.

PLAINTIFF

**AND:**             **KAMLESHAN SAMI MUDALIAR** of Lot 5, Wainibuku Subdivision, 9 Miles, Taxi Driver.

DEFENDANT

**BEFORE:**        **Master Vishwa Datt Sharma**

**COUNSELS:**     **Mr. Suruj Sharma** - for the Plaintiff  
                     **Mr. Shelvin Singh** - for the Defendant

**Date of Hearing:** 06<sup>th</sup> September, 2016

**Date of Ruling:** 25<sup>th</sup> October, 2016

**RULING**

*(Application seeking Vacant Possession pursuant to s169 of the Land Transfer Act Cap 131)*

**INTRODUCTION**

1. The Plaintiff filed the Summons on 24<sup>th</sup> November, 2014 and sought for the following orders:
  - (a) That the Defendant to give immediate vacant possession of the land comprised in Crown Lease No 1777 situated at Lot 5, Wainibuku Subdivision, Nasinu, in the Republic of Fiji; AND
  - (b) That the costs of and incidental to this application may be paid by the Defendant.

2. There are 2 (Two) affidavits filed before the Court:
  - a) Affidavit in Support of James Raghwan Raman filed on 24<sup>th</sup> November, 2014 ("Plaintiff's Affidavit");
  - b) Affidavit in Opposition of Kamleshan Sami Mudaliar filed on 26<sup>th</sup> February, 2015 ("Defendant's Affidavit In Opposition");
3. The proceedings was heard on a defended basis and therefore this court has to determine the pending issue in terms of the laws provided for in *ss169, 171 and 172 of the Land Transfer Act [Cap 131]*.

#### THE LAW

4. The application is filed in terms of s.169 of the Land Transfer Act [Cap 131] which 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."*
5. Pursuant to *section 172 of the Act* the onus is on the Defendant to show cause why she refuses to give up possession to the Plaintiff and why an order for possession should not be made against her.
6. 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."*

7. 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."*

(Underline is mine for emphasis)

8. As far as the requirements in terms of **section 172** are concerned, the Supreme Court in the case of **Morris Hedstrom Limited v. Liaquat Ali (Action No. 153/87 at p2)** said 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."*

9. The requirements of **section 172** have been further elaborated by the Fiji Court of Appeal in **Ajmat Ali s/o Akbar Ali v Mohammed Jalil s/o Mohammed Hanif (Action No. 44 of 1981 - judgment 2.4.82)** where the court said:

*"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. There is accordingly*

*nothing in section 172 which requires an automatic order for possession unless "cause" is immediately shown.*  
(Emphasis added)

10. In *Premji v Lal* [1975] FJCA 8; Civil Appeal No 70 of 1974 (17 March 1975) the Court of Appeal said:

*'These sections and equivalent provisions of the Land (Transfer and Registration) Ordinance (Cap. 136-1955 Laws of Fiji) have been considered in a number of cases in this court and the Supreme Court. In Jamnadas & Co. Ltd. v. Public Trustee and Prasad Studios Ltd. (Civil Appeal No. 39 of 1972 - unreported) this court said -*

*'Under Section 172 of the Act the Judge is required to dismiss the summons if the respondent proves to his satisfaction a right to possession ...'*

11. Under **Section 172 of the Act** the judge is empowered to dismiss the summons if the respondent proves to her satisfaction that she has a valid defence, a right to possession, locus standi and or a licence. It further provides that a judge may make any order and impose any terms that he may think fit. The dismissal of the summons is not to prejudice the right of a Plaintiff to take any other proceedings to which he may be otherwise entitled.
12. Reference is made to the case authorities of *Caldwell v. Mongston* (1907) 3 F.L.R. 58 and *Perrier Watson v. Venkat Swami* (Civil Action 9 of 1967 - unreported) wherein the Supreme Court held-

*'that if the proceedings involve consideration of complicated facts or serious issues of law, it will not decide the cases on summary proceedings of this nature, but will dismiss the summons without prejudice to the Plaintiff's right to institute proceedings by Writ of Summons.'*

#### Factual Matrix

- (a) That the Plaintiff has been the joint registered proprietor of **Crown Lease No. 1777** (hereinafter referred to as "the said property") with her husband, **Raman Sami Mudaliar** since **3<sup>rd</sup> May 1996** vide **Transfer No. 395469**.
- (b) That the Plaintiff is the sole Executrix and Trustee and the sole beneficiary of the Estate of **Raman Sami Mudaliar** vide **Probate No. 50133**.

