

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 185 of 2016

BETWEEN : **APIMELEKI NASALO NO.2** of Lawaki Village, Lautoka,
PLAINTIFF

AND : **MOSESE TAVUTU** of Saweni, Lautoka,
DEFENDANT

Mr. Isoa Douglas Tikoca for the Plaintiff
The Defendant appeared in person.

Date of Hearing : - 07th December 2016
Date of Ruling : - 10th March 2017

RULING

(A) INTRODUCTION

- (1) The matter before me stems from the Plaintiff's Originating Summons for an Order for vacant possession against the Defendant, pursuant to **Order 113 of the High Court Rules, 1988.**
- (2) The application for eviction is supported by an affidavit sworn by the Plaintiff on 31st August 2016.
- (3) By the action, the Plaintiff seeks vacant possession of the land comprised in **Agreement for Lease, TLTB Reference No:- 4/7/40848 on Natuanivibona (Part of) Subdivision Lot 1 in the Tikina of Vuda in the Province of Ba having an area of 2034m².**

- (4) The application for eviction is strongly resisted by the Defendant.
- (5) The Defendant filed an “**Affidavit in Opposition**” opposing the application for eviction followed by an “**Affidavit in Reply**” thereto.
- (6) The Plaintiff and the Defendant were heard on the Originating Summons. They made oral submissions to Court. In addition to oral submissions, Counsel for the Plaintiff filed a careful and comprehensive written submission for which I am most grateful.

(B) THE FACTUAL BACKGROUND

- (1) What are the circumstances that give rise to the present application?
- (2) To give the whole picture of the action, I can do no better than set out hereunder, the averments/assertions of the pleadings.
- (3) The Plaintiff in his “**Affidavit in Support**” deposed *inter alia*;

- Para*
1. *THAT I am Plaintiff in this matter and I am duly authorized to depose this Affidavit.*
 2. *THAT I make this my Affidavit from matters well known to me and from documents which have come into my possession and which I believe to be true.*
 3. *THAT I am the Lessee of Agreement for Lease of TLTB Ref No. 4/7/40848 at Natuanivibona (part of) Subdivision Lot 1 in the Tikina of Vuda and the Province of Ba having an area of 2034m². There is now produced and marked as “AN-1” is a copy of the Agreement to Lease.*
 4. *THAT the Plaintiff entered into a Tenancy agreement with the Defendant whereby the Defendant would pay a monthly rental in the sum of \$500.00 at the end of the month and the Defendants started residing on the property on or about in 2013.*
 5. *THAT the Defendant first defaulted in paying his rent in March 2013 and the Plaintiff through their solicitors at that time Gordon and Co issued a Legal Notice to quit the Defendant dated 29th November 2013. There is now produced and marked as “AN-2” is a copy of the letter.*
 6. *THAT the Defendant cleared his arrears however then defaulted again in February 2014 and has not paid rent to the Plaintiff since then.*

7. *THE Plaintiff then issued a Notice to Vacate through their solicitors Vuataki Law on 7th July 2014 to the Defendant. There is now produced and marked as "AN-3" is a copy of the letter.*
8. *THE Defendant still did not pay his rental arrears so the Plaintiff issued another Notice to vacate dated 26th August 2015. There is now produced and marked as "AN-4" is a copy of the letter.*
9. *THE Defendant has neglected to pay his rental arrears or to vacate the property and because of his default the Plaintiff has not been able to make payments to iTLTB to clear the Lease arrears. There is now produced and marked as "AN-5" is a copy of the letter from iTLTB dated 29th September 2015 (iTLTB file copy).*
10. *THAT the Defendant was required to pay rent of \$500.00 per month and have failed to do so since February 2014 till to date.*
12. *THAT a letter from iTAUKEI Land Trust Board regarding rent payment was issued to the Defendant on the 29th of September 2015, but the Defendant still failed to pay the rental arrears. There is now produced and marked as "AN-6" is a copy of the letter (iTLTB file copy)*
13. *THAT the Defendant has been unjustly enriched and continues to reside on the property without the consent of the Plaintiff and the Plaintiff continues to suffer due to the default in payments by the Defendant.*
14. *THAT the Defendant is residing on the property illegally and unlawfully.*
15. *THAT the Plaintiff request that the Defendant vacate in exercise of their rights as the Lessee of the said property.*
16. *THAT I therefore ask in terms of our Originating Summons filed herewith.*

