

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

CIVIL ACTION NO.: HBC 126 of 2017

BETWEEN : **PUSHPA WATI** **PLAINTIFF**

AND : **GANGA RAM** **DEFENDANT**

APPEARANCES/REPRESENTATION

PLAINTIFF : Ms. S Naidu [AP Legal]
DEFENDANT : Ms. Kirti on Instruction [Singh & Singh Lawyers]
RULING OF : Acting Master Ms Vandhana Lal
DELIVERED ON : 29 May 2019

JUDGEMENT

[Order 113 Summary Proceedings For Possession Of Land]

1. This is a summary proceeding for possession of land under the provision of Order 113 of the High Court Rules.
2. Ashika Deo the deponent of the affidavit in support states she is the lawful daughter of plaintiff Pushpa Wati and that she has the authority of the plaintiff to depose the Affidavit.

According to her, the plaintiff is the registered lessee of Methodist Church sub-lease 822326 being Lot 2, Farm Road, 10 miles, Nasinu.

The defendant was engaged by the Plaintiff to act as the caretaker for the premises and look after the upkeep and maintenance of the property since the plaintiff was resident in Australia. The defendant had informed the plaintiff that his brother had asked him to leave his house due to a dispute.

This was an oral arrangement allowing the defendant to reside on the premises without rent or charge and the defendant looks after the premise without charge or emoluments.

Subsequently the defendant commenced occupation of the premises as the caretaker and proceeded to construct a temporary shelter. Later the defendant moved into the main residential premises.

In following months the plaintiff received information that the defendant was not properly looking after the premises and for this reason the plaintiff decide to end the arrangement which the plaintiff had duly informed the defendant of.

The plaintiff through her solicitors had a notice served for the defendant to vacate the property. The defendant has wilfully refused to comply with the notice. He continues to occupy the property and use the electricity and water registered in favour of the plaintiff.

The plaintiff denies the structure on the property was damaged by a cyclone. According to her, the dwelling was in good, habitable condition.

She further denies she had approached the defendant and offered that the defendant builds a dwelling for himself and move onto the land.

According to her, the defendant had asked her for a 5 square meter area to build a shed to use as store for his belongings. The defendant used the building materials from the plaintiff's house to re-design and reconstruct the same house while he lived in it. The plaintiff did not request the defendant to erect a dwelling to satisfy any lease condition as the premises already had the plaintiff's dwelling house on it.

The plaintiff denies there was no arrangement made for the defendant to develop the property on her undertaking and a proper application will be made to the land lessor for transfer of the appropriate land to the defendant.

The plaintiff also denies indicating to the defendant that she will sell the property to the defendant if she decided to remain in Australia. Instead the defendant was to leave premises whenever she needed vacant possession of the same.

She denies giving access to the plaintiff's Fiji Electricity Authority (FEA) account for power to be connected to the new building. According to her Fiji Electricity Authority (FEA) connection was left disconnected for some time. She permitted the defendant to reconnect and use her account as he was the caretaker of the property.

She stayed on the residence of a week in 2015 and had questioned the defendant about why he had reconstructed the dwelling.

According to her, she had paid for the fencing and hired labourers to erect the fence.

3. In his opposition the defendant informs that he moved into the premises sometimes in mid-2011 as he was requested to do so as a caretaker initially. Neither he nor his family had proper accommodation on the property.

At this time the plaintiff had a small wood and iron dwelling house which was badly damaged by a cyclone. The dwelling could not occupy thereafter.

According to him, the plaintiff approached him and offered that he builds a dwelling for himself and moves onto the land.

He claims he was told that it was important that a dwelling was erected on the land as the lease condition by the land lessor required the tenant (the plaintiff) to develop the property. She told him that if the property is not developed she stands to lose the land.

He was not prepared to build a home however he claims to be persuaded by the plaintiff to accept the offer to build. The plaintiff offered him to build the dwelling in a corner of the land so that it will permit her to build and develop her property without his development being an obstruction to her proposed future development. He did so on plaintiff's undertaking that the portion of the land he utilises will be given to him and a proper application will be made to the land lessor for the transfer of the appropriate land.

The plaintiff had also indicated that if she decided to remain in Australia, she will sell the property to him.

The plaintiff also gave him access to Fiji Electricity Authority (FEA) account for power to be connected to the new dwelling, she is said to have given a written authority.

After he had constructed the wooden and iron dwelling and started residing there, the plaintiff had on many occasions lived with him on the property whilst on holiday in Fiji.

