

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. 283 of 2016

BETWEEN

JEANNE MARIE DARRAH of 3249 Harrison Road, San Francisco
CA 94119, Legal Practitioner.

PLAINTIFF

AND

DESMOND GEORGE MONGSTON, MOANA MONGSTON and
LETTICIA MONGSTON all of Taunovo, Navua, Fiji
(Occupation is unknown to the plaintiff) and all
OCCUPANTS OF CERTIFICATE OF
TITLE No. 10613.

DEFENDANTS

Counsel : Mr. S. Singh for the Plaintiff
Mr. R. Vananalagi for the defendants

Date of Hearing : 20th July 2020

Date of Judgment : 30th July 2020

JUDGMENT

[1] The plaintiff filed this originating summons pursuant to Order 113 of the High Court rules 1988, seeking the following orders:

That the defendants give up immediate vacant 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

That the costs of this application be paid by the defendants to the plaintiff.

[2] The learned Master of High Court by his ruling dated 24th July 2018 converted this action to a writ action.

[3] The basis of the plaintiff's action is that she is the administratrix of the estate of her parents Lois Darrah aka Bertha Lois Darrah and Guard Clement Darrah and she is the proprietor of the property in question.

[4] At the pre-trial conference the parties admitted the following facts:

1. The plaintiff Jeanne Marie Darrah is an attorney and the administratrix of the estate of Guard Clement Darrah and Lois Darrah aka Bertha Lois Darrah.
2. By transmission of death No. 831517 and 831518, on 19th September 2016, the plaintiff was registered as proprietor of Certificate of Title No. 10613 being Lot 4 on Deposited Plan No. 2585 ("the said property").
3. The defendants reside on the said property with their families and have built three houses on the said property.
4. The plaintiff has not consented to the defendants or their family members occupying the said property or building any residence on the said property.

5. The plaintiff has served notice to quit dated 20 June 2016 on the defendants requiring them to vacate the said property within 30 days' time.
6. The defendants failed to vacate the said property as a result of which the plaintiff filed an Originating Summons action under Order 113 of the High Court Rules requiring the defendants to give up vacant possession of the property to the plaintiff so that she can complete the administration of the estates.

[5] It is a fact admitted by the defendant that the plaintiff is the registered proprietor of the property. However, the plaintiff in her evidence tendered the Certificate of Title and Letters of administration of the estates of her father and the mother.

[6] Any of the defendants did not testify at the trial. It was their eldest sister who testified at the trial. Her evidence is that the plaintiff's father Mr. Darrah discussed with their father and asked him to look after the property and for that he agreed to pay \$100.00 per week but it was never paid to their father. Her own evidence is that at the time this conversation she was only 12 years of age.

[7] The defendants' father had registered a caveat on the property on the basis that he is claiming an estate or interest as tenancy at will and as intending purchaser of the property. There is no evidence of tenancy nor is there any evidence that there was an agreement to sell between the defendants' father and the plaintiff's father.

[8] Even if there was an oral as claimed by the defendants such an oral agreement is contrary to the provisions of section 59 of the Indemnity, Guarantee and Bailment Act 1881 which provides:

No action shall be brought-

- (a) whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or
- (b) whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person; or
- (c) to charge any person upon any agreement made upon consideration of marriage; or

(d) upon any contract or sale of lands, tenements or hereditaments or any interest in or concerning them; or

(e) upon any agreement that is not to be performed within the space of one year from the making thereof,

unless the agreement upon which such action is to be brought or some memorandum or note thereof is in writing and signed by the party to be charged there or some other person thereunto by him lawfully authorised.

[9] In this case the defendants' position is that there was an oral agreement between their father and the plaintiff's father which is not enforceable since section 59 of the Indemnity, Guarantee and Bailment Act 1881 requires such an agreement has to be in writing.

[10] Even if the court accepts the position of the defendants that they occupied the property with the consent of the previous owner it is not sufficient for them to continue to be in possession after his demise. There is no evidence that the plaintiff permitted them to stay on the property after the demise of her father.

[11] In the case of **Chandra v Sami** [2014] FJHC 234; HBC138.2013 (4 April 2014) it was held:

Defendant claims that he came on the property with the consent of said Ram Narayan and subsequently remained on the property with consent of Jagdish Narayan as care-taker.

Even though Defendant resided on the property with consent of the predecessor on title he has no right to occupy the property if it is not consented to by the present owners of the subject property.

In **Adarsh Vikash Sharma & Anor v. Rohit Kumar and Ors.** Civil Action No. HBC 34 of 2013 his Lordship Justice Amaratunga in dealing with Application under Order 113 Rule (1) of the High Court Rules to evict previous owners of the property stated as follows:-

*"...The words '**remained in occupation**' covers any previous owners and non-trespassers whose initial entry to the premises could not be categorized as trespasser. The phrase '**remained in occupation**' denotes*

that their initial entry may or may not be legal but their remaining in occupation is the illegality and the basis of the action for eviction in terms of the Order 113 is the illegal 'remaining' of the property and there is no mention as to the initial entry to property may or may not be legal and the consideration of that is irrelevant to the Order 113, and in order to satisfy this requirement what the Plaintiff who claims possession has to establish is that the Defendants are remaining on the property without their consent or licence."

I endorse the comments made by his Lordship as any other view will lead to uncertainty.

- [12] The defendants' witness say the defendants have done lot of improvements to the property in that they have constructed three structures and these construction work costs them \$60,000.00.
- [13] In the affidavit in response of the 1st named defendant he states due to the arrangement with the plaintiffs' parents to have his father as the caretaker of the property they constructed three houses which are worth around \$50,000.00.
- [14] The witness for the defendants said in her evidence they are willing to give up possession of the property provided the plaintiffs pay the defendants the construction cost of \$60,000.00.
- [15] The burden is on the defendants to establish by adducing evidence that they in fact spend the amount claimed for the construction. The originating summons was converted to a writ action to facilitate the parties to adduce evidence to prove their respective claims. However, the defendants sought not to adduce any evidence on the quantum of damages claimed.
- [16] Order 113 rule 6(2) provides;

Nothing in this Order shall prevent the Court from ordering possession to be given on a specified date, in the exercise of any power which could have been exercised if possession had been claimed in an action begun by writ.

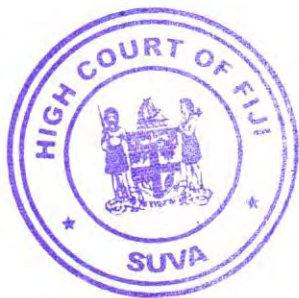
[17] These proceedings were in fact begun by originating summons but the learned Master of the High Court converted it to a writ action and the matter proceeded as if it was begun by a writ.

[18] The defendant have been in occupation of this property since 1972 and therefore the court is of the view they should be given reasonable time to vacate the property.


[19] For the reasons aforementioned the court makes the following orders.

ORDERS

1. The defendants are ordered to vacate the property comprised in Certificate of Title No. 10613 being Lot 4 on Deposited Plan No. 2585 and handover the possession to the plaintiff within thirty (30) days from the date of the judgment.
2. The defendants are also ordered to pay the plaintiff \$3000.00 as costs of this action.



30th July 2020


Lyone Seneviratne

JUDGE