

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL APPELLATE JURISDICTION

Civil Case No. HBC 41 of 2020

ON AN APPEAL from the Judgment delivered by the Master on 12 May 2022 in Civil Action No. HBC 41 of 2020

BETWEEN: **NASINU LAND PURCHASE AND HOUSING CO-OPERATIVE SOCIETY LIMITED** a co-operative society duly incorporated pursuant to the Co-operative Societies Ordinance Cap 219 and having its principal place of business at 68 Suva Street, Suva.

APPELLANT (ORIGINAL PLAINTIFF)

AND : **INDAR KISHORE** of Certificate of Title No. 44012 being Lot 1 on Deposit Plan No. 11360 in the District of Naitasiri in the Island of Viti Levu in the Fiji Islands situated near Y. M. Haniff Road.

**FIRST RESPONDENT
(ORIGINAL FIRST DEFENDANT)**

AND : **SHALEN** of Certificate of Title No. 44012 being Lot 1 on Deposit Plan No. 11360 in the District of Naitasiri in the Island of Viti Levu in the Fiji Islands situated near Y. M. Haniff Road.

**SECOND RESPONDENT
(ORIGINAL SECOND DEFENDANT)**

AND : **MUNI NANDAN** of Certificate of Title No. 44012 being Lot 1 on Deposit Plan No. 11360 in the District of Naitasiri in the Island of Viti Levu in the Fiji Islands situated near Y. M. Haniff Road.

**THIRD RESPONDENT
(ORIGINAL THIRD DEFENDANT)**

AND : **VIREND** of Certificate of Title No. 44012 being Lot 1 on Deposit Plan No. 11360 in the District of Naitasiri in the Island of Viti Levu in the Fiji Islands situated near Y. M. Haniff Road.

**FOURTH RESPONDENT
(ORIGINAL FOURTH DEFENDANT)**

A N D : EDWARD of Certificate of Title No. 44012 being Lot 1 on Deposit Plan No. 11360 in the District of Naitasiri in the Island of Viti Levu in the Fiji Islands situated near Y. M. Haniff Road.

**FIFTH RESPONDENT
(ORIGINAL FIFTH DEFENDANT)**

A N D : RABE of Certificate of Title No. 44012 being Lot 1 on Deposit Plan No. 11360 in the District of Naitasiri in the Island of Viti Levu in the Fiji Islands situated near Y. M. Haniff Road.

**SIXTH RESPONDENT
(ORIGINAL SIXTH DEFENDANT)**

A N D : AJINESH KUMAR of Certificate of Title No. 44012 being Lot 1 on Deposit Plan No. 11360 in the District of Naitasiri in the Island of Viti Levu in the Fiji Islands situated near Y. M. Haniff Road.

**SEVENTH RESPONDENT
(ORIGINAL SEVENTH DEFENDANT)**

A N D : RONIL NALESH KISHORE aka BANDU of Certificate of Title No. 44012 being Lot 1 on Deposit Plan No. 11360 in the District of Naitasiri in the Island of Viti Levu in the Fiji Islands situated near Y. M. Haniff Road.

**EIGHTH RESPONDENT
(ORIGINAL EIGHTH DEFENDANT)**

A N D : SUKU of Certificate of Title No. 44012 being Lot 1 on Deposit Plan No. 11360 in the District of Naitasiri in the Island of Viti Levu in the Fiji Islands situated near Y. M. Haniff Road.

**NINTH RESPONDENT
(ORIGINAL NINTH DEFENDANT)**

A N D : GOPAL GYANENDRA of Certificate of Title No. 44012 being Lot 1 on Deposit Plan No. 11360 in the District of Naitasiri in the Island of Viti Levu in the Fiji Islands situated near Y. M. Haniff Road.

**TENTH RESPONDENT
(ORIGINAL TENTH DEFENDANT)**

A N D : **ANISHA** of Certificate of Title No. 44012 being Lot 1 on Deposit Plan No. 11360 in the District of Naitasiri in the Island of Viti Levu in the Fiji Islands situated near Y. M. Haniff Road.

