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

CIVIL ACTION NO. HBC 13 OF 2017

(On appeal from the judgment of the Master delivered on 27 June 2019 at the High Court of Fiji, Lautoka in Civil Action No. 13 of 2017)

BETWEEN : **AISAKE RAVUTUBANANITU** of Tagitaginatua, Tavua, Businessman.

APPELLANT (ORIGINAL PLAINTIFF)

A N D : **BASKARAN NAIR** of Koronisalusalu, Tavua, Driver.

RESPONDENT (ORIGINAL DEFENDANT)

Appearances : Ms Ravai for the appellant/plaintiff
Mr N. Padarath for the respondent/defendant
Date of Hearing : 10 July 2020
Date of Judgment : 28 August 2020

JUDGMENT

Introduction

[01] This is an appeal, with leave being granted to appeal out of time, from the order of the learned Master (*"the Master"*) dated 27 June 2019. By that order, the Master dismissed an application of the plaintiff/appellant (*"the appellant"*) filed under Order 113 of the High Court Rules 1988, as amended (*"HCR"*) for possession of the land against the defendant/respondent (*"the respondent"*).

[02] At the hearing, counsel who represented the parties informed the court that they will rely on their respective written submission. As such, there was no oral argument.

Factual background

[03] The plaintiff brought an action under O 113 of the High Court Rules 1988, as amended ("*HCR*") against the defendant for an order for immediate vacant possession of the property known as Agreement for Lease No. 64646 (*part of*) TLTB No 4/4/1953 in the District of Tavua in the Province of Ba ("the *property*"). He brought the action on the basis that he is the registered proprietor of all that piece of land, being Native Land known as Koronisalusalu Lot 2 in the District of Tavua, Province of Ba.

[04] The defendant had, the plaintiff alleged, come to occupy the property forcefully and without any authority from the plaintiff.

[05] On 19 March 2009, his solicitor, the plaintiff issued a quit notice against the defendant.

[06] On 27 February 2017, the plaintiff obtained a default judgment against the defendant, which was subsequently set aside with consent and subject to costs of $700.00 payable by the defendant to the plaintiff.

[07] Thereafter, the defendant filed an affidavit in response and stated "*that he was living on the land for the past 59 years, built a house in 1987, this land belonged to his grandfather, Anand Nair and then to this father, Achunda Nair, in 1993 his father sold the land to a Ram Padarath with an agreement that once acre of land would belong to his 5 children.*" He said his right of occupation was through that agreement.

[08] The plaintiff then filed an answering affidavit and stated that: "*iTLTB granted to him a lease in 1999, his block of land was vacant but when he returned from New Zealand in 2008, he discovered the defendant had built on it. He then immediately gave a notice to vacate. He further said that in the locality diagrams marked yellow is the block belonging to the defendant's family and clearly demarcated and marked orange belonging to him under lease from iTLTB.*"

[09] Having heard the matter on 28 February 2018, the Master delivered his judgment on 27 June 2019. By that judgment, he dismissed the appellant's application for possession. The appellant appeals, having obtained leave to appeal out of time, that judgment to this court.

Reasoning in the court below

[10] The Master summarizes his reasons for dismissing the application [at paragraphs 24, 25 and 26]:

> *"24. According to the above condition, the agreement to lease of the plaintiff shall exclude other lease when surveyed. The defendant and his brothers too have been living there for longtime, and one brother of the defendant obtained same agreement for lease for part of same land whilst the defendant is waiting for the same for the area he has been occupying. However, none of their land is duly surveyed. At this point, the plaintiff faces a risk of losing some portion if his land is duly surveyed as per the above condition 2. Therefore, it appears that, the plaintiff started this proceeding invoking the jurisdiction of this court under Order 113 against the defendant, to eject him in order to avoid such risk, before he goes for survey. This attempt of the plaintiff should not be allowed, i.e. the plaintiff should not be allowed to eject all neighboring occupants when the area of land agreed to be leased to him is un-surveyed. The plaintiff must ascertain the area of land agreed to be leased to him by an authorized survey, before seeking an order for ejectment. In the absence of any such survey there is a reasonable doubt as the extent of the land for which the plaintiff has right to possess according to his annexure* ***"AR1"*** *since the defendant derives his right to possess part of the main land from his father who owned the main land sometime back.*
>
> *25. In addition, there are several complicated issues in this matter. Firstly the extent of the land agreed to be leased to the plaintiff yet to be surveyed and determined. Secondly, the right of the defendant to occupy the part of the same land, which he claims from his father who owned the Native Lease for the main land to be determined. Thirdly, the defendant and his other brother too paid the fee for separate leases for the areas they have been occupying. Fourthly, there is another agreement for lease issued to one of the brother of the defendant which is marked as* ***"BN7"*** *for part of the same main land. That agreement for lease also has same condition in relation to survey like the agreement of the plaintiff. Therefore, his (brother of the defendant) land too should be surveyed as it also forms part of the main land called 'Koronisalusalu'. Thus, all the rights of the plaintiff, defendant and his brothers to certain portion of the land which they claim to form part of main land called 'Koronisalusalu' to be determined through a proper survey with the active involvement of iTLTB.*
>
> *26. According to the above discussion, the plaintiff obtained the right of possession of un-surveyed part of the main land called 'Koronisalusalu' through his agreement to lease. On the other hand, the defendant's right to*

