

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 100 of 2014

IN THE MATTER of an application
for summary possession under
Order 113 of the High Court Rules,
1988.

BETWEEN: **SHABANA KHATOON BI** of Lot 1, Nokonoko Road,
Laucala Beach Estate, Suva, Businesswoman.

PLAINTIFF

AND: **MAULESIO SERU** also known as **MAULISIO SERU**
and SERU MAULISIO, and every other person in
illegal occupation of all that piece of land contained
and described in and as Certificate of Title No.
34724 being 'part of' that piece of land known as
"Tamavua" and containing two hundred and forty
one square metres (241 m²) be the same a little
more or less and situate in the city of Suva in the
Island of Viti Levu and being Lot 21 on Deposited
Plan No. 7523.

DEFENDANT

COUNSEL: VP Lawyers for the Plaintiff
Qarcia Barristers and Solicitors for the Defendant

BEFORE: Acting Master S. F. Bull

JUDGMENT: 01 June 2015

JUDGMENT

Introduction

1. The Plaintiff is the last registered proprietor of the property described in the originating summons for this action. The Defendant was the previous owner of the said property. By a sale and purchase

agreement (the Agreement) of 7 June 2013, the Plaintiff purchased from the Defendant the said land for \$26,000. A condition of the sale/purchase was that the Defendant as vendor would give vacant possession to the Plaintiff within four months of the date of settlement. This was not done and a notice to quit was issued. Despite this, the Defendant remains in occupation of the land.

2. The Plaintiff now brings this application for vacant possession under O. 113 of the High Court Rules 1988 (the HCR). The application is brought by way of originating summons supported by affidavit.

The affidavit in support

3. The Plaintiff deposes that she is the registered proprietor of all that land described in the summons. Annexed to her affidavit is a certified true copy of the Certificate of Title with her name memorialized thereon on 16 September 2013. She had purchased the said land from the Defendant pursuant to a sale and purchase agreement signed by both of them on 7 June 2013. Under clause 7 of that agreement, the Defendant had agreed to give vacant possession of the said land to her within four months of the date of settlement.
4. On her instructions, her lawyers wrote to the Defendant on 6 August 2013, reminding him of this requirement under the agreement, and the need for him to make all necessary arrangements for the removal of his house from the said property prior to the possession date of 7 December 2013. When the Defendant failed to give up vacant possession within the time agreed, a notice to quit dated 2 January 2014 was served on him. The Defendant's solicitors replied in his behalf, asking for more time to enable the Defendant to make arrangements for vacant possession. She consented to extension of time and her solicitors advised the Defendant's solicitors accordingly by letter dated 22 January 2014.
5. Despite this, the Defendant has failed to give up vacant possession and continues with other persons to occupy the land.

The answering affidavit

6. The Defendant swore an affidavit in opposition on 17 June 2014, denying that the Plaintiff is the registered proprietor of the property, and deposing ignorance of any transaction that took place between him and the Plaintiff and her solicitors in respect of the land. He disputes the sale of the property saying that no one, including the Plaintiff's counsel and the lawyer witnessing his signature, had told him anything about the sale of the property.
7. His son Rafaele Save Seru (Rafaele) had been present and had been advised in English by the Plaintiff's counsel to put the Defendant's thumbprint on the sale and purchase agreement. Neither the lawyers present there nor his son had given any "proper explanation" to him. To date, he has not received "anything" either from the Plaintiff's lawyer or from his son Rafaele. He denies having ever given power of attorney to Rafaele to deal with his (the Defendant's) property and had never gifted to the said son the property in question.
8. The Defendant also denies being served with a notice to quit and says that he had not instructed any lawyer to act in his behalf and reply to the Plaintiff's notice.
9. Subsequently, Rafaele admitted to him to having conspired with the Plaintiff to sell the Defendant's property without his knowledge and consent. According to his son, the Plaintiff had told him that she would give him \$26,000 if he could get his father, the Defendant, to put his thumbprint on a document to sell the property.
10. He has lodged a complaint with the Samabula Police against his son in respect of his son's actions in this matter.
11. Rafaele Save Seru also swore an affidavit in support of the Defendant's opposition to the summons. He deposes amongst other things that the Plaintiff had approached him to sell his father's land for \$26,000. It was she who had picked him and his father up on 7 June 2013 and

took them to have the papers signed for the sale and transfer of the land. Rafaele says that he had not told the Defendant the reason for their going to the lawyer's office on 7 June 2013 and though the lawyer witnessing the Defendant's signature had explained to his father what was to be signed, all of them, including the lawyer, knew his father did not understand what was explained to him. It was the Plaintiff who told him to take his father's hand and have his thumbprint affixed to the Agreement, and this he did without telling the Defendant what he was putting his thumbprint was for. He helped the Defendant place his thumbprint on the papers requesting a provisional title, as well as on a declaration prepared by the Plaintiff's counsel. The Defendant's acknowledgment of the deposit paid by the Plaintiff on 7 June 2013 was also done in this manner.

