

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

Civil Action No. HBC 378 of 2016

**IN THE MATTER** of an application  
for possession of land under Section  
169 of Land Transfer Act.

**BETWEEN:**       **THE UNIVERSITY OF THE SOUTH PACIFIC** a body corporate established by Royal  
Charter and having its principal address at Laucala Campus, Suva, Fiji Islands.

**PLAINTIFF**

**AND:**           **NARESH CHAND** of 8 Mariko Street, Raiwai, Suva, Fiji Islands, occupation unknown to the  
Plaintiff.

**DEFENDANT**

**BEFORE:**       **Master Vishwa Datt Sharma**

**COUNSELS:**   **Mr. Tuitoga**     - for the Plaintiff  
                  **Mr. Kunal Singh** - for the Defendant

**DATE OF RULING:** 19<sup>th</sup> July, 2017

**RULING**

[Vacant possession pursuant to section 169 of  
the Land Transfer Act, Cap 131]

## INTRODUCTION

1. The Plaintiff filed Originating Summons on 8<sup>th</sup> December, 2015 and sought for the following order-
  - (a) That the Defendant do show cause why he should not give up immediate vacant possession to the Plaintiff of all the freehold property vested in the Plaintiff which the Defendant is unlawfully occupying being the land comprised and described in Certificate of Title No. 14046, Lot 23 on Deposited Plan No. 3608 situated at 9 Mariko Street, Raiwai, Suva, Fiji Islands of which the Plaintiff is the registered proprietor and that the costs of this application be summarily assessed and paid by the Defendant to the Plaintiff within a prescribed period.
2. This application is made in support of an affidavit deposed by Dr. Guilio Masasso Paunga and filed on 09<sup>th</sup> December, 2015.
3. The application is made pursuant to *Section 169 of the Land Transfer Act, Cap 131*.
4. This case proceeded to hearing on a defended basis and both parties to the proceeding were represented by Counsels at the hearing.
5. This court has a duty to determine the pending issue before the court in a just and fair manner in terms of the laws provided for in *ss. 169, 171 and 172 of the Land Transfer Act [Cap 131]*.

## PLAINTIFF'S CASE

6. In summary the Plaintiff in his Affidavit states as follows-
  - (i) That the Plaintiff is the registered proprietor of all the freehold property comprised and described in Certificate of Title No. 14046, Lot 23 on Deposited Plan No. 3608 situated at 8 Mariko Street, Raiwai, Suva, Fiji Islands.
  - (ii) That the Defendant ("**Defendant**") and his mother are illegally occupying the Property.
  - (iii) That by letter dated 27 August 2015, the Plaintiff's solicitors called upon the Defendant to quit and deliver up vacant possession of the Property not later than 28 September 2015.
  - (iv) That despite the above demand, the Defendant and/or his mother to date have neglected and/or failed to vacate the Property.
  - (v) That he verily believes that the Defendant and his mother have no right to remain in possession of the Property and that the Plaintiff is entitled to immediate vacant possession of the Property occupied by the Defendant and his mother.
  - (vi) He further believes that the Defendant and/or his mother do not have an arguable and/or valid defence to this action.



- (vii) *He therefore prays that the Plaintiff be granted immediate vacant possession of the Property and that the Defendant be ordered to pay costs of and incidental to the action.*

