IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 220 of 2017

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

BETWEEN	:	**ASESELA SADOLE** formally of Rakuibalenasiga, Lot 1, Nailaga, Ba, but now residing at Vunaece Road, Namadi Heights, Tamavua, Suva, Fiji Islands, Retired. **Plaintiff**
AND	:	**MAKITALENA VADRASOLA** of Nailaga, Ba, Fiji Islands. **Defendant**

Before	:	Master U.L. Mohamed Azhar
Counsels	:	Mr. A Dayal for the plaintiff Mr. K. Tunidau for the Defendant
Date of Judgment	:	04th June 2019

JUDGMENT

01. This is the plaintiff's summons filed pursuant to section 169 of the Land Transfer Act (Cap 131) against the defendant, seeking an order on him to deliver vacant possession of the premises situated on Native Lease No. 26793, Lot 1on BA 1889 Land known as Rakuibalenasiga in the Tikina of Nailaga in the Province of Ba and containing area of Thirteen Acres, Two Roots and Zero Purches (13A. 2R. 00P). The summons is supported by an affidavit sworn by the plaintiff and the there are two documents attached with the affidavit. The **"AS 1"** is the copy of the Native Lease certified by the Registrar of Title and **"AS 2"** is the copy of the Notice sent by the solicitors of the plaintiff to the defendant to vacate the disputed land.

02. Upon service of the summons, the defendant appeared through her solicitors and filed her affidavit and opposed the plaintiff's summons for vacant possession. Her affidavit too contains two documents, marked as **"MV 1"** and **"MV 2"**. The "**MV 1"** is the copy of a letter issued by the Advisory Counsellor and the "**MV 2"** contains some photographs of the house that was damaged during the TC Winston and where the defendant is residing

with her children. This was followed by the affidavit filed by the plaintiff together with another set of two documents which are again marked as **"AS 1"** and **"AS 2"**. The **AS 1** is claimed to be the letter written by the husband of the defendant to her to inform that he resigned from his work with the plaintiff. The said letter is written in iTaukei language and the plaintiff has attached an English translation of the same. The **"AS 2"** is the photocopy of his "Help for Home Financial Assistance Card" (**"HHFAC"** or **"M-PAISA** Card). At the hearing of the summons both counsels, made the oral submission and tendered their respective written submissions.

03. There are several authorities from the High Courts and the Appellate Courts which have settled the law and procedure on the summary procedure available for a registered proprietor under the Land Transfer Act (Cap 131) and it does not need much deliberations. However a brief note on the law and procedure is necessary for the purpose of this judgment. The Land Transfer Act, which provides for such summary procedure, is based on the well-known Torrens System of Registration generally applied in certain countries in Pacific. When explaining this system of registration in **Breskvar v. Wall** (1971-72) 126 CLR 376 Barwick C.J stated at page 385 that:

> *The Torrens system of registered title of which the Act is a form* ***is not a system of registration of title but a system of title by registration****. That which the certificate of title describes is not the title which the registered proprietor formerly had, or which but for registration would have had. The title it certifies is not historical or derivative. It is the title which registration itself has vested in the proprietor.* (Emphasis added).

04. In that same case Windeyer J. concurring with the Chief Justice stated at pages 399 and 400 that:

> *I cannot usefully add anything to the reasons that he and my brothers McTiernan and Walsh have given for dismissing this appeal. I would only observe that the Chief Justice's aphorism,* ***that the Torrens system is not a system of registration of title but a system of title by registration****, accords with the way in which Torrens himself stated the basic idea of his scheme as it became law in South Australia in 1857. In 1862 he, as Registrar-General, published his booklet, A Handy book on the real Property Act of South Australia. It contains the statement, repeated from the South Australian Handbook, that:*
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> *"……* ***any system to be effective for the reform of the law of real property must commence by removing the past accumulations, and then establish a method under which future dealings will not induce fresh accumulations****.*
>
> ***This is effectuated in South Australia by substituting 'Title by Registration' for 'Title by Deed****'..."*
>
> *Later, using language which has become familiar, he spoke of "indefeasibility of title". He noted, as an important benefit of the new*

system, ***"cutting off the retrospective or derivative character of the title upon each transfer or transmission, so as that each freeholder is in the same position as a grantee direct from the Crown". This is an assertion that the title of each registered proprietor comes from the fact of registration, that it is made the source of the title, rather than a retrospective approbation of it as a derivative right.*** (Emphasis added).

