

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 147 of 2016

IN THE MATTER of an
application section 169 of the Land
Transfer Act (Cap 131)

BETWEEN : **RAM SINGH** and **SURENDRA SINGH** both of Sydney,
Australia, Medical Practitioner and Retired
Plaintiffs

AND : **PREMILA WATI SINGH, RONALD KUMAR SINGH, AJIT**
KUMAR SINGH ASHWIN LATA and other occupants of the
premises all of Nasoso, Nadi.
Defendants

Before : Master U.L. Mohamed Azhar

Appearance : Mr. D.S. Naidu for the plaintiffs
Ms. A. Swamy for the defendants

Date of Judgment : 08th March 2019

JUDGMENT

01. This is the summons filed by the plaintiffs pursuant to section 169 of the Land Transfer Act Cap 131 against the defendant, to show cause why the defendants, their servants and or agents should not give vacant possession to the plaintiffs of all that property known as Crown Lease No. 9498 with an area 1073 m² of 16 known as Lot 11 SO 8067, part of Nasosovou Nadi, situated in the District of Nadi, on the island of Viti Levu. The summons was supported by an affidavit sworn by the second named plaintiff. The affidavit has five attachments, namely, authority given by the first named plaintiff to the second named plaintiff, True Copy of the Crown Lease No 9498 certified by the Registrar of Titles, a copy of the Notice sent by the plaintiffs' solicitors to the defendants to vacate the premises, a copy of the letter sent by the defendants' solicitors to the plaintiffs' solicitors and their reply are marked as SS 1 to SS 5 respectively.
02. All the defendants opposed the summons and the first named defendant filed the affidavit in opposition on behalf of all of them. Her affidavit has 9 Exhibits marked as A to H. The Exhibit A is the copy of Letter of Administration granted to her brother in respect of

estate of her late mother Ram Rati, Exhibit B is the copy of her Birth Certificate, Exhibit C is the copy of the Caveat she lodged on 28.07.1997 in respect of the property in dispute, Exhibit D is the copy of Deed of Renunciation, Exhibit E is the copy of the Transfer form one Jack Singh to one Vimal Singh, Exhibit F is the copy of Transfer from Vimal Singh to the plaintiffs, Exhibit G is copy of Notice of Removal of Caveat, and Exhibit H is the copy of Removal of Caveat.

03. The second named plaintiff then filed his affidavit in reply and attached three more documents marked as 1 to 3. The document 1 is the copy of the sealed order in Case No 81 of 2013 which was decided by this court, the document 2 is the copy of the letter sent by the solicitor for one Jack Singh who was the Administrator of the Estate of Ram Rati and the document 3 is the copy of the Charge Sheet in Nadi Magistrate's Court where the second and third defendants were charged for allegedly assaulting the second named plaintiff. The first named plaintiff then filed the supplementary affidavit and attached the copy of an affidavit sworn by the first named defendant in the said Civil Action No 81 of 2013. The first named defendant again filed here affidavit in reply to the said supplementary affidavit of the first named plaintiff. Both counsels thereafter moved the court to deliver the judgement based on the affidavits of the parties and their legal submissions.
04. There are number of cases by this court and the appellate courts which deal with the law and procedure applicable for the recovery of possession under Land Transfer Act Cap 131 (**The Act**). The summary procedure under the Act, to promptly and speedily restore the registered proprietor to the possession of the subject property stems from the cardinal principle of the statute, based on *Torrens system* that, the register is everything and in the absence of any fraud, the registered proprietor has an indefeasible title against the entire world. This principle was well explained by the Fiji Court of Appeal in **Subaramani v Sheela** [1982] 28 FLR 82 (2 April 1982) which held that:

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

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

05. The summary procedure is set out in the following sections of the Act:

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.

Particulars to be stated in summons

170. 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.

Order for possession

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.

Dismissal of summons

172. 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.

