IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 256 of 2016

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

BETWEEN	:	**SAIYAD AZAD HUSSAIN** also known as **SAIYAD AZAAD HUSSAIN** of Drasa, Lautoka, Businessman.
		Plaintiff
AND	:	**IQBAL HUSSEIN** of Drasa, Lautoka, Businessman.
		Defendant

Before	:	Master U.L. Mohamed Azhar
Counsels	:	Ms. S. Khan for the Plaintiff Mr. Nandan for the Defendant
Date of Judgment	:	05th August 2019

JUDGMENT

01. The plaintiff, being the last proprietor of the property described in Certificate of Title No 19907 as Vadraiyawalailai (Part of) being Lot 1 on D.P No. 4591 in the District of Lautoka, Island of Vitilevu and comprising an area of 25 acres 3 roods and 1 perch, took out the summons from this court pursuant to section 169 of the Land Transfer Act (Cap 131) and sought an order on the defendant to deliver vacant possession of the said property. The summons is supported by an affidavit sworn by one Rida Mohammed claims to be a lawful attorney of the plaintiff and a copy of a Power of Attorney No 57543 is annexed with his affidavit marked as **"FM 1"**. The said affidavit has other annexures too which are marked as **"FM 2"** and **"FM 3"**. The defendant opposed the summons and filed the affidavit sworn by himself and attached the documents marked as **"IH 1"** to **"IH 12"**. The plaintiff then filed the affidavit in reply sworn by the same attorney together with another set of documents marked as **"AFM 1"** and **"AFM 2"**.

02. At the hearing of the summons, counsel for the defendant took up two preliminary issues in addition to allegation of fraud on part of the plaintiff in getting himself registered as the proprietor of the subject property. The first is that the copy of Power of Attorney (**FM 1**) is not admissible as it does not comply with section 11 of the Civil Evidence Act. The second is that the attorney does not have requisite authority to depose the affidavit on behalf of the plaintiff. In conjunction with second issue, the counsel for the defendant further submitted that, the said affidavit has some statements that the attorney is not able of his own knowledge to prove. Therefore, the counsel objected such statements to be accepted by the court.

03. The first issue is in relation to authenticity and admissibility of Power of Attorney. Though the said Power of Attorney is registered at the office of the Registrar of Deeds, the copy marked as **"FM 1"** and attached with the supporting affidavit is not certified by the Registrar as true copy. The counsel for the defendant, citing the section 11 (1) of the Civil Evidence Act submitted that, **"FM 1"** should not be admitted in evidence. The said section 11 (1) provides as follows:

> *Proof records of business or public authority*
>
> ***11.****(1) A document which is shown to form part of the records of a business or public authority may be received in evidence in civil proceedings* ***without further proof****.*
>
> *(2) A document is to be taken to form part of the records of a business or public authority if this is produced to the court with a certificate to that effect signed by an officer of the business or authority to which the records belong.*(Emphasis added).

04. The above section in its plain and simple language provides that, further proof is not required when a certified copy such document is tendered in a civil proceeding and it may be received in evidence. This section neither shuts out uncertified copies of such documents, nor makes certification mandatory. Thus, the court is given wide discretion in relation to uncertified copies of such record. This is further supported by the provision in sub-section 6 of the same section 14. The said sub-section 6 provides that, the court may, having regard to the circumstances of the case, direct that all any of the above provisions of this section (11) do not apply in relation to a particular document, or record, or class or description of documents or records. Thus, if any such document is caught by section 11 of the Civil Evidence Act, the court should decide whether to admit it or not, exercising the wide discretion given to it considering the circumstances of each and every case.

