IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 18 of 2016

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

BETWEEN : **JAMNA LAL and NITESH PRASAD** both of Nalawa, Rakiraki, Farmer.

Plaintiffs

AND : **BIJEN PRASAD (BIJU)** of Baruto, China Settlement.

Defendant

Before : Master U.L. Mohamed Azhar

Counsels : Mr. S. Titiko for the Plaintiff
Mr. Padharath for the Defendant

Date of Judgment : 13th March 2020

JUDGMENT

01. This is the plaintiffs' summon filed pursuant to section 169 of the Land Transfer Act (Cap 131), against the defendant seeking an order on the defendant and his family members to deliver vacant possession of the premises and the land comprised in Instrument of Tenancy No. 13051 NLTB Reference No. 4/3/40354 containing an area of 2.0609 hectares, owned by Mataqali Nabonubonu. The summons was supported by an affidavit sworn by the both plaintiffs. A copy of the Instrument of Tenancy is marked as **"JL NP A"** and annexed together with a written notices sent by the solicitors of the plaintiff, and the affidavit of service of that notice.

02. The defendant, upon service of the above summons, appeared through his solicitor and filed his affidavit in opposition with three documents marked as **"VK 1"** to **"VK 9"**. Basically, the defendant claimed estoppel and also stated that, the affidavit of the plaintiff to be challenged on some legal grounds which will be urged by his counsel at hearing of the summons. The plaintiff did not file any affidavit in reply to the affidavit filed by the defendant. Though this case was once struck out, it was late reinstated on the application of the plaintiff.

03. At the hearing of the summons the counsel for the plaintiff filed written submission and relied on the affidavit of the plaintiff. On the other hand, the counsel for the defendant made the oral submission. Both counsels touched the law on this special procedure for recovery of possession under the Land Transfer Act (Cap 131). The Land Transfer Act (Cap 131) provides 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). The rationale for this speedy remedy available for the registered proprietors stems from the cardinal principle of the statute that, the register is everything and in the absence of any fraud, the registered proprietor has an indefeasible title against the entire world. 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."*

04. The *Locus Standi* of the person who seeks an order for eviction is set out in section 169 and it provides for three categories of persons, who can invoke the jurisdiction of this court under that section. The procedural requirements of an application, namely the description of land and the time period to be given to the person so summoned, are mentioned in section 170. The other two sections namely 171 and 172 provide for the two powers that the court may exercise in such applications under the section 169. The burden to satisfy the court on fulfillment of the requirements under sections 169 and 170 is on the plaintiff and once this burden is discharged, it then shifts to the defendant to show his or her right to possess the land. The exercise of court's power, either to grant the possession to the plaintiff or to dismiss the summons, depends on how the said burden is discharged by respective party to the proceedings. However, dismissal of a summons shall not prejudice the right of a plaintiff to take any other proceedings to which he or she may be otherwise entitled against any defendant. Likewise, in the case of a lessor against a lessee, if the lessee, before hearing of the summons, pays or tenders all rent due and all costs incurred by the lessor, the summons shall be dismissed by the court.

05. The plaintiffs brought this summons on the basis that, they are the registered proprietor of the land and the premises which is the subject matter of this case. As mentioned in the affidavit of the defendant, his counsel took up two preliminary objections in relation to the locus of the plaintiff to bring this summons on two grounds. Firstly, the defendant's counsel argued that the purported Instrument of Tenancy is registered at the office of the Registrar of Deed and not at the Registrar of Title and therefore, the plaintiff is not the

'registered proprietor' for the purpose of section 169 (a) of the Land Transfer Act. Secondly, the counsel urged that, the copy of the said Instrument is not certified by the Registrar of Deeds as required by section 14 of the Registration Act Cap 224 and therefore not admissible in evidence. Hence, the counsel for the defendant submitted that, the plaintiff does not have locus standi to bring this summons under section 169 (a) of the Land Transfer Act (Cap 131) moved the court to dismiss the same. Similar objections were raised in some other cases too and this court discussed the same in those cases (see: **Lal v Chand** [2019] FJHC 538; HBC63.2017 and **Deosharan v Tangavellu** [2019] FJHC 537; Civil Action 159 of 2017). However, it has become necessary to repeat the same discussion in this case too.

06. The defendant's counsel, in support of his first ground of objection cited the decision of Mr. Justice Sapuvida in **Kumar v Devi** [2017] FJHC 269; HBC202.2013 decided on 7th April 2017. It was an Appeal from the judgment dated 9th February 2015 and delivered by the Puisne Judge of this court, sitting as the Master of the High Court (The Master). In that case, the then Master made an order for delivery of vacant possession of the property concerned to the plaintiff who was the holder of Instrument of Tenancy governed by the Agricultural Landlord and Tenancy Act ('ALTA'). On appeal by the defendant, the judge reversed the order of the then Master and held that, the said Instrument of Tenancy was not registered at the Office of the Registrar of Title in accordance with the Land Transfer Act and therefore the plaintiff was not the registered proprietor within the meaning of section 169 (a) of the Land Transfer Act.

07. However, there are two other decisions by Madam Justice Anjala Wati in **Habid v Prasad** [2012] FJHC 22; HBC 24. 2010 (17 January 2012) and in **Chand v Nasarwaqa Co-operative Ltd** [2015] FJHC 90; HBC18.2013 (17 February 2015) and both decisions recognized the holder of Instrument of Tenancy as the Registered Proprietor for the purpose of section 169 (a) of the Land Transfer Act. Though the counsel for the plaintiff was aware of the first decision in **Habid v Prasad** (supra), he relied on the decision of Justice Sapuvida for his argument, as he was the counsel who advanced that argument before Justice Sapuvida in that appeal against the judgment of the then Master.