06. The clear and unambiguous language in sections 169 and 170 sets out the requirements for the applicant or the plaintiff and the requirements of the application respectively. The *locus standi* of the person who seeks order for eviction is set out in section 169 and it provides for the three categories of the persons who are entitled to invoke the jurisdiction

of this court under that section. The requirements of an application, namely the description of land and the time period to be given to the person so summoned, are mentioned in section 170. The other two sections namely 171 and 172 provide for the powers that the court may exercise in the applications under the section 169. The burden to satisfy the court on the fulfillment of the requirements under section 169 and 170 is on the plaintiff and once this burden is discharged, it then shifts to the defendant to show his or her right to possess the land. The exercise of court's power, either to grant the possession to the plaintiff or to dismiss the summons, depends on how the said burden is discharged by respective party to the proceedings. However, dismissal of the summons shall not prejudice the right of the plaintiff to take any other proceedings, against the person summoned, to which he or she may be otherwise entitled. Likewise, 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 summons shall be dismissed by the court.

07. The plaintiffs invoked the jurisdiction of this court under the first category mentioned in section 169 of the Act as the last registered proprietors. The paragraph 3 of the affidavit deposed by the second named plaintiff and the corresponding document marked as **SS 2** are evident that both the plaintiffs are the last registered proprietors of the Crown Lease No. 9894. However, the defendants neither denied nor admitted the said paragraph 3. The affidavit in opposition filed by the first named defendant conveniently omitted answering the said paragraph 3 of the affidavit of the second named plaintiff, but her other averments indicates that, she admits that the property was transferred to the plaintiffs from her bother Vimal Singh. In any event, I refer to the section 18 of the Land Transfer Act Cap 131 which reads as follows;

Every duplicate instrument of title duly authenticated under the hand and seal of the Registrar shall be received in all courts as evidence of the particulars contained in or endorsed upon such instrument and of such particulars being entered in the register and shall, unless the contrary be proved by the production of the register or a certified copy thereof, be conclusive evidence that the person named in such instrument or in any entry thereon as seised of or as taking an estate or interest in the land described in such instrument is seised or possessed of such land for the estate or interest so specified as from the date of such certificate or as from the date from which such estate or interest is expressed to take effect.

08. The document marked as **SS 2** is the true copy of the Crown Lease No.9894 and it is certified by the Registrar of Title. The Crown Lease is an instrument of title as per the section 2 of the Act. Hence the certified copy of the Crown Lease No 9894 (**SS 2**) is the conclusive evidence that, the plaintiffs are the last registered proprietors, since there is nothing to prove the contrary. It follows that, the plaintiffs have satisfied the first requirement of locus to bring this action and being the last proprietors they are entitled to invoke the jurisdiction of this for this purpose.
09. The second requirement is the particulars to be stated in the summons, which is description of the land as required by the section 170. There are some conflicting decisions on what particulars to be stated in the summons filed under the section 169 of the Act. The judgement in **Atunaisa Tavuto v Sumeshwar Singh** HBC 332/97L was distinguished in **Wati v Vinod** [2000] 1 FLR 263 (20 October 2000). This court had

discussed this matter in several cases and what is actually required by the statute is whether the person, so summoned to appear, had the full knowledge, without any misunderstanding, of the land and premises from which he ought to be evicted. If there is any misunderstanding of premises which is the subject matter of the proceeding, it should be brought by the person so summoned to show cause, and in the absence of any such misunderstanding, the description given by any applicant seems to be sufficient and adequate under the section 170 of the Land Transfer Act. This was the view that is supported by the Court of Appeal in Premji v Lal [1975] FJCA 8; Civil Appeal No 70 of 1974 (17 March 1975). In this case, the description of the land and premises were not in dispute. As such no detail discussion is warranted in this case on the particulars that a summons under section 169 should contain.