05. The above aphorisms make it clear that, the registration is everything and it is the registration that grants the title to a person so registered. ***It is the title by registration and not registration of title***. Such title obtained through registration is indefeasible or unimpeachable except in case of fraud. Since the Land Transfer Act (Cap 131) is based on the same concept, it provides for a speedy procedure for obtaining possession where the occupier can show no cause why an order should not be made: **(Mishra JA in Jamnadas v Honson Ltd [1985] 31 FLR 62 at page 65).**

06. The procedure is set out in the following provisions of the Land Transfer Act Cap 131:

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.

07. The unambiguous language in sections 169 and 170 set out the requirements for the applicant or the plaintiff and the requirements of the application/summons respectively. The *Locus Standi* of the person who seeks order for eviction is set out in section 169 and it allows three categories of persons who may summon any persons under this section and they are:

(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.

08. Most of the applications are filed by the first category of persons, and on the other hand there are reasonable numbers of applications filed by other two categories. However, there are two conflicting views by the High Court on the first category of persons who can invoke the jurisdiction of this court under the above section. Whilst one view goes to narrow down this category and limit it to only those proprietors who hold the Certificate of Title registered at the office of the Registrar of Titles under the specific provisions of the Land Transfer Act Cap 131, the other view expands the scope in order to cover all those who hold their lands, whether freehold or leasehold on the basis that, the word 'registered' is making reference to registration of land and not the nature of land and therefore, if the land is registered either at Registrar of Titles Office or at the Deeds Office, it is still registered land and the holder of such land is the 'Registered Proprietor'.

09. Since both cases are equally binding on this court, having independently analyzed the provisions of the Land Transfer Act together with other provisions of the connected legislations, this court in two cases namely **Raveen Lal v Suresh Chand** HBC 63 of 2017 and **Deosharan v Tangavellu aka Puttu** HBC 159 of 2017 and both were decided

29.05.2019, this court has opted the broad interpretation to the term "Registered Proprietor". Accordingly, the term "Registered Proprietor" means the registered proprietor of the land or of estate or interest in the land that subject to the provisions of the Land Transfer Act, and this includes any mortgage thereon. Since the land that subject to the Land Transfer Act includes both leasehold and freehold land as provided in section 5 of the Act, any person holding the last registered title, whether it is a Crown Lease or Native Lease or Certificate of title or Residential Lease or Mining Lease or Agricultural Lease or a mortgage on that all land subject to the Land Transfer Act, shall be the last proprietor for the purpose of section 169 (a) of that Act and such person has the *locus standi* to invoke the jurisdiction of this court under that section.

10. The **"AS 1"** is the copy of the Native Lease No. 26793 issued for the purpose the Agricultural Landlord and Tenant Act. The Registrar of Titles has certified it as the true copy of the Lease registered at the Office of the Registrar of Titles on 08.09.2003. The plaintiff is the lessee as per the said document. It is the conclusive evidence of the plaintiff's title. Furthermore, the defendant did not dispute that, the plaintiff is the proprietor of the disputed land. Thus, the plaintiff has passed the first threshold under the section 169 (a) of the Land Transfer Act.