08. Concisely, Justice Sapuvida in that case (**Kumar v Devi**) has interpreted the term "Registered Proprietor" to mean and include only those persons who have their titles to the land registered under the specific provisions of the Land Transfer Act and at the office of the Registrar of Titles. In doing so in a narrow way, Justice Sapuvida has categorically excluded all the others who hold the leases or instruments of tenancy which include native and crown leases granted for agricultural purposes and instruments of tenancy that are registered at the office of Registrar of Deeds in accordance with the Registration Act Cap 224. Justice Sapuvida further held that, the protection of a title by the notion of 'indefeasibility' is available only for those who possess the Certificate of Title registered at the office of Registrar of Titles under the Land Transfer Act and not for the Deeds which are usually registered at the office the Registrar of Deeds. On the other hand, Madam Justice Anjala Wati in those two judgments has adopted a broader interpretation to the term "Registered Proprietor" and held that, the word 'registered' is making reference to registration of land and not the nature of land. Madam Wati further held that, if the land is registered either at office of Registrar of Titles or at the office of Registrar of Deeds, it is still registered land or the holder of such land is the 'Registered Proprietor' for the purpose of section 169 (a) of the Land Transfer Act.

09. Majority of the decisions under the section 169 of the Land Transfer Act follows the broad view taken by Madam Justice Anjala Wati and some have similar view taken by Mr. Justice Sapuvida, though they have not discussed the matter as Justice Sapuvida dealt with it. In any event, there are two conflicting views by Honourable Judges, apart from the other judgments of the Masters of the High Court, on the question whether the holder of an Instrument of Tenancy or a Lease registered under the Registration Act at the office of Registrar of Deeds, can be considered as "the registered proprietor" for the purpose of section 169 (a) of the Land Transfer Act Cap 131. The reason for these conflicting views by the Honourable Judges is due to the manner of interpretation of the scope and application of Land Transfer Act, the notion of 'indefeasibility' and the term 'Registered Proprietor' under that Act. This court is entitled and bound to decide which of two previous conflicting decisions to be followed in this case, as both judgments are equally binding on this court. However, it would be judicious to examine and interpret the Land Transfer Act and the connected provisions in a way independent from those two conflicting judgments before opting to go either way. Therefore, the issue before this court may be dealt with in three angles. Firstly, the application and scope of the Land Transfer Act in general; secondly, the scope of the "indefeasibility" and thirdly, the meaning and scope of the term "Registered Proprietor" under that Act.

10. A brief note on the laws that govern the land in Fiji is necessary before examining the application of the Land Transfer Act Cap 131. Three separate legislations governed the land in Fiji before Land Transfer Act (Cap 131) was enacted. They are Crown Land Act (now known as State Land Act), Native Land Act (now known as iTaukei Land Act) and Land (Transfer and Registration) Ordinance. Title to land acquired by the Crown to be taken in the name of Director of Lands, and the director shall perform the duty imposed by the Crown Land Act in relation to control, administration and disposal of Crown Land. On the other hand, the Native Land Trust Act (now known as iTaukei Land Trust Act) established the Native Land Trust Board (now known as iTaukei Land Trust Board) to secure, protect and manage iTaukei land ownership rights and facilitate commercial transactions relating to iTaukei land use. The iTLTB administers and negotiates all leases and licenses agreements on behalf of the landowners. The Land Transfer Act (Cap 131) was enacted repealing the Land (Transfer and Registration) Ordinance (see: section 178 of the Land Transfer Act) in 1971 and it has been in force since then, with the other two Legislations. The Director of Land and iTLTB continues to administer the respective land. The Land Transfer Act only made necessary amendments to the Crown Land Act, Native Land Trust Act and other connected legislations related to land transactions in order to bring them in line with the Land Transfer Act. This will be examined in detail later in this judgment.

11. Undoubtedly, the Land Transfer Act 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).

12. 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).

13. 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.'*

14. The above authorities are 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***. The Land Transfer Act (Cap 131) too provides for the same procedure of the title by registration and protects such title, registered in accordance with

its provisions, in the absence of fraud as provided in sections 39 to 41 of that Act. Now I turn to examine the scope the Land Transfer Act in general. It is paramount to analyze the scope of any legislation, when interpreting it as it would help to easily apply to any given context. This is so important in the case of Land Transfer Act which was introduced to the country like Fiji which had already had three separate and main legislations, among others, dealing with the complex nature of land issues.

15. Since the main cause for the different views of the Honourable Judges is the way of interpretation of the provisions of the Land Transfer Act as stated above, it is necessary to start the analysis with a brief note on the schools of thought in interpreting the statutes. The ***literal rule*** is to seek the intention of the legislature through an examination of the language in its ordinary and natural sense even if the result to be inconvenient or impolitic or improbable (Higgins J. in **Amalgamated Society of Engineers v Adelaide Steamship Co Ltd** [1920] HCA 54; (1920) 28 CLR 129, McHugh J. in ***Hepples v FCT*** [1992] HCA 3; (1991-1992) 173 CLR 492, 535-6, preferred this method of interpretation even if it produces "anomalies or inconveniences". Courts have stressed this rule of interpretation to the extent that they "cannot depart from the literal meaning of words merely because the result may ... seem unjust" (**CPH Property Pty Ltd & Ors v FC of T** 98 ATC 4983, 4996 *per* Hill J.) Lord Diplock in **Duport Steels Ltd v Sirs** [1980] 1 All ER 529, 541 stated

