

IN THE HIGH COURT OF FIJI  
AT SUVA  
CIVIL JURISDICTION

Civil Action No. HBC 283 of 2016

**BETWEEN:** JEANNE MARIE DARRAH as Administratrix of the estates of LOIS DARRAH aka BERTHA LOIS DARRAH and GUARD CLEMENT DARRAH of California, USA, Legal Practitioner.

**PLAINTIFF**

**AND:** DESMOND GEORGE MONGSTON, MOANA MONGSTON and LETTICIA MONGSTON all of Taunovo, Navua, Fiji (Occupants unknown to the Plaintiff) and all OCCUPANTS OF CERTIFICATE OF TITLE NO 10613.

**DEFENDANTS**

**Counsel:** Mr. Shelvin Singh for the Plaintiff  
Mr. Vananalagi for the Defendants

**Before:** Master Vishwa Datt Sharma

**Date of Ruling:** 24<sup>th</sup> July, 2018 @ 9am

**RULING**

*(Amended Originating Summons pursuant to Order 113 of the High Court Rule, 1988 and the Inherent Jurisdiction seeking an order for vacant possession.)*

## INTRODUCTION

1. The Plaintiff by her **Originating Summons** dated 15<sup>th</sup> November, 2016 is seeking an order that the **Defendant give up immediate possession to the Plaintiff of the property comprised in Certificate of Title No. 10613 being Lot 4 on Deposited Plan No. 2585** which the Plaintiff is the registered proprietor of which the defendants occupy; AND Costs of this application.
2. This application is made pursuant to **Order 113** of the High Court Rules, 1988 and the Inherent Jurisdiction of this Honourable Court.
3. The **Defendant** opposed the application and filed an **Affidavit in Opposition**.
4. There are 3 (Three affidavits) filed before the Court:
  - a) Affidavit in Support of Jean Marie Darrah filed on 15<sup>th</sup> November, 2016 ("Plaintiff's Affidavit");
  - b) Affidavit in Response of Desmond George filed on 07<sup>th</sup> February, 2017 ("Defendant's Affidavit In Response"); and
  - c) Affidavit in Reply of Jeanne Darrah filed on 24<sup>th</sup> February, 2017 ("Plaintiff's Answering Affidavit").
  - d) Affidavit in Reply of Jeanne Darrah filed on 7<sup>th</sup> March, 2017 ("Plaintiff's Affidavit")

## THE LAW

5. The Plaintiff has made his application pursuant to **Order 113** of the High Court Rules, 1988 which deals with summary proceedings for possession of land and provides as follows-

### **Proceedings to be brought by originating summons (O.113, r.1)**

1. 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.

## PLAINTIFF'S CASE

6. That Jeane Marie Darrah is the Administratrix of the estates of her grandparents, Lois Darrah aka Bertha Lois Darrah and Guard Clement Darrah.
7. That she is the registered proprietor of the property contained in Certificate of Title No. 10613 being Lot 4 on DP No. 2585 in her capacity as the administratrix of the estates of Lois Darrah aka Bertha Lois Darrah and Guard Clement Darrah.

8. The Defendants are occupying the said property without her consent or without any license from her and she doesn't know personally any of the Defendants correct names, and names of all the defendants residing on the property.
9. Notice to Quit was served on the Defendants on 23<sup>rd</sup> June, 2016 and applied for vacant possession, the Defendants continue to occupy the property.
10. Seeks for immediate vacant possession.

#### DEFENDANT'S CASE

11. He stated as follows-
  - He doesn't admit that the Plaintiff is the Administratrix of the estates of the deceased,
  - He does not admit that the Plaintiff is the Registered Proprietor of the property contained in CT No 10613 being Lot 4 on DP No. 2585;
  - That he has in his possession the Original Title given by the deceased to his late father and he does not know the Plaintiff managed to register the Transmission by Death etc. on the Title;
  - Living on the property for the last 40 years or so with the consent of the Deceased;
  - The Deceased hired his father Anthony Mongston in 1972 to be the caretaker of the property and agreed to pay her late father in the sum of \$100 per week thereof;
  - The Deceased also gave his late father the Original Title thereof to keep in custody which he now has in his possession;
  - The Deceased however, never paid her late father the agreed wages as they never came back to Fiji until their demise. Will claim for this money as well from the Plaintiff owed for last 45 years;
  - Consequently, due to the arrangement (at 2<sup>nd</sup> bullet point above) , his late father had built 3 houses on the property which he is now living in today which is worth around \$50,000 in improvements;
  - He has lodged a caveat on 08<sup>th</sup> July 2016 and did not receive a notice of the removal of caveat by the Plaintiff;
  - He is in possession of the Original Title and doesn't understand how the Plaintiff was able to register the Transmission by Death and the application for the removal of the caveat on the Title.
  - That there may have been a **fraudulent act** by the Plaintiff to register and/or obtain the Title. There was no request made for a provisional Title by the Plaintiff.
  - Seek the summons to be dismissed with costs.