05. However, the situation would be different in case of an uncertified copy of a Deed being tendered in evidence. The reason is that, the section 14 of the Registration Act completely shuts out all uncertified duplicates and copies of registered deeds. The uncertified copies of registered deeds are neither authentic, nor admissible in evidence. The said section 14 is as follows:

> *Duplicates and copies of registered deed endorsed by Registrar to be evidence*
>
> ***14.*** *No duplicate or copies of a registered deed shall be deemed to be authentic or shall be received in evidence unless they contain an endorsement or marking by the Registrar that they have been examined with the registered deed and found to be correct but, when so endorsed or marked, they shall be received as evidence of the contents of the said deed in all courts of law within Fiji. The fees chargeable for copies or authentication of duplicates or copies shall be as prescribed*

06. It is obvious that, the law stipulates two different standards in relation documentary evidence of public records and deeds when the uncertified copies of them were tendered in civil proceeding. Whilst the section 11 of the Civil Evidence Act gives the discretion to the court, the section 14 of the Registration Act completely excludes the duplicates and copies unless they are certified and endorsed. The very reason for this is the difference of underlying rationale or principles. The underlying principle in relation to records of public authority is that, there is a rebuttable presumption of law represented by Latin maxim: *omnia praesumuntur rite et solemniter esse acta*, which means official acts are presumed to have been done rightly and regularly. Accordingly, if a certified copy of any such record is tendered in civil proceedings it may be received in evidence without further proof. However, the court is not barred from seeking further proof considering the particular circumstances of a case, because the section says: "***may*** **be received....without further proof**". Likewise, if an uncertified copy is tendered, it does not mean that such copy should necessarily be rejected, because the court has discretion to allow it under sub-section 6 as mentioned above. On the other hand, the underlying rationale in excluding uncertified duplicates and copies of registered deeds is the elimination of fraud. Therefore, no duplicate or copies of a registered deed shall be deemed to be authentic or shall be received in evidence unless they contain an endorsement or marking by the Registrar that they have been examined with the registered deed and found to be correct, and the court has no discretion to receive an uncertified copy or duplicate of a registered deed in evidence.

07. An instrument conferring authority by deed is termed a power of attorney (**Halsbury's Laws of England**, Fourth Edition, and Volume I paragraph 730 at page 438). There is no single legislation in Fiji that specifically deals with execution or registration of the Power

of Attorney. There are several legislations which make provisions in relation to Power of Attorney for the purposes of those specific legislations. The examples are Property Law Act Cap 130 (see: Part XII), Land Transfer Act Cap 131 (see: Part XVIII), and Mining Act Cap 146 (see: section 14 and 86) etc. Most of the provisions provide that, a Power of Attorney should be deposited at the office of the Registrar, and the Registrar shall cause it registered in the respective Register to be known as the "Powers of Attorney Register". Therefore, execution, deposition and registration of a power of attorney may be dealt with in accordance with the respective legislation. However, when it is tendered in evidence in any civil proceedings, the section 14 of the Registration Act, which commonly applies to all copies and duplicates of deeds, shall be applicable as the power of attorney is a deed and not the section 11 which deals with the record of public authority.

08. The Power of Attorney, marked as **"FM 1"** and attached with the affidavit in this case, seems to have been made for the purpose of dealing with the disputed property in accordance with Part XVIII of the Land Transfer Act Cap 131. It has been duly deposited and registered as appears from the endorsement of the Registrar of Deed, made on 11.05.2016. It may be sufficient for the purpose of Part XVIII of the Land Transfer Act. However, it is not sufficient for purpose of tendering in evidence in this case as it lacks the certification and endorsement to its correctness as required by section 14 of the Registration Act. It is therefore, not authentic and shall not be received in evidence in this case.

09. Now I turn to discuss the second issue raised by the counsel for the defendant and that is the authority to depose an affidavit and some statement which the deponent is unable of his own knowledge to prove, as claimed by the counsel.

