IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 40 of 2016

BETWEEN : **LIA TINAI KAWA** of Lautoka as the Sole Administrator and Trustee of Estate of Charles Morris.

PLAINTIFF

AND : **FRANCIS MORRIS** of Lot 10, Kadavu Street, Lautoka

DEFENDANT

Mr. Vikrant Chandra for the Plaintiff
Mr. Isoa Douglas Tikoca for the Defendant

Date of Hearing : - 05th July 2016
Date of Ruling : - 28th October 2016

RULING

(A) INTRODUCTION

(1) The matter before me stems from the Plaintiff's Originating Summons dated 09th March 2016, made pursuant to Section 169 of the Land Transfer Act, Cap. 131, seeking an order for vacant possession against the Defendant.

(2) The Defendant is summoned to appear before the Court to show cause why she should not give up Vacant Possession of the Plaintiff's property comprised in **'Native Lease'** No:- 25829 described as 'Waiyavi' Sub-division Stage 1, Section 42, Lot 10 on ND 3610 comprising an area of 258 square metres.

(3) The Originating Summons for eviction is supported by an Affidavit sworn by one 'Margaret Mahezareen Fullman', the Power of Attorney holder of the Plaintiff.

(4) The Originating Summons for eviction is strongly contested by the Defendant.

(5) The Defendant filed an Affidavit in Opposition opposing the application for eviction followed by an Affidavit in Reply thereto.

(6) The Plaintiff and the Defendant were heard on the Originating Summons. They made oral submissions to Court. In addition to oral submissions, Counsel for the Plaintiff and the Defendant filed a careful and comprehensive written submission for which I am most grateful.

(B) THE FACTUAL BACKGROUND

(1) What are the circumstances that give rise to the present application?

(2) The Originating Summons for eviction is supported by an Affidavit sworn by one 'Margaret Mahezareen Fullman', the Power of Attorney holder of the Plaintiff which is substantially as follows;

Para 1. *THAT I am the lawful holder of the Attorney of the Plaintiff pursuant to the Power of Attorney No. 56586 and I have the Plaintiff's authority to swear this Affidavit. Annexed hereto and marked with letter "MF1" is a certified true copy of the said Power of Attorney No.56586.*

2. *I deposed to the facts herein as within my personal acknowledge and that acquired by me in the course of my duties save and except where stated to be on information and belief and where so stated I verily believe to be true.*

3. *THAT the Plaintiff is the registered proprietor at Native Lease NO. 25829 described as Waiyavi sub – division Stage 1 Section 42 Lot 10 on ND 3610 comprising an area of 258 square metres together with all improvements thereon situated at Kadavu Street, Lautoka (hereinafter referred to as "the property") Annexed hereto and marked with letter "MF2" is a copy of the said Native Lease NO. 25829.*

4. *THAT the Plaintiff has sold the property to Mohammed Shakeel Yusuf Khan and me.*

5. *THAT the said Mohammed Shakeel Yusuf Khan and I intend to carry out general repairs and maintenance to the property.*

6. *THAT I have been advised by the Plaintiff's Solicitors that on the 3rd day of August 2015, a notice to vacate was issued and served on the Defendant but the Defendant failed to comply with the said notice, Annexed hereto and marked with letter :MF3" is a copy of the said notice.*

7. *THAT I most humbly pray to this Honourable Court that Order in terms be granted for the Plaintiff's summons, and further the Defendant be restrained from damaging the Plaintiff's property when she moves out of the property.*

(C) THE LAW

(1) Against this factual background, it is necessary to turn to the applicable law and Judicial thinking in relation to the principles governing the exercise of the discretion to make the Order the Plaintiff now seeks.

(2) Rather than refer in detail to the various authorities, I propose to set out, with only limited citations, what I take to be the principles in play.

(3) 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]

(4) 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.'

(5) 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."*

(6) 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.*

(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 application for vacant possession.

> *Para 3.* *THAT the Plaintiff is the registered proprietor of Native Lease NO. 25829 described as Waiyavi sub – division Stage 1 Section 42 Lot 10 on ND 3610 comprising an area of 258 square metres together with all improvements thereon situated at Kadavu Street, Lautoka (hereinafter referred to as "the property") Annexed hereto and marked with letter "MF2" is a copy of the said Native Lease NO. 25829.*

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 **Native Lease No- 25829** (Annexure MF-2) the Plaintiff's deceased husband, Charles Herbert Morris, is the registered lessee of the Native land in question. In January 1999, the Native lease is granted to him by the Native Land Trust Board for a term of 99 years. He was registered as the lessee of the Native Land on 25th July 2001. Therefore, the Plaintiff's deceased husband holds a registered lease and could be characterized as the last registered proprietor.

With regard to the first limb of Section 169 of the Land Transfer Act, Counsel for the Defendant endeavoured to argue that it is not competent for the Plaintiff to bring the action for possession because at the material time she was not 'the registered proprietor of the land' a condition precedent for proceedings brought under Section 169 (a) of the Land Transfer Act.

