

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

**CIVIL JURISDICTION**

**CIVIL ACTION NO. HBC 59 of 2016**

**BETWEEN** : **SIKELI TALE** of Velovelo, Lautoka,

**PLAINTIFF**

**AND** : **ADI LIKUVONO KUTA KOROI YAGOMATE** of Rifle Range,  
Lautoka,

**DEFENDANT**

(Ms.) Shantel Natasha Hazelman , Legal Aid Commission, for the Plaintiff.  
(Ms) Unaisi Baleilevuka for the Defendant.

Date of Hearing : - 27<sup>th</sup> October 2016  
Date of Ruling : - 03<sup>rd</sup> February 2017

**RULING**

**(A) INTRODUCTION**

- (1) The matter before me stems from the Plaintiff's Originating Summons, dated 13<sup>th</sup> April 2016, made pursuant to **Section 169** of the **Land Transfer Act**, for 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 Plaintiffs property comprised in **Housing Authority Sub-lease No- 179868** which contains **Crown Lease No. 5037, Lot 12** on DP 4637 situated in the province of Ba, Vuda having an area of 26.3 perches.

- (3) The Originating Summons for eviction is supported by an affidavit sworn by the Plaintiff on 12<sup>th</sup> April 2016.
- (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.

**(B) THE LAW**

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

**Section 169 states;**

*“The following persons may summon any person in possession of land to appear before a judge in chambers to show cause why the person summoned should not give up possession to the applicant:-*

- (a) **the last registered proprietor of the land;**
- (b) .....
- (c) ...

**Section 170 states;**

*“The summons shall contain a description of the land and shall require the person summoned to appear at the court on a day not earlier than sixteen days after the service of the summons.”*

**Section 171 states;**

*“On the day appointed for the hearing of the summons, if the person summoned does not appear, then upon proof to the satisfaction of the judge of the due service of such summons and upon proof of the title by the proprietor or lessor and, if any consent is necessary, by the production and proof of such consent, the judge may order immediate possession to be given to the plaintiff, which order shall have the effect of and may be enforced as a judgment in Ejectment.*

**Section 172 states;**

*“If the person summoned appears he may show cause why he refuses to give possession of such land and, if he proves to the satisfaction of the judge a right to the possession of the land, the judge shall dismiss the summons with costs against the proprietor, mortgagee or lessor or he may make any order and impose any terms he may think fit;*

*Provided that the dismissal of the summons shall not prejudice the right of the plaintiff to take any other proceedings against the person summoned to which he may be otherwise entitled:*

*Provided also that in the case of a lessor against a lessee, if the lessee, before the hearing, pay or tender all rent due and all costs incurred by the lessor, the judge shall dismiss the summons.*

[Emphasis provided]

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

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

*“s.171. On the day appointed for the hearing of the Summons, if the person summoned does not appear, then upon proof to the satisfaction of the Judge of the due service of such summons and upon proof of the title by the proprietor or lessor and, if any consent is necessary, by the production and proof of such consent, the judge may order immediate possession to be given to the plaintiff, which order shall have the effect of and may be enforced as a judgment in ejectment.”*

*“s.172. If a person summoned appears he may show cause why he refuses to give possession of such land and, if he proves to the*

*satisfaction of the judge a right to the possession of the land, the judge shall dismiss the summons with costs against the proprietor, mortgagee or lessor or he may make any order and impose any terms he may think fit.”*

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

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

*“Under Section 172 the person summoned may show cause why he refused to give possession of the land and if he proves to the satisfaction of the judge a right to possession or can establish an arguable defence the application will be dismissed with costs in his favour. The Defendants must show on affidavit evidence some right to possession which would preclude the granting of an order for possession under Section 169 procedure. That is not to say that final or incontrovertible proof of a right to remain in possession must be adduced. What is required is that some tangible evidence establishing a right or supporting an arguable case for such a right, must be adduced.”*