**ELEVENTH RESPONDENT
(ORIGINAL ELEVENTH DEFENDANT)**

A N D : **AMINI** of Certificate of Title No. 44012 being Lot 1 on Deposit Plan No. 11360 in the District of Naitasiri in the Island of Viti Levu in the Fiji Islands situated near Y. M. Haniff Road.

**TWELFTH RESPONDENT
(ORIGINAL TWELFTH DEFENDANT)**

A N D : **VIKASH** of Certificate of Title No. 44012 being Lot 1 on Deposit Plan No. 11360 in the District of Naitasiri in the Island of Viti Levu in the Fiji Islands situated near Y. M. Haniff Road.

**THIRTEENTH RESPONDENT
(ORIGINAL THIRTEENTH DEFENDANT)**

A N D : **RITESH** of Certificate of Title No. 44012 being Lot 1 on Deposit Plan No. 11360 in the District of Naitasiri in the Island of Viti Levu in the Fiji Islands situated near Y. M. Haniff Road.

**FOURTEENTH RESPONDENT
(ORIGINAL FOURTEENTH DEFENDANT)**

A N D : **JENENDRA LAL** of Certificate of Title No. 44012 being Lot 1 on Deposit Plan No. 11360 in the District of Naitasiri in the Island of Viti Levu in the Fiji Islands situated near Y. M. Haniff Road.

**FIFTEENTH RESPONDENT
(ORIGINAL FIFTEENTH DEFENDANT)**

A N D : **VINE COA** of Certificate of Title No. 44012 being Lot 1 on Deposit Plan No. 11360 in the District of Naitasiri in the Island of Viti Levu in the Fiji Islands situated near Y. M. Haniff Road.

**SIXTEENTH RESPONDENT
(ORIGINAL SIXTEENTH DEFENDANT)**

A N D : **FARIDA ALI** of Certificate of Title No. 44012 being Lot 1 on Deposit Plan No. 11360 in the District of Naitasiri in the Island of Viti Levu in the Fiji Islands situated near Y. M. Haniff Road.

**SEVENTEENTH RESPONDENT
(ORIGINAL SEVENTEENTH DEFENDANT)**

A N D : **ISIRELI TAWAKE** of Certificate of Title No. 44012 being Lot 1 on Deposit Plan No. 11360 in the District of Naitasiri in the Island of Viti Levu in the Fiji Islands situated near Y. M. Haniff Road.

**EIGHTEENTH RESPONDENT
(ORIGINAL EIGHTEENTH DEFENDANT)**

A N D : **APETAIA** of Certificate of Title No. 44012 being Lot 1 on Deposit Plan No. 11360 in the District of Naitasiri in the Island of Viti Levu in the Fiji Islands situated near Y. M. Haniff Road.

**NINETEENTH RESPONDENT
(ORIGINAL NINETEENTH DEFENDANT)**

A N D : **SAILASA** of Certificate of Title No. 44012 being Lot 1 on Deposit Plan No. 11360 in the District of Naitasiri in the Island of Viti Levu in the Fiji Islands situated near Y. M. Haniff Road.

**TWENTIETH RESPONDENT
(ORIGINAL TWENTIETH DEFENDANT)**

A N D : **BANDU** of Certificate of Title No. 44012 being Lot 1 on Deposit Plan No. 11360 in the District of Naitasiri in the Island of Viti Levu in the Fiji Islands situated near Y. M. Haniff Road.

**TWENTY FIRST RESPONDENT
(ORIGINAL TWENTY FIRST DEFENDANT)**

A N D : **LIVAI VACALEGA** of Certificate of Title No. 44012 being Lot 1 on Deposit Plan No. 11360 in the District of Naitasiri in the Island of Viti Levu in the Fiji Islands situated near Y. M. Haniff Road.