11. The section 170 provides for the two requirements of the application, namely the description of land and the time period to be given to the person so summoned. In facts, these are the technical requirements. The fact that, the application for ejectment involves with the property right of a citizen and the order for possession deprives him from his right, which has more effect on his social and economic wellbeing, the courts in all jurisdictions had a tendency to be strict on the applicant, especially in relation to compliance and the technicalities of the respective statute. This resulted in the judgement of **Atunaisa Tavuto v Sumeshwar Singh** HBC 332/97L which held that, in application such as under section 169 of Land Transfer Act, the technicalities are strictly construed, because of the drastic consequences that follow for one of the parties upon the relief sought being granted. That was a case where an application for vacant possession was sought, however, the applicant failed to give the particulars such as Crown Lease number, lot number and the situation of land, though the Housing Authority Lease number was correctly mentioned. The court dismissed the summons stating that, it behoved the plaintiff and his counsel to have exercised more diligence in that regard.

12. The above case, however, was distinguished by Prakash J, in **Wati v Vinod** [2000] 1 FLR 263 (20 October 2000) and it was held that:

> *"The Court has not been provided nor able to locate any authorities to suggest that "a description" as per section 170 means a full description of the land. The Act itself does not specify what a. description of the land entails. What is adequate or full description? What is a sufficient description? The purpose is clearly for the parties to be informed as to what land the application relates to. This is clear from the supporting affidavit. In this regard I cannot concur with the sentiments of my brother Justice Madraiwiwi in* ***Atunaisa Tavuto v Sumeshwar Singh*** *(Civil Action No. HBC0332 of 1997L) submitted by the Defence Counsel in support of his argument on s.170. It is not clear what Justice Madraiwiwi had meant in stating that "The Summons is defective in not properly describing the*

subject property" (emphasis added). It is not clear whether "a description means full or proper description. Further, the Supreme Court in the case of ***Ponsami v Dharam Lingam Reddy*** *(Appeal No. 1 of 1996) was dealing with the need for compliance with the Supreme Court Rules not a statutory provision such as Section 170. The statute does not clearly specify what "a description" requires. In* ***Vallabh Das Premiji v. Vinod Lal, Nanki and Koki*** *(Civil Appeal 70 of 1974) the Court of Appeal had accepted a description as in the present summons as sufficient".*

13. Seemingly, the view of Prakash J is based on the plain and unambiguous meaning of the statute which does not specify what description of land entails and what is adequate or full description of the land. It is not the duty of the court to impose more conditions and restrict the interpretation of a statute when the wording is clear and unambiguous. 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 who is 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 is 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).

14. It is incumbent on the court to consider the property right of the person so summoned under this application. However, the more emphasis should not be given to such property rights, at the expense of a registered proprietor of a land, who has indefeasible title against the entire world by *Torrens system* of land registration. Accordingly, the reasoning of Prakash J in **Wati v Vinod** (supra) seems to be more rational than the view of Madraiwiwi J in **Atunaisa Tavuto v Sumeshwar Singh** (supra). These two judgments are from the Honourable Judges and are equally binding on this court. Therefore, for better reasoning I prefer the view of Prakash J over the other. Accordingly, if an applicant can give the description of a land or premises which can give clear understanding for the persons so summoned under this section, the former is deemed to have discharged his duty under this section. As far as the time period of 16 days that should be provided to such person is concerned, it should be interpreted strictly as the section is mandatory as the defendant should be given sufficient time to prepare his or her defence.

15. In this case the land has been described in the summons and it was duly served on her. She was given more time than prescribed by the section 170 of the Land Transfer Act. The identification and the description of the land is not in dispute in this matter as the defendant is well acquainted with the subject property as she has been occupying the same for quite long time.

16. 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 matter has been settled by the Former Chief Justice His Lordship 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 ejectment 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 ejectment from the land. There is no need for a duplicating function, a further scrutiny by the Director, of the Plaintiff's application for ejectment either before or after the judge gives his order".

17. 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.

