

**IN THE HIGH COURT OF FIJI**  
**WESTERN DIVISION AT LAUTOKA**  
**CIVIL JURISDICTION**

**CIVIL ACTION NO. HBC 63 OF 2018**

**BETWEEN** : **TONGHE TRADING COMPANY PTE LTD** a duly registered company under the Laws of Fiji having its registered office at 17 Mestry Building, Lodhia Street, Nadi, Fiji.  
**PLAINTIFF**

**AND** : **MOHAMMED KALIM KHAN** currently of Keolaiya, Sabeto, Nadi, Fiji.  
**DEFENDANT**

**Appearances** : Mr R. R. Gordon with Mr P. Chauhan for the plaintiff  
No appearance for the defendant

**Date of Hearing** : 26 June 2018

**Date of Ruling** : 14 September 2018

## **J U D G M E N T**

### **Introduction**

[01] This is an originating summons seeking an order for possession of the part of a land.

[02] By its summons filed on 23 March 2018, Tonghe Trading Company Pte Ltd, the plaintiff claims against the defendants and/or others, whose names and details are unknown to the plaintiff, for the following orders and/or declarations:

1. *A declaration that the defendants and/or others, whose names and details are unknown to the plaintiff, are trespassers on and of the plaintiff's piece and parcel of land known as Leavatuoraqala No. 3 and containing an area of 19.2225 hectares and situate in the Tikina of Nadi in the Island of Viti Levu and more fully described and contained in Native Lease No. 25188;*

2. *A declaration that the defendants and/or others, whose names and details are unknown to the plaintiff, are illegally and/or unlawfully occupying the plaintiff's piece and parcel of land known as Leavatuoraqala No. 3 and containing an area of 19.2225 Hectares and situate in the Tikina of Nadi in the Island of Viti Levu and more fully described and contained in Native Lease No. 25188;*
3. *An order that the defendants and/or others, whose names and details are unknown to the plaintiff, do immediately and forthwith vacate all that piece and parcel of land known as Leavatuoraqala No. 3 and containing an area of 19.2225 Hectares and situate in the Tikina of Nadi in the Island of Viti Levu and more fully described and contained in Native Lease No. 25188;*
4. *An order that the defendants and/or others, whose names and details are unknown to the plaintiff, do immediately and forthwith give to the plaintiff vacant possession of all that piece and parcel of land known as Leavatuoraqala No. 3 and containing an area of 19.2225 Hectares and situate in the Tikina of Nadi in the Island of Viti Levu and more fully described and contained in Native Lease No. 25188;*
5. *An order that the defendants and/or others, whose names and details are unknown to the plaintiff, do pay the plaintiff's costs of instituting, bringing and maintaining this cause of action and proceedings on an indemnity basis;*
6. *Such further Orders that the Court deems just and necessary in the circumstances of this action.*

[03] The plaintiff, in the statement of the question included in the originating summons pursuant of O 7, R 3 (1), has pleaded the following cause of action against the defendant:

1. *The defendants and/or others, whose names and details are unknown to the plaintiff, entered into and/or remained in occupation of the plaintiff's piece and parcel of land known as Leavatuoraqala No. 3 and containing an area on 19.2225 Hectares and situate in the Tikina of Nadi in the Island of Viti Levu and more fully described and contained in Native Lease No. 25188, without the consent, authority or licence of the plaintiff.*
2. *The defendants and/or others, whose names and details are unknown to the plaintiff, are occupying the plaintiff's piece and parcel of land known as Leavatuoraqala No. 3 and containing an area of 19.2225 Hectares and situate in the Tikina of Nadi in the Island of Viti Levu and more fully described and*

*contained in Native Lease No. 25188, without the consent, authority or licence of the plaintiff.*