**TWENTY SECOND RESPONDENT
(ORIGINAL TWENTY SECOND DEFENDANT)**

A N D : **ESAVA DELAI** of Certificate of Title No. 44012 being Lot 1 on Deposit Plan No. 11360 in the District of Naitasiri in the Island of Viti Levu in the Fiji Islands situated near Y. M. Haniff Road.

**TWENTY THIRD RESPONDENT
(ORIGINAL TWENTY THIRD DEFENDANT)**

A N D : **EMELE ROKONAWA** of Certificate of Title No. 44012 being Lot 1 on Deposit Plan No. 11360 in the District of Naitasiri in the Island of Viti Levu in the Fiji Islands situated near Y. M. Haniff Road.

**TWENTY FOURTH RESPONDENT
(ORIGINAL TWENTY FOURTH DEFENDANT)**

A N D : **VERENIKI BATIKALOU** of Certificate of Title No. 44012 being Lot 1 on Deposit Plan No. 11360 in the District of Naitasiri in the Island of Viti Levu in the Fiji Islands situated near Y. M. Haniff Road.

**TWENTY FIFTH RESPONDENT
(ORIGINAL TWENTY FIFTH DEFENDANT)**

A N D : **MOSESE** of Certificate of Title No. 44012 being Lot 1 on Deposit Plan No. 11360 in the District of Naitasiri in the Island of Viti Levu in the Fiji Islands situated near Y. M. Haniff Road.

**TWENTY SIXTH RESPONDENT
(ORIGINAL TWENTY SIXTH DEFENDANT)**

A N D : **BOBBY** of Certificate of Title No. 44012 being Lot 1 on Deposit Plan No. 11360 in the District of Naitasiri in the Island of Viti Levu in the Fiji Islands situated near Y. M. Haniff Road.

**TWENTY SEVENTH RESPONDENT
(ORIGINAL TWENTY SEVENTH DEFENDANT)**

A N D : **FAIYAZ** of Certificate of Title No. 44012 being Lot 1 on Deposit Plan No. 11360 in the District of Naitasiri in the Island of Viti Levu in the Fiji Islands situated near Y. M. Haniff Road.

**TWENTY EIGHTH RESPONDENT
(ORIGINAL TWENTY EIGHTH DEFENDANT)**

A N D : **FILIFE** of Certificate of Title No. 44012 being Lot 1 on Deposit Plan No. 11360 in the District of Naitasiri in the Island of Viti Levu in the Fiji Islands situated near Y. M. Haniff Road.

**TWENTY NINTH RESPONDENT
(ORIGINAL TWENTY NINTH DEFENDANT)**

A N D : **THE OCCUPIERS** of Certificate of Title No. 44012 being Lot 1 on Deposit Plan No. 11360 in the District of Naitasiri in the Island of Viti Levu in the Fiji Islands situated near Y. M. Haniff Road.

**RESPONDENTS
(ORIGINAL DEFENDANTS)**

Appearances : Ms Komal Singh with Mr Krish Chand for the appellant.
Mr Kevin Skiba for the 24th respondent.
Other respondents in person.

Hearing : Friday, 30th September, 2022 at 9.00 a.m

Judgment : Friday, 02nd December, 2022 at 9.00 a.m

JUDGMENT

(A) INTRODUCTION

[1]. This is an appeal against the Judgment of the learned Master handed down on 12.05.2022.

[2]. By that Judgment, the learned Master dismissed the appellant's [the original plaintiff's] originating summons filed pursuant to Order 113 of the High Court Rules, 1988 seeking to recover vacant possession of the land comprised in Certificate of Title No:- 44012 being Lot 1 on deposited plan no: 11360 in the district of Naitasiri in the land of Viti Levu against 29 **named respondents** [the original defendants] and against **unknown occupiers** of the land.

[3]. Being aggrieved by the said Judgment, the appellant appealed against the Judgment of the learned Master.

(B) THE GROUNDS OF APPEAL

[4]. The appellant in its notice of appeal filed on 26.5.2022 has set out seven [07] grounds of appeal.

[5]. I do not intend to address the said grounds separately because they overlap but shall crystallize the same into the issues that were argued on.