12. Subsequently, he signed a letter of acknowledgment and confirmation dated 12 September 2013 without any power of attorney from the Defendant. He says that he had used all the monies received from the sale of the property without the knowledge of the Defendant or anyone else in the family and the Defendant only came to know about the sale of his property when a notice to vacate was served on him. He informed the Defendant that he had sold the property and used all the money paid in instalments starting from 7 June 2013. He also told the Defendant that the documents the Defendant had put his thumbprint on at the lawyer's officer were for the sale of his property. As a result, the Defendant lodged a complaint against him with the Police.
13. Rafaele denies telling the Defendant that he had conspired with the Plaintiff to sell the property, but confirms not having any power of authority from the Defendant to sell his property.

The affidavit in reply

14. In reply, the Plaintiff says she had purchased the land from the Defendant himself. She denies all the Defendant's allegations as to

the manner in which the Agreement was signed by the Defendant, saying that an independent legal practitioner had explained the contents of the sale and purchase agreement to the Defendant in the iTaukei language and that he had placed his thumbprint on the document having understood its contents. Payment of the deposit of \$1,500 on 7 June 2013 was to the Defendant himself. The transfer document was signed by the Defendant after an independent legal practitioner had explained to him the contents of the document in the iTaukei language. The payment of \$4083.33 on 19 June 2013 was made by her to the Defendant and on this day, the Defendant had informed her he wanted the balance of the purchase price to be collected for him by his son, Rafaele.

15. Thereafter, the Defendant received and collected the balance of the purchase price from her through his son who had been authorised by the Defendant himself to do so.
16. The legal practitioners, Messrs Mesui C. Volau, engaged by the Defendant, stated in their letter dated 7 January 2014 (a copy of which is annexed) that they were acting on the instructions of the Defendant.
17. She is not aware of any complaint lodged with the Police by the Defendant against his son and to date, she has not been contacted by the Police.
18. She has purchased the property as a bona fide purchaser from the Defendant with his full knowledge and consent and has paid consideration for it. He has transferred his full interest and estate in the said land to her and she has been registered as the proprietor thereof.

The law

19. The Plaintiff brings these proceedings under Order 113 of the High Court Rules, 1988, rule 1 of which provides:

Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this order.

20. The Supreme Court Practice 1999 states that

The circumstances in which the procedure can be used are restricted to cases where the land is occupied by persons who have entered into or remain in possession of the land without the licence or consent of the person claiming possession.

21. In *Baiju v Kumar* [1999] FJHC 19; [1999] 45 FLR 74 (31 March 1999), it was said:

This Order is narrowly confined to the particular remedy stated in r.1. It is also to be noted, as the White Book says at p.1603:

“this Order would normally apply only in virtually uncontested cases or in clear cases where there is no issue or question to try, i.e. where there is no reasonable doubt as to the claim of the plaintiff to recover possession of the land or as to

wrongful occupation on the land without licence or consent and without any right, title or interest thereto.”

22. Later on, the Court stated:

I would say that Order 113 is akin[sic] summary procedure under s169 of the Land Transfer Act Cap. 131. It is an effective and speedy relief to property owners in cases where tenants or other persons have no right to continue to stay in possession.

Preliminary issue

23. The Plaintiff’s counsel makes a preliminary objection to what it claims are the defective and irregular affidavits of the Defendant. It is submitted that the affidavits were not indorsed as required by O.41 r9. In addition, the jurat was placed overleaf on its own in contravention of the rules. Plaintiff’s counsel urges the Court not to permit the Defendant’s defective affidavits to be used in these proceedings and to have them struck out instead.

24. I have perused the affidavits. I admit the affidavits are defective and display a casual attitude towards the rules of the Court on the preparation and swearing of affidavits. In *Kim Industries Ltd, In Re* (No 1) [2000] FJHC 267; [2000] 1 FLR 141 (7 July 2000), Gates J (as His Lordship then was) stated:

If an affidavit bears an irregularity in its form, such as the omission of the endorsement note, leave must be obtained from the court for it to be filed or used [Ord. 41 r.4 and Ord. 41 r. 9(2)]. In this case I am prepared to grant such leave to the petitioner. However these Rules have good purpose behind them. The failure of counsel to come with adequately prepared affidavits will not always

result in a court allowing indulgence under Ord. 41 or Ord. 2 r. 1 see *Ba Town Council v. Fiji Broadcasting Commission and Others*[1976] 22 FLR 91 at 94B; *Gleeson v. J. Whippell & Co. Ltd.*[1977] 1 WLR 510.

