

2. The application is supported by the affidavit of Sudesh Prakash and Madhu Prakash deposited and filed herein. The application is made pursuant to Order 113 of the High Court Rules 1988, and the inherent jurisdiction of the High Court.

Grounds for the Application

3. The 1st Plaintiff, Himalaya Parvat Company Pte Ltd is the registered owner/lessee of the property comprised in Certificate of Title No. 18548 being Lot 1 on Deposited Plan No. 4622 known as Tamavua (part of) in the District of Suva in the Island of Viti Levu in the Fiji Islands which contain an area of eight acres three roods and eleven perches.
4. The Plaintiff acquired the property on or about 24 September 1980.
5. The 1st Plaintiff is in the process of subdividing the said property and is currently in the process of obtaining individual titles after the deposit plan and other necessary works are completed to achieve this purpose.
6. The approved scheme plan for CT 18548 being registered as DP 4622 shows that the total number of lots to be divided by the 1st Plaintiff is 43.
7. The 1st Plaintiff is also making roads and other provisions so as to ensure that it complies with all the requirements of the Authorities.
8. The Plaintiff has presold all the lots to various individuals and the said lots are already being occupied by various individuals.
9. The 1st Plaintiff also maintains the record of the owners of those lots and it being freehold land. The 1st Plaintiff is permitting the owners of such land to sell the land to other buyers.
10. The 2nd Plaintiff Madhu Prasad is the registered owner of Lot 23 which he purchased from the Estate of the previous owner. The record of the transaction is kept with the 1st Plaintiff.

11. On the same lot is a building which is currently occupied by various individuals who have despite being given notices and advice by the 1st Plaintiffs previous counsel, refused to vacate the premises and as such they have no license to remain on the premises.
12. The occupants are forcefully staying there as trespassers, and both Plaintiffs intend to obtain Court Order for them to be evicted from the premises so as to allow the Plaintiffs to assume occupation and for the use and benefit of the 2nd Plaintiff.
13. Lot 23 is described in the deposited plan, the 1st Plaintiff is the owner of the entire piece of land and it also confirms that Lot 23 belongs to the 2nd Plaintiff. They both seek immediate orders for the removal of the occupants so as to allow the 2nd Plaintiff to enjoy the lot for his own use and benefit.
14. The occupants are illegally occupying the property, and they have no legal right to remain on the said property.
15. The Plaintiffs are unable to use the said property until the Defendants and the occupiers vacate the same.
16. The Plaintiffs believe that the Defendants and occupiers will not vacate the property until an Order for eviction is made against them.
17. The application is opposed and the Defendants have filed the affidavit of Apenisa Waqawai No.2 deposed on the 28th of February and filed on the same day.

Opposition to the Application

18. Apenisa Waqawai No. 2 is one of the occupiers of Certificate of Title No. 18548 being Lot 1 on DP Plan No. 4622 known as Tamavua (part of) in the island of Viti Levu.
19. He only admits that Himalaya Parvat Company Pte Ltd is the registered owner of the land comprised in CT 18548 being Lot 1 on DP No 4622 known as Tamavua (part of).

20. He denies that Madhu Prakash is the owner of Lot 23 on the Deposited plan and states that his late sister Vasemaca Labalaba Cakau is the registered owner of Lot 23, which she purchased from the 1st Plaintiff.
21. There is a building in Lot 23, which he currently occupies with others. He also admits that he was previously served with eviction notices from the 1st Plaintiff's previous counsel, however this was in respect to Civil Action No. HBC 285 of 2023, which has since been dismissed.
22. He maintains that Lot 23 belongs to his late sister. They have been residing on this piece of land since 2012 after his sister emigrated to the United States of America.
23. He maintains that Lot 23 remains registered to his sister and they continue to occupy the lot because she has given her consent for him to remain on the lot.
24. He denies that Madhu Prakash is now the registered owner of Lot 23 and he further states that Madhu Prakash is now storing his old vehicles and building supplies on the property, despite their objections to the same.
25. He confirms that he has been served with the Originating Summons and Affidavit in Support however he states that the originating documents were not affixed on the main door other conspicuous part of the house.
26. He denies the orders sought in the Originating Summons and seeks that the same be dismissed.

The Response

27. In his affidavit in reply, Sudesh Prakash maintains that according to the records maintained by the 1st Plaintiff:
 - i. The late Vasemaca Labalaba was the owner of Lot 23.
 - ii. Vasemaca Labalaba passed away on 1 October 2018.
 - iii. One Samuela Tuinayau Rokomatu applied for grant in her Estate and submitted a copy of his Letters of Administration over the Estate of Vasemaca Labalaba granted on the 16th of May 2022.

