

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

Civil Action No. HBC 39 of 2020

**BETWEEN:** **VIJAY RAM** Businessman of 2609 NE 5<sup>th</sup> CT, Renton, WA 98056, USA.

**APPELLANT/PLAINTIFF**

**AND:** **BEN LADPETER** and his dependants, servants, agents, together with all others whose names are unknown to the Plaintiff but occupying all that land comprised and described in Certificate of Title 39503.

**RESPONDENT/DEFENDANT**

**BEFORE:** **Hon. Mr. Justice Vishwa Datt Sharma**

**COUNSEL:** **Mr Savou J.** for the Appellant/Plaintiff  
**Mr Ladpeter B.** as the Respondent/Defendant

**Date of Ruling:** **28<sup>th</sup> October 2022 @ 9.30am**

**JUDGMENT**

[Notice of Appeal to Set Aside the Decision of Master delivered on 11<sup>th</sup> March 2021]

## INTRODUCTION

[1] The Plaintiff/Appellant, Vijay Ram filed a Notice of Appeal and sought for the following Orders:-

- (i) To set aside the Decision of the Master delivered on 11<sup>th</sup> of March 2021 dismissing the Plaintiff's application against the Defendant for Summary possession of the land comprised in CT 39503.
- (ii) An Order for vacant possession pursuant to *Order 113 of the High Court Rules* against the Defendant in respect of the land comprised in CT 39503.
- (iii) That the Plaintiff's bailiff filed Affidavit of service verifying the fact that the Originating summons and Affidavit was left at the premises on CT 39503 on the 19<sup>th</sup> of February 2020.
- (iv) And for such further orders as the Court deems just.

On the grounds:

- (i) The learned Master erred in dismissing the proceedings. *Order 113 of the High Court Rules does not specify that a proceeding can be rendered a nullity and dismissed de jure over purported non-compliance in relation to Order 113 Rules 4(2) (a) and (b).*
- (ii) The learned Master was obliged to apply *Order 2 Rule 1 of the High Court Rules* which states that a failure to comply with the requirements of the Rules whether in respect of time, manner, form or content or any other manner is to be treated as an irregularity and shall not nullify a proceeding.
- (iii) The learned Master erred in assuming that the Originating Summons and the Affidavit in support commencing these proceedings were not served in the manner stipulated *under Order 113 Rules 4(2) and (b) of the High Court Rules*. Under the laws of evidence, a Court cannot assume a fact without there being clear and incontrovertible evidence before it of such a fact.
- (iv) The learned Master acting in the interests of fairness and justice had to apply *Order 2 Rule 2 of the High Court Rules* by directing the Plaintiff to regularize, subject to costs, the filing of the Affidavit of service clarifying service in the manner prescribed *under Order 113 Rule 4(2) (a) and (b)*, and then proceed with the matter, without causing any prejudice to either the Defendant or the Plaintiff.
- (v) It is not in dispute that the Defendant was personally served with the Originating Summons and the Affidavit in support in accordance with *Order 113 Rule 4(1) (a) of the High Court Rules* therefore there is no basis, at law, for dismissing the case against him given that he has not shown a basis for lawful possession of the land, having admitted in his affidavit that he had no consent of the Plaintiff to occupy the land.

[2] The Plaintiff/Appellant furnished Court with his written submission and also made oral submissions at the hearing whilst the Defendant in person made oral submissions only.

[3] The Plaintiff/Appellant's contention herein is that the Master refused to grant the Order for Vacant

**Possession on the assumption that the Originating Summons Application had not been served in accordance with Order 113(4) (2) of the High Court Rules 1988.**

- [4] It is not in contention that the Defendant, Ben Ladpeter was properly served with the Application on 19<sup>th</sup> February 2020 in compliance **with Order 113 (4) (1) (a) of the High Court Rules 1988**. The Defendant filed his Affidavit in Opposition on 8<sup>th</sup> December 2020 but did not show a right to occupation because the Defendant does not show that he had obtained the consent of the Plaintiff (Vijay Ram) rather, according to the Defendant the tenant handed over the keys to the Defendant and he later came to know the the said property was owned by Vijay Ram (Plaintiff/Appellant).
- [5] **According to the Appellant/Plaintiff, the issue of facts in the instant case relates to whether or not service was affected in compliance with Order 113(4) (2) of the High Court Rules 1988. He further labours that this side issue on the appeal is not in relation to the substantive matter but is procedural and should be treated under Order 2 Rule 1 of the High Court Rules 1988 as a remedial one.**

