

**IN THE HIGH COURT OF FIJI**

**AT SUVA**

**CIVIL JURISDICTION**

**Civil Action No. HBC 197 of 2022**

**IN THE MATTER** of an Application  
for possession of Land under Section  
169 of the Land Transfer Act 1971.

**BETWEEN:**            **LITIA MARAMA TUIVANUAVOU aka LITIA MARAMA** of  
Raiwaqa, Beautician acting as Administratrix (with Will annexed) in  
the Estate of **RATU LUKE NAMRAMA DALIGADUA**  
**TUIVANUAVOU NAKANACAGI aka LUKE TUIVANUAVOU**  
**NAKANACAGI**, Late of Nakasi in the Republic of Fiji, Builder,  
Testate.

**PLAINTIFF**

**SERUPEPELI SOWANI** of Lot 166, Vavalagi Place, Nakasi.

1<sup>st</sup> **DEFENDANT**

**AND:**                    **SUNDAY SOWANI** of Lot 166, Vavalagi Place, Nakasi.

2<sup>nd</sup> **DEFENDANT**

**Representation**        : Mr V. Faktaufon & Ms Faktaufon (Vama Law) for the Plaintiff.  
                                 : Mr S. Raikanikoda (Rakanikoda & Associates) for the Defendants.

**Date of Hearing**        : 16<sup>th</sup> November 2023.

**JUDGMENT**

1. The Plaintiff filed an Originating Summon pursuant to Section 169 of the Land Transfer Act 1971 for an Order that the Defendants give immediate vacant possession to the Plaintiff of Residential Lease described in State Lease No. 443700, being Lot 166 on Vavalagi Place, Wainibuku Low Cost Sub-divison, situated in the District of Naitasiri, and Island of Viti Levu. The Summon is supported by an Affidavit of the Plaintiff. The service of the Summons were acknowledge by the Defendant’s Lawyer. On 25<sup>th</sup> July 2022 the 1<sup>st</sup> Defendant filed an Affidavit in Opposition. On 15<sup>th</sup> September 2022 an Affidavit in Reply was filed by the Plaintiff.
  
2. Section 169 of the Land Transfer Act 1971 provides “*The following persons may summon any person in possession of land to appear before a Judge in Chambers to show cause why the person summoned should not give up possession to the Applicant –*
  - (a) *The last registered proprietor of the land*
  - (b) ...
  - (c) ...”

Section 170 of the Land Transfer Act 1971 requires the particulars be stated in the summons and that “*the summons shall contain a description of the land and shall require the person summoned to appear at the Court on a day not earlier than sixteen days after the service of the summons.*” Section 171 of the Land Transfer Act 1971 dealing with order of possession states that “*on the day appointed for the hearing of the summons, if the person summoned does not appear, then upon proof to the satisfaction of the Judge of the due service of such summons and upon proof of the title by the proprietor or lessor and, if any consent is necessary, by the production and proof of such consent, the Judge may order immediate possession to be given to the Plaintiff, which order shall have the effect of and may be enforced as a judgment in ejectment.*”

3. Section 172 of the Land Transfer Act 1971 provides that “*if the person summoned appears he may show cause why refuses to give possession of such land and, if he proves to the satisfaction of the judge a right to the possession of the land, the judge shall dismiss the summons with costs against the proprietor, mortgage or lessor or he may make any order and impose any terms he may think fit, provided that the dismissal of the summons shall not prejudice the right of the plaintiff to take any other proceedings against the person summoned to which he may be otherwise entitled, provided also that in the case of a lessor against a*

*lessee, if the lessee, before the hearing, pay or tender all rent due and all costs incurred by the lessor, the judge shall dismiss the summons.”*

4. **Morris Hedstrom Ltd v. Liaquat Ali (SBC 153/87S) Supplementary FLR Volume 1 (Civil) 1887-2000) 141, Gurdial Singh v Shiu Raj (ABU 44/82) Supplementary FLR Volume 1 (Civil) 1887-2000, 84, Shyam Lal v Eric Martin Schultz (1972) 18 FLR 152 and Azmat Ali v. Mohammed Jalil (1982) 28 FLR 31** are some of the cases that have dealt with Section 169 applications. These and a number of other cases have set out the procedure for Section 169 applications.
5. Section 169 (a) of the Land Transfer Act, requires the Plaintiff to be the **last registered proprietor** of the land. The term “**proprietor**” is defined in the Land Transfer Act as “*the registered proprietor of land, or of any estate or interest therein*”. The term “**registered**” is defined in the Interpretation Act, as “*registered used with reference to a document or the title to any immovable property means registered under the provisions of any written law for the time being applicable to the registration of such document or title*”. In this matter the Plaintiff, Litia Marama Tuivanuavou, the daughter of the deceased, Luke Tuivanuavou Nakanacagi, is the Administratrix (with will annexed) of the estate. The Plaintiff is registered by virtue of the Transmission by Death (No. 916623) as the executrix of the Estate on Lease no. 443700 the subject land for which vacant possession is being sought. Section 93 (3) of the Land Transfer Act 1971 provides that “... *the person so registered shall hold such estate or interest subject to all equities affecting the same, but for the purpose of any dealing therewith shall be deemed to be the absolute proprietor thereof*.”(my underlining) Furthermore by virtue of Section 93 (4) of the Land Transfer Act the Plaintiff’s title is deemed in law to be vested in her from the date of her father’s death. The Plaintiff has locus to seek vacant possession in this matter.
6. Section 169 applications are summary in nature and can be determined by way of affidavit evidence. The provision is intended to operate without the need for lengthy trials involving oral examination of witnesses. It should be expeditiously dealt with. It has to be inexpensive and without technicalities. It would normally apply in virtually uncontested cases or in clear cases where there is no questions or issues. That is, there is no reasonable doubt as to the claim of the plaintiff to recover possession of the land