10. The authority to swear an affidavit in civil suits has been an arguable point in several cases in Fiji, and there are several cases, where the courts have rejected some affidavits for lacking authority from the actual parties to the suits. In some instances, the courts have accepted the affidavits despite the absence of written authority from the respective parties to the actions. Therefore, two questions to be decided in relation to the second preliminary objection of the counsel for the defendant. First is who can depose an affidavit in a civil suit? The second is whether a written authority is required to determine the admissibility of an affidavit sworn by a person other than a party to a civil suit?

11. The Order 41 of the High Court Rules deals with the matters connected with the affidavits that are filed in civil suits. There is no requirement, in any of the rules under this Order, for a written authority for a person, who swears an affidavit. The rule 5 of the said Order provides for the contents of an affidavit. It reads;

Contents of Affidavit (O.41, r.5)

5.-(1) Subject to Order 14, rules 2(2) and 4(2), to Order 86, rule 2(1), to paragraph (2) of this rule and to any order made under Order 38, rule 3, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove.

(2) An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof. (Emphasis added).

12. According to the above rule, subject to the specific rules mentioned therein and paragraph 2 of the rule, a person, who is able to speak to of his own knowledge to such facts, can swear an affidavit to that effect, as emphasized above. In this sense, the affidavit is equated to the oral evidence given in court. The **Supreme Court Practice (White Book) 1999** has the same rule under Order 41. The **White Book 1999** reads;

Contents of affidavit (O.41, r.5)

5. (1) Subject to –

(a) Order 14, rule 2(2) and 4(2);

(b) Order 86, rule 2(1) and 4(1A);

(ba) Order 88, rule 5(2A);

(c) Order 113, rule 3;

(d) Paragraph (2) of this rule, and

An affidavit may contain only such facts as the deponent is able of his own knowledge to prove.

(2) An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof.

13. The only difference between Fiji High Court Rules and the **White Book 1999** is that, the exceptions are more in the **White Book** than Fiji Rules. It means that, Fiji Rules are more flexible than the rules in White Book 1999, as the exceptions are less in Fiji Rules. The **White Book 1999**, then explains the effect of this rule as follows;

Effect of Rule

This rule was taken from the former O.38, r.3. Its effect is to require that save in the excepted cases, an affidavit must contain the evidence of the deponent, as to such facts only as he is able to speak to of his own

knowledge, and to this extent, equating affidavit evidence to oral evidence given in Court.

The excepted cases are:

(1) Affidavits under O.14, rr. 2 (2) and 4(2) either by the plaintiff or by the defendant;

(2) Affidavits under O.86, rr. 2 (1) and 4 (1A) either by the plaintiff or defendant;

(2A) Affidavits under O.86, r.5 (2A) in support of applications by a mortgagee claiming possession or payment;

(3) Affidavits under O.88, r.5(2A) in support of applications by mortgagees for possession or payment;

(4) Affidavits under O.113, r.3 on behalf of the plaintiff in summary proceedings for possession of land;

(5) Affidavits for use in interlocutory proceedings; and
Affidavits made pursuant to an order under O.38, r.3(2) that evidence of any particular fact may be given at the trial by statement on oath of information or belief. (Emphasis added).

14. Accordingly, the affidavits, which are equated with the oral evidence, are the way of giving evidence and the person who has privy to any information may depose an affidavit to that effect. This was affirmed by the court in **Vodafone Fiji Ltd v Pacificconnex Investment Ltd** [2010] FJHC 419; HBE097.2008 (30 August 2010) and held that;

> *Affidavits are a source of providing evidence and anyone privy to knowledge and information has a right to depose to an affidavit.*

15. There are two exceptions under Fiji Rules and the first is the affidavits fall under rule 5 (1), namely the affidavits fall under Order 14, rules 2(2) and 4(2); Order 86, rule 2(1) and Order 38 rule 3. The second is the affidavit falls under rule 5 (2). Accordingly, in any application which falls under first exceptional rules, the respective parties should swear the affidavits. If the respective parties are not able to swear such affidavits, they must authorize a person to do so. Under the second exception the affidavit to be used in interlocutory proceedings to be sworn by a person who has information or belief with the sources and grounds thereof.