- (4) The Defendant for his part in seeking to show cause against the Summons, filed an **"Affidavit in Opposition"** in which he deposed *inter alia*;

- Para*
1. *I am the above named Defendant in this action.*
 2. *I make this Affidavit from matters known to me and documents in my possession and believe the same to be true and correct.*
 3. *I have read the Affidavit of Apimeleki Nasalo No. 2 in Support of the application, sworn on the 31st day of August, 2016 and filed herein.*
 4. *I neither admit nor deny the contents of paragraph 1-3 of the Affidavit of Apimeleki Nasalo.*
 5. *As to paragraph 4, I say as follows:-*

- 4.1 *That I deny having entering into a Tenancy Agreement with the Plaintiff.*
- 4.2 *That I deny having agreed to a monthly rental payment to the Plaintiff in the sum of \$500.00 per month.*
- 4.3 *That the only written Tenancy Agreement I had executed as tenant was on 22nd March, 2014 with Tokatoka Wadigi Trust (hereinafter referred to as the Tenancy agreement) as Landlord created by and pursuant to Deed of Trust No. 44566 registered on 23rd December, 2013 the proprietor of all Wadigi Trust property for use of the residential property. (Annexed hereto marked with letter MT-1)*
- 4.4 *That tenancy was for a period of 2 years commencing from the 1st day of January, 2014 with rental of \$400.00 VIP payable on the first week of each month.*
- 4.5 *That I had been making regular payments to APIMELEKI NASALO name of receiver of rent and in total I have paid up to \$4,800.00 to NAKALOUGATA HOUSE reason why I stopped making payment.*
- 4.6 *That I am aware that sometimes in March, 2010 the Plaintiff was removed as a Trustee from Tokatoka Wadigi Trust, but I have been on most occasions harassed by the Plaintiff to pay him rent.*
6. *THAT I neither deny nor confirm the contents of paragraphs 5-14 and further say that:-*
- 6.1 *I am not aware of one Mr. APIMELEKI NASALO being a Director of Wadigi Investment Limited.*
- 6.2 *That as a private company, the Plaintiff has not shown any form of authorization from the company, and is misrepresenting himself to others as a Director of the company.*
- 6.3 *That the Plaintiff continues to represent himself as a Director of the Company despite his removal as a Trustee.*
7. *That this application is an abuse of the Court process and I therefore pray that the Summons filed herein to be dismissed and costs be in the cause.*

(5) “In rebuttal”, the Plaintiff deposed as follows;

- Para 1. *THAT I am the Plaintiff herein and depose this my Affidavit in reply to the affidavit of Mosese Tavutu deposed the 4th day of November, 2016 (“the Tavutu affidavit”) from matters well known to me and documents in my possession which I believe to be true.*
2. *THAT as to paragraph 4 of the Tavutu affidavit, I maintain what I stated in paragraph 1-3 of my affidavit in support.*
3. *THAT as to paragraph 5 of the Tavutu affidavit, I maintain what I stated in paragraph 4 of my affidavit in support and further state in reply to 4.1 – 4.6 as follows;*
- 4.1 *That I did in fact enter into a tenancy agreement with the defendant.*
- 4.2 *That the rental agreement was for \$500.00 monthly.*
- 4.3 *That the defendant has failed to prove his tenancy agreement between him and the Tokatoka Wadigi Trust by not annexing the written tenancy agreement as the Tenancy agreement is his basis for remaining on the property.*
- 4.4 *That the defendant is unlawfully staying in my property and is willfully misleading the Court as the Agreement to Lease is in my name as Annexure in my Affidavit in Support.*
- 4.5 *That the defendant definitely had not been making regular payments to me hence I had to engage Gordon & Co for some payment to be done by the defendant as stated in paragraph 5 and 6 of my affidavit in support.*
- 4.6 *That I am no longer a trustee of Tokatoka Wadigi Trust because I was taken out illegally and also that I have never harassed the defendant in any type or manner and I put the defendant to strict proof of the same.*
4. *THAT as to paragraph 6 of the affidavit of Tavutu, I maintain my statement on paragraph 5-14 and I wish to reply and further state on sub paragraph 6.1 - 6.3 the affidavit of Tavutu as follows;*
- a) *That the current action herein does not deal with any lease from the Company Wadigi Investment limited however it is revolved around Agreement for lease of TLTB as annexed in “AN-1” of my affidavit and that the Defendant is unlawfully and illegally trespassing on my property.*
5. *THAT I therefore ask for Orders in terms of my Summons and for the defendants affidavit in opposition to be struck out with costs to the Plaintiff.*