In my view, by virtue of the provision of Section 93 (4) of the Land Transfer Act, the Plaintiff's title is deemed in law to have vested in her from the date of her husband's death. Since she instituted proceedings for possession after obtaining the letter of administration allowing her husband's death and now that the transmission has been registered, she is by force of law at all material times the registered proprietor of the Native Lease in question albeit in her representative capacity.

On the question of whether a **lessee** can bring an application under Section 169 (a) of the Land Transfer Act, if any authority is required, I need only refer to the sentiments expressed by Master Robinson in "**Michael Nair v Sangeeta Devi**", Civil Action No: 2/12, FJHC, decided on 06.02.2013. The learned Master held;

> *"The first question then is under which ambit of section 169 is the application being made? The application could not be made under the second or third limb of the section since the applicant is the lessee and not the lessor as is required under these provisions. But is the applicant a registered proprietor? A proprietor under the Land Transfer Act means the registered proprietor of any land, or of an estate or interest therein". The registration of the lease under a statutory authority, the iTLTB Act Cap 134, creates a legal interest on the land making the applicant the registered proprietor of the land for the purposes of the Land Transfer Act. He can therefore make an application under section 169 of the Land Transfer Act".*

The same rule was again applied by the learned Master in "**Nasarawaqa Co-operative Limited v Hari Chand**", Civil Action No: HBC 18 of 2013, decided on 25.04.2014. The learned Master held;

"It is clear that the iTLTB as the Plaintiff's lessor can take an action under section 169 to eject the Plaintiff. This is provided for under paragraphs [b] &[c]. For the lessor to be able to eject the tenant or the lessee it must have a registered lease. It is not in dispute that the Plaintiff holds a registered lease,the lease is an "Instrument of Tenancy" issued by the iTLTB under the Agricultural Landlord and Tenancy Act. It is for all intents and purposes a native lease and was registered on the 29 November 2012 and registered in book 2012 folio 11824. It is registered under the register of deeds. There is nothing in section 169 that prevents a lessor ejecting a lessee from the land as long as the lease is registered. How will the lessee then eject a trespasser if the lessor in the same lease can use section 169? The lessee under section 169 can eject a trespasser simply because the lessee is the last registered proprietor. The Plaintiff does not have to hold a title in fee simple to become a proprietor as long as he/she is the last registered proprietor. A proprietor is defined in the Land Transfer Act as "proprietor" means the registered proprietor of land, or of any estate or interest therein". The Plaintiff has an interest by virtue of the instrument of tenancy and therefore fits the above definition and can bring the action under section 169."

A somewhat similar situation as this was considered by His Lordship Justice K.A. Stuart in **Housing Authority v Muniappa** 1977, FJSC. His Lordship held that the Plaintiff Housing Authority holds a registered lease therefore it could be characterised as the last registered proprietor.

In **Habib v Prasad** [2012] FJHC 22, Hon. Madam Justice AngalaWati said;

"The word registered is making reference to registration of land and not the nature of land. If the land is registered either in the Registrar of Titles Office or in the Deeds Office, it is still registered land. This land has been registered on 4th March, 2004 and is registered at the Registrar of Deeds Office, it is still registered land. The registration is sufficient to meet the definition of registered in the Interpretation Act Cap 7:-

"Registered" used with reference to a document or the title to any immoveable property means registered under the provision of any written law for the time being applicable to the registration of such document or title".

(2) Before determining against the Defendant, the real issue and the only issue which this Court has to consider **at the outset** is whether the Plaintiff has satisfied the **threshold criteria spelt out in Section 170 of the Land Transfer Act.**

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.

ORIGINATING SUMMONS

LET ALL PARTIES concerned attend before a Master in Chambers at the High Court of Fiji at Lautoka ***on Thursday the 14th day of April, 2016*** *at the hour of 8.00 o'clock in the forenoon or so on thereafter as Counsel can be heard on behalf of the above named Plaintiff for:*

(a) *An order that the Defendant, her agents, servants or others do forthwith give immediate vacant possession of* ***Native Lease No. 25829 described as Waiyavi sub-division Stage 1 42 Lot 10 on ND 3610 comprising an area of 258 square meters*** *together with all improvements thereon situated at Kadavu Street, Lautoka.*

(b) *Damages*

(c) *Costs*

(Emphasis added)

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

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 14th April 2016. According to the Affidavit of Service filed by the Plaintiff, the Originating Summons was served on the Defendant on 22nd March 2016.

Therefore the Defendant is 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 too has been complied with.

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 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 Defendant to establish a lawful right or title under which she is entitled to remain in possession.**

In the context of the present case, I am comforted by the rule of law enunciated 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 HedstromLimited –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]

(3) After an in-depth analysis of the totality of the Affidavit evidence in this case, I now summaries my understanding of the salient facts as follows;

- The land in question in this case is 'Native Land' within the meaning of 'Native Land Trust Act'.
- The Native Land is initially leased by the Native Land Trust Board (Landlord) to 'George Morris', (the father of the Defendant and father-in-law of the Plaintiff) and to 'Charles Herbert Morris' (the brother of the Defendant and the husband of the Plaintiff).
- On 24th October 1994, 'George Morris' passed away. His wife Elenoa Tinai became the administratrix of the estate of 'George Morris'.
- The property only vested with the estate up to 1998. The Native Lease expired in 1998 and the lease reverted back to the Native Land Trust Board.
- In 1999, a new lease is granted to 'Charles Herbert Morris' for a term of 99 years, by the Native Land Trust Board, as evidenced by Certified copy of Native Lease No:- 25829 (Annexure MF-2).
- The Native Lease No:- 25829 (Annexure MF-2) is registered with the Registrar of Titles on 25th July 2001.
- In 2009, 'Charles Herbert Morris' passed away.