16. The next question is whether written authority is necessary? It must be noted here that, those who argue that, the written authority should be given to swear an affidavit, very

often cite the passage or the note that appears at page 117 of the **White Book 1967.** It states as follows;

> *'The affidavit may be made by the Plaintiff or by any person duly authorized to make it. If not made by the Plaintiff, the affidavit itself must state that the person making it is duly authorized to do so-* ***Chingwin –v- Russell*** *(1910) 27 T.L.R. 21".*

17. In fact, the above note has, frequently, been cited by the courts too, in support of the view which seeks the authority from either the plaintiff or the defendant to depose an affidavit. On the face of it, the above note makes inference that, there must be an authority from the party, either the plaintiff or the defendant, if the affidavit is not deposed by them. However, a careful reading of the said authority **Chingwin –v- Russell** reveals that, it was decided under Order 14, which is one of the common exceptions mentioned in both High Court Rules (Order 41 rule 5) and White Book 1999 as stated above. The following dictum of **Vaughan Williams L.J.** in that case makes it crystal clear that, the courts asked for the authority only in cases of exceptions, which require the respective parties to swear the affidavits, as identified by the above rules. His Lordship **Vaughan Williams** held that;

> *"Where an affidavit in support of a summons under Order 14 is sworn by a person other than the plaintiff he should state his means of knowledge and also the* ***fact*** *that he is authorized to make the affidavit."* (Emphasis added).

18. The above dictum makes two propositions abundantly clear. Firstly, the case (**Chingwin –v- Russell**) decided under the exception (Order 14) should not, generally, be applied to all the affidavits in the civil suits. Secondly, the court did not call for a written authority to swear the affidavit in that case, but, it required the deponent to state the fact that he was authorized to do so, as emphasized above, notwithstanding the fact that, the application was under the Order 14 which requires the party himself or herself to swear the affidavit. In that case, His Lordship **Vaughan Williams** cited another case, which is **Lagos v. Grunwaldt** (1910) 1 K.B 41. That case too was decided under Order 14. In that latter case, the plaintiff, who had acted as the legal representative of the defendants during litigation in South America, sent in his bill of costs to their solicitors in England, and afterwards issued a specially indorsed writ against the defendant's, claiming the professional charges and disbursements. An application for leave to sign judgment under Order XIV was supported by an affidavit made by a member of the English firm of solicitors who represented the plaintiff. This affidavit was sworn in London, and the deponent stated that he was a member of the firm of solicitors acting for the plaintiff; that the defendants were justly truly indebted to the plaintiff in the sum claimed in the writ for

professional charges; gave the history of the case; and added that it was within his own knowledge that the debt was incurred and was till owing, such knowledge being obtained from correspondence received from the plaintiff and from correspondence and conversations the deponent had had with the defendant's solicitors and that he was duly authorized by the plaintiff to make the affidavit. The Court of Appeal unanimously held that;

> *There was a liquidated demand, but that the affidavit was irregular, in as much as the deponent was not a person who could swear positively to the facts and verify the cause of action and the amount claimed within Order XIV, r.1, and his affidavit was only made on information and belief. The conditions imposed by the rule were not fulfilled, and the Court had no jurisdiction to make an order under Order XIV.* (Emphasis added).