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

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

(C) **THE FACTUAL BACKGROUND**

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

- Para 1. THAT I am the registered proprietor of Housing Authority Sub-Lease No. 179868 being Lot 12 DP 4637 consisting of 26.3p situated at Vuda, Ba (hereinafter called the “said property”). A copy of the said Housing Authority Sub-lease No. 179868 is annexed hereto and marked with letter “ST 1”*
2. *THAT the Defendant and I were in a de-facto relationship.*
3. *THAT during the course of our relationship and upon the request of the Defendant I had loaned her a substantial amount of money and to an understanding that she would repay the same.*
4. *THAT the funds loaned to the Defendant were monies from a small business that our village was operating being as income from transporting villagers to and from the main land. The management of the business was handled by myself.*
5. *THAT thereafter the Defendant could not repay the monies that she had loaned therefore she then proposed to settle her debt by transferring the said property under my name.*
6. *THAT the Defendant had then on the 26<sup>th</sup> of August 2015 transferred the said property under my name.*
8. *THAT in order to repay the village funds I would need to sell the said property and the Defendant was well aware of this.*
9. *THAT in attempt to sell the property with suitable and interested buyers lined up the Defendant has refused to vacate the property.*
10. *THAT I had also issued the Defendant with a one month’s notice to vacate the said property on the 30<sup>th</sup> of December 2015. A copy of the said Notice is annexed hereto and marked with letter “ST 2”*
11. *THAT despite receipt of the said Notice to vacate the defendant refuses and/or neglects to give up vacant possession of the said land and remains therein unlawfully.*
12. *THAT in the circumstances above I pray to this Honourable Court for Order in terms of my Summons for Ejectment filed herein.*

- (3) The Defendant for her part in seeking to show cause against the Summons, filed an “**Affidavit in Opposition**”, which is substantially as follows;

- Para 1. THAT I am the Defendant in this action herein.*
2. *THAT I depose of the facts herein as within my own knowledge that acquired by me in the course of negotiating with the Plaintiff and or its agents or servants, save and except where stated to be on information, belief and whereto stated. I verily believe to be true.*
3. *THAT as to paragraph 1 of the Plaintiff’s Affidavit in Support (hereinafter referred to the “said Affidavit”), I state that the Plaintiff became the registered proprietor of the said property after requesting me to transfer the same under his name.*
4. *THAT as to paragraph 2 of the said Affidavit, I state that I was in a de-facto relationship with the Plaintiff since 17<sup>th</sup> January, 2013 and we have two children together and my youngest daughter passed way on 9<sup>th</sup> August, 2016.*
5. *THAT prior to the said transfer of the property to the Plaintiff, my parents Ropate & Sera Yagomate were the registered proprietors of the said property.*
6. *THAT the Plaintiff had misused the Mataqali funds which was more than \$80,000 (Eighty Thousand Dollars).*
7. *THAT the Plaintiff then requested me to assist him in transferring the property to his name to provide evidence to the Mataqali that he had invested the misused funds to purchase the said residential property.*
8. *THAT I then requested my father to assist us to transfer the said residential property on a temporarily basis to me and I then have transferred the said property to the Plaintiff simultaneously.*
9. *THAT there was a mutual understanding and agreement between me and the Plaintiff that after providing the said title to the Mataqali to prove that he had invested the said monies in purchasing the said residential property and after showing evidence to the Mataqali, the Plaintiff promised to reverse the transfer back to me.*
10. *THAT after the Property was transferred to the Plaintiff; the Plaintiff has breached the mutual agreement and proceeded further to capitalize the property into his personal capacity and use.*
11. *THAT after several and numerous requests, the Plaintiff refused to transfer the said property to me and commenced in issuing legal proceedings to evict me from the property.*
12. *THAT the Plaintiff is very well aware that the said property is owned by my parents and is our family home and he has completely denied all this by initiating legal proceedings against me.*