- ❖ The Plaintiff instituted proceedings for possession after obtaining the letter of administration allowing her husband's death and the transmission has been registered on 01st July 2013.

(4) What are the Defendant's reasons refusing to deliver vacant possession? The application for vacant possession is opposed by the Defendant on various reasons expressly set out in the Affidavit in Opposition. There is a considerable amount of overlap between one reason and another and that it is more likely to be helpful for them to be looked at cumulatively rather than separately. The reasons fall within a very small compass. The Defendant's reasons raise the question of '**indefeasibility of title**', '**equitable interest**' and '**Constructive Trust**'.

Reference is made to paragraphs 5 – 23 and 27 of the Defendant's Affidavit in Opposition.

Para 5. *THAT the late George Morris our Biological father acquired the property at Lot 10 Kadavu Street, Lautoka through a personal loan from Westpac ad the property was then registered under George Morris and Charles Herbert Morris as he was the only son.*

6. *THAT the Morris family included our father George Morris, Mother Elenoa Tinai and seven siblings Elizabeth, Elenoa, Violet, Charles Herbert, myself, Lavenia and finally Ema. Annexed hereto and marked "FM1" are the birth certificates of the siblings.*

7. *THAT the property solely serves as a Family house for everyone to enjoy its comfort and in case if any of the family members faced problems they could be housed there.*

8. *THAT on 24th October 1994 our father George Morris passed away and thereafter our mother Elenoa Tinai became the sole Administratrix of the estate of George Morris by virtue of Probate number 31204 in the High Court of Suva. Annexed hereto and marked "FM2" is a copy of the Probate.*

9. *THAT on or around 1998 the lease for the property had expired so our Mother Elenoa Tinai gathered all the siblings and chose Charles Morris to repay for the lease as he was occupying the property to which he agreed.*

10. *THAT during the meeting with the Siblings, Charles Morris (deceased) promised and endorsed our Mothers wishes not to change any name on the title for the property and to conserve, respect and hold it in trust for the siblings as it is a family house.*

11. *THAT I arranged all his documents and through negotiating with Native Land Trust Board ("NLTB") the price of $23,000.00 for renewal was reduced to $9,000.00 and through my deceased*

brother's Fiji National Provident Fund he paid NLTB and made arrangements with them thereafter.

12. *THAT in the same year 1998 our mother passed away, then Charles's wife Lia Tinai Kawa moved in and said that Charles wanted us out of the family house.*

13. *THAT around the year 2000 Charles had asked my husband and I to move back into the property as he could no longer maintain it and that's when he also found out that the wife told the family to move out of their own house to which he was very furious at his wife.*

14. *THAT when moving back into the family house we re-joined with our daughter who Charles and Lia Kawa requested to adopt and later stated that he would give his share of the property to our daughter, to further protect and maintain the family house.*

15. *THAT according to paragraph 3 of the affidavit on annexure "MF2" on 21st July 2001 the lease was registered and only Charles Morris name was included and left out the biological sisters who rightfully own shares by virtue of our deceased parents.*

16. *THAT on or around 2009 Charles Morris passed away thereafter his wife's family through the iTaukei traditional customs asked for her to return home in which I requested for her to stay with us as we are family in which they agreed.*

17. *THAT on or around 2010 Lia Kawa left on her own free will and asked my 8 year old daughter who Charles only gave the combination to the suit case which contained most of our family history, receipts and documents pertaining to the property.*

18. *THAT on or around 2013 when Cyclone Evan struck Fiji our house was badly damaged and through all the arrangements I made, the Fiji Government through its Cyclone Rehabilitation programme delivered to the house $11,355.68 worth of building material. Annexed hereto and marked with letter "FM3" is a copy of the rehabilitation transaction.*

19. *THAT after receiving the material my husband and I arranged for carpenters and materials from Reddy Diamond, Raynil, New star Aluminium, R.C.Manubhai Ltd, Kasabias Ltd and Vinod Patel and paid an amount around $4000.00 - $5000.00 to repair the house. However the total of physical receipts that could be salvaged amounts to $2102.47 from 2013 – 2014. Annexed hereto and marked with letter "FM4" are copies of the receipts.*

20. *THAT from year 2000 – 2015 I had also paid for both Water and Electricity bills. However the total of physical receipts that could be salvaged amounts to $2524.35. Annexed hereto and marked with letter "FM5" are copies of water and electricity bill receipts.*

21. *THAT on 23rd August 2013 the iTaukei Land Trust Board served me a notice for the reassessment of rent lease for the Family house from*

$200.00 per annum to $250.00 per annum. Annexed hereto and marked "FM6" is a copy of the notice.

