

IN THE HIGH COURT OF FIJI
AT LABASA
CIVIL JURISDICTION

Civil Action No. HBC 57 of 2016

BETWEEN : **PETER IAN KNIGHT and ROSALIA LUSIANA CHUTE**
as executors and trustees of the Estate of Adi Vulase
Susi Tarte.

PLAINTIFFS

AND : **EMOSI RADRODRO, LAWA MATARETI, TEVITA,**
SINNOLO, RONITA, AREITA LEWANIVONU,
MATERETI, LAISIASA RAIMBETE AND SITERI,
Occupants of Certificate of Title No. 21834, being Lot 1
on Deposit Plan No. 2496 in the Province of
Cakaudrove on the island of Taveuni, jointly and
severally.

Appearances : Reddy & Nandan Lawyers for the Plaintiff
No Appearance for/by the Defendants

JUDGMENT

1. The Plaintiffs seek an order under Order 113 of the High Court Rules for the Defendants to give to the Plaintiffs immediate possession of the land comprised in Certificate Title No. 21834 situated in the Province of Cakaudrove on the Island of Taveuni.
2. The Plaintiffs are executors and trustees of the Estate of Adi Vulase Susi Tarte. Through transmission by death, they are presently the last registered proprietors of the property comprised on Certificate of Title No. 21834 Lot 1 on Deposited Plan No. 2496. The Defendants, it is alleged, are illegally occupying a portion of the said land. The second Plaintiff deposes in support of the application that through

both their former and present solicitors, they had written to the Defendants to vacate the premises but the Defendants continue to occupy the property. The second named Plaintiff also swears that the Defendants do not have any legal right to occupy the said property. She does not know the name of any person occupying the land who is not named in the summons.

3. Affidavits of service filed by the Plaintiffs say that the Defendants had been served with the originating summons, affidavit in support, and notice of appointment to hear the originating summons.

The law

4. The application is brought pursuant to Order 113 of the High Court Rules which 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.

5. The affidavit in support of an application for vacant possession under this Order must state:
 - a. the plaintiff's interest in the land;
 - b. the circumstances in which the land has been occupied without licence or consent and in which his claim to possession arises; and
 - c. that he does not know the name of any person occupying the land who is not named in the summons.
6. In *Prasad v Chand* [2001] 1 FLR 164 (30 April 2001), Gates J (as then was) stated that an affidavit in support of an application under Order 113 need not provide evidence that a notice to quit had been served, for

[A]fter all, if no right to occupy the land is shown to the judge and the Defendant is not a former tenant, it is doubtful whether a notice to quit need be served or proved in order to found jurisdiction.

7. It is no longer a requirement that a plaintiff has to state in the affidavit in support that he had taken reasonable steps to identify any person occupying the land who is not named in the summons. (*The Supreme Court Practice 1999*, at 113/8/11, p. 1796)
8. An affidavit of service must be before the Court at the hearing of the originating summons for an order for possession and an order for possession will only be made upon the Court being satisfied that service has been effected.

Analysis

9. The Defendants neither appeared at any time during these proceedings, nor filed any papers in opposition to the originating summons. At the hearing, their names were called outside the Courtroom three times. None of them appeared.
10. The issue for the Court's determination is whether an order for possession ought to be made on the material before it.
11. I first consider whether service has been effected on the Defendants. The provisions of Order 113 in respect of service are relevant. Rule 4 (1) requires that the originating summons and affidavit in support must be personally served on any person named in the summons, or by leaving a copy of the summons and of the affidavit in support at the premises, or as the Court directs.
12. In addition to service on the named defendants in this manner, the originating summons and supporting affidavit must also be affixed to the main door or other conspicuous part of the premises, and if

practicable, placed in an envelope addressed to “the occupiers” and inserted through the letter-box at the premises. (O.113 Rule 4)

13. In this way, any person who is not named as a defendant in the originating summons but is in occupation of the land has the opportunity to, if he wants, apply at any stage of the proceedings to be joined as a defendant if he wishes to be heard on whether an order for possession should be made. (Order 113 Rule 5)
14. The affidavit of service filed by the Plaintiff avers that the originating summons and affidavit in support were personally served on all the Defendants on 13 October 2016 after each of them confirmed they were the person named in the said papers. However there is nothing to say that service has been effected in accordance with Rule 4 (2) which, like Rule 4 (1), is a mandatory requirement.
15. I also note that copies of the originating summons served on the Defendants in this matter and attached to the affidavit of service do not bear the seal of the Court. It is a compulsory requirement under Rule 4 (3) that every copy of the originating summons for service under Rule 4 (1) and (2) must be sealed with the seal of the High Court out of which it was issued.
16. To compound the difficulties in the Plaintiff’s application, the affidavit in support does not in my opinion comply with the mandatory requirement of Rule 3 in that it fails to set out the circumstances in which the land has been occupied by the Defendants without licence or consent and in which the Plaintiffs’ claim to possession arise. All that the affidavit says is that the Defendants are illegally occupying a portion of the said land. It does not address how or why the Defendants came to be on the property.
17. In Sharma v Kumar Civil Action No: HBC 34 of 2013, Amaratunga J set aside an order for vacant possession in favour of the Plaintiff, on

the ground of non-compliance with the mandatory requirements of Order 113 Rule 3 (c) and Rule 4 (2).

18. *The Supreme Court Practice* (supra) at 113/8/9 has this to say about the need to comply with the requirements of Order 113:


This procedure enabling a person claiming possession of land to proceed on a summons without naming as defendants any person whose names he does not know, must be strictly complied with and it would not be right to waive any defect arising from any non-compliance with such special procedure (*see per Pennycuick V.-C., Re 9 Orpen Road, Stoke Newington* [1971] 1 W.L.R. 166 at 945, 168; [1971] 1 All E.R. 944.

19. In light of the instances of non-compliance with the Rules highlighted above, I am not satisfied that there has been proper service in accordance with the Rules, or compliance with the requirement for the affidavit in support to state, amongst other things, the circumstances in which the Defendants had come into occupation, and which give rise to the Plaintiff's claim for possession. I do not consider that an order for possession ought to be made in the circumstances.

20. Order:

1. The application for vacant possession is dismissed.




S.F. Bull
Acting Master