#### **Analysis and Determination**

- [6] The Plaintiff/Appellant before the Master of the High Court filed an Originating Summons together with an Affidavit in Support deposed by Plaintiff Vijay Ram.
- [7] The substantive matter sought for by the Plaintiff as can be ascertained from the Plaintiff's submissions at paragraph 13 (i) and (ii) as appears hereunder is straightforward and has not been rebutted by the Defendant:-
- (i) That the Defendant is in unlawful occupation of the land without any license or consent or colour of right to occupy it; and
  - (ii) That the Plaintiff's Title to the land is indefeasible under the Land Transfer Act and therefore the Plaintiff's right to exclusive and uninterrupted possession of the land is paramount and protected under the Land Transfer Act.
- [8] The Defendant/Respondent Ben Ladpeter filed an affidavit in opposition.
- [9] The Plaintiff/Appellant submitted that:-
- (a) The Master erred in failing to first ascertain whether or not there had been compliance with **Order 113 (4) (2) of the High Court Rules 1988** before making her decision;
  - (b) Had the Master sought clarifications on this issue, it would have been made known to Master that the Originating Summons and re-dated documentation had not only been served on the Defendant personally but had also been left at the premises in full compliance with **Order 113 (4) (2) of the High Court Rules 1988**.
  - (c) The Originating Summons filed by the Plaintiff/Appellant pursuant to **Order 113 of the High**

**Court Rules 1988** sought for Vacant Possession of the property comprised and described in Certificate of Title No. 39503 being Lot 5 on DP 8035 situated at Vuninokonoko, and that **Ben Ladpeter and his dependants, servants, agents together with all others whose names are unknown to the Plaintiff but occupying all that land comprised and described in Certificate of Title 39503, to give vacant possession accordingly.**

(d) I make reference to **Order 113 rule 3 of the High Court Rules 1988** which provides as follows:-

**"3. The Plaintiff shall file in support of the originating summons an affidavit stating:**

- a. His interest in the land.
- b. The circumstances in which the land has been occupied without licence or consent and in which his claim to possession arises.
- c. **That he does not know the name of any person occupying the land who is not named in the summons."** (Emphasis added)

[10] In **Supreme Court Practice 1993 (White Book) page 1796** state as follows:-

**"113/8/11            Affidavit in Support**

At the time of the issue of the originating summons, the plaintiff must file an affidavit in support, in which he must state his interest in the land and the circumstances in which the land has been occupied without licence or consent and in which his claim to possession arises (see r.3 (a) and (b)).

In addition, the plaintiff must in his supporting affidavit state that he does not know the name of any person occupying the land who is not named in the summons (r.3(c)). There is no longer any requirement that the plaintiff should take or that he should state in his supporting affidavit that he has taken reasonable steps to identify such person or persons. **The essential point is that the use of the machinery of the Court against persons not named as defendants in proceedings is obviously and exceptional measure and can only be justified where the plaintiff claiming possession does not in fact know their named and state this fact positively in his supporting affidavit."** (Emphasis added)

[10] Upon the perusal of the Affidavit in Support of the Plaintiff, Vijay Ram at paragraph 4, he deposed that:-

**"I do not know the name of the person occupying the land who is not named in the Summons."**

[11] Abovementioned averment deposed at paragraph 4 of the Plaintiff's affidavit no doubt is in full compliance with the mandatory requirements of **Order 113 rule 3(c) of the High Court Rules 1988.**

[12] The Petitioner had the Originating Summons and the supporting affidavit served onto the Defendant, Ben Ladpeter on 19<sup>th</sup> February 2020 at Navua.

[13] However, the process server, Avineshwar Dutt Sharma did not leave a copy of the Originating Summons and the Affidavit in Support at that premises as it appears in the latter part of the written submission

of the Plaintiff at paragraph 10.

- [14] **He only served the Defendant Ben Ladpeter and not the dependents, servants, agents together with all other whose names are unknown to the Plaintiff but occupying all that land "as occupiers".**
- [15] In terms of *Order 113 rule 3(c) of the High court Rules, 1988*, the Court has a mandatory requirement and is required to make an order for vacant possession against the unnamed parties "occupiers" to the action as the Defendants.
- [16] Bearing in mind how the service of the substantive Originating Summons together with the Affidavit in Support was served by the process server, **I find that the Plaintiff did not comply with the mandatory requirements contained in Order 113 rule (4) (2) which deals with the service of the Summons to the parties 'unknown' to the Plaintiff which would invariably allow me to accede to the relief sought in the Plaintiff/Appellant's notice and grounds of appeal filed on 15<sup>th</sup> March 2021 respectively.**
- [17] There is evidence that the Defendant, Ben Ladpeter was served with the Originating Summons and the Affidavit in Support and prove of service has been filed by an affidavit of service in court.
- [18] However, **I find no evidence of any service of the Originating Summons and/or affidavit of service onto the dependents, servants, agents together with all others whose names are 'unknown' to the Plaintiff but occupying the Certificate of Title No. 39503.**
- [19] It is appropriate that I paraphrase the mandatory requirements at *Order 113 rule 4 of the High Court Rules:-*
- "4(1) *where any person in occupation of the land is named in the originating summons, the summons together with a copy of the affidavit in support shall be served on him or her-*
- (a) *Personally or in accordance with Order 10, Rule 5;*
- (b) *By leaving a copy of the summons and of the affidavit or sending them to him or her, at the premises; or*
- (c) *In such other manner as the court may direct.*
- (2) *The summons shall, in addition to being served on the named defendants, if any, in accordance with paragraph (1) be served, unless the Court otherwise directs, by:-*
- (a) *Affixing a copy of the summons and a copy of the affidavit to the main door other conspicuous part of the premises; and*
- (b) *If practicable, inserting through the letter box at the premises a copy of the summons and a copy of the affidavit enclosed in a sealed envelope addressed to "the occupiers".*
- (3) *Every copy of an originating summons for service under paragraph (1) or (2) shall be sealed with the seal of the High Court out of which the summons was issued.*
- (4) *Order 28, Rule 4 shall not apply to proceedings under the Order."*
- [20] **Order 113 rule 4(2)** has a mandatory requirement for the Plaintiff to serve and bring to the attention of the Originating Summons and the affidavit in support to **the 'unknown' Defendants i.e. dependents,**