19. In the above case (**Lagos v. Grunwaldt**), the deponent had clearly averred in the disputed affidavit that, he was duly authorized by the plaintiff to make the said affidavit. However, the court did not ask for a written authority to be attached with the said affidavit, but, went on to examine whether the deponent could have positively sworn to the facts. **Cozens-Hardy M.R** said at pages 46 and 47 that;

> *He says, "I verily believe that there is no defence to this action," and then, "It is within my own knowledge that the said debt was incurred and is still due and owing, such knowledge being obtained from correspondence received from the plaintiff and also from correspondence and conversations I have had with Messers. Pritchard, Englefield & Co. I am duly authorized by the plaintiff to make this affidavit." In my opinion it is impossible to say that this is an affidavit made by a person who can swear positively to the facts. It is obviously nothing more than a statement made on his information and belief, that information being derived from his own client, the plaintiff, who tells him this is due – and that obviously will not be enough to enable him to make the affidavit – and from further statements made by Pritchard, Englefield & Co., who, beyond all doubt, were not the solicitors for the defendant Grunwaldt at the time when those statements were made. Is it possible that the deponent can swear positively to the facts as to the stamped paper for forty-three documents, which is the first item in the bill which is given here? Is it possible that he can swear this sum was paid? I might go through all the items. Is it possible that he can swear that the fees charged by Dr. Lagos and another attorney, amounting to 1,500l in all, were due? It seems to me we should be giving an irrational and improper extension to Order XIV, r.1, if we*

said that such an affidavit as that, made in aid of the plaintiff, was sufficient to bring his claim within the peculiar provisions of Order XIV. In my opinion on that ground there was no jurisdiction under Order XIV, to make the order which was made. We might as well say that the plaintiff's solicitor in every case could make an affidavit to satisfy Order XIV, and that would be dangerous beyond anything. There may be cases (I do not wish to be misunderstood on this point) in which the plaintiff's solicitor or the plaintiff's solicitor's clerk may be perfectly competent to make an affidavit satisfying the conditions of Order XIV, r.1. There are no conditions here which justify us in saying that the plaintiff's solicitor could make the affidavit and swear positively to the facts, and swear positively verifying the amount claimed. (Emphasis added)

20. It follows from the above decisions that, the authority to swear an affidavit should be required only in those circumstances exempted by the Order 41 rule 5, and the authority alone cannot make an affidavit admissible, but the court is still under duty to examine, whether the deponent can positively swear to the facts contained in the affidavits. A deponent can be disqualified from positively swearing to the facts, even though he or she was authorized to do so, as described by the above decision. In any event, none of the authority requires that, there should be a written authority attached with the affidavit.

21. The Fiji Court of Appeal in **Pacific Agencies (Fiji) Ltd v Spurling** [2008] FJCA 49; Civil Appeal Miscellaneous 10 of 2008S (22 August 2008), was of the view that, the person, who is able of his own knowledge to prove, should have sworn the affidavit and Hickie JA stated that it could have been sworn by the solicitor who knew the issues. Though, the Supreme Court, in the same case (**Pacific Agencies (Fiji) Ltd v Spurling** [2008] FJSC 27; CBV0007.2008S decided on 17 October 2008) had some concerns on the view of Hickie JA in relation to the sole knowledge of solicitors and swearing affidavits by the solicitors as stated by Hickie JA, it did not reverse the rationale that, the deponent should be able of his own knowledge to prove facts (see: both the judgment of Hickie JA in Court of Appeal and the judgment of Supreme Court as cited above).

22. The above analysis on the rules of the court and the decided cases supports the conclusion that, the general rule is that, save in the excepted cases, an affidavit must contain the evidence of the deponent, as to such facts only as he is able to speak to, of his own knowledge to prove. The exceptions are the applications under Order 14 rules 2(2) and 4(2); Order 86 rule 2(1); Order 38 rule 3 and the affidavits falling under paragraph 2 of Order 41 rule 5. For the applications under Order 14 rules 2(2) and 4(2), Order 86 rule 2(1) rules and Order 38 rule 3 the respective parties to swear an affidavit. If not, the deponent should have been authorized to do so. However, there is no requirement for a

written authority to be attached with the affidavit under those circumstances, but the deponent should state the fact that, he was authorized to make affidavit as held by His Lordship **Vaughan Williams** in **Chingwin –v- Russell** (supra). An affidavit sworn for the purpose of being used in interlocutory proceedings to be sworn by a person who has information or belief with the sources and grounds thereof.