> *"...the role of the judiciary is confined to ascertaining from the words that the Parliament has approved as expressing its intention what that intention was, and to give effect to it. Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they consider the consequences of doing so would be inexpedient, or even unjust or immoral".*

16. On the other hand, the ***purposive rule*** of interpretation is to interpret the legislation to find the purpose for which the Parliament passed that legislation and to give effect to such purpose. This allows the court to use the extrinsic tools such as Parliamentary debate or Committee Report or Hansard. The basis of this rule is that, statutory interpretation cannot be founded on the wording of the legislation alone (*per* Iacobucci J in **Re Rizzio & Rizzo Shoes Ltd.**, [1998] 1 S.C.R. 27, at paragraph 21). The purposive approach was explained by Kirby J in **Federal Commissioner of Taxation v Ryan**, (2000) 42 ATR 694, at pages 715 and 716, as follows:

> *"In the last decade, there have been numerous cases in which members of this court, referring to the statutory and common law developments, have insisted that the proper approach to the construction of federal legislation is that which advances and does not frustrate or defeat the ascertained purpose of the legislature, to the full extent permitted by the language which the Parliament has chosen. Even to the point of reading words into legislation in proper cases, courts will now endeavor, more wholeheartedly than in the past, to carry into effect an apparent legislative purpose. Examples of this approach abound in Australia, England and elsewhere. This court should not return to the dark days of literalism".*

17. The other rule, that falls middle of the above mentioned two rules, is the ***golden rule***. This rule takes middle path between above two rules and embraces both ordinary meaning of the language and the manifest purpose of the legislation. Viscount Simon LC explained this approach in **Nokes v. Doncaster Amalgamated Collieries Ltd**. [1940] 3 All ER 549 at pages 553 and 554 as follows:-

> *"The principles of construction which apply in interpreting such a section are well –established. The difficulty is to adapt well- established principles to a particular case of difficulty. The golden rule is that the words of a statute must prima facie be given their ordinary meaning. We must not shrink from an interpretation which will reverse the previous law, for the purpose of a large part of our statute law is to make lawful that which would not be lawful without the statute, or, conversely, to prohibit results which would otherwise follow. Judges are not called upon to apply their opinions of sound policy so as to modify the plain meaning of statutory words, but, where, in construing general words the meaning of which is not entirely plain, there are adequate reasons for doubting whether the legislature could have been intending so wide an interpretation as would disregard fundamental principles, then we may be justified in adopting a narrower construction.* ***At the same time, if the choice is between two interpretations the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility, and should rather accept the bolder construction, based on the view that Parliament would legislate only for the purpose of bringing about an effective result"***. (Emphasis added).

18. When interpreting the Land Transfer Act too, the court should endeavor to prima facie give ordinary meaning of its words whilst avoiding a construction that would reduce the legislation to futility if the court is to choose between two interpretations and the narrower of which would fail to achieve the manifest purpose of the legislation. With this background, I now turn to analyze the provisions of the Land Transfer Act in relation to its application. The most important sections are the sections 3, 4 and 5 mentioned in Part II of the Land Transfer Act, which deals with the application of that Act. The Land Transfer Act in its unambiguous wordings explains its application in three steps in those three sections. Firstly the section 3 explicitly excludes all written laws, Acts and practice that are inconsistent with the Land Transfer Act and further provides that, they shall not apply to land subject to the Land Transfer Act. The said section 3 of the Land Transfer Act reads as follows:

> *Laws inconsistent not to apply to land subject to Act*
>
> *3. All written laws, Acts and practice whatsoever so far as inconsistent with this Act shall not apply or be deemed to apply to any land subject to the provisions of this Act or to any estate or interest therein.*

19. Secondly, by section 4, the Land Transfer Act brings all land, hitherto, were subject to the provisions of Land (Transfer and Registration) Ordinance, every estate or interest therein and all instruments and dealings affecting any such land, estate or interest into its

purview. This is because the Land Transfer Act by its section 178 repealed the Land (Transfer and Registration) Ordinance. The said section 4 provides as follows:

Scope of Act

> ***4.*** *All land subject to the provisions of the Land (Transfer and Registration) Ordinance and every estate or interest therein and all instruments and dealings affecting any such land, estate or interest shall from the commencement of this Act be deemed to be subject to the provisions of this Act.*

20. In the third step, which is provided in the very important section to the discussion in this judgment, the Land Transfer Act provides what land subject to that Act. That is section 5 of that Act, which reads that:

What lands subject to Act

> ***5.*** *The following freehold and leasehold land shall be subject to the provisions of this Act:-*
>
> *(a) all land which has already in any manner become subject to the provisions of the Land (Transfer and Registration) Ordinance;(Cap. 136.) (1955 Edition)*
>
> *(b) all land hereafter alienated or contracted to be alienated from the Crown in fee*
>
> *(c)* ***all leases of Crown land*** *granted pursuant to the provisions of the Crown Lands Act,* ***all leases of native land*** *granted pursuant to the provisions of the Native Land Trust Act and* ***all mining leases, special mining leases****, special site rights and road access licences granted pursuant to the provisions of the Mining Act;(Cap. 132.) (Cap. 134.) (Cap. 146.)*
>
> *(d) all land in respect of which any order is hereafter made under the provisions of any Act now or hereafter in force which has the effect of vesting that land in any person in freehold tenure.*(Emphasis added).

