

**IN THE HIGH COURT OF FIJI**  
**WESTERN DIVISION**  
**AT LAUTOKA**

**CIVIL JURISDICTION**

**CIVIL ACTION NO. HBC 231 of 2015**

**IN THE MATTER** of an application  
under Section 169 of the Land Transfer  
Act.

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**BETWEEN** : **AJAY KUMAR** formally of Qeleloa, Nadi, but now of 4020 Great  
North Road, Kingston, Auckland, New Zealand,

**PLAINTIFF**

**AND** : **ANISH KUMAR** of Taviracagi No.2, Qeleloa, Nadi,

**DEFENDANT**

**Mr. Vikrant Chandra for the Plaintiff**  
**The Defendant appeared in person.**

**Date of Hearing: - 23<sup>rd</sup> May 2016**  
**Date of Ruling : - 16<sup>th</sup> September 2016**

**RULING**

**(A) INTRODUCTION**

- (1) The matter before me stems from the Plaintiff's Originating Summons dated 17<sup>th</sup> December 2015, made Pursuant to Section 169 of the "Land Transfer Act", Cap 131, for an Order for Vacant Possession against the Defendant.

- (2) The Defendant is summoned to appear before the Court to show cause why he should not give up vacant possession of the Plaintiff's property comprised in Agreement for lease dated 23<sup>rd</sup> August 2006 land known and described as "Taviracagi No.2" in the District of Nadi in the Province of Ba with a total area of 1807 square meters of itaukei land.
- (3) The application for eviction is supported by an Affidavit sworn by the Plaintiff on 16<sup>th</sup> July, 2015.
- (4) The application for eviction is strongly contested by the Defendant.
- (5) The Defendant filed an "Affidavit in Opposition" opposing the application for eviction followed by an "Affidavit in Reply" thereto.
- (6) The Plaintiff and the Defendant were heard on the Summons. They made oral submissions to Court.

**(B) THE FACTUAL BACKGROUND**

- (1) What are the circumstances that give rise to this present application?
- (2) To give the whole picture of the action, I can do no better than set out hereunder the averments/assertions of the pleadings/affidavits.
- (3) The Plaintiff in his Affidavit in Support deposed *inter alia*;

- Para 1. THAT I am the lessee of the land comprised in the Agreement for Lease dated 23<sup>rd</sup> August, 2006 TLTB File Reference Number 4/10/8033 for the land known and described as "Taviracagi No.2" in the District of Nadi in the Province of Ba with a total area of 1807 square meters of itaukei land.*
2. *THAT the Defendant has been living on the said land illegally.*
  3. *THAT a notice to quit and deliver vacant possession of the said land dated 22<sup>nd</sup> June, 2015 was served on the defendant on the same day but the Defendant refused to acknowledge the same. Annexed hereto and marked as "AK2" is a copy of the said notice.*
  4. *THAT the Defendant has not vacated the said land as to date and is occupying the same illegally.*
  5. *THAT despite making several request for the Defendant to vacate but he has failed to do so and has refused to adhere to any of my notice.*
  6. *THAT the Defendant does not have any legal right to stay or occupy the said land and as such he is to give vacant possession.*

7. THAT the Defendant does not have any defence in this action and the Defendant refuses or neglect to vacate the premises despite the notice given to him.
8. THAT I therefore pray to this Honourable Court that the Defendants be ordered to be given immediate vacant possession of the said property in terms of the originating summons filed herewith.
9. THAT I also seek the costs of this application from the Defendant.

(4) The Defendant for his part in seeking to show cause against the Summons, filed an Affidavit in Opposition, which is substantially as follows;