13. *THAT the said transfers from my father Ropate Yagomate to me was by way of natural love and affection towards me as the daughter. Annexed hereto and marked as annexure "ALY1" is a copy of the said transfer document.*
14. *THAT the said Transfer from myself to the Plaintiff was transferred for Eighty Thousand Dollars (\$80,000) subject to the valuation report, however these said monies was never exchanged hands as our mutual agreement was to only transfer the said property to assist him with showing evidence to his Mataqali to avoid been prosecuted by the relevant authorities. Annexed hereto and marked as annexure "ALY2" is a copy of the said transfer.*
15. *THAT the said transfer was done on the same day and was registered with the Registrar of Titles simultaneously.*
16. *THAT the Plaintiff obtained this said property by way of deception and he has also breached his agreement and betrayed me.*
17. *THAT I only consented to the said transfer as I only wanted to assist him and for him not to be prosecuted for a criminal charge.*
18. *THAT the Plaintiff personally went to the Registrar of Titles to pick up the said Lease and since then he started ignoring me and my calls.*
19. *THAT in the circumstances we request this Honourable Court that the Plaintiff's application be struck out with costs.*

(4) The Plaintiff filed an **Affidavit in rebuttal** deposing *inter alia*;

- Para 1. *THAT I make this Affidavit in reply to the Defendant's Affidavit in Opposition filed on the 5<sup>th</sup> of September 2016.*
2. *THAT I depose of the facts herein as within my knowledge that acquired by me in the course of negotiating with the Defendant and or its agents or servants, save and except where stated to be on information belief and where to state. I verily believe to be true.*
3. *THAT as to paragraph 3 of the Defendant's Affidavit in Opposition (hereinafter referred to the "said Affidavit") I deny that I ever requested the Defendant to transfer the property but rather the Defendant proposed to settle her debt by transferring the said property under my name.*
4. *THAT as to paragraph 4 of the said Affidavit I admit that the Defendant and I was in a de-facto relationship and we do have two children together however the Defendant and I never resided together in Fiji.*
5. *THAT I as to paragraph 5 of the said affidavit I say that the last registered proprietor was the Defendant and I had no knowledge of the dealing between the Defendant and her parents.*

6. *THAT as to paragraph 6 I never misused the mataqali monies but rather the Defendant had loaned the monies and promised to repay the same.*
7. *THAT as to paragraph 7 I deny the allegations and say that it was the Defendant's proposal to have the said property transferred and sold.*
8. *THAT as to paragraph 8 I say that I had no knowledge of the dealing between the Defendant and her father as she had informed me that the property had belonged to her.*
9. *THAT as to paragraph 9 and 10 I say that there was no such agreement made between the Defendant and I but rather the agreement was the property be transferred and sold to recover the monies she had loaned.*
10. *THAT I deny the contents as to paragraph 10 and say that it was I that tried requesting the Defendant after the transfer was made to have the property sold however she had avoided my calls and failed to keep her end of the agreement which was to have the property sold.*
11. *THAT I deny the contents of paragraph 12 and say that the Defendant told me that the property had belonged to her hence her request to have the same transferred and sold.*
12. *THAT as to paragraph 12 I had no knowledge of the dealings between the Defendant and her father.*
13. *THAT as to paragraph 14 I deny the contents and say that Iqbal and Associates was engaged as solicitors for the Transfer and we were advised by the solicitors that the transfer to be done in such manner as the property had already been transferred by love and affection and the same could not be made in the same manner between myself and the Defendant.*
14. *THAT as to paragraph 15, 16 and 17 I deny the contents.*
15. *THAT as to paragraph 18 I admit that I had gone to collect the title as it had been transferred under my name but denied the other contents.*
16. *THAT I pray to this Honourable Court that the Defendant's application be dismissed with costs.*



**(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 (01) of the affidavit in support of the Originating Summons.

*Para 1. THAT I am the registered proprietor of Housing Authority Sub-Lease No. 179868 being Lot 12 DP 4637 consisting of 26.3p situated at Vuda, Ba (hereinafter called the "said property"). A copy of the said Housing Authority Sub-lease No. 179868 is annexed hereto and marked with letter "ST 1"*

The application cannot be made under the second or third limb of Section 169 since the Plaintiff is the lessee and not the lessor as required under the provisions.

