

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 47 of 2019

BETWEEN : **RAJENDRA KUMAR NAIR** of Qeleloa, Nadi, Retired.

Plaintiff

AND : **SURENDRA NAIR** of Qeleloa, Nadi.

Defendant

Before : Master U.L. Mohamed Azhar

Appearance : Mr. E. Sailo for the plaintiff
The defendant in person

Date of Judgment : 16.02.2024

JUDGMENT

01. The plaintiff summoned the defendant pursuant to Order 113 of the High Court Rules. The summons seeks the following orders:

- a. That the defendant namely Surendra Nair, forthwith quits and delivers vacant possession of all the plaintiff's land contained in State Land No. 20487 known as Navo (part of) Lot No. 4 on S O 5733 being LD 4/10/5085 in the District of Nadi situated at Qeleloa, Nadi.
- b. The cost of the application be paid by the defendant on indemnity basis, and
- c. Such further or other relief as this Court may deem just.

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 LJ., 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 LJ. In **Wiltshire C.C. v Frazer** (1983) PCR 69 Stephenson LJ 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 LJ 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 marked a copy of State Lease No. 20487 and annexed with his affidavit to prove his right to claim possession of the property mentioned in his summons. It is a copy certified by the Registrar of Title. It is a conclusive proof of the fact that the plaintiff is lessee of the subject property as per section 18 of the Land Transfer Act. It is a direct grant from the state to the plaintiff. The plaintiff's right to claim possession of the subject property is thus established.
07. The burden now shifts to the defendant to satisfy the court that he has consent either from the plaintiff or his predecessor in title or he has title either equal or superior to that of the plaintiff. It appears from the affidavit in opposition filed by the defendant that, he relies on the consent given to him by the previous proprietor of the lease. The defendant stated that, the subject property previously belonged to late Krishna Nair and he gave it to his daughter Inira Nair who is his (defendant's) sister in law. The defendant further stated that, his brother's name also Krishna Nair and he married to Inira Nair – the daughter of previous owner late Krishna Nair.
08. The brother of the defendant Krishna Nair too passed away and the sister in law married to Anil Nair another brother of the defendant. The defendant claimed that, his sister in law left to Canada with her second husband and he continues to occupy the subject property as his siblings contributed to build the house situated therein. However, the defendant has not adduced any evidence to show that, the subject property belonged to late Krishna Nair and

he consented to him to occupy the subject property. As stated above, the current lease is a direct grant from the state to the plaintiff. It shows that, the previous Lease Number is 13643. However, the defendant failed to adduce at least the previous Lease to see whether it was actually given to late Krishna Nair, let alone consent. The defendant merely asserted in his affidavit without any proof. In the absence of any such evidence to substantiate his claim, the mere assertion in the affidavit cannot be considered as discharging the burden on him.

09. Accordingly, the defendant failed to establish that he has consent from the predecessor in title, nor are there complicated issues which warrant dismissal of summons. He has no right whatsoever to defend the summons and to remain in possession of the subject property. This is a straightforward case. The defendant and other all illegal occupants ought to be evicted from the subject property with immediate effect. Furthermore, the defendant should pay a reasonable amount of costs to the plaintiff for defending this summons without any colour of right whatsoever to occupy the subject property.
10. 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 pay summarily assessed costs in sum of \$ 2000 to the plaintiff within a month from today.




U. L. Mohamed Azhar
Master of the High Court

At Lautoka
16.02.2024