possess his portion of land, of course un-surveyed, derives from his father who owned the main land sometime back. Whilst the defendant and his other brother too made the payment for new lease of the land they occupy, another brother of the defendant has already obtained an agreement for lease for another un-surveyed portion of main land 'Koronisalusalu'. In these circumstances, the plaintiff cannot succeed in this application when all those issues remain unsettled; as both the plaintiff and defendant have the equal right to possess an un-surveyed portion of main land called 'Koronisalusalu'. It follows that the summons filed by the plaintiff ought to be dismissed without cost."

Grounds of appeal

[11] The appeal is preferred on the following 5 grounds:

1. *The Master erred in law and/or in fact in saying NLTB has received the payment for new lease in year 2012 from the defendant and his other brother as established by annexure "BN6"in the affidavit of the defendant and therefore the defendant cannot be considered as trespasser or a squatter. [para 18 of the judgment].*

2. *The Master erred in law and/or in fact in giving weight to the letter from Mataqali members, annexed as "BN4"in the defendant affidavits. [para 17 of the judgment]*

3. *The Master erred in law and/or in fact in saying that the defendant has a right to the portion of the land he occupy based on the right of his father who had the Native Lease for mainland and then transferred to Ram Padarath excluding one acre. [para 21 of the judgment]*

4. *The Master erred in law and/or in fact in ruling that the plaintiff must ascertain the area of land agreed to be leased to him by an authorized survey before seeking an order for ejectment. [para 24 of the judgment]*

5. *The Master erred in law and/or in fact in failing to consider the conclusive evidences of the notice to vacate dated Friday May 8 2009 annexure as "AR3"in the plaintiff's affidavit.*

The law

[12] The HCR, O 113, provides:

> *"**Proceedings to be brought by originating summons** (O 113, R 1)*
>
> ***1** Where a person claims possession of land which he or she 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 or her licence or consent or that of any predecessor in title of his or her, the proceedings may be brought by originating summons in accordance with the provisions of this Order.*
>
> ...
>
> ***Order for possession (O 113, R 6)***
>
> *6 (1) A final order shall not be made on the originating summons except by a Judge in person and shall, except in case of urgency and by leave of the Court, not be made less than 5 clear days after the date of service."*

[13] In *Baiju v Kumar* 1999 FJHC 20, Pathik J (as he was then) explains the scope of the 113 proceedings as follows:

> *"..."**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 <u>trespassers</u>.**"*
>
> *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."***
>
> *Order 113 is effectively applied with regard to eviction of squatters or trespassers. In **Department of Environment v James and others** (1972) 3 All E.R. 629 squatters and trespassers are defined as:*

"he is one who, without any colour of right, enters on an unoccupied house or land, intending to stay there as long as he can ....."

There ***GOULDING J.*** *said that:*

".....where the plaintiff has proved his right to possession, and that the defendant is the trespasser, the Court is bound to grant an immediate order for possession....."

Another definition of "trespasser" is as set out in ***CLERK & LINDSELL ON TORTS*** *(15th Ed. 1982) page 631:*

"A trespasser is a person who has neither right nor permission to enter on premises".

Also as was said by ***LORD MORRIS OF BORTH-Y-GEST*** *in* ***BRITISH RAILWAYS BOARD v HERRINGTON*** *(1972) A.C. 877 at 904:*

"The term 'trespasser' is a comprehensive word; it covers the wicked and the innocent; the burglar, the arrogant invader of another's land, the walker blindly unaware that he is stepping where he has no right to walk, or the wandering child - all may be dubbed as trespassers".