According to the defendant, he had spent approximately \$20,000 towards the construction of the wood and iron dwelling. He states he would not have spent his lives earning at his age on building a house if he was not promised that the dwelling will stay there permanently.

Since 2011, he has been residing on the property and developed the same by fencing and cultivating.

4. Order 113 of the High Court reads:

"where a person claims possession of land which he or she 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 or her license or consent or that of any predecessor in title of his or her, the proceedings may be brought by originating summons in accordance with the provision of this order"

5. This order provides for recovery of possession of land which is in wrongful occupation by trespassers – **The Supreme Court Practice, 1993 Volume 1, notes to Order 113, 1 – 8/1 at p1602.**

The explanation note further goes on to read:

"The exceptional machinery of this Order is plainly intended to remedy an exceptional mischief of a totally different dimension from that which can be remedied by a claim for the recovery of land by the ordinary procedure by Writ followed by Judgment in Default or under Order 14....."

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 possessing the land or as to wrongful occupation on the land without licence or consent and without any right, title or interest thereto."

6. Pathik J. in **Baiju v Kumar [1999] 45 FLR 72** had discussed who a trespasser or a squatter is: I shall reproduce the relevant paragraph from the Judgment.

In Department of Environment v James and others [1972] 3 All E.R. 629 squatters and trespassers are defined as:

"he is one who, without any colour of right, enters on an unoccupied house or land, intending to stay there as long as he can"

There Goulding J. said that:

".....where the plaintiff has proved his right to possession, and that the defendant is the trespasser, the Court is bound to grant an immediate order for possession....."

Another definition of "trespasser" is as set out in Clerk & Lindsell on Torts (15th Ed. 1982) page 631:

"A trespasser is a person who has neither right nor permission to enter on premises".

Also as was said by Lord Morris of-Borth-Y-Gest in British Railways Board v. Herrington [1972] A.C. 877 at 904:

"The term 'trespasser' is a comprehensive word; it covers the wicked and the innocent; the burglar, the arrogant invader of another's land, the walker blindly unaware that he is stepping where he has no right to walk, or the wandering child - all may be dubbed as trespassers".

I refer to Sir Frederick Pollock's statement in the case of Browne v. Dawson (1840) 12 Ad. & El 624 where he said:

"..... A trespasser may in any case be turned off land before he has gained possession, and he does not gain possession until there has been something like acquiescence in the physical fact of his occupation on the part of the rightful owner....."

7. There are two limbs to order 113 (**Raliwalala v. Kaicola a Suva high Court Civil Action No. HBC 114 of 2014 delivered on 30 January 2015; Tamata v Paul & Leslie a Lautoka High Court Civil Action No. HBC 14 of 2006 delivered on 07 October 2016**) and these are:

Firstly the plaintiff has to satisfy he has a legal right to claim possession of the land;

Once that is proven, the burden is on the defendant who needs to satisfy the court that he has a licence or consent of the owner or predecessor to occupy the land.

8. Annexure A to the affidavit of Ashika Deo sworn on 31 March 2017 is copy Memorandum of Lease.

This document is not a whole document in that the memorial page is missing.

Furthermore I note the copy was certified true copy by Registrar of Title on 5 December 2016 some six months prior to filing of the application in Court.

Hence I cannot make a definite finding that as at 04 May 2017 the plaintiff was still lessee of the said lease.

9. There is no dispute that the defendant came onto the property as a caretaker.

He claims to have developed a dwelling on the property costing him \$20, 000. He claims he did so on the persuasion of the plaintiff with a promise to be allocated a piece of land on the property.

10. With evidence before me I cannot hold that the defendant is a mere trespasser and make orders in favour of the plaintiff under order 113 of the High Court Rules.

11. There are allegations that ought to be heard on oral evidence for a proper determination.

12. There is an affidavit sworn by the daughter of the claiming to have authority to do so. However there is no authority attached and no reasons stated why the plaintiff could not depose the affidavits.

This is another reason why I do not find it appropriate to make orders on the plaintiff's application.

13. Hence I am converting the action into a Writ Action.

14. The plaintiff is to file and serve her statement of claim in 14 days.

The defendant is to file and serve statement of defence and counter-claim [if any] in 14 days thereafter.

The plaintiff is to file and serve reply to statement of defence and statement of defence to counter-claim [if any] in seven (7) days thereafter.

The plaintiff shall before the next Court date file and serve a summons for direction.

Matter will now be called for mention on 11 July 2019.

15. Cost to be in cause.




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Vandhana Lal [Ms]
Acting Master
At Suva.