

**IN THE HIGH COURT OF FIJI**

**AT SUVA**

**CIVIL JURISDICTION**

**Civil Action No: HBC 34 of 2013.**

**BETWEEN:** **ADARSH VIKASH SHARMA** and **NEELAM DEO** both of Matanikorovatu Road, Nasinu, Technical Services Manager and Purchasing Officer respectively.

**PLAINTIFF**

**AND:** **ROHIT KUMAR** of Lot 15 Matanikorovatu Road, Nasinu and **THE OCCUPANTS.**

**DEFENDANT**

**BEFORE** : **Justice Deepthi Amaratunga**

**COUNSEL** : **Ms. Devan R. S. S.** for the Plaintiff Respondent

**Mr. Shah H.S** for the Defendant – Applicant

**Date of Hearing** : **15<sup>th</sup> April, 2013**

**Date of Decision** : **25<sup>th</sup> April, 2013**

**DECISION**

**A. INTRODUCTION**

1. The Applicant is seeking setting aside and stay of the order that granted possession of the property in issue in terms of the Order 113 of the High Court Rules of 1988. This application is made in terms of Order 113 rule 8. The main contention is that the Plaintiff had not complied with the requirements of Order 113 rule 4(2).

## **B. ANALYSIS**

2. Order 113 rule 8 states as follows

‘8. The judge may, on such terms as he thinks just, set aside or vary any order made in proceedings under this Order.’

3. Supreme Court Rules 1999 (White Book) page 1799 states as follows (113/8/16)

‘Setting aside order – Any order, which presumably includes a final order for possession made in proceeding under this Order may be set aside or varied on such terms as may be just (see r.8) but this can only be done by a Master, who however need not be the Master who made the order though it should be relisted before the Master who made the order, if possible. The application to set aside or vary the made by summons served on the opposite party and supported by affidavit, stating as fully as possible the grounds relied on for sitting aside or varying the order in question.’

4. The applicant has filed a summons supported by an affidavit stating grounds in support of the summons. The affidavit in support is sworn by Rohit Kumar, who is the named Defendant in this action. He filed an affidavit in opposition to the summons seeking possession and since he could not establish a right to possess the Plaintiffs were granted immediate possession of the property. The hearing of the said summons seeking eviction was heard on 22<sup>nd</sup> March, 2013 and the said judgment was delivered on 27<sup>th</sup> March, 2013 granting possession to the Plaintiff.

5. The summons filed by the Plaintiff in terms of Order 113 for vacant possession named Rohit Kumar as a Defendant, but there were other unknown occupants

in the said premises and they were named in the summons filed on 18<sup>th</sup> February, 2013 as 'The Occupants', but in the affidavit in support filed on the same day at paragraph 4 stated that the occupants were the wife and other family members.

6. Order 113 rule 3 state the requirements of affidavit in support as follows

**'3. The Plaintiff shall file in support of the originating summons an affidavit stating**

- 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
- c. **That he does not know the name of any person occupying the land who is not named in the summons.'** (emphasis added)

7. In Supreme Court Practice 1999 (White Book) page 1796 state as follows

**'113/8/11 Affidavit in support**

At the time of the issue of the originating summons, the plaintiff must file an affidavit in support, in which he must state his interest in the land and the circumstances in which the land has been occupied without licence or consent and in which his claim to possession arises (see r.3(a) and (b)).

In addition, the plaintiff must in his supporting affidavit state that he does not know the name of any person occupying the land who is not named in the summons (r.3(c)). There is no longer any requirement that the plaintiff should take or that he should state in his supporting affidavit that he has taken reasonable steps to identify such

person or persons. The essential point is that he has taken reasonable steps to identify such person or persons. **The essential point is that the use of the machinery of the Court against persons not named as defendants in proceedings is obviously and exceptional measure and can only be justified where the plaintiff claiming possession does not in fact know their named and state this fact positively in his supporting affidavit.**'(emphasis added)

8. There is no averment in the affidavit in support of the Plaintiff filed on 18<sup>th</sup> February, 2013 stating that Plaintiff is unaware of the occupants of the house as required in terms of Order 113 rule 3(c). This is a mandatory requirement as the court is required to make an order against unnamed parties to an action. Without this averment the plaintiff could not have proceeded with this action against the other occupants hence the grant of possession to the Plaintiff should be set aside.
9. Even if I am wrong on the abovementioned, the Plaintiff did not comply with the mandatory requirements contained in Order 113 rule 4 (2), which deals with the service of the summons to the parties unknown to the Plaintiff, which will invariably lead to setting aside of the order for possession to the Plaintiff.
10. Order 113 rule 4 of the High Court Rules of 1988 state 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".

11. At the oral hearing the counsel for the Plaintiff admitted that they did not comply with the requirements contained in Order 113 rule 4(2). This is a mandatory requirement since the summons needed to be brought to the notice of the unnamed parties. The non compliance of the said mandatory requirements would make the order for possession to the Plaintiff nugatory. The compliance of Order 113 rule 4(2) is mandatory since there is a mandatory requirement for the Plaintiff to allege that there are parties unknown who are in possession of the premises. In order to obtain an order against unknown parties the plaintiff is required to comply with the additional methods of service of the summons. If this is not done the mandatory process has not been followed and any subsequent order needs to be set aside.

12. The counsel for the Plaintiff argued that since the summons was served to the named Defendant and he was represented at the hearing of the summons for possession, the order for eviction against the named Defendant should be made. The learned counsel argued that court can vary the order and grant eviction of the named Defendant since he was represented by a counsel and was not successful in establishing a right to possession of the premises. This may be of no use for any pragmatic application, since the named Defendant and others are all family members living in one premises and eviction of named Defendant would not result the possession of the premises or even a part of premises, which leaves such a variation not meaningful and also improbable to execute considering the circumstances of the case. No such orders have been

sought in the summons filed by the Plaintiff on 18<sup>th</sup> February, 2013 which only confined to seeking possession of the entire premises. Such variation of order will not be in compliance with the summons filed in this action which sought possession of the premise described in the summons.

**C. CONCLUSION**

13. I do not think that such variation of the order that granted immediate possession is warranted in the circumstances of the case. The Plaintiff has failed to comply with two mandatory requirements contained in the Order 113 of the High Court Rules of 1988 and they are Order 113 rule 3(c) and Order 113 rule 4(2). These are mandatory requirements. The circumstances of this case does not warrant to vary the order that granted possession to the Plaintiff to an eviction order against the named Defendant, who was served with the summons. No eviction order was sought in the summons and such variation will be not in accordance with the summons and also with Order 113 of the High Court Rules of 1988 considering the circumstances of the case. Considering the circumstances of the case I will not grant a cost.

**D. FINAL ORDERS**

- a. The Order made on 27<sup>th</sup> March, 2013, granting the Plaintiff possession of the premises is set aside.
- b. No cost.

Dated at **Suva** this **25<sup>th</sup> day** of **April, 2013**.

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**Justice Deepthi Amaratunga**  
**High Court, Suva**