

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

CIVIL ACTION NO.: HBC 219 of 2018

BETWEEN : MOHAMMED BINSAD
PLAINTIFF

AND : MOHAMMED INTAZ
DEFENDANT

APPEARANCES/REPRESENTATION

PLAINTIFF : Mr. J. Bale [Jackson Bale Lawyers]
DEFENDANT : Ms. L. Satula & Mr. J. Reddy [Jiten Reddy Lawyers]
RULING BY : Acting Master Ms Vandhana Lal
DELIVERED ON : **19 August 2022**

INTERLOCUTORY RULING

1. This is the Defendant's application dated 18th April 2019 to set aside the orders made on 06th March 2019 and for leave for the Defendant to defend the proceedings.

The Defendant also seeks stay of execution of the judgment/order.

The application is made pursuant to Order 8 and Order 113 of the High Court Rules and is supported by an affidavit sworn by Mohammed Binsad on 18th April 2019.

2. The Defendant's argument can be summarized as follows.

The Plaintiff had filed civil action HBC 194/18 seeking orders for vacant possession of the property that is subject to the current proceeding.

On 17th July 2018 the said matter was struck out.

Thereafter the Plaintiff filed the current proceedings for vacant possession.

This matter was called on 15th August 2018 when his counsel raised preliminary issues:

- *Plaintiff had filed action No. HBC 194/18 and the matter was struck out;*
- *Plaintiff again seeks orders for vacant possession hence this proceeding is an abuse of process.*

This matter was listed for mention on 03rd October 2018 to fix a hearing date. Another counsel was instructed to appear.

He cannot recall if he received any hearing date.

On 15th March 2019 his counsel was served with an order.

On 19th March 2019 his counsel filed an application for setting aside and stay of the order. The application was listed for mention on 15th March 2019.

The Defendant claims the matter was not listed and adjourned to 17th April 2019.

Due to unavailability of his counsel on 17th April 2019, his counsel instructed Messrs Toganivalu & Valenitabua Lawyers to appear on instruction who agreed to appear.

However, on 18th April 2019 Messrs Toganivalu & Valenitabua Lawyers informed they could not appear as their counsel had to appear at Nasinu Court.

The Defendant claims he has filed a writ of summon vide action number 144/2018 seeking damages etc or property he transferred to his name and he has also filed another application for a second caveat.

The Defendant wishes to raise triable issues for court's determination.

3. According to the Plaintiff, the court sheriff has completed execution of the court order and the Plaintiff has vacant possession of the property.

He further claims the application is an abuse of court process as the Defendant on 19th March 2019 filed a similar application which was struck out on 17th April 2019.


The Defendant has made application pursuant to Order 8 and 113 of High Court Rules instead of appealing the decision of the court.

Determination

4. The Defendant has filed a notice of motion.
5. Order 32 rule 1 of the High Court Rules requires that "*every application in chambers (exception being Order 25 rule 7) not made ex-parte must be made by summons*".
6. The Defendant is not in compliance with Order 32(1) which is a mandatory provision.
7. Furthermore, the Defendant is invoking the Court's jurisdiction pursuant to Order 8 and Order 113 of the High Court Rules.
8. Order 8 of the Rules outlines requirements of forms for originating and other motions.
9. This rule has no relevance to the application, since as stated earlier Order 32 Rule 1 requires a summon to be filed.
10. Order 113 of the Rules deals with summary proceeding for possession of land. Under this provision of the Rules, the Plaintiff claims that the Defendant has entered or remind in occupation without his or her licence or consent or that of any predecessor in title of his or her.

11. A perusal of the Plaintiff's originating summons dated 26 July 2018 indicates that the Plaintiff had not invoked Order 113 of the Rules to obtain the order for possession and neither has the Court exercised its jurisdiction under Order 113 of the Rules whilst making orders on the Plaintiff's application.
12. The Plaintiff's application was pursuant to Section 169 of the Land Transfer Act.
13. Hence Order 113 has no relevance to the proceeding.
14. Order 32 Rule 5(3) makes provision for court if satisfied that it is just to do so rehear the summons.
15. Defendant has not invoked this provision of law.
16. Furthermore, the writ of possession has been executed and vacating the orders now will be a futile exercise.
17. For these reasons the application dated 18th April 2019 fails and is dismissed with costs awarded in favour of the Plaintiff and summarily assessed at \$800 and to be paid within 14 days from to-date.




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Vandhana Lal [Ms]
Acting Master
At Suva.

24 August 2022

TO:

1. Suva High Court Civil Action No. HBC 219 of 2018;
2. Jackson Bale Lawyers, Solicitors for the Plaintiff;
3. Jiten Reddy Lawyers, Solicitors for the Defendant.