I refer to ***SIR FREDERICK POLLOCK'S*** *statement in the case of* ***BROWNE v DAWSON*** *(1840) 12 Ad. & El 624 where he said:*

"..... A trespasser may in any case be turned off land before he has gained possession, and he does not gain possession until there has been something like acquiescence in the physical fact of his occupation on the part of the rightful owner...."" *[Emphasis original]*

Summary of the submissions

The appellant

[14] Mr Nawaikula submits that the Master was correct in his analysis of the law that Order 113 is normally used only for very clear cases of trespass or occupation of land without a licence or consent or any right. However, the Master is wrong in his application of the law especially on the decision that the defendant is not a trespasser.

[15] In his ruling and decision the Master is suggesting that the mere receipt of an application to lease land (that the respondent is trespassing) automatically

absolves the respondent from being a trespasser or squatter. That is, he submits, an erroneous statement of the law by the Master because how can a receipt of a mere application absolve someone from being a trespasser or a squatter.

[16] The Master erred in law and in fact in giving weight to the letter from the Mataqali to NLTB asking NLTB for permission to allow the respondent to stay for a while until such time that they can move on. The letter relies on compensate grounds as well as it highlights the landowners dispute with the appellant.

[17] The Master had given weight to this letter to come to the conclusion that the respondent can no longer be regarded as a trespasser and squatter.

[18] It is totally wrong for the Master to give weight to *"BN4"* because the landowners have no privity to the tenancy agreement between NLTB and the appellant.

[19] It is trite law that when a lease expires, and because the relationship is contractual, the tenants' right ends and he cannot confer any more right to the land to his representatives, agent or even administrator of his estate. The Master should have known, and he has acknowledged that fact from part of his judgment that that piece of land, *"BN6"*, has been given to the plaintiff under a lease. The respondent has been sitting on that land as a trespasser because after his father's lease expired, that portion of the land was leased to the plaintiff before he built on it.

[20] The land being under an agreement for lease issued by NLTB the conclusive evidence of whether or not a person is trespassing over that lease is the authority of iTLTB. The Master erred in law and/or fact in ordering that the plaintiff and the defendant have equal rights to possess an un-surveyed portion.

The respondent

[21] Mr Padarath submits that the Master's decision to dismiss the appellant's Order 113 summons was the correct decision, as the appellant had not met the requirements required for the remedy of vacant possession under Order 113.

[22] The respondent had entered and remains in possession of the land with the consent and licence of the appellant's predecessor in title.

[23] A reasonable doubt has been created in this case in relation to the appellant's claim of possession. Given the facts that the appellant's land is unsurveyed, the appellant cannot entirely guarantee that the land that the respondent occupy is part of the appellant's land.

[24] The appellant could only be a licensee and not a lessee of iTLTB by virtue of the agreement to lease, as it is trite law that a major difference between a lessee and licensee is that the lessee has exclusive possession to a defined piece of land.

Discussion

[25] The decision, the subject matter of this appeal, was made by the Master in the recovery of possession proceedings brought under the HCR, O 113. Under that Order, a person who claims possession of land which he or she 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 or her licence or consent or that of any predecessor in title of his or her. The land in dispute in these proceedings is a native land.

[26] As the registered proprietor, the appellant brought the eviction proceedings under Order 113 to evict the respondent from the land on the basis that he (the respondent) entered into or remained in occupation without his (appellant) licence or consent or that of any predecessor in title of his. The appellant could bring eviction proceedings under O 113 because he the registered proprietor of the land.

[27] The central issue on appeal was whether or not the respondent was a trespasser.

[28] The Master dismissed the appellant's action on the basis that the respondent was not a trespasser.

[29] I propose to deal with the grounds of appeal in turn.

Ground 1*: The Master erred in law and/or in fact in saying NLTB has received the payment for new lease in year 2012 from the defendant and his other brother as established by annexure"BN6"in the affidavit of the defendant and therefore the defendant cannot be considered as trespasser or a squatter.*

[30] The appellant produced before the Master a receipt for payment for a new lease made in 2012 (*"BN6"*).

[31] The question that arises is whether the payment by the respondent to the iTLTB for a new lease gives any right to the respondent to possess or occupy the land.

[32] Indeed, the respondent had made an application for a new lease with the application fee of $57.50 to the iTLTB.

[33] The Master held that the making of an application for lease a land (that the respondent is trespassing) automatically absolves the respondent from being a trespasser or squatter.

[34] There is no law or rule that the making of an application for lease to the iTLTB with the relevant application fee would automatically absolve the applicant (in this case the respondent) from being a trespasser or squatter or give any right to possess the land intended to lease.