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*”

#### **Is the Plaintiff the last registered proprietor?**

According to the Housing Authority Sub-lease No- 179868 (annexure marked ST-1 referred to in the affidavit of the Plaintiff, sworn on 12<sup>th</sup> April 2016) the Plaintiff is the last registered lessee of the subject land. The **Housing Authority Sub-lease No- 179868** is registered with the Registrar of Titles on 15<sup>th</sup> October 1980. According to the memorial of the Housing Authority Sub-lease No- 179868, the Plaintiff obtained registered title on 26<sup>th</sup> August 2015. Thus, it seems to me tolerably clear that the Plaintiff holds a registered lease and could be characterised as the last registered proprietor.

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 characterized as the last registered proprietor.

In **Habib v Prasad** [2012] FJHC 22, Hon. Madam Justice Angala Wati 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 4<sup>th</sup> 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 immovable property means registered under the provision of any written law for the time being applicable to the registration of such document or title”.*

Applying the aforesaid principles to the instant case, I am driven to the conclusion that the Plaintiff is the last registered proprietor of the land comprised in Housing Authority Sub-lease No- 179868.

- (2) Pursuant to Section 170 of the Land Transfer Act;
- (1) **the Summons shall contain a “description of the Land”**
- AND
- (2) **shall require the person summoned to appear in the court on a day not earlier than “sixteen days” after the service of Summons.**

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

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

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

#### **ORIGINATING SUMMONS**

***LET** all the Defendant attend a Master in Chambers, at the High court of Fiji sitting at Lautoka on **Friday the 13<sup>th</sup> day of May, 2016 at 8.30 o’clock in the forenoon on the hearing of an application by the above-named Plaintiff that the Defendant do show cause why she should not give up immediate vacant possession to the Plaintiff of Housing Authority Sub-Lease No. 179868 being Lot 12 DP 4637 consisting of 26.3p situated at Vuda, Ba on the grounds set forth in the Affidavit of SIKELI TALE father’s name “Ropate Vunibola” duly sown and filed herein***

(Emphasis added)

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

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

The Originating Summons was returnable on 13<sup>th</sup> May 2016. According to the Affidavit of Service filed by the Plaintiff, the Originating Summons was served on the Defendant on 19<sup>th</sup> April 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 has been complied with.

- (4) To sum up; having carefully considered the pleadings, evidence and oral submissions placed before this Court, it is quite possible to say that the Plaintiff has satisfied the threshold criteria spelt out in Section 169 and 170 of the Land Transfer Act. **The Plaintiff has established a prima facie right to possession.**

**Now the onus is on the 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 expounded in the following judicial decisions.

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

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

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

*"Under Section 172 the person summoned may show cause why he refused to give possession of the land and if he proves to the*

*satisfaction of the Judge a right to possession or can establish an arguable defence the application will be dismissed with costs in his favour. The Defendants must show on affidavit evidence some right to possession which would preclude the granting of an order for possession under Section 169 procedure. That is not to say that final or incontrovertible proof of a right to remain in possession must be adduced. What is required is that some tangible evidence establishing a right or supporting an arguable case for such a right must be adduced.”*

(Emphasis is mine)

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

*“If the person summoned appears he may show cause why he refuses to give possession of such land and, if he proves to the satisfaction of the judge a right to the possession of the land, the judge shall dismiss the summons with costs against the proprietor, mortgage or lessor or he may make any order and impose any terms he may think fit; Provided that the dismissal of the summons shall not prejudice the right of the plaintiff to take any other proceedings against the person summoned to which he may be otherwise entitled:*

*Provided also that in the case of a lessor against a lessee, if the lessee, before the hearing, pay or tender all rent due and all costs incurred by the lessor, the judge shall dismiss the summons”.*

[Emphasis provided]

- (5) Let me now move to consider the Defendant’s reason refusing to deliver vacant possession.