23. The main factor, in deciding the admissibility of an affidavit, is whether the deponent is able of his own knowledge to prove the facts contained in a particular affidavit or whether the deponent can positively swear to those facts. The affidavit, which is equated to oral evidence given in court, may contain other facts and information and even the hearsay. Hence, like the court analyses the oral evidence in court, the affidavit too should be analyzed, and the court should consider which averments to be accepted, which to be rejected, and what weight should be given to that affidavit, bearing in mind the fact that, the averments in the said affidavit is not tested by cross examination. Without this judicial exercise, a court cannot declare an affidavit as irregular or defective and reject it, merely on the basis that, the letter of authority is not attached with the particular affidavit.

24. In the case before me, the deponent being the holder of Power of Attorney deposed the supporting affidavit. The affidavit is not falling under any exceptions mentioned in Order 41 rule 5 of the High Court Rules. Thus, it should contain only such facts as the deponent is able of his own knowledge to prove.

25. Briefly, the attorney deposes about the proprietorship of the plaintiff and the illegal occupation by the defendant and refusal to vacate the property despite numerous requests and demand notices by the plaintiff. The attorney further stated that, defendant and his family is making threat to the plaintiff. It is evident from the affidavit that, the attorney (deponent) is a Digger Operator and presently residing in Brisbane, Australia. There is no evidence before me as to when he left Fiji and how long he has been in Australia. The reason to look for these details is that, the attorney must be able in his own knowledge to prove the facts he deposes in his affidavit. All the incidents and facts the attorney deposes in his affidavit had allegedly happened in Fiji and the question is how the deponent, who is working in Australia, could be able in his own knowledge to prove them? In fact the dispute, between the plaintiff and the defendant over the property, links with late Saiyad Zulfikar Hussein who initially owned it. The plaintiff is the son of late Saiyad Zulfikar Hussein and the defendant is the grandson. There is nothing to show in the affidavit that, the deponent is anyhow related to them, apart from the fact that he is formerly from Drasa Lautoka. The attorney deposes that he acquired the knowledge during the course of negotiation with the defendant. The question is how the deponent could have come to know from the discussion he had with the defendant that he and his family have been illegally occupying the property, as the defendant traces his right to possess the property to his father who is the beneficiary under the Last Will of late Saiyad Zulikar Hussein?

26. Furthermore, the deponent in his affidavit, filed in reply to the affidavit of the defendant, states that, the father of the defendant renounced his right over the property and executed a Deed of Renunciation. He also attached an uncertified copy of a Deed of Renunciation claimed to have been executed by the father of the defendant. However, the defendant has categorically denied it and stated that his father did not execute such a Deed. Given the fact that the section 14 of the Registration Act shuts out all uncertified deeds as unauthentic, the copy annexed by the attorney in affidavit cannot be admitted in evidence. In any event, the attorney, whose relation to the parties to this action is unknown and who is residing overseas, could not be, in his own knowledge, able to prove those facts. Besides, the attorney in replying some paragraphs of the affidavit of the defendant states that, he has no knowledge of those contents of defendant's affidavit. Thus, the attorney himself admits that, he has no knowledge in certain issues between the plaintiff and the defendant. It follows that the affidavit deposed by the attorney in this matter does not comply with Order 45 rule 1 of the High Court. More importantly, it is quite odd that, the plaintiff who is a businessman residing in Fiji did not depose the affidavit in support of his own application in this matter, but requested his attorney, who resides overseas, to do so for the reasons best known to him (plaintiff). For all these reasons, I decline to admit the supporting affidavit in this matter.

27. Even though the copy of power of attorney and the supporting affidavit of the attorney are rejected as aforesaid, the facts that the plaintiff is the last registered proprietor, the summons contains adequate description of the disputed property and the defendant was given time as required by the section 170, are not disputed. The defendant admitted that, the plaintiff is the last registered proprietor, but alleged that, the latter (plaintiff) fraudulently transferred the property to his name. Therefore, it has become necessary to examine the merits of this matter.