18. As pointed out above, the plaintiff tendered the certified copy of the Native Lease which is the conclusive proof of the fact that, he is the registered proprietor of the land in dispute and the defendant too admitted the same. The description of the land and premises as per the summons is adequate to give full understanding of it to the defendant and she is well aware of it. It follows that, the plaintiff has passed the threshold set out under sections 169 and 170. Thus, the onus now shifts to the defendant to show her right to possess the land and premises in dispute in this application. The Supreme Court in the case of **Morris Hedstrom Limited –v- Liaquat Ali** CA No: 153/87 said 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)

19. The duty on the defendant is, now, not to produce any final or incontestable proof of her right to remain in the property, but to adduce some tangible evidence establishing a right or supporting an arguable case for her right to remain in possession of the land in dispute. The defendant in her affidavit, especially in paragraphs 5 to 23 has averred her right to possess. Briefly, the defendant is from Nagelewai village, Wainimala, Naitasiri and was married to Malelili Nakulanikoro Nasau, who is the nephew of the plaintiff. They were separated almost a year before this application was filed in this court and the defendant has been living in the farm house situated in the disputed land with her seven children. The defendant further states that, about 14 years ago, the plaintiff approached her and her husband to occupy the disputed farm and he (plaintiff) further promised to transfer the lease to the defendant and her husband so that, the money generated from the farm could be used for the education of their children. As the result of the said promise by the plaintiff, the defendant says that she sold her *yaqona* plantation in her village of Nagelewai, Wainimala, Naitasiri and re-settled on the plaintiff's land described in the summons for ejectment. It is clear from the averments of the defendant that, she claims her right to stay on the land based on the promise made by the plaintiff. The most important averments of the defendant are as follow:

4. ***THAT*** *I am a mother of seven children and my husband deserted us about two years ago and living separately from us at Nailaga village, Ba. We are legally married. My husband is from Nailaga village and the Plaintiff is also from the same village whilst I come from Naqelewai village, Wanimala, Naitasiri.*

5. ***THAT*** *about 14 years ago I was approached with my husband by the Plaintiff to occupy and farm his land at Karavi, Ba and described at paragraph 2 of the Affidavit. The approach was made at my village of Naqelewai, Wainimala, Naitasiri where my husband and I were residing and doing yaqona (kava) farming.*

6. ***THAT*** *at the time the Plaintiff made his approach he also promised that he will after some time transfer the lease to me and my husband so that the money generated from the land will help educate our children.*

7. *THAT as a result of this promise made by the Plaintiff myself and I sold our yaqona plantation in my village of Naqelewai, Wainimala, Naitasiri and resettled on the Plaintiff's land as described hereto above.*

8. *THAT until the last two years I and my husband had worked on the sugarcane farm and the cane proceeds had gone directly to the Plaintiff's bank account.*

9. *THAT other than cane farming I had also acquired cattle and goats to rear to sustain us as we do not received any money from the Plaintiff for our sustenance.*

10. *THAT I had also resumed yaqona farming in my village through my extended family to help in my children's education and other family needs.*

11. *THAT all this while I had expected the Plaintiff to transfer the land to us as he had promised and especially that the farm's cane tonnage and yield had increased and multiplied through our hard work.*

12. *THAT the Plaintiff's promise to transfer the land to us was made verbally and unfortunately no written agreement was made to this regard and I was at the time only an ordinary villager and yaqona farmer.*

13. *THAT I verily believed the Plaintiff had suggested a period of about 10 years to have the land transferred.*

14. *THAT I also trusted the Plaintiff as he was a lawyer and former magistrate and the fact that he was also closely related to my husband.*

15. *THAT I was surprised when the Plaintiff through his solicitors game me notice to vacate because the Plaintiff had not satisfied his promise to transfer the land.*

16. *THAT the notices to vacate came after my husband deserted me and my children. I verily believe the Plaintiff and my husband have colluded to have me and my children vacated.*

20. The above averments clearly raise the defence of promissory estoppel which is generally available for the defendants in cases of this nature. It is necessary now to briefly deal with the promissory estoppel before going to the reply given by plaintiff for the above contention of the defendant. The promissory estoppel is the legal principle that a promise is enforceable by law, even if it was made without any formal consideration, when a promisor has made a promise to a promise, who then relies on that promise to his

subsequent detriment. The promissory estoppel may provide a defence, but it can create no cause of action :(**Combe v Combe** [1951] 2 KB 215).

