

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

**[CIVIL JURISDICTION]**

**CIVIL ACTION NO. HBC 70 OF 2023**

**BETWEEN** : **MOHAMMED FAIYAZ as Administrator of the Estate of Mohammed Zulka Nair aka Mohammed Zulka Nain aka Mohammed Zulkar Nain aka Mohammed Julkar Nain** of Martintar, Nadi, Company Director.

**PLAINTIFF**

**AND** : **HAZRATH NABI, NASEEM BANO and NABIAH BANO** of Goundar Road, Martintar, Nadi, occupation unknown.

**DEFENDANTS**

**Before** : Master P. Prasad

**Counsels** : Mr. M. Arun for Plaintiff  
Mr. K. Chand for Defendants

**Date of Hearing** : 4 September 2024

**Date of Decision** : 15 November 2024

**JUDGMENT**

(Vacant possession – Order 113)

1. The Plaintiff has instituted this action pursuant to Order 113 of the High Court Rules 1988 for: (i) immediate vacant possession of all that piece of land including the dwelling comprised of 1 bedroom concrete structure occupied by the Defendants in Certificate of Title No. 16776 being Lot 2 on DP 3911 specifically being the portion of the land comprising the 1/6th share of the late Mohammed Zulka Nair aka Mohammed Zulka Nain aka Mohammed Zulkar Nain aka Mohammed Julkar Nain located on the left end of the common access road on the said Lot 2 DP 3911 (Property); (ii) the Defendants be restrained from altering and/or damaging the Plaintiff's property when they move out; (iii) an order that the Defendants clear all the utility bills resulting from occupation

of the Property within 14 days of the order of this Honourable Court; (iv) costs; and any such further order or relief.

2. The Plaintiff is the son and the Administrator of the Estate of Mohammed Zulka Nair aka Mohammed Zulka Nain aka Mohammed Zulkar Nain aka Mohammed Julkar Nain Hazra Bibi (Mr Nain). Mr. Nain's estate currently owns one undivided sixth share in Certificate of Title No. 16776 (CT 16776).
3. The Plaintiff through his affidavits avers that:
  - a. the other co-owners of CT 16776 had mutually agreed to and approved a demarcation for each of their respective undivided share whereby each of them would build a house and occupy the same;
  - b. the Defendants have been unlawfully occupying a dwelling house comprised of 1 bedroom concrete structure extended by the Defendants to include another bedroom using wood and corrugated iron;
  - c. the Defendants were given permission by Mr. Nain to temporarily reside on the Property;
  - d. Mr. Nain revoked the consent when he served on the Defendants a notice to vacate in either 2004 or 2005;
  - e. The Defendants have continued to reside on the Property;
  - f. The Defendants were given another notice to vacate on 24 January 2023;
  - g. The Defendants replied to the notice on 9 February 2023;
  - h. The first named Defendant is not entitled to a share in the estate of Mr. Nain; and
  - i. The Defendants have no colour of right to be in occupation of the Property and are in unlawful occupation thereof.
4. The first named Defendant in his Affidavit in Opposition states the following:
  - a. The Defendants have been in occupation of the Property for the past 35 years;
  - b. The first named Defendant is the adopted son of Mr Nain and the adoption was effected through family arrangements;
  - c. Mr Nain had allowed the Defendants to permanently reside on the Property and the said permission was never revoked;
  - d. The Defendants pay for utility bills and city rates for occupation of the Property;
  - e. Mr. Nain never issued any notice to the Defendants to vacate the Property;
  - f. There is a current Domestic Violence Restraining Order against the Plaintiff for the protection of the second and third named Defendants;
  - g. The other co-owners of CT 16776 and/or their predecessors have authorised the occupancy of the Defendants; and

h. The Defendants are not trespassers and have a right to remain on the Property.

5. Order 113 states that:

*“Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being tenants of tenants holding 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 provision of this Order”*

6. Footnote 113/1-8/1 of the 1997 Supreme Court Practice at page 1653 reads:

*“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). The Court, however, has no discretion to prevent the use of this summary procedure where the circumstances are such as to bring them within its terms, e.g. against a person who has held over after his licence to occupy has terminated (*Greater London Council v. Jenkins* [1975] 1 W.L.R. 155; [1975] 1 All E.R. 354) but of course the Order will not apply before the licence has expired (*ibid.*). The Order applies to unlawful sub-tenants (*Moore Properties (Ilford) Ltd v. McKeon* [1976] 1 W.L.R. 1278).”*

7. Order 113 outlines a summary procedure for possession of land and Master Azhar (as he then was) in ***Prasad v Mani*** [2021] FJHC provided a detailed analysis of its purpose and application which I gratefully adopt. Master Azhar further stated that *“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 from the current owner or his predecessor in title.”*

