

IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

Civil Action No. HBC 221 of 2020

BETWEEN: **ISIRELI NIUBALAVU** of 411 Rolland Plains Road, Telegraph Point, NSW,
2441, Australia, Aged Care Nurse.

PLAINTIFF

AND: **LAISANI NAISERE** aka **LAISANI NIUBALAVU** and all other occupants of
Lot 28 House No.7, Sukanaivalu Road, Nabua, Suva.

DEFENDANT

BEFORE **Hon. Justice Vishwa Datt Sharma**

COUNSEL: **Mr. Volakauvuki J.** for the Plaintiff

Ms. Fa U. with Mr Wainiqolo E. for the Defendant

DATE OF DECISION: **19th October, 2023.**

DECISION

[S169 - Vacant Possession]

Introduction

1. The Plaintiff filed an Originating Summons and sought for the following orders:

[1] That the Defendant **LAISANI NAISERE** aka **LAISANI NIUBALAVU** and all other occupants do show cause why they should not give up vacant possession to the Plaintiff of the property situated at Lot 28 House No. 7, Sukanaivalu Road, Nabua on DP No. 5253 described and comprised in Crown Lease containing 14.9 perches.

[2] Costs of this action in the sum of \$1,000.00.

[3] Such other orders that the Honourable Court deems just.

2. The Summons is supported by an Affidavit deposed by the Plaintiff, Isireli Niubalavu.
3. The Defendant has filed an Affidavit in Response wherein she alleges fraud on the part of the Plaintiff. Her contention is that she never signed and/or executed any Deed of Renunciation renouncing her rights to the said property. Her allegation was that her signature was forged.

The Law

4. The Law relevant to this application seeking for Vacant Possession is found in sections 169, 170 and 172 of the Land Transfer Act 1971.
5. **Section 169 provides**, so far as relevant:

Ejectors

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;

Particulars to be stated in summons

170. *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.*

Dismissal of summons

172. *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.

6. The Plaintiff in his capacity is the last registered proprietor pursuant to Section 169 of the Land Transfer Act 1971, instituted this eviction proceedings against the Defendant.
7. As per Section 170 of the Land Transfer Act 1971, the Originating Summons issued by the Plaintiff clearly describes the land in which Vacant Possession is being demanded from the Defendant.
8. Section 172 of the Land Transfer Act 1971 requires the person summoned to show cause to the court why he or she should not give up possession to the Plaintiff.

The Determination

9. The Plaintiff seeks to evict the Defendant.
10. The Defendant is the Biological sister of the Plaintiff.
11. The Defendant denies signing the Deed of Renunciation in which her interest as a biological owner to her father's Estate was renounced in favor of the Plaintiff.

12. According to the Defendant the Deed was the very primary document that allowed the ownership of the property to be transferred in whole to the Plaintiff.
13. The Defendant in her Affidavit deposed that in 2018 after making enquiries with the Fiji Public Trustee on the family property that she was told that her brother [Plaintiff] was then the new owner and that her mother was given the original Title to the property. At that time, the Defendant felt that the property should eventually be given to her brother, Isireli Niubalavu [Plaintiff] since he was the only brother.
14. Further, the Defendant in her Affidavit raises the issue of proprietary estoppel. That is under the Rules of Intestacy, she has a right and entitlement to her share in the said property since she never renounced her right and/or consented to the transfer of the property. She states spending money on the property and renouncing the same.
15. The Crown Lease No. 225203 on Deposit Plain No. 5253 situated at Lot 28 House No. 7, Sukanaivalu Road, Nabua confirms that the said property was transferred to Isireli Niubalavu [Plaintiff] on 09th December 1988.
16. Since the transfer of the property to the Plaintiff on 9th December 1988, the Defendant did not take any effective measures or otherwise to find out her interest, entitlement and any shares in the said property. She explains that she only came to know that the property was transferred to the Plaintiff when she was asked to vacate the property and served subsequently with a notice to vacate and later confirming the ownership of the property and questioned the status of the Renunciation, which she alleges is rather forged.
17. Bearing in mind that the Defendant has raised a serious allegation of fraud, it becomes a triable issue of the proceedings.
18. It is only appropriate, that the issue of fraud be decided in a Writ Action whereby the Court can hear *Viva Voce* evidence and determine the issue and make a determination on the application for Vacant Possession accordingly.
19. For the above rational, the Plaintiff's Originating Summons is hereby dismissed.

Costs


20. It is only fair that each party to the proceedings bear their own costs at the Court discretion.

Orders

- A. The Plaintiff's Originating Summons is dismissed.
- B. Each party to the proceedings to bear their own costs.

Dated at Suva this 19th day of October, 2023.




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Vishwa Datt Sharma
JUDGE

CC: TORAH LAW, SUVA
MESSRS LAW SOLUTIONS, SUVA