

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CIVIL JURISDICTION**

**Civil Action No. HBC 151 of 2013**

**IN THE MATTER** of an application  
by the Plaintiff under section 169 of  
the Land Transfer Act 1971.

**BETWEEN** : **SHIU KUMAR NAIDU** of Manikoso Housing Nasinu in the Republic of Fiji  
Islands.

**PLAINTIFF**

**AND** : **MANJULA DEVI TARAI** of lot 18 Kaicaca Lane, Manikoso Housing,  
Nasinu in Republic of Fiji Islands.

**1<sup>ST</sup> DEFENDANT**

**AND** : **URAIYA TARAI** of lot 18 Kaicaca Lane, Manikoso Housing, Nasinu in  
Republic of Fiji Islands.

**2<sup>ND</sup> DEFENDANT**

**BEFORE** : **Acting Master Thushara Rajasinghe**

**COUNSEL** : Plaintiff in person  
Defendants in person

**Date of Hearing** : **12<sup>th</sup> November, 2013**

**Date of Ruling** : **13<sup>th</sup> December, 2013**

**RULING**

**A. INTRODUCTION**

1. The Plaintiff filed this Summons pursuant of section 169 of the Land Transfer Act seeking an order for vacant possession of Plaintiff's land and premises which is occupied

by the Defendants situated on Title No 296873, Lot 18 on DP No 7692 in the Province of Naitasiri in the Island of Viti Levu.

2. The Defendants upon being served with the Summons filed their affidavit in opposition which was then followed by the reply affidavit of the Plaintiff. Subsequently this matter was set down for hearing on the 12<sup>th</sup> of November 2013. Plaintiff and the Defendant made their respective arguments by themselves as they were not represented during the hearing. Thereafter, I invited both of them to file their respective closing submissions which they filed accordingly.
3. Having considered the Summons, respective affidavits and written submissions of the parties and their respective oral arguments, I now proceed to pronounce my judgment as follows.

## **B. BACKGROUND**

4. The plaintiff claims that he is the registered proprietor of all the land known as Title No 296873, lot 18 on DP No 7692 in the Province of Naitasiri in the Island of Viti Levu. He stated that he was approached by the two defendants one is his elder daughter and other is his son-in-law respectively and asked his financial assistance to sublease this land which was offered to them by the Housing Authority. He then transferred fund of \$ 14,980 from his FNEP account to finance the first installment of the sub lease of this land. He was then added to the title as one of the co –owners of this lease along with the two defendants. The plaintiff and the two defendants agreed that the balance amount of this lease will be paid by the two defendants. However, the two defendants failed to finance the balance amount, consequently the Housing Authority issued a demand notice. Plaintiff claims that subsequent to this Demand Notice, he financed the balance sum of \$24,731.25 to the Housing Authority and obtained the consent of the defendants to transfer the Sub Lease to the plaintiff. The plaintiff tendered a copy of said registered sub lease with registered memorials of subsequent transfer to him as annexure to his affidavit in support.

5. The two Defendants did not deny that the Plaintiff financed the first installment of this lease, but contended that they had also been paying a monthly installment of \$350 since 2006. However due to the financial constrains that they suffered, they failed to continue the payment in recent months.
6. The main contention of the Defendants against the claim of the Plaintiff is that the Plaintiff had transferred this sublease to his name by fraudulently. Both Defendants denied giving their consent for such transfer as first Defendant was sick and the second Defendant was serving a jail term in the prison at that material time of this alleged transfer took place. Having stated their show cause to the Plaintiff's claim, the two Defendants stated that they also have an ownership to this land to possess.

### **C. THE LAW**

7. Sections 169 to 172 of the Land Transfer Act outline the procedure for the application in this nature. In view of the section 169 of the Act, the last registered proprietor of the land and/or a lessor with power to re-enter where the lessees or tenant is in arrear for such period and/or a lessor who has issued a legal notice to quit or the term of the lease has expired are allowed to institute proceedings under this section to evict the person who is in possession of the land without a right to the possession.
8. Section 171 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”.*

9. In view of the section 171 of the Act, the onus is on the Plaintiff to prove his title of proprietorship in order to obtain a judgment for vacant possession inter alia other requirements stipulated in section 171.

10. Section 172 deals with the Defendant's burden of prove where it states that

*“If the person summoned appears he may show cause why he refuses to give possession of such land and, if he proves to the satisfaction of the judge a right to the possession of the land, the judge shall dismiss the summons with costs against the proprietor, mortgagee or lessor or he may make any order and impose any terms he may think fit”.*

11. In view of section 171 and 172 of the Act, the purpose of this special proceedings under section 169 is to provide a summary procedure for the registered proprietor and/or the lessor to eject the occupiers from the land who either occupy the same without any legal right to possession or breach of tenant or lease agreement. The proceedings under this summary procedure constitutes two main limbs. The first is the onus of the Plaintiff to satisfy the court that he is the last registered proprietor or a lessor defined under section 169 (a), (b) and (c) of the Act. Once the Plaintiff satisfied the first limb, the burden will shift on the Defendant to prove that he has a legal right to the possession of the land.