**ANALYSIS AND DETERMINATION**

12. The issue for Court's determination is **whether the plaintiff is entitled to possession of the property comprised in Certificate of Title No. 10613 being Lot 4 on Deposited Plan No. 2585 sought under this Order.**
13. Reference is made to the Case of "*Baiju v Kumar (1999) FJHC 20; HBC 298 J.98*, wherein Justice Pathik succinctly dealt with the scope of the order as hereunder-

"The question for Court's 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."

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."

14. **The Plaintiff's contention** is that the **Defendants** are occupying the said property **without her consent or without any license** from her and she **doesn't know personally** any of the **Defendants correct names, and names of all the defendants residing on the property.**
15. **The Defendant's contention** is that he is in possession of the Original Title of the property and has been living on the property for about 40 years. He doesn't admit the Plaintiff to be the registered proprietor of the property contained in CT No 10613 being Lot 4 on DP No. 2585. He is alleging Fraud against the Plaintiff and unaware how the Plaintiff succeeded in registering the transmission by death on the subject property. The Counsel representing the Defendant submitted that nowhere in the Plaintiff's affidavit does it show and/or reflect the circumstances in which the land has been occupied without licence or consent.


16. I have had the opportunity to cross check with the two (2) Deceased's Estate files in possession and custody of the High Court Principal Probate Registry, as to who were given the respective grants to administer the Deceased Estates of Lois Darrah (L/A No. 58609) and Guard Clement Darrah (L/A No. 58610). These Estate files confirm that the Plaintiff in the current case, **Jeanne Marie Darrah** was granted Letters of Administration Grant in both the Estates on 15<sup>th</sup> June, 2016. The Plaintiff has filed only one of the two L/A Grants in the Affidavit in Support. However, the Writ of Summons mentions that the Plaintiff is suing in her capacity as the Administratrix of both estates. The very purpose of the Letters of Administration grants given herein to Jeanne Marie Darrah is to allow her to administer the two Deceased's Estates. This is the reason why the folio of the Certificate of Title No. 10613 has an endorsement read "*Transmission by Death*"-*Jeanne Marie Darrah as the administratrix of the Estate of Guard Clement and not the Registered Proprietor of the property as claimed by the Defendant.*"
17. I reiterate and make reference to paragraphs 3, 4 and 7 of the Defendant's Affidavit in Opposition. From these paragraphs, I find that it reveals that the Defendant and his family allegedly has been living on the said land for the past 40 years or so through an arrangement and consent of the Predecessors, the Plaintiff's parents for the Defendants late father to be the caretaker of the property with an agreed sum of \$100. Not only this but three (3) houses were allegedly built by the Defendant's late father. The Defendant has also alleged **Fraud** on the part of the Plaintiff and the Defendant will have the burden of proving the same at the hearing and not summarily.
18. Obviously, these claims and allegations by the Defendant raises dispute and issues within the Defendants' respective Affidavits. Therefore, I find there is dispute and these are clearly issues which cannot be resolved by affidavit evidence summarily and parties ought to go to trial to resolve these Dispute and issues.
19. In conclusion, since the Substantive Claim of the Plaintiff has been commenced by an **Originating Summons**, seeking an order for Vacant Possession pursuant to section 169 of the Land Transfer Act, and bearing in mind that here exists Dispute and Triable issues, it is not possible to grant an order on the Originating Summons without hearing the entire evidence at a hearing.
20. In these circumstances, it has become appropriate that without making an order for dismissal of the Originating Summons that now I invoke the provisions of Order 28 Rule 9 (1) of the High Court Rules, 1988 and order that this matter be entered for trial as if the Originating Summons was a Writ Action accordingly.
21. Taking into consideration the above circumstances, it is only appropriate that at this stage of the proceedings, I make no order as to costs but leave it to the end of the disposition of this matter.
22. I now proceed to make the following Final Orders-

FINAL ORDERS

- A. The Plaintiff's Originating Summons seeking an order for the Defendant to give immediate Vacant Possession of all the property comprised in Certificate of Title No. 10613 being Lot 4 on Deposited Plan No. 2585, is now converted to a Writ action and entered for a trial.
- B. There will be no order for Costs at this stage of the proceedings until the final disposition of the matter.

DATED AT SUVA THIS 24<sup>th</sup> DAY OF July 2018



  
MASTER  
VISHWA DATT SHARMA

cc: *Shelvin Singh Lawyers, Suva*  
*Vananalagi & Associates, Suva*