22. *THAT on the same day I met with Neli Turagabeci one of the iTLTB Staff and made arrangements with the payments and agreed to pay $50.00 per week to which I paid $50 thereafter. Annexed hereto and marked "FM7" is a copy of the receipt for payment of rent.*

23. *THAT on the following week when I got to iTLTB to pay another $50.00 I was advised by Neli Turagabeci and the staff at the cashier that I should not make any more payments as Lia Kawa have cleared the arrears and will be handling the payments from them onwards.*

27. *THAT the transactions by my brother Charles Morris, Lia Tinai Kawa, Margaret Fullman and Mohammed Yusuf Khan is Fraudulent and illegal as the property is to be held in constructive trust for my siblings as beneficiaries of the Estate of our parents, Lia Kawa by virtue of Estate of Charles Morris and I as the true beneficiaries.*

(5) Based on the above grounds in Opposition, there are three (03) problems that concern me. As I see it, three (03) problems lie for determination by the Court. They are;

(1) Is there any **equitable estoppel or lien** arising in the Defendant's favour on the land for the money expended on the land by the Defendant i.e; the money expended on repairing the house, the payment for water, electricity and TLTB rent?

(2) Whether a Court of equity will impose a **'Constructive Trust'** on the Plaintiff's deceased husband, Charles Morris for the benefit of the Defendant?

(3) Whether the Plaintiff's deceased husband, Charles Morris holds an **indefeasible title**?

(6) There are no complicated questions of fact in this case to be investigated. Therefore, the procedure under Section 169 is most appropriate.

Having said that let me move to examine the **first question** posed at paragraph five.

It is not in dispute that all improvements and maintenance were carried out by the Defendant without the consent of the Native Land Trust Board (Statutory Landlord). The improvements to the Native Land were made without the knowledge or at least acquiescence of the Statutory Landlord i.e. the Native Land Trust Board.

The residential lease rentals have been paid under the tenant's name 'Charles Herbert Morris'.

It is not in dispute that the improvements carried out by the Defendant including contributions made towards the development of the property lacked the knowledge

and the prior consent of the Native Land Trust Board. Thus, the issues of compensation from improvements cannot justify continual occupation of the property. Any prejudice to the Defendant from the improvements to the land she has made can be dealt with by way a separate action against the landlord seeking compensation for those improvements.

The Fiji Court of Appeal in **Ram Chand v Ram Chandar, Appeal No:- ABU 0021. 20025** observed that the mere fact a tenant carries out improvements without the consent of his or her landlord does not give him a right to continue occupation of the land if the landlord is otherwise lawfully entitled to it. The fact that improvements are made is not really an answer to a landlord's application for possession.

Therefore, I am constrained to answer the first question posed at paragraph five negatively.

(7) Now let me move to examine the **second question** posed at paragraph five.

Reference is made to paragraph 27 of the Defendant's Affidavit in Opposition.

> *Para 27.* *THAT the transactions by my brother Charles Morris, Lia Tinai Kawa, Margaret Fullman and Mohammed Yusuf Khan is Fraudulent and illegal as the property is to be held in **constructive trust** for my siblings as **beneficiaries of the Estate of our parents**, Lia Kawa by virtue of Estate of Charles Morris and I as the true beneficiaries.*

At this stage I ask myself, "What is the nature of the Defendant's interest in the land?"

Is it such as to avail it against the Plaintiff (Purchaser) who took with full notice of it?

Did the Plaintiff take the land on **"constructive trust"** to permit the Defendant to stay there for her life time or for long as she wished?

What is meant by the phrase **"Constructive Trust"**?

A **"Constructive Trust"** is a trust imposed by law. A Constructive Trust arises by operation of law. A Constructive Trust is an equitable remedy and they are discretionary in nature. (See; **Re Polly Peck International PLC (in administration) v MacIntosh (1998) 3 All E.R. 512 and 825.**

In a broad sense, the Constructive Trust is both an institution and a remedy of the law of equity. Please see; **Muschinski v Dadds (1985) 160 C.L.R. 583.**

Constructive Trusts are not always subject to the requirement of certainty of subject matter. In **"Giumelli v Giumelli (1999) 196 C.L.R. 101 at 112 Gleeson C.J., McHugh, Gummon and Callinan JJ,** found that some Constructive Trusts create or

recognize no proprietary interest but rather impose a personal liability to account for losses sustained by constructive beneficiaries. In that situation there is no identifiable Trust property.

During the 1970's the United Kingdom's Court of Appeal, led by Lord Denning MR, adapted a free-ranging remedial basis for constructive trusts and came to the view that a constructive trust is "**imposed by law whenever justice and conscience require it**"; **Hussey v Palmer (1972) 3 All E.R. 744.**

Therefore, the law as I understand is this;

- As a species of Trust, Constructive Trusts inherently create equitable proprietary interests in favour of identifiable beneficiaries.
- Constructive Trust is a liberal process, founded upon large principles of equity.

