

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

**Civil Action No. HBC 138 of 2013**

**BETWEEN** : **AJIT CHANDRA AND SANT KUMARI** of 63 Lakeba Street, Samabula, Suva, Driver and Domestic Duties respectively.

**PLAINTIFF**

**AND** : **NAGHUR SAMI** of Lot 5, Caubati Subdivision, Nasinu, Caretaker

**DEFENDANT**

**BEFORE** : Justice Kamal Kumar

**COUNSEL** : Mr F. Vosarogo for the Plaintiffs  
No Appearance for the Defendant

**DATE OF HEARING** : 6<sup>th</sup> March 2013

**DATE OF JUDGMENT** : 4<sup>th</sup> April 2014

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**JUDGMENT**

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## **1.0 Introduction**

1.1 On 14 May 2013 Plaintiff filed Application by way of Originating Summons under Order 113 of High Court Rules seeking following Orders:-

***“(i) That the Defendant and his family and or occupants give up immediate vacant possession to the Plaintiff of the premises located on the land described as State Freehold Land more appropriately described as Crown lease No 4/16/3437, Lot No 5 on DSS 523 consisting of an area of 809 sq. m.***

***(ii) That the cost of this application be paid by the said person.”***

1.2 The Summons was called on 5 June 2013 when Defendant appeared in person and informed the Court that his lawyer is Mr Sheik Shah. Defendant was then directed to file Affidavit in Opposition within twenty one (21) days with Plaintiff to file Affidavit in Reply within seven (7) days from thereafter.

1.3 Application for vacant possession was adjourned to 10<sup>th</sup> July 2013 for hearing.

1.4 On 10 July, 2013 Defendant’s Counsel informed the Court that Defendant does not intend to file Affidavit in Opposition.

1.5 Court then directed Plaintiff to comply with requirement of Order 113 of the High Court Rules within seven (7) days and this matter was adjourned to 24 July 2013 for mention.

1.6 Mention date of 24 July 2014 was vacated by his Lordship Justice Amaratunga who had the carriage of this matter until then.

1.7 This matter was then referred to me and I caused it to be called on 29 August 2013.

1.8 The Sheriff could not serve Notice of Adjournment Hearing on the Defendant prior to 29 August 2013 and as such this matter was adjourned to 13 September 2013 at 9.30 a.m. for service.

- 1.9 On 13 September 2013 Defendant appeared in person and informed the Court that his Solicitor Mr Sheik Shah had passed away and all his documents are in the possession of Legal Practitioners Unit.
- 1.10 At Courts request Counsel for the Plaintiff agreed to provide copies of the Originating Summons and Affidavit in Support to the Defendant to enable him to file Affidavit in Opposition.
- 1.11 The Court then granted Defendant time until 18 October 2013 to seek legal advise and file and serve Affidavit in Opposition. The Court also directed Plaintiff to file Affidavit in Reply by 1<sup>st</sup> November 2013 and adjourned this matter to 5 November 2013 for mention only.
- 1.12 This matter was not called on 5 November 2013 and was re-listed to be called on 19 November 2013.
- 1.13 On 6 November 2013 Messrs Rigsby Law filed Notice of Appointment of Solicitors on behalf of the Defendant.
- 1.14 On 19 November 2013 Defendant's Counsel who appeared on instructions sought twenty one days to file Affidavit in Opposition. In view of the lengthy delay, Court directed Defendant to file and serve Affidavit in Opposition by 29 November 2013 with Plaintiff to file Affidavit in Reply by 13 December 2013. This matter was adjourned to 24 January 2014 to fix hearing date.
- 1.15 Defendant failed to comply with direction for filing of Affidavit in Opposition and on 24 January 2014, Defendant was granted further time until 31 January 2014 to file Affidavit in Opposition with Plaintiff to file Reply by 7 February 2014 and the Summons was adjourned to 11 February 2014 to fix hearing date.
- 1.16 Defendant filed Affidavit in Opposition on 5 February 2014 and served it on Plaintiff's Solicitors on 6 February 2014.
- 1.17 On 11 February 2014 Plaintiff's Counsel sought further time to file Affidavit in Reply and as such the Court directed Plaintiff to file and serve Affidavit in Reply by 14 February 2014 and adjourned the Summons to 6 March 2014 at 3.30 pm for hearing. The Court also directed parties to file and serve Submissions by 4.00pm on 4 March 2014.
- 1.18 On 14 February 2014 Plaintiff filed Affidavit in Reply.

1.19 On 6 March 2014 at 3.30 p.m. when this matter was listed for hearing Plaintiffs appeared by their Counsel who handed in Plaintiffs Submissions but there was no appearance by the Defendant or his Counsel. Plaintiffs Counsel informed the Court that Plaintiffs relied on the Affidavits and Submission filed.

## **2.0 Background Facts**

2.1 One Ram Narayan was the lessee of all that property known as Lot 5 on DSS No. 523 Caubati Subdivision (LD Ref: 4/16/3437) in the District and Province of Naitasiri containing 809 sqm (subject to survey) (hereafter referred as **“the subject property”**)

2.2 In 2007 the said Ram Narayan passed away and his sons Ashok Narayan and Jagdish Narayan were appointed Executors and Trustees of Ram Narayan’s estate.

2.3 On or about 31 October 2013 Executors and Trustees of Estate of Ram Narayan transferred all the estates, interest in the subject property to themselves by way of Administration.

2.4 On or about 31 October 2013 the said Jagdish Narayan and Ashok Narayan transferred all their interest in the subject property to the Plaintiffs for the consideration sum of \$45,000.00.

2.5 On 4 December 2012 Plaintiffs caused Notice to Vacate dated 29 November 2012 to be served on Defendant who were in occupation of the subject property.

