

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 231 of 2017

BETWEEN: **TIERI RAITINI** of 17 Nairai Road, Raiwai, Suva.

PLAINTIFF

AND: **ATONIO MASIYASA, ROSALIA DICAU AND IOWANE RALEEVE** all of
17 Nairai Road, Raiwai, Suva.

DEFENDANTS

BEFORE: **Hon. Mr. Justice Vishwa Datt Sharma**

COUNSEL: **Mr. Young M. [Young & Associates]** - for the Plaintiff
 Mr. Skiba K. [Legal Aid Commission] - for the 1st Defendant
 No appearance - of the 2nd and 3rd Defendants.

Date of Ruling: **26th January, 2021 @ 9.30am**

RULING

(Originating Summons pursuant to Order 113 of the High Court Rule, 1988)

INTRODUCTION

1. The **Plaintiff** by an **Originating Summons** filed on 09th August, 2017 claimed against the Defendants the following orders-
 - (i) That the Plaintiff is the registered attorney of the Aleta Adimaivunivesi, one of the registered proprietor of property comprised in Certificate Reference: HA No. LP/18/251/S Housing Lease No. 237366 known as C.L. 4283, Lot 21, 22, 23, 24, 25 and 26 on DP No.3720 situated in Province of Rewa, Suva known as Lot 17, Nairai Road, Raiwai, Suva.
 - (ii) That the Plaintiff is the appointed caretaker of the said property of Atonio Raisele (Deceased) the second registered property comprised in Certificate Reference: HA No. LP/18/251/S Housing Lease No. 237366 known as C.L. 4283, Lot 21, 22, 23, 24, 25 and 26 on DP No.3720 situated in Province of Rewa, Suva known as Lot 17, Nairai Road, Raiwai, Suva.
 - (iii) That the Plaintiff is entitled to possess and occupy the said land, which comprised in Certificate Reference: HA No. LP/18/251/S Housing Lease No. 237366 known as C.L. 4283, Lots 21, 22, 23, 24, 25 and 26 on DP No.3720 situated in Province of Rewa, Suva known as Lot 17, Nairai Road, Raiwai, Suva.
 - (iv) That the Defendant together with other persons not named in the summons are occupying the Plaintiff's land without their consent.
 - (v) That the Defendant together with other persons not named in the summons are the members of their families or extended.
 - (vi) That the Defendant has created unnecessary turmoil not only in my immediate family and relatives, but also between the Defendant and the Plaintiff.
 - (vii) That the Defendant together with other persons not named in the summons occupying the Plaintiff land shall give vacant possession of the Plaintiff's land.
 - (viii) That the Defendants to pay the costs to the Plaintiff.
 - (ix) Any other order as it deems fit and just by this Honourable Court.
2. This application is made pursuant to **Order 113** of the High Court Rules, 1988.
3. The 1st named **Defendant, Atonio Masiyasa** was represented by the Legal Aid Commission Counsel [LAC] and has filed an affidavit on 28th September 2017 and opposed the Plaintiff's application.
4. The 2nd named **Defendant** [Rosalia Dicaui] and 3rd named **Defendant** [Iowane Raleeve] did not file any affidavit response for the Plaintiff's Application nor were represented by any counsel at the hearing but relied on the affidavit file by the first Defendant.
5. Later in the proceedings the court was informed by the Plaintiff's counsel that the 2nd and 3rd Defendants are not in occupation of the said property.
6. However, Defendants' written submission was filed by Legal Aid Commission on 27th April 2020.
7. The Plaintiff also furnished court with his written submissions.

THE LAW

8. **Order 113** of the High Court Rules, provides as follows-

Proceedings to be brought by originating summons (O.113, r.1)

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.

PLAINTIFF'S CASE [summarised]

9. The Plaintiff is the caretaker of Atonia Raisele who is now the deceased.
10. By registered Power of Attorney of Aleta Adimaivunivesi [2nd registered owner of the HA Lease No.237366] the Plaintiff is authorised herein to act and commence this proceedings.

DEFENDANT'S CASE [summarised]

11. 2nd and 3rd Defendants are no longer in occupation of the said property in question.
12. First Defendants contention is that the current application should have been commenced by **Section 169 of Land Transfer Act**. No proper procedures have been followed.
13. The property descriptions does not match or is consistent with the title deed referenced [HA No LP/18/251/s. HL 237366 known as CL 4283. This is an incorrect description.
14. Plaintiff's Power of Attorney lacks the Locos Standi. The appointment of the care taker by Antonia Raisele ceases upon death of the deceased.
15. The Defendant moved into the said property on the invitation of the deceased. The license to live in the property was offered by the Deceased Antonia Raisele who had prior to his death voluntarily invited the Defendants to occupy the said property in exchange for the free care giving services before his Death.

