

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 131 of 2016

BETWEEN : **KAMLA NADHAN** of Lovu, Lautoka, Retired Carpenter.

Plaintiff

AND : **PUSHPA REDDY** of Vatamai Road No. 5 Lovu, Lautoka.

Defendant

Before : Master U.L. Mohamed Azhar

Counsels : Ms. J. Naidu for the Plaintiff
Ms. S. Ravai for the Defendant

Date of Judgment : 18th September 2019

JUDGMENT

01. The plaintiff filed the Originating Summons against the defendant, pursuant to Order 113 of the High Court Rules and inherent power of this court. The plaintiff sought an order that, the defendant and all persons unknown but either living jointly with the defendant or alone and occupying any dwelling or structure erected on the subject property do give immediate vacant possession of iTLTB Agreement for Lease No. 4/7/4602 known as Lovu M/L 185 Lot 2 in the Tikina of Vuda, Province of Ba containing an area of 1910m². The plaintiff also sought the cost on solicitor/client indemnity basis. The plaintiff attached 5 documents with his affidavit marked as “KN1” to “KN5” respectively.
02. The defendant opposed the summons and filed the affidavit with the two annexures marked as “PR 1” and “PR 2”. Thereafter the plaintiff filed the affidavit in reply together with further documents which are marked as “KN1” and “KN2”. At the hearing of the summons, both counsels made oral submission based on the affidavits of their respective clients and later filed the written submission with the leave of the court.
03. The purpose of the Order 113 of the High Court Rules, in its plain meaning is to provide a summary and speedy procedure for the recovery of possession of any land when it is in wrongful occupation by a person who has no consent or licence either from the

applicant/plaintiff or his predecessor in title. The introduction of this rule in United Kingdom was prompted by the decision of **Manchester Corp v Connolly** [1970] 1 All ER 961, [1970] Ch. D 420 where it was held in appeal that the court had no power to make an interlocutory order for possession. This was well explained in **Dutton v Manchester Airport** [1999] All ER 675 at 679 as follows:

"Order 113 was introduced in 1970 (by the Rules of the Supreme Court (Amendment No 2) 1970, SI 1970/944), shortly after the decision of this court in Manchester Corp v Connolly [1970] 1 All ER 961, [1970] Ch 420. It had been held in that appeal that the court had no power to make an interlocutory order for possession. Order 113 provides a summary procedure by which a person entitled to possession of land can obtain a final order for possession against those who have entered into or remained in occupation without any claim of right--that is to say, against trespassers. The order does not extend or restrict the jurisdiction of the court. In University of Essex v Djemal [1980] 2 All ER 742 at 744, [1980] 1 WLR 1301 at 1304 Buckley LJ explained the position in these terms:

'I think the order is in fact an order which deals with procedural matters; in my judgment it does not affect in any way the extent or nature of the jurisdiction of the court where the remedy that is sought is a remedy by way of an order for possession. The jurisdiction in question is a jurisdiction directed to protecting the right of the owner of property to the possession of the whole of his property, uninterfered with by unauthorised adverse possession.'

04. The 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".

05. The scope of this rule 1 was explained by Justice Pathik in **Baiju v Kumar** [1999] FJHC 20; Hbc0298j.98s (31 March 1999). Justice Pathik cited the passage from the **White Book** when explaining the scope and stated that:

"The question for Court's determination is whether the plaintiff is entitled to possession under this Order. To decide this, the 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." (Emphasis mine)

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." (Emphasis is original)

06. It is apparent from the decision in **Dutton v Manchester Airport** (supra) and the commentary in the **White Book** cited above that, this is the procedure to recover the possession of a land occupied by a trespasser or a squatter. KENNEDY LJ., in **Dutton v Manchester Airport** (supra) said at page 689 that:

The working of RSC Ord 113 and the relevant facts can be found in the judgment of Chadwick LJ. In Wiltshire CC v Frazer (1983) 47 P & CR 69 at 76 Stephenson LJ said that for a party to avail himself of the order he must bring himself within its words. If he does so the court has no discretion to refuse him possession. Stephenson LJ (at 77) went on to consider what the words of the rule require. They require:

'(1) Of the Plaintiff, that he should have a right to possession of the land in question and claim possession of land which he alleges to be occupied solely by the defendant. (2) that the defendant, whom he seeks to evict from his land [the land], should be persons who have entered into or have remained in occupation of it without his license or consent [or that of any predecessor in title of his].'