3. *The defendants and/or others, whose names and details are unknown to the plaintiff, are trespassers on and of the plaintiff's piece and parcel of land known as Leavatuoraqala No. 3 and containing an area of 19.2225 Hectares and situate in the Tikina of Nadi in the Island of Viti Levu and more fully described and contained in Native Lease No. 25188.*
4. *The defendants and/or others, whose names and details are unknown to the plaintiff, are illegally and/or unlawfully occupying the plaintiff's piece and parcel of land known as Leavatuoraqala No. 3 and containing an area of 19.2225 Hectares and situate in the Tikina of Nadi in the Island of Viti Levu and more fully described and contained in Native Lease No. 25188.*
5. *This summons and/or application is made pursuant to and under Order 113 of the High Court Rules, 1988.*
6. *In the alternative and without prejudice to this application and/or proceedings being brought and made pursuant to and under Order 113 of the High Court Rules, 1988 the plaintiff brings this application and/or proceeding under Section 169 of the Land Transfer Act.*
7. *The plaintiff is the current and last registered proprietor of all that piece and parcel of land known as Leavatuoraqala No. 3 and containing an area of 19.2225 Hectares and situate in the Tikina of Nadi in the Island of Viti Levu and more fully described and contained in Native Lease No. 25188.*

[04] The plaintiff relies on Order 113 of the High Court Rules, section 169 of the Land Transfer Act and the inherent jurisdiction of the court.

[05] The originating summons at the bottom specifically states that: *'If the defendants do not acknowledge service, such judgment may be given or order made against or in relation to them as the Court may think just and expedient'*.

### **The Law**

[06] The HCR, O 113, R 1 deals with the summary proceedings for possession of land, which provides:

*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.*

[07] The summary of the affidavit evidence of the plaintiff is as follows:

*“... ”*

- 4. On or about 9 November 2017, the plaintiff purchased a piece of land known as Leavatuoraqala No. 3 and containing an area of 19.2225 hectares and situate in the Tikina of Nadi in the Island of Viti Levu and more fully described and contained in Native Lease No. 25188 (the “principal land”).*
- 5. The plaintiff was and is at all material times the proprietor of the principal land.*
- 6. At some point in time prior to 9 November 2017 and unknown to the plaintiff the defendants or others, whose names and details are unknown to the plaintiff, entered into possession and/or occupation of that portion and/or parcel of the land that was encompassed in native Lease No. 21588.*
- 7. The defendants and/or others, whose names and details are unknown to the plaintiff, moved into possession and/or occupation of that portion and/or parcel of the principal land that was encompassed in Native Lease No. 21588 without the knowledge, consent, license or authority of the plaintiff.*
- 8. That the defendants and/or others, whose names and details are unknown to the plaintiff, continue to illegally occupy that portion and/or parcel of the principal land that was encompassed in native Lease No. 21588.*
- 9. To the best of my knowledge and from information in the plaintiff’s custody and business records, the named defendants and/or others, whose names and details are unknown to the plaintiff, are in possession and/or occupation of that portion and/or parcel of the principal land that was encompassed in Native Lease No. 21588.*

10. *The plaintiff as registered proprietor of Native Lease No. 21588 did not, at any time, grant consent, authority or licence to the defendants and/or others, whose names and details are unknown to the plaintiff, to occupy and/or take possession of that portion and/or parcel of the principal land that was encompassed in Native Lease No. 21588.*
11. *The defendants and/or others, whose names and details are unknown to the plaintiff, who are currently occupying and/or in possession of that portion and/or parcel of the principal land that was encompassed in Native Lease No. 21588 were never tenants and/or lessees of the plaintiff with the consent and authority and licence of the plaintiff.*
12. *The defendants and/or others, whose names and details are unknown to the plaintiff, who are currently occupying and/or in possession of that portion and/or parcel of the principal land that was encompassed in Native Lease No. 21588 are not tenants and/or lessees of the plaintiff holding over under and/or from any termination of tenancy or lease with the plaintiff with the consent and authority and license of the plaintiff.*
13. *The plaintiff at no time whatsoever received or is receiving any payment(s) from the defendants and/or others, whose names and details are unknown to the plaintiff, who are currently occupying and/or in possession of that portion and/or parcel of the principal land that was encompassed in Native Lease No. 21588 in the form of any rental(s).*
14. *The defendant and/or others, whose names and details are unknown to the plaintiff, have no legal or lawful right to remain on or in possession and/or occupation of that portion and/or parcel of the principal land that was encompassed in Native Lease No. 21588.*
15. *The defendants and/or others, whose names and details are unknown to the plaintiff, have not obtained the consent of the iTaukei Land Trust Board, the Head Lessor of Native Lease No. 21588 to occupy, take possession of and/or to deal with Native Lease No. 21588.*