(C) GROUND (1), (2), (3) and (5)

[6]. By an originating summons the appellant brought proceedings under Order 113 of the High Court Rules, 1998 to recover possession of property comprised in Certificate of Title No. 44012 **against 29 named respondents and against unknown occupiers of the property** on the ground that they are in occupation of the property without license or consent from the appellant.

[7]. The learned Master dismissed the originating summons filed against the named 29 respondents and **against unknown occupiers of the property** concluding that proper service of the summons had not been effected under Order 113, Rule 4(2) of the High Court Rules, 1988.

[8]. The learned Master at paragraph (19) to (27) of the judgment reasoned thus:

Is the Plaintiff in compliance with Order 113 Rule 4 of the Rules?

19. *The first affidavit of service is filed on 14th February 2020 and sworn by Jope Tikoisuva on 13th February 2020.*

20. *As per the server he on “12th February 2020 at 1.45pm personally serve **THE DEFENDANTS** personally at their place of residence comprised in certificate of title no. 44012 being Lot 1 on Deposit Plan No. 11360 in the District of Naitasiri in the island of Viti Levu in the Fiji Islands situated near Y. M. Haniff Road with a true copy of the ...”*

21. *On paragraph 3 of the affidavit of service the server states that he pasted the documents on the doors of four Defendants. My understanding is that these four Defendants are out of the named Defendants as on paragraph 6 of the said affidavit of service, according to the server the other twenty-five Defendants refused to acknowledge service.*
22. *Annexure "A" to the affidavit of service is copy of originating summon and affidavit in support.*
23. *Annexure "B" are some photographs. It does not identify who the people are in particular whether they are the named Defendants or other occupants on the premises.*
24. *Another set of affidavit of service was filed by Plaintiff's solicitors on 04th March 2020.*
The server was Jope Tikoisuva and he states the following:
 - (a) *That I did on the 12th day of February 2020, at 1.45pm serve the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth. Fourteen, Fifteenth, Sixteenth, Seventeenth, Nineteenth, Twenty First, Twenty Second, Twenty Third, Twenty Fifth, Twenty Sixth, Twenty Seventh and Twenty Ninth personally at their place of occupation comprised in Certificate of Title No. 44012 being Lot 1 on Deposit Plan No. 11360 in the District of Naitasiri in the Island of Viti Levu in the Fiji Islands situated near Y. M Haniff Road with a true copy of Originating Summons, Affidavit in Support and Acknowledgment of Service filed on 3 day of February 2020.*
 - (b) *Annexed hereto and marked as "A" are Photographs taken of the service effected.*
 - (c) *That I was unable to locate the Eighteenth, Twentieth, Twenty Fourth and Twenty Eighth Defendants. Service of the Originating Summons, Affidavit in Support and Acknowledgment of Service on the main door of the house belonging to Sireli Tawala, Sailasa, Emele Koronawa and Faiyaz respectively.*

(d) *Annexed hereto and marked as "B" are photographs taken of the service effected.*

25. *In the current proceedings, the Plaintiff is also seeking orders against "The Occupiers".*

26. *As per the affidavit of service filed on 04th March, 2020 there is no mention if the server effected service pursuant to Order 113 Rule 4(2) of the High Court Rules.*

27. *Neither can service as effected as stated in the affidavit of service filed on 14th February 2020 be held to be in compliance with said provision of the Rules.*

[9]. The learned Master at paragraph (28) and (29) of the judgment concluded thus:

28. *The Plaintiff is seeking recovery of possession of the subject land not Only against the named Defendants but other Occupiers hence it is prudent they had to comply with the mandatory requirements of Order 113 Rule 4(2) of the Rules.*

29. *Hence, I find that it would be an abuse of process and denial of due process for the other occupants who have not been put on notice as required under Order 113 Rule 4(2) of the Rules.*

[10]. The learned Master gave her mind to the following authorities [precedents];

(A) *Sharma and Another v Kumar, High Court Suva, Case No. 34 of 2013, Judgment delivered on 25.4.2013.*

(B) *Narsaiya & Ors v Narsiya, Suva High Court Probate Action No: HPP 36 of 2017. Judgment delivered on 12.01.2018.*

[11]. The learned Master stated the followings at paragraph (12) to (18) of the written Judgment;

12. *In Sharma and Another v Kumar, a Suva High Court Civil Action No. 34 of 2013*

(Delivered on 25th April 2013) Amaratunga J. whilst determining an application for setting aside an order for possession dealt with the issue of service of the summons and in particular to the parties unknown to the Plaintiff in that case.