12. In **Morris Hedstrom Limited-v- Liaquat Ali** CA No: 153/87 held that

*“Under Section 172 the person summonsed may show cause why he refused to give possession of the land and 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.”*

13. In view of **Morris Hedstrom** (supra) the Defendant is only required to adduce some tangible evidence to establish a right of possession or an arguable case against the

Plaintiff's claim for vacant possession. On the other hand the Plaintiff is burdened with to establish a conclusive and indefeasible registered proprietorship on the land he claims.

#### **D. ANALYSIS**

14. Having reviewed the laws pertaining to the applications under section 169 of the Act, I now turn to analyse the evidences adduced before me with the relevant legal provisions and principles.
15. The Defendants' main contention is that the Plaintiff is not the last registered proprietor of this land as the transfer of this sublease to the plaintiff is a fraud. Accordingly the main issue for the determination in this ruling is that whether the plaintiff is the last registered proprietor of the land.
16. In order to establish his registered proprietorship, the Plaintiff tendered a copy of the registered sublease of this land with all subsequent memorials entered therein as annexure "A" to his affidavit in support. In order to challenge the said transfer to the Plaintiff, the Defendants tendered a copy of transfer deed which was executed on 19<sup>th</sup> of April 2012 between the Plaintiff and two Defendants and witnessed by Raman Pratap Singh and Simoni Nacolawa both of them are Barristers & Solicitors in Suva as an annexure to their affidavit in opposition.
17. Section 2 of the Land Transfer Act defines the Proprietor as "registered proprietor of Land or of any estate or interest therein. Section 44 (1), (2) and (3) of the Act provides the procedure to constitute a valid registration of transfer of any land or of any estate or interest therein under the Land Transfer Act, where Section 44 (1) (2) and (3) states that;

*“(1) The proprietor of any land subject to the provisions of this Act, or of any estate or interest therein, may transfer the same by executing a transfer in the prescribed form, which transfer shall, for description of the land intended to be dealt with, refer to the instrument to the land, with such further description as may be necessary, and shall contain a precise statement of the estate or interest intended to be transferred.*

- (2) *Transfers shall be registered in the prescribed manner and transferees shall have priority according to the date and time of registration.*
- (3) *Upon the registration of a transfer, the estate and interest of the transferor as set forth in the instrument of transfer, with all rights, powers and privileges thereof belonging or appertaining, shall pass to the transferee, and the transferee shall thereupon become the proprietor thereof and shall be subject to and liable for all requirements and liabilities to which he would have been subject and liable if he had been the former proprietor of such estate or interest.”*

18. In view the Section 44 (1), (2) and (3) of the Act, the Transferor and the Transferee are first required to execute the transfer in a prescribed form and then register the said transfer in the prescribed manner. Section 21 of the Act deals with the registration of instruments of title. According to section 2 of the Act, the instrument of title includes a certificate of title, crown grant, lease, sublease, mortgage, or other encumbrance as the case may be. Section 21 of the Land Transfer Act stipulates that;

- 1) *Every instrument of title shall be deemed and taken to be registered under the provisions and for the purposes of this Act as soon as the same has been signed by the Registrar and marked with a serial number in the register, **and every instrument purporting to transfer or in any way to affect land subject to the provisions of this Act, or any estate or interest therein, shall be deemed to be so registered as soon as a memorial thereof as herein described has been entered in the register upon the folium constituted by each existing instrument of title affected by such dealing.** (Emphasized is mine)*
- 2) *The person named in any instrument of title or other instrument registered as provided in subsection (1) as the proprietor or as*

*becoming a proprietor, of land subject to the provisions of this Act, or of any estate or interest therein, shall be deemed and taken to be the duly registered proprietor thereof.*

19. I now turn to the annexure “A” of the Plaintiff’s affidavit in support which is the copy of registered sublease with all subsequent registered memorials therein and to the annexure “B” of the Defendants’ affidavit in Opposition.
20. The registered dated of the last registered memorial on the registered sublease which is the transfer to the Plaintiff, is 16<sup>th</sup> of January 2012. The same date can be found as the date of registration on the Transfer Deed executed by the parties. However, the date of execution of the Transfer Deed is 19<sup>th</sup> of April 2012.
21. In view of these findings, I find that the transfer deed had been registered and memorial had entered in the register and in the existing instrument of title on the 16<sup>th</sup> of January 2012, which is three months before the execution of the transfer document by the parties on 19<sup>th</sup> of April 2012. This is undoubtedly in contravened with the section 44 and 21 of the Land Transfer Act and obviously generates a dispute on the actual proprietorship of this land.

**E. CONCLUSION,**

22. In concluding my judgment, I hold that the Plaintiff has failed to establish that he is the last registered proprietor of this Sub Lease pursuant to section 169 (a) of the Land Transfer Act. Meanwhile, I am satisfied that the Defendant has successfully adduced that there is an arguable case to determine the right of possession of this land. I accordingly make following orders that;
  - i. The Summons filed on 27<sup>th</sup> of May 2013 by the Plaintiff is refused and dismissed accordingly,
  - ii. The Defendant is granted a cost of \$ 750 assessed summarily,

Dated at Suva this 13<sup>th</sup> day of December, 2013.

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**R.D.R. Thushara Rajasinghe**  
**Acting Master of High Court, Suva**