... [Emphasis supplied]"

## Discussion

- [08] The plaintiff has commenced eviction proceedings under O 113 of the HCR against the named and un-named defendants. The plaintiff is not only relying on O 113 but also alternatively relying on section 169 of the LTA. The plaintiff contended that claim for recovery of possession of land may be brought either under O113 or under section 169 or in combination of both.
- [09] From the pleadings, it appears to me that the plaintiff had predominantly intended to bring eviction proceedings under O 113. First, I will deal the application as it had been made pursuant to O 113. The plaintiff specifically states in the supporting affidavit that the defendant or other un-named defendants are illegally occupying the portion of the land and they are/were not tenants of the plaintiff.

### *Scope of O 113*

- [10] Recently, I have set out the scope of O 113, citing Halsbury's Laws of England, Vol. 37 (4<sup>th</sup> Ed, para 425 (c. f. *Deo Sagayam v Rajendra Prasad* (HBC 46 of 2017)). Let me say and quote the same in this case as well:

#### *“(iii) Summary Proceedings for the Possession of Land*

*425. Scope of Order 113. The procedure for summary judgment under Order 113 of the Rules the Supreme Court applies to a claim for possession of land which is occupied solely by a person or persons, not being a tenant or tenants holding over after the termination of a tenancy, who entered into or remained in occupation without the licence or consent of the person making the claim or that of any predecessor in title of his. The procedure applies to the wrongful occupier who has entered into, or who has remained in, occupation without licence or consent of the owner, it applies to unlawful sub-tenants, and it applies not only where the wrongful occupier is known or can be identified but also where not every wrongful occupier is known or can be identified, and even where all the occupiers are unknown and no person can be named as a defendant.*

*The procedure does not apply to a claim for possession of land against a tenant holding over after the termination of the tenancy.*

*The procedure operates not by way of the grant of interlocutory relief but by way of a final judgment or order.*

1. *RSC Ord. 113, r.1 Order 113 provides an exceptional procedural machinery for the speedy and summary recovery of possession of land which is in the wrongful occupation of trespassers or "squatters", without proceeding to a trial. It is intended to remedy an exceptional mischief of a totally different character or dimension from that which can be remedied by an ordinary claim for the recovery of possession of land by the ordinary procedure of the issue of a writ followed by a judgment in default of notice of intention to defend or under Ord.14.*
2. *See Greater London Council v Jenkins [1975] 1 All ER 354, [1975] 1 WLR 155, CA, where a licence to occupy was terminated.*
3. *Moore Properties (Ilford) Ltd v McKeon [1977] 1 All ER 262, [1976] 1 WLR 1278.*
4. *See Re Wykeham Terrace, Brighton, Sussex, ex parte Territorial Auxiliary and Volunteer Reserve Association for the South East [1971] Ch 204. See also Ex parte Amalgamated West End Development and Property Trust Ltd (1969) Times, 18<sup>th</sup> September; Ex parte London Diocesan Board of Education Inc (1969) Times, 25<sup>th</sup> September. Where the wrongly occupiers are known, the proceedings take on the character of an action in rem, since the action would then related to the res itself without there being any other party but the plaintiff.*

[11] Possession claims under O 113 are against trespassers or squatters are claims for the recovery of land which is alleged to be occupied by persons who entered or remained on the land without the consent or licence of a person entitled to possession of the land or his or her predecessor in title. The procedure does not apply to a claim for possession of land against a tenant holding over after the termination of the tenancy.

[12] O 113 is effectively applied with regard to eviction of squatters and trespassers. Here, [there are] issues, thus order for possession refused: Pathik, J in *Baiju v Jai Kumar* (1999) 45 FLR 79; HBC 298/98 31 March 1999.