8. In the Court of Appeal case of **Nair v Khan** [2024] FJCA 40, wherein the Honourable Justice Jitoko, P in dismissing the appeal stated that “*the purpose or objective of Order 113 of the High court Rules ...in essence, a summary proceeding for possession of land akin to summary procedure under section 169 of the Land Transfer Act*” [see paragraph 10]. The Honourable Justice Jitoko, P further stated that “*it is a summary proceeding that is intended to remedy an exceptional mischief totally different from the usual remedy of claim of recovery of land by the ordinary procedure as found under section 169 of the proceedings of the Land Transfer Act. Its primary and only purpose is the recovery of possession of land. No other cause of action, such as a counterclaim, or any other relief or remedy such as rent, mesne profits or claims of damaged or even an injunction may be joined in the claim*” [see paragraph 13].

9. Goulding J in **Department of Environment v James and others** [1972] 3 All E.R. 629 said that:

*“where the plaintiff has proved his right to possession, and that the defendant is a trespasser, the court is bound to grant an immediate order for possession”.*

10. Master Rajasinghe (as he then was) in **Raliwalala v Kaicola** [2015] FJHC 66 on the application of Order 113 stated as follows:

*“6. In view of Order 113, 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 license or consent or that of any predecessor in title.*

*7. The main purpose of Order 113 is to provide 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 license or consent. They can be defined as trespassers or illegal occupants. These trespassers or illegal occupants have sometimes been referred to as squatters. In **Mcphail v Persons unknown**, (1973) 3 All E.R.394) Lord Denning has observed “the squatter” as a person who without any colour of right, enters into an unoccupied house or land and occupies it. His Lordship found that in such instances, the owner is not obliged to go to court to regain his possession and could take the remedy into his own hands, which indeed, recommended as an unsubstantial option. Therefore, Order 113 has provided the owners a speedy and effective procedure to recover the possession instead of encouraging them to take a remedy of self-help.*

*8. The proceedings under Order 113 encompass two main limbs. 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.”*

11. Justice Stuart in **Kant v Nair** [2021] FJHC 89 held that:

*“Because of the summary nature of an application under Order 113, and because of the wording of the rule itself, it is clear that the court does not, in an application for possession, embark on an assessment of the balance of convenience. Instead, if the defendant is able to present evidence and/or argument that reaches the ‘serious question’ level 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.”*

12. Therefore, only in situations where there arises in the Court’s view, triable issues, would an Order 113 application be refused: **Nair v Khan** [Supra]; **Baiju v Kumar** [1999] 45 FLR 79.

13. Hence a plaintiff seeking relief from this Court under this Order must demonstrate that: (i) they have the right to possess the land in question; (ii) they are claiming possession of the land currently occupied by the defendant; and (iii) the defendant, whom the plaintiff aims to evict, is someone who has entered and remained on the land without the plaintiff’s (or any predecessor in title) permission or consent.

14. The Plaintiff has attached a certified true copy of CT 16776 wherein the registered proprietors holding undivided shares are as follows:

- a. Mohammed Dennis Imran Shareef – 1/6<sup>th</sup> share.
- b. Mohammed Faiyaz as Administrator of the Estate of Mr Nain – 1/6<sup>th</sup> share.
- c. Sharina Bano – 1/6<sup>th</sup> share.
- d. Mohammed Mustafa – 2/6<sup>th</sup> shares.
- e. Mohammed Ramzan – 1/6<sup>th</sup> share.

15. The Defendants do not dispute that the Plaintiff is the Administrator of the estate of Mr. Nain as to a 1/6<sup>th</sup> share in CT 16776. The Plaintiff has thus satisfied that he has an interest in the said Property and that they have a right to possess the same.

16. However, the Defendants have refused to vacate the Property based on the claim that the predecessors in title and the other co-owners of CT 16776 have authorised the Defendants to occupy the Property.

17. Accordingly, the main issue to be determined is whether the Defendants have entered or remained on the Property without consent (from the Plaintiff or any predecessor in title) to occupy the same and/or whether there are triable issues in this matter.