### **DEFENDANT'S CASE**

7. The Affidavit In Opposition deposed by the **Defendant** can be summarised as follows-

- (i) *The Defendant states that his mother has expired and he is not staying on the property illegally.*
- (ii) *That he agrees that he has not moved out of the property after being served with the notice. However, he denies that his mother stays with him as she expired in year 2012.*
- (iii) *That his father namely Muni Deo worked at the Air Force Hanger as a cook during the World War II which was located in Monivatu (USP Lower Campus) and it is during that time, his father resided on the Defendants property somewhere close to the mathematics department and CRC is presently located.*
- (iv) *That sometimes in year 1953 the Plaintiff relocated his father on the said Land (where the Plaintiff is presently residing) as the Plaintiff intended to expand its business. It was further agreed that his father together with his family would reside on the said land for as long as they wished.*
- (v) *That on 8<sup>th</sup> of February 1994, Professor Ron. G. Crocombe wrote to the Vice Chancellor of the University of the South Pacific, requesting that the Plaintiff value the land and offers it for sale at valuation price to Mr. Muni Deo (his father) and his family.*
- (vi) *That he together with his father contacted the Plaintiff on many occasions but there was no response by Plaintiff on the sale of the said land to his family.*
- (vii) *That in 2002 after much persistence by him, the Plaintiff had a valuation done of the said land and it was agreed between the Plaintiff and him on 14<sup>th</sup> August 2002 that the said land would be sold to him for a sum of \$45,000.00 [hereinafter referred to as the said deal.*
- (viii) *As per the letter of offer dated 14 August 2002 he contacted the Plaintiff for arrangements for the sale of the said land and a law firm by the name of Lateef & Lateef Lawyers were appointed by the Plaintiff to prepare all documentations.*
- (ix) *That a sale and purchase agreement was prepared by Lateef & Lateef Lawyers and signed but due to sudden demise of the then Vice-Chancellor, Mr. Siwatibau in year 2003, the deal was put on hold. He was not provided with a copy of the sale and purchase agreement.*
- (x) *That he contacted the Plaintiff on many occasions regarding the deal but he was turned away from the Vice Chancellors Office with the following words:*
- (a) *"Please check with us later when a new vice-chancellor was appointed".*
- (b) *In year 2005 - "we will contact you once this vice-chancellor has settled in and had a look at your file".*

- (c) In year 2006 - "please leave your contact and we will get in touch once the vice-chancellor has read our file".
- (d) In year 2009 - "we will contact you on this issue".
- (xi) A letter was written in 2015 but no response was received by USP.
- (xii) He has made substantial improvement on the property.
- (xiii) He has also time and again, maintained the vegetation and maintained the property. He humbly seeks that this application be struck out with costs on solicitor's client indemnity basis.

### THE LAW

8. The application is filed in terms of s 169 of the Land Transfer Act [Cap 131] which provides as follows:

*"The following persons may summon any person in possession of land to appear before a judge in chambers to show cause why the person summoned should not give up possession to the applicant:*

- (a) the last registered proprietor of the land;
- (b) *a lessor with power to re-enter where the lessee or tenant is in arrear for such period as may be provided in the lease and, in the absence of any such provision therein, when the lessee or tenant is in arrear for one month, whether there be or be not sufficient distress found on the premises to countervail such rent and whether or not any previous demand has been made for the rent;*
- (c) *lessor against a lessee or tenant where a legal notice to quit has been given or the term of the lease has expired."*

9. In the case of *Ram Narayan v Moti Ram (Civ. App. No. 16/83)* Gould J. P. said-

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

10. The procedure under s.169 is governed by sections 171 and 172 of the Land Transfer Act (Cap 131) respectively which stipulates as follows:-

*"s.171. On the day appointed for the hearing of the Summons, if the person summoned does not appear, then upon proof to the satisfaction of the Judge of the due service of such summons and upon proof of the title by the proprietor or lessor and, if any consent is necessary, by the production and proof of such consent, the judge may order immediate possession to be given*



to the Plaintiff, which order shall have the effect of and may be enforced as a judgment in ejectment."

s.172. If a 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."

(Underlined is mine for emphasis)

11. As far as the requirements in terms of section 172 are concerned, the Supreme Court in the case of *Morris Hedstrom Limited v. Liaquat Ali (Action No. 153/87 at p2)* said as follows and it is pertinent:

"Under Section 172 the person summoned 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."

12. The requirements of section 172 have been further elaborated by the Fiji Court of Appeal in *Ajmat Ali s/o Akbar Ali v Mohammed Jalil s/o Mohammed Hanif (Action No. 44 of 1981 - judgment 2.4.82)* where the court said:

"It is not enough to show a possible future right to possession. That is an acceptable statement as far as it goes, 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. We read the section as empowering the judge to make any order that justice and the circumstances require. There is accordingly nothing in section 172 which requires an automatic order for possession unless "cause" is immediately shown. (Emphasis added)

13. In *Premji v Lal [1975] FJCA 8; Civil Appeal No 70 of 1974 (17 March 1975)* the Court of Appeal said:

'These sections and equivalent provisions of the Land (Transfer and Registration) Ordinance (Cap. 136-1955 Laws of Fiji) have been considered in a number of cases in this court and the Supreme Court. In *Jamnadas & Co.*



*Ltd. v. Public Trustee and Prasad Studios Ltd. (Civil Appeal No. 39 of 1972 - unreported) refers.*