#### *Forms of originating summons*

[13] The originating summons shall be in Form No.3 in Appendix [1] and no acknowledgement of service shall be required (O 113, R 2).

[14] The plaintiff has used Form 3 as required. However, the plaintiff has failed to modify the Form to suit the claim under O 113. In the originating summons, the plaintiff has included a statement of question pursuant to O 7, R 3, which falls under general provisions governing originating summons. Rule 3 requires that every originating summons must include a statement of question on which the plaintiff seeks the determination or direction of the High Court or, as the case may be, a concise statement of the relief or remedy claimed in the proceedings begun by the originating summons with sufficient particulars to identify the cause or causes of action in respect of which the plaintiff claims that relief or remedy. In my opinion, such statement is not required in a claim under O 113. The statement of question included in the originating summons demonstrates that there are issues to be determined. In O 113 claim, the plaintiff must state that he is entitled to possession of the land in question and the defendants, named or un-named, are in occupation without his or her licence or consent or that of any predecessor in title of his or her.

[15] Obviously, the plaintiff had intended to bring an ordinary possession claim, and in that process they had invoked the court's jurisdiction under O 113 or section 169, but failed to follow the procedure relevant to those proceedings.

*Particulars of claim and evidence in support.*

[16] O 113, R 3 requires that the plaintiff must file in support of the originating summons an affidavit stating:

- a) his interest in the land;
- b) the circumstances in which the land has been occupied without licence or consent and in which his claim for possession arises; and
- c) that he does not know the name of any person occupying the land who is not named in the summons.

[17] The plaintiff has filed in support of the originating summons an affidavit and states that the plaintiff had purchased the land in question on 9 November 2017 and that the plaintiff is the proprietor of the land. The plaintiff has stated its interest in the land or basis for claiming possession.



[18] The land in respect of which the claim is made has been identified. The plaintiff states that the named defendant and the un-named defendants are in occupation of the portion of the land. The portion occupied by the defendants has not been identified.

[19] Most importantly, the plaintiff must state the circumstances in which the land has been occupied without his or her licence or consent and that of any predecessor in title of his or her. The plaintiff only states that at some point in time prior to 9 November 2017 (the date on which the land was transferred to the plaintiff) and unknown to the plaintiff the defendants or others, whose names and details are unknown to the plaintiff, entered into possession and/or occupation of that portion of the land. The plaintiff fails to provide the circumstances in which the portion of the land has been occupied by the defendants without the consent or licence of the plaintiff or its predecessor in title. I reject the plaintiff's contention that the plaintiff is not obliged to provide the date on which the defendants came to occupy the portion of the land without the consent or licence of the plaintiff or its predecessor in title. The date when the defendants came into occupation of the portion of land is extremely important to determine whether the defendants are trespassers or not. O 113 is primarily aimed at people who come into the land as squatters or are given a licence which is terminated and then refuse to depart. The envisaged term of occupation is a matter of months or a few years: per Coventry, J in *Australian Conference Association Limited v Mere Sela & Ors* [2006] HBC 357/05S 3 April 2006.

#### *Service*

[20] The HCR, O 113, R 4, explains how originating summons filed under O 113 must be served. R 4 provides:

#### *Service of originating summons (O 113, R 4)*

*4.-(1) Where any person in occupation of the land is named in the originating summons, the summons together with a copy of the affidavit in support shall be served on him or her-*

*(a) personally or in accordance with Order 10, Rule 5;*

*(b) by leaving a copy of the summons and of the affidavit or sending them to him or her, at the premises; or*

*(c) in such other manner as the court may direct.*

*(2) The summons shall, in addition to being served on the named defendants, if any, in accordance with paragraph (1) be served, unless the Court otherwise directs, by-*

*(a) affixing a copy of the summons and a copy of the affidavit to the main door or other conspicuous part of the premises; and*

*(b) if practicable, inserting through the letter-box at the premises a copy of the summons and a copy of the affidavit enclosed in a sealed envelope addressed to "the occupiers." [Emphasis supplied]*