- (c) That Transmission by Death and Transfer have been endorsed on the Title by the Registrar of Titles vide dealing Nos. **784017** and **784018** on **9<sup>th</sup> August 2013** but has not been signed off by the Registrar by virtue of the Caveat No. **763056** registered by the Plaintiff on **2<sup>nd</sup> October 2012**.
- (d) That the said property was owned by **Muniamma** since **13<sup>th</sup> October 1967** and was since that date used as a family home by **Muniamma**, her husband, **Rama Sami Mudaliar** and **Kamleshan Sami Mudaliar**.
- (e) That the Plaintiff married the late **Raman Sami Mudaliar** in **1984** and thereafter jointly with the Plaintiff's late husband took over and made monthly payments to the **Housing Authority** in respect of the Mortgage over the said property.
- (f) In 1996, **Muniamma** (Plaintiff's mother-in-law) transferred the subject property to the Plaintiff for the consideration sum of **\$45,000.00** which sum the Plaintiff borrowed from **FNPF** and was secured by mortgage over the subject property.
- (g) In 1999, the Plaintiff and her husband decided to let the Defendant occupy the subject property free of rental and operate their taxi business on the condition that the Respondent make loan repayment of **\$400.00** per month to **FNPF** from taxi income of **\$800.00** per month and the Defendant to pay all outgoings, town rates and lease rental and maintain the subject property from balance taxi income of **\$400.00** per month.
- (h) The Plaintiff and her husband informed the Defendant that if they decided to return to Fiji and reside on the subject property or sell it they would give Defendant reasonable notice to vacate the subject property.
- (i) The Plaintiff's husband passed away on **30<sup>th</sup> March 2008**.
- (j) In early 2010, the Plaintiff was informed by **FNPF** that her loan repayments were not being made to her loan account and it would sell the subject property under its Mortgage.
- (k) In April 2010, the Plaintiff came to Fiji with money from her personal savings in USA and paid off balance loan of **\$22,425.90** to **FNPF**.
- (l) On **16<sup>th</sup> April 2010**, whilst the Defendant was living at the subject property, the Defendant handed to the Plaintiff a "Sale and Purchase Agreement" in respect of the subject property which had purchase price of **\$150,000.00** with an acknowledgement of deposit of **\$50,000.00**.
- (m) The Plaintiff after receiving the Agreement refused to sign.
- (n) The Defendant then informed the Plaintiff that he will only pay her **\$80,000.00** and that the purchase price of **\$150,000.00** was in the Agreement for the Defendant to obtain loan from the Bank.

- (o) The Plaintiff informed the Defendant that she will not sign the Agreement, and if the Defendant wanted to purchase the subject property then she would sell to him for \$300,000.00 which was near the estimated market value.
- (p) That after the above incident the Plaintiff and her Attorney were refused entry on the subject property by the Defendant.
- (q) Thus, it prompted the Plaintiff to commence this proceedings.