10. The second named plaintiff in paragraph 4 of his affidavit stated that, he applied for the consent of the Director of Lands for this proceeding. The first named defendant in her affidavit had picked this averment and stated in paragraph 6 of her affidavit that, the consent of the Director of Lands was necessary for this purpose. In fact, the section 171 requires the proof and production of consent if any such consent is necessary. The question is therefore, whether any consent from the Director of land is necessary for an application under 169. This question had already been settled by His Lordship the Chief Justice Anthony Gates (as His Lordship then was) in Prasad v Chand [2001] FJLawRp 31; [2001] 1 FLR 164 (30 April 2001). His Lordship held that:

"At first sight, both sections would seem to suggest that an Applicant should first obtain the Director's written consent prior to the commencement of section 169 proceedings and exhibit it to his affidavit in support. However I favour Lyons J's approach in Parvati Narayan v Suresh Prasad (unreported) Lautoka High Court Civil Action No. HBC0275 of 1996L 15th August 1997 at p 4 insofar as his Lordship found that consent was not needed at all since the:

"section 169 application (which is the ridding off the land of a trespasser) is not a dealing of such a nature as requires the Director's consent."

This must be correct for the Director's sanction is concerned with who is to be allowed a State lease or powers over it, and not with the riddance of those who have never applied for his consent. With respect I was unable to adopt the second limb of Lyons J's conclusion a few lines further on where his lordship stated that the order could be made conditional upon the Director's consent. For if the court's order of ejectment was not "a dealing" then such order would not require the Director's consent and the court would not be subject to section 13. The court is not concerned with the grant of or refusal of, consent by the Director, provided such consent is given lawfully. Consent is solely a matter for the Director. The statutory regime appears to acknowledge that the Director's interest in protecting State leases is supported by the court's order of ejectment against those unable to show cause for their occupation of the land which is subject to the lease. The court is asked to make an order of ejectment against a

person in whose favour the Director either, has never considered granting a lease, or has never granted a lease. The ejection of an occupier who holds no lease is therefore not a dealing with a lease. Such occupier has no title. There is no lease to him to be dealt with. The order is for his ejection from the land. There is no need for a duplicating function, a further scrutiny by the Director, of the Plaintiff's application for ejection either before or after the judge gives his order".

11. The section reads as '*...if any consent is necessary..*' and the above authority clearly states that, the consent of the Director for the application under 169 is not necessary. Thus, the question of consent does not arise in applications under section 169.
12. As discussed above, the locus standi of the plaintiffs has been established and the description of the land and premises is not in dispute as it is adequate to give full understanding of it to the defendant. It follows that, the plaintiffs have fulfilled the requirements under sections 169 and 170 and the onus now shifts to the defendants to show his right to possess part of the land and premises in dispute in this application. The Supreme Court in **Morris Hedstrom Limited -v- Liaquat Ali** CA No: 153/87 succinctly explained what is required from a person who is summoned under section 169 of the Land Transfer Act and held that:

"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 such a right must be adduced." (Emphasis added)

13. The duty on the defendant is now not to produce any final or incontestable proof of his right to remain in the property, but to adduce some tangible evidence establishing a right or supporting an arguable case for his right. The first named defendant asserts her right to possess the disputed the property in paragraph 7 of her affidavit.
14. Briefly, she claims that, her late mother Ram Rati was the proprietor of the property in dispute and died intestate. She and her brothers were the beneficiaries and one brother Jack Singh was granted Letter of Administration. She further claims that, her brothers colluded to transfer the subject land to one Vimal Singh and they made a Deed of Renunciation in favour of the said Vimal Singh, however she did not sign the said Deed of Renunciation. Accordingly, Vimal Singh fraudulently transferred the land to his name and thereafter transferred to the plaintiffs. She therefore claims that, she did not renounce her right and interest on the land which belonged to the Estate of Ram Rati. She claims that, she still remains as the beneficiary which makes her to possess the said property. She filed the caveat too, but was irregularly removed as she claimed in her affidavit. She attached the documents as mentioned above in support of her averments in the affidavit.