- Para 1. That I am the Defendant in this matter.
2. That I refer to the Plaintiff summons and affidavit in support filed on the 17<sup>th</sup> December, 2015 file in the honorable court and hereby filed this affidavit in opposition in reply.
  3. That in reply to paragraph 1 of this affidavit I hereby says that I have no knowledge of the claim and that the lease has been transferred to the Plaintiff.
  4. That in reply to paragraph 2 of this affidavit I say that I am not living here illegally because that the said land was owned by my grandmother before it was illegally transferred to the Plaintiff as claimed.
  5. That as referred to paragraph 3 I have no knowledge as claimed.
  6. That I have no knowledge of paragraph 4 of the affidavit as claimed.
  7. That I refer to the paragraph 5 of the affidavit and hereby say that I disagree with the claim because I had stated in court that I will defend this case.
  8. That I refer to paragraph 6 of the affidavit and says that I have the right to stay or occupy the said land because the Plaintiff is my brother and the said land belongs to our grandmother.
  9. That I refer to the paragraph 7 of the affidavit that I have a strong defense because this is the family property and my brother did not inform that the lease has expired before my brother (Plaintiff) process the new lease to this name.
  10. That I refer to paragraph 8 and reply that I strongly dispute and immediate vacant possession that the Plaintiff is requesting in his affidavit.

11. *That the Plaintiff is migrated to New Zealand and I am living in the said property and taking care of our family heritage and further say that if I vacate the said property I have no place to live with my family.*
12. *That I seek cost from the Plaintiff.*

(5) The Plaintiff filed an “Affidavit in Rebuttal” deposing *inter alia*;

- Para 1. *THAT I am the Plaintiff in this matter and I make and swear this Affidavit for and on that behalf.*
2. *THAT I refer to the affidavit in opposition filed by the Defendant on the 24<sup>th</sup> day of March 2016, in the matter herein and reply to the same as follows.*
3. *THAT in reply to paragraph 3 of the same, I refer to and repeat what I have stated in paragraph 1 of my affidavit in support filed on the 17<sup>th</sup> day of December 2015, in the matter herein that the I hold a new agreement for lease dated 23<sup>rd</sup> August, 2006 for the land in question.*
4. *THAT in reply to the contents of paragraph 4 of the same, I say that the grandmother’s title has expired prior to August, 2006 and that I have obtained a new title over the said land.*
5. *THAT as to the contents of paragraph 8 of the said affidavit, I repeat what I have stated in paragraph 4 herein-above.*
6. *THAT I deny each and every allegation contained in paragraph 9 of the said affidavit and further state that I have obtained a new title over the said land.*
7. *THAT I deny each and every allegation contained in paragraph 9 of the said affidavit and further state that I have obtained a new title over the said land and that I have obtained the same in good faith without any fraud or misrepresentation.*
8. *THAT save as specifically traversed herein, I categorically deny each and every allegation contained in the said affidavit in reply and put the Defendant to strict proof of each of the said allegations.*
9. *THAT I therefore pray to the Honourable Court that the Defendants be ordered to be given immediate vacant possession of the said property in terms of my originating summons filed herewith with costs.*

(C) **THE LAW**

- (1) Against this factual background, it is necessary to turn to the applicable law and Judicial thinking in relation to the principles governing the exercise of the discretion to make the Order the Plaintiff now seeks.
- (2) Rather than refer in detail to the various authorities, I propose to set out, with only limited citations, what I take to be the principles of the law.
- (3) Sections from 169 to 172 of the Land Transfer Act (LTA) are applicable to summary application for eviction.

**Section 169 states;**

*“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 states;**

*“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 states;**

*“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.*

**Section 172 states;**

*“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;*

*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.*

*[Emphasis provided]*

- (4) The procedure under Section 169 was explained by Pathik J in **Deo v Mati** [2005] FJHC 136; HBC0248j.2004s (16 June 2005) as follows:-

*The procedure under s.169 is governed by sections 171 and 172 of the Act which provide respectively 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.”*

*It is for the defendant to ‘show cause.’*

- (5) The Supreme Court in considering the requirements of section 172 stated in **Morris Hedstrom Limited v. Liaquat Ali** (Action No. 153/87 at p2) 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.”*

- (6) The requirements of Section 172 have been further elaborated by the Fiji Court of Appeal in Azmat Ali s/o Akbar Ali v Mohammed Jalil s/o Mohammed Hanif (Action No. 44 of 1981 – judgment 2.4.82) where it is stated:

*“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.*

## **(D) ANALYSIS**

- (1) This is an application brought under Section 169 of the Land Transfer Act, [Cap 131].

Under Section 169, certain persons may summon a person in possession of land before a judge in chambers to show cause as to why that person should not be ordered to surrender possession of the land to the Claimant.