### Plaintiff's Case

#### 13. The Plaintiff's Affidavit filed in this case deposed as follows:

- (i) That he is the brother and duly appointed **Power of Attorney** holder of Mrs Pushpa Mudaliar aka Pushpa Wati Devi (Mrs Mudaliar), the Plaintiff herein. Mrs Mudaliar is currently resident in the States of California in the United States of America (USA).
- (ii) That by virtue of his appointment as Attorney of and mandate from Mrs Pushpa Mudaliar, he is duly authorised to depose this Affidavit on behalf of the Plaintiff. His appointment as holder of Power of Attorney is current and duly registered. Annexed hereto and marked as Annexure "A" is a true copy of the Power of Attorney granted to him by Mrs Pushpa Mudaliar.
- (iii) Mrs Pushpa Mudaliar is the Executrix and Trustee of the Estate of Raman Sami Mudaliar aka Rama Sami Mudaliar, by virtue of which, she is the legal and registered proprietor of the property comprised of Crown Lease No. 1777 being Lot 5 Wainibuku subdivision in the province of Rewa and district of Suva ("the Property"). A true copy of the Crown Lease No. 1777 is annexed hereto and marked as Annexure "B".
- (iv) Mr Kamlesh Mudaliar (Kamlesh), the named Defendant herein is the Plaintiff's brother-in-law. On or about 1999, Mrs Mudaliar and Kamlesh had an informal family understanding arrangement encompassing the following essential terms:
  - (a) Kamlesh was to reside at the property rent free in return for looking after the property whilst Mrs Mudaliar was in USA.
  - (b) Kamlesh was to give immediate vacant possession of the property at the request of Mrs Mudaliar; and
  - (c) Kamlesh was to maintain the property in clean and tidy condition. (the arrangement).
- (v) That pursuant to the arrangement, Kamlesh has been residing at the property since 1999.
- (vi) On or about September 2010, Mrs Mudaliar returned to Fiji and requested Kamlesh to vacate the property as per the arrangement but Kamlesh refused to vacate the property and remains in occupation of the property.
- (vii) Mrs Mudaliar had made numerous and persistent requests to Kamlesh to vacate the property but Kamlesh has not done so.

- (viii) Mrs Mudaliar thereafter, on 16<sup>th</sup> September 2010 caused a Notice to Quit to be served on the defendant for his continued illegal occupation of the Property. The Notice to Quit was issued on 16<sup>th</sup> September 2010 and served on 3<sup>rd</sup> October 2010, providing Kamlesh a month's time to vacate the Property. Annexed hereto and marked "C" is the Affidavit of Service with respect to the service of the Notice to Quit on Kamlesh.
- (ix) Kamlesh failed to comply with the requests of Mrs Mudaliar and failed to comply with the Notice to Quit dated 16<sup>th</sup> September 2010. Mrs Mudaliar gave Kamlesh further time and indulgence to move out of the Property without prejudice to the said Notice. However, despite a grant of further four (4) years, Kamlesh has failed to move out of the property and continues to fail to do so.
- (x) That on 2<sup>nd</sup> September 2014, Mrs Mudaliar through her solicitors issued a second Notice to Quit dated 2<sup>nd</sup> September 2014, giving Kamlesh one month's notice to vacate the property. The Notice to Quit dated 2<sup>nd</sup> September 2014 was served on the Defendant on 13<sup>th</sup> September 2014 and the one month period for Kamlesh to vacate lapsed on 14<sup>th</sup> October 2014. Annexed hereto and marked "D" is the Affidavit of Service with respect to the service of the Notice to Quit on Kamlesh. Despite the said Notice, Kamlesh continues to be in illegal and unlawful occupation of the property and has failed to pay to the Plaintiff and give an account of all rental payments received from the Tenant in the lean-to-house.
- (xi) Notwithstanding the Notice to date, Kamlesh continues to illegally occupy the property and he has done so without payment of any rent or consideration in kind.
- (xii) He caused his solicitors to seek consent and approval from the Ministry of Lands and Mineral Resources to issue eviction proceedings with respect to the property. The Ministry of Lands and Mineral Resources wrote to my solicitors vide their letter dated 21<sup>st</sup> August 2013 granting consent to issue eviction proceedings. A true copy of the said letter from the Ministry of Lands and Mineral Resources is annexed hereto marked as Annexure "E".
- (xiii) He humbly prays to this Honourable Court that an order be made for immediate delivery of the vacant possession of the property by Kamlesh to the Plaintiff in terms of the Summons filed herein.

#### Defendant's Case

14. **The Affidavit in Response deposed by the Defendant states as follows:**

- (i) He deposed to the facts herein as acquired by him in the course of his duties and where stated on information and belief.
- (ii) He has read what appeared to be the affidavit in support of James Raghwan Raman, the lawful attorney of the Plaintiff sworn and filed on 24<sup>th</sup> November 2014 (the said affidavit) and have understood its meaning and effect.

