

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

**[CIVIL JURISDICTION]**

**Civil Action No. HBC 232 of 2017**

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

**BETWEEN** : **FOUR R ELECTRICAL & GENERAL CONTRACTORS**  
**LIMITED** a limited liability company having its registered at  
Yalalevu, Ba.

**Plaintiff**

**AND** : **NALESH NAND** of Yalalevu, Ba.

**Defendants**

Before : Master U.L. Mohamed Azhar

Counsels : Mr. S. Krishna for the plaintiff  
The Defendant is in person

Date of Judgment : 21<sup>st</sup> June 2019

**JUDGMENT**

01. The plaintiff company filed the instant summons supported by an affidavit sworn by its director Rishikendra Kumar pursuant to section 169 of the Land Transfer Act (Cap 131) against the defendant and all other occupiers of the property comprised in Certificate of Title No. 36513, land known as Valele and Nawaralailai being Lot 1 on DP 8561 in the District of Ba and Island of Viti Levu and sought following orders from the court:

- 1) ***THAT*** the Defendant, **NALESH NAND** and together with all other occupiers of the subject property do give immediate vacant possession of Certificate of Title No. 36513, all the piece of land on Certificate of Title Number 36513, land known as Valele and Nawaralailai being Lot 1 on DP 8561 in the District of Ba and Island of Vitilevu.
- 2) ***THAT*** the Defendant do pay costs to the Plaintiff for this application to be assessed on a Solicitor/Client basis; and

3) ***THAT** such further or other relief as this Honourable Court may deem just and fair.*

02. The supporting affidavit, sworn by the director of the plaintiff company contains two annexures marked as “**RK 1**” and “**RK 2**”. The “**RK 1**” is the true copy of the Certificate of Title No 36513 certified by the Registrar of Titles and “**RK 2**” is the copy of notice sent by the solicitors for the plaintiff company to the defendant and his wife Yogita Nand requesting to deliver the vacant possession of the subject property to the plaintiff company.
03. The defendant appeared in person and filed a lengthy affidavit together with the several documents which include some photographs of the premises and his late mother, copies of several letters he sent the Resident Magistrate in Ba who heard another matter between the parties, copies of some business registration and some proposal to set up a restaurant etc. The plaintiff company, in reply to the said affidavit of the defendant, filed an affidavit sworn by the same director and attached a copy of offer letter sent by Westpac Bank for mortgagee sale of Certificate of Title 36513 of the subject property marking as “**RK 1**”. At the hearing the counsel for the plaintiff made a brief oral submission and tendered his written submission and the defendant was allowed to file his submission later as he was appearing in person.
04. 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 is founded on the well-known Torrens System of Registration that the registration is everything and in the absence of fraud the registered proprietor has an indefeasible title. The Fiji Court of Appeal in **Subaramani v Sheela** [1982] 28 FLR 82 (2 April 1982) 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. Thus, the Land Transfer Act provides a speedy procedure for obtaining possession when the occupier fails to show cause why an order should not be made (**Mishra JA** in **Jamnadas v Honson Ltd** [1985] 31 FLR 62 at page 65). Furthermore, this procedure is to provide a quick and relatively inexpensive summary method of finding out whether a

person who is in possession had any legal right to be there. (Stuart J., in Vivek Prasad v. Ram Sundar Lautoka C.A. 788/76 (unreported)).