13. *On paragraph 9 of the said judgment, he stated the provision of Order 113 Rule 4 (2) was a mandatory requirement.*

14. *Further on paragraph 11 he held:*

This is a mandatory requirement since the summons needed to be brought to the notice of the unnamed parties. The non-compliance of the said mandatory requirements would make the order for possession to the plaintiff nugatory. The compliance of Order 113 rule 4 (2) is mandatory since there is a mandatory requirement for the plaintiff to allege that there are parties unknown who are in possession of the premises. In order to obtain an order against unknown parties the plaintiff is required to comply with the additional methods of service of the summons. If this is not done the mandatory process has not been followed and any subsequent order needs to be set aside.

15. *His Lordship had made similar comments in the case of **Narsaiya & Ors v Narsaiya, a Suva High Court Probate Action No. HPP 36 of 2017** (delivered on 12th January 2018) where he held:*

9. *Order 113 is specifically designed for recovery of possession of a premises. The order obtained through this method not only can be applied to the Defendant or his agents but also for everybody whether that person had obtained possession independently of defendant. See *University of Essex v Dalemal and others* [1980] W.L.R. 1301; [1980] 2 ALL ER 743.*

10. *So, in order to safeguard rights of the people who are subjected to an order made in terms of the said provision in the High Court Rules, special procedural safeguards are in place and these are mandatory. One such provision is regarding the service of the originating summons, not only to the defendant but also for other party “interested”.*

16. *In the said case, Amaratunga J. found the Plaintiff had not complied with Order 113 Rule 4(2) (a) and (b) of the High Court Rules and neither was there any court order to deviate from the procedure. Hence, he held the said provision of the rule was “mandatory and that it gave notice not only to the named defendant but also for any other person as the order obtained under said High Court Rules can be applied to any person and not only to the defendant”.*

17. *He further went on to state:*

“(14) Any order for possession obtained in terms Order 113 of the High Court Rules of 1988 can be an order in character of an action in rem. An order can be obtained in relation to the premises as opposed to a named defendant. So Order 113 rule 4 (2) is a mandatory provision and lack of evidence of such compliance of that is fatal irregularity for this action.”

18. *In Sharma’s case [supra], the Plaintiff’s Counsel submitted that since the named Defendant was present in Court and represented and that the said Defendant was not successful in establishing a right of possession, the Court may vary the order and grant eviction of the named Defendant. However, His Lordship came to the following conclusion:*

I do not think that such variation of the order that granted immediate possession is warranted in the circumstances of the case. The plaintiff has failed to comply with two mandatory requirements contained in the Order 113 of the High Court Rules of 1988 and they are Order 113 rule. 3(c) and Order 113 rule 4(2). These are mandatory requirements. The circumstances of this case does not warrant to vary the order that granted possession to the Plaintiff to an eviction order against the named Defendant, who was served with the summons. No eviction order was sought in the summons and such variation will be not in accordance with the summons and also with Order 113 of the High Rules of 1988 considering the circumstances of the case.