21. **Snell's Principles of Equity** (28th Edition 1982) at page 556 explains the rule of promissory estoppel as follows

> *"Where by his words or conduct one party to a transaction freely makes to the other an unambiguous promise or assurance which is intended to affect the legal relations between them (whether contractual or otherwise) a, and before it is withdrawn, the other party acts upon it, altering this position to his detriment, the party making the promise or assurance will not be permitted to act inconsistently with it. It is essential that the representor knows that the other party will act on his statement. Yet the conduct of the party need not derive its origin only from the encouragement of representation of the first; the question is whether it was influenced by such encouragement or representation".* (Emphasis added)

22. **Central London Property Trust Ltd v High Trees House Ltd** [1947] KB 130 is the famous English decision which reaffirmed and extended the doctrine of promissory estoppel in contract law in England and Wales. In that case, Lord Denning (as His Lordship then was) held estoppel to be applicable if a promise was made which was intended to create legal relations and which, to the knowledge of the person making the promise, was going to be acted on by the person to whom it was made and which was in fact so acted on. Having explained the development of the law, Lord Denning held that:

> *If I consider this matter without regard to recent developments in the law there is no doubt that the whole claim must succeed. This is a lease under seal, and at common law, it could not be varied by parole or by writing, but only by deed; but equity has stepped in, and the courts may now give effect to a variation in writing (see Berry v Berry, [1929] 2 KB 316). That equitable doctrine could hardly apply, however, in this case because this variation might be said to be without consideration.*
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> *As to estoppel, this representation with reference to reducing the rent was not a representation of existing fact, which is the essence of common law estoppel; it was a representation in effect as to the future—a representation that the rent would not be enforced at the full rate but only at the reduced rate. At common law, that would not give rise to an estoppel, because, as was said in Jorden v Money (1854) (5 HL Cas 185), a representation as to the future must be embodied as a contract or be nothing. So at common law it seems to me there would be no answer to the whole claim.*
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> *What, then, is the position in view of developments in the law in recent years? The law has not been standing still even since Jorden v Money. There has been a series of decisions over the last fifty years which,*

although said to be cases of estoppel, are not really such. They are cases of promises which were intended to create legal relations and which, in the knowledge of the person making the promise, were going to be acted on by the party to whom the promise was made, and have in fact been so acted on. In such cases the courts have said these promises must be honoured. There are certain cases to which I particularly refer: Fenner v Blake ([1900] 1 QB 426), Re Wickham (1917) (34 TLR 158), Re William Porter & Co Ltd ([1937] 2 All ER 361) and Buttery v Pickard (1946) (174 LT 144). Although said by the learned judges who decided them to be cases of estoppel, all these cases are not estoppel in the strict sense. They are cases of promises which were intended to be binding, which the parties making them knew would be acted on and which the parties to whom they were made did act on. Jorden v Money can be distinguished because there the promisor made it clear that she did not intend to be legally bound, whereas in the cases to which I refer the promisor did intend to be bound. In each case the court held the promise to be binding on the party making it, even though under the old common law it might be said to be difficult to find any consideration for it. The courts have not gone so far as to give a cause of action in damages for breach of such promises, but they have refused to allow the party making them act inconsistently with them. It is in that sense, and in that sense only, that such a promise gives rise to an estoppel. The cases are a natural result of the fusion of law and equity; for the cases of Hughes v Metropolitan Ry Co (1877) (2 App Cas 439), Birmingham & District Land Co v London & North Western Ry Co (1888) (40 Ch D 268), and Salisbury v Gilmore ([1942] 1 All ER 457), show that a party will not be allowed in equity to go back on such a promise. The time has now come for the validity of such a promise to be recognized. The logical consequence, no doubt, is that a promise to accept a smaller sum in discharge of a larger sum, if acted on, is binding, notwithstanding the absence of consideration, and if the fusion of law and equity leads to that result, so much the better. At this time of day it is not helpful to try to draw a distinction between law and equity. They have been joined together now for over seventy years, and the problems have to be approached in a combined sense.' (Emphasis added).