[35] In the absence of any law or rule that gives legal right to possess a land for which an application for lease has been made with the relevant application fee, albeit with consent of the land owing unit (*"LOU"*), I cannot approve the proposition that receipt of an application to lease land (that the respondent is trespassing) [with the application fee and with consent of the LOU] automatically absolves the respondent from being a trespasser or squatter.

[36] The counsel for the appellant referred to me the case of *Apimeleki Nasalo No.2 v Mosese Tavutu* (Civil Action No. HBC 185 of 2016 where Master Jude Nanayakkara (as he then was) said:

> *"Moreover, the land in question in this case is 'Native Land' within the meaning of Native Land Trust Act. The defendant has entered into possession of the land and remains in occupation of the land without the knowledge or acquiescence of the Statutory Landlord i.e. the Native Land Trust Board. Therefore, the defendant is an illegal occupant."*

[37] iTLTB issued a quit notice dated 8 May 2009 (which was served to the respondent on 10 May 2009) against the respondent (*"AR3"*) that:

"...

<u>RE: NOTICE TO VACATE</u>
<u>NATIVE LAND KNOWN KORONISALUSALI LOT 2</u>
<u>TAVUA</u>

We have been advised that you illegally in occupation of the above native lease without the consent of our lessee Mr Waisake Ravutubananitu.

This letter serves to give you notice to vacate the above land within seven day (7) days from the date of this notice; failing which we will advise Mr Ravutubananitu to take legal action to evict you together with costs.

Thank you.
Yours faithfully,
Sgd/
[Eparama Ravaga]
<u>Manager North Western</u>"

[38] Before iTLTB issue the quit notice, the appellant through his solicitor issued a notice dated 19 March 2009 (which was served to the respondent on 21 March 2009) to vacate against the respondent that:

"...

<u>RE: NOTICE TO VACATE – KORONISALUSALU LOT 2</u>

...

I refer to my letter to you of 21st April 2004 on which I demand you vacate the property as instructed by my client (copy attached).
Because of the above I am instructed to evict you.
I now demand that you vacate the premises with immediate effect failing which I will obtain an immediate Order from the Court to see to your eviction together with costs.
Yours faithfully,
Nawaikula Esquire
Sgd/"

[39] It appears that the respondent had entered into possession of the disputed land and remains in occupation of the same without the knowledge or acquiescence of iTLTB and/or without the consent of the lessee, the appellant. Therefore, the respondent, in my opinion, is a trespasser.

[40] Ground 1, therefore, succeeds.

***GROUND 2:** The Master erred in law and/or in fact in giving weight to the letter from Mataqali members, annexed as "BN4"in the defendant affidavits. [para 17 of the judgment]*

[41] It is true that the Turaga ni Mataqali had given a letter to the respondent respecting Ref: Notice to vacate – 4/4/1953 Mr. Baskaran Nair f/n Achudan Nair; Native Land Known Koronisalusalu Lot 2 (*"BN4"*) that: *"... we have had discussion with them and agreed that on compassionate ground we allowed them to stay since their leasehold expired a few years ago until such time that they have secured a place for relocation or when the Housing Authority development earmarked for Tavua is completed..."*

[42] Obtaining the consent of the Mataqali is a precondition to get a lease on a native land. iTLTB is the regulatory body of all native land. In all native lease, iTLTB is the lessor. This means that it finally decides whether to grant a lease to an individual or not.

[43] Mataqali's consent for a lease cannot be taken as an authority to possess or occupy a native land. It is not intended to regularise a wrongful or illegal possession. Therefore, ground 2 succeeds as well.

***GROUND 3:**The Master erred in law and/or in fact in saying that the defendant has a right to the portion of the land he occupy based on the right of his father who had the Native Lease for mainland and then transferred to Ram Padarath excluding one acre. [para 21 of the judgment]*

[44] The Master at para 21 of his judgment says:

> *"Thus the right of the defendant to possess the un-surveyed part of main land which has been occupied by him derives from the right of his father who had the Native lease for main land and then transferred it to Ram Padarath excluding one acre. Accordingly, the defendant too has the right to that portion of main land, of course un-surveyed, and then right is equal to that of the plaintiff."*

[45] The respondent claimed that he was living on the land for the past 59 years, built a house in 1987, this land belonged to his grandfather, Anand Nair and then to

this father, Achunda Nair, in 1993 his father sold the land to a Ram Padarath with an agreement that one acre of land would belong to his 5 children. This was the basis for his claim for the right of occupation.

