

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

CIVIL ACTION NO. HBC 247 OF 2019

BETWEEN : **VALEMASIMA (FIJI) LTD** a limited liability company
having its registered office at 74 Ellis Place, Fantasy
Island, Nadi.

PLAINTIFF

AND : **MOHAMMED SHAHEEM** of Nawaicoba, Nadi

DEFENDANT

Before : Master P. Prasad

Counsels : Messrs AK Lawyers for Plaintiff
Siddiq Koya Lawyers for Defendant

JUDGMENT

(Vacant possession)

1. The Plaintiff has instituted this action for eviction relying on Order 113 of the High Court Rules 1988. This is supported with an Affidavit of Abbas Ali, Director of the Plaintiff company.
2. The Defendant has opposed the Summons and filed an Affidavit in Opposition together with a Supplementary Affidavit in Opposition.
3. The Summons was fixed for Hearing before this Court on 18 July 2024. However, the Defendant sought an adjournment on the ground that the counsel for the Defendant was unavailable due to personal commitment. The parties then mutually elected to file written submissions on the issues and moved the Court to fix the matter for oral hearing at a later date. This Court having allowed the same, had the matter listed for 14 August 2024 to check on written submissions. On the said day, Counsel for the Defendant sought more time to file the same and the parties agreed for this application to be dealt with by way of written submissions solely. The Defendant filed his submissions on 26 August 2024 and the Plaintiff replied to the same on 10 September 2024.

4. In considering this application by the Plaintiff, the Court has extensively considered the affidavits filed by each party along with their respective written submissions.
5. The Plaintiff holds an Instrument of Tenancy (IOT) over the land known as Ravubitu (part of) in the Tikina of Momi, in the Province of Nadroga/Navosa and having an area of approximately 20.9953 hectares owned by the Tokatoka Sawaya, Mataqali Vagadra (Plaintiff's land). This IOT is for a term of 30 years with effect from 1 January 2014 and the relevant iTaukei Land Trust Board (iTLTB) number is iTLTB No. 6/11/40346. The IOT was registered with the Register of Deeds on 23 September 2014 in its Book 2014 Folio 12745.
6. The Plaintiff in its Affidavit in Support alleges that the Defendant owns the land which is adjacent to the Plaintiff's land and that the Defendant has illegally entered the Plaintiff's land without the Plaintiffs consent, and is occupying an empty house which was occupied by the previous lessee. The Plaintiff further claims that the Defendant has fenced off a portion of the Plaintiff's land and is cultivating the same.
7. On 5 April 2019 and on 15 April 2019, iTLTB and the Plaintiff's legal counsel served respective notices (Notices) to the Defendant for him to vacate Plaintiff's land. The 5 April 2019 notice from iTLTB to the Defendant states: - *"We note that you have allowed the caretakers of your agricultural lease land to occupy a dwelling house situated on the neighbouring lease land (in the name of Valemasima (fiji) Limited TLTB Ref: 11/40346. You and your caretakers actions constitute trespass on the neighbouring lease land as well as unlawful occupation of the mentioned dwelling house by your caretakers. The dwelling house does not belong to you nor is it situated in your lease land. Your continuous actions in allowing the utilisation of the said house is likely to result in legal actions against you by Valemasima (Fiji) Limited or by the Board, at its discretion. You are hereby requested to immediately vacate the dwelling house and deliver vacant possession of it to Valemasima (Fiji) Limited."*
8. The Defendant through his affidavits claims that his cousin, one Aktar Nisha is the lessee of a separate Instrument of Tenancy over the land which is adjacent to Plaintiff's land with relevant iTaukei Land Trust Board number iTLTB No. 4/11/7051 which is described as land known as Ravubitu (part of) in the Tikina of Momi, in the Province of Nadroga and having an area of approximately 43.7061 hectares owned by Mataqali Vagadra, Tokatoka Sawaya (Defendant's land). This Instrument of Tenancy was issued for a term of 30 years with effect from 1 July 2004. The same is registered with the Registrar of Deeds on 22 June 2005 of its Book 2005 Folio10053.
9. The Defendant claims to have purchased the Defendant's land from Aktar Nisha and was in the process of transferring the Instrument of Tenancy to himself when he was issued with the Notices.

