

**IN THE HIGH COURT OF FIJI**

**WESTERN DIVISION**

**AT LAUTOKA**

**CIVIL JURISDICTION**

**CIVIL ACTION NO. HBC 168 of 2014**

**BETWEEN** : **NIRMALA WATI** of Naikabula Road, Lautoka, Domestic Duties  
**PLAINTIFF**

**AND** : **SATEN KUMAR** of Naikabula road, Lautoka, Driver  
**DEFENDANT**

**Ms. Jyoti Sangeeta Singh Naidu for the Plaintiff**  
**The Defendant in person**

**Date of Hearing :- 20<sup>th</sup> February 2015**

**Date of Ruling :- 02<sup>nd</sup> April 2015**

**EXTEMPORE RULING**

**(A) INTRODUCTION**

- (1) By summons dated 20<sup>th</sup> October 2014, the Plaintiff seeks an order that the Defendant deliver immediate vacant possession of the Plaintiff's property. The property is described in Agreement for Lease, NLTB No. 4/7/6622.
- (2) The application is made under Order 113 of the High Court Rules.
- (3) The Defendant has filed an affidavit in opposition opposing the application followed by an affidavit in reply thereto.

- (4) The Plaintiff and the Defendant were heard on the originating summons. They made oral submissions to court. In addition to oral submissions, the Plaintiff filed written submissions to which I am grateful.

(B) **FACTUAL BACKGROUND**

- (1) The Plaintiff in her affidavit in support of summons deposes as follows;

- (1) *My late husband, Krishna Dutt was the registered lessee for the land described as Waikaka Subdivision Lot 2 in the Province of Ba and District of Vuda and containing an area of 2098 square meters (hereinafter referred to as the said "land"). A copy of the said agreement for Lease NLTB No. 4/7/6622 is annexed herein and marked as "NW1".*
- (2) *Sometimes in the year 2006 my husband and I allowed Mr Kumar to make a temporary house for himself till he finds a suitable place to stay.*
- (3) *After sometime my husband asked the Mr Kumar to vacate the premises since he was only allowed there on temporary basis and also the house he had built was without consent from the iTLTB.*
- (4) *My husband passed away on 27<sup>th</sup> November, 2010 and on or about 26<sup>th</sup> January 2012, the High Court of Fiji in the Probate Jurisdiction granted me letters of administration (probate) to administer the estate of my late husband, Krishna Datt aka Krishna Dutt who died Intestate. (Annexed herewith and marked as 'NW2' is a true copy of the Letters of Administration granted on the 26<sup>th</sup> day of January 2012).*
- (5) *That the said land then was transferred to me by way of Transmission by Death on 12<sup>th</sup> December, 2012. A copy of Transmission by death and Transfer of Land is annexed herein and marked as "NW 3" and "NW 4" respectively.*
- (6) *That now I am the registered lessee of all that piece or parcel of land described as Waikaka Subdivision Lot 2 in the Province of Ba and District of Vuda and containing an area of 2098 square meters (the said land) which is a native lease for residential property with TLTB No 4/7/6622 as reference number.*
- (7) *Currently, I am residing at the same property in the separate dwelling house, and paying a sum of \$310 (Three Hundred and Ten Dollars) per annum to iTLTB as ground rent for which the Defendant makes no contribution. A copy of the official receipt from iTLTB is annexed herein and marked as "NW 5".*

- (8) *There is no agreement for the Defendant to reside on the said land.*
  - (9) *The Defendant is not contributing anything towards the land and is staying there without my consent; the Defendant has no colour of rights to occupy the premises and is unlawfully occupying the premises.*
  - (10) *On several occasions I verbally asked the Defendant to vacate the premises since that is what the initial agreement was. He was only allowed to stay on temporarily basis on the said land while he looked for his permanent place to stay.*
  - (11) *The Defendant had failed/neglected to act on my verbal notice and so I then instructed my Solicitor Messrs Qoro Legal to issue a Notice to Vacate to the occupier of the property, which the Defendant failed/neglected to comply with. Annexed herewith and marked as "NW 6" is a true copy of Notice to vacate dated 11<sup>th</sup> July 2014.*
  - (12) *Despite our numerous demands/attempt to evict him, the Defendant together with his family has refused to vacate the property. The Defendants have blatantly, contemptuously and disrespectfully disobey the Notice to vacate.*
  - (13) *There is no agreement or licence or consent for the Defendant or their families to stay or live on our property. In other words, they are occupying my property without license or my consent.*
  - (14) *The Defendants together with his family members currently are residing on that piece of land now without any colour of rights or license to occupy my land. They are trespassers.*
  - (15) *By the reasons of the matters aforesaid, I have been deprived of the use and enjoyment of the said land and suffered loss and continue to suffer loss and damage.*
- (2) The Defendant in his affidavit in **opposition** deposes as follows:
- (1) ***THAT*** *in answer to Paragraph 6 of the said Affidavit I say that sometimes in 2004 my late brother Krishna Dutt gave me piece of Land from his property to build a house and stay there for good. He also gave consent to F.E.A. and Water Authority to connect the meters under my name. I annex herewith a copy of the said Declaration dated the 15<sup>th</sup> day of January, 2004 and mark it as "SKI".*
  - (2) ***THAT*** *Paragraph 7 of the said Affidavit is denied, as my late brother never asked me to vacate the said premises.*

