

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 179 of 2021

BETWEEN : **ARUNA KUMARI** formerly of Lovu, Lautoka, currently of 74
Kimpton Road, Papatoetoe 2025, Auckland, New Zealand, Retired.
Plaintiff

AND : **JULEKHA BI, ARISH R, DEAN ZOHEB** and **OTHER**
OCCUPANTS of on TLTB Lease Ref No.4/7/4150, Lot 5, Lovu,
Lautoka.
Defendant

Before : Master U.L. Mohamed Azhar

Appearance : Ms. S. Begum for the Plaintiff
Mr. S. Nand for the Defendant

Date of Judgment : 18 July 2024

JUDGMENT

01. The plaintiff summoned the defendant pursuant to Order 113 of the High Court Rules. The summons seeks the following orders:

- a. AN ORDER that the defendants together with all other occupants do give immediate vacant possession of all the piece of iTLTB [formerly NLTB] land, Reference No. 4/7/4150, Lovu, M/L 73, Lot 5, Class B, Residential Lot in Lovu, Lautoka (the property);
- b. AN ORDER that the Police do assist with the serving of Order granted by the court;

- c. Costs of this application to be paid by the defendant on Solicitor/ Client indemnity basis; and
- d. Such further or other relief and/or Orders as this court may deem just.

02. 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".

03. This Order provides for a procedure to recover of possession of a land which is in wrongful occupation by trespassers who have neither license nor consent either from the current owner or his predecessor in title. **The Supreme Court Practice 1988 (White Book)** 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.

04. The procedure was 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)”.

05. The plaintiff, who invokes the jurisdiction of the 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. Secondly, the plaintiff should 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.
06. 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.
07. The Exhibit marked as “RK1” and annexed with the affidavit that supports the summons is the copy of the Notice of Approval to Lease issued by the Native Land Trust Board and now known as iTaukei Land Trust Board. It was issued to the plaintiff in respect of the property. The plaintiff annexed this document in order to prove her right to claim possession of the property. In fact, this was admitted by the defendants. Accordingly, there is no doubt as to the right of the plaintiff to claim the possession of the property.
08. The plaintiff submitted that, defendants have been in possession of the property without her consent or licence. The defendants do not claim that they have the title equal or superior to that of the plaintiff. They admit that the plaintiff is the holder of Approval Notice to Lease over the subject property. However, they claim that, they had been liaising with the plaintiff to purchase the property. The defendants further elaborated that, their dealing with the plaintiff was through Facebook/Messenger messages. The defendants annexed a copy

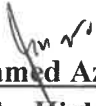
of the conversation/chats they had with the plaintiff via Messenger in this regard. The plaintiff challenged the authenticity of those chats as exhibited by the defendants.

09. The question is whether, those messages are sufficient to form a valid contract and can they give an equitable right to the defendants to challenge the current proceedings against them? On perusal of the messages between the plaintiff and the defendants it reveals that, the defendants were interested in buying the property from the plaintiff. However, there was no proper offer and acceptance or sale and purchase agreement between them. It is also evident from that conversation that, one Khan was interested in the property and defendants' acquaintance with the plaintiff was through Khan. The defendants, as it appears, used that acquaintance to try buying the property from the plaintiff. Accordingly, those conversation are not sufficient to form a binding contract or agreement for sale of the subject property to the defendants.
10. The defendants also asserted in paragraph their affidavit that, they had been paying the rent to NLTB for last 14 years. The defendants by this assertion try to establish a proprietary estoppel. However, there is no single evidence to substantiate their claim of paying rent for last 14 years, let alone other requirements of proprietary estoppel.
11. In the meantime, the conversation/chat between the plaintiff and the defendants indicate that, the plaintiff knew that, the defendants had been occupying the property. The plaintiff could have allowed them to occupy. However, former licensee too could be evicted by the court if the procedure is adopted. The court does not have discretion to refuse such an application. Cairns LJ. In **Great London Council v Jenkins** [1975] 1 W.L.R 155; [1975] 1 All E.R 354 held at page 359 that:

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.'
12. The plaintiff's right to claim the possession is not disputed as she is the holder of Notice of Approval to Lease NLTB No. 4/7/4150. The defendants failed to establish that they have right to remain in possession; nor are there complicated issues which warrant dismissal of summons. This is a straightforward case. The defendants and other all illegal occupants ought to be evicted from the property with immediate effect. Furthermore, the defendants should pay a reasonable amount of costs to the plaintiff for commencing this proceeding.
13. In result, I make following final orders:

- a. The defendants and other occupants of the property are hereby ordered to immediately deliver the vacant possession of the property to the plaintiff, and
- b. The defendants should pay a summarily assessed costs in sum of \$ 2000 to the plaintiff within a month from today.




U. L. Mohamed Azhar
Master of the High Court

At Lautoka
18.07.2024