

IN THE HIGH COURT OF FIJI
CIVIL JURISDICTION
AT SUVA

Civil Action No 258 of 2022

BETWEEN : **ITAUKEI LAND TRUST BOARD** a statutory body having
its registered office in 431 Victoria Parade, Suva

PLAINTIFF

AND : **KASANITA LIKU** and Family of Dokanaisuva, Colo-i-Suva

FIRST DEFENDANT

AND : **AMRIKA PRASAD** and Family of Dokanaisuva, Colo-i-
Suva

SECOND DEFENDANT

AND : **RAJNESH KAMAL** and Family of Dokanaisuva, Colo-i-
Suva

THIRD DEFENDANT

Before : **Banuve, J**

Counsels : V. Tuicolo for the Plaintiff
Defendants in Person

Date of Hearing : 11th July 2024

Date of Ruling : 18th July 2024

RULING

A. Introduction

1. On 8th September 2023, the Plaintiff (ILTB) filed an Originating Summons pursuant to Order 113 of the *High Court Rules* 1988, in which the following orders were sought against the 3 Defendants:
 1. *THAT the abovenamed Defendants and/or any other occupants forthwith deliver up to the Plaintiff vacant possession of ALL that piece and/or parcel of land known as Nairairaikikalabu (part of) Lot 34 formerly R1527 (part of) in the Tikina/District of Naitasiri with an area of 850² (subject to survey).*
 2. *Such further and/or other relief this Honourable Court deems just and equitable; and*
 3. *Costs of this action to be borne by the Defendants.*
2. The Originating Summons was supported by an affidavit of Isoa Kasainaseva, a Senior Estates Officer, Operations of the Central/Eastern Division whose evidence was to the following effect;
 - i. TLTB is the administrator of all i-Taukei land within Fiji for the benefit of landowning units such as provided under the ILTB Act.
 - ii. The subject land is located at Colo-i-Suva in an area known as Dokanaisuva owned by Mataqali Naulukaroa of Kalabu Village in the District of Naitasiri, Province of Naitasiri. The Mataqali consists of more than 40 members.
 - iii. The Plaintiff issued a Residential Lease over the subject land to Nilesh Chand for a term of 99 years effective from 1st January 2015 with annual rental of \$300.00 and to date the lessee is paying the sum of \$410.00 per annum as reassessed effective from 2020. Lease was granted after the lessee complied with TLTB's residential lease application requirements including required documentation and the payment of requisite fees.

- (a) Lease Offer letter for the subject land dated 4th December 2014 reflects the sum of \$5, 279.50 which he had fully settled 6 (six) weeks later.
 - (b) Residential lease was issued to him for a term of 99 years effective from 1st January 2015 with an area of 850m².
 - (c) As a condition of his agreement to lease, lessee is required to engage a surveyor to survey the lease boundaries so it can become a fully registered lease. He has paid the requisite fees and proceeded with his Survey Instructions.
 - (d) The lessee is paying the lease rental on time so the Mataqali Naulukaroa can benefit from the lease income.
- iv.* The Lessee upon coming in to start construction on his lease, finds all the Defendants occupying the land. He has raised his complaints to TLTB and its officers have carried out an inspection of the subject lease. The lessee is only able to occupy one quarter of the lease area whilst the Defendants have unjustly enriched themselves by occupying the rest of the leased land.
 - v.* A portion of the land from the Mataqali Naulukaroa was allocated for all Defendants to move to with an opportunity to lease land is also located at Colo-i-Suva. The Defendants refused to move to the allocated land.
 - vi.* Despite the lessee issuing them with Notices to vacate in February 2020, all the named Defendants continue to occupy the land.
 - vii.* The lessee initiated eviction proceedings, Civil Action HBC 111 of 2020, which did not succeed.
 - viii.* The lessee is not able to occupy and enjoy his lease and also survey his lease boundaries. All Defendants have no consent from the Board and the landowners of Naulukaroa to occupy the said land. Further, they are not paying any lease income for the benefit of all the Mataqali members.

- ix. All the Defendants continue to stay on the land and make improvements at the expense of the lessee, Nilesh Chand, despite their being warned to refrain from extending their houses.
 - x. Most times, the Defendants have verbally harassed the lessee which has affected his right to enjoyment of his residential lease.
 - xi. All Defendants have been issued with Notices of Unlawful Occupation dated 29th March 2022, however the Defendants have refused to vacate.
 - xii. All Defendants and their respective families have not obtained the consent from the Board to occupy or lease the said land.
 - xiii. The occupation by the Defendants of the said land has not generated any income or monetary returns for the landowning unit.
3. The Defendants have personally appeared before the Court at various times when the matter was called and did so, representing themselves at the hearing of this matter on 11th July 2024.
 4. Affidavits in response have been filed by all 3 Defendants on 8th December 2022¹ and on 23rd February 2023².
 5. The facts deposed in the affidavits of the Defendants are similar in the reasons they provide for their occupation of the subject leased land. The Second Defendant, Amrika Prasad in the affidavit he deposes on 8th December 2022, in opposition to the Affidavit of Isoa Kasainaseva (the deponent) says:
 - i. The deponent and his family has been occupying the subject land, (*Nairairaikikalabu (part of) Lot 34 formerly R1527 (part of) in the Tikina/District of Naitasiri*), since 2006, upon the consent of the then mataqali headman, Samuela Bilivanua after payment of the sum of \$1,000.00 (a down payment of \$500.00, and on construction of a house another \$500.00). The deponent, and the other Defendants had paid an additional amount of

