

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

**CIVIL JURISDICTION**

**CIVIL ACTION NO. HBC 02 of 2015**

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

**BETWEEN** : **KESAIA MARAMA NAVA** of Namoli Village, Lautoka

**PLAINTIFF**

**AND** : **VAKAMOCE PICKERING** of Tomuka Settlement, Lautoka

**DEFENDANT**

**The Plaintiff is in person**  
**The Defendant is in person**

**Date of Hearing :- 08<sup>th</sup> July 2015**  
**Date of Ruling :- 21<sup>st</sup> August 2015**

**RULING**

**(A) INTRODUCTION**

1. Before me is the Plaintiff's Originating Summons pursuant to Section 169 of the Land Transfer Act 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.
3. The application for eviction is supported by an affidavit sworn by the Plaintiff on 07<sup>th</sup> January 2015.
4. The application for eviction is strongly resisted 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 Originating Summons. They made oral submissions to Court. In addition to oral submissions, the Plaintiff filed a written submission.

**(B) THE LAW**

- (1) 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, 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.*

*[Emphasis provided]*

- (2) 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.’*

- (3) 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.”*

- (4) 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.”*

### **(C) FACTUAL BACKGROUND AND ANALYSIS**

1. What are the facts here? It is necessary to approach the case through its pleadings/affidavits, bearing all those legal principles in my mind.
2. To give the whole picture of the action, I can do no better than set out hereunder, the main averments/assertions of the pleadings/affidavits.
3. The Plaintiff in her affidavit in support deposed *inter alia*;
  - (a) *I am one of the registered proprietors on the land known as Crown Lease No. 31456.*
  - (b) *I am authorised to depose this affidavit on behalf of other registered proprietors. I have either personal knowledge of the matters contained in this*



*affidavit or where matters are not known personally to me, I have ascertained their truth from sources specified.*

- (c) *I make this affidavit in support for an order that the defendant, **VAKAMOCE PICKERING** give the plaintiff's immediate vacant possession of all that land comprised in Crown Lease No. Crown Lease No 31456, Lot 1 ON SO 6702 Tikina Vitogo and in the province of Ba, containing an area of 1089 square metres ('the property'). The said Crown Lease No. 31456 is annexed and marked 'A'.*
  - (d) *Semesa O'coner is a Registered Bailiff gave a first "Notice to Vacate" letter dated the 4<sup>th</sup> day December, 2014 to the defendant asking her to vacate the said premises. The said letter is annexed and marked "B".*
  - (e) *That the said letter dated the 4<sup>th</sup> of December, 2014 was personally served on the defendant, and she acknowledged receipt of the same time.*
  - (f) *Despite receipt of the said notice to quit (hereinbefore referred to) the defendant continues to neglect and or refuses to give up vacant possession of the said premises situated upon the said land and remains therein unlawfully as a trespasser.*
  - (g) *The defendant are also in arrears on her payments in the sum of \$4900.00.*
4. The Defendant for his part in seeking to show cause against the Summons, filed an affidavit in which he deposed *inter alia*;
- (a) *THE Defendant accepts that the Plaintiff name is on the title of the Crown Lease No. 31456 otherwise deny any other allegations in paragraph 1.*
  - (b) *THE Defendant neither admits nor denies paragraph 2 of the Plaintiffs Affidavit as it has no knowledge of the same.*
  - (c) *THE Defendant denies the allegations in paragraph 3 and further states that*
    - *That sometimes between November of 200, the Defendant agreed to rent the Plaintiff's dwelling house situated at Tomuka for \$200.00 per month.*
    - *That the Plaintiff agreed for the Defendant and the family to rent her dwelling house at Tomuka.*

- *That while the Defendant was occupying the Plaintiff's house at Tomuka, the Plaintiff informed the Defendant that she wanted to sell the house.*
- *That both parties agreed for the Defendant to pay sum of \$6,000.00 as Holding Deposit for the purchase of the land and four bedroom part wooden part concrete house and improvements at Tomuka on Native Land lease S/D Lot 1 reference 476812 comprising 792 sq. meters.*
- *That on 4<sup>th</sup> day of November 2005 an agreement was signed between the Plaintiff and Defendant for the down payment of \$6000.00 with terms and conditions as per the said agreement. Attached hereto and marked "VP 1" is a copy of the Agreement.*
- *That soon after the agreement was signed the Plaintiff approached the Defendant asking for more money to effect the required documents needed for the sale and Transfer of the said property to the Defendant.*
- *That the Defendant paid the total sum of \$23,696.00 to the Plaintiff as all progressive payments for the house in question.*
- *That both the Plaintiff and Defendant were in friendly forms and both happy as the Defendant was doing everything possible not to disappoint the Plaintiff.*
- *That at one stage the Plaintiff visited the Defendant, it was discussed between both parties that the property will be sold for \$37000.00 in total was also made known to the Defendant that she had to pay another \$14000.00 as the balance from all the money the Plaintiff already received from the Defendant.*
- *That the Defendant agreed verbally to what transpired between their discussions and agreed that she will pay the balance of \$14000.00*
- *That the Defendant went to the Colonial Bank, Lautoka to make arrangements for the \$14000.00 balance required by the Defendant.*
- *That the Bank (Colonial) told the Defendant that they needed an Engineering Certificate to affect the release of the \$14000.00.*
- *That the Defendant informed the Plaintiff of the Banks requirement.*
- *That the Plaintiff said that she will arrange for the Engineering Certificate as per Bank's requirement.*