21. The above section is clear that four categories of both freehold and ***leasehold*** land subject to the Land Transfer Act Cap 131. They are **(a)** all land which have already in any manner become subject to the provisions of the Land (Transfer and Registration) Ordinance, which was repealed by the Land Transfer Act; **(b)** all land alienated or contracted to be alienated from the Crown in fee after the Land Transfer Act; **(c) all leases** granted pursuant to the provisions of the Crown Lands Act (State Lands Act), Native Land Trust Act (iTaukei Land Trust Act) and **all mining leases**, **special mining leases**, special site rights and road access licences granted pursuant to the provisions of the Mining Act, and **(d)** all land in respect of which any order is made under the provisions of any Act which has the effect of vesting that land in any person in freehold

tenure. Accordingly, not only freehold, but also the leasehold land under both the State Land Act and iTaukei Land Trust Act subject to the Land Transfer Act.

22. The intention of the legislature is manifest from the above section that, the application of the Land Transfer Act is not restricted to the freehold land that are registered under the specific provisions of that Act, but it embraces the other leasehold land too under those three legislations mentioned in the above section. This is further supported by some sections of those three legislations.

23. The sub-sections 12 (2) and (3) the State Land Act provide that:

> *(2) When a lease made under the provisions of this Act has been registered, it shall be subject to the provisions of the Land Transfer Act, so far as the same are not inconsistent with this Act in the same manner as if such lease had been made under that Act and shall be dealt with in a like manner as a lease so made.* ***(Cap 131)***
>
> *(3) It shall be lawful for the Registrar of Titles to charge and collect in respect of any lease registered under the provisions of this Act, or in respect of any dealing with such lease, the fees prescribed under the Land Transfer Act, in the same manner as if such lease was a lease under that Act.* ***(Cap 131)*** (Emphasis added)

24. The subsections 10 (2) and (3) of the iTaukei Land Trust Act (formerly known as Native Land Trust Act) are the verbatim of the above mentioned two subsections of State Land Act as such it is not necessary to repeat the same. In the meantime, the section 45 (1) of the Mining Act provides for the same effect, however with full details for the separate kind of leases made under that Act. The said section 45 is as follows:

> *Mining leases, special site rights and road access licenses to be registered by the Registrar of Titles*
>
> ***45.****-(1) Every mining lease, special mining lease, special site right and road access licence shall be recorded in registers, to be kept by the Registrar of Titles called the "Register of Mining Leases", the "Register of Special Site Rights" and the "Register of Road Access Licences".*
>
> *(2) On registration, every mining lease, special mining lease, special site right and road access licence shall be subject to the provisions of the Land Transfer Act in so far as such provisions are not inconsistent with the provisions of this Act, in the same manner as if such lease, right or licence were a lease under the provisions of the Land Transfer Act, and shall be dealt with in like manner.* ***(Cap 131)***
>
> *(3) It shall be lawful for the Registrar of Titles to charge and collect in respect of any mining lease, special mining lease, special site right or road access licence, registered under the provisions of this Act, or in*

respect of any dealing with such lease, right or licence, the fees prescribed under the Land Transfer Act (including the fees for registering any such lease, right or licence) in the same manner as if such lease, right or licence were a lease under the provisions of that Act. ***(Cap 131)***

(4) In the event of any mining lease, special mining lease, special site right or road access licence being granted over any alienated or native land the instrument of title of the owner of such land shall be referred to in such lease, right or licence and on registration thereof the Registrar of Titles shall give notice of such registration to the holder of the duplicate instrument of title to the land affected by such registration and shall enter a memorial of the lease, right or licence on instrument of title and on the duplicate thereof, if produced to him.

25. The important fact to be noted that, all the above Acts were enacted much before the Land Transfer Act which was brought in 1971. The State Land Act was brought in 1945 by Ordinance No 15 of 1945 and came into effect from 01.08.1946, the iTaukei Land Trust Act was brought in 1940 by Ordinance No 12 of 1940 and came into effect from 07.06.1940 and the Mining Act was brought in 1965 by Ordinance No 25 of 1065 and came into effect from 16.12.1966. However, all the above Acts have reference to the Land Transfer Act Cap 131 in relation to the leases made under the respective Act. This is obvious from the phrase ***"Cap 131"*** which denotes the Land Transfer Act as highlighted above. This means that, the above provisions were added to those three Legislations or they were amended after the introduction of the Land Transfer Act (Cap 131) to make them all consistent with the Land Transfer Act in compliance with section 3 of that Act.

26. The summary of the examination on the application of the Land Transfer Act is that, all the land in Fiji, whether it is a freehold or lease hold under the Crown Land Act or Native Land Act or Mining Act, comes under the administration of the Land Transfer Act. It is achieved; firstly, by not allowing laws and practice inconsistent with the Land Transfer Act (section 3 of that Act), secondly, by repealing Land (Transfer and Registration) Ordinance and bringing all the land governed by that Ordinance under the Land Transfer Act (section 4 and 178 of the Land Transfer Act), thirdly, by bringing all freehold and leasehold land under the purview of the Land Transfer Act by the explicit and unambiguous language in section 5 of that Act and finally, by necessary amendments in three main Legislations, namely State Land Act, iTaukei Land Act and Mining Act which generally deals with leasing of land, to avoid any doubt in relation to the leases issued under those Acts. This makes the intention of Legislature clear when it brought the Land Transfer Act that, leases made under those Acts were not excluded, but manifestly brought into the purview of the Land Transfer Act upon registration under the provision of any written law for the time being applicable to the registration of such leases.