- (3) **THAT** Paragraph 8, 9 and 10 of the said Affidavit are not denied.
- (4) **THAT** in answer to Paragraph 11 of the said Affidavit I say that I have paid the sum of \$100.00 yearly for 4 years from 2004 and thereafter \$150.00 yearly till 2010 to my deceased brother being the contribution towards the ground rent to iTLTB. After the death of my brother I stop paying rental because the Plaintiff was demanding \$200.00 per year from me.
- (5) **THAT** after sighting my late brother's Lease attached in the Plaintiff's Affidavit I would like to say that my house is totally out of the boundary to the said lease and further request if the officers of this Honourable Court may inspect the same for the clarification.

(3) In **rebuttal**, the Plaintiff deposes as follows;

- (1) **THAT** in response to paragraph 6 (second) of the Defendant's affidavit I state that as I as the Trustee of my Husband's Estate I have never received any money for any rent and I verily believe my husband also has not received any money from the Defendant for the area he is occupying in my Native Agreement for Lease.
- (2) **THAT** in response to paragraph 7 of the Defendant's Affidavit I am advised by my Solicitors that such statement should be made only if it is supported by Survey reports from the Land Surveyors, thus I verily believe that the Defendant is not qualified to make such statement without any evidence. I also state that under paragraph 4 of the Defendant's affidavit the Defendant admits that my deceased Husband had given him a piece of land which was on temporary basis and therefore he is the trespasser on the said property.

(C) **THE LAW**

- (1) Order 113 of the High Court Rules provides a summary procedure for possession of Land.

Order 113 provides;

*“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.”*

- (2) Justice Pathik in “**Baiju v Kumar (1999) FJHC 20; HBC 298 J.98**, succinctly stated the scope of the order as follows;

*“The question for (the) Courts determination is whether the plaintiff is entitled to possession under this Order. To decide this 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.”*

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 hold 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.”*

*I have carefully considered all the affidavits evidence adduced in this case and the written and oral legal submissions from both counsel.*

...

*The facts do not reveal that the defendant is a trespasser on the land. He continued living there as a licensee ...*

*On the facts of this case, the cases to which I refer to hereafter do not make the defendant a trespasser or a squatter.*

*Order 113 is effectively applied with regard to eviction of squatters or trespassers. In Department of Environment v James and others [1972] 3 All E.R. 629 squatters and trespassers are defined as:*

***“he is one who, without any colour of right, enters on an unoccupied house or land, intending to stay there as long as he can .....*”**

There Goulding J. said that:

***“.....where the plaintiff has proved his right to possession, and that the defendant is the trespasser, the Court is bound to grant an immediate order for possession .....*”**

*Another definition of “trespasser” is as set out in Clerk & Lindsell on Torts (15<sup>th</sup> Ed. 1982) page 631:*

***“A trespasser is a person who has neither right nor permission to enter on premises”.***

Also as was said by Lord Morris of-Borth-Y-Gest in British Railways Board v. Herrington [1972] A.C. 877 at 904:

***“The term ‘trespasser’ is a comprehensive word; it covers the wicked and the innocent; the burglar, the arrogant invader of another’s land, the walker blindly unaware that he is stepping where he has no right to walk, or the wandering child – all may be dubbed as trespassers”.***

*I agree with [Counsel for the defendant] that the defendant’s father and his children gained possession of the land only after the plaintiff had given his consent in or about 1970 and for that matter, the physical fact of the defendant’s occupation is that of acquiescence on the land. I refer to Sir Frederick Pollock’s statement in the case of Browne v. Dawson (1840) 12 Ad. & El 624 where he said:*

***“..... A trespasser may in any case be turned off land before he has gained possession, and he does not gain possession until there has been something like acquiescence in the physical fact of his occupation on the part of the rightful owner.....”***

(D) ANALYSIS

(1) At the beginning of the hearing of the matter, the counsel for the Plaintiff (Ms) Jyoti Naidu, invited the attention of the Court to paragraph 02 of her Written Submissions entitled “**Facts**” which reads;

1.1 *The Plaintiff's late husband was the lessee for the land described as Waikaka Subdivision Lot 2 in the Province of Ba and District of Vuda and containing an area of 2098 square meters.*

1.2 *The Plaintiff is the Administratrix for her Husband's Estate and the said land has been transferred to her by way of Transmission by Death on 12<sup>th</sup> December, 2012 which is registered with Registrar of Deeds.*

1.3 *The Defendant is the brother of the Plaintiff's Husband and sometime in 2006 the couple allowed the Defendant only to make temporary house for himself till he finds a suitable place to stay.*

1.4 *The Plaintiff alleges the Defendant is now a trespasser to the property.*

1.5 *The Plaintiff on various occasion asked the Defendant verbally to move out of the property which the Defendant failed/neglected to act on it.*

1.6 *The Plaintiff has given a Written Notice through her Solicitors on 11<sup>th</sup> July, 2014 to the Defendant for vacant possession which the Defendant failed/neglected to comply with.*

(2) **In rebuttal**, the Defendant says that in 2004, his deceased brother (Plaintiff's husband) gave him a piece of land from his property to build a house and stay. Thereafter, he built a house on the land.