14. Under *Section 172 of the Act*, the judge is empowered to dismiss the summons if the respondent proves to his satisfaction that he has a valid defence, a right to possession, locus standi and or a licence. It further provides that a judge may make any order and impose any terms that he may think fit. The dismissal of the summons is not to prejudice the right of a Plaintiff to take any other proceedings to which he may be otherwise entitled.
15. It is for the defendant to 'show cause' why he is refusing to give vacant possession of the land comprised in the Certificate of Title No. 14046, being Lot 23 on DP 3608 situated at 9 Mariko Street, Raiwai, Suva, Fiji Islands of which the Plaintiff is the registered proprietor?
16. Reference is made to the case authorities of *Caldwell v. Mongston (1907) 3 F.L.R. 58* and *Perrier Watson v. Venkat Swami (Civil Action 9 of 1967 - unreported)* - wherein the Supreme Court held 'that if the proceedings involve consideration of complicated facts or serious issues of law, it will not decide the cases on summary proceedings of this nature, but will dismiss the summons without prejudice to the Plaintiff's right to institute proceedings by Writ of Summons.'

#### ANALYSIS and DETERMINATION

17. The question for this court to determine is whether the Plaintiff is entitled to the possession of the land comprised in the Certificate of Title No. 14046 being Lot 23 on DP 3608 situated at 9 Mariko Street, Raiwai, Suva, Fiji Islands, of which the Plaintiff is the registered proprietor in terms of *s169 of the Land Transfer Act [Cap 131]*?
18. In this case, the Plaintiff must first comply with the requirements of section 169 of the Land Transfer Act cap 131, which are stated hereunder as follows-
  - (a) The first requirement or the first limb of section 169 is that the applicant must be the last registered proprietor of the subject land.
  - (b) The second is that the applicant be a lessor with power to re-enter where the lessee or tenant is in arrears; and
  - (c) The third is where a lessor against a lessee or tenant where a legal notice has been given or the term of the lease has expired. The second and third limb of section 169 does not appear to apply in that the defendant is not the plaintiff's tenant who is in arrears and/or the term of the lease has expired.



19. In this instance, the first limb of s169 applies. The annexure marked GMP 1' within the Affidavit in Support of Dr. Giulio Masasso Paunga confirms that The University of the South Pacific, the Plaintiff in this action is the last registered proprietor of the Certificate of Title No. 14046, being Lot 23 on DP 3608 situated at 9 Mariko Street, Raiwai, Suva Fiji Islands .

In this respect, the certified true copy of the Certificate of Title No. 14046 shows clearly that the land in question was granted to the Plaintiff the University of the South Pacific on 24<sup>th</sup> January, 1974. The Plaintiff, The University of the South Pacific for the purposes of section 169 application is the last registered proprietor of the said Certificate of Title No. 14046.

20. It is trite law that once the Plaintiff satisfies the court that he is the last registered proprietor or the lessor described under the *section 169 (a), (b) and (c) of the Act, the burden shifts to the Defendant to prove that he has a right as to possession.*
21. However, the Defendant raised the Defence of Proprietary Estoppel and informed Court of what had actually transpired between the Plaintiff and the Defendant's father, the late Muni Deo.
22. Proprietary Estoppel is a legal claim which may arise in relation to rights to use the property of the owner, and may even be effective in connection with disputed transfers of ownership. Proprietary estoppel transfers rights if-
- Someone is given a clear assurance that they will acquire a right over property;
  - They reasonably rely on the assurance;
  - They act substantially to their detriment on the strength of the assurance; and
  - It would be unconscionable to go back on the assurance.
23. The Defence of Proprietary Estoppel was outlined by White J in the case of *Denny v. Jensen [1977] NZLR 635* where White J summarised the doctrine of Proprietary Estoppel. He used *Snell's Equity (13<sup>th</sup> Ed)*, at paragraph 39-12 which stated that it is 'one of the qualifications' to the general rule that a person who spends money on improving the property of another has no claim to reimbursement or to any proprietary interest in that property, simply put that at all time when Defendant was making improvements to the subject land he did not do it knowingly that he would be reimbursed for the improvements.
24. Reference is also made to the case of *Nand v. Kumar [2013] FJHC 266* where Amaratunga J stated-

'The general rule, however is that "*liabilities are not to be forced upon people behind their backs*" and four conditions must be satisfied before proprietary estoppel applies. There must be an expenditure, a mistaken belief, conscious silence on the part of the owner of the land and no bar to the equity."