As I understand the evidence, the Plaintiff and the Defendant were in a de-facto relationship for three years. The subject land was registered under the name of one ‘Ropate Voreqe Yagomate’, the Defendant’s father.

As I see from the notations in the memorials on the title, ‘Ropate’ did transfer the said property to the Defendant on 26<sup>th</sup> August 2015 at 2.27pm.

According to the Defendant, the said transfer was made out of natural love and affection. On the same day, the Defendant transferred the property to the Plaintiff. This transaction took place also at 2.27 pm as memorialised.

The Defendant explains the above transaction in her Affidavit in Opposition as follows;

*Para*

4. *THAT as to paragraph 2 of the said Affidavit, I state that I was in a de-facto relationship with the Plaintiff since 17<sup>th</sup> January, 2013 and we have two children together and my youngest daughter passed way on 9<sup>th</sup> August, 2016.*
5. *THAT prior to the said transfer of the property to the Plaintiff, my parents Ropate & Sera Yagomate were the registered proprietors of the said property.*
6. *THAT the Plaintiff had misused the Mataqali funds which was more than \$80,000 (Eighty Thousand Dollars).*
7. *THAT the Plaintiff then requested me to assist him in transferring the property to his name to provide evidence to the Mataqali that he had invested the misused funds to purchase the said residential property.*
8. *THAT I then requested my father to assist us to transfer the said residential property on a temporarily basis to me and I then have transferred the said property to the Plaintiff simultaneously.*
9. *THAT there was a mutual understanding and agreement between me and the Plaintiff that after providing the said title to the Mataqali to prove that he had invested the said monies in purchasing the said residential property and after showing evidence to the Mataqali, the Plaintiff promised to reverse the transfer back to me.*
10. *THAT after the Property was transferred to the Plaintiff; the Plaintiff has breached the mutual agreement and proceeded further to capitalize the property into his personal capacity and use.*
11. *THAT after several and numerous requests, the Plaintiff refused to transfer the said property to me and commenced in issuing legal proceedings to evict me from the property.*
12. *THAT the Plaintiff is very well aware that the said property is owned by my parents and is our family home and he has completely denied all this by initiating legal proceedings against me.*
13. *THAT the said transfers from my father Ropate Yagomate to me was by way of natural love and affection towards me as the daughter. Annexed hereto and marked as annexure "ALY1" is a copy of the said transfer document.*
14. *THAT the said Transfer from myself to the Plaintiff was transferred for Eighty Thousand Dollars (\$80,000) subject to the valuation report, however these said monies was never exchanged hands as our mutual agreement was to only transfer the said property to assist him with showing evidence to his Mataqali to avoid been prosecuted by the relevant authorities. Annexed hereto and marked as annexure "ALY2" is a copy of the said transfer.*

15. *THAT the said transfer was done on the same day and was registered with the Registrar of Titles simultaneously.*
16. *THAT the Plaintiff obtained this said property by way of deception and he has also breached his agreement and betrayed me.*
17. *THAT I only consented to the said transfer as I only wanted to assist him and for him not to be prosecuted for a criminal charge.*
18. *THAT the Plaintiff personally went to the Registrar of Titles to pick up the said Lease and since then he started ignoring me and my calls.*

(6) I do not wish to rest the matter there. The matter goes much further. In my opinion, however contrary to the submission of counsel for the Plaintiff, the Defendant's father, 'Ropate' still has a beneficial interest in the property. On the facts of the instant case, it seems to me perfectly plain that the transfer of the property from 'Ropate' to the Defendant was 'temporary' and the intention was that the Defendant should transfer the property back to 'Ropate' once the Plaintiff clears his debts. With due respect to the forceful and tenacious argument of counsel for the Plaintiff, in my opinion, the Plaintiff holds the title on trust for Ropate.

The Mataqali too has a stake in the property if the money in question was in fact used towards purchasing the property. The Mataqali has been explained by the Plaintiff that the sum of \$80,000 the Plaintiff allegedly misappropriated from the Mataqali account was used to purchase the property. Thus, in equity, the Mataqali has some beneficial interest in the property.

