

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 219 of 2013

- BETWEEN** : **GOPAL PILLAY** of Ragg Avenue, Namadi Heights, Suva, Businessman.
PLAINTIFF
- AND** : **TORI GREY & FAMILY & OTHERS** of Wainadoi, Suva, occupation unknown to the Plaintiff.
FIRST DEFENDANT
- AND** : **MANUELI & FAMILY & OTHERS** of Wainadoi, Suva, occupation unknown to the Plaintiff.
SECOND DEFENDANT
- AND** : **VILIPE NAGONE & FAMILY & OTHERS** of Wainadoi, Suva, occupation unknown to the Plaintiff.
THIRD DEFENDANT
- AND** : **INOKE VUNDADAWA & FAMILY & OTHERS** of Wainadoi, Suva, occupation unknown to the Plaintiff.
FOURTH DEFENDANT
- AND** : **KALIYOBA & FAMILY & OTHERS** of Wainadoi, Suva, occupation unknown to the Plaintiff.
FIFTH DEFENDANT
- AND** : **VILIAME SALABOGI & FAMILY & OTHERS** of Wainadoi, Suva, occupation unknown to the Plaintiff.
SIXTH DEFENDANT
- AND** : **DELAI & FAMILY & OTHERS** of Wainadoi, Suva, occupation unknown to the Plaintiff.
SEVENTH DEFENDANT

BEFORE : Master Thushara Rajasinghe

COUNSEL : Ms. Drova M. for the Plaintiff
Defendants are in person

Date of Hearing : 19th June, 2014

Date of Judgment : 29th August, 2014

JUDGMENT

A. INTRODUCTION

1. The Plaintiff instituted this action by way of an Originating Summons, seeking an order to recover immediate possession of the premises located at Wainadoi as comprised and described in certificate of title No 22616, Lot 6 on DP 5505 of which the Plaintiff is the registered proprietor.
2. Upon being served with this Summons all the defendants excluding the first Defendant filed their affidavit in opposition. The Plaintiff then filed his affidavit in reply. Subsequently, this matter was set down for hearing on 19th of June 2014. The fourth defendant consented to vacate the premises during the cause of the hearing. I accordingly entered a judgment against the fourth Defendant to vacate the premises. Moreover, a judgment was entered against the first Defendant to vacate the premises on the ground of his non appearance and failure to file his objections to this Summons. Other remaining Defendants and the Plaintiff consented to conduct the hearing by way of written submissions which they filed accordingly. Having considered the Summons, respective affidavits and written submissions of the parties, I now proceed to pronounce my judgment as follows.

B. BACKGROUND

B (1) Plaintiff's case,

3. The Plaintiff claims that he is the registered proprietor of this property and the Defendants have been occupying the land without his consent or licence. He further deposed that he issued notices to the Defendant to vacate the property which they refused to comply.

B (2) Defendants' case

4. Defendants' defence is mainly founded on their contention that their grandfather had an arrangement with the husband of the previous registered owner of this property that was Pushpa Wati, to look after the land including the fish pond and farm and live on the land. In view of that arrangement, they have been living on this land for over a period of 60 years and erected their respective houses and cultivated their farms. They categorically denied that they are trespassers or illegal occupants and forcefully contended that they have been occupying this land with the consent of previous owner. The Defendants further contended that they have an equitable right to the possession of this property as they have erected their houses and cultivated their farms upon the said arrangement.

C. THE LAW

5. Order 113 of the High Court Rules provides a summary procedure for possession of land, where it states that;

"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".

6. In view of Order 113, a person who has a legal right to claim the possession of a land could institute an action, claiming the possession of said land against a person who has entered into or remains in occupation without his license or consent or that of any predecessor of his title.
7. The main purpose of Order 113 is to provide a speedy and effective procedure for the owners of the lands to evict persons who have entered into and taken the occupation of the land without the owner's license or consent. They can be defined as trespassers or illegal occupants. These trespassers or illegal occupants have sometimes been referred to as squatters. In **Mephal v Persons unknown, (1973) 3 All E.R.394** Lord Denning has observed "the squatter" as a person who without any colour of right, enters into an unoccupied house or land and occupies it. His Lordship found that in such instances, the owner is not obliged to go to court to regain his possession and could take the remedy into his own hands, which indeed, recommended as an unsubstantial option. Therefore, Order 113 has provided a speedy and effective procedure to provide a remedy to the owners instead of encouraging them to take a remedy of self-help.
8. The proceedings under Order 113 encompass two main limbs. The first is the onus of the plaintiff. The Plaintiff is required to satisfy that he has a legal right to claim the possession of the land. Once the plaintiff satisfies the first limb, the onus will shift towards the defendant, where the Defendant has burdened with to satisfy the court that he has a licence or consent of the owner or of any predecessor of the title of the owner to occupy the land.

D. ANALYSIS

9. The Defendants do not dispute the proprietorship of the Plaintiff, wherefore, I turn to the second limb, that whether the Defendants have a licence or consent from the Plaintiff or any predecessor of the title of the Plaintiff to enter into or remain in occupation.