27. In addition, there are other provisions too, both in Land Transfer Act and its subsidiary legislation, which denotes the broad application of the provisions of that Act. An example is found in section 2 of that Act which defines "instrument of title". It reads:

"Instrument of title" ***includes*** *a certificate of title, Crown grant, lease, sublease, mortgage or other encumbrance as the case may be;* (Emphasis added)

28. The above section unequivocally includes all Crown grant, lease, sublease, mortgage and other encumbrance too. Another example is the section 2 (11) of the Regulation made under that Act. It provides for classification of titles and the order in which it should be arranged in case of a document deals with more than one class of title. The said section is as follows:

> *(11) Where a document deals with more than one class of title to land the title references shall be arranged to appear in the following order:-*
>
> *(a) Native Leases,*
>
> *(b) Crown Leases,*
>
> *(c) Certificates of Title,*
>
> *and the title numbers in each class shall be shown in strict numerical order.*

29. It is apparent from the above Regulation made under the Land Transfer Act that both the Native lease and the Crown Lease precede the Certificate of title issued under that Act in sequence. This further supports above conclusion that, both freehold and leasehold land in Fiji comes under the administration of the Land Transfer Act. Hence any narrow construction of scope and application of the Land Transfer Act, by limiting it to the only land registered under the specific provisions of that Act, will not only reduce that legislation to futility but also be contrary to the manifest purpose and intention of the legislature.

30. I now turn to discuss the application and scope of the notion of 'indefeasibility' derives from the operation of the Land Transfer Act, i.e. whether the 'indefeasibility' applies to *all the land subject to that Act* or to only land registered at the office of the Registrar of Titles under the specific provisions of that Act? Though the concept of 'indefeasibility' is central in the system of registration under the Land Transfer Act, the term 'indefeasibility' is not used in the Act. The Privy Council in dealing with a similar matter under the Land Transfer Act of New Zealand in **Fraser v Walker and Others** [1967] 1 All ER 649 held at page 652 as follows:

> *"It is these sections which, together with those next referred to, confer on the registered proprietor what has come to be called "indefeasibility of title". The expression, not used in the Act itself, is a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys. This conception is central in the system of registration.* (Emphasis added).

31. The term 'indefeasibility' stems from 'indefeasible' which means 'unimpeachable' and may have been used by the court to describe the immunity given to the registered title,

based on the phrase 'defeasible' used in section 38 of the Land Transfer Act which reads that:

Registered instrument to be conclusive evidence of title

***38**. No instrument of title registered under the provisions of this Act shall be impeached or defeasible by reason or on account of any informality or in any application or document or in any proceedings previous to the registration of the instrument of title.* (Emphasis added).

32. The indefeasibility under the Land Transfer Act follows the registration, and the registered proprietor of any land, estate or interest therein shall, except in case of fraud, hold the same absolutely free from all other encumbrances. This is provided in section 39 to 42 of this Act which read as follows:

Estate of registered proprietor paramount, and his title guaranteed

***39**.-(1) Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the registered proprietor of **any land subject to the provisions of this Act, or of any estate or interest therein**, shall, except in case of fraud, hold the same subject to such encumbrances as may be notified on the folium of the register, constituted by the instrument of title thereto, but absolutely free from all other encumbrances whatsoever except-*

(a) the estate or interest of a proprietor claiming the same land, estate or interest under a prior instrument of title registered under the provisions of this Act; and

(b) so far as regards any portion of land that may by wrong description or parcels or of boundaries be erroneously included in the instrument of title of the registered proprietor not being a purchaser or mortgagee for value or deriving title from a purchaser or mortgagee for value; and

(c) any reservations, exceptions, conditions and powers contained in the original grant.

*(2) Subject to the provisions of Part XIII, no **estate or interest in any land subject to the provisions of this Act** shall be acquired by possession or user adversely to or in derogation of the title of any person registered as the proprietor of any estate or interest in such land under the provisions of this Act*

Purchaser not affected by notice

***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.

Instrument etc, void for fraud

***41**. Any instrument of title or entry, alteration, removal or cancellation in the register procured or made by fraud shall be void as against any person defrauded or sought to be defrauded thereby and no party or privy to the fraud shall take any benefit therefrom.*

Proprietors protected against ejectment

***42**.-(1) No action for possession, or other action for the recovery of **any land subject to the provisions of this Act, or any estate or interest therein**, shall lie or be sustained against the proprietor in respect of the estate or interest of which he is registered, except in any of the following cases:-*

(a) the case of a mortgagee as against a mortgagor in default;

(b) the case of a lessor as against a lessee in default;

(c) the case of a person deprived of any land, estate or interest by fraud, as against the person registered as proprietor of that land, estate or interest through fraud, or as against a person deriving otherwise than as a transferee bona fide for value from or through a person so registered through fraud;

(d) the case of a person deprived of or claiming any estate or interest in land included in any grant or certificate of title of other land by misdescription of that other land, or of its boundaries, as against the proprietor of any estate or interest in the other land, not being a transferee or deriving from or through a transferee thereof bona fide for value;

(e) the case of a proprietor claiming under an instrument of title prior in date of registration, in any case in which two or more grants or two or more instruments of title, may be registered under the provisions of this Act in respect of the same land, estate or interest.

(2) In any case other than as aforesaid, the production of the register or of a certified copy thereof shall be held in every court of law or equity to be an absolute bar and estoppel to any such action against the registered

proprietor of the land, estate or interest the subject of the action, any rule of law or equity to the contrary notwithstanding.