[12]. The gist of the submissions made by Ms. Singh counsel for the appellant is this; (reference is made to paragraph 4.17, 4.18, 4.21, 4.25 and 4.27 of the written submissions of the appellant filed on 29.09.2022]

- 4.17 *The Appellant further submits that those unnamed illegal occupiers are either related to the named Respondents or share the same compound area as their dwellings are built closely together. Therefore, **the service to those occupiers is deemed to be effected under Order, 113 R 4 (2) since the Originating Summons, the Affidavit in Support and the Acknowledgement of Service had been pasted on either the walls or the fence of the dwellings** as provided in the Affidavit of Service marked as annexure “A” and “B” respectively.*
- 4.18 *The pasting of the Originating Summons and the Affidavit in Support on the walls or the houses and on the fence, where people share the same Compound or block of land is compliance with Order 113 R (2). In the absence of such procedure, it would have been very difficult to serve the occupiers as the Respondents do not cooperate and do not allow people to enter their dwellings or land during such service.*
- 4.21 *The Appellant submits that the Second, Fifth, sixth, Eleventh, Fourteenth, Seventeenth, Nineteenth, Twentieth, Twenty Sixth, Twenty seventh, Twenty Eighth and Twenty Ninth Respondents did not oppose the Appellant’s application to recover possession on the grounds that the Second, Fifth, Sixth, Eleventh, Fourteenth, Nineteenth, Twentieth, Twenty Sixth, Twenty Seventh, Twenty Eighth and Twenty Ninth Respondents had not been served with the Appellant’s Originating Summons and these Respondents consented to Appellant's application to recover vacant possession.*
- 4.25 *Other occupiers who had been joined in the proceedings by virtue of them being an occupier, had not opposed the application on the grounds that they have not been served and in the Affidavit in Opposition filed by them, they had failed to establish a right to be in occupation of the Appellants land.*
- 4.27 *The Appellant submits that none of the Respondents who had filed an Affidavit in Opposition opposing the application by the Appellant to recover vacant possession had been able to satisfy the Learned Master that they had consent from the Appellant or his predecessor in title to occupy the Appellants land, nevertheless, the Appellants application still got dismissed.*

[13]. With respect, I **do not** find these submissions persuasive.

- [14]. I cannot accept the argument of the appellant that it had complied with the requirements of service in relation to unknown occupiers as per Order 113, Rule 4(2) of the High Court Rules, 1988.
- [15]. I cannot accept the argument of the appellant that “*the pasting of the originating summons and the affidavit in support on the walls or the houses and on the fence is in compliance with Order 113, rule 4(2) of the High Court Rules.*”
- [16]. The dwellings of the persons unknown were *not barricaded* so in order to satisfy the requirement of Order 113, rule 4(2) (a) the originating summons and the affidavit in support should have been pinned on the main door so that the summons and the affidavit is visible. I see no reason whatever to give the words in Order 113, rule 4(2)(a) other than its ordinary and natural meaning. I conclude that the originating summons had not been effected in accordance with Order 113, Rule 4(2) of the High Court Rules, 1988. The compliance with Order 113, Rule 4(2) is a *condition precedent* to be satisfied by the appellant before invoking the jurisdiction of the court and therefore the fact that the unknown occupiers did not contest the appellant’s application to recover possession is **totally immaterial**. The compliance with Order 113, Rule 4(2) is a condition precedent to found the jurisdiction of the court. It is therefore irrelevant whether harm has been occasioned to the unknown occupiers as a result of the appellant’s failure to comply with the mandatory requirement of Order 113, Rule 4(2). It is important to discern the distinction between failure to observe procedural safeguards which is a condition precedent to found the court’s jurisdiction and mere technical irregularities. The court may waive technical irregularities. The court cannot waive compliance with mandatory procedural safeguards which is a condition precedent to found the court’s jurisdiction.
- [17]. The learned Master is correct in concluding that there has been no sufficient service within Order 113, Rule 4(2) of the High Court Rules, 1998.
- [18]. The learned Master was quite right. I dismiss grounds of appeal no – (1), (2), (3) and (5) as bereft of merit.