(C) **THE LAW**

- (1) Against this factual background, it is necessary to turn to the applicable law and the judicial thinking in relation to the principles governing summary application for eviction under **Order 113 of the High Court Rules, 1988.**
- (2) Rather than refer in detail to various authorities, I propose to set out hereunder important citations, which I take to be the principles remain in play.
- (3) **Order 113 of the High Court Rules, 1988** 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.”

- (4) 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 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.*

- (5) 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

.....

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 (15th 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.”

- (6) I refer to Sir Frederick Pollock’s statement in the case of Browne v. Dawson (1840) 12 Ad. & El 624 where his Lordship 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) The Plaintiff’s Counsel submits that the Plaintiff is the proprietor (lessee) of the ‘Native Land’.

The land is leased by iTLTB to the Plaintiff from the first day of July 2015 for a term of 50 years at a yearly rental of \$300.00. I ascertained this from the copy of “Agreement for Lease” TLTB No:- 4/7/40848 annexed to the Plaintiff’s Affidavit sworn on 31st August 2016 in support of his application.

The Plaintiff says that he entered into a ‘Tenancy Agreement’ with the Defendant. There is one observation I may make on this part of the case. The Plaintiff did not choose to exhibit the ‘tenancy agreement’.

The Plaintiff says that the Defendant entered into possession of the land by virtue of the ‘Tenancy Agreement’.

The Plaintiff alleges that the Defendant neglected to pay the rentals and he was served with Notice dated 29/3/2013 to deliver vacant possession of the land but he has refused to do so.

On the other hand, the Defendant says that he came on the land by virtue of a Written Tenancy Agreement he has entered into with 'Tokatoka Wadigi Trust' on 22nd March 2014. The Defendant too did not choose to exhibit the 'Tenancy Agreement'. He says that the said Tenancy Agreement was for a period of 02 year commencing from 01st of January 2014. The Defendant asserted that the Plaintiff was the former Trustee of 'Tokatoka Wadigi Trust' and a total of \$4,800.00 has been paid to the Plaintiff as rentals.

The Defendant says that he never entered into a 'Tenancy Agreement' with the Plaintiff.

(2) The question for Court's determination is whether the Plaintiff is entitled to possession of the land under Order 113 of the High Court Rules. To decide this, the Court has to consider the 'scope' of the Order.

(3) **What is the scope of Order 113 of the High Court Rules, 1988?**

Scope of **Order 113** of the High Court Rules is discussed in **The Supreme Court Practice, 1993 Volume 1, 0,113/1 – 8/1 at page 1602**. The relevant paragraph is as follows:

"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."

(Emphasis added)

The Court in "Ralinalala v Kaicola" (2015) FJHC 66 said;

"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".

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 licence or consent or that of any predecessor in title.

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 licence or consent. They can be defined as trespassers or illegal occupants. These trespassers or illegal occupants have sometimes been referred to as squatters. In Mcphail 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 the owners a speedy and effective procedure to recover the possession instead of encouraging them to take a remedy of self-help.

The proceedings under Order 113 encompass two main limbs. The first is the onus of the Plaintiff. The Plaintiff is first 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 to occupy the land."