Applying those principles to the case before me, what do we find?

As I said earlier, the property only vested with the estate prior to 1998. The Native lease expired in 1998 and the lease reverted back to the Statutory Landlord i.e. Native Land Trust Board.

In 1999, the Native Land Trust Board granted a new lease to 'Charles Herbert Morris', for a term of 99 years as evidenced by certified copy of Native Lease No:- 25829 (Annexure MF-2).

The Defendant is a person without a lease or tenancy or licence of any kind enabling her to occupy the property. She has no legal status over the property. She was never registered as proprietor/lessee of the Native Land. She never had a registrable interest in land. The Plaintiff's deceased husband is the registered proprietor holding a registered lease over the Native Land. The Defendant has not paid any rent to Native Land Trust Board as a tenant to endeavor to establish a semblance of an interest in the Native Land. The original lease over the Native Land expired in 1998. There was no extension. Thus, the Native Lease in relation to the estate of 'George Morris' expired in 1998. Thereafter, the property reverted back to the statutory land lord, Native Land Trust Board. In 1999, when the Native Land Trust Board granted a new lease to the Plaintiff's deceased husband, the property was not vested in the estate of 'George Morris'. The property only vested in the estate up to 1998. Thereafter, the lease reverted back to the NLTB. The NLTB thereupon had the clear discretion to grant a new lease to anyone who applied for it. Neither the Defendant by virtue of her being a beneficiary in her father's , George Morris's estate , nor the estate itself , has a legal right on the native land after 1998. Nor does any such legal right accrue to her under any law simply by virtue of the fact that she is still in occupation of the said Native

Lease. It follows then that there is no statutory duty or other obligation on the part of the NLTB to consult the Defendant first before leasing out and afresh.

In these circumstances, the Court cannot interfere with the exercise of discretion on the part of the Native Land Trust Board as to whom it intends to grant the lease of the Native Land. The Native Land Trust Board is entitled to grant to whoever is most entitled or qualified.

I hold that no Constructive Trust can be created in relation to a Native Lease without the written Consent of the Native Land Trust Board. Moreover, a Court of equity will not impose on the Plaintiff or her deceased husband a Constructive Trust in favour of the Defendant, since the Defendant is not a tenant, there is no tenancy, there is no evidence of payment of rental to NLTB as a tenant and nothing to show a semblance of any legal interest in the Native Land.

During the course of the arguments in relation to Constructive Trust, Counsel for the Defendant took me through what Lord Diplock said in **Gissing v Gissing 1971 AC 886** and what Lord Craighead said in '**Stack v Dowden' 2007(2) ALL. ER 929**.

I closely read the above judicial decisions.

The case of '**Gissing v Gissing**' and '**Stack v Dowden**' relates to matrimonial property. Therefore, they are clearly distinguishable from the case before me.

Therefore, I am constrained to answer the second question earlier posed at paragraph (05) negatively.

Suffice it to say that the Defendant's stance will not stand as, Section 59 (d) of the 'Indemnity, Guarantee and bailment Act' (Cap 232) states that no action shall be brought upon **any contract or sale of lands or any interest** in them unless the agreement upon which such action is brought or a memorandum thereof is in writing. Quite plainly this provision is designed to prevent fraud.

No such writing is in evidence in the present case. There is no shred of evidence tending to establish such writing.

For the sake of completeness, Section 59 (d) of the act is reproduced below.

59. ***No action shall be brought-***

(a) .....
(b) .....
(c) .....

(d) ***upon any contract or sale of lands,*** *tenements or hereditaments or any interest in or concerning them; or*

(e) ……

(8) Let me now proceed to examine the **third question** posed at paragraph five.

The Defendant contends that; (Reference is made to paragraph 27 of the Defendant's Affidavit in Opposition).

> *Para 27. THAT the transactions by my brother Charles Morris, Lia Tinai Kawa, Margaret Fullman and Mohammed Yusuf Khan is* ***Fraudulent and illegal*** *as the property is to be held in constructive trust for my siblings as beneficiaries of the Estate of our parents, Lia Kawa by virtue of Estate of Charles Morris and I as the true beneficiaries.*

Sections 38 and 39 (1) of the Land Transfer Act, can be regarded as the basis of the concept of "indefeasibility of title" of a registered proprietor. Under Torrens System of land law the registration is everything and only exception is **fraud.**

I should quote Section 38 and 39 (1) of the **Land Transfer Act**, which provides;

Section 38 provides;

> *Registered instrument to be conclusive evidence of title*
>
> *"38. No instrument of title registered under the provisions of this Act shall be impeached or defeasible by reason or on account of any informality or in any application or document or in any proceedings previous to the registration of the instrument of title.*

Section 39 (1) provides;

> *"39-(1) Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the registered proprietor of any land subject to the provisions of this Act, or of any estate or interest therein, shall except in case of fraud, hold the same subject to such encumbrances as may be notified on the folium if the register, constituted by the instrument*

of title thereto, but absolutely free from all other encumbrances whatsoever except...