(3) Nothing in this Act contained shall be so interpreted as to leave subject to an action of ejectment or for recovery of damages or for deprivation of the estate or interest in respect of which he is registered as proprietor any bona fide purchaser for valuable consideration of ***any land subject to the provisions of this Act, or any estate or interest therein****, on the ground that the proprietor through or under whom he claims was registered as proprietor through fraud or error or has derived from or through a person registered as proprietor through fraud or error; and this whether such fraud or error consists in wrong description of the boundaries or of the parcels of any land or otherwise howsoever.* (Emphasis added).

33. What is important for the discussion in this case is the scope of the indefeasibility under the above provisions. As highlighted in the above sections, the indefeasibility or the immunity, subject to the exception of fraud, covers ***any land subject to the provisions of the Land Transfer Act, or any estate or interest therein***. The above sections, therefore, should be read with the section 5 of that Act, which provides what land subject to that Act. Accordingly, the indefeasibility is extended to all land or estate or interest therein as provided in section 5 above and it covers both the freehold and leasehold lands as discussed above. It follows that if a person holds a Certificate of Title or any lease issued under State Land Act, iTaukei Land Trust Act or Mining Act or has any estate or interest in that land including mortgage, his title shall be indefeasible, except in case of fraud. Therefore, the narrow construction of provisions of the Land Transfer Act to the effect that only the certificate of title issued that Act will be indefeasible; will be contrary to the express provisions which reflect the manifest purpose of that Act that gives wider protection to both the freehold and leasehold land mentioned in section 5 of that Act.

34. Furthermore, the notion of indefeasibility of title is not the one which is unique under the Land Transfer Act or introduced for the first time in Fiji by that Act, but it appears to have commenced in Fiji with the **Ordinance XXV of 1879** which Article XIX states:

> *"All crown grants to be issued under this Ordinance shall be registered as prescribed by the Real Properties Ordinance, 1876 and if so registered shall, with the exceptions about mention, be indefeasible from date of issue as well as also certificates of title following thereupon in conformity with section XIV of the Real Property Ordinance."* (Emphasis added).

35. The next aspect of discussion is the scope of the first category of a person who can invoke the jurisdiction of this court and that is *"the registered proprietor"*. In **Habid v Prasad** (supra) Madam Justice Anjala Wati referred to the interpretation provided for the term "Registered" in section 2 of the Interpretation Act Cap 7. I do follow the same way as Madam Justice Anjala Wati, and I have justification to do so in twofold. Firstly, though the registration is paramount and whole Torrens system, which is the base for the Land Transfer Act, is founded on the registration, the term 'Registered' is not defined in that Act. Secondly the meaning given in section 2 of the Interpretation Act specifically deals with the document or title of immovable properties which has direct link to the term

"Registered" used in the Land Transfer Act. The section 2 of the Interpretation Act Cap 7 reads as follows:

> *"Registered" used with reference to a document or the title to any immoveable property means registered under the provision of any written law for the time being applicable to the registration of such document or title".* (Emphasis added).

36. The term *"Registered"*, if it is used with reference to a document or the title to any immoveable property, means registration of land under provision of any written law for the time being applicable to the registration and not nature of the land. Accordingly, what matters is the registration under any applicable law. In the meantime, the term 'proprietor' is defined in section 2 of the Land Transfer Act and it provides:

> *"Proprietor" means the registered proprietor of land or of any estate or interest therein.* (Emphasis added).

37. The section 2 of the Land Transfer Act further defines the "estate or interest" and it means:

> *"estate or interest" means any estate or interest in land subject to the provisions of this Act, and includes any mortgage thereon.* (Emphasis added).

38. Reading the definition of all three above mentioned 'terms' ('Registered', 'Proprietor' and 'Estate or Interest') reveals that, any person who is the registered proprietor, under any written law for the time being applicable to the registration of such document or title of land or estate or interest of land subject to the provisions of the Land Transfer Act is the 'Registered Proprietor' for the purpose of section 169 (a) of that Act. The scope of the section 5 of the Land Transfer Act, which provides what land subject to this Act, was discussed in the preceding paragraphs and it revealed that four categories of both freehold and *leasehold* land subject to the Land Transfer Act Cap 131. Accordingly, a registered person holding any class of title, whether it is a Crown Lease or Native Lease or Certificate of Title and even a mortgagee of any such land is the 'Registered Proprietor' and can invoke the jurisdiction of this court under the section 169 (a) of that Act as the 'Registered Proprietor'.

39. Sometimes it is argued that, the section 8 of the Agricultural Landlord and Tenant Act (ALTA) differentiates between the leases registrable under the provisions of the Land Transfer Act and the leases registrable under the provisions of the Registration Act and therefore, only the proprietors of leases registrable under the provisions of the Land Transfer Act can bring the action under the section 169 of the Land Transfer Act. The said section 8 (3) of the Agricultural Landlord and Tenant Act (ALTA) is as follows:

> *8 (1).....*
> *8 (2).....*
>
> *(3) Every instrument of tenancy shall be signed by the parties thereto and-*

*(a) if registrable under the provisions of the Land Transfer Act, shall be registered in accordance with the provisions of that Act and, notwithstanding the provisions of section **60**, all other provisions of the said Act shall apply to such instrument and all dealings relating thereto; or **(Cap. 131.)***

*(b) if not registrable under the provisions of the Land Transfer Act, shall, together with all dealings relating thereto, be registered as deeds under the provisions of the Registration Act. **(Cap. 131.)** (Cap. 224.)*