07. The above decisions and the commentary on this Order 113 makes it manifestly clear that, the courts must be satisfied that there is no reasonable doubt on, (a) the claim of the plaintiff and (b) on the wrongful occupation of the defendant. It follows that, it is the duty of the plaintiff, who invokes the jurisdiction of this court under this Order, to firstly satisfy the court that, it is virtually a clear case where there is no doubt as to his claim to recover the possession of the land. In that process, he must be able to show to the court his right to claim the possession of the land and then to satisfy that the person or persons (not being a tenant or tenants holding over after the termination of the tenancy) entered into the land or remained in occupation without his licence or consent or that of any predecessor in title. Once the plaintiff satisfies these two factors, he or she shall be entitled for an order against the defendant. Then, it is incumbent on the defendant, if he wishes to remain in possession, to satisfy the court that he had consent either from the plaintiff or his predecessor in title. If the defendant can show such consent, then the application of the plaintiff ought to be dismissed.
08. The plaintiff traces his right to possess the property to one Victor Naresh Mani who had an Agreement to Lease with iTLTB over the property. The document marked as “KN 1” and attached with the affidavit of the plaintiff is the copy of the Agreement to Lease signed by and between iTLTB and the said Victor Naresh Mani. Victor Naresh Mani then transferred it to the plaintiff and Ramend Ramiya and the transfer was registered on 26.02.1993 at the office of Registrar of Deeds. The plaintiff’s document marked as “KN2” is the copy of the said Transfer. Accordingly, the plaintiff initially obtained an undivided half share of the property and he co-owned it with Ramend Ramiya. Upon the death of Ramend Ramiya, all his heirs renounced their rights to one Purnima who was the Administratrix of late Ramend Ramiya. The Administratrix Purnima thereafter on 22.10.2015 transferred the rights over the undivided half of the property to the plaintiff. The annexure marked as “KN5” is the copy of the Transfer by said Purnima to the plaintiff. Therefore, the plaintiff now claims the right to possess the entire property and also claims that, the defendant and all other occupiers are trespassers having occupied the

property without his (plaintiff's) consent. The plaintiff further stated that the defendant with servant and agents and other occupiers have no licence, permit or permission in any shape or form to occupy the land or portion of it and they are unlawfully and illegally occupying the same.

09. On the other hand the defendant claims that her right to possess the undivided half share of the property derived from Ramend Ramiya, the then co-owner of the plaintiff. The defendant stated that, her late husband and the plaintiff were known each other as both were members of Lovu Sangam Temple. It was the plaintiff who informed her husband about the vacant house that belonged to Ramend Ramiya in the said property and they (defendant and her late husband) started renting the said house. This is admitted by the plaintiff in his affidavit (paragraph 6 of affidavit in reply), however, he stated that, he is not aware of what was the dealing between them. Thereafter they entered into a sale and purchase agreement with Ramend Ramiya to buy the said house. The defendant attached a copy of the said agreement marked as "PR2". The "PR2" is the copy of Sale and Purchase Agreement dated 05.06.1997 and entered into by and between Mr. Mariappa Pillay and Mrs. Pushpa Kanta Pillay as purchasers and Mr. Ramend Ramaiya as the seller. The subject property of the said agreement is the undivided half share of the property in dispute in this case. The purchase price was \$ 4,000 and it was executed in the presence of two witnesses. The defendant further claims that, since then, they have been living in that house and did several material improvements. The defendant specifically stated in her affidavit that, Ramend Ramiya migrated to Canada without transferring the house to them and she continues to occupy the same after death of her husband. The Administratrix and wife of late Ramend Ramiya, Purnima knew about this transfer, however, she failed to transfer the house as claimed by the defendant.
10. The plaintiff, in reply to the sale and purchase agreement between the late husband of the defendant and Ramend Ramiya, stated that, there was no consent from iTLTB for such dealing. However, the plaintiff, who raises concern over the impugned sale and purchase agreement, failed to satisfy the court that the Transfer, by which he claims the rights over the property, was sanctioned by iTLTB. The "KN1" is the Agreement to Lease that was originally signed by iTLTB and Victor Naresh Mani –the original lessee in relation to the subject property. The plaintiff claims that, original lessee transferred the undivided half share of the property to him and the balance to Ramend Ramiya. However, by operation of the section 2 (j) of the said document "KN1", the said original lessee could not have transferred the property to plaintiff and Ramend Ramiya, without the written consent from iTLTB. There is nothing in the affidavit of the plaintiff to show that, such transfer was done with the written consent of the iTLTB. In this circumstance, the plaintiff too cannot claim the title to the property for two reasons. Firstly, there is nothing to say that the said Transfer was sanctioned by written consent of iTLTB. Secondly, what was transferred by the original lessee is the right to occupy the said property under the Agreement to Lease, and not the title of the property, let alone the written sanction of iTLTB. In any event, the said Transfer by the original lessee, though not giving a title to

the plaintiff, gives a right to occupy the property, subject however to the decision of iTLTB – the original Lessor.