*(3) Every copy of an originating summons for service under paragraph (1) or (2) shall be sealed with the seal of the High Court out of which the summons was issued.*

*(4) Order 28, Rule 4 shall not apply to proceedings under this Order.*

- [21] Individually named defendant must be personally served or in accordance with O 10, R 5 or by leaving a copy of the summons and of the affidavit or sending them to his or her at the premises (O 113, R 4 (1)). The plaintiff has complied with Rule 4 (1) by personally serving a copy of the summons and of the affidavit on the named defendant, Mohammed Kalim Khan. An affidavit of service to that effect has been filed.
- [22] The plaintiff also seeks an eviction order against unknown defendants. The plaintiff is entitled to bring eviction proceedings under O 113 against the unknown defendants. In that case, the plaintiff must state in the affidavit that he does not know the name of any person occupying the land who is not named in the summons (O 113, R 3 (c)).
- [23] If the order sought under O 113 includes any person not known to the plaintiff, then a copy of the summons and of the affidavit must be affixed to the main door or other conspicuous part of the premises, and if practicable, inserting through the letter-box at the premises a copy of the summons and a copy of the affidavit enclosed in a sealed envelope addressed to "the occupiers" (O 113, R 4 (2) (a) and (b)).
- [24] Though the plaintiff seeks orders against the un-named defendants, there is no affidavit of service to prove service on the un-named defendants by affixing a

copy of the summons and of a copy of the affidavit on some conspicuous part of the land as required by Rule 4 (2). This is required in addition to personal service on the named defendant.

#### *Combined proceedings*

- [25] The plaintiff has begun combined proceedings, proceedings under O 113 and proceedings under section 169, in the same action. Both proceedings cannot be combined in the same proceedings. The proceeding under O 113 is aimed at people who come into the land as squatters/trespassers or are given a licence which is terminated and then refuse to depart. A person entitled to possession of the land may apply for eviction of those people, whether named or un-named, giving the circumstances in which they came into possession of the land in the affidavit in support. O 113 proceeding is not available against the tenants holding over after termination of the tenancy. A final order for possession cannot be made, except in case of urgency, less than 5 clear days after the date of service. An affidavit in support in O 113 R 3 proceedings need not show evidence of prior notice to quit if there is no right to occupy the land and the defendant is not a former tenant. A notice to quit need not be served or proved to found jurisdiction: per Gates, J (as his Lordship then was) in *Indar Prasad & Bidya Bati v Pusup Chand* (2001) 1 FLR 164 at 168.
- [26] Proceedings under 169 may be brought by the proprietor, mortgagee or lessor of the property. In that proceeding, the proprietor may summon any person in possession of land to appear at court on a day not earlier than 16 days after the service of the summons to show cause why the person summoned should not give up possession to the applicant. Section 169 proceeding is available even against the tenants holding over after termination of the tenancy. A notice to quit would be required under that proceeding.

#### **Conclusion**

- [27] The plaintiff does not give the circumstance in which the named and un-named defendant came into occupation of the part of the land. The plaintiff is unable to state the date on which the defendants came to occupy the part of the land without the plaintiff's consent or licence or its predecessor in title. There is no affidavit of service on the un-named defendants as required by O 113, R 4 (2).

The plaintiff ought to have affixed a copy of the summons and a copy of the affidavit to some conspicuous place of the land pursuant to Rule 4 (2) as the claim includes un-named defendants. The plaintiff had failed to do so. The plaintiff in addition to possession orders also seeks declaratory relief, which indicates that the case does not come within the scope of the procedure under O 113.

[28] For the foregoing reasons, I would dismiss the claim, but without costs.

### **The Result**

1. Application for possession orders under O113 of the High Court Rules is refused.
2. There will be no order as to costs.

*M. H. Mohamed Ajmeer*  
14/9/18  
.....

**M. H. Mohamed Ajmeer**

**JUDGE**



**At Lautoka**

**14 September 2018**

**Solicitors:**

**For the plaintiff: M/s A C Law, Barristers & Solicitors**