ANALYSIS AND DETERMINATION

16. The court notes that the **2nd and 3rd Defendants** are no longer in occupation of the said property in question for which an order for vacant possession is sought.
17. The Plaintiff avers that the Defendants do not have any legal or equitable rights or proprietary rights to continue occupying the above mentioned property and are further refusing to vacate the property in question.

18. Bearing in mind the above, it is necessary to consider the current matter in terms of the applicable law in the light of reported decisions in relation to the principles governing the summary application herein seeking an order for eviction pursuant to Order 113 of the High Court Rules, 1988.
19. I set out hereunder a few important citations which I consider to be the guidance in determining the current impending issue in the proceedings before the court.
20. **Order 113 of the High Court rules 1988** provides a **summary procedure** for the possession of land.
21. Justice Pathik in "**Baiju v Kumar (1999) FJHC 20; HBC 298 J.98**, succinctly stated the scope of the order as follows:

"The question for (the) Courts determination is whether the plaintiff is entitled to possession under this Order. To decide this 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".

22. 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".

23. **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....."

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"

24. 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".

25. The Housing Authority Sub Lease referenced number LP/18/251/s Lease number 237366 C.L. 4283 confirms that Antonia Raisele, Aleta Adimaivunivesi, Pio Kaveri Raisele are the registered lessee.

26. The supporting affidavit of the Plaintiff, Tierl Ratini dated 02nd August, 2017 deposes that she is the Registered Power of Attorney for Aleta Adimaivunivesi who holds one half share of the property in the Housing Authority Sub Lease number 237366 C.L. 4283.
27. The 2nd Registered lessee, Atonia Raisele is a deceased and took demise on 22nd December, 2016.
28. The Plaintiff states that she was appointed as the care taker to manage and renovate the said property in liaison with Aleta Adimaivunivesi located at 17 Nairai road, Raiwaqa.
29. She further stated that the Defendants have been in occupation of the said property without any colour of right nor was there any Tenancy Agreement signed between them.
30. The Defendants were served with notices and have refused to give vacant possession.
31. The Plaintiffs affidavit in support establishes the fact that Aleta Adimaivunivesi is one of the Registered Lessees of the Housing Authority Sub Lease reference number LP/18/251/s, Lease Number 237366 C.L. 4283 and has given the Power of Attorney to the Plaintiff, Tierl Ratini to commence the current proceedings to seek an order for vacant possession. However, she cannot seek for vacant possession against the Defendants alone when there are Two (2) other Registered Lessees who hold the same Housing Authority Sub Lease respectively.
32. However, the Defendants contention is that the Plaintiffs current application should have been commenced in terms of the provisions of **section 169 of the Land Transfer Act**.
33. The Plaintiff's Power of Attorney lacks the locus standi and the appointment of the care taker ceases to be operational upon the death one of the Registered Lessee, Atonia Raisele.
34. The Defendants further stated that they were invited on the property by the Registered sub Lease holder, Antonia Raisele and therefore, the defendants have the licence and the consent to occupy the said property in Question.
35. The **Central issue** for this Courts determination is **whether the plaintiff is entitled to vacant possession of the property comprised in Housing Authority Sub Lease no. [HA No LP/18/251/s. HL 237366 known as CL 4283, Lots 21-26 on DP No 3720 situated in the province of the Rewa, Suva known as Lot 17 Nairai Road Suva under order 113 of the High Court Rules?**
36. In order to decide the above issue, the court has to consider the scope of the order 113.
37. **Scope of Order 113 of the High Court Rules** is discussed in The Supreme Court Practice, 1993 Volume 1, 0,113/1 - 8/1 at page 1602. The relevant paragraph is as follows:

"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."

38. Thus, the provisions of **Order 113**-

- (i) allows a person to claim 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;
- (ii) allows a person who has a legal right to claim the possession of a land could institute an action, claiming the possession of said land against a person who has entered into or remains in occupation without his licence or consent or that of any predecessor in title;
- (iii) Provides for a speedy and effective procedure for the owners of the lands to evict persons who have entered into and taken the occupation of the land without the owner's licence or consent.

39. The proceedings under **Order 113 encompass two main limb test**. The first is the onus of the Plaintiff. The Plaintiff is first required to satisfy that he has a legal right to claim the possession of the land. Once the Plaintiff satisfies the first limb, the onus will shift towards the defendant, where the Defendant has burdened with to satisfy the Court that he has a licence or consent of the owner to occupy the land.