or as to the wrongful occupation of the land without licence or consent and without any right or interest. The Defendants have to show cause as to why they should not give up vacant possession (Section 172) and in this regard the Defendant's must show on affidavit evidence why the Court should not make an order for vacant possession. They do not have to prove a conclusive right to remain in possession only some *tangible evidence establishing a right* or at least supporting *an arguable case for such a right* (see *Morris Hedstrom Limited –v Liaquat Ali (supra)*). The phrase *tangible evidence* has often been used as a general criteria establishing a right or cause why the Court should not make an order for vacant possession under section 169. For the evidence to be tangible it must be real and capable to be established, not a vague or an elusive perception of a right of possession.

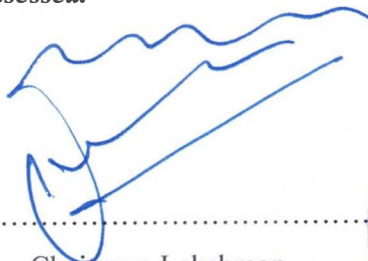
7. The 1<sup>st</sup> Defendant had a relationship with the wife (Olive Whippy) of Luke Tuivanuavou Nakanacagi. Olive Whippy passed away in April 2022. The position of the 1<sup>st</sup> Defendant is that he had been sending monies to Olive Whippy to repair and renovate the house on the property (Lease No. 443700). This claim is disputed by the Plaintiff. The position of the Plaintiff is that if the 1<sup>st</sup> Defendant has any claim it is against the Estate of Olive Whippy and not against the Estate of Luke Tuivanuavou Nakanacagi. The 1<sup>st</sup> Defendant in his affidavit in opposition in paragraphs 9 and 13 respectively, avers as follows, *“I further say that I do not wish to deprive the Plaintiff and her sibling their rights to the property, however, I request to be repaid for all the monies that I had spent in repairing, renovating and rebuilding the property and increasing its current valuation and condition to \$250,000 to what it is today”* and *“that until the Plaintiff and her siblings and whoever else who are the beneficiaries of Tuivanuavou Estate have repaid my monies spent on this property, I shall continue to live on the property”*.
8. The 1<sup>st</sup> Defendant is asserting his right to remain on the land on the basis that he expended monies in repairing, renovating and rebuilding the house on the subject property. The 1<sup>st</sup> Defendant's claim can be dealt with by way of a separate action. The Lawyer for the 1<sup>st</sup> Defendant informed me that he was engaged at the 'tail end' of the proceedings and he did not have written submissions. His submission basically amplified what the 1<sup>st</sup> Defendant was seeking through his affidavit, which was compensation for the monies he expended on the property. The Estate of Luke

Tuivanuavou Nakanacagi is administered by the Plaintiff. Luke Tuivanuavou Nakanacagi left a will and in it he gave his real and personal property to his children. No other person is named as a beneficiary in his will. The subject land is part of the estate of Luke Tuivanuavou Nakanacagi. The Defendants have not relied upon the defence of promissory or proprietary estoppel. It would seem so as neither the deceased nor his executor or administrator had any dealing with the Defendants in relation to the property. It is quite plain from case authorities that if the owner of land requests another, or indeed allows another, to expend money on the land under an expectation created or encouraged by the landlord that he will be able to remain there, that raises an equity in the licensee such as to entitle him to stay. He has a licence coupled with an equity: **Per Lord Denning in Inwards & Ors .v. Baker [1965] 1 All ER 446.** This is not the case in this matter.

9. The Defendants have failed to show why the order for vacant possession sought by the Plaintiff should not be made. The Plaintiff is entitled to an order for immediate vacant possession. The Plaintiff has incurred costs in litigating this matter. The Defendants are to pay \$2000.00 to the Plaintiff as costs. The costs have been summarily assessed.

### **Orders**

- (a) ***The Defendants are to immediately give vacant possession to the Plaintiff of Residential Lease described in State Lease No. 443700, Being Lot 166 on Vavalagi Place, Wainibuku Low Cost Sub-division, situated in the District of Naitasiri, and Island of Viti Levu***
- (b) ***The Defendants are to pay \$2000.00 to the Plaintiff as costs. The costs have been summarily assessed.***



Chaitanya Lakshman  
**Acting Puisne Judge**  
**14<sup>th</sup> December 2023**