15. At a glance, her assertion seems to be not only impressive but also supportive of an arguable case. However, the supplementary affidavit filed by the first named plaintiff and the document attached to it manifestly discredit the above assertion of the first named defendant. The said document attached with the affidavit is marked **RS 1** and it is an affidavit filed by the same lady (first named defendant) in the said Civil Action HBC 81 of 2013. The Action No. 81 of 2013 (**the said Action**) was instituted by the plaintiffs' predecessor in title, one Vimal Singh. It was the summons for ejectment filed under the same provision of the Act, against three defendants. The plaintiff Vimal Singh in the said Action is the brother of the first named defendant in this action and the first defendant in the said case was his nephew (son of the first defendant in this case and the third named defendant in this case). Though Vimal Singh, the then registered proprietor was the plaintiff in the said Action, his summons for ejectment was supported by an affidavit sworn by his sister Premila Singh who is the first named defendant in this case. After the defendants in the said case filed their affidavit opposing the said summons for ejectment, the same lady (first named defendant in this case) filed the affidavit in reply which now tendered marked as "**RS 1**" with the supplementary affidavit of the first named plaintiff in this case.
16. The lady (first named defendant) did not deny **RS 1** and she could not in any event deny the same as it was the evidence on oath and filed in this court. The relevant paragraphs of the said affidavit (**RS 1**) are as follows:

AFFIDAVIT OF PREMILA SINGH IN RESPONSE TO AJIT KUMAR'S AFFIDAVIT

1. *That save as to admit that I am the eldest sister, I deny that the remainder of the 1st Defendant's affidavit (hereinafter referred to as "the affidavit") and further say that the Plaintiff is indeed the true and lawful registered proprietor of the crown leases No: 9498 Lot 11 on SO 671 situated at Nasoso (hereinafter referred to as "the lease")*
2. *That I annex herein a recent copy of the said lease marked as "PS1" which clearly indicates the Plaintiff, my brother Vimal Singh is the registered owner of the lease.*
3. *That as to paragraph 2 of the affidavit, I reiterate paragraph 2 of my affidavit.*
4. *That paragraph 3 of the affidavit is denied and I further say that I did not have any right nor authority to give any consent to the 1st defendant to stay on the property also the documents annexed 'AK2' was typed up and prepared by the defendant and his friends and or agents namely Joe and Manasa Talatala.*
 - (b) *That the 1st Defendant and his family had vacated the premises in 2007 after a Notice to vacate was issued by Jack Singh.*

(c) *That the 1st Defendant forcefully re entered the plaintiff's property and chased the Plaintiff's previous tenants out and took over the Plaintiff's premises and pocketing the rentals from the tenants.*

5. *That as to paragraph 4 of the affidavit, I further say, I had no authority or right to give any kind of authority or consent for anyone to occupy the said property.*

17. The above averments clearly indicate that the first defendant lady in this matter, who claimed that her interest was transferred to Vimal Singh by collusion among her brothers, had recognized the transfer to her brother Vimal Singh and was aware of the same. However, she did not take any action against them as the beneficiary of the Estate of late Ram Rati. If it was collusion by her brothers and her interest on the property was transferred without her knowledge, she should have acted against the said transfer to her brother Vimal Singh. When this affidavit (RS 1) was revealed to the court, the first named defendant filed a supplementary affidavit in reply and stated as follows:

1. *THAT I am the 1st named Defendant in the action herein.*
2. *THAT in so far as the content of this affidavit is within my personal knowledge it is true, in so far as it is not within my personal knowledge, it is true to the best of my knowledge and information and belief.*
3. *THAT as to the contents of paragraph 2 of the said Affidavit, I never said that I had no interest and/or rights in the said property being Crown Lease No. 9498. All I said as per paragraphs 4 and 5 of the Exhibit marked RS1 that I did not have any right nor any authority to give any consent to the 1st defendant to stay on the property, as I am only a beneficiary and not a trustee of the Estate to give consent.*
4. *THAT the Exhibit RS1 being Affidavit of Premila Singh in response to Ajit Kumar's Affidavit sworn on 3rd July 2013 was a pre-typed document handed over to me at my home by Vimal Singh to execute before a lawyer.*
5. *THAT I was never aware what was written in the said document.*
6. *THAT at the time of the execution of the document, I was removed from my home and I was residing at a "HART" home which was given to me by the government and I was desperate to go back to my own home. Thus, Vimal Singh had promised me that if I sign the said Affidavit he will allow me to go back to my home, which I really wanted to do so.*