- (iii) *Save to admit receiving the Notices, he denied the allegations in paragraphs 4, 5, 6, 7, 8, 9, 10, 11 and 13 of the said affidavit.*
- (iv) *He has since issued proceedings against the Plaintiff to this action (by way of a separate action) to extend the Caveat on the property and for an equitable claim to enforce the promise by the Plaintiff and her late husband (his brother) that the property was to be transferred to him in consideration of him paying off the mortgage on the property owed to the Fiji National Provident Fund.*
- (v) *He has relied on the promised by the Plaintiff and his late brother that they will transfer the property to him once the mortgage had been paid to him. Had he known in 1998 that the Plaintiff will renege on her promises, he would not have spent all his life savings on repayment of the FNPF loan.*
- (vi) *He together with his family would be prejudiced if they are evicted from the said property having spent all their savings not only in repayment of the FNPF mortgage but also making payment of lease rental and doing renovations to the property.*
- (vii) *Annexed hereto and marked "A" is a copy of his affidavit in support of his application in the proceedings before Justice Kumar in Civil Action No. 82 of 2015 and he seeks to rely on the contents of the said affidavit in this proceedings.*
- (viii) *He humbly seeks an Order that the application be dismissed with costs.*

#### ANALYSIS and DETERMINATION

15. The question for this court to determine is whether the Plaintiff is entitled to the vacant possession of the premises on the land comprised and described on vacant possession of the land comprised in Crown Lease No 1777 situated at Lot 5, Wainibuku Subdivision, Nasinu, in the Republic of Fiji, of which the Plaintiff is the registered proprietor or Lessee of in terms of s.169 of the Land Transfer Act Cap 131?
16. In this case, the Plaintiffs must first comply with the requirements of section 169 of the Land Transfer Act cap 131, which are stated hereunder as follows:
  - (a) The first requirement or the first limb of section 169 is that the applicant must be the last registered proprietor of the subject land.
  - (b) The second is that the applicant be a lessor with power to re-enter where the lessee or tenant is in arrears; and
  - (c) The third is where a lessor against a lessee or tenant where a legal notice has been given or the term of the lease has expired. The second and third limb



*of section 169 does not appear to apply in that the defendant is not the plaintiff's tenant who is in arrears and/or the term of the lease has expired.*

(Underline for emphasis)

17. In this case, the first limb of s169 applies. However, the Defendant disputes that the Plaintiff is the registered Lessee or a proprietor in this instant case since the Registrar of Titles has not completed the Transfer of the Title by endorsing its signature.
18. The Defence Counsel raised the following Defences-
- (a) That the Plaintiff did not have the **locus standi** to bring this action for vacant possession against the Defendant,
  - (b) That of **Promissory and Proprietary Estoppel, and**
  - (c) That there are **tribal issues** and the matter cannot be determined by affidavit evidence.
19. The Plaintiff has annexed in the Affidavit in Support a **certified true copy of the Crown Lease No. 1777.**
- The **Crown Lease No 1777** clearly shows that the **Lease** was transferred to the Plaintiff, Pushpa Mudaliar and her Husband, Ram Sami Mudaliar by folio No. 395469 on 03<sup>rd</sup> May, 1996.
20. Reference is made to the case Supreme Court Case of Lok v Ram [2014] FJSC 4; CBV001.2013 94 April 2014), whereby the Court explained the meaning of 'locus standi' as follows-
- 'The concept of locus standi connotes the meaning of 'standi'. The Plaintiff must have such interest in the matter to which her claim relates. Where a person has no interest at all or no sufficient interest to support a particular legal claim or action, such person will not have locus standi and thus no standing to sue another person. In other words, it is a threshold to give standing to sue'.*
21. In the present case before this Court, the Defendant was to only reside with his family in the house property and that in consideration of the Defendant looking after the house, he would stay there rent free save for the payment of utilities and outgoings. Otherwise, the Defendant did not have any other beneficial interest or entitlement to the present property in question and the Deceased 'Will' also does not confirm any beneficial interest of the Defendant in the property. After all, the Deceased 'Will' is the legal

document which is not challenged by the Defendant for any reasons herein. If I may add, the Defence Counsel in his written submissions at paragraph 5 admits wherein he states '*that the Plaintiff is the Executrix and Trustee of the Estate of Raman Sami Mudaliar and therefore she is the owner of the property comprised in Crown Lease No. 1777 being Lot 5 Wainibuku.*'