40. Upon the application of the above Principles, My findings are as follows-

41. Altogether, there are three(3) Registered Lessees, namely, Antonia Raisele, Aleta Adimaivunivesi and Pio Kaveri Raisele to the Housing Authority Sub Lease Reference; LP/18/251/s. Lease No. 237366 known as C.L. 4283.

42. These lessees have the legal right to claim the possession of the land pursuant to Order 113 of the High Court Rules, 1988.

43. However, in the current proceedings before court, the proceeding for vacant possession has been commenced by Tieri Raitini alone in her capacity as the Power of Attorney holder on behalf of one of the Registered Lessees, Aleta Adimaivunivesi only.

44. Lessee, Antonia Raisele is a Deceased who died Testate. Probate in Antonia Raisele's Estate was granted to his son Pio Kaberi Raisele on 05th January, 2019 who is one of the Three (3) Registered Lessees of the Housing Authority Sub Lease Reference; [HA No LP/18/251/s. Lease No. 237366 known as CL 4283.

45. Therefore, for the present time there are only two (2) remaining lessees, Aleta Adimaivunivesi and Pio Kaberi Raisele holding the housing authority Registered Lease in question in respect of which an order for vacant possession is sought by the Plaintiff, Tieri Raitini.

46. Bearing in mind the above, I find that the Plaintiff, Tieri Raitini commencing proceedings alone cannot succeed in obtaining an order for vacant possession with the instrument of Power of Attorney from one of the two (2) Registered Lessees therein.
47. The Plaintiff in her capacity as the Power of Attorney holder for the Registered Lessee, Aleta Adimaivunivesi together with the remaining Registered lessee, Pio Kaberi Raisele, should have at least jointly commenced proceedings in order to succeed in the grant of an order for vacant possession.
48. Therefore, I am not satisfied that the Plaintiff, Tieri Raitini alone in her capacity as the Power of Attorney holder for one of the Two (2) Registered Lessees has a legal right to claim for the possession of the land and/ or seek an order for vacant possession pursuant to order 113 of the High Court Rules 1988.
49. For the above rationale, the onus will now shift towards the Defendants to satisfy that either they have licence or consent of the plaintiff and or the Registered Lessee, Aleta Adimaivunivcesi and Pio Kaberi Raisele, being the Registered Lessees of the Housing Authority Sub Lease in question to remain in continuous occupancy of the Housing Authority Sub Lease described hereinabove.
50. I reiterate and it is notable that the 2nd and 3rd Defendants are no longer in occupation of the said property in Question as confirmed by the Plaintiff at the hearing.
51. The Defendants have filed a Response Affidavit opposing the Plaintiff's application raising the issues in terms of license and consent that was obtained from one of the Registered Lessees, Antonia Raisele who has apparently died Testate and his Estate is being administered by his son Pio Kaberi Raisele in terms of the Deceased will whereby the parcel of the land contained in the Housing Authority Sub lease HA No LP/18/251/s. Reference; 237366 known as CL 4283 has bequeathed the Estate to him accordingly.
52. The Defendants have not provided any concrete evidence of licence and/or consent to the court in order to stay in the continuance occupancy of the said property in question.

In Conclusion

53. The Housing Authority still remains the Registered Proprietor of the Housing Authority Sub Lease reference LP/18/251/s. Lease No. 237366 known CL 4283.
54. However, the Housing Authority Sublease in question herein now stands in the name of the Registered Lessees, Aleta Adimaivunivesi and Pio Kaberi Raisele respectively.
55. The Affidavit in response filed herein raises formal evidence of the tribal issues in terms of the consent and/ or license which may tantamount to a Defence for the Defendants accordingly and needs to be tested and ironed out at a proper trial rather than by a summary proceedings as the case is herein.

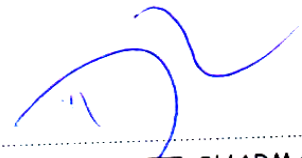
56. However, this tribal issues cannot be dealt with by means of an application by an Originating Summons, rather must be commenced procedurally by a writ action instead.
57. Therefore, for the aforesaid reasons, I have no alternative but to Dismiss the Plaintiff's Originating Summons seeking for an order for vacant possession.
58. The matter proceeded to a full hearing with filing of Affidavits and written submissions by both parties to the proceedings. It is only just and fair that in these circumstances and at the courts discretion, each party is hereby ordered to bear their own costs.

FINAL ORDERS:

- i. The Plaintiff's Originating Summons is dismissed.
- ii. Each party to bear their own costs.

Dated At Suva This 26th Day of January 2021.




VISHWA DATT SHARMA
JUDGE

cc: Young & Associates, Suva
Legal Aid Commission, Suva