The crux of his submission is that he does not live on the land comprised in Native Lease No:- 4/7/6622. He categorically states that his house is located outside the boundaries of Native Lease No: 4/7/6622. Reference is made to paragraph 07 of the affidavit in opposition.

***“THAT** after sighting my late brother's Lease attached in the Plaintiff's Affidavit I would like to say that **my house is totally out of the boundary to the said lease** and further request if the officers of this Honourable Court may inspect the same for the clarification.”*

(Emphasis added)

The Plaintiff maintains that the Defendant stays on the land comprised in Native Lease No. 4/7/6622. The Defendant disputes it. However he admitted in court that he uses the driveway of the Plaintiff.

- (3) Therefore, it is manifest that there is **conflicting affidavit evidence**. Thus, I am unable to resolve the issue unless oral evidence is given.
- (4) I interpose the view that the procedure under order 113 is a summary process (akin to Section 169 of Land Transfer Act) and it is only clearest of cases should it be used. I am fortified in my view by the following Judicial decisions.

In "**Jamaludin v Kamru Din**" Civil Action No:- 37 of 2014, (unreported) the court held;

*"Section 172 allows the Judge to make other orders and impose any terms but this can only be done if cause is shown by the defendant. For example the Judge can dismiss the summons and order that the application be instituted by a writ action where evidence is required to be adduced. In the past the High Court has held that if the proceedings involve complicated facts or serious issues of law, it will not decide them on summary proceedings of this nature but will dismiss the summons without prejudice to the plaintiff's right to institute proceedings in another manner or by writ action (see Caldwell v Mongston (1907) 3 F.L.R. 58 and Pirrier Watson v Venkat Swami (Civil Action 9 of 1967 – unreported)."*

The following statements from the Court of Appeal case of **Ambika Prasad f/n Ram Piyare v. Santa Wati f/n Kali Charan, Bissun Deo f/n Jag Deo** (Civ. App. No. 38/95s – FCA Reps 98/130) is apt and I adopt it here;

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

In "**Vallabh Das Premji v. Vinod Lal and Others, F.C.A Civil Appeal No. 70 of 1974 (unreported)**" the Court said:

*"In the past, on earlier but similar legislation, the Supreme Court has held that if the proceedings involve consideration of complicated facts or serious issues of law, it will not decide them on summary proceedings of this nature, but will dismiss the summons without prejudice to the plaintiff's right to institute proceedings by Writ of Summons. Instances quoted by counsel are Caldwell v. Mongston (1907) 3 F.L.R. 58 and Ferrier Watson V. Venkat*



*Swami (Civil Action 29 of 1967 – unreported). The power of the court to adopt this approach has not been challenged so it is not material to consider whether it arises under section 172 of the Act or from inherent power to reject as unsuitable procedure where another, comprehensive and better suited to the determination of controversial matters, is available.”*

(Emphasis Added)

(5) **The Supreme Court practice, 1993 Vol.01, O.113/1-8/1 at Page 1602 reads;**

*“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.”*

(Emphasis Added)

Before I take leave of the matter, I echo the words of “Gould” V. P. in “**Ram Narayan v. Moti Ram**” Civil Appeal No. 16 of 1983.

*“The summary procedure has been provided in the Land Transfer Act and, where the issues involved are straightforward, and particularly where there are no complicated issues of fact, a litigant is entitled to have his application decided in that way.”*

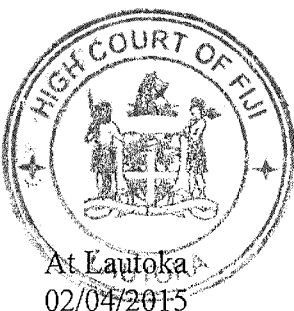
(Emphasis Added)

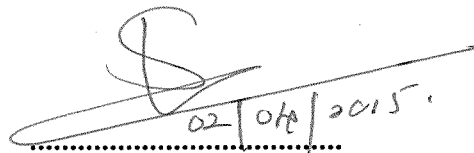
(E) **CONCLUSION**

After considering the facts of this case and the submissions made to court, I conclude that there is **conflicting affidavit evidence** and as a result the application for vacant possession under Order 113, which is summary in nature, fails.

(F) **FINAL ORDERS**

1. The originating summons for vacant possession under Order 113 is dismissed without prejudice to the Plaintiff’s right to institute proceedings in another manner or by writ action.
2. I make no order as to costs.



  
02/04/2015

**Jude Nanayakkara**  
**Acting Master of the High Court**