(D) Ground (4)

- [19]. The ground of appeal no. (4) is founded on the learned Master’s is finding at paragraph (29) of the Judgment which reads as follows:

(29) *Hence, I find that it would be an abuse of process and denial of due process for the other occupants who have not been put on notice as required under Order 113, Rule 4(2) of the Rules.*

[20]. The learned Master in paragraph (28) of the written judgment concluded:

28. *The Plaintiff is seeking recovery of possession of the subject land not only against the named Defendants but other Occupiers hence it is prudent they had to comply with the mandatory requirements of Order 113 Rule 4(2) of the Rules.*

[21]. The gist of the submissions made by Ms. Singh, counsel for the appellant is this; (reference is made to paragraph 5.1, 5.2, 5.3, 5.10 and 5.11 of the appellant's written submissions filed on 29.09.2022).

5.1 *The Learned Master erred and/or misdirected herself in law and in fact in holding that the Appellant's application for recovery of land was an abuse of process and denial of due process.*

5.2 *The Appellant submits that the named Respondents and the Occupiers do not have any legal interest in the property. The occupation on the Appellants land has not been consented by the Appellant. The only manner by which any person can reside on the Appellant's land is if they become a paid member of the Co-operative.*

5.3 *There is no evidentiary material before the Court to suggest that an Order for possession cannot be made and that the application by the Appellant for the recovery of land was an abuse of process and denial of due process.*

5.10 *The Appellant had complied with all requirements of service and none of the Respondents were able to establish a right of occupation in the land of the Appellant which qualified the Appellant for recovery of its land.*

5.11 *The Appellant could not have resorted to any other means of evicting mass illegal occupants than filing an application pursuant to Order 113 of the High Court Rules, therefore, the application before the Learned Master was not an abuse of process.*

[22]. Ms. Singh in her written submissions relied on the following authorities (precedents):

- *Arya Pratinidhi Sabha v Merrum John Sami & Anr.*¹
- *Baiju v Jai Kumar*²
- *Dutten v Manchester Airport*³.
- *Adarsh Vikash Sharma & Anr v Rohit Kumar & Ors*⁴.

[23]. I gave my mind to the authorities referred to by Ms. Singh.

[24]. I do **not** find the submissions of Ms. Singh persuasive.

[25]. Nevertheless, I find that it was **not open** to the learned Master to conclude that the appellant's lawsuit against the unknown occupiers of the land is an abuse of process of the court **merely because the service of the originating summons had not been effected on the unknown occupiers of the premises in accordance with Order 113, Rule 4(2) of the High Court Rules, 1988.**

[26]. The public interest in the administration of justice requires that the court protect its ability to function as a court of law by ensuring that its processes are used fairly by state and citizens alike. Unless the court protects its ability so to function in that way, its failure will lead to an erosion of public confidence by reason of concern that the court's processes may lend themselves to oppression and injustice. The key elements of abuse of process is the malicious and deliberate misuse of regularly issued civil or criminal court process that is not justified by the underlying legal action, and that the abuser of process is interested only in accomplishing some improper purpose. Abuse of process is an intentional tort.

[27]. I already found that the service of the originating summons had not been effected on the unknown occupiers of the premises in accordance with Order 113, Rule 4(2) of the High Court Rules, 1988. This is a **fatal irregularity of a procedural safeguard** as opposed to **a mere technical irregularity**. What is important to discern is that being wrong, being stubborn and being stupid is not enough to find abuse of process? One must intentionally seek to abuse the court system. The key is state of

¹ HC Suva, Civil Action No. HBC 350 of 2008. Date of Ruling 09.06.2009.

² [1999] 45 FLR 74

³ LTA 98/7462/1, Date of Judgement 18.1.1999

⁴ HC Suva, Civil Action No. HBC 34 of 2013, Date of Decision 25.4.2013.

mind and that is one reason such cases may be difficult to prove. The learned Master had made no specific finding on the question whether the appellant had some improper collateral purpose or motive in initiating and maintaining the proceeding against the respondents, so as to cause improper vexation and oppression. Therefore, it was not open for the learned Master to conclude that the appellant's proceedings for vacant possession constituted an abuse of process of the court.