- *That the Plaintiff produced an Engineering Certificate to the Defendant which was rejected by the Bank as they do not recognise the Engineer who prepared the Engineering Certificate.*
- *That the Plaintiff was informed about the Engineering certificate and also the Bank's refusal to accept it and Bank's refusal to release the \$14000.00.*
- *That because the Defendant approached the Merchant Bank where her money was invested and asked the said Bank about the \$14000.00.*
- *That after one week the Merchant Bank approved the \$14000.00.*
- *That the Defendant took the said \$14000.00 to the Plaintiff whereby at the Defendant informed the Plaintiff for them to see a lawyer.*
- *On the 24<sup>th</sup> day of October 2006 both the Defendant and the Plaintiff property in question.*
- *That the Plaintiff rejected the \$14000.00 and the Defendant was shocked about the Plaintiff's response as per their verbal agreement.*
- *That the Defendant was served with a notice to vacate the said property and in that notice the Plaintiff demanded that we pay \$75000.00 as the present valuation of the said property.*
- *That the Defendant only valued the property after the Defendant had made alternations/renovations to the property in question.*
- *That the Defendant has made various alterations to the property inclusive of extensions which has amounted to the sum of \$4500. Attach hereto and marked "VK 2" are copies of photographs of the extensions.*
- *That the Defendant sought assistance from the Police about this matter and the Plaintiff agreed that she already received \$23696.00 from the Defendant witnessed by P O Tuitai of Lautoka Police Station.*
- *That the Plaintiff at no time demanded any rental monies since payments commenced in regards to the agreement marked as VK1.*

(d) *THE Defendant accepts that it had received the said notice as stated in paragraph 4 of the Plaintiff's Affidavit.*

- (e) *THE Defendant admits paragraph 5 of the Plaintiff's Affidavit.*
- (f) *THE prevailing application is an abuse of court process and should be dismissed with cost in favour of the defendant.*

5. The Plaintiff filed an affidavit in rebuttal deposing *inter alia*;

- (a) *I am the Applicant herein and I deposed this Affidavit in Response to the Affidavit in response of the Defendant,*
- (b) *That I also would like to refer to my earlier Affidavit at paragraph 2 wherein mistakes were made on the Certificate of Title which it was wrongly deposed as Crown Lease and ought to have been a iTaukei Lease No. 315456, Lot 1 on SO 6702, and also that it was wrongly deposed that there were several proprietors of the said property was also misleading.*
- (c) *That I am the Sole Registered Proprietor of the said Lease and never was there any other person registered together with me.  
(Refer to my Annexure paragraph of my Affidavit).*

*History of the Dealing*

- (d) *That as far back as in 2005, the Plaintiff entered into an agreement with the Defendant for the sale of the said land herein to the Defendant.  
(Refer VPI of the Defendant Affidavit)*
- (e) *That the said agreement stipulated that the sum of \$6,000.00 (Six Thousand Dollars) was to be paid to the Plaintiff by the Defendant as a holding deposit on the 4<sup>th</sup> November 2005.*
- (f) *That the said incomplete and defective agreement did not specify what was the purchase price of the said property which comprises both the land and a four bedroom house part concrete and part wooden, nor did it state how much was balance to be paid.*
- (g) *The Plaintiff and the Defendant do acknowledged from the agreement that there was no discussion on the full purchase price and according to an old valuation of the said property the value was estimated to be \$75,000.00 (Seventy Five Thousand Dollars).  
(Attached herein is a copy of the valuation marked "KMA").*



- (h) That the total payment made from time to time by the Defendant were as follows:

11/11/05	-	\$3,000.00
05/12/05	-	\$5,000.00
21/03/06	-	\$5,000.00
15/06/06	-	\$ 500.00
02/06/06	-	\$3,000.00
11/07/06	-	\$ 500.00

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Total payment                      \$17,000.00

(Attached herein is a copy of record of payment marked "KMB").

- (i) That the total payment made by the Plaintiff would now be \$23,000.00 (Twenty Three Thousand Dollars) plus by 2006 and since then no other payment made a lapse of 9 years until todate.
- (j) That this sales would have been proper if the Defendant had regularly paid but since she made the payment in two years only 2005 and 2006 and never bothered to make the payment in the last 9 years, I have no option but to exercise my right of ownership to vacate her from the premises.
- (k) That I have calculated the amount of money paid and treat it as rental as she could not satisfy the sales and Purchase Agreement.
- (l) That our dealing was without the consent of iTLTB and I am advised that the whole agreement was illegal and without any effect.
- (k) That our Solicitor then Mr Naivalu could have advised us but no such advised received and we carried on with our agreement on our understanding that it was legal.
- (l) That I am reliably advised that any dealing on iTaukei land, the Board must be informed and consented to such dealing which in this case no such consent was given nor was the Board informed of our dealing.