¹ Affidavits of **Amrika Prasad** and **Ratnesh Kamal Deo**, respectively

² Affidavit of **Kasanita Liku**

\$10.00 a month to the mataqali which was then increased to \$15.00 in 2010 which they continue to pay to date. Copies of receipt are tendered stated to be issued by the landowning unit.

- ii.* The deponent denies that he has unjustly enriched himself by occupying the said land, rather he had moved onto the land before the lessee, upon the consent of the then mataqali headman and the initial payment of \$1,000 and the monthly payment of \$15.00, to date.
- iii.* The lessee moved onto the land between 2009 and 2010 and by that time the deponent and the other Defendants with their families were already residing on the said land.
- iv.* In around 2015-2016, a committee was formed between the landowners, TLTB and the settlers whereby there were discussions on proper leases being given to us. These talks were eventually stopped by the Mataqali members and we were unable to reach an outcome.
- v.* It came as a big surprise that the lessee had been granted an Agreement for Lease given that the deponent had been trying to follow the same procedure to lease the portion of land he was occupying.
- vi.* Nothing was forthcoming from the new Mataqali headman on the possibility of providing a vacant land that the deponent and other Defendants could reside on.
- vii.* The deponent has been residing on the subject land for over 16 years and have invested a lot of finance and resources in building a home for the family.
- viii.* Over the years, with the consent of the Mataqali, other families settling in the same area have got their electricity lines and water pipes running through the same piece of land, Should the deponent, and other Defendants be removed from the land, other families will be impacted by this decision given that the lines and the pipes will also have to be moved.

B. The law

6. The Originating Summons proceedings filed by the Plaintiff against the Defendants has been initiated pursuant to Order 113 of the *High Court Rules* 1988.
7. Order 113 is entitled ‘**Summary Proceedings for Possession of Land**’

Order 113, Rule 1 states:

Proceedings to be brought by originating summons

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 [or her] license or consent or that of any predecessor in title of his [or hers], the proceedings may be brought by originating summons in accordance with the provisions of this Order.*
8. The primary issue that the Court has to determine is whether the summary process for obtaining possession of land pursuant to Order 113 of the *High Court Rules* 1988, as sought in the Originating Summons filed on 8th September 2022, is appropriate, given the peculiar circumstance of this case.
9. The Plaintiff has provided written submissions to support its position that the orders it seeks in the Originating Summons ought to be granted and relies on an earlier ruling of this Court – *NLTB v Veisamasama* – Civil Action HBC 34 of 2011 (*Master Amaratunga*), for the following propositions;
 - i. Section 4 of the *Native Land Trust Act* [Cap 134] is wide enough to grant to ILTB, the power to institute an action in terms of Order 113, as the provision vests and entrusts the control of all native land on it.
 - ii. Further, section 4 of the *Native Land Trust Act* [Cap 134] specifically indicates that such land should be administered by the Plaintiff for the benefit of the Fijian owners, and their benefit is of paramount consideration, as opposed to individual interests.

- iii. The Plaintiff has to act in the best interest of the Fijian owners of the land and interest in land vested on them by statute and which it needs to protect from outsiders.
10. In *Veisamasama*, the Defendant was the spouse of a lessee, who had passed away. On the passing of the lessee in, his estate was administered in 1984 and the lease terminated. A new lease was issued to a different lessee, Ian Chute, in 1985. The Defendant remained on the leased property and continued to do so, even after the subsequent lease to Ian Chute, expired in 2002. The Defendant sought to justify her continued presence on the subject leased land, on the following basis;
 - i. an oral agreement with Ian Chute, although no supporting evidence was provided to affirm this.
 - ii. a written approval provided by the customary head of the Yavusa and Mataqali, the customary owners of the subject land, which was later determined to be false, by the Native Lands and Fisheries Commission, on the basis that the position was vacant.
 11. In its finding, the Court held that the Defendant did not have a claim against the Plaintiff, as her occupation of the subject land, was due to an initial lease to her deceased husband, which had been determined. Although the new lessee, Ian Chute, allowed her to remain on the property, that 'allowance' could not justify her occupation, against NLTB, moreover, as the subsequent lease had also expired in 2002. The application sought by the Plaintiff, in terms of Order 113 of the *High Court Rules 1988*, was granted.
 12. In short, the inability of the Defendant to justify her continued occupation of the subject land, after the initial lease granted to her husband had been terminated, warranted the issue of the summary process in Order 113 against her.
 13. In this case, the Plaintiff, finds *Veisamasama* directly applicable, also and seeks the orders prayed for in the Originating Summons pursuant to Order 113.³