11. Likewise, there is nothing to say that, the iTLTB consented for dealing between the late husband of the defendant and Ramend Ramiya to transfer rights over the half share of the property to the former. However, the said sale and purchase agreement (**PR 2**), though not sanctioned by iTLTB, is the proof that, the said Ramend Ramiya had consented and or licensed the defendant and her late husband to enter into and occupy the half portion of the property. Though the impugned sale and purchase agreement does not give the title of the undivided half share of the property to the defendant, it is sufficient to prove that, the defendant entered into the property with the license and consent of Ramend Ramiya – the predecessor. Further, the plaintiff too admitted in paragraph 16 of his affidavit in reply that, he was informed by the defendant and her late husband that, they had dealing with Ramend Ramiya in relation to the half portion of the property occupied by them.
12. The plaintiff in his affidavits (paragraphs 12 and 13 of the supporting affidavit and paragraph 18 of his affidavit in reply) described the defendant and her dependents as trespassers who have been illegally occupying his property without his consent. However, these averments are contrary to his own document marked as “**KN6**” and annexed with his supporting affidavit. The “**KN6**” is the copy of the letter dated 24.05.2016 and sent by the solicitors of the plaintiff to the defendant. It was admitted in that letter that, the plaintiff allowed the defendant to live in that house. Therefore, the defendant could not be a trespasser as claimed by the plaintiff, because a trespasser is the one who, without any colour of right, enters on an unoccupied house or land, intending to stay there as long as he can. Thus, averments of the plaintiff contradict his own document.
13. The purpose of the Order 113 of the High Court Rules, in its plain meaning is to provide a summary and speedy procedure for the recovery of possession of any land when it is in wrongful occupation by a person who has no consent or licence from the applicant or his predecessor in title. The above discussion clearly shows that, the claim of both the plaintiff and the defendant to occupy their respective portion of the property stems from the Transfer of Agreement to Lease by the original lessee Victor Naresh Mani who transferred the undivided half share of the property to both the plaintiff and Ramend Ramiya. Whilst the plaintiff is the direct transferee of Victor Naresh Mani, the defendant’s late husband had Sale and Purchase Agreement with other transferee and co-owner – Ramend Ramiya. The very fact is that, the original lessee Victor Naresh Mani did not have authority to transfer his rights under the “**KN1**” – the Agreement to Lease, without the consent of iTLTB. In this sense, both the plaintiff and the defendant are in equal position with other over the right to occupy their respective portion of the subject property.
14. In **Dutton v Manchester Airport** [1999] All ER 675 Laws LJ, held at page 689 that:

'...Elementarily he (applicant or plaintiff) cannot exclude any occupier who, by contract or estate, has a claim to possession equal or superior to his own. Obviously, however, that will not avail a bare trespasser'

15. Further, it is the settled law that, the person who seeks an ejectment must have a superior legal title. In **Danford v McAnulty** (1883) 8 A.C 456 at 462 Lord Blackburn said:

'...in ejectment, where a person was in possession those who sought to turn him out were to recover upon the strength of their own title; and consequently possession was at law a good defence against any one, and those who sought to turn the man in possession out must show a superior legal title to his.'

16. It follows that, the defendant is having right equal to that of plaintiff, to occupy her respective portion of the property in one hand, and she cannot be regarded as the trespasser on the other hand. Unless and until the iTLTB, the original lessor issues the proper lease, on appropriate conditions, regularizing their occupation, neither party will be able to evict the other from the occupation of the respective portion. This analysis inevitably leads to the conclusion that, the summons filed by the plaintiff ought to be dismissed and the both parties should bear their own cost.

17. Accordingly, I make following final orders:

- a. The summons filed by the plaintiff on 01.07.2016 is dismissed, and
- b. Both parties to bear their own cost.



At Lautoka
18.09.2019

U. L. Mohamed Azhar
U. L. Mohamed Azhar
Master of the High Court

[1999] FJHC 20; Hbc0298j.98s (31 March 1999)