

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 214 of 2020

BETWEEN : **JIMI TARIA** of Balawa Crescent, Lautoka, Medical Practitioner

Plaintiff

AND : **MANI LAL and TOGETHER WITH ALL OTHER**
OCCUPANTS of Bilolo, Ba, Cultivator.

Defendant

Before : Master U.L. Mohamed Azhar

Counsels : Ms. M. Raga for the plaintiff
Ms. J. Singh for the defendant

Date of Judgment : 31.07.2023

JUDGMENT

01. The plaintiff summoned the defendant pursuant to Order 113 of the High Court Rules. The summons, among other orders, seeks for an order that the defendant together with all other occupants including family and dependents do give immediate vacant possession to the plaintiff the last registered owner of the said premises and land comprised in Instrument of Tenancy No. 6624 described as Nukuvule SD Lot 3, Ba, District of Bulu, containing an area of 9.4092 hectares (**The subject property**).

02. The Order 113 rule 1, under which the current application was filed by the plaintiff, reads:

"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".

03. This Order provides for a procedure to recover of possession of a land which is in wrongful occupation by trespassers who have neither license nor consent either from the current owner or his predecessor in title. **The Supreme Court Practice 1988 (White Book)** further states at paragraph 113/1-8/1 at page 1470 that:

For the particular circumstances and remedy described in r.1, this Order provides a somewhat exceptional procedure, which is an amalgam of other procedures, e.g., procedure by ex-parte originating summons, default procedures and the procedure for summary judgment under O. 14. Its machinery is summary, simple and speedy, i.e. it is intended to operate without a plenary trial involving the oral examination of witnesses and with the minimum of delay, expense and technicality. Where none of the wrongful occupiers can reasonably be identified the proceedings take on the character of an action in rem, since the action would relate to the recovery of the res without there being any other party but the plaintiff. On the other hand, like the default and summary procedures under O.13 and O.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 possession of the land or as to wrongful occupation of the land without licence or consent and without any right, title or interest thereto.

04. The procedure is intended to operate with minimum delay, expense and technicality as opposed to plenary trial involving oral examination of witnesses. Where none of the wrongful occupiers can reasonably be identified, the proceedings take on the character of an action in rem, since the action would relate to the recovery of the res without there being any other party but the plaintiff. Kennedy L.J., in **Dutton v Manchester Airport** (supra) said at page 689 that:

The wording of Order 113 and the relevant facts can be found in the judgment of Chadwick L.J. In **Wiltshire C.C. v Frazer** (1983) PCR 69 Stephenson L.J. said at page 76 that for a party to avail himself of the Order he must bring himself within its words. If he does so the court has no discretion to refuse him possession. Stephenson L.J. went on at page 77 to consider what the words of the rule require. They require:

“(1) of the plaintiff that he should have a right to possession of the land in question and claim possession of land which he alleges to be occupied solely by the defendant;

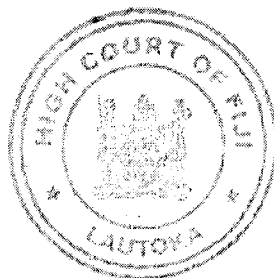
(2) that the defendant, whom he seeks to evict from his land (the land) should be persons who have entered into or have remained in occupation of it without his licence or consent (or that any predecessor in title of his)".


05. In view of that, it is the duty of a plaintiff, who invokes the jurisdiction of the court under this Order, to firstly satisfy the court that, it is virtually a clear case where there is no doubt as to his or her claim to recover the possession of the land. In that process, he/she must be able to show to the court his or her right to claim the possession of the land and then to satisfy that the person or persons (not being a tenant or tenants holding over after the termination of the tenancy) entered into the land or remained in occupation without his or her licence or consent or that of any predecessor in title. Once a plaintiff satisfies these two factors, he or she shall be entitled for an order against the defendant or the occupier. Then, it is incumbent on a defendant or the person occupies that property, if he or she wishes to remain in possession, to satisfy the court that he or she had consent either from the plaintiff or his or her predecessor in title or he or she has title either equal or superior to that of the plaintiff. If the defendant can show such consent or such title, then the application of the plaintiff ought to be dismissed.
06. The plaintiff established the right to occupy the subject property by producing the copy of the Instrument of Tenancy which was duly transferred to him. The transfer was registered on 09.01.2020. The defendant does not deny that the subject property was transferred to the plaintiff. However, the defendant claims that, his brother one Hari Lal transferred the subject property to the plaintiff without the knowledge of the defendant and other two brothers.
07. It appears from the affidavit of the defendant that, the father of the defendant had the original lease over a property which was then sub-divided into three and given to the defendant and to his two brother. Hari Lal is one of the defendant's brothers who got the subject property comprised in Instrument of Tenancy No. 6624 which is described as Nukuvule SD Lot 3. This Lot 3 was leased to Hari Lal – the brother of the defendant on 01.07.1999 and registered on 17.11.2000. Simultaneously, the Instrument of Tenancy No. 6622 which is described as Nukuvule SD Lot 2 was leased to the defendant and the same was registered on the same day i.e. 01.07.1999. A copy of the said Lease is annexed by the defendant with his affidavit marking as "A". This property that was leased to the defendant is totally different. Since the defendant and his brother Hari Lal had two different leases in respect of two different lots of land, it cannot be said that, the defendant was occupying the subject property.
08. Hari Lal transferred his land – the Lot 3 (the subject property) to the plaintiff. The defendant claimed that, iTLTB did not carry out an inspection before transfer of the subject property to the plaintiff. The defendant moved the court to convert this matter into a Writ Action and to join iTLTB as party to it. The transfer was consented the iTLTB

and all due process was followed as it is evident from the Exhibit marked as "JT 5" and annexed with the supporting affidavit of the plaintiff. Furthermore, the defendant commenced the Civil Action HBC 47 of 2020 against the plaintiff and others including iTLTB. The defendant alleged in that case that the plaintiff trespassed to his property comprised in Instrument of Tenancy No. 6622 which is described as Nukuvule SD Lot 2. The defendant claimed damages from the plaintiff and other in that matter.

09. However, the defendant on his own volition withdrew it on 13.08.2020 and finally it was struck out by the court. The plaintiff annexed the copy of the sealed order made on 13.08.2020 in that matter marking as "JT 4". The defendant who seeks to convert this matter into a Writ Action should have proceeded with that matter without withdrawing it. It was after withdrawal of that matter, the plaintiff commenced this summons for eviction. If there are complicated issues to be determined between the plaintiff and the defendant in respect of the subject property, he (defendant) should have continued the matter that he commenced. For this reason, the defendant's claim that, this summons should be converted into Writ Action is unacceptable.
10. Accordingly, the defendant neither has any consent from the predecessor in title, nor are there complicated issues which warrant conversion of this summons into a Writ Action. He has no right whatsoever to defend the summons and to remain in possession of the subject property. This is a straightforward case and the defendant ought to be evicted from the subject property.
11. Therefore, I make following final orders:
 - a. The defendant and other occupants of the subject property are hereby ordered to immediately deliver the vacant possession of the subject property to the plaintiff, and
 - b. The defendant should summarily assessed costs in sum of \$ 2000 to the plaintiff within a month from today.

At Lautoka
31.07.2023




U. L. Mohamed Azhar
Master of the High Court