For the sake of completeness, Section 169 of the Land Transfer Act is reproduced below;

- 169.** *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) *a lessor against a lessee or tenant where a legal notice to quit has been given or the term of the lease has expired.*

- (2) In all applications under Section 169 of the Land Transfer Act, the Plaintiff/Applicant must first comply with the requirement of the law.

The first requirement of Section 169 of the Land Transfer Act is that the Plaintiff must be the “**last registered proprietor**” or a “**lessor with power to re-enter where the lessee or tenant is in arrears**” or a “**lessor against the lessee or tenant where a legal Notice has been given or the term of the lease has expired.**”

I ask myself, under which limb of Section 169 is the application being made?

This is the threshold question.

As far as Section 169 (b) and (c) are concerned they apply where there is a landlord and tenant relationship.

Section 169 (b) and (c) do not apply in the case before me since the Defendant is not the Plaintiff’s Tenant who is in arrears and/or the term of the lease has expired.

Therefore, in this instant case, the first limb of Section 169 applies.

Under Section 169 (a), the Plaintiff must be “**the last registered proprietor**” of the land in question.

Has the Plaintiff proved that he is the last registered proprietor of the land in question?

This is the pivotal question that awaits the determination by this Court.

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**, Cap 7, 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*”.

The Plaintiff says that he is the lessee of the land comprised in “Agreement for Lease”, dated 23<sup>rd</sup> August 2006.



For the sake of completeness, paragraph one (01) of the Affidavit in Support of Originating Summons is reproduced below in full.

*Para 1. THAT I am the lessee of the land comprised in the Agreement for Lease dated 23<sup>rd</sup> August, 2006 TLTB File Reference Number 4/10/8033 for the land known and described as "Taviracagi No.2" in the District of Nadi in the Province of Ba with a total area of 1807 square meters of itaukei land. Annexed hereto and marked as "AK-1" is a copy of the said lease.*

The annexure **AK-1** clearly shows that the Plaintiff is the lessee of the land comprised in "Agreement for Lease", TLTB file reference No:- 4/10/8033.

But the "Agreement for Lease" is not registered with Registrar of Titles or Registrar of Deeds.

Thus, the Plaintiff has no registered title or interest.

To be more precise, the Plaintiff is not the registered proprietor of the land in question.

The interpretation of the words contained in the Property Law is found in Section 2 and according to the said interpretation the word **registered** is defined as follows:

*"registered" or "duly registered" in the case of land or any estate or interest therein means registered in the manner provided by the Land Transfer Act; and the 'the register' and 'registration' have corresponding meaning.*

(Emphasis added)

Without the proof of registered interest the Plaintiff cannot succeed.

The provisions of Section 169 of the Land Transfer Act are mandatory and there is no discretion given to the Court as to the persons who might commence proceedings pursuant to that Section.

On the whole of the material disclosed in this case, it seems to me perfectly plain that the Plaintiff has no legal standing to bring this action. It is not competent for the Plaintiff to bring this action for vacant possession because the Plaintiff is not the registered proprietor of the land in question, a condition precedent for proceedings brought under Section 169 (a) of the Land Transfer Act.

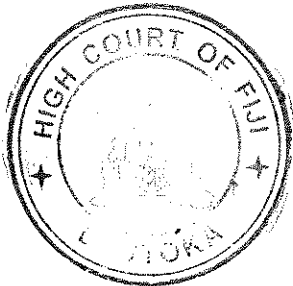
Accordingly, I have no alternate but to dismiss the Originating Summons.

I cannot see any other just way to finish the matter than to follow the law.

In view of the approach I have adopted, I do not consider it necessary for me to express my views on the merits of the Defendant's arguments relating to his right to possession. It will be at best a matter of academic interest only or at worst an exercise in futility to discuss the merits of the Defendant's arguments relating to his right to possession.

**(E) FINAL ORDERS**

- (1) The Originating Summons is dismissed.
- (2) I make no order as to costs.



At Lautoka

16<sup>th</sup> September 2016.

A handwritten signature in black ink is written over a horizontal line. Below the signature, the date "16/09/2016" is written in black ink.

**Jude Nanayakkara**  
**Master**