10. The Defendants claim that their grandfather had an arrangement with the husband of the previous owner, Pushpa Wati to look after this land and live on it. They contended that they have been living on this land base on this arrangement. They claim that their families have been living on this land over last 60 years.
11. The Plaintiff admitted that the previous owner of the land was Pushpa Wati and she became the registered proprietor to this land in 1983. He contended that if the Defendants had a consent or licence from the previous owner, it would have been obtained either in 1983 or thereafter, wherefore, the Defendants' contention of that their families have been living on this land over last 60 years is false and should not be accepted.
12. In view of Order 113, the consent or the licence is not necessarily required at the time of occupation, which can be granted subsequently to remain in the occupation. Hence, I do not find any merits in the contention of the learned counsel for the Plaintiff that the claim of Defendants that they have been living on this land for over 60 years is false as Pushpa Wati became the registered proprietor of the property in 1983.
13. The learned counsel for the Plaintiff submitted that the arrangement as claimed by the Defendants has made between the grandfather of the Defendants and the husband of the previous owner. The previous owner Pushpa Wati was not a party to that arrangement; hence that arrangement does not constitute a proper and a valid consent or licence to occupy the land. Indeed, pursuant to the Order 113, the consent or the licence can be granted only by the person who has a right to claim the possession or the predecessor of his title to claim the possession.
14. In this instance case, the consent or the licence has being given by the husband of the previous owner. The Defendants' families have been living on this land over a period of 60 years and have erected their houses and farms on it over the years. They claim that they are not trespassers and illegal occupants and have an equitable right to the possession of this land.
15. Under such circumstances, I am compelled to consider the purpose, application and the limitations of this summery procedure for the possession of land under order 113. Justice Pathik in **Baiju v Kumar (1999) FJHC 20; HBC) 298j.98**, has extensively discussed the

scope of the application of Order 113. His lordship while referring "The supreme court practice:, 1993 Vol 1, observed that:

"The question for Court's determination is whether the plaintiff is entitled to possession under this Order. To decide this the Court has to consider the 'scope' of the Order. This aspect is covered in detail in The Supreme Court Practice, 1993 Vol 1, O.113/1-8/1 at page 1602 and I state hereunder the relevant portions in this regard:

"This Order does not provide a new remedy, but rather a new procedure for the recovery of possession of land which is in wrongful occupation by trespassers." (emphasis mine) As to the application of this Order it is further stated thus:

"The application of this Order is narrowly confined to the particular circumstances described in r.1. i.e. to the claim for possession of land which is occupied solely by a person or persons who entered into or remain in occupation without the licence or consent of the person in possession or of any predecessor of his. The exceptional machinery of this Order is plainly intended to remedy an exceptional mischief of a totally different dimension from that which can be remedied by a claim for the recovery of land by the ordinary procedure by writ followed by judgment in default or under O.14. The Order applies where the occupier has entered into occupation without licence or consent; and this Order also applies to a person who has entered into possession of land with a licence but has remained in occupation without a licence, except perhaps where there has been the grant of a licence for a substantial period and the licensee holds over after the determination of the licence (Bristol Corp. v. Persons Unknown) [1974] 1 W.L.R. 365; [1974] 1 All E.R. 593."

This Order is narrowly confined to the particular remedy stated in r.1. It is also to be noted, as the White Book says at p.1603:

"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

on the land without licence or consent and without any right, title or interest thereto.....

Order 113 is effectively applied with regard to eviction of squatters or trespassers”

16. In view of the above observation of Justice Pathik in **Baiju v Kumar** (Supra) and Lord Denning M.R. in **Mcphail v Persons unknown**, (Supra) I find that this order could be used only in very clear and precise instances of illegal occupations.

17. Justice Pathik in **Baiju v Kumar** (supra) further elaborated the limitation of this procedure where he observed that ;

I would say that Order 113 is akin summary procedure under s169 of the Land Transfer Act Cap. 131. It is an effective and speedy relief to property owners in cases where tenants or other persons have no right to continue to stay in possession.

As can be seen from the evidence before this Court that the defendant maintains that he has the right to stay on the land whereas the plaintiff disputes it. There are triable issues and these cannot be resolved in a summary manner by affidavit alone. The following statements from the Court of Appeal case of AMBIKA PRASAD f/n Ram Piyare and SANTA WATI f/n KALI CHARAN, BISSUN DEO f/n Jag Deo (Civ. App. No. 38/95s) which concerned s169 are apt to suit the circumstances of this case:

"Whether or not the appellant had an equitable interest and whether or not there was fraud by the respondents in the manner alleged are matters which are disputed by the respondents in their affidavits. These are clearly issues which cannot be resolved by affidavit evidence and ought to go to trial."

To conclude, for these reasons particularly because of the dispute as to possession between the parties it is not possible to make the order sought in the summons without going to trial.

18. The Defendants claim that they have obtained the consent of the husband of the previous owner and have been living on this property pursuant to such consent, which is disputed

by the Plaintiff. Furthermore, they claim that they have an equitable right to the possession of this property. Under such circumstances, I find that these contrasting claims raised by the parties actually require a proper and full hearing and could not be determined in summary manner by affidavits alone. The nature and the scope of the arrangement made between the grandfather of the Defendants and the husband of the previous owner, whether the previous owner has actually consented for her husband to make that arrangement and whether the Defendants have an equitable right to the possession of this land upon such arrangement are some of the issues that could not be resolved only by affidavit evidence and require a proper hearing of the parties.

19. Having considered the reasons set out above, I make following orders that;
- i. The Originating Summons for Summary Possession of Land filed by the Plaintiff on 24th of July 2013 is hereby refused and dismissed,
 - ii. No order for cost,

Dated at **Suva** this **29th** day of **August, 2014**.



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R.D.R. Thushara Rajasinghe
Master of High Court, Suva