22. Further, the Plaintiff's husband, Raman Sami Mudaliar took demise on 30<sup>th</sup> March, 2008, leaving behind a 'Will'. On 19<sup>th</sup> August, 2010, the Plaintiff, Pushpa Mudaliar was issued with a Probate Grant in the Deceased Husband's Estate in terms of the Deceased 'Will' wherein the Deceased, had bequeathed all his property to the Plaintiff, Pushpa Mudaliar.
23. Therefore, the question of *locus standi* does not become an issue in this case. The Plaintiff, Pushpa Mudaliar was a joint proprietor and lessee of the property in question on 03<sup>rd</sup> May, 1996 and continues to be the Proprietor and lessee of the property to the present time in terms of the endorsement on the folios of the Crown Lease No. 1777 and the Deceased's Will dated and executed on 14<sup>th</sup> November, 2007 respectively.
24. The term "Lessee" is defined as proprietor of a Lease or sub lease in the *Land Transfer Act Cap 131*. Therefore, the term "Lessee" follows within the ambits of *section 169* application.
25. The Plaintiff is for the purposes of *section 169* the last registered proprietor and Lessee of the said property and accordingly has the *locus standi* to commence or bring in this proceeding against the Defendant.
26. After the Plaintiff has established the first limb test of *section 169* that is that the Plaintiff is the registered proprietor and Lessee of the property in Crown Lease No. 1777, then the Defendant bears the onus of showing cause as to why vacant possession should not be granted to the Plaintiff.
27. Pursuant to *section 172 of the Land Transfer Act Cap 131*. The Defendant needs to satisfy this court on affidavit evidence that she has a right to possession. (Case of *Muthusami v Nausori Town Council F.C.A. 23/86* refers).
28. There is no need to prove conclusively a right to possession and it is sufficient for the Defendant to prove that there is some tangible evidence establishing the existence of a right or of an arguable defence. (Case No. 152 of 1987- *Morris Hedstrom Ltd v Liaquat Ali* refers).

29. *Sections 39-42 of the Land Transfer Act*, and under the Torrens system of land registration which operates in Fiji, the title of the registered proprietor is indefeasible unless actual fraud is proved. (Case of *Subramani v Sheela* [1982] FJCA 11; [1982] 28 FLR 82 (2 April 1982); *Assets Company Ltd v Mere Roihi* [1905] AC 176 at p. 210; *Fels v Knowles* 26 N.Z.L.R. 608, at p 620 refers).
30. In *Subramani* (supra) the Fiji Court of Appeal (per Gould V.P.' Marsack, J.A., and Spring J.A.) states as follows-

*'The indefeasibility of title under the Land Transfer Act is well recognized; and the principles clearly set out in a judgment of the New Zealand Court of Appeal dealing with provisions of the New Zealand Land Transfer Act which on that point is substantially the same as the Land Transfer Act of Fiji. The case is Fels v Knowles 26 N.Z.L.R. 608. At page 620 it is said:-*

*"The cardinal principle of the statute is that the register is everything, and that, except in case of the actual fraud on the part of the person dealing with the registered proprietor, such person, upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against the entire world."*

#### *Promissory and Proprietary Estoppel*

31. The Defendant also raised the defence of Promissory and Proprietary Estoppel stating-

*"That his late brother Raman Sami Mudaliar and the Plaintiff had agreed to transfer the property to him once the mortgage had been paid off. The deal was that when the Plaintiff and his late brother were able to settle in USA, then the property will be transferred to the Defendant subject of course to the payment of the FNPF debt. If they were not able to settle in USA, then the Plaintiff, Defendant's late brother Raman Sami Mudaliar would come back to Fiji and reside with the Defendant on the property. The Defendant sought to enforce the promise of the Plaintiff and his late brother for a specific performance of the representations that were made to him."*

32. In *Denny v Jessen* [1977] 1 NZLR 635 at 639 Justice White summarized proprietary estoppel as follows:

*"In Snell's Principles of Equity (27th ed) 565 it is stated that proprietary estoppel is "... capable of operating positively so far as to confer a right of action". It is "one of the qualifications" to the general rule that a person who*