18. The Defendants have in their Affidavit in Opposition annexed the following:

- a. Utility bills from the Water Authority of Fiji and Fiji Electricity Authority (addressed to the first named Defendant) and a receipt from the Nadi Town Council for the payment of town rates.
- b. A copy of a document executed by Mohammed Hakim, Mohammed Zain, Mohammed Suleman and Mohammed Ramzan giving consent to the first and second named Defendants to build a house and stay on CT 16776.
- c. A copy of a document dated 13 February 2017 executed by Mohammed Suleman (predecessor to Shareen Bano's 1/6<sup>th</sup> share) stating in essence that CT 16776 has not been subdivided with no claims as to who owns which section of the same. The document also states that Mohammed Suleman has no issues with the first named Defendant occupying the Property and that Mohammed Suleman's consent needs to be obtained in order to evict the first named Defendant. This authority also states that the first named Defendant was adopted by Mr. Nain through family agreement.
- d. A copy of an 'authority' executed on 12 February 2023 by Mohammed Dennis Imran Shareef authorising and consenting to first named Defendants occupation of the Property. This authority also states that Mohammed Shareef is the owner of an undivided 1/6<sup>th</sup> share in CT 16776 and until each party has their share identified, the first named Defendant cannot be removed. This authority further states that the first named Defendant was adopted by Mr. Nain through family agreement.
- e. A copy of another 'authority' dated April 2023 executed by Durga Wati aka Khairul Nisha and Mohammed Mustak (as Administrators in the Estate of Mohammed Mustaf). The contents of this authority are the same as the authority dated 12 February 2023 referred to in (d) above.
- f. A copy of an authority dated 12 February 2023 from Sharina Bano, Shafina Bano and Shavino Bano, the contents of which are also the same as the authority dated 12 February 2023 referred to in (d) above.

19. The Plaintiff in his Affidavit in Reply states that;

- a. the six estates in CT 16776 are clearly physically identified.
- b. the Defendants are not tenants.
- c. the first named Defendant is neither the biological nor the adoptive son of Mr. Nain.
- d. the authorities referred to in paragraph 18 (b) and (c) above are not marked "irrevocable" and the authors are now deceased.

- e. the authorities referred to in paragraph 18 (d), (e) and (f) are tailor made to suit the Defendants purpose for these proceedings, and that the said authorities have no legal standing to comment on Mr Nain's 1/6<sup>th</sup> share of CT 16776.
20. As tenants in common, each co-owner of a property has the right to possess and enjoy the whole of the land and this right includes the right to invite someone to live on the premises.<sup>1</sup> As such, each tenant in common is entitled to the possession of the whole land, and yet, unlike a joint tenant, is entitled only to a distinct share thereof, a combination of concepts possible only because the physical boundaries of his or her share, called an undivided share, have not yet been determined.<sup>2</sup>
21. In this regard, while the Plaintiff being the Administrator of 1/6<sup>th</sup> share of the land is entitled to possession and enjoyment of CT 16776, the said entitlement is subject to the rights and interests of the other shareholders.
22. Justice Amaratunga in **Singh v Singh** [2023] FJHC 464 in dealing with an application under Section 169 of the Land Transfer Act 1971, discussed the essence of tenancies in common and His Lordship stated:

*"11. So, as the registered owner of undivided share of the Property Plaintiff is entitled to possession of the Property in proportion to the share he holds, as there are no boundaries to demarcate his share, he is entitled to possess the Property only subject to the other half shareholders rights. If the other co-owner does not object, he can evict any person who has no right to the Property, such as Defendant.*

*12. Plaintiff is not required to obtain consent of all the co-owners for the institution of an action in terms of Section 169 of Land Transfer Act 1971, which is based on the Torrens system of Land Law where the central issue is the registration of the title. So there is no requirement for Plaintiff to obtain consent of remaining half shareholders, but the Defendant should derive a right to possess from the said co-owners to show a right to possession of the property."*

23. None of the affidavits filed by the Plaintiff had annexed to it any subdivision plan nor any agreement between the co-owners to show rights of occupancy of each of the 6 shares over CT 16776.
24. The Defendants on the other hand have annexed documents which may insinuate that they had the respective consent of the predecessors in title as well as those of the other co-owners to occupy CT 16776. The documents

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<sup>1</sup> See B J Edgeworth et al., Sackville and Neave Australian Property Law, 8<sup>th</sup> ed., LexisNexis Butterworths Australia, 2008 at page 642.

<sup>2</sup> Ibid at page 631.

produced indicate that there are disputes over the right of the occupancy of the Defendants.

25. Justice Jitoko in ***Nairs Transport Co Pte Ltd v Devi [2024] FJCA 146***, clearly stated that the Court will agree to grant relief under Order 113:

*“only in the clearest of cases” (see: ***Bavindra Kumar v. Agheshwar Kumar & Others [2010] HBC 157/08L***). Where there are disputes over the right to occupancy, the matter is best left to a proper writ proceedings rather than originating Summons under Order 113.”*

26. Therefore, I find that there are triable issues in this case. There are disputes over the right of occupancy of the Defendants and this matter is best left to a proper Writ proceeding. The Plaintiff is at liberty to initiate such a Writ proceeding should he wish to.

27. Accordingly, I make the following orders:

- (a) The Plaintiff’s Originating Summons filed on 28 March 2023 is hereby dismissed.
- (b) Costs summarily assessed in the sum of \$1000.00 to be paid to the Defendant



**P.Prasad**  
**Master of the High Court**

**At Lautoka**  
**15 November 2024**