*(4) Where a lease or sub-lease may lawfully be given in respect of agricultural land, a tenant may request his landlord in writing to provide, sign or execute such lease or sub-lease, as the case may be, or to register it in accordance with the provisions of the Land Transfer Act. **(Cap. 131.)***

40. Obviously, the above provisions, in unambiguous terms, provide that, every instrument of tenancy issued for the purpose of the above Act (ALTA) shall be registered either under the Land Transfer Act or Registration Act depending on the registrability of the said instrument with the option to the tenant to request the landlord to register the same under the Land Transfer Act. However, the mere difference drawn by these provisions should not be construed to come to a conclusion that, holder of the Instrument of Tenancy, issued for the purpose of the ALTA and registered under the Registration Act, cannot invoke the jurisdiction of this court under section 169 of the Land Transfer Act. Several facts should be considered when interpreting above provisions. The object of the ALTA, as clearly stated in its long title, is to provide for the relations between the landlords and tenants of agricultural holdings and for the matters connected therewith. The provisions of the ALTA will regulate the relations between the landlord and tenants only if the land is used for the agricultural purpose. Conversely, if the land is used for the mining purpose, it is the Mining Act that will apply. However, for both purposes, agricultural and mining, the lease would be the Crown Lease or Native Lease or the lease issued under the Land Transfer Act.

41. Furthermore, the ALTA, which was enacted prior to the Land Transfer Act, has the reference to ***Cap 131*** which denotes the Land Transfer Act, as emphasized above. This means that, the above provisions of ALTA were added and or amended after the introduction of the Land Transfer Act (***Cap 131***), with aim of bringing all such leases under the concept "title by registration" which is the base of the Land Transfer Act as discussed above. Therefore, those provisions, which have clear reference to Land Transfer Act, cannot be interpreted in isolation of the Land Transfer Act (Cap 131). This can be further explained in the following way that is to say, the agricultural leases can be issued under the State Land Act, iTaukei Land Trust Act and under the Land Transfer Act (see: Part X of that Act). If the leases issued under the first mentioned two Acts, they will be registered according to the provisions of Registration Act and by operation of The sub-sections 12 (2) and (3) the State Land Act and subsections 10 (2) and (3) of the iTaukei Land Trust Act, those leases shall be subject to the provisions of the Land Transfer Act, so far as the same are not inconsistent with the Land Transfer Act in the same manner as if such lease had been made under the Land Transfer Act and shall be dealt with in a like manner as a lease so made. On the other hand, the leases issued under

the Land Transfer Act are automatically governed by that Act. Therefore, the intention of the legislature for adding the above provisions to ALTA, after introduction of the Land Transfer Act, is to bring all agricultural leases registrable either way under the purview of the Land Transfer Act. Accordingly, in case of any agricultural lease registrable under either the Registration Act or the Land Transfer Act, the end result would be that it shall be subject to the provisions of the Land Transfer Act. Therefore the above provisions of ALTA should not be construed in a superficial manner to come to a conclusion that, holder of the Instrument of Tenancy, registered under the Registration Act for the agricultural purpose, cannot be considered as the "registered proprietor".

42. Finally, the logical argument is that, according to section 2 of the Land Transfer Act, the term 'estate or interest' includes the 'mortgage' in the land subject to the provision of the Land Transfer Act. It means that any mortgage on any land mentioned in section 5 of the Land Transfer Act will be considered as 'estate or interest' and the Mortgagee becomes the 'Registered Proprietor'. If the mortgage is considered as the interest on the land subject to the Land Transfer Act, why the lease on the land mentioned in section 5 (land subject to the Land Transfer Act) cannot be considered as the interest on that land? And why a holder of a registered lease of the land subject to section 5 of the Land Transfer Act, cannot be considered as the Registered Proprietor? In fact, a holder of agricultural lease issued under either State Land Act or iTaukei Land Trust Act becomes 'Registered Proprietor' in two ways. One is that, his lease is subject to the Land Transfer Act by operation of section 5 of that Act read with sub-sections 12 (2) and (3) the State Land Act and subsections 10 (2) and (3) of the iTaukei Land Trust Act. The other way is that, if it is an agricultural lease, the holder has an agricultural interest on that land that subject to the Land Transfer Act, as per the interpretation in section 2 of that Act. As a result he or she becomes 'registered proprietor' within the meaning of that Act.

43. The above analysis on the scope of the Land Transfer Act, the defeasibility under that Act together with the examination of the other provisions of the relevant statutes and interpretation of the term "Registered Proprietor" support the view that, 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 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. This broad construction of the application of the Land Transfer Act and the term "Registered Proprietor" is in line with the express provisions which reflect the manifest purpose of that Act, which gives wider protection to both the freehold and leasehold land mentioned in section 5 of that Act.

44. For the above reasons I prefer to follow the decision of Madam Justice Anjala Wati in **Habid v. Prasad** (supra) and **Chand v Nasarwaqa Co-operative Ltd** (supra), which gives broad interpretation to the term "Registered Proprietor" than the decision of Justice Sapuvida in **Kumar v Devi** (supra), which gives narrow interpretation.

45. An Instrument of Tenancy is a lease between the lessor – the iTaukei Land Trust Board entrusted to deal with the iTaukei land (Native Land) and the lessee – the holder of the Instrument for the agricultural purpose. It is a Native Lease of Native (iTaukei) Land granted pursuant to Native Land Trust Act which is subject to Land Transfer Act as per the above analysis. The tenant has the agricultural interest on that land for the period mentioned therein and his interest is registered. The conditions that are generally attached with such Instrument of Tenancy clearly state that the land is Native Land and subject to the Native Land Trust Act. This further shows that, it is a lease of Native or Crown Land governed by the respective Acts and subject to the Land Transfer Act. For the above reasons, I hold that, a person holding an instrument of tenancy is the "Registered Proprietor" within the meaning section 169 (a) of the Land Transfer Act and has locus standi to bring the proceeding in this court. Therefore, I decline to accept the first objection of the counsel for the defendant.