*spends money on improving the property of another has no claim to reimbursement or to any proprietary interest in the property. In Plaimmer v Wellington City Corporation (1884) 9 App Cas 699; NZPCC 250 it was stated by the Privy Council that "...the equity arising from expenditure on land need not fail merely on the ground that the interest to be secured has not been expressly indicated."(ibid, 713, 29). After referring to the cases, including Ramsden v Dyson (1866) LR 1 HL 129, the opinion of the Privy Council continued, "In fact the court must look at the circumstances in each case to decide in what way the equity can be satisfied" (9 App Cas 699, 714; NZPCC 250, 260). In Chalmers v Pardoe[1963] 1WLR 677:[1963] 3 All ER 552 (PC) a person expending money was held entitled to a charge on the same principle. The principle was again applied by the Court of Appeal in Inwards v Baker [1965] 2 QB 29; [1965] 1 All ER 446. There a son had built on land owned by his father who died leaving his estate to others. Lord Denning MR, with whom Danckwerts and Salmon L JJ agreed, said that all that was necessary:*

*"... is that the licensee should, at the request or with the encouragement of the landlord, have spent the money in expectation of being allowed to stay there. If so, the court will not allow that expectation to be defeated where it would be inequitable so to do."(ibid, 37,449).*

33. In *Wilfred Thomas Peter v Hira Lal and Frasiko*; HBC 40 of 2009 the Hon. Judge stated that the following four (4) conditions should be met for the Defence of Proprietary Estoppel to apply:-

- i. *An expenditure;*
- ii. *A mistaken belief*
- iii. *Conscious silence on the part of the owner of the land; and*
- iv. *No bar to the equity*

34. The Defendant submitted to the Court in terms of the above as follows-

**An Expenditure**

*He made payment to the Director of Lands, Nausori Town Council and the FNPF. He has maintained the property. The fact that such payments have been made and property maintained in itself shows that the Defendant has acted to his detriment.*

**A mistaken belief**

*The promise, reliance and/ or undertaking by the Plaintiff and his late brother, Raman Sami Mudaliar to transfer the property to the Defendant in consideration of paying off the mortgage on the property owed to FNPF.*

**Conscious silence on the part of the owner of the land**

No action for possession was filed during the life time of the Plaintiff's husband nor was any notice issued to the Defendant when Raman Sami Mudaliar was alive. This shows that the Defendant's claim that the property was to be transferred to him has some merit which is evidenced by his occupation of the property for more than 10 years and his expenditure solely on this property.

**No bar to the equity**

The Defendant's reliance on the promise by the Plaintiff and his late brother to transfer the property to him, the fact that he has actually relied on that promise and changed his position, the fact that he has made payments to FNPF the fact that he has not invested him in any other property and the fact that he has acted to his detriment by relying on that promise. In law, this amounts to enforcement of a promissory estoppels and/or proprietary estoppel.

35. The Plaintiff submitted otherwise as follows-

**An Expenditure**

That there has been no evidence of expenditure incurred by the Defendant.

**A mistaken belief**

There is no evidence of any mistaken belief of any constructive trust created between the Plaintiff and the Defendant and or the parties to this proceeding.

**Conscious silence on the part of the owner of the land**

That there have been notices sent to the Defendant to vacate the property which has not been adhered to by the Defendant countering any belief of a conscious silence on the part of the Plaintiff.

The Counsel representing the Plaintiff further stated that the Defendant is the Plaintiff's brother-in-law. On or about 1999, the Plaintiff and the Defendant had an informal family undertaking and arrangement encompassing the following essential terms-

- The Defendant was to reside at the Property rent free in return for looking after the property whilst the Plaintiff was in USA;
- The Defendant was to give immediate vacant possession of the Property at the request of the Plaintiff; and

- *The Defendant was to maintain the property in clean and tidy condition.*

*Pursuant to this arrangement, the Defendant has been residing at the Property since 1999. On or about September 2010, the Plaintiff returned to Fiji and requested the Defendant to vacate the Property as per the arrangement but the Defendant refused to vacate the Property and remains in occupation of the Property.*

36. The evidence before this court shows that the arrangement between the Plaintiff and the Defendant was for the Defendant to reside on the Property rent free, operate their taxi business on the condition that the Defendant will make monthly loan repayments of \$400 to FNPF from the taxi income of \$800 per month and the Defendant to pay all outgoings, town rates, lease rental, look after and maintain the subject property from the balance taxi income of \$400 per month whilst the Plaintiff was in USA. Further, the understanding between them was that the Defendant will immediately vacate possession of the Property at the request of the Plaintiff which the Defendant is now refusing to do so.