10. The Defendant further claims that he has been residing on the Defendant's land for more than 15 years and at the time of purchase, officers from iTLTB had shown him the land markings from which it was clearly visible that the house which the Defendant was occupying is within the boundary of the Defendant's land.

11. The Defendant further states that after being served with the Notices, officers from iTLTB identified new boundary markings to the Defendant whereby he was informed that the Defendant's land boundary no longer contained the house which is subject to this proceeding. The Defendant claims that the iTLTB has made a mistake in identifying the new boundary for the Defendant's land.

12. 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"

13. 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)."*

14. 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 explanation of its history. 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.”*

15. Thus Order 113 is in essence applied for eviction of squatters or trespassers.

16. 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”.

17. 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.”

18. Therefore, 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.
19. The Plaintiff has provided a copy of the IOT with iTLTB reference number 6/11/40346 issued to it by the iTLTB and the notice from iTLTB to the Defendant stating that the Defendant and his caretakers are in occupation of a house which is situated on land leased to the Plaintiff. The Defendant has not challenged these documents.
20. In his affidavit, the Defendant claims that iTLTB has erred in altering the "markings," which presumably refers to the boundary markings of the two Instruments of Tenancy, i.e. iTLTB No. 6/11/40346 and iTLTB No. 4/11/7051. However, the Defendant has not offered any evidence to support this assertion.
21. Accordingly, the main issue to be determined is whether the Defendant has a licence or consent of the Plaintiff to occupy the subject property.
22. The Defendant's legal counsel, in their written submissions, claims that the Defendant has lived on their land for more than 45 years. This contradicts the Defendant's own affidavit, wherein he stated that he has resided on the land for 15 years. However, no evidence has been presented to support his claim.
23. In the same submissions it has also been asserted that the Defendant purchased his land from his cousin, Aktar Nisha. However, the Defendant has not provided any documentation in his affidavits to support this claim. The only documents submitted by the Defendant are the Instrument of Tenancy issued to Aktar Nisha by iTLTB and a copy of the Power of Attorney from Aktar Nisha to the Defendant.
24. The Plaintiff's counsel has correctly pointed out that the Defendant has failed to provide any evidence, documentary or otherwise that support their claim that: (i) the house is not located on the Plaintiff's land; (ii) proof of any sale or purchase between the Defendant and Aktar Nisha; (iii) transfer documents pertaining to any sale and purchase; or (iv) any consent from iTLTB regarding the alleged transfer dealing between the Defendant and Aktar Nisha.
25. On the contrary, the Plaintiff has provided evidence of ownership of the Defendant's land and established the boundaries between the Plaintiff's land and the Defendant's land, demonstrating that the Defendant is occupying that portion of the land that rightfully belongs to the Plaintiff. Therefore, the Plaintiff has satisfied the Court that it has the right to possess the land in question.

26. The Defendant's argument primarily revolves around the claim that the error lies with iTLTB in determining the boundary between the two properties.

27. If the Defendant believes that iTLTB has made a mistake in determining the boundary between the Plaintiff's land and the Defendant's land, the Defendant has the option to pursue a separate legal action against iTLTB. However, in the current proceedings, the Defendant cannot assert a right to remain on the property without demonstrating any legal basis for his claim.

28. Therefore, I find that the Defendant has not obtained any consent nor a license to occupy or remain in occupation of the Plaintiff's land.

29. Accordingly, I make the following orders:

(a) The Defendant is ordered to immediately deliver to the Plaintiff vacant possession of Instrument of Tenancy over land known as Ravubitu (part of) in the Tikina of Momi in the Province of Nadroga/Navosa and having an area of approximately 20.9953 hectares owned by the Tokatoka Sawaya, Mataqali Vagadra, registered with the Register of Deeds on 23 September 2014 of its Book 2014 Folio 12745.

(b) Costs of this action summarily assessed at \$2,000.00 to be paid by the Defendant within 28 days.



P. Prasad
Master of the High Court

At Lautoka
21 November 2024