7. THAT at no time I have stated in any document that I do not have any interest in the said property. Neither I have signed any renunciation document renouncing my interest in the said property.
 8. THAT I reiterate my affidavit sworn on 20th of August 2016 and confirm the contents of the same.
18. In the above averments she tries to say that, she only said in “RS1” that ‘she did not have authority to allow anyone to the said property’, but she never said that, she did not have any right and interest on the property. Not only this explanation by her, but also the alleged collusion by her brothers in transferring the property to Vimal Singh another bother cannot be believed in. The reason is other affidavit she filed in the said Action 81 of 2013. The plaintiffs in this case, however, could not trace it, and I was able to refer to the said file and found the same. That is the affidavit supporting the summons filed by Vimal Singh for evicting those who were illegally occupying the same property. The contents of the said affidavit are as follows with the added emphasis:

AFFIDAVIT OF PREMILA SINGH IN SUPPORT OF SUMMONS FOR EJECTMENT

1. THAT I am the Plaintiff's eldest sister and swear this affidavit in support for the Plaintiff with regards to his Nasoso property known as Crown Lease No: 9498, Lot 11 on SO 671 situated at Nasoso, Nadi. (Annexed herein marked "VS1" is a copy of the property lease) of which he is the registered proprietor.
2. THAT the matters I deposit herein are within my personal knowledge save as except where stated to be on information and belief and where so stated, I verify believe the same to be true.
3. THAT I confirm that my youngest son Ajit Kumar, the 1st Defendant is currently illegally and unlawfully occupying the Plaintiff's property without his consent since sometimes in August 2011.
4. THAT the Plaintiff had just completed major renovations to this property and had rented the same out to two tenants when the 1st Defendant re-entered the Plaintiff's property vacating the Plaintiff's tenants and moving into the main house with his family.
5. THAT the 1st Defendant's elder brother, Ronald Kumar was the care taker on the Plaintiff's property at the time and he and his family left for their own safety.
6. THAT the 1st Defendant moved into the property with his family and there on after vacating the Plaintiff's tenant from the

property and thereafter rented the other two premises out to his own tenants.

7. THAT there are two tenants on the Plaintiff's property paying rentals of \$300.00 and \$200.00 per month for rentals who occupy self-contained extension to the property and a self-contained concrete master bedroom unit.
 8. THAT I am aware of this as I normally visit the 1st Defendant at the Plaintiff's property and have seen them paying the 1st Defendant their rentals.
 9. THAT the 1st Defendant is using the rental monies for his and his families own personal use.
 10. THAT since moving on to the property I have also seen the 1st Defendant acquire a new fridge, TV and a boat which no doubt would have come from the rental proceeds.
 11. THAT I do not live at the Plaintiff's property but live at the HART settlement in Navakai, Nadi where I have been since August 2009, however I have kept some of my belongings in the Plaintiff's home since the floods last year for safe keeping being; 4 bags of clothes, plastic containers, a double bed mattress and a TV, pots, plates, cups and cutleries which I will remove from the Plaintiff's property soon.
 12. THAT I had moved these things to the Plaintiff's property as my room at the HART settlement in Navakai was flooded through badly early last year.
 13. THAT on my last visit to Nasoso being late February, 2013 I noticed the Plaintiff's property was damaged, in that I saw the bedroom doors with holes and was kicked in and also noted that the back door was broken.
 14. THAT I have given the Plaintiff an understanding that I will not re-enter his property after the removal of my belongings and confirm that the last time I had left the property the 1st Defendant was issued with a Notice to vacate sometimes in 2007.
 15. THAT I humbly seek Orders in terms of the Plaintiff's summons filed herein.
19. According to the above averments, several facts are revealed, namely, (a) the lady (first defendant in this case) was not only aware that, her brother Vimal Singh was the registered proprietor at that time, but also she defended his title by filling the supporting affidavit on his behalf for his case, (b) had her brothers colluded to transfer the property