Instead, the Defendant says that the Plaintiff and his late brother, Raman Sami Mudaliar made the promise, reliance and/ or undertaking to transfer the property to the Defendant in consideration of paying off the mortgage on the property owed to FNPF. The Defendant has not produced any evidence to the Court in terms of the promise or any undertaking by the Plaintiff and the late brother which he has mentioned.

If there was any promise or undertaking as the Defendant alleges although he has failed to establish the same to the Court, then why did he not think appropriate in the circumstances to make an application to the Court for a legal entitlement to the property in terms of the Vesting Order application as provided for in the law.

However, the Defendant on 16<sup>th</sup> April, 2010, whilst living at the subject property, handed to the Plaintiff a Sale and Purchase Agreement in respect of the subject property which had a purchase price of \$150,000 with an acknowledgement of deposit of \$50,000, which the Plaintiff received but refused to sign the same. The Plaintiff did inform the Defendant that if he wanted to purchase the subject property, then she would sell to him for a price of \$300,000.

The question that comes to mind is '*if the Defendant is raising a Defence of Promissory and Proprietary Estoppel, then why would he hand over a Sale and Purchase Agreement in respect of the subject Property with a purchase price of \$150,000?*'

I find that there is no evidence of **expenditure**, or of any **mistaken belief** of any constructive trust created between the Plaintiff and the Defendant and or the parties to this proceeding. Further, there is no evidence of conscious silence on the part of the Plaintiff since there was an arrangement only between them for the Defendant to reside on the subject Property, maintain the same and to give vacant possession when sought or requested for by the Plaintiff.

Eventually, the Plaintiff issued the Notice to Quit in September, 2010, and when the same was not complied with by the Defendant, the Plaintiff gave the Defendant further time and indulgence to move out of the Property without Prejudice to the said Notice. However, despite a grant of further Four (4) years, the Defendant has failed to move out of the Property and still continues to fail to do so.

37. For the aforesaid rational, I find that the Plaintiff was a **joint proprietor and lessee** of the property in question on 03<sup>rd</sup> May, 1996 and continues to be the **Proprietor and lessee of the property** to the present time in terms of the endorsement on the folios of the **Crown Lease No. 1777** and the **Deceased's Will** dated and executed on 14<sup>th</sup> November, 2007 respectively.
38. The Plaintiff obtained the written **Consent** from the Ministry of Lands on 21<sup>st</sup> August, 2014 to institute the Legal Proceedings for eviction against the Defendant. (Annexure marked 'D' refers).
39. The **Defendant** has failed to show any cause including *a right to possession* or has *tangible evidence establishing a right or supporting an arguable case for such a right that must be adduced in terms of section 172 of the Land Transfer Act Cap 131*.
40. There is accordingly nothing in **section 172** which requires an automatic order for possession unless "cause" is immediately shown.
41. Further, the **Defendant** has failed to satisfy this court on the four (4) limb test for the **promissory and proprietary estoppel** which he raised in his Defence.
42. Following are the final orders of this court.

FINAL ORDERS

- A. The Defendant to give vacant possession of the land comprised in Crown Lease No 1777 situated at Lot 5, Wainibuku Subdivision, Nasinu, in the Republic of Fiji to the Plaintiff.
- B. The Defendant to deliver vacant possession to the Plaintiff in one (1) month's time on or before the 25<sup>th</sup> November, 2016.
- C. Execution is hereby suspended till the 25<sup>th</sup> November, 2016.
- D. The Defendant to pay Costs to the Plaintiff summarily assessed at \$1,000 and to be paid within 14 days.

Dated at Suva this 25<sup>th</sup> day of October, 2016



MR VISHWA DATT SHARMA  
Master of High Court, Suva

cc: Patel Sharma Lawyers, Suva.  
Shelvin Singh Lawyers, Suva.