22. Later in the case of **Moorgate Mercantile Co Ltd v Twitchings** [1975] 3 All ER 314 Lord Denning MR held at 323:

> *'Estoppel is not a rule of evidence. It is not a cause of action. It is a principle of justice and of equity. It comes to this. When a man, by his words or conduct, has led another to believe in a particular state of affairs, he will not be allowed to go back on it when it would be unjust or inequitable for him to do so. Dixon J [in Grundt v Great Boulder Pty Gold Mines Ltd [1937] HCA 58; (1937) 59 CLR 641 at 674] put it in these words:*
>
> > *"The principle upon which estoppel in pais is founded is that the law should not permit an unjust departure by a party from an*

assumption of fact which he has caused another party to adopt or accept for the purpose of their legal relations."

In 1947, after the High Trees case [Central London Property Trust Ltd v High Trees House Ltd (1946) [1956] 1 All ER 256, [1947] KB 130], I had some correspondence with Dixon J about it, and I think I may say that he would not limit the principle to an assumption of fact, but would extend it, as I would, to include an assumption of fact or law, present or future. At any rate, it applies to an assumption of ownership or absence of ownership. This gives rise to what may be called proprietary estoppel. There are many cases where the true owner of goods or of land had led another to believe that he is not the owner, or, at any rate, is not claiming an interest therein, or that there is no objection to what the other is doing. In such cases it has been held repeatedly that the owner is not to be allowed to go back on what he has led the other to believe. So much so that his own title to the property, be it land or goods, has been held to be limited or extinguished, and new rights and interests have been created therein. And this operates by reason of his conduct—what he had led the other to believe—even though he never intended it.' (Emphasis added).

23. The above authority clearly indicates that, the rule on promissory estoppel operates by reason of conduct of the promisor, i.e. what he had led the other party to believe even though he never intended it. In this case, if the plaintiff by his words or conduct had led the defendant to believe that she can re-settle in his disputed, he will not be allowed to go back on it when it would be unjust or inequitable for him to do so. Summary of the averments of the defendant in her affidavit is that, the defendant was living with her husband in her village; however, they moved to plaintiff's land subsequent to the discussion between them and the plaintiff for purpose of their children's education. Further, the defendant sold the *yagona* plantation in her village in order to re-settle in the disputed land and she has been occupying the same for 14 years as per her contention. The plaintiff also promised to transfer the land as per the defendant.

24. On the other hand, the plaintiff has replied to contention of the defendant in detail in relation to the fact that, the former approached the latter to resettle in the disputed land. The following are the more specific averments of the plaintiff:

*6. In response to paragraphs (5) through (7) of the Defendants AIO, I deny the contents thereof to the extent that my nephew and the defendant (the **'couple'**) decided to move and settle on my farm, after our discussion at my residence in Suva to support their efforts in the better education of their children **('Suva Discussion").***

7. I further state and categorically deny the contents of paragraph 6 and state that there was never a promise at any time during the Suva Discussion, nor at any time thereafter, to transfer the property or any part thereof to the couple within the first 10 years of their taking residence and their work on my property.