46. In the case before me, the special conditions of the Instrument of Tenancy attached in the affidavit of the plaintiff clearly state that, it is a Native Lease under the Native Land Trust Act and renewable under the same Act. Hence, this lease is subject to the Land Transfer Act and holder of such lease is the registered proprietor for the purpose of the proceeding under section 169 of the Land Transfer Act. However, I cannot come to a conclusion on the locus standi of the plaintiff in this case, as the defendant's counsel took up another objection in relation to the copy of the Instrument of Tenancy the plaintiffs attached with their affidavit. The plaintiffs attached a mere photocopy of the Instrument of Tenancy and it is not certified by the Registrar of Title or Deeds. The counsel for the defendant argued that, the section 11 (1) of the Civil Evidence Act requires any document shown to form part of the records of a business or public authority to be produced with the certificate of an officer of authority to which the records belong. The counsel for the defendant also mentioned about a decision of Justice John Connors; however, he could not give the names of the parties or the citation of that case. In fact, it is the decision of Justice John Connors in **Sharma v. Mati** [2004] FJHC 366; HBM0425.2003L (4 February 2004). In that case, Justice Connors relying on the section 11 (1) of the Civil Evidence Act rejected a photocopy of agricultural lease as it was not certified by the Registrar of Title.

47. The section 11 (1) of the Civil Evidence Act provides for the proof of records of business or public authority and states that, a document with the certificate signed by the officer of the business or public authority forms part of the business or public authority and may be received in evidence in civil proceedings without further proof. The said section is 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.*

48. Accordingly, if any such document is tendered in any civil proceeding, it may be received in evidence and further proof is not necessary for the contents of such document. It appears form the phrase *"may be received in evidence in civil proceedings without further proof"* that, it neither mandatorily requires the certified copy, nor completely shuts out an uncertified copy of such document. Therefore, a court is not prohibited from receiving an uncertified copy if the court considers it necessary for any reason given by that court. Likewise, a court is not prohibited from calling further proof of any certified copy if it considers necessary. Thus, the above section gives a wide discretion to the court in relation to records of business or public authority. Therefore, I decide that, the above section will not help the counsel for the defendant's counsel much to support his argument in relation to the uncertified copy of instrument of tenancy attached by the plaintiffs in this case.

49. However, the most relevant section applicable to this situation is the section 14 of the Registration Act, because an Instrument of Tenancy is deed registered at the office of Registrar of Deeds. The section 14 specifically deals with the deeds and provides that, no duplicate or copies of a registered deed shall be deemed to be authentic or received in evidence unless they contain an endorsement by the Registrar. The section reads 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*

50. The above section is explicit and unambiguous in its wording and makes it mandatory for the copies or duplicates of a registered deed to be endorsed correct by the Registrar to be authentic and admissible in evidence. The above section neither gives any discretion to the court to exercise and determine the authenticity, nor allows the court to determine the probative value of any uncertified duplicate or copy of any deed, but it is a mandatory provision which completely shuts out uncertified copy or duplicate of any registered deed. Therefore, any copy or duplicate which lacks the above requirement shall not be deemed to be authentic; nor be received in evidence. The rational for this mandatory requirement is that, all the rights in relation to the immovable properties are established based on the registration of the deeds and other title documents. The Registrar is the only person who can certify the last registration and the last registered proprietor at any point in time. Thus the requirement of certificate by the Registrar becomes pivotal as it not only eliminates any possible fraud, but also prevents claims by multiple claimants who might have been the owners of the particular property before current holder. In this case, the plaintiffs attached the mere photocopy of the Instrument of Tenancy which is not certified as required by the above section. As a result, it cannot be considered as authentic; nor be received in evidence to prove that, they are the last registered proprietors of the subject property in this case.

51. The above discussion reveals that, though the holder of either crown or native lease is considered as the registered proprietor for purpose of section 169 (a) of the Land Transfer Act Cap (131), the plaintiffs failed to adduce certified copy of such lease, which is the authentic and admissible in evidence. Failure to attach a certified copy of the instrument of tenancy may be an oversight of the solicitors for the plaintiffs. However, the parties are bound by conducts of their counsels (**Lownes v Babcock Power Ltd** [1998] EWCA Civ 211). In addition the incompetence or negligence of legal advisers is not a sufficient excuse (**R v. Birks** [1990] 2 NSWLR 677). Therefore I hold that, the plaintiffs failed to establish the first requirement of being a registered proprietor. As a result they failed to pass the first threshold under the section 169 (a) of the Land Transfer Act (Cap 131). As discussed above, the burden to establish the right to possess the land shifts to the defendant if, and only if, the plaintiff passes the threshold under section 169 and 170 of the Land Transfer Act (Cap 131). Since the plaintiff has failed in this, I hold that, the burden did not shift to the defendant and it is not necessary to discuss the defence put forward by the defendant in his affidavit.

52. Thus, the summons filed by the plaintiff ought to be dismissed. As a result, I make following final orders:

a. The summons filed by the plaintiff is hereby dismissed, and

b. The parties to bear their own cost in this matter.

U.L.Mohamed Azhar
Master of the High Court

At Lautoka
13.03.2020