25. In *Prasad v Mohammed* [2005] FJHC 124; HBC0272J.1999L (3 June 2005), the following irregularities in the defendant's affidavit were noted:

- “(i) That the affidavit stated it was filed by solicitors for the plaintiff, when it should have referred to the defendant.
- (ii) The affidavit was not indorsed, and was in breach of Order 41 r.9 (2).
- (iii) The text was separated from the jurat inappropriately.
- (iv) The words "Before me" were omitted above the Commissioner's signature.
- (v) And the certificate referring to the use of an Hindustani interpreter, when the affidavit was sworn, was inadequate.”

26. The Court notwithstanding an application by the Plaintiff's counsel to strike out the affidavits for the irregularities, granted leave for them to be used in evidence.

27. In this case, the irregularities are the absence of the indorsement note, and the placement of the jurat on its own on a separate page. I have considered the irregularities and the objection. Notwithstanding the defects, I am prepared to accept in evidence the Defendant's affidavits in their current form, and accordingly grant leave for them to be used as such in these proceedings, pursuant to O. 41 r. 4, and O. 41 r. 9 (2) of the HCR.

28. I turn now to the substantive application. The Plaintiff is the registered proprietor of the property in question, her name being memorialised on the Certificate of Title on 16 September 2013. The Defendant was the previous owner under a transfer instrument registered under his name on 28 December 2006. Though the Defendant swears that he had not been aware of the sale of his property to the Plaintiff on 7 June 2013, he does say that he only became aware after 2 January 2014 when his granddaughter told him about the notice to quit from the Plaintiff's counsel.
29. I consider that the bringing of this application under Order 113 is unremarkable. In Chandra v Sami [2014] FJHC 234; HBC138.2013 (4 April 2014), Kumar J approved the following comments of Amaratunga Jin Sharma v Kumar [2013] FJHC 144; HBC34.2013 (27 March 2013):

The words '*remained in occupation*' covers any previous owners and non-trespassers whose initial entry to the premises could not be categorized as trespasser. The phrase '*remained in occupation*' denotes that their initial entry may or may not be legal but their remaining in occupation is the illegality and the basis of the action for eviction in terms of the Order 113 is the illegal '*remaining*' of the property and there is no mention as to the initial entry to property may or may not be legal and the consideration of that is irrelevant to the Order 113, and in order to satisfy this requirement what the Plaintiff who claims possession has to establish is that the Defendants are remaining on the property without their consent or licence."

30. I find that the Defendant and the unnamed occupiers of the property have remained in occupation without the consent of the Plaintiff and in this sense are trespassers.

31. Pursuant to sections 39 – 42 of the Land Transfer Act, and under the Torrens system of land registration which operates in Fiji, the title of the registered proprietor is indefeasible unless actual fraud is proved. (See Subramani v Sheela [1982] FJCA 11; [1982] 28 FLR 82 (2 April 1982); Assets Company Ltd v Mere Roihi[1905] AC 176 at p.210; Fels v. Knowles 26 N.Z.L.R. 608, at page 620)
32. In Subramani(supra) the Fiji Court of Appeal (per Gould V.P., Marsack, J.A., and Spring J.A.) stated:

The indefeasibility of title under the Land Transfer Act is well recognised; and the principles clearly set out in a judgment of the New Zealand Court of Appeal dealing with provisions of the New Zealand Land Transfer Act which on that point is substantially the same as the Land Transfer Act of Fiji. The case is Fels v. Knowles 26 N.Z.L.R. 608. At page 620 it is said:

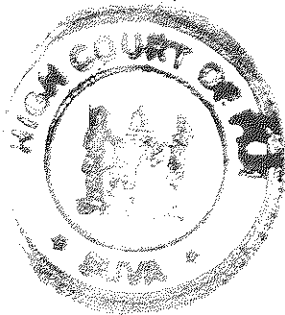
"The cardinal principle of the statute is that the register is everything, and that, except in case of actual fraud on the part of the person dealing with the registered proprietor, such person, upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against all the world."

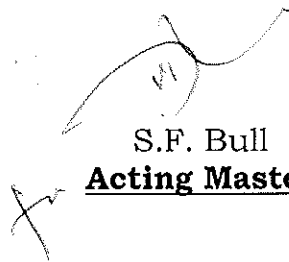
33. In this case, the Defendant makes some very serious allegations in his affidavit which is supported by the affidavit of his son Rafaele, wherein the latter admits that the contents of the Agreement, the transfer instrument and other documents pertinent to the sale and transfer of the property and subsequent payments, had not been explained to the Defendant. Rafaele swears to having told the Defendant that he (Rafaele) had sold the land without the Defendant's approval and consent.

34. The contents of the Rafaele's affidavit, if proved, could indicate fraud in the manner in which the Defendant was made to part with and the manner in which the Plaintiff gained ownership of the property. These, in my opinion, constitute triable issues which cannot be resolved summarily on affidavit evidence alone. I consider these issues must go to trial.
35. For this reason, I refuse the application for vacant possession.

Orders:

1. The application for vacant possession is refused.
2. The Plaintiff to pay costs of \$300, summarily assessed.




S.F. Bull
Acting Master