28. The Land Transfer Act Cap 131 was introduced to Fiji in 1971 and it repealed the Land (Transfer and Registration) Ordinance (see: section 178 of the Land Transfer Act). However, the other two legislations, namely Crown Land Act (now known as State Land Act), Native Land Act (now known as iTaukei Land Act) continue to govern the lands fall under their purview with the necessary amendments caused by the introduction of Land Transfer Act to bring all dealings relating to land under the well-known Torrens System of Registration. The effect and application of the said system of registration, that was generally applied in certain countries in Pacific, was explained in **Breskvar v. Wall** (1971-72) 126 CLR 376 and 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).

29. 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:*
>
> *"……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).

30. It was further held in **Fels and another v Knowles and another** (1907) 26 NZLR 604 by Stout C.J at page 620 as follows:

> *'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. Nothing can be registered the registration of which is not expressly authorized by the statute.'

31. Accordingly, the registration is everything and it is the registration that confers the title to person so registered. It is the title by registration and not registration of title. This system of registration 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. The only exception is the actual fraud, and in the absence such fraud as provided in sections 39 to 41 of the Land Transfer Act, the registered proprietor shall have an indefeasible title. This was confirmed the Fiji Court of Appeal in ***Subaramani v Sheela [1982] 28 FLR 82 (2 April 1982)*** where the court 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."*

32. As a result of this guarantee given to a registered proprietor, there was a need for a mechanism by which he or she could enforce his or her indefeasible right against an illegal occupant. Thus, this need was fulfilled by the special jurisdiction given to this court under the sections 169 to 172 of the Land Transfer Act. Therefore, the underlying principle of the summary procedure is to protect the last registered proprietor who has an indefeasible title from illegal occupation by others at a minimal cost. So having a summary procedure for eviction under those sections of the Land Transfer Act is the necessary consequence of Torrens system of registration. The nature of this summary procedure was explained by the Fiji Court of Appeal again and it was held that, it is a speedy procedure for obtaining possession when the occupier fails to show cause why an order should not be made (per: *Mishra JA in* **Jamnadas v Honson Ltd** [1985] 31 FLR 62 at page 65).

33. The sections 169 and 170 of the Land Transfer Act set out the requirements for the applicant or the plaintiff and the application respectively. The *Locus Standi* of the person who seeks order for eviction is set out in section 169 and the requirements of the application, namely the description of land and the time period to be given to the person so summoned, are mentioned in section 170. The sections 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. 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.

34. As stated above, the defendant admitted that, the plaintiff is the last registered proprietor as per the Certificate of Title and there is no dispute in relation to the other procedural requirements specified by the sections 170 and 171. Thus, the burden shifts to the defendant to show his right to possess the disputed property. The Supreme Court in **Morris Hedstrom Limited –v- Liaquat Ali** CA No: 153/87 explained the duty of a defendant 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)

35. The duty on the defendants is, not to produce any final or incontestable proof of their 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" (10th 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.

36. 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).

