

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

**[CIVIL JURISDICTION]**

**Civil Action No. HBC 80 of 2019**

IN THE MATTER of an Application under  
Order 113, Rule 1 of the High Court Rules of Fiji

**BETWEEN: SURENDRA PRASAD** of Tamuka Settlement, House No. 359,  
Lautoka, formally of Waiyavi, Stage 5, Lautoka, Fiji

**Plaintiff**

**AND: ABBU MANI** of Korovuto, Ba, School Teacher.

**Defendant**

Before: Master U.L. Mohamed Azhar

Counsels: Mr. K. Chang of Legal Aid Commission for the plaintiff  
Mr. N. Padarath for the defendant

Date of Judgment: 17.03. 2021

**JUDGMENT**

01. The plaintiff summoned the defendant pursuant to Order 113 of the High Court Rules by the Originating Summons issued on 10.04.2019. The summons seeks the following orders that:
  1. The defendant, his relatives and occupants give up immediate vacant possession to the plaintiff of the land comprised in State Lease No. 19039 situated in the district of Ba in the island of Viti Levu land known as Lot 12 on Plan BA No. 2332 being part of Rarawai and Vunisamoloa formally CT 7822 having an area of 5.4405 hectares, of which Surendra Prasad is the last registered proprietor and of which the defendant currently occupies;
  2. That the cost of this application be paid by the defendant; and
  3. Any other orders that this Honourable Court deems just and equitable.
  
02. The summons is supported by an affidavit sworn by the plaintiff and contains annexures marked from “A” to “F”. The defendant opposed the summons and filed the affidavit in

opposition with the annexures marked as “AM1” to “AM8”. The plaintiff thereafter filed the affidavit in reply and annexed another document which is also marked as “A”. At the hearing, both counsels made oral submission and also tendered their written submission.

03. The Order 113 rule 1, under which the current application was filed by the plaintiff, 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".

04. The above rule is based on the English rules of the High Court. The English courts did not have jurisdiction to summarily order for possession of any property, before introduction of this rule into the High Court Rules. This position was explained by the English Court of Appeal in **Manchester Corp v Connolly** [1970] 1 All ER 961, [1970] Ch. D 420 in which the court held that, the court had no power to make an order for possession and give leave to issue a writ of possession on an interlocutory motion before final judgment had been obtained. The necessity then arose for a speedy and prompt procedure to summarily obtain a final order for possession where not every wrongful occupier can reasonably be identified (see: **The Supreme Court Practice 1988** at paragraph **113/1-8/1** at page **1470**). This resulted in introduction of Order 113 to the High Court Rules. Kennedy LJ explained this background 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.'

05. Accordingly, this Order does not provide a new remedy, rather a new procedure for the recovery of possession of land which is in wrongful occupation by trespassers who have neither license nor consent either from the current owner or his predecessor in title. In proceedings under this Order, the only claim that can be made in the Originating Summons is recovery of possession of land. No other cause of action can be joined with such a claim in proceeding under this Order, and no other relief or remedy can be claimed in such proceedings. The Order is narrowly confined to the particular remedy described in rule 1. **The Supreme Court Practice 1988 (White Book)** states at paragraph **113/1-8/1** at page **1470** that:

In proceedings under this Order, the only claim that can be made in the Originating Summons is for the recovery of possession of land; notwithstanding O.15 r.1, no other cause of action can be joined with such a claim in proceedings under this Order, and no other relief or remedy can be claimed in such proceedings, whether for payment of money, such as rent, mesne profits, damages for use and occupation or other claim for damages or for an injunction or declaration or otherwise. The Order is narrowly confined to the particular remedy described in r.1.