³ paragraph 1 herein

C. Analysis

14. Whilst the Court finds the general position outlined in Veisamasama broadly applicable, the objective behind the inception of Order 113, as a summary process, needs to be borne in mind, when applying it to a specific circumstance. In this regard, the Court has found a series of cases from the High Court at Lautoka of utmost assistance, Kant v Nair- Civil Action No 163 of 2020 (15th February 2021)⁴, Nadhan v Reddy –Civil Action No HBC 131 of 2016 (18th September 2019)⁵, Nadhan v Reddy-Civil Action No HBC 131 of 2016 (30th September 2020)⁶ and ILTB v Webb & 7 Others –Civil Action No HBC 271 of 2019. (23rd October 2020)⁷
15. In Kanta v Nair, the Court conveniently sets out the rationale for the inception of Order 113:

“7. It is clear from the cases applying this rule that Order 113 provides a procedure to deal summarily, (and hopefully quickly), with claims to which there is clearly no defence. The point is made in the decision of the Court of Appeal of England and Wales in Dutton v Manchester Airport [1999] 2 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 of possession . The jurisdiction is question is a jurisdiction directed to protecting the right of the owner of the property, to the possession of the whole of his property, uninterfered by unauthorized adverse possession’

⁴ per Stuart J

⁵ per Master Azhar (as he then was)

⁶ per Stuart J

⁷ per Stuart J

Also relevant to this issue is the commentary in the Supreme Court Practice, 1993 (White Book) Vol 1, O.113/1-8/1 at page 1603 as follows:

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 possession of the land or as to wrongful occupation of the land without a license or consent and without any right, title or interest thereto.

16. In *Nadhan v Reddy* [2019] FJHC 894 (18th September 2019) the Master⁸ helpfully summarizes the purpose and application of Order 113:

“The above decisions and the commentary on this Order 113 makes it manifestly clear that 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. It follows that, it is the duty of the plaintiff, who invokes the jurisdiction of this Court under this Order, to first satisfy the court that, it is virtually a clear case where there is no doubt as to his claim to recover the possession of the land. In that process, he must be able to show to the court his right to claim 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 license or consent or that of any predecessor in title. Once the plaintiff satisfies these two factors, he or she shall be entitled for an order against the defendant. Then it is incumbent on the defendant, if he wishes to remain in possession to satisfy the court that he has consent either from the plaintiff or his predecessor in title. If the defendant can show such consent, then the application of the plaintiff ought to be dismissed.

17. The Court finds the cases cited as useful for identifying certain propositions to consider in determining whether the summary procedure provided by Order 113, is appropriate, for the peculiar factual matrix presented to it by the parties, in this case.

- i.* It is necessary for the Plaintiff to show that there is no basis upon which the occupier/defendant is entitled to remain on the property. (Eg; the right of occupation has been terminated-(*NLTB v Veisamasama – HBC 34 of 2011*).

⁸ Master Azhar

- ii. If the Plaintiff cannot do so, or if there is a factual dispute about the effectiveness of the termination, **or if there is some other alleged basis for occupation which is contentious , an application under Order 113 will probably be not appropriate.**⁹
- iii. When it comes to the Defendant's opposition under Order 113, **the burden of showing that they have a case that justifies refusing the plaintiff's summary application is not particularly high , particularly if it is based on a factual dispute. The summary nature of the jurisdiction is not suited to resolving contested issues of fact requiring evidence , cross examination etc.**¹⁰
- iv. Due to the summary nature of an application under Order 113, and because of the wording of the rule itself, the court does not embark on an assessment of the balance of convenience. If the Defendant is able to present evidence and/or argument that reaches the serious question level (neither frivolous or vexatious) as to both fact and law, he is entitled to have the application under section 113 dismissed, **so that the plaintiff pursues its application for possession in ordinary proceedings where the issues raised can be properly explored and decided.**

D. Have the Defendants raised a serious question ?

- 18. The summary process provided by Order 113 is being used by the Plaintiff, in this instance, because the lessee of the subject land had been deemed earlier in a related proceeding-*Chand v Deo, Prasad & Liku*- Civil Action No 111 of 2020 to have no *locus* to issue eviction proceedings pursuant to section 169 of the *Land Transfer Act* [Cap 133], against the same Defendants in this proceeding.¹¹
- 19. It may be an issue of little moment, however the ruling of the Master in Civil Action 111 of 2020, ought to have alerted the Plaintiff on the need to evaluate its options on whether to initiate proceedings to regain possession pursuant to summary process under Order 113 of the *High Court Rules 1988* or issue eviction proceedings under section 169 of the *Land Transfer Act* [Cap 134], as suggested by the Master.