06. The relevant provisions of the Land Transfer Act Cap 131 are as follows;

*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. Concisely, the sections 169 and 170 set out the requirements for the applicant or the plaintiff and the application respectively. The *Locus Standi* of the person who may seek an order for eviction is set out in section 169. The particulars to be stated in the summons, 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 two powers that the court may exercise in dealing with 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 or the property in dispute. 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 a plaintiff to take any other proceedings, against any person so 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. I now turn to discuss how the parties discharged the burden on them in this case.
08. The plaintiff company invoked the jurisdiction of this court under the section 169 (a) of the Land Transfer Act, being the last registered proprietor of the subject property. The annexure "RK 1" is the true copy of the Certificate of Title certified by the Registrar of Titles. It is evident from the said Instrument of Title and the averments of both affidavits filed on behalf of the plaintiff company that, it became the proprietor of the subject property through Mortgagee's sale registered on 14.12.2015. However, the defendant in paragraph 4 of his affidavit states that, his late mother Champa Wati is the registered proprietor of the subject property. Interestingly, the defendant relies on the same Instrument of Title marked as "RK 1" and tendered by the plaintiff company for his contention. In fact, the late mother of the defendant was the original proprietor of the subject property. However, the title passed to the plaintiff company under and by virtue of Mortgagee's sale and the plaintiff company is the last proprietor of the subject property at the moment.
09. The section 18 of the Land Transfer Act provides that, the duly authenticated Instrument of title to be conclusive proof of the particulars contained in or endorsed upon such instrument unless the contrary is proved. The said section is as follows:

*Instrument of title to be evidence of proprietorship*

*18. 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.*

10. The Instrument of Title marked “**RK 1**” is duly authenticated under the hand and seal of the Registrar of Title and it is the conclusive evidence that, the plaintiff company is seised or possessed of the land and premises described in the said Instrument from 14.12.2015 through the Mortgagee’s sale registered on that day. Accordingly, the plaintiff company is the last registered proprietor of the subject property and it has locus standi to summons the defendant under section 169 (a) of the Land Transfer Act.
11. The section 170 provides that 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. The solicitors for the plaintiff company filed the affidavit of service for the proof of service of summons on the defendant. It is evident from the said affidavit that the summons was duly served on the defendant on 14.11.2017 giving him more than 16 days prescribed by the section 170. In the meantime, the section 170 does not specify what description of land entails and what adequate or full description of the land is. What is actually required by the statute is the description that can give full knowledge to the person so summoned, without causing any misunderstanding of the land and premises from which he or she ought to be evicted. 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) and the decision of High Court in **Wati v Vinod** [2000] 1 FLR 263 (20 October 2000). In this case, the defendant does not dispute the description given in the summons as he has been occupying the same property and well aware of it.
12. The section 171 requires the proof and production of consent if any such consent is necessary. The question is therefore, whether any such consent is necessary for an application under section 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".*

13. 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.
14. The summary of the above discussion clearly indicates that, the Instrument Tile marked as "**RK 1**" conclusively proves that the plaintiff company is the last registered proprietor of the subject property. The description of the property is not disputed and the defendant was given time more than what is required by the statute. It follows that, the plaintiff company has passed the threshold set out under sections 169 and 170 of the Land Transfer Act (Cap 131).
15. In consequence, the onus now shifts to the defendant to show his right to possess the property 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)*

16. The duty on the defendant is, 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 their right to remain in possession of the property in

dispute. **Black's Law Dictionary** defines "tangible evidence" as "physical evidence that is either real or demonstrative" (10<sup>th</sup> Edition, page 678). Thus, duty of the defendant is to produce some real or demonstrative physical evidence and not bare assertions. A bare assertion is not sufficient for this purpose.

