

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

Civil Action No: HBC 219 of 2013

**BETWEEN** : **GOPAL PILLAY**  
**PLAINTIFF**

**AND** : **TORI GREY & FAMILY & ORS**  
**FIRST DEFENDANT**

**AND** : **MANUELI & FAMILY & ORS**  
**SECOND DEFENDANT**

**AND** : **VILIPE NAGONE & FAMILY & OTHERS**  
**THIRD DEFENDANT**

**AND** : **INOKE VUNDADWA & FAMILY & ORS**  
**FOURTH DEFENDANT**

**AND** : **KALIYOBA & FAMILY & ORS**  
**FIFTH DEFENDANT**

**AND** : **VILIAME SALABOGI & FAMILY**  
**SIXTH DEFENDANT**

**AND** : **DELAI & FAMILY & OTHERS**  
**SEVENTH DEFENDANT**

Coram : The Hon. Mr Justice David Alfred

Counsel : Mr J Savou for the Appellant/Plaintiff  
Mr N Nawaikula for the Respondents/Defendants

Date of Hearing : 9 August 2016

Date of Judgment : 11 August 2016

## JUDGMENT

1. This is an Appeal by the Appellant (Plaintiff) against the decision of the Master delivered on 29 August 2014, whereby he dismissed the Plaintiff's Application under Order 113 of the Rules of the High Court (RHC) for an order to recover immediate possession of the land, held under Certificate of Title No. 22616, Lot 6 on D.P 5505 (the land), of which he is the registered proprietor.
2. At the outset of the hearing there were some extraneous issues involving the Counsel which I had to deal with in an incisive manner, and which will therefore not trouble me in arriving at my decision here, leaving only one which required consideration.
3. This was the Respondents' (Defendants') Counsel's contention that the Appellant's Counsel had not filed an Appeal Record.
4. I retired for a few minutes to consider the objection. When I returned to the bench, I announced my decision that the Defendants' Counsel's objection was not allowed. It is a fact, of which I am taking judicial notice, that in an appeal from the decision of a Master, no appeal record is filed because the matter remains as the original action.
5. The hearing then commenced. The Plaintiff's Counsel submitted that the Master was wrong because there was no consent from the present owner of the land. The consent of the previous owner's husband was no consent and Counsel relied on the decision of Kumar J in *Ajit Chandra and Sant Kumari AND Naghur Sami* : Suva Civil Action No. HBC 138 of 2013 (Ajit Chandra). Counsel said the Defendants remaining in occupation of the land was an illegality and asked for the Appeal to be allowed.
6. Counsel for the Defendants now submitted. He had 2 arguments against the Appeal being allowed. The first was the Appellant's Counsel had failed to file a

summons for directions and this should be deemed as the Appellant has abandoned the Appeal.

7. The second was that as the Master had found there were triable issues, the affidavits were not sufficient evidence and the Master was correct to say there should be a full trial.
8. The Plaintiff's Counsel in his reply said there was a distinction here between the predecessor in title and her husband and the Master erred in finding there were issues that could not be resolved by affidavit evidence only and that a proper hearing was required.
9. At the conclusion of the hearing, I said I would take time to consider my decision. In reaching my decision, I have perused:
  - (i) The Judgment of the Master dated 29 August 2014 (the Judgment).
  - (ii) The Notice of Appeal and Grounds of Appeal.
  - (iii) The Appellant's Skeleton Argument.
  - (iv) The Appellant's Bundle of Authorities
  - (v) The relevant sections of the Land Transfer Act (Cap. 131)(the Act).
10. I now deliver my Judgment.
11. The Plaintiff is applying under Order 113 of the RHC for an order that the Defendants give vacant possession of the land to him. In his Affidavit in Support the Plaintiff deposes that he is the registered proprietor of the land. The Defendants are currently occupying the land, as squatters, as he had never given his approval or licence to them to do so.
12. The common thread running through each Affidavit in Response of the Defendants is that there was an arrangement between an antecedent and "Pushpa Wati's husband Naren Singh" for them to live on the land. A perusal of the Certificate of Title (photocopy) shows that the said Puspa Wati became the registered proprietor of the land in 1983.

13. I accept the Master's analysis in the Judgment that the Defendants do not dispute the proprietorship of the Plaintiff, that the previous owner of the land was Pushpa Wati, and the (alleged) consent or licence had been given by her husband.
14. As the application is made under the provisions of Order 113, I shall now turn to the RHC. Order 113 rule 1 reads "*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*".
15. It is clear that the Plaintiff had correctly brought these proceeding by way of Originating Summons, because on the materials before the Master, which he has accepted in his Judgment, the Plaintiff is asserting the Defendants entered into or remained in occupation of the land without the licence or consent of himself or any predecessor in title. I note that it is not part of the Defendants' case that any such consent as aforementioned had been obtained.
16. Before I pronounce my Judgment, I shall deal with the Defendants' Counsel's 2 arguments. With regard to the first, suffice it for me to say that even if there had been no summons for directions, filed under Order 59 rule 17(2), both the Defendants' Counsel and the Plaintiff's Counsel had appeared before me on 30 November 2015 when I had given directions with regard to the Appeal and fixed a date for the hearing of the Appeal. Thus the intent of the rule had been complied with.
17. With regard to the second argument, I am unable to accept that there are triable issues or conflicting affidavit evidence. On the contrary, there is really no dispute that no consent was ever given by the Plaintiff. I shall follow the decision of my learned brother Kumar J in Ajit Chandra's case where he said at para 3.12 that "*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.*” Kumar J therefore ordered the Defendant to give immediate vacant possession to the Plaintiff.

18. I am fortified in the decision, which I have reached, by the judgment of my learned brother Amaratunga J in: *Adaarsh Vikash Sharma & Anor v Rohit Kumar and Ors*: Civil Action HBC No 34 of 2013. He held that to satisfy the requirement under Order 113, “*what the Plaintiff who claims possession has to establish is that the Defendants are remaining on the property without their consent or licence.*” The judge therefore granted immediate possession of the property described in the originating summons.
19. Here it is as clear as daylight that the Defendants are occupying the land without the Plaintiff's consent or licence. More, they undeniably never even had the consent or licence of the previous owner.
20. If I may say so, one thing stands out in this matter with the utmost clearness and it is this. The Master reached an indefensible conclusion when he said there were triable issues regarding whether the Defendants have an equitable right to the possession of the land, and that therefore there should be a proper hearing. In my opinion, it is crystal clear there were no equitable rights here, for none could stem from an alleged consent given by the spouse of a previous owner. If I were to countenance such a view, it would erode the principle of the paramountcy of the title of the registered proprietor of the land (the Plaintiff) and contravene Section 39(1) and Section 42(1) and (2) of the Act.
21. The decision of Pathik J in: *Baju v Kumar* : Suva High Court Civil Action No. 298 of 1998 is not applied because the facts therein are distinguishable from the facts here.
22. At the end of the day, I am satisfied that I shall have to upset the decision of the Master, and allow this Appeal. In fine I make the following Orders:
  - (1) The Judgment is hereby set aside.

- (2) The Defendants are to give the Plaintiff immediate vacant possession of the land and premises thereon, held under Certificate of Title No. 22616, Lot 6 on DP 5505.
- (3) The parties are to bear their own costs.

**Delivered at Suva this 11<sup>th</sup> day of August 2016.**



  
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David Alfred  
**JUDGE**  
High Court of Fiji