(E) Ground (6) and (7)

[28]. In paragraph (28), (29) and (30) of the written judgment, the learned Master concluded thus:

28. *The Plaintiff is seeking recovery of possession of the subject land not only against the named Defendants but other Occupiers hence it is prudent they had to comply with the mandatory requirements of Order 113 Rule 4(2) of the Rules.*

29. *Hence, I find that it would be an abuse of process and denial of due process for the other occupants who have not been put on notice as required under Order 113 Rule 4(2) of the Rules.*

30. *For this reason, the application shall fail and is dismissed. It is only just and fair to set aside the orders made for possession in the proceedings and I order so pursuant to Order 113 Rule 8 of the Rules.*

[29]. The gist of the submissions made by Ms Singh, counsel for the appellant is this, (reference is made to paragraph 6.1, 6.2, 6.5, and 6.9 of the written submissions filed on behalf of the appellant on 29.09.2022).

6.1 *The Learned Master erred and/or misdirected herself in law in dismissing the Appellant's application for recovery of land and further setting aside the Orders made for possession earlier in the proceedings pursuant to Order 113 R 8 of the High Court Rules of Fiji.*

6.2 *The decision is also wrong and tantamount to a wrongful exercise of the discretion given under Order 113, R 8 of the High Court Rules of Fiji. Order 113, R 8 of the High Court Rules reads:*

“The Judge may, on such terms as he or she thinks just, set aside or vary any order made in proceeding under this order.”

6.5 *The Learned Master's ruling does not indicate that any of the Respondents had sought the Orders made in proceedings under O.113 to be set aside pursuant to O. 113, R 8. The Learned Master exercised the discretion without objections by the Respondents or any such application for set aside.*

6.9 *The Learned Master in the Appellants case failed to exercise the discretionary power with caution and such decision by the Learned Master is also wrong and tantamount to a wrongful exercise of the discretion.*

[30]. As per the court record, the learned master has earlier in the proceedings made order for vacant possession against 2nd, 5th, 6th, 11th, 12th, 14th, 19th, 20th, 26th, 27th, 28th and 29th **named respondents**.

[31]. The learned Master in paragraph (29) and (30) of the written Judgment concluded thus:

(29) *Hence, I find that it would be an abuse of process and denial of due process for the other occupants who have not been put on notice as required under Order 113 Rule 4(2) of the Rules.*

(30) *For this reason, the application shall fail and is dismissed. It is only just and fair to set aside the orders made for possession earlier in the proceedings and I order so pursuant to Order 113, Rule 8 of the Rules.*

[32]. Order 113, Rule (8) of the High Court Rules, 1988 is in the following terms:

“The Judge may, on such terms as he or she thinks just, set aside or vary any order made in proceedings under this Order”.

[33]. The natural and ordinary meaning of Order 113, Rule 8 is that any order made earlier in the proceedings under Order 113 may be set aside **if the court think just to do so**.

[34]. The central issue is whether there was material before the Master to set aside the previous order for vacant possession made against the 2nd, 5th, 6th, 11th, 12th, 14th, 19th, 20th, 26th, 27th, 28th and 29th **named respondents**.

[35]. The finding of the learned Master that the summons had not been effected on the **unknown occupiers** of the land in accordance with Order 113, Rule 4(2) is of **no** assistance at all to the Master to set aside the previous order for vacant possession made against the 2nd, 5th, 6th, 11th, 12th, 14th, 19th, 20th, 26th, 27th, 28th and 29th **named respondents**. I find that such decision by the learned Master lacked a reasonable basis in fact and law therefore it tantamount to a wrongful exercise of the discretion.

ORDERS

- [1]. The appeal against the judgment of the learned Master dated 12.05.2022 is **partly allowed**.
- [2]. The learned Master's order made pursuant to Order 113, Rule 8 of the High Court Rules, 1988 setting aside the previous order for vacant possession made earlier in the proceedings against 2nd, 5th, 6th, 11th, 12th, 14th, 19th, 20th, 26th, 27th, 28th and 29th **named respondents** is set aside.
- [3]. The parties to bear their own costs.




02/12/2022
Jude Nanayakkara
JUDGE

High Court – Suva
Friday, 02nd December, 2022.