2.6 Upon grant of consent by Director of Lands Plaintiffs instituted this proceedings.

## **3.0 Application To Obtain Vacant Possession**

3.1 Plaintiff filed the Application pursuant to Order 113 of the High Court Rules.

3.2 Order 113 Rule 1 of the High Court Rules provides:-

**“1. 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.”**

- 3.3 The facts stated in the Affidavit in Support of Originating Summons are that stated under the heading Background Facts in this Judgment.
- 3.4 Even though the Defendant whether by himself or his Counsel failed to appear on the date of hearing I have considered the Affidavit in Opposition filed by the Defendant.
- 3.5 At paragraphs 4 to 10 of the Affidavit in Opposition the Defendant states as follows:-

**“4. THAT** with regards to paragraphs 6 to 10, I say that my wife and myself have been caretakers of the said property for the last 18 years and we came to be on the property due to the fact that the late Ram Narayan who was the previous owner of the property was very and bed-ridden for a long while, and for this reason we have to care for him for a long number of years for his sons namely Jagdish Narayan and Ashok Narayan reside in Australia;

**5. THAT** whilst caring for the late Ram Narayan, a verbal agreement was made between myself, my wife and the late Ram Narayan for the property to be sold to us for the sum of \$30,000.00 (Thirty thousand dollars).

**6. THAT** the late Ram Narayan passed in the year 2007 while still under our care and this was the first time his two sons appeared in Fiji even thou he has been sick over the years;

**7. THAT** the said property was transferred to the two brothers only days after cremation of their late father

*took place and out of concert, we notified the Lands Department if investigation can be conducted for the swift transfer of State land to someone who are no longer residence of Fiji;*

- 8. THAT** *a letter dated 7/8/2009, was issued from the Department of Lands to Patel Sharma Lawyers advising them to refrain from any dealings in regards to the property for an investigation has to be carried out. Annexed hereto and marked with the letter "NS1" is a copy of the said letter to confirm the same.*
  
- 9. THAT** *a Sale and Purchase Agreement was made between myself and Jagdish Narayan dated 14/11/2008, confirming that we were to be given the change to buy the property and that we were to continue to care for the property and that we are to be paid the sum of \$200-00 (Two Hundred Dollars) per month until sale is effected. Annexed hereto and marked with the letter "NS2" is a copy of the said Agreement to confirm the same;*
  
- 10. THAT** *a Caveat was placed on the property on the 30<sup>th</sup> day of August, 2012, forbidding any registration and/or dealings with the land. Annexed hereto and marked with the letter "NS3" is a copy of the registration to confirm the same."*

- 3.6 Almost all the content and allegations in the Affidavit of Opposition are directed at Mr Ram Narayan and his children the predecessors on title and as such the Plaintiffs have not been able to answer or counter any allegations in the Affidavit in Opposition fully.
  
- 3.7 If there was any Agreement for Defendant to purchase the subject property from Ram Narayan or his Estate and they have not fulfilled their obligation then it is a matter between the Defendant and Estate of Ram Narayan.
  
- 3.8 I find that Plaintiffs are bona fide purchasers for value.
  
- 3.9 Defendant therefore became a trespasser on the subject property by remaining on the property without the consent of the Plaintiffs after he became aware of Plaintiffs ownership of the subject property.

- 3.10 Even if Defendant did not become aware about the transfer of the subject property when it was transferred he certainly became aware when Notice was served on him by Plaintiffs Solicitors on 4 December 2013.
- 3.11 Defendant claims that he came on the property with the consent of said Ram Narayan and subsequently remained on the property with consent of Jagdish Narayan as care-taker.
- 3.12 Even though Defendant resided on the property with consent of the predecessor on title he has no right to occupy the property if it is not consented to by the present owners of the subject property.
- 3.13 In ***Adaarsh Vikash Sharma & Anor v. Rohit Kumar and Ors.*** Civil Action No. HBC 34 of 2013 his Lordship Justice Amaratunga in dealing with Application under Order 113 Rule (1) of the High Court Rules to evict previous owners of the property stated as follows:-

*“...The words ‘**remained in occupation**’ covers any previous owners and non-trespassers whose initial entry to the premises could not be categorized as trespasser. The phrase ‘remained in occupation’ denotes that their initial entry may or may not be legal but their remaining in occupation is the illegality and the basis of the action for eviction in terms of the Order 113 is the illegal ‘remaining’ of the property and there is no mention as to the initial entry to property may or may not be legal and the consideration of that is irrelevant to the Order 113, and in order to satisfy this requirement what the Plaintiff who claims possession has to establish is that the Defendants are remaining on the property without their consent or licence.”*

- 3.14 I endorse the comments made by his Lordship as any other view will lead to uncertainty.
- 3.15 In this proceeding it is evidently clear that Defendant has been and is in occupation of the subject property without the consent of the Plaintiffs the current owners of the subject property.
- 3.16 In relation to the Caveat lodged by the Defendant I note that the Caveat is not registered. The reason for this could be that the lease in respect of the subject property is not registered lease and is only


Approval Notice (Unregistered Lease) and as such there is nothing at Registrar of Titles Office against which the Caveat can be registered.

#### **4.0 Conclusion**

I make the following Orders:-

- (i) Defendant do give immediate vacant possession of all the property being crown land and known as Lot No 5 on DSS 523 Caubati Subdivision (LD Ref 4/16/3437) in the District and Province of Naitasiri, containing an area of 809 sq. m (subject to survey) to the Plaintiffs;
- (ii) Defendant do pay Plaintiff's costs assessed in sum of \$1,000.00.



  
K. Kumar  
**JUDGE**

**At Suva**

4 April 2014