37. According to above decisions, 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.

38. It reveals from the affidavit of defendant that, the Certificate of Title No 19907, which was part of previous Title No 8947, was originally owned by late Sayad Zulfikar Hussein, the father of the plaintiff and the grandfather of the defendant. Sayad Zulfikar Hussein died testate on 04.09.1993 and he had bequeathed his property to his wife and children. The three daughters were given option of taking $ 1,000 in lieu of ¼ acre of Certificate of Title No 8947. The elder son and father of the defendant – Siyad Akbar Hussein was given 4 acres of the same Title No 8937. The wife of the deceased – Mohammadi Bagun and plaintiff - the younger son- were given the residue and the reminder of the estate in equal shares. The wife –Muhammadi Bagum was appointed as the sole Executrix and Trustee of the Estate. The said Muhammadi Bagum, being the Trustee of the Estate, was registered as the Registered Proprietor of Certificate of Title No 19907 (Previous Title No. 8947) through Transmission by Death on 16.11.1994 at 12.00 p.m. On the same date and time, the said Trustee transferred the same Title to her name instead of distributing the shares as per the Last Will of her late husband – Sayad Zulfikar Hussein. It is deposed in the affidavit of the defendant that, all the beneficiaries renounced their interests in the Estate in favour of said Trustee Muhammadi Begum, but the father of the defendant did not renounce his interest. There are several Deeds of Renunciation which annexed to the affidavit. The plaintiff's attorney too attached a copy of Deed of Renunciation allegedly executed by the father of the defendant. However, the defendant vehemently denied the same. In any event, all those copies are uncertified and therefore, caught by section 14 of the Registration Act which provides that, uncertified copies of the deed are neither authentic, nor admissible in evidence. The actual issue is whether all those beneficiaries had actually renounced their interest in favour of the Trustee or not. This issue cannot be decided solely on the affidavit that contains the uncertified copies of the Deeds which are unauthentic and inadmissible in evidence.

39. The documents marked as **"IH 8"** to **"IH 11"** and attached with the affidavit of the defendant further reveal that, the dispute over the distribution of the Estate never happened as the defendant petitioned to Islamia Tabligi Jamaat - the religious body – to solve the dispute between him and the plaintiff over Estate property. The correspondence further reveals that, the said religious body tried to amicably solve the issue; however, the defendant decided to seek legal advice. The defendant's father obtained Letter of Administration De Bonis Non of the Estate of late Zulfikar Hussein. The said Letter of Administration De Bonis Non is marked as **"IH 12"** and attached with the affidavit of the defendant. This shows that, Muhammadi Bagum - the Trustee of late Sayad Zulfikar Hussein - died without administering the Estate and if it is so, the transfer of the subject property to the plaintiff would be questionable. Hence, a full investigation in proper trial is inevitable in this case.

40. The defendant attached a letter from the religious body Islamia Tabligi Jamaat, which is marked as **"IH 11"**, with his affidavit. It is a reply from the said religious body to the complaint - the father of the defendant in relation to the dispute over the subject property. It appears that, the said letter was issued after the discussion with the interested stakeholders and it reveals that, the attorney of the plaintiff too has some interest on the subject property. The attorney in the paragraph 19 of the second affidavit filed in response to defendant's affidavit, stated that, the house occupied by the defendant was built by him (attorney). It appears that the attorney, who has some interest over the property that is unknown to the court at this stage, might have come to a compromise with the plaintiff and filed this action under the disguise of Power of Attorney. The parties to this action are disputing over the shares they have in the ancestral property. The plaintiff is the direct beneficiary and the defendant claims his right through his father who is the direct beneficiary. However, there is nothing before the court as to the right of the attorney of the plaintiff who claims to have built the house occupied by the defendant. Thus, these complicated issues cannot be decided solely on the affidavits.

41. The summary of the discussion is that, the affidavit of the attorney is not in compliance with the Order 41 rule 5 of the High Court and the uncertified copy of the Power of Attorney too cannot be considered as authentic and therefor it is inadmissible. However, the fact the plaintiff is the last proprietor is admitted by the defendant and he did not dispute the other requirements that should be fulfilled by the plaintiff. Nevertheless, the defendant was able show some arguable case and satisfied this court to form an opinion that, the issues in this case ought to be tried in trial proper. Therefore, I decide that, the matters in this case need full investigation in a proper trial and the summons filed by the plaintiff seeking order for vacant possession of disputed property ought to be dismissed.

42. In result, I make the following orders:

1. The summons filed by the plaintiff is dismissed,
2. The parties to bear their own cost.

U.L.Mohamed Azhar
Master of the High Court

At Lautoka
05/08/2019