- iv. The 1st Plaintiff registered Lot 23 to Samuela Tuinayau Rokomatu on 19 May 2022.
 - v. The 1st Plaintiff required Samuela Tuinayau Rokomatu to confirm that there were no other beneficiaries to the Estate of Vasemaca Labalaba. On 29 May 2024 he produced a letter from the Registrar of Births and Deaths confirming that he had no other siblings.
 - vi. On the 28th of November 2022 Samuela Tuinayau Rokomatu sold Lot 23 to the second Plaintiff, Madhu Prakash for \$25, 000
28. The Plaintiffs therefore assert that the occupiers are trespassers, and they no longer have consent from the owner of the property to remain on the property.
29. The matter was then adjourned for hearing on the 16th of April 2025. Counsel made oral submissions supplemented by written submissions. The matter is now adjourned for ruling.

Submissions for the Plaintiffs

30. The Plaintiffs submit that 1st Plaintiff is the registered proprietor of the whole property encompassed in Certificate of Title No. 18548, being Lot 1 on DP No. 4622 known as Tamavua (part of).
31. The 1st Plaintiff has now commenced subdividing the property, dividing it into separate lots and arranging for separate certificates of titles to be issued for each lot.
32. The 2nd Plaintiff purchased Lot 23 on the subdivision plan from the Estate of Vasemaca Labalaba, from the Administrator of the Estate, Samuela Tuinayau Rokomatu for \$25, 000.
33. The 1st Plaintiff confirms that Madhu Prakash is now the registered proprietor of Lot 23, as confirmed by their records and they are in the process of obtaining a separate certificate of title for Lot 23.
34. The Plaintiffs both confirm that the current occupiers of Lot 23 do not have their consent to remain on the land. They have been formally notified that they do not have the consent of the registered owners to remain on Lot 23.

35. The Defendants have challenged service on the basis that the Summons was not affixed to the main door or another conspicuous part of the building. The Plaintiffs submit the authority of Singh vs Tawake [2022] FJHC 343; HBC 210 of 2019 (22 April 2022) where the High Court held that proper service could be done in the following manner: -
- a) Personally or in accordance with Order 10 Rule 5;
 - b) By leaving a copy of the Summons and of the affidavit or sending them to him or her, at the premises; or
 - c) In such manner as the Court may direct
36. The Plaintiffs submit that the occupants were properly served, and even the deponent of the affidavit in opposition Apenisa Waqawai, has deposed that he has been served with the Originating Summons and affidavit in support.
37. Their objection is that they were permitted by the previous registered owner Vasemaca Labalaba to remain on Lot 23. This permission has now been rescinded as the ownership has been properly transferred and the successor in title is not bound by the previous permission or consent to remain in occupation.
38. The Plaintiffs therefore seeks orders in terms of the Summons, with costs.

The submissions for the Defendants

39. The Defendants raise a preliminary issue for the Court to rule on, that the Plaintiffs have failed to effect service in accordance with Order 113.
40. The Defendants rely on the authority of Narsaiya vs Narsaiya [2018] FJHC 5; HPP 36 of 2017 (12 January 2018) where Justice Amaratunga stated as follows: -

“11. Order 113 rule 4 deals with the service of the Originating Summons and it states as follows

‘4(1) Where any person in occupation of the land is named in the Originating summons, the summons together with a copy of the affidavit in support shall be served on him-

- (a) Personally or in accordance with Order 10, rule 5 or*
- (b) By leaving a copy of the summons and of the affidavit or sending them to him, at the premises; or*

(c) *In such other manner as the Court may direct.*

(2) *The summons shall, in addition to being served on the named defendants, if any, in accordance with paragraph (1) be served, unless the Court otherwise directs by-*

(a) *affixing a copy of the summons and a copy of the affidavit to the main door or other conspicuous part of the premises and*

(b) *if practicable, inserting through the letter-box at the premises a copy of the summons and a copy of the affidavit enclosed in a sealed envelope addressed to "the occupiers".* (emphasis added)

12. The affidavit of service does not indicate compliance of Order 113 rule 4(2) (a) and rule 4(2)(b) of the High Court Rules of 1988. There is no order of the court to deviate from such procedure, hence it is a mandatory provision.

13. Order 113 rule 4(2)(a) is specifically designed to give notice not only to the named Defendant but also for any other person as the order obtained under said High Court Rule can be applied to any person and not only to the Defendant.

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 said 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.

15. Apart from the said non-compliance it is mandatory to comply with Order 113 rule 2 of the High Court Rules of 1988. This is a mandatory provision since the procedure adopted in Order 113 was for a special purpose for recovery of possession of a premises which may affect basic human right of such person that has guaranteed in the Bill of Right of the Constitution of Fiji. No acknowledgement of service is required and this is a deviation for normal procedure. It is imperative to comply with such provisions.

16. It is clear that the Order 113 of the High Court Rules of 1988 was for special purpose and it can be used for that special purpose only. If not it would lead to an abuse of process and denial of due process for the affected parties including defendants.”