17. Furthermore, 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).

18. According to above decisions, the duty of the court is to decide whether a defendant adduced any real or demonstrative physical evidence establishing a right or supporting an arguable case for such a right or even he failed to adduce such evidence whether an open court hearing is required or not, given the circumstances of a case. Bearing these principles in mind, I now turn to examine the affidavit of the defendant.
19. As stated above the defendant attached several documents and deposed several facts in his affidavit. The affidavit and the documents therewith span over number of pages. However all of them not only irrelevant to this proceedings, but also insufficient either to establish a right to remain in possession or an arguable case or to influence this court to decide that an open court hearing is required. If I correctly summarize all of his averments what he says is that his late mother Champa Wati is the registered proprietor and he has an interest to stay in the property and to fulfill the unfinished projects of his late parents.
20. It seems that the defendant has mistaken the law and the registration system under the Land Transfer Act and that is why he still claims that his late mother is the registered proprietor of the subject property. Therefore, it becomes necessary to expound the registration system under the Land Transfer Act and the result that follows registration under that Act. The Land Transfer Act (Cap 131) was introduced in Fiji in 1971 repealing the then existed Land (Transfer and Registration) Ordinance (see: section 178 of the Land Transfer Act). It is founded on the well-known Torrens System of Registration generally applied in certain countries in Pacific. Under that system, it is the registration that gives title to any proprietor. It is the system of **title by registration and not a system of registration of title**. Therefore, a title that a proprietor gets under that system is neither historical nor derivative. The system cuts off the retrospective or derivative character of the title upon each transfer or transmission, so as that each freeholder or proprietor is in the same position as a grantee direct from the Crown. The registration is made the source of the title, rather than a retrospective approbation of it as a derivative right. This was well explained by Barwick C.J and Windeyer J in **Breskvar v. Wall** (1971-72) 126 CLR 376. His Lordship Chief Justice held 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).

21. In that same case Windeyer J. concurred with the Chief Justice and quoted Torrens' word and explained the basic idea of his scheme of registration which later became the law in many Pacific countries including Fiji. Windeyer J speaks 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:*

*".....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).*

22. Accordingly, once a person is registered as the proprietor under the provisions of the Land Transfer Act, the registration cuts off all the retrospective and derivative character of that title and the last person so registered is in the same position as a grantee direct from the Crown. That is why the section 169 (a) requires to be the '**last registered proprietor**' to enjoy the indefeasibility subject, however, to the only exception of fraud.
23. In the case before me, though the late mother of the defendant once was a registered proprietor, the plaintiff company is the last registered proprietor of the subject property. The plaintiff company became the proprietor through the Mortgagee's sale registered on 14.12.2015 and defendant's mother Champa Wati died on 12.06.2017, almost one and



half year after the plaintiff company became the registered proprietor of the subject property. As per the Instrument of Title marked “**RK 1**”, which is the conclusive evidence in terms of section 18 of the Land Transfer Act, the plaintiff company’s title is indefeasible and unimpeachable except in case of fraud.

24. It further seems from the averments in paragraphs 07 and 24 of the affidavit of the defendant that, he has further mistaken by the term “proprietor” used in the proceedings under section 169 of the Land Transfer Act. He stated as follows in those two paragraphs referring to the business carried out:

- *Nitya Nand & Sons Shop – Proprietor Late Mrs. Champa Wati (who Died on 12<sup>th</sup> June, 2017).*
- *Highway Cuisine Wine & Dine Restaurant and Cake Shop – Proprietor Mrs. Yogita Nand.*
- *ENS Quantity Surveyors & Management Services – Proprietor Mr. Nalesh Nand (Defendant).*

**Ground Floor:**

- *Investor 1:  
Nitya Nand & Sons – Proprietor Late Mrs. Champa Wati (who Died on 12<sup>th</sup> June, 2017).*
- *Investor 2:  
ENS Quantity Surveyors & Management Services – Proprietor Mr. Nalesh Nand (Defendant).*
- *Investor 3 & Investor 4:  
Highway Cuisine wine & Dine Restaurant and NYDS Cakes- Proprietor Mrs. Yogita Nand.*

**First Floor:**

- *Investor 5:  
National Construction Co- Proprietor Late Mrs. Champa Wati (who Died on 12<sup>th</sup> June, 2017).*

25. What he means in the above averments is the ownership of those businesses carried out by him and Yogita Nand in the subject property. This is different from the proprietorship under the Land Transfer Act which means the ownership of the property itself. Therefore, the averments of the defendant become irrelevant to this matter. The defendant further

states about a Civil Case No. 58 of 2016 in the Magistrate Court of Ba and claims there was an illegal order by that court to evict his late mother and him. In fact, these are not relevant to the proceeding under the section 169 of the Land Transfer Act. Apart from that, there is nothing in his affidavit which can demonstrate or establish a right for him to possess the subject property or supporting an arguable case for such a right or which can require an open court trial.