⁹ Stuart J at paragraph 9-*Kant v Nair* –Civil Action HBC 163 of 2020

¹⁰ Stuart J at paragraph 10

¹¹ *Nilesh Chand v Ratnesh Kamal Deo, Amirka Prasad and Kasanita Liku*-Civil Action No 111 of 2020 (21st January 2021)

20. The real issues of contention raised by the Defendants are two fold¹²;

(i) Defendants are not Trespassers

A party wanting to take advantage of the summary procedure provided for by Order 113 must show that the Defendants against whom the order for possession sought had or have no basis to enter or remain on the land in respect of which the order is sought. *It is much easier to do this if the plaintiff is able to explain the basis upon which the Defendants came to be occupying the land, or on what basis they had been allowed to remain there prior to the application being made.*¹³

As the Court stated in *ILTB v Webb & Others*¹⁴ ;

“ On the other hand ILTB has considerable resources of money, staff, records and technology , yet it had appeared to issue the lease to Western Builders in 2008 without first making any inquiry about whether anyone was residing on the land being leased. Had it done so, it would have discovered the Defendants occupying the land; because their evidence –such as it is-is that they have been living there for many years.....I do not readily accept in the absence of very clear evidence that people who have lived on the land for over 20 years and up to 50 years, who have been paying or providing to the landowning unit some sort of rent or reward for the use of their land , and have been allowed to carry out improvements to the land are trespassers who can be summarily evicted under Order 113 process”

The Court is faced with the same issue in this proceeding. The Defendants are not identifiable clearly as “trespassers,” on the affidavit material provided in this proceeding, rather,

- i. All 3 Defendants have resided on the subject land to date for periods of 18 -20 years, (2004-2006) and were inhabiting the subject land before the lessee, Nilesh Chand moved on to the subject land and granted a lease by the Plaintiff, in 2015.

¹² *ILTB v Webb & 7 Others* –Civil Action HBC 271 of 2019, paragraphs 17-21, per Stuart J

¹³ Paragraph 17 per Stuart J

¹⁴ Paragraph 18

- ii. All 3 Defendants paid an amount of \$1000 for initial occupancy of the subject land and a monthly amount of \$15.00, to the Mataqalu Naulukarua, payable to date.

(ii) Other occupants

The Defendants¹⁵ depose that over the years, with the consent of Mataqali Naulukarua, other families settling in the same area have got their electricity lines and water pipes running through the same piece of land and should they be removed these families will also be impacted.

As stated by the Court in *Webb*¹⁶,

“ This suggests that the ILTB is willing to acquiesce/consent to occupation of the land by these people , and they are arguably not ‘trespassers’. Unless there is a sound distinction to be drawn between the defendants and these other users of these land... , it may be that they are all licensees who are entitled to proper process before they can be evicted. Furthermore, allowing for the tolerance extended to residents whose homes do not impinge on the leased area.....means that the Defendants may be facing unnecessary eviction, whilst their neighbors are allowed to stay. I am reluctant to countenance such an arbitrary outcome”

As in *Webb*, it is difficult to reconcile the Plaintiff’s treatment of neighboring occupants who whilst not residing on the subject land, like the Defendants, have been allowed by the landowners do use it, to have their electricity lines and water pipes running through the subject land. This suggests that these other occupants are not trespassers and the Court is reluctant also on these evidence, to assume that the Defendants are any different, to be the subject to an order for vacant possession pursuant to Order 113.

The Court finds on these 2 issues, that the Defendants have met the serious question threshold which makes them inappropriate to be determined pursuant to Order 113.

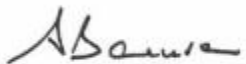
¹⁵ Paragraphs 26 of the affidavits of Amirka Prasad and Ratnesh Deo and paragraph 7 of the affidavit of Kasanita Liku

¹⁶ Paragraph 19

FINDINGS:

1. Taking into account these considerations, the Court is not persuaded that the Plaintiff is entitled, in the circumstance, to the remedy provided by summary process under Order 113 of the *High Court Rules* 1988.
2. The Plaintiff may consider it appropriate, rather, that it initiates process by way of writ of summons for orders that may lead to the eviction of the Defendants, however, that is matter for the Plaintiff to decide.
3. The application is dismissed.
4. Parties to bear their own costs.




Savenaca Banuve
Judge

At Suva
18th July 2024