[46] The appellant on his answering affidavit states that iTLTB granted to him a lease in 1999, his block of land was vacant but when he returned from New Zealand in 2008, he discovered the defendant had built on it. He then immediately gave a notice to vacate. He further said that in the locality diagrams marked yellow is the block belonging to the defendant's family and clearly demarcated and marked orange belonging to him under lease from iTLTB.

[47] The respondent father, Achunda Nair was the lessee of the property before 1993, and his father sold it to a Ram Padarath reserving one acre of that for his 5 children. This arrangement was with Ram Padarath by the respondent's father. The appellant was not privy to this arrangement, and the respondent is not bound by it.

[48] The respondent cannot now rely on the lease (expired) that was granted to his father. The respondent appears to be continuing to occupy the property even after his father's lease expired. This may be the reason why iTLTB issued eviction notice against the respondent in May 2009. The respondent seems to have applied to lease the same land in 2012, after iTLTB and the appellant had issued eviction notice against him.

[49] I find merits in the appellant's submission that the Master erred in law and in fact is saying that respondent has a right to the portion of the land he occupy based on the rights of his father who had native lease for the main land and then transferred to Ram Padarath excluding one acre.

[50] Ground 3 succeeds as well.

Ground 4: *The Master erred in law and/or in fact in ruling that the plaintiff must ascertain the area of land agreed to be leased to him by an authorized survey before seeking an order for ejectment. [para 24 of the judgment]*

[51] The Master held that: *"Therefore, it appears that, the plaintiff started proceeding invoking the jurisdiction of this court under 113 against the defendant, to eject him in order to avoid such risk, before he goes for surveys. This attempt of the applicant should not be allowed."*

[52] It is to be noted that there is no prohibition in O 113 that eviction proceedings (under that Order) cannot be brought against any person in respect of un-surveyed land/lease.

[53] However, the locality diagram submitted by the appellant clearly depicts the disputed land. The Master did not consider and give any weight to the locality diagram. More than anything else, the locality diagram, albeit it is not approved by a surveyor, portrays the area or portion of the land the respondent occupy and it also portrays that that area or the portion of the land the respondent occupy falls within the boundary of the appellant's lease.

[54] Generally, iTLTB issues leases subject to survey. A survey may be necessary to determine the exact extent of the property. The property covered by the lease could be identified even without a survey plan. Therefore, I hold that eviction proceedings under O 113 can be brought in respect of the un-surveyed property.

[55] Ground 4, accordingly, has merits.

***Ground 5**: The Master erred in law and/or in fact in failing to consider the conclusive evidences of the notice to vacate dated Friday May 8 2009 annexure as "AR3"in the plaintiff's affidavit.*

[56] It was submitted on behalf of the appellant that the land being under an agreement for lease issued by iTLTB is the conclusive evidence of whether or not a person is trespassing over that lease the authority of iTLTB.

[57] Having found that the respondent was trespassing on the lease issued to the appellant, iTLTB, being regulatory body of all native land, issued the notice to vacate against the respondent. iTLTB's quite notice against the respondent may be considered prima facie proof that the respondent is illegally occupying the lease granted to the appellant.

[58] Ground 5 succeeds as well.

Conclusion

[59] For the reasons given, the appeal succeeds. I would accordingly set aside the Master's decision dated 27 June 2019.

[60] I now consider that the appellant had filed the eviction application under O 113 before me, on the ground that the respondent is a trespasser.

[61] The appellant is the lessee by virtue of the lease issued to him by iTLTB. On the strength of the lease, although it is not registered with the Registrar of Title, he is entitled to possession of the leasehold.

[62] Eviction proceedings under O 113 may be brought for the recovery of possession of land which is in wrongful occupation by trespassers (see *Baiju v Kumar, above*). I have found the respondent to be a trespasser in the disputed property. As such, he is in wrongful possession of the disputed property. I would, therefore, enter judgment in favour of the appellant. Accordingly, the respondent shall deliver up possession of the disputed property to the appellant with immediate effect. Further, the respondent shall also pay summarily assessed costs of $1,500.00 to the appellant.

Result

1. Appeal allowed.
2. Master's order dated 27 June 2019 set aside.
3. The respondent shall deliver up possession of the property known as Agreement for Lease No. 64646 (part of) TLTB No. 4/4/1953 (Koronisalusalu Lot 2) to the appellant with immediate effect.
4. The respondent shall pay summarily assessed costs of $1,500.00 to the appellant.

28/8/20

....
M. H. Mohamed Ajmeer
JUDGE

At Lautoka

28 August 2020

Solicitors:

Nawaikula Esquire, Barristers & Solicitors for the appellant

Samuel K Ram, Barrister & Solicitor for the respondent