26. Even though the defendant did not allege fraud it may be appropriate to note the dictum of Crossman J in **Waring (Lord) v London and Manchester Assurance Company Limited and others** [1935] 1Ch 310 as it deals with the mortgagee's sale, and the plaintiff company too became the proprietor through a mortgagee's sale. Crossman J held at p 317 as follows:

*The law, as stated by Kay J. in Warner v. Jacob (20 Ch. D 220,224), is perfectly clear. The learned judge there says: "...a mortgagee is strictly speaking not a trustee of the power of sale. It is a power given to him for his own benefit, to enable him the better to realize his debt. If he exercises it bona fide for that purpose, without corruption or collusion with the purchaser, the Court will not interfere even though the sale be very disadvantageous, unless indeed the price is so low as in itself to be evidence of fraud."*

27. Furthermore, section 40 of the Land Transfer Act provides that:

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

28. In the background of above decision and the provisions of section 40 above, the defendant cannot succeed in satisfying this court of his right to remain in possession of the subject property or getting the plaintiff company's summons dismissed, with his mere assertions of history and family business contained in his affidavit. His averments neither suggestive of promissory nor proprietary estoppel. Accordingly, Plaintiff Company's case is a clear-cut and straightforward case, where no complicated issues involved. Therefore, the plaintiff company is entitled to have this matter decided in its favour as Justice Gould V.P. stated in **Ram Narayan v. Moti Ram** (Civil Appeal. No. 16/83 FCA, decided on 28.07.1983) as follows:

*“...the summary procedure has been provided in the Land Transfer Act and, where the issues involved are straightforward, and particularly where there are no complicated issues of fact, a litigant is entitled to have his application decided in that way”.*

29. It seems that the defendant has been in occupation of the property for some time with his late mother and having business too. However, being in occupation for long time or care and compassion for the land or the property cannot supersede the clear principles on which the Land Transfer Act (Cap131) is founded. In **CPS Realty-Fiji Inc And David Simpson & Anne Simpson** Civil Action No. 178/90 (unreported) Jayaratne J., held that:

*“Section 169 of the Land Transfer Act is very strict in its application. It is very effective piece of legislation to obtain recovery of possession of land by Summary Judgment. No amount of compassion, unfairness or caring for the land as urged by the Defendant can be allowed to supersede the statutory legal effect of the Section”.*

30. The above discussion reveals that, the plaintiff company is the registered proprietor of the property in dispute and it has complied with all requirements under sections 169 and 170 of the Land Transfer Act. However, the defendant failed to provide any tangible evidence establishing his right or supporting an arguable case for such a right as required by the decision of the Supreme Court in **Morris Hedstrom Limited –v- Liaquat Ali** (Supra). The affidavit of the defendant only contains some assertion of history and businesses of his parents, which are not relevant to this proceeding. Further there is no evidence to show actual fraud which can only impeach the title of the plaintiff. This is a straightforward case which does not need an open court hearing or trial proper. Therefore, the plaintiff company is entitled for an order by this court on the defendant and on other occupiers to immediately deliver the vacant possession of the property to the plaintiff company. Though the plaintiff company seeks the indemnity cost in this case, I do not see any reason for the same.

31. Accordingly, I make following final orders:

- a. The defendant and all those occupying the property described in the summons are hereby ordered to immediately deliver the vacant possession of that property to the plaintiff company, and
- b. The defendant is further ordered to pay a summarily assessed cost of \$ 500.00 to the plaintiff company within 14 days from today.



At Lautoka  
21/06/2019

  
**U.L.Mohamed Azhar**  
**Master of the High Court**