8. *I also reiterate that the basis for the Suva Discussion was the reason why the couple, in their own accord, decided to move to my property and not in response to any promise for transfer of lease.*

9. *In reply to paragraph 8, it was the dealing of Defendant's property and I am unaware of the same as I was not part of it.*

10. *In reply to paragraph 8 and 9, since the Defendant's husband stopped cultivating my farm, the cane production dropped.*

11. *In reply to paragraph 10, the Defendant is now cultivating her farm in her village to sustain her living and she should move to her village instead of staying further on my property.*

12. *In reply to paragraph 11 and 12, I verily believe according to my personal knowledge that during the time the Defendant's husband worked on the farm, cane production remained at a decreasing rate and with no significant increases recorded during that time.*

13. *The contents of paragraph 13 are denied and I reiterate the contents of paragraphs 7 and 8 above.*

14. *I categorically deny paragraph 15, by reiterating paragraphs 7 and 8 above.*

15. *I further state the following, in complete denial of the contents of paragraph (15) of the Defendant, where it is stated that the notice to vacate the property had come as a surprise to the Defendant:*

(a) *The marital issues of the couple was negatively impacting the sugar cane production of my property on a significant scale to the extent that in the past 2 years since January 2016 there has been zero production on the said property;*

(b) ***THAT*** *in addressing this, my immediate response was to speak with Malelili Nakulanikoro Nasau about the dismal cane production. Such a conversation took place on the 18 January 2016 in Ba Town at Malelili Nakulanikoro Nasau's sisters house, where I spoke with Malelili Nakulanikoro Nasau and his father Timoci Nasau, upon which I was informed of the said Malelili's intention to resign* ***('Resignation');***

(c) *I accepted the Resignation and verily believed that given such a state of affairs as had developed between the couple, and the dismal cane production, that it was necessary that the Defendant vacate the property;*

(d) *I verily believe according to my personal knowledge that at the point of his Resignation Malelili Nakulanikoro Nasau was no longer in contact*

*with the Defendant, and communicated the Resignation to the Defendant via 25 January 2016 letter, and copied to myself. Exhibited hereto and marked with letters **'AS-1'** is a copy of the resignation letter dated 25th January 2016 in Fijian Language and Translated to English language.*

(e) On or about January 2016, the said resignation letter was hand delivered by one Eparama N Draso, to the Defendant;

(f) Although the Defendant refused to accept the said resignation letter on the first instance it was hand delivered to her, the said Eparama N Draso did explain to the Defendant the full contents of the letter on or about 2 days thereafter, which the Defendant appeared to fully understand;

(g) On the 15 March 2016, I approached the Defendant at my property to verbally inform her that the implications:

(i) of the above state of affairs in (a) through (f) above; and

*(ii) given that the property suffered damages from Tropical Cyclone Winston **('TC Winston'),***
That they vacate the property to allow my unhindered access to my property for inspection with a view to repairing and upgrading the property, as well as to enable continuity to cane production.

(h) I verily believe given my observation of the defendant when I informed her of my intention on the 15 March 2016, that she appeared to fully understand me and did not voice any objections nor raise any queries in respect of my wish for the property to be vacated;

*(i) **THAT** the particulars of the 15 March 2016 conversation was recorded by myself **('Record of conversation')**, which specifically included the following terms:*

*(i) The Defendant to vacate the property within two to three weeks **('stipulated time')** from the date of the conversation;*
(ii) The need to vacate the property is to enable repair works to be done and arrangement made for a caretaker to move in.

25. In short, the plaintiff has admitted that there was a discussion, which he referred to as **"Suva Discussion"** and following that discussion, the defendant and her husband decided to move and settle in his land to support their efforts in the better education of their children. It then becomes obvious that, it was the discussion at the residence of the plaintiff in Suva that led the defendant and her husband to move from their village and to settle in the disputed land belongs to the plaintiff for the main purpose of education of their children. However, there is no detail evidence before the court in relation to the said **"Suva Discussion"** except some bare averments of the plaintiff and the defendant. If this

discussion led the defendant to move from her village after selling her yaqona plantation and settle in the plaintiff's land, the plaintiff should not be allowed to back to what had led the defendant to believe. The plaintiff denies promising the defendant to transfer land to her. In any event, the matters surrounding to the said **"Suva Discussion"** cannot be decided based on the affidavits only, but need the detailed evidence refined through a cross examination in a trial, as the real issue to be decided by the court is whether matters discussed in the said **"Suva Discussion"** are sufficient to create the defence of promissory estoppel in this case or not.