41. The Defendant maintains that they are on Lot 23 by permission of the registered proprietor Vasemaca Labalaba and the Plaintiff, in particular the 2nd Plaintiff has not been able to demonstrate that he is the registered proprietor of Lot 23.

42. The Defendant therefore submits that the Originating Summons must be dismissed with costs.

Analysis

43. The main challenge raised by the Defendants the Occupiers is that the Plaintiffs have failed to serve the Defendants in accordance with the specific provisions of Order 113 Rule 4, which provides as follows: -

Service of originating summons (O.113, r.4)

- 4.-(1) Where any person in occupation of the land is named in the originating summons, the summons together with a copy of the affidavit in support shall be served on him –
- a) personally or in accordance with Order 10, rule 5; or
 - b) by leaving a copy of the summons and of the affidavit or sending them to him, at the premises; or
 - c) in such other manner as the Court may direct.
- (2) The summons shall, in addition to being served on the named defendants, if any, in accordance with paragraph (1) be served, unless the Court otherwise directs, by –
- (a) affixing a copy of the summons and a copy of the affidavit to the main door or other conspicuous part of the premises, and
 - (b) if practicable, inserting through the letter-box at the premises a copy of the summons and a copy of the affidavit enclosed in a sealed envelope addressed to “the occupiers”.
- (3) Every copy of an originating summons for service under paragraph (1) or (2) shall be sealed with the seal of the High Court out of which the summons was issued.
- (4) Order 28, rule 4 shall not apply to proceedings under this Order.
44. In this case, the Plaintiffs did not name any of the Defendants in the Originating Summons therefore Order 113 Rule 4 (2) applies to these pleadings. The Defendant was required by the Rules to affix the Summons to the main door or other conspicuous part of the premises. Another mode for proper service is to insert the Summons and affidavit in support into the letterbox of the premises.
45. The Plaintiffs have not complied with these requirements therefore the provisions of Order 2 of the High Court Rules apply. Order 2 Rule 1 (1) and (2) provide as follows: -

“Non-Compliance with rules (O.2, r.1)

- 1.-(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgement or order therein.

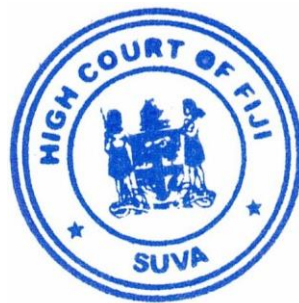
- (2) Subject to paragraph (3), the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1), and on such term as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein or exercise its powers under these Rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit.”
46. The Court finds that the failure to effect proper service is an irregularity and shall not nullify these proceedings. Another factor that undermines this initial objection is the fact that the occupiers have formally responded to the affidavit and appeared in Court and instructed counsel to defend the action.
47. The initial objection is therefore not substantiated, and the Court is satisfied that those parties who are entitled to be heard in these proceedings have appeared and made submissions.
48. Having dealt with that preliminary point, the Court now turns to the substantive application before the Court.
49. Order 113 (3) stipulates what the affidavit in support must contain, as follows: -
- a) his interest in the land;
 - b) the circumstances in which the land has been occupied without licence or consent and in which his claim to possession arises; and that he does not know the name of any person occupying the land who is not named in the summons
50. The Plaintiffs have both identified their interest in the land. The 1st Plaintiff owns the whole piece of land, which they have subdivided into separate lots, and the 2nd Plaintiff owns Lot 23.
51. Lot 23 is currently occupied by Occupiers including Apenisa Waqawai and others and originally, they were given permission by the previous registered owner Vasemaca Labalaba to come and live there. Lot 23 has no separate certificate of title therefore any orders will be for the 1st Plaintiff only as the registered proprietor of the whole piece of land.
52. Vasemaca Labalaba passed away intestate and her son, Samuela Tuinayau Rokomatu took out Letters of Administration in her estate. He then took over the proprietorship and ultimately sold Lot 23 to the 2nd Plaintiff for \$25, 000.


53. I find that the Plaintiffs, primarily the 1st Plaintiff, have established that they have legal interests in the land. The occupiers no longer have their permission to be on the land and any consent or license given to the Defendants to be on Lot 23 has been rescinded.
54. The Plaintiffs will succeed, and they are also entitled to costs, which will be summarily assessed.

This is the order of the Court: -

1. I direct the Occupiers to grant immediate vacant possession under Order 113 of the High Court Rules of Fiji to the 1st Plaintiff of the land comprised in Certificate of Title No. 18548 being Lot 1 on Deposited Plan No. 4622 known as Tamavua (part of) in the District of Suva in the Island of Viti Levu in the Fiji Islands which contain an area of eight acres three roods and eleven perches on the ground that it is entitled to possession and that the persons in occupation are in occupation without license or consent.
2. The Defendants will pay costs, summarily assessed at \$700, one month to pay.

There is a right of appeal.





Mr. Justice U. Ratuveli
Puisne Judge

cc: - Saneem Lawyers
-Legal Aid Commission