Expenditure

25. According to the Defendant, substantial expenditure was done on the said property in terms of building a complete 5 Bed Room house, prayer place, maintaining the vegetation and the property. Further, substantial amount of utility bills were also paid.

Mistaken Belief

26. The Defendant upon carrying out various improvements on the land knew that one day he will be entitled to the property in question since there was an existence of an offer letter.
27. Based on the representation by the Plaintiff, the Defendant and his father believed that all the works and improvements that they did on the subject land was just that, works and improvements with hopes that the property would be transferred to them. Offer was also made by USP and the same was accepted by the Defendant but the Plaintiff halted.

Conscious silence on the part of the owner of the land

28. The Plaintiff submitted that from around 1953 when the Plaintiff relocated the Defendant's father to the subject land to 2015 when the Plaintiff issued a Notice to Vacate to the Defendant, the Plaintiff, for a period of 62 years did not make any proper attempts to notify the Defendant of their intention to evict the Defendant which would have saved the Defendant a lot of costs as to the improvements done on the subject land.
29. That the offer letter and proposed sale and purchase agreement was made under the administration of the late Vice Chancellor in 2003. The Plaintiff even then had 12 years timeframe from 2003-2015 to show the Defendant their intention to evict the Defendant but again failed to do so.
30. The Defendant further submitted that the Plaintiff continued to pay the SCC rates showing that they knew about the property, saw the developments on the property and yet remained silent. They raised no objection until the value of the land went up and knew they want the land for themselves for reasons unknown.

No Bar to Equity

31. The Defendant submitted that there was no evidence that the Defendant or his late father had contravened some statute, or prevented the exercise of a statutory discretion



or prevented or excused the performance of a statutory duty meaning that from the expenditures, the Defendant and his late father had paid out through the years for the works and maintenance done to the subject land. The Defendant has a bar to equity as an equitable relief whether from entitlement or compensation.

32. The Defendant cited the case of *Thorner v. Major [2008] UKHL 55*, wherein Lord Walker found three (3) main elements of proprietary estoppel:

Held: 'nevertheless most scholars agree that the doctrine is based on three main elements; although they express them in a slightly different terms, a representation or assurance made to the claimant; reliance on it by the claimant; and detriment to the claimant in consequence of his (reasonable) reliance.'

Representation or assurance

33. In terms of above, the Defendant submitted there was assurance by the Plaintiff by an offer letter that the land would be transferred to the Defendant based on the valuation. Around 1953, representation made by the Plaintiff when the Plaintiff relocated the Defendant's father and stated that they could live on the subject land as long as they like.

34. Therefore, the Defendant and his father believed and had sufficient certainty that they would be entitled to the subject land.

Reliance by the Claimant

35. Base on the representation, the Defendant and his father maintained and made various changes and improvements to the subject land as outlined in the Defendant Affidavit in Reply at paragraph 9 (j).

Detriment to the Claimant in Consequence of his reliance

36. The Defendant submitted that based on the reliance by the Defendant of the representation made by the Plaintiff, the Defendant and his father has put 62 years in maintaining and improving the subject land. In losing this property, the Defendant will be at a great loss and this loss cannot be compensated.

37. On the other hand, in terms of the Defence of Proprietary Estoppel raised by the Defendant, the Plaintiff submitted that we only need to repeat the words of Fatiaki J in *Wati v Raji (1966) FJHC 105*:

*'Turning finally to the question of 'proprietary estoppel'. Suffice to say that the mere occupation of a piece of land on a yearly tenancy for whatever length of time, is not a circumstance capable of giving rise to any form of 'estoppel', proprietary or otherwise, nor in any 'equity' created hereby which the court would protect.*