06. **The Supreme Court Practice 1988 (White Book)** further states at paragraph **113/1-8/1** at page **1470** that:

For the particular circumstances and remedy described in r.1, this Order provides a somewhat exceptional procedure, which is an amalgam of other procedures, e.g., procedure by *ex parte* originating summons, default procedures and the procedure for summary judgment under O. 14. Its machinery is summary, simple and speedy, i.e. it is intended to operate without a plenary trial involving the oral examination of witnesses and with the minimum of delay, expense and technicality. Where none of the wrongful occupiers can reasonably be identified the proceedings take on the character of an action in rem, since the action would relate to the recovery of the res without there being any other party but the plaintiff. On the other hand, like the default and summary procedures under O.13 and O.14, 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 of the land without licence or consent and without any right, title or interest thereto.

07. The above decisions and the commentaries in the **White Book** suggest that, this is the procedure to recover the possession of a land occupied by a trespasser or a squatter. It is simple and speedy machinery that is intended to operate with minimum delay, expense and technicality as opposed to plenary trial involving oral examination of witnesses. Where none of the wrongful occupiers can reasonably be identified the proceedings take on the character of an action in rem, since the action would relate to the recovery of the res without there being any other party but the plaintiff. Kennedy LJ., in **Dutton v Manchester Airport** (supra) said at page 689 that:

The wording of Order 113 and the relevant facts can be found in the judgment of Chadwick LJ. In **Wiltshire C.C. v Frazer** (1983) PCR 69 Stephenson LJ said at page 76 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 went on at page 77 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 licence or consent (or that any predecessor in title of his)”.

08. In view of that, it is the duty of a 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 or her claim to recover the possession of the land. In that process, he/she must be able to show to the court his or her 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 or her licence or consent or that of any predecessor in title. Once a plaintiff satisfies these two factors, he or she shall be entitled for an order against the defendant or the occupier. Then, it is incumbent on a defendant or the person occupies that property, if he or she wishes to remain in possession, to satisfy the court that he or she had consent either from the plaintiff or his or her predecessor in title or he or she has title either equal or superior to that of the plaintiff. If the defendant can show such consent or such title, then the application of the plaintiff ought to be dismissed.
09. The plaintiff in this case marked the copy of Crown Lease No. 19039 as “A” and annexed with his affidavit. It is a duly certified Instrument of Title ("instrument of title" includes a certificate of title, Crown grant, lease, sublease, mortgage or other encumbrance as the case may be according to section 2 of Land Transfer Act). The section 18 of the Land Transfer Act specifically provides that, duly certified copy of

Instrument of title to be conclusive evidence of proprietorship unless the contrary is proved by the production of the register or a certified copy thereof. The defendant does not dispute the proprietorship of the plaintiff. He claims his right to occupy the subject property based on the Sale and Purchase Agreement he signed with the plaintiff.

10. Admittedly, the plaintiff and the defendant had a Loan Agreement and later entered into a Sale and Purchase Agreement, whereby the defendant agreed to purchase the subject property. It is on that agreement the defendant entered the subject property and has been occupying the same. He claims that, he fulfilled his duties under the said agreement and incurred costs; however, the plaintiff failed to proceed with transfer of the subject property to him. Briefly, the defendant claims that, he has right to occupy the subject property based on the said Agreement; however the plaintiff breached the same. Therefore, the defendant prayed the court to dismiss the summons filed by the plaintiff. On the other hand, the plaintiff rejects those allegations and states that, the Director of Lands refused to grant consent for transfer and therefore the said Agreement was nullified. The plaintiff further claims that, he served on the defendant the notice to vacate the subject property subsequent to refusal of Direction of Land.
11. It appears that, there are issues between the parties over the Sale and Purchase Agreement they signed. However, the dispute between the parties in relation to their duties and obligations under the said Sale and Purchase Agreement is not the matter for consideration in this court under the application made pursuant to Order 113 of the High Court Rules. Indeed, the defendant entered the property with the consent and licence of the plaintiff in accordance with the said Sale and Purchase Agreement, but now remains in the same without consent and or licence as the plaintiff demanded him to vacate it after the Director of Land refused to grant consent for transfer of subject property to the defendant. The question is whether the jurisdiction of this court under Order 113 of the High Court Rules can be invoked in this case when the defendant, who entered the property with consent and licence, remains without consent and licence now?
12. The Order 113 of the High Court Rules not only applies where the occupier has entered into occupation without licence or consent, but also applies to a person who has entered into possession of land with a licence but has remained in occupation without a licence, Pennycuik V-C in **Bristol Corporation v. Persons Unknown** [1974] 1 W.L.R. 365; [1974] 1 All E.R. 593 held at page 595 that:

Looking at the words of that rule, it seems to me to be clear that the order covers two distinct states of fact. The first is that of some person who has entered into occupation of the land without the licence or consent of the person entitled to possession or any predecessor in title of his, and secondly that of the person who has entered into occupation of the land with a licence from the person entitled to possession of the land or any predecessor in title of his but who remains in such occupation without the

licence or consent of the person entitled to possession or any predecessor in title. That that is the true construction appears to be perfectly clear from the use of the word 'or' and if the rule did not cover the second state of affairs which I have mentioned, that is to say of entry with licence and remaining in occupation without licence, then the words 'or remained' would, so far as I could see, have no significant meaning at all. Obviously there never could be proceedings against someone who had entered, but did not remain in occupation of the land.

13. It must be noted that, Pennycuick V-C in that **Bristol Corporation v. Persons Unknown** (supra) expressed in obiter that, the court has discretion whether to permit this summary procedure to be used in cases where there had been a licence to occupy. However, the Court of Appeal in **Great London Council v Jenkins** [1975] 1 W.L.R 155; [1975] 1 All E.R 354, unanimously disapproved that obiter and held that, the court has no discretion to refuse to allow the summary procedure to be used, even where the respondent had been in occupation under the licence for a substantial period and the court is bound to grant an order for possession in such circumstances. Cairns LJ., held at page 359 that:

With respect to Pennycuick V-C, that opinion, expressed obiter, appears to me one which it would be difficult to sustain. It may well be that a local authority or other responsible landlord would be reluctant to use this summary procedure against a former licensee with whom good relations have been maintained over a long period. But if the procedure is adopted, I do not consider that there is any discretion for the court to say: 'I shall not make an order for possession, because I do not think this is the sort of defendant against whom the procedure should be used.'

14. It is clear beyond peradventure that, in a summons made under this Order 113 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. The court has no discretion to refuse to allow the summary procedure to be used, even where the respondent had been in occupation under the licence for a substantial period and the licence has been terminated. In the case before me, the defendant entered the subject property with the consent and licence of the plaintiff pursuant to their Agreement. However, the licence had already been terminated when the plaintiff served the notice on the defendant demanding him to vacate the same property, following refusal of Director of Land to grant consent to transfer the same to the defendant. Since the plaintiff has invoked the jurisdiction of this court under Order 113, this court has no discretion to refuse the order for possession considering the previous relationship between the plaintiff and the defendant. This court is bound to grant order for possession as emphasized by English Court of Appeal in **Great London Council v Jenkins** (supra). It follows that the defendant ought to be evicted immediately from the subject property. The agreement between the parties cannot

be a defence for the defendant to remain in possession of the subject property. However, it may give him a cause of action to sue the plaintiff for breaching it.

15. The court in **Department of the Environment v. James and Others** [1972] 3 All E.R 629 held that, if a plaintiff, in an action for ejectment, proves his legal title in possession, he is, as of right, entitled to an immediate judgment for possession. The common law courts under common law rules have no discretion delay him. The plaintiff too in this case, as of right, is entitled to an immediate judgment for possession of the subject property, as his title is not disputed and the defendant has no defence since the consent and licence had already been withdrawn. The court also notes that, this judgment shall not operate as a bar for the defendant to sue the plaintiff for alleged breach of the said Sale and Purchase Agreement.
16. Accordingly, I make following final orders:
  - a. The defendant and all other occupants of the subject property are ordered to immediately deliver to the plaintiff the vacant possession of the subject property described in the originating summons, and
  - b. There is no order as to costs.

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

**At Lautoka**  
**17.03.2021**