Response to Defendant's Affidavit

- (m) That as to paragraph 1 of the Defendant's Affidavit the Plaintiff refers to paragraph 2 above that this title is Native (the said Affidavit)
- (n) That as to paragraph 2 of the said Affidavit, the Plaintiff repeats paragraph 2 above that she Kesaia Marama is the registered owner of the said property

- (o) *That whatever allegations made by the Defendant even it was genuine but by reason of no consent from the iTLTB the whole Sale and Purchase Agreement is illegal and without any effect.*
  - (p) *That it does not help to answer each and every allegation as it will come to since it is illegal.*
  - (q) *That by reason of the above I seek order in terms of my application and request your assistance in the eviction of the Defendant from my land.*
- (6) The real issue and the only issue which this Court has to consider **at the outset** is whether the Plaintiff has satisfied the **threshold criteria in Section 170 of the Land Transfer Act.**

Pursuant to Section 170 of the Land Transfer Act;

- (1) **the Summons shall contain a “description of the Land”**

AND

- (2) **shall require the person summoned to appear in the court on a day not earlier than “sixteen days” after the service of Summons.**

The interval of not less than 16 days is allowed to give reasonable time for deliberations and to prevent undue haste or surprise.

**I ask myself, are these requirements sufficiently complied with by the Plaintiff?**

The Originating Summons filed by the Plaintiff reads as follows:

*“LET ALL PARTIES concerned attend before a Master in Court at the High Court at Lautoka on Friday the 13<sup>th</sup> day of February, 2015 at 8.30 o’clock in forenoon on the hearing of an application by the abovenamed Plaintiff that the Defendant VAKAMOCE PICKERING do show cause why he should not give up immediate vacant possession to the Plaintiff of the premises occupied by the Defendant on the property known as crown lease: 31456, in the Town of Lautoka and the province of Ba, containing an area of 1089 square meters and that the cost of this application be paid by the Defendant.*



*AND TAKE NOTICE that at the hearing of this summon, the Plaintiff intends to refer to the Affidavit of KESALA MARAMA NAVA in support of the application for immediate vacant possession.*

*DATED at Lautoka this 13<sup>th</sup> day of January, 2015.*

*This summons was filed for and on behalf of the Plaintiff's whose address for service is at Namoli, Lautoka."*

(Emphasis Added)

In the course of the hearing of the Summons, the Plaintiff simplistically submitted that the land in dispute is iTaukei Lease No:- 31456 and not Crown Lease No:- 31456.

Annexed to the affidavit of the Plaintiff is what purports to be a photocopy of **iTaukei Lease No:- 31456**.

Suffice it to say that the Originating Summons filed by the Plaintiff does contain a description of the land known as **Crown Lease No:- 31456** and not **iTaukei Lease No:- 31456**. Therefore, it is clear beyond question that the Summons does not contain a description of the subject land.

In the course of the hearing of the Summons, the Plaintiff, with breath taking disingenuousness admitted that the subject land was wrongly mentioned in the Originating Summons and in the Affidavit in Support.

Therefore, I am constrained to hold that the first express requirement of Section 170 of the Land Transfer Act has not been complied with.

I turn next to consider the second express requirement of Section 170 of the Land Transfer Act.

The Originating Summons was returnable on 13<sup>th</sup> February 2015. Pursuant to Section 170 of the Land Transfer Act, the summons shall require the person summoned to appear in the court on a day not earlier than "sixteen days" after the service of Summons. However, the Originating Summons was served on the Defendant on 16<sup>th</sup> February 2015. (The Summons was not re-dated by the Plaintiff.) Therefore, the second express requirement too has not been complied with.

It is worth remarking that the Defendant did not make any reference to the said defects in his Affidavit in Opposition or at the hearing.

But nevertheless, I desire to emphasize that the court is bound to look into the "pre requisites" before the burden shifts to the Defendant.

Having carefully considered the pleadings, evidence and oral submissions placed before this Court, it is quite possible to say that the Plaintiff has not satisfied the threshold criteria in Section 170 of the Land Transfer Act.

**(D) CONCLUSION**

In light of the above, I have no hesitation in holding that the mandatory requirement of Section 170 of the Land Transfer Act and the legal consequences that flow from non compliance defeat the Plaintiff's claim for vacant possession.

Therefore, the Defendant needs not show any evidence of a cause to remain on the property since this matter can go no further.

Accordingly, there is no alternate but to dismiss the Originating Summons.

**(E) FINAL ORDERS**

- (1) Originating Summons dismissed.
- (2) The Plaintiff is ordered to pay costs of \$1000.00 (summarily assessed) to the Defendant which is to be paid within 14 days from the date hereof.



At Lautoka

21<sup>st</sup> August 2015

A handwritten signature in blue ink, dated 21/08/2015.

**Jude Nanayakkara**  
**Acting Master of the High Court**