**servants, agents together with all others therein in occupation of the said property CT 39503.**

[21] The service had not been effected on the 'unknown' persons in occupation of the said property CT 39503 Lot 5 on DP No. 8035 from whom the vacant possession of the property is sought.

[22] Further, the Appellant/Plaintiff apart from the above issue of service not being effected in compliance with **Order 113(4) (2) of the High Court Rules 1988**, raised another issue and argued that the **side issue in this appeal is not in relation to the substantive matter but is rather procedural in nature and should be treated under Order 2 Rule 1 of the High Court Rules 1988 as a remedial one.**

[23] **Order 2 Rule 1** of the high Court Rules, 1988 provides as follows:-

*"1(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.*

*(2) Subject to paragraph (3), the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1), and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein or exercise its powers under these Rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit.*

*(3) The Court shall not wholly set aside any proceedings or the writ or other originating process by which they were begun on the ground that the proceedings were required by any of these Rules to be begun by an originating process other than the one employed."*

[24] I note from the file records that the substantive matter was heard uncontested by the Master on 11<sup>th</sup> March 2021 and subsequently a **Ruling was delivered" that the application fails and is dismissed accordingly.**

[25] There was no application procedural or otherwise made by the Appellant/Plaintiff at any stage of the hearing of the substantive proceedings proper nor did the Appellant/Plaintiff endeavoured to draw the attention of the Court/Master that there was any non-compliance and/or anything left undone in respect of service on the 'occupiers' in terms of **Order 113(4) (2) of the High Court Rules, 1988.**

[26] It was an afterthought by the Appellant/Plaintiff that he realized that he had failed to comply with the requirements of **Order 113(4) (2)** of the high Court Rules, 1988 and endeavours to submit to Court now in the Appeal hearing that the side issue was only of a **'procedural nature and had no relation to the substantive matter'** and should have been treated and/or rectified by **Order 2 Rule 1 of the High Court Rules 1988** as a **remedial one.**

[27] As far as this court is concerned, the side issue raised herein with regards to the procedural aspect in fact has a **nexus to the substantive matter** and should have been rectified before the substantive hearing. One cannot just seek for the orders on the substantive matter via hearing first and then revert to seek rectification of the side issue in respect of any failure to carry out the procedural aspect of the

proceedings.

[28] For the aforesaid Rational, I hold that the Master made a correct Decision after conducting the hearing of the matter on 11<sup>th</sup> March 2021 resulting in the non-compliance of the requirements of **Order 113 r (4) (2) of the High Court Rules 1988** by the Plaintiff/Appellant and proceed to dismiss the Plaintiff/Appellant's Appeal seeking for the orders therein accordingly.

#### Costs

[29] The appeal matter proceeded to hearing. It is only fair that the Respondent/Defendant should be entitled to a reasonable cost summarily assessed at \$500. The cost to be paid within 14 days.

#### ORDERS

- i. The Plaintiff/Appellants Appeal filed on 15<sup>th</sup> March 2021 seeking an order for Setting Aside the Master's Decision of 11<sup>th</sup> March 2021 for Summary Possession of the land comprised in Certificate of Title No.39503 pursuant to Order 113 of the High Court Rules 1988 is accordingly dismissed.
- ii. An order for vacant possession against the Defendant pursuant to Order 113 of the High Court Rules, 1988 is also refused and dismissed, and
- iii. An order for the Plaintiff's Bailiff to file an Affidavit of service verifying the fact that the Originating Summons and affidavit was left at the premises on CT 39503 on 19<sup>th</sup> February 2020 is also refused and accordingly dismissed.
- iv. The Plaintiff/Appellant to pay the Respondent/Defendant summarily assessed costs of \$500 within 14 days timeframe.

Dated at Suva this 28<sup>th</sup> day of October 2022.



.....  
**VISHWA DATT SHARMA**  
**JUDGE**

cc: *Mr Jiaoji Savou, Suva.*  
*Mr. Ben LADPETER, Suva.*