

IN THE HIGH COURT OF FIJI
IN THE CENTRAL DIVISION
CIVIL JURISDICTION

Civil Action No. 102 of 2024

IN THE MATTER of the property
comprised in NLTB Lease No.
4/14/500040763, lot 3 on
Kelebalavu Subdivision (part of)

BETWEEN: **URMILA WATI** of Nadali Road, Nausori, Domestic Duties.

PLAINTIFF

AND: **SUSHILA KRISHNA** of Nadali Road, Nausori, Garment Factory
Worker.

DEFENDANT

For the Plaintiff : Mr Kumar. E
For the Defendant : Mr Kumar. V
Date of Hearing : 8 October 2024
Date of Decision : 5 February 2025
Before : Waqainabete -Levaci, S.L.T.T, Puisne Judge

JUDGEMENT

(APPLICATION FOR VACANT POSSESSION)

BACKGROUND

1.1 The Applicant had filed an Originating Summons seeking for vacant possession against the Defendant as a cause of action. The property comprises of NLTB Lease No 4/14/50040763 on Kelebalavu Subdivision (part of) (hereinafter in this Judgment referred to as 'the lease'). They seek as follows:

- A. That the Defendants deliver vacant possession of the property comprised in NLTB Lease No: 4/14/50040763, Lot 3 on Kelebalavu Subdivision (part of) to the Plaintiff immediately;
- B. That the costs of this application be paid by the Defendant on an indemnity basis.

On the Grounds that:

- A. The Plaintiff is entitled to possession of the property comprised of NLTB Lease No: 4/14/50040763, on Lot 3 on Kelebalavu Subdivision (part of);
 - B. The Defendant remains in occupation of the said property and refused to vacate the same as per the Plaintiff's notice dated 23 January 2024;
 - C. The Plaintiff is put to significant costs to file proceedings against the Defendant whose license to occupy the property comprised in NLTB Lease No: 4/14/50040763, Lot 3 on Kelebalavu Subdivision (part of) has expired.
- 1.2 The Applicant claims the Defendant has continued to reside on the property and refused to vacate despite the Plaintiff's written notification dated 23 January 2024 duly served on the Defendant.
- 1.3 The Applicant deposes that she is the registered proprietor of the lease together with her mother, Shankutala Kumari, deceased, who passed away on 17 December 2018.
- 1.4 She seeks vacant possession of property from the Defendant, who is the partner of the late Mehmoon Nisha Hussain. The late Mehmoon Nisha Hussain had entered into a temporary arrangement with her mother to temporarily reside on the property.

- 1.5 Despite reassurances by the Defendant to vacate the property after Mehmaan Nisha Hussain and her mother had passed away, they refuse to do so.
- 1.6 The Defendant argues otherwise and states that they were offered by the Plaintiff residence for life.

2 AFFIDAVITS AND SUBMISSIONS

- 2.1 In their Affidavit, the Applicant admits that the Agreement to Lease for the property is not registered either in the Register of Titles or in the Register of Deeds.
- 2.2 The Applicant deposes that the Defendants license to remain on the property has expired and a notice to vacate was duly served on them. That despite formal notification, the Defendants have failed to comply and remain on the property.
- 2.3 The Defendant's Affidavit deposes that there was an oral agreement between the Applicant, deceased mother Shakuntala Devi, her deceased partner Naimun Nisha Hussein and herself to reside on the property from 2019 for life, to pay \$1500 to be paid to Applicant by 2019, the lease to be shared by the parties, the parties will bear their own costs utility bills and that she was to make payment of the utility bills to the Applicant and her mother.
- 2.4 The Defendant had thereafter built their home and invested in electrical works and installation of meter box.
- 2.5 The Defendant deposed that when receiving the notice to vacate in 2024, she was surprised and shocked as she had been reassured by the Applicant and her mother they would reside on the property for life. Despite attempts to communicate, she was informed she was to move away from the property.
- 2.6 She was later threatened to move out of the home despite promises from the plaintiff to her and her late partner.
- 2.7 Defendant argues that she was given consent to reside on the premises after having paid \$1500 in year 2019 which they had received.
- 2.8 That she has invested \$55,000 worth of developments and maintenance on the house built on the property.

- 2.9 In response the Applicant denied the oral agreement for the occupation of the property for life and only admitted that she had agreed for the deceased partner to reside on the property temporarily whilst she looked for a land to stay.
- 2.10 The Applicant deposed that the deny issuing receipts to the Defendant or her partner. She does admit that the Defendant's partner contributed to the land rental payments until 2020.
- 2.11 The Applicant admits that they had agreed to the late Mehmaan Nisha paying for plumbing works as this benefited them.
- 2.12 The Applicant submits that since the issue of dispute is an issue of law and