38. In the instant case, according to the Defendant, his father Late Muni Deo worked at the Air Force Hanger as a cook during the World War II which was located in Monivatu (USP Lower Campus) and it is during that time, his father resided on the Plaintiff's property.
39. The Plaintiff relocated his father on the said Land (where the Plaintiff is presently residing) in 1953, as the Plaintiff intended to expend its business.
40. It was further agreed that his father together with his family would reside on the said land for as long as they wished.
41. That on 8<sup>th</sup> of February 1994, Professor Ron. G. Crocombe wrote to the Vice Chancellor of the University of the South Pacific, requesting that the Plaintiff value the land and offers it for sale at valuation price to Mr. Muni Deo (his father) and his family.
42. That he together with his father contacted the Plaintiff on many occasions but there was no response by Plaintiff on the sale of the said land to his family.
43. That in 2002 after much persistence by him, the Plaintiff had a valuation done of the said land and it was agreed between the Plaintiff and him on 14<sup>th</sup> August 2002 that the said land would be sold to him for a sum of \$45,000.
44. As per the letter of offer dated 14 August 2002 he contacted the Plaintiff for arrangements for the sale of the said land and a law firm by the name of Lateef & Lateef Lawyers were appointed by the Plaintiff to prepare all documentations. That a sale and purchase agreement was prepared by Lateef & Lateef Lawyers and signed but due to sudden demise of the then Vice-Chancellor, Mr. Siwatibau in year 2003, the deal was put on hold. He was not provided with a copy of the sale and purchase agreement.
45. That he contacted the Plaintiff on many occasions regarding the deal but he was turned away from the Vice Chancellors Office. He was told to either to check later or that they will contact him. A letter was also written in 2015 but no response was received by USP.
46. The Defendant stated that he has made substantial improvement on the property.
47. If the Defendant's father had executed the Sale and Purchase Agreement with the Plaintiff then why didn't the Defendant's father, Muni Deo pursue his claim in a Court of Law in terms of the executed Sale and Purchase Agreement and sought for an order for Specific performance in terms of Order 86 of the High Court Rules, 1988 and or for a subsequent settlement and transfer of the Plaintiff's property into his name?
48. Did the Defendant make any exhaustive efforts to file an application for a Vesting Order since he claims that he had been residing on that property for more than twenty (20) years? Did he ever thought of proceedings with a legal action against the Plaintiff in a



Court of law to have his alleged right to entitlement of land (if any) dealt with accordingly? If not then why not?


49. The **Defendant** has not produced to the Court nor annexed to his Affidavit any copy of the purported **Sale and Purchase Agreement** of the property which was allegedly prepared and signed by the Plaintiff and the Defendant's father, the late Muni Deo.
50. Further, the **Defendant** will also be unable to enforce this purported Agreement as it would be contrary to *section 59 of the Indemnity and Bailment Act Cap. 232* which provides as follows:  
  
*\*59. No action shall be brought-*  
  
*(d) upon any contract or sale of lands, tenements or hereditaments or any interest in or concerning them; unless the agreement upon which such action is to be brought or some memorandum or note thereof is in writing and signed by the party to be charged there or some other person thereunto by him lawfully authorised.*
51. In absence of any evidence supporting the claim of **Proprietary Estoppel**, the **Defendant's** Defence of **Proprietary Estoppel** fails to the extreme.
52. In conclusion, the **Defendant** is in the present occupation of the Plaintiff's premises on the **Certificate of Title No. 14046** being Lot 23 on DP 3608 situated at 9 Mariko Street, Raiwai, Suva.
53. The **Defendant** was served with a **Notice to Vacate** dated 27<sup>th</sup> August, 2015. According to the Plaintiff, the **Defendant** continues to occupy and live on the said property and to date is refusing to give vacant possession.
54. I do not find any **defence** and or **evidence** that he has any **legal or equitable right** to continue occupying the Plaintiff's property since there is no **Tenancy Agreement** entered into between the parties. If there was any existence of any **consent** as apprised to court by the Defendant on **reliant of the letter** written by USP to the Defendant dated 14<sup>th</sup> August, 2002, then the fact that a **Notice to Vacate** was already served onto the **Defendant** would mean that the consent (if any) in existence which is denied by the Plaintiff, would then be formally withdrawn at this point in time.
55. I proceed to make the following final orders of this court.

FINAL ORDERS

- A. The Plaintiff's Originating Summons seeking an order for Vacant Possession hereby succeeds against the Defendant.
- B. The Defendant to give vacant possession of the Plaintiff's property comprised in the Certificate of Title No.14046 being Lot 23 on DP 3608 situated at 9 Mariko Street, Raiwai, Suva, in the Republic of Fiji in one (1) calendar months' time, on or before 19<sup>th</sup> August, 2017 at 4pm.
- C. Execution will be suspended till the 19<sup>th</sup> August, 2017 at 4 pm.
- D. Cost is summarily assessed at \$750 against the Defendant and to be paid within 28 days.

Dated at SUVA this 19<sup>th</sup> day of JULY, 2017



  
VISHWA DATT SHARMA  
Master of High Court, Suva

cc: Haniff Tuitoga, Suva  
K.S.Law, Nausori.