(Emphasis added)

When reduced to its essentials, the law in relation to Order 113 as I understand from the aforesaid is this;

- ❖ A person who has a legal right to claim the possession of a land could institute an action under Order 113 against a person who has entered into or remains in occupation without his licence or consent or that of any predecessor in title.

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.
- ❖ To evict an occupant, the applicant must show better title than the respondent.

Applying these principles to the case before me, what do we find?

- (4) The Plaintiff is the proprietor (lessee) of the said land. Therefore, I am satisfied that the Plaintiff has a legal right to claim the possession of the land, pursuant to Order 113 of the High Court Rules, 1988.

Now the onus will shift towards the Defendant, where the Defendant is burdened with to satisfy that he has a licence or consent of the owner or of any predecessor of the title of the owner to occupy the land.

What is the Defendant's reason refusing to deliver vacant possession?

The Defendant for his part in seeking to show cause against the Summons adduced following grounds in opposition. They are; (I focus on paragraph 5 of the Defendant's Affidavit in Opposition.

Para 5. *As to paragraph 4, I say as follows:-*

- 4.1 *That I deny having entering into a Tenancy Agreement with the Plaintiff.*
- 4.2 *That I deny having agreed to a monthly rental payment to the Plaintiff in the sum of \$500.00 per month.*
- 4.3 *That the only written Tenancy Agreement I had executed as tenant was on 22nd March, 2014 with Tokatoka Wadigi Trust (hereinafter referred to as the Tenancy agreement) as Landlord created by and pursuant to Deed of Trust No. 44566 registered on 23rd December, 2013 the proprietor of all Wadigi Trust property for use of the residential property. (Annexed hereto marked with letter MT-1)*
- 4.4 *That tenancy was for a period of 2 years commencing from the 1st day of January, 2014 with rental of \$400.00 VIP payable on the first week of each month.*
- 4.5 *That I had been making regular payments to APIMELEKI NASALO name of receiver of rent and in total I have paid up*

to \$4,800.00 to NAKALOUGATA HOUSE reason why I stopped making payment.

- 4.6 *That I am aware that sometimes in March, 2010 the Plaintiff was removed as a Trustee from Tokatoka Wadigi Trust, but I have been on most occasions harassed by the Plaintiff to pay him rent.*

It is quite clear from 'Agreement for lease' (annexure marked AN-1 referred to in the Affidavit of the Plaintiff sworn on 31st August 2016) the Plaintiff is the proprietor (lessee) of the said Native land. The Plaintiff obtained title on 01st July 2015.

The Defendant cannot rely on the purported 'Tenancy Agreement' entered into with 'Tokatoka Wadigi Trust' because the land was not registered under the name of 'Tokatoka Wadigi Trust' and the 'Trust' is not the registered proprietor (lessee) of the land.

Moreover, the land in question in this case is 'Native Land' within the meaning of Native Land Trust Act.

The Defendant has entered into possession of the land and remains in occupation of the land without the knowledge or acquiescence of the Statutory Landlord i.e. the Native Land Trust Board. Therefore, the Defendant is an illegal occupant".

(E) CONCLUSION

For the reasons, which I have endeavored to explain, I venture to say beyond a per adventure that the facts and circumstances in this case do reveal that the Defendant is an illegal occupant on the land. Therefore, I have no hesitation in reaching the conclusion that the Defendant has no right to claim possession.

(F) ORDERS

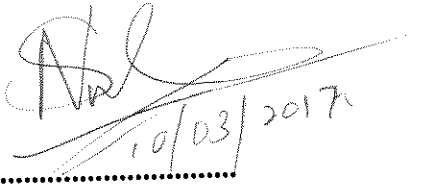
- (1) The Defendant is to deliver immediate vacant possession of the land comprised in **Agreement for Lease, TLTB Reference No:- 4/7/40848 on Natuanivibona (Part of) Subdivision Lot 1 in the Tikina of Vuda in the Province of Ba having an area of 2034m².**
- (2) The Defendant is to pay costs of \$500.00 (summarily assessed) to the Plaintiff within 14 days hereof.

I do so order!



At Lautoka

10th March 2017


10/03/2017

Jude Nanayakkara
Master