26. The plaintiff further stated that, the husband of the defendant resigned from him and attached a letter written in iTaukei language together with the English translation (**"AS 1"** in the affidavit filed on 23.01.2018). the said letter is written by the husband of the defendant to her. The said letter was served on the defendant and she initially refused to accept it; however she accepted the same later as per the contention of the plaintiff. Few matters should be considered in relation to the said averment of the plaintiff on the resignation of the defendant's husband. Firstly, why the plaintiff tried and somehow served the said letter to the defendant, when it was actually written by the husband of the defendant to herself? Secondly, the plaintiff did not aver anything in his affidavit that, the husband of the defendant was employed when the plaintiff referred the **"Suva Discussion"** in his affidavit. He only stated that, *my nephew and the defendant (the 'couple') decided to move and settle on my farm, after our discussion at my residence in Suva to support their efforts in the better education of their children* ***('Suva Discussion").*** The question is why the issue of employment and resignation coming here all of a sudden? Finally, the plaintiff has asked the defendant to vacate the land only after she was separated from her husband, who is the nephew of the plaintiff. She has been occupying the land for nearly 14 years from the said **"Suva Discussion"** as it appears from paragraph 18 of the plaintiff affidavit in reply that, the defendant and her husband has been in occupation from 2003 and this application for ejectment was filed in 2017. It seems, as alleged by the defendant that, the attempt to evict the defendant has arisen after the separation of defendant from her husband, the nephew of the plaintiff. In any event, all these facts to be decided in an open court trial.

27. Furthermore, the plaintiff stated that, there was a discussion between him and the defendant on 15.03.2016 and she did not object for his wish to vacate her from the land. The plaintiff further stated that, he recorded the said discussion on 15.03.2016 between him and the defendant and referred it as **"Record of conversation"** in his affidavit. Though the plaintiff stated in his affidavit that the time for the defendant to vacate the land, arrangement of a caretaker and repair of the house were discussed in the said conversation, there is no detailed evidence before the court in relation to the said conversation. The plaintiff did not even produce the said **"Record of Conversation"** to the court. As discussed above there is no detailed evidence in relation to the said **"Suva Discussion",** which led the defendant and her family to move from her village to the land belongs the plaintiff in 2003. In addition there is no detailed evidence in relation to late discussion though it was recorded by the plaintiff and referred to as **"Record of conversation",** except those bare averments in the affidavits. In fact, these matters need to be tested in an open court hearing for the court to come to a conclusion in relation to the defence taken up by the defendant.

28. The Fiji Court of Appeal in **Ali v Jalil** [1982] FJLawRp 9; [1982] 28 FLR 31 (2 April 1982) explained the nature of the orders a court may make in terms of the phrase used in section 172 of the Land Transfer Act, which says "*he (judge) may make any order and impose any terms he may think fit*". The Court held that:

> *"..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*". (Emphasis added).

29. The above discussion reveals that, the plaintiff is the registered proprietor of the land in dispute and he has complied with the procedural requirements under the section 170 of the Land Transfer Act. What is required from the defendant as per the decision of the Supreme Court in **Morris Hedstrom Limited –v- Liaquat Ali** (Supra) is that **some tangible evidence establishing a right or *supporting an arguable case for such a right*.** The defendant through her contention in her affidavit has shown an arguable case based on the principle of promissory estoppel which requires an open court hearing. This conclusion requires the summons to be dismissed under the section 172 of the Land Transfer Act (Cap 131) as this is the fit order this court can make in this case considering all the evidence adduced before this court through the affidavits of the parties.

30. Accordingly, I make following final orders:

a. The summons filed by the plaintiff seeking vacant possession of the property is hereby dismissed, and

b. The parties to bear their own cost

HIGH COURT OF FIJI
LAUTOKA

U.L.Mohamed Azhar
Master of the High Court

At Lautoka
04/06/2019