Therefore, the equitable claim of the Mataqali has to be balanced against the equitable claim of 'Ropate'.

All these are serious questions to be tried in this case. In my view, the aforesaid questions have an important bearing in determining the rights of the Plaintiff and the Defendant.

The Plaintiff cannot, in my judgment, expect the court to assess the requirements of justice with his eyes in blinkers; he must look at all the circumstances.

After considering all, I am convinced that the proceedings involve complicated facts and serious issues of law. The factual issues in this case are complicated and the facts, in some respect at least, obscure; difficult questions of conflict of laws are almost certain to arise out of the circumstances. These are to be determined. I refuse to embark on them on summary proceedings and it is, in my opinion, safer in the interest of justice to leave the matters to be solved in another manner or by writ action.

The Plaintiff has had recourse to Section 169 of the Land Transport Act. This provides a summary and expeditious method of obtaining possession and is applicable in most ordinary cases. It is not however, a method by which legal inferences can be



satisfactorily dealt with. The evidence before me in the Affidavits is too meagre to enable me to feel justified in definitely deciding on this Originating Summons the serious issues of fact and law between the parties.

In this, I am comforted by the decision of the Fiji Court of Appeal in 'Vallabh Das Premji v Vinod Lal and Others', FCA , Civil Appeal No- 70 of 1974.

In "Vallabh Das Premji v. Vinod Lal and Others, F.C.A Civil Appeal No. 70 of 1974" the Court said:

*"In the past, on earlier but similar legislation, the Supreme Court has held that if the proceedings involve consideration of complicated facts or serious issues of law, it will not decide them 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. Instances quoted by counsel are Caldwell v. Mongston (1907) 3 F.L.R. 58 and Ferrier Watson V. Venkat Swami (Civil Action 29 of 1967 – unreported). The power of the court to adopt this approach has not been challenged so it is not material to consider whether it arises under section 172 of the Act or from inherent power to reject as unsuitable procedure where another, comprehensive and better suited to the determination of controversial matters, is available."*

(Emphasis Added)

In "Jamaludin v Kamru Din" Civil Action No:- 37 of 2014, the court held;

*"Section 172 allows the Judge to make other orders and impose any terms but this can only be done if cause is shown by the defendant. For example the Judge can dismiss the summons and order that the application be instituted by a writ action where evidence is required to be adduced. In the past the High Court has held that if the proceedings involve complicated facts or serious issues of law, it will not decide them on summary proceedings of this nature but will dismiss the summons without prejudice to the plaintiff's right to institute proceedings in another manner or by writ action (see Caldwell v Mongston (1907) 3 F.L.R. 58 and Pirrier Watson v Venkat Swami (Civil Action 9 of 1967 – unreported)."*

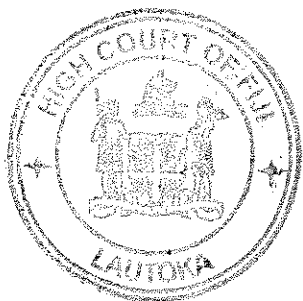
(Emphasis Added)


I can see no reason why the rule of law enunciated in the aforementioned judicial decisions should not be applied in the case before me. One word more, I have no hesitation whatsoever in relying on the above judicial decisions in the instant matter before me.

Applying those principles to the present case and carrying those principles to their logical conclusion, I dismiss the Originating Summons without costs, but without prejudice to the Plaintiff's right to establish his claim to the land by any other process than the summary one to which he has had recourse.

**(E) ORDERS**

- (1) The Plaintiff's Originating Summons for vacant possession under Section 169 of the Land Transfer Act is dismissed without prejudice to the Plaintiff's right to institute proceedings in another manner or by Writ action.
- (2) The Plaintiff being legally aided, there will be no order as to costs.



  
03/02/2017  
.....  
**Jude Nanayakkara**  
**Master.**

At Lautoka  
03<sup>rd</sup> February 2017