I am conscious of the fact that section 40 of the Land Transfer Act seeks to dispel Notice of a Trust or unregistered interest in existence in the following manner;

> *40.Except in the case of fraud, no person contracting or dealing with or taking or proposing to take a transfer from the proprietor of any estate or interest in land subject to the provisions of this Act shall be required or in any manner concerned to inquire or ascertain the circumstances in or the consideration for which such proprietor or in any previous proprietor of such estate or interest is or was registered, or to see to the application of the purchase money or any thereof, or shall be affected by notice, direct or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding, and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud."* (Underlining is mine).

With regard to the concept of "**indefeasibility of title of a registered proprietor**", the following passage from the case of **"EngMee Young and Others (1980) Ac 331** is apt and I adapt it here;

> *"The Torrens system of land registration and conveyanncing as applied in Malaya by the National Land Code has as one of its principle objects to give certainty to land and registrable interests in land. Since the instant case is concerned with Title to the land itself their Lordships will confine their remarks to this, though similar principles apply to other registrable interests. By s.340 the title of any person to land of which he is registered as proprietor is indefeasible except in cases of fraud, forgery or illegality and even in such cases a bond fide purchase for value can safely deal with the registered proprietor and will acquire from him on indefensible registered title."*

In "**Prasad v Mohammed**" **(2005) FJHC 124; HBC 0272J.1999L (03.06.2005) His Lordship Gates,** succinctly stated the principles in relation to **fraud** and **indefeasibility of title** as follows;

> *[13] In Fiji under the Torrens system of land registration, the register is everything: Subramani & Ano v DharamSheela & 3*

Others [1982] 28 Fiji LR 82. Except in the case of fraud the title to land is that as registered with the Register of Titles under the Land Transfer Act [see sections 39, 40, 41, and 42]: Fels v Knowles [1906] 26 NZLR 604; Assets Co Ltd v Mere Roihi [1905] AC 176, PC. In Frazer v Walker [1967] AC 569 at p.580 Lord Wilberforce delivering the judgment of the Board said:

"It is to be noticed that each of these sections except the case of fraud, section 62 employing the words "except in case of fraud." And section 63 using the words "as against the person registered as proprietor of that land through fraud." The uncertain ambit of these expressions has been limited by judicial decision to actual fraud by the registered proprietor of his agent: Assets Co Ltd v Mere Roihi.

It is these sections which, together with those next referred to, confer upon the registered proprietor what has come to be called "indefeasibility of title. ***"The expression, not used in the Act itself, is a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys. This conception is central in the system of registration."***

[14] Actual fraud or moral turpitude must therefore be sown on the part of the plaintiff as registered proprietor or of his agents Wicks v. Bennet [1921] 30 CLR 80; Butler v Fairclough [1917] HCA 9; [1917] 23 CLR 78 at p.97

(Emphasis Added)

In the case of **SHAH –v- FIFTA** (2004) FJHC 299, HBC 03292J, 2003S (23rd June 2004) the Court took into consideration Sections 38, 39 and 40 of the Land Transfer Act, Cap 131. Under Section 38 of the Lands Transfer Act, Cap 131 it states that;

"No instrument of title registered under the provisions of this Act shall be impeached or defeasible by reason of or an account of any informality or in any application or document or in any proceedings previous to the registration of the instrument of title".

Pathik J in this case; **SHAH –v- FIFITA***(supra)* emphasised on section 40 of the Land Transfer Act Cap 131 as follows:

"Except in the case of fraud, no person contracting or dealing with or taking or proposing to take a transfer from the proprietor of any estate or interest in land subject to the provisions of this Act shall be required or in any manner concerned to inquire or ascertain the

circumstances in or the consideration for which such proprietor or in any previous proprietor of such estate or interest is or was registered, or to see to the application of the purchase money or any part thereof, or shall be affected by notice, direct or constructive, of any trust or unregistered interest, any rules of law or equity to the contrary notwithstanding, and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud".

Fraud for the purpose of the Land Transfer Act has been defined by the Privy Council in **Assets Company Ltd v Mere Roihi** [1905] AC 176 at p.210 where it was said:

".... by fraud in these Acts is meant actual fraud, i.e. dishonesty of some sort, not what is called constructive or equitable fraud – an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud. Further, it appears to their Lordships that the fraud which must be proved in order to invalidate the title of a registered purchaser for value, whether he buys from a prior registered owner or from a person claiming under a title certified under the Native Lands Act, must be brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out fraud if he had been more vigilant, and had made further inquiries which he omitted to make, does not of itself prove fraud on his part. But if it be shown that his suspicions were aroused, and that he abstained from making inquiries for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him. A person who presents for registration a document which is forged or has been fraudulently or improperly obtained is not guilty or fraud if he honestly believes it to be a genuine document which can be properly acted upon."

Fraud: Sufficiency of evidence;

In **Sigatoka Builders Ltd v Pushpa Ram & Ano**. (Unreported) Lautoka High Court Civil Action No. HBC 182.01L, 22 April 2002 the Court held in relation to "Fraud: sufficiency of evidence";

"Though evidence of fraud and collusion is often difficult to obtain, the evidence here fails a good way short of a standard requiring the court's further investigation. In ***Darshan Singh v Puran Singh*** *[1987] 33 Fiji LR 63 at p.67 it was said:*

*"**There must, in our view, be some evidence in support of the allegation indicating the need for fuller investigation which would make Section 169 procedure unsatisfactory.** In the present case the appellant merely asserted that he had paid the money for the*

purchase of the property. This was denied by both Prasin Kuar and the respondent. ***There was nothing whatsoever before the learned judge to suggest the existence of any evidence, documentary or oral, that might possibly assist the appellant in treating the case as falling within the scope of Section 169 of the Land Transfer Act and making an order for possession in favour of the respondent."***

In that case it was also held that a bare allegation of fraud did not amount by itself to a complicated question of fact, making the summary procedure of Section 169 in appropriate see too ***Ram Devi v Satya Nand Sharma & Anor****.*
[1985] 31 Fiji LR 130 at p.135A. A threshold of evidence must be reached by the Defendant before the Plaintiff can be denied his summary remedy. In ***Wallingford v Mutual Society****[1880] 5 AC 685 at p. 697 Lord Selbourne LC said:*

"With regards to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice. And here I find nothing but perfectly general and vague allegations of fraud. No single material fact is condescended upon; in a manner which would enable any Court to understand what it was that was alleged to be fraudulent."

(Emphasis Added)

It is clear from the above mentioned judicial decisions that a bare allegation of fraud does not amount by itself to a complicated question of fact, making the summary procedure inappropriate.

Therefore, in the "Torrens System" registered interests can be set aside if they have been procured by fraud, where fraud refers to active fraud, personal dishonesty or moral turpitude.

The well-known case of "**Frazel v Walker**" **(1967) 1 A.C. 569** held that apart from fraud, or from errors of misdescription which can be rectified, the registered proprietor holds his title immune from attack by all the word, but claims in *personam* will still subsist.

In **Suttan v O'Kane 1973 2 N.Z.L.R. 204**; **Both the leading Judgments contain lengthy reviews of earlier cases of fraud in respect of a person who procures himself to be registered proprietor in cases where he then knows, or later becomes aware, of an unregistered interest.**

Richmond J. and Turner P. were in agreement that a person who knows of another's interest and procures registration which cheats the other of that interest is guilty of fraud and his title can be impeached:

"It is well settled that knowledge of a breach of trust or of the wrongful disregard and destruction of some adverse unregistered

interest does itself amount to fraud. In ***Locher v Howlett*** *it is said by Richmond J: 'It may be considered as the settled construction of this enactment that a purchaser is not affected by knowledge of the mere existence of a trust or unregistered interest, but that he is affected by knowledge that the trust is being broken, or that the owner of the unregistered interest is being improperly deprived of it by the transfer under which the purchaser himself is taking'.."*

per Salmod J. in **Waimiha Sawmilling Co. Ltd. v. Waione Timber Ltd 1923 NZLR 1137 at 1173 – N.Z. Court of Appeal, affirmed in the Privy Council 1926 A.C. 101.**

A few quotations from authorities relied on by the Lordships are relevant;

"If the defendant acquired the title, said Prendergast C.J. in ***Merrie v McKay*** ***(1897) 16 NZLR 124****, "Intending to carry out the agreement with the Plaintiff, there was no fraud then; the fraud is in now repudiating the agreement, and in endeavoring to make use of the position he has obtained to deprive the Plaintiff of his rights, under the agreement. If the Defendant acquired his registered title with a view to depriving the Plaintiff of those rights, then the fraud was in acquiring the registered the title. Whichever view is accepted, he must be held to hold the land subject to the Plaintiff's rights under the agreement, and must perform the contract entered into by the Plaintiff's vendor'*

Merrie v McKay was cited with approval by Salmond J in **Wellington City Corporation v Public Trustee 1921 NZLR 423 at 433**. There Salmond J. said;

"It is true that mere knowledge that a trust or other unregistered interest is in existence it not of itself to be imputed as fraud. A purchaser may buy land with full knowledge that it is affected by a trust, and the sale may be a breach of trust on the part of the seller, but the purchaser has the protection of s. 197 unless he knew or suspected that the transaction was a breach of trust. Fraud in such a case consists in being party to a transfer which is known or suspected to be a violation of the equitable rights of other persons. Where, however, the transfer is not itself a violation of any such rights, but the title acquired is known by the purchaser to be subject to some equitable encumbrance, the fraud consists in the claim to hold the land for an unencumbered estate in willful disregard of the rights to which it is known to be subject. Thus in ***Thompson v. Finlay*** *it was held that a purchaser of land breached the Land Transfer Act who takes with actual notice of a contract by the seller to grant a lease to a third person is bound by that contract. Willaims J. says "If there is a valid contract affecting an estate, and the interest is sold expressly subject to that contract, it would be a distinct moral fraud in the purchaser to repudiate the contract, and the Act does not protect moral fraud". Specific performance of the contract to lease was decreed against the purchaser accordingly."*

For a similar decision, see the decision by Prendergast, C.J. in

- **Finnovan v Weir**
  5 N.Z, S.C. 280 p.

- **Merrci v McKay**
  16 N.Z, L.R. 124 p

As I understand the law, the "**fraud**" in acquiring the registered title is this;

"A purchaser is not affected by knowledge of the mere existence of a Trust or unregistered interest, but that he is affected by knowledge that the trust is being broken, or that the owner of the unregistered interest is being improperly deprived of it by the transfer under which the purchaser himself is taking."

The situation in the case before me is completely different.

As I said earlier, the Defendant in the case before me has no equitable interest and legal interest in the land. Therefore the Courts of equity will not impose a Constructive Trust on the Plaintiff for the benefit of the Defendant.

The Plaintiff's deceased husband obtained registered title to the land on 25th July 2001 and his title is not subject to an equitable claim or encumbrance, because at the time of registration there was no any legal agreement affecting the Native Land or an agreement which is enforceable either at law or in equity. There was no valid Contract/Agreement binding the Plaintiff's deceased husband because the Defendant did not acquire legal interest or equity.

A person who knows of another's **legal interest** and procures registration which cheats the other of that legal interest is guilty of fraud and his title can be impeached.

I have no doubt personally and I am clearly of the opinion that the Plaintiff's deceased husband is not guilty of fraud and his title cannot be impeached because; (As already mentioned)

- The Defendant has no equitable or legal interest in the land.

- The Defendants is not a tenant, there is no tenancy and she has not paid any rent to NLTB **as a tenant** to endeavor to establish a semblance of an interest in the Native land. The Defendant has no legal status over the Native Land.

- ❖ As I said earlier, the original lease over the Native Land expired in 1998. There was no extension. Thus, the Native Lease in relation to the estate of 'George Morris' expired in 1998. Thereafter, the property reverted back to the statutory land lord, Native Land Trust Board. In 1999, when the Native Land Trust Board granted a new lease to the Plaintiff's deceased husband, the property was not vested in the estate of 'George Morris'. The property only vested in the estate up to 1998. Thereafter, the lease reverted back to the NLTB. The NLTB thereupon had the clear discretion to grant a new lease to anyone who applied for it. Neither the Defendant by virtue of her being a beneficiary in her father's , George Morris's estate , nor the estate itself , has a legal right on the Native Land after 1998. Nor does any such legal right accrue to her under any law simply by virtue of the fact that she is still in occupation of the said Native Lease. It follows then that there is no statutory duty or other obligation on the part of the NLTB to consult the Defendant first before leasing out and afresh.

- ❖ The Plaintiff's deceased's husband's knowledge, that the property serves as a family house, which is not enforceable either at law or in equity to grant a legal right, is not of itself to be imputed as fraud.

- ❖ The Plaintiff's deceased's husband's registered title to the Native Lease is not a violation of some equitable encumbrances, legal interest or valid legal contract of the beneficiaries of 'Grorge Morris'. There is nothing whatsoever before the court to suggest the existence of any evidence, documentary or oral to challenge the Plaintiff's deceased husband's title on grounds of fraud.

  Under Section 169, the Plaintiff is entitled to seek possession of the property on the strength of her deceased husband's title. Her right to possession does not depend on the purported family arrangement which is not enforceable either at law or in equity, but on her deceased husband's registered ownership. The purported 'family arrangement' is if no consequence to a claim by the Plaintiff based on her deceased husband being the registered owner.

Therefore, I am constrained to answer the <u>third question</u> earlier posed at paragraph five (5) in the affirmative.

(9) To sum up, for the reasons which I have endeavoured to explain, it is clear beyond question that the Defendant has 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 Defendant has failed to adduce some tangible evidence establishing a right or supporting an arguable case for such a right.

I disallow the grounds adduced by the Defendant refusing to deliver vacant possession.

(E) CONCLUSION

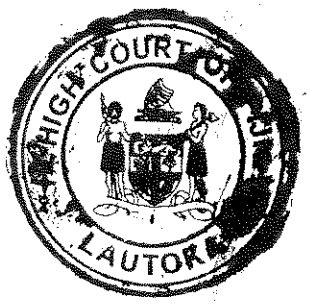
Having had the benefit of oral submissions for which I am most grateful and after having perused the affidavits, written submissions and the pleadings, doing the best that I can on the material that is available to me, I have no doubt personally and I am clearly of the opinion that the Defendant has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

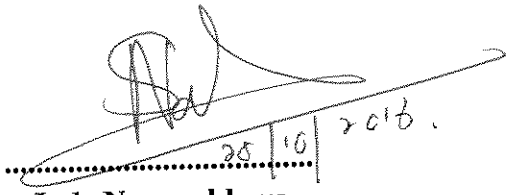
In these circumstances, I am driven to the conclusion that the Plaintiff is entitled to an order as prayed in Summons for immediate vacant possession.

(F) FINAL ORDERS

(1) The Defendant to deliver immediate vacant possession of the land described in the Originating Summons, dated 09th March 2016.

(2) The Defendant to pay costs of $750.00 (summarily assessed) to the Plaintiff within 14 days hereof.





Jude Nanayakkara
Master

At Lautoka
28th October 2016