to Vimal Singh she would not have defended his title, nor she would have filed the affidavits supporting his summons for ejecting her biological son who was the first defendant in the said case, (c) she did not live in that property as she had been living at HART settlement in Navakai, Nadi since August 2009, (d) she left the property sometimes in 2007 when a Notice to Vacate was issued, and (e) she only kept her belongings to save from flooding and assured to her brother Vimal Singh that, she would not re-enter the property after removal of her personal belongings. The counsel for the defendants submitted in her written submission that, the plaintiffs in this case were aware at the time they purchased the said land that the defendants were in occupation of the same. This submission is blatant contrary to the affidavits the first named defendant filed in the said Action, where she deposed that, she vacated the land sometimes in 2007 and had been living at HART settlement in Navakai, Nadi. The vital question is as to how the first named defendant who defended the title of her brother Vimal Singh in this court in a different matter (Civil Action No. 81 of 2013) can subsequently challenge the same title on the basis of fraud or collusion in the same court in this matter?

20. Even if there is an alleged fraud, it should be on part of the registered proprietor whose title to be impeached or on his agent. It should be an actual fraud and not constructive. The House of Lord explained this in Assets Co Ltd v Mere Roihi (Consolidated Appeals) [1905] AC 176 and held at page 210 that:

“Passing now to the question of fraud, their Lordships are unable to agree with the Court of Appeal. Sects, 46, 119, 129 and 130 of the Land Transfer Act, 1870, and the corresponding sections of the Act of 1885 (namely, ss. 55, 56, 189 and 190) appear to their Lordships to show that 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 persons 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 of fraud if he honestly believes it to be a genuine document which can be properly acted upon.”

21. In fact, the plaintiffs are the bona fide purchasers from the registered proprietor whose title had been defended by the first named defendant in that previous Action No. 81 of 2013. In total, the first named defendant not only concealed the material facts in the

affidavits she filed in this matter, but also seemingly committed perjury when deposing the same affidavits contrary to what she deposed in those two affidavits filed by her in the said Action. She is deceitful, and abusing the process of the court, which is meant for keeping order and doing justice, to achieve an improper end. The worst part of her conduct is that, she is now defending her two sons, Ronald Kumar Singh and Ajit Kumar Singh (2nd and 3rd defendants in this matter) whom she described as “the care taker” and “the illegal occupant” respectively in the affidavits she filed in the said Action No 81 of 2013 in support of her brother Vimal Singh who is the predecessor of the plaintiffs in title. In that case, the former Master of this court ordered all the defendants, including the third named defendant in this case, to immediately hand over the possession of the land to Vimal Singh. The document marked “SS 1” and tendered with the Affidavit in reply filed by the second named plaintiff, which is the sealed order of the court in the said Action, is the proof for the same. How the “one time care taker” and “one time illegal occupant” to a registered proprietor can become the lawful occupants to the successor in title?

22. The counsel for the defendants in her submission stated that, the plaintiffs had knowledge that, the defendants on the said land prior the land being transferred and they should have made some inquiries about the occupation of the said land by the defendants. She further submitted that, the plaintiffs had knowledge of some interest of the defendants on the said land. I cannot agree with these submissions for several reasons. Firstly and most importantly, the plaintiffs purchased this land from Vimal Singh whose indefeasible title to the land had already been tested and confirmed by this court in the previous Action No. 81 of 2013 and that title is indefeasible against the entire world based on the principle explained by the Fiji Court of Appeal in Subaramani v Sheela (supra). Secondly, the first named defendant while defending the title of Vimal Singh clearly stated in the supporting affidavit that, she left the land in 2007 and given undertaking to him not to return to the land. If she had interest on the land she should have sorted out with her brother. However, she submitted the affidavits for the court to decide her brother’s indefeasible title against the entire world. Thirdly, the court in that case ordered Ajit Kumar who was the first defendant in that case (third named defendant in this case) to immediately hand over the possession of the land to Vimal Singh. It means the court already decided that Ajit Kumar did not have any interest on the land. Fourthly, the first named defendant through her affidavits filed in that case satisfied the court that, Ajit Kumar was an illegal occupant and Ronald Kumar was a care taker. Therefore, they cannot have any interest against the plaintiffs in this case, as they did not have before. Fifthly, supposing the plaintiffs failed to exercise due diligence as submitted by the counsel, the want of due diligence itself is not sufficient to defeat the indefeasibility of title of the plaintiffs in this case as Winneke P held in Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd [1998] 3 V.R 133 at 135- 136:

"It is true, as the trial judge in this case found, that the appellant, through its officers and solicitors, was in possession of information which, if they had acted with due diligence, might have alerted them to the existence of Kandy's fraud. But a want of due diligence, resulting in a failure to make further inquiry, would not itself be sufficient to defeat the indefeasibility of the appellant's title: Vassos v State Bank of South Australia [1993] 2 V.R. 316 at 332-3."

23. For the above reasons, I am of view that the defendants failed to adduce any tangible evidence establishing the right to possess the said property. It follows that, they must be ordered to immediately deliver the vacant possession of the property to the plaintiffs who are the last registered proprietors of the same.
24. The first named defendant when filed the supplementary affidavit attaching the affidavit of the first named defendant in the other matter 81 of 2013, sought the indemnity costs. The obvious reason is the deceitful double stands took by the first named defendant in relation to the transfer of the property in dispute. She once defended the title of her brother Vimal Singh against her son in the previous Action No. 81 of 2013 and now challenges the same tile as to have been obtained by a fraudulent way. She with other defendants had *prima facie* misused the process of this court by putting forward a defence which from the outset she knew was unsustainable. The third named defendant, who was ordered by the court in the said Action to vacate the property, has now returned to it and disturbing the current proprietors. The first named defendant together with other defendants not only prevented the plaintiffs from enjoying the property right, but also caused them to incur legal cost. The conduct of all defendants therefore amounts to a misuse of the process of the court which warrants the court to impose the indemnity cost. Beldam LJ in Willis v Redbridge Health Authority [1996] 3 All ER 114 said at page 118 that:
- Firstly, I consider that the defendants had *prima facie* misused the process of the court by putting forward a defence which from the outset they knew was unsustainable. In Afzal v Ford Motor Co Ltd [1994] 4 All ER 720 at 747 I expressed the view that such conduct by a defendant could amount to a misuse of the process of the court.
- Secondly, I would emphasise that the purpose of an order that one party should pay the other's costs on an indemnity basis is not penal but compensatory and where one party causes another to incur legal costs by misusing the process to delay or to defer the trial and payment of sums properly due, the court ought to ensure, so far as it can, that the sums eventually recovered by a plaintiff are not depleted by irrecoverable legal costs.
25. The indemnity cost will be order in a situation where the defendant's actions, in conducting any defence to the proceedings, have involved an abuse of process of the court whereby the court's time and litigant's money has 'been wasted on totally frivolous and thoroughly unjustified defences': Baillieu Knight Frank (NSW) Pty Ltd v. Ted Mannv Real Estate Pty Ltd (1992) 30 NSWLR 359, at 362, per Power, J.
26. Applying the above authorities on imposing indemnity cost to the frivolous and thoroughly unjustified defence taken by the defendants, I conclude that, this is a proper case to order for indemnity cost. I order all the defendants to pay the indemnity cost to the plaintiffs.
27. Accordingly, I make following final orders:

- a. The defendants are ordered to immediately deliver the vacant possession of the property described in the summons to the plaintiffs,
- b. The defendants are further ordered to pay the indemnity cost to the plaintiffs.



At Lautoka
08/03/2019


U.L. Mohamed Azhar
Master of the High Court