

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 189 of 2021

IN THE MATTER of Order 113 of the
High Court Rules 1988

BETWEEN: **LARRY LYNEL BORTLES** of 7375 Falcon Rock dr, Las Vegas, NV 89123,
USA, Businessman

PLAINTIFF

A N D: **APIMELEKI DOMONI and all THE OCCUPANTS OF PROPERTY COMPRISED**
IN CERTIFICATE OF TITLE NO 6684 being LOT 1 ON DO 1277

DEFENDANT

Appearance : Mr. Shelvin Singh for the Plaintiff
Mr. Antonio Bale for the Defendants

Date of Hearing : Monday, 13th June 2022 at 2.30pm

Date of Decision : Friday, 17th June 2022 at 9.00am

DECISION

[A] **INTRODUCTION**

[1]. The matter before me stems from the plaintiffs Originating Summons dated 15.09.2021 filed pursuant to Order 113 of the High Court Rules, 1988 and the inherent jurisdiction of the court seeking the grant of the following orders:

- *That the defendant gives up immediate vacant possession to the plaintiff of the property comprised in Certificate of Title No. 6684 being Lot 1 on DP No. 1277*

which the plaintiff is the registered proprietor of which the defendant occupies and

- *That the costs of this application be paid by the defendant to the plaintiff.*

[2]. The Originating summons is supported by an affidavit of the plaintiff sworn on 08.09.2021. The defendant filed an affidavit in opposition followed by an affidavit in reply thereto.

[B] **THE LAW**

[1]. In order to understand the issues that arise in the instant case, I bear in mind the applicable law and the judicial thinking reflected in the following judicial decisions.

[2]. The Order 113 rule (1) of the High Court Rules is in these terms:

"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."

[3]. Justice Pathik in **Baiju v Kumar**¹ 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.113/108/1 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.

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

¹ (1999) FIHC 20, HBC 298 j 98

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 hold over after the determination of the licence (Bristol Corp. v. Persons Unknown) [1974] 1. W.L.R. 365; [1974] 1 All E.R. 593

[C] **THE FACTUAL BACKGROUND**

What are the facts here? It is necessary to approach the case through its pleadings/ affidavits, bearing those legal principles uppermost in my mind.

The plaintiff in his affidavit in support deposed *inter alia* that:

1. *I am the Plaintiff in this action.*
2. *I depose to the facts herein as within my knowledge and that acquired by me in the course of my duties save and except where stated to be on information and belief.*
3. *I am the registered owner of the property contained Certificate of Title No. 6684 being Lot 1 on DP No. 1277 which I beneficially hold on behalf of Fiji Marina Partners Partnership (" the said property") Annexed hereto and marked "A" is a copy of the said Title.*
4. *The Defendant, Apimeleki and his family of whose names I do not know are occupying the residential building on my property without my permission. I do not know the names of other occupants of the property and have no legal or equitable arrangements in place with them.*
5. *I do not want the Defendants on my property and have asked them to vacate the said property but without success.*

6. *By notice dated 03 August 2021, I have caused the Defendants to be served with a Notice to Vacate. Despite service of the notice, the defendants have failed to vacate the property.*
7. *The Defendants have no legal right to remain on the property and have failed to adhere to the notice to vacate served on them.*
8. *I need the Defendants to vacate my land as they have no legal right to be on the land or any improvements on the land.*
9. *I also seek costs of and incidental to this proceeding.*
10. *I pray to this Honourable Court for an order for vacant possession in terms of the Summons filed herein.*

[D] **CONSIDERATION AND THE DETERMINATION**

- [1]. The plaintiff seeks an order that he recover vacant possession of the land comprised in Certificate of Title No. 6684 being Lot 1 on DP No. 1277, (Annexure "A"), on the ground that he is the registered proprietor of the land and that the defendants are in occupation without the plaintiff's licence or consent.
- [2]. In "**Wiltshire CC v Frazer**"² Stephenson LJ said that for a party to avail himself of the Order 113, he must bring himself within its words. If he does so, the court has no discretion to refuse him possession. Stephenson LJ [at para 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 the 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.*
- [3]. Have those requirements met in this case? Does the plaintiff have a right to possession of the land which meets the first of the requirement set out by Stephenson LJ and the

² [1983] 47 P & CR 69 at 76

defendants have no right which they can pray in aid to justify their continued possession.

- [4]. As I understand the plaintiff's affidavits filed in this case, the plaintiff says:
- *That he is the registered proprietor of the property comprised in Certificate of Title No. 6684 being Lot 1 on DP 1277.*
 - *That the defendant and the persons unknown to the plaintiff are residing on the property.*
 - *A notice dated 03.08.2021 has been served on the occupants but they have refused to give vacant possession.*
 - *The defendant and the persons unknown to the plaintiff living on the property have no right to be on the property.*
- [5]. The defendant has authorized his father to swear and file an affidavit in opposition where he claims:
- *That he was taken to the land in the year 2000 by one George Taylor and asked to take care of the property.*
 - *That he had brought his father to the property.*
 - *The plaintiff was very old in the year 2000.*
 - *The plaintiff may have died.*
 - *That the affidavits may not be genuine.*
 - *That someone else owned the property with the plaintiff due to their being a judgment registered on the title.*
- [6]. As I understand the pleadings and the written submissions of counsel for the plaintiff, the plaintiff does rely upon his title to bring the action to recover possession. I note that, as per the Certificate of Title No. 6684, (annexure A) the property was conveyed to the plaintiff on 13.09.1984 and thereby became and has remained the owner of the property.

- [7]. I will deal with the defences which were adumbrated. First it was said that the defendant was brought to the land in the year 2000 by one George Taylor and asked to take care of the property.

The defendant cannot rely on this as a defence to the plaintiff's claim. George Taylor is not the owner of the property. He had no title to the land. There has been no suggestion in the case that George Taylor enjoyed title or interest in the land to bring the defendant to the land in the year 2000.

It has been common ground that the land was conveyed to the plaintiff by conveyance in 1984 and the plaintiff became, and has remained the owner of the property 17 years before the defendant was brought to the land by one George Taylor in 2000. The plaintiff enjoyed title to the land since 1984. The plaintiff has not granted the defendant licence to enter and occupy the land in question and therefore the defendant and others have entered into occupation without any claim of right and they are trespassers on the land. The defendant has no interest in the property.

- [8]. Secondly, it was said that "*the affidavit may not be genuine*". This would require overwhelming proof. The original affidavits of the plaintiff have been presented to court before the hearing of the matter. **No acceptable material has been placed on record to come anywhere near a finding of fraud or a finding that the whole proceeding was an ingenious fiction.** The Civil Law regarded fraud as being in the nature of a crime, and therefore never presumed it but required it to be fully proved.³ Hence, a finding of fraud cannot be based on suspicion or conjecture and has been held to require proof beyond reasonable doubt.⁴ The onus of proving fraud lies upon the person who alleges it⁵. Bare allegation of Fraud is not sufficient. No material has been placed on record.

- [9]. Thirdly, it was said that "*someone else owns the property with the plaintiff due to there being a judgment registered on the title*". I would not attach importance to this. The title of the plaintiff is not denied by the defendant. It is not in issue that a creditor has used a money judgment to place a lien on the title on 30-11-2016. This could be of no assistance to a trespasser. Once the debt has been paid and/or a satisfactory settlement has been reached, the creditor agrees to release the lien. The plaintiff's right to occupy the land and be in possession arises from his title which has the protection of the law of trespass against intruders. Otherwise the law is powerless to correct a proved or

³ Wessels Section 1160; C.2.21.6 cited and approved by C.G Weeramantry on the law of contracts, at page 319 Section 322.

⁴ Narayan Chettiar v Official Assignee, High Court Rangoon (1941) AIR (P.C) 93

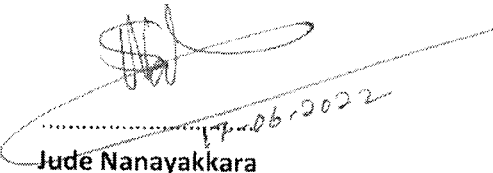
⁵ Monir, Evidence, 4th Edition, Vol.2 at page 618 and Phipson on Evidence, 10th Edition, at page 100.

admitted wrongdoing; and that would be unjust and disreputable. The plaintiff has title to bring an action for ejectment since there was trespass committed on the property. (See paragraph seven above). An action for trespass can only be brought by a person who is in possession or who has a right to be in 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, interfered with by unauthorized adverse possession. The plaintiff's claim for recovery of possession of the land which is in wrongful occupation by trespassers cannot be defeated by the judgment lien placed on the property. A creditor can file a lien on the plaintiff's property. This will only convert the money judgment from unsecured debt to secured debt. This will not affect the plaintiff's locus standi to bring these proceedings.

- [10]. In my judgment the plaintiff has a right to possession arising from title which meets the first of the requirements set out by Stephenson LJ, and the defendant had no right which he can pray in aid to justify his continued possession. There is clearly no defence to the claim for possession.

[E]. ORDERS

- [1]. The defendant and all the occupants of property comprised in Certificate of Title No. 6684 being Lot 1 on DP 1277 give vacant possession to the plaintiff.
- [2]. I make no order as to costs of the case.


Jude Nanayakkara
[Judge]

High Court - Suva
Friday, 17th June, 2022