

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

Civil Action No. HBC 209 of 2023

IN THE MATTER of an
Application under Order 113 of the
High Court Rules 1988.

BETWEEN: **SHANTILAL HOLDINGS PTE LIMITED** a private company
having its registered office at 37 Cumming Street, Suva, Fiji.

PLAINTIFF

AND: **THE OCCUPIERS** of State Lease No. 475366 being Lot 1 on
DP 6742.

DEFENDANTS

Representation : Ms. A. Singh (Kohli & Singh Suva) for the Plaintiff.
 : Ms. Rarawa Tale and Mr. Atunaisa Bulewa
 (Occupiers/Defendants) – In Person.
Date of Hearing : 6th February 2024.

JUDGMENT

- [1] The Plaintiff filed Originating Summons on 12th July 2023 under Order 113 of the High Court Rules 1988 seeking recovery of possession of the property comprised in State Lease No. 475366 being Lot 1 on DP 6742 situate in the district of Naitasiri comprising an area of 1337 m² on the ground that the persons in occupation are in occupation without licence or consent. The Summons is supported by an Affidavit in support of Jasumati Ben, a Director of the Plaintiff Company. An affidavit of service is filed for service upon one Ms Rarawa and the summons and a copy of the affidavit being pasted upon the main door of the premises at Nakasi Road, State Lease No. 475366. On 11th

December 2023, Ms Rarawa Tale filed an Affidavit in Opposition in person. On 21st December 2023 an Affidavit in Reply was filed by the Plaintiff.

- [2] Order 113 of the High Court Rules 1988 provides for summary proceedings for possession of land and states that "1. *Where a person claims possession of land which he or she alleges is occupied by a person or persons (not being a tenant or tenants holding over after the termination of tenancy) who entered into or remained in occupation without his or her licence or consent or that of any predecessor in title of his or hers, the proceedings may, be brought by originating summons in accordance with the provisions of this Order.*" Rule 4 of Order 113 provides for the service of the originating summons.
- [3] Order 113 provides a summary procedure by which a person entitled to possession of land can obtain a final order for possession against those who have entered into or remained in occupation without any claim of right - that is to say, against trespassers. The Order does not extend or restrict the jurisdiction of the court. In University of Essex v Djeamal and others [1980] 1 WLR 1301, Lord Justice Buckley explained the position in these terms, at page 1304D-E:

"I think the Order is in fact an Order which deals with procedural matters; in my judgment it does not affect in any way the extent or nature of the jurisdiction of the court where the remedy that is sought is a remedy by way of an order for possession. The jurisdiction in question is a jurisdiction directed to protecting the right of an owner of property to the possession of the whole of his property, uninterfered with by unauthorised adverse possession."

- [4] The Supreme Court Practice 1988 (The White Book) at paragraph 113/1-8/1 on page 1470 provides important guidance on Order 113 which states 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."

- [5] In an **Order 113** action a Court must be satisfied that there is no reasonable doubt on, (a) the claim of the plaintiff and (b) on the wrongful occupation of the defendant. A Court has no discretion to refuse to allow the summary procedure to be used, even where the Respondent had been in occupation under the licence for a substantial period and the licence has been terminated. It is the duty of the Plaintiff to firstly satisfy the court that, it is virtually a clear case where there is no doubt as to his claim to recover the possession of the land. In that process, the Plaintiff 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 licence or consent or that of any predecessor in title. Once the Plaintiff satisfies these two factors, he or she shall be entitled for an order against the Defendant or the occupier. Then, it is upon the Defendant or the person who 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.
- [6] The Plaintiff has provided a certified copy of the Lease No. 475366 in the affidavit in support of the Originating Summons. It is marked as annexure "B". Section 18 of the Land Transfer Act provides that a certified copy of an instrument of title shall be received in all courts as evidence of the particulars contained in or endorsed upon such instrument and of such particulars being entered in the register and shall, unless the contrary be proved by the production of the register or a certified copy thereof, be conclusive evidence that the person named in such instrument or in any entry thereon as seized of or as taking an estate or interest in the land described in such instrument is seized or possessed of such land for the estate or interest so specified as from the date of such certificate or as from the date from which such estate or interest is expressed to take effect. The plaintiff further asserted that the defendant is occupying the property without their consent and the consent of the predecessor in title. The burden now shifts to the Defendants to satisfy the Court that they have licence or consent either from the Plaintiff or the predecessor in title or to show a title that is either equal or superior to that of Plaintiff, in order to remain in possession of the subject property.
- [7] The Defendants acknowledge that the Plaintiff is the registered proprietor of the Lease No. 475366. The Defendants have averred that they moved into the property in June 2023 as it was vacant for 20 years. They also state that the land was returned to their Mataqali and had been fraudulently transferred. There is no evidence of any fraudulent transfer of the land before me. The land is not i-taukei or native land. It is State Freehold Land. The Plaintiff as of right,

is entitled to an immediate judgment for possession of the subject property. They have proved title and absence of consent or licence for the Defendant and others, and the Defendants have failed to show any right equal or superior to that of the Plaintiff to possess the subject property. Lord Denning in the well-known case of McPhail v Persons (names unknown) [1973] 3 All ER 393, [1973] Ch 447 explained the law as to squatters, at P.456 with the remedy of self-help. He said this:

"Now I would say this at once about squatters. The owner is not required to go to the courts to obtain possession. He is entitled, if he so desires, to take the remedy into his own hands. He can go in himself and turn them out without the aid of the courts of law. This is not a course to be recommended because of the disturbance which might follow. But the legality of it is beyond question."

Further Lord Denning went on to consider the remedy by action. He said at P. 457:

"Seeing that the owner can take possession at once without the help of the courts, it is plain that, when he does come to the courts, he should not be in any worse position. The courts should give him possession at once, else he would be tempted to do it himself. So the courts of common law never suspended the order for possession."

The Plaintiff is entitled immediate vacant possession of the said property. There will be no orders for costs, as none has been sought by the Plaintiffs.

[8] Court Orders as follows:

(a) Ms. Rarawa Tale and Mr Atunaisa Bulewa (Defendants) and all other occupants of the subject property are ordered to immediately deliver to the Plaintiff the vacant possession of the subject property mentioned in the originating summons.

(b) No orders as to costs.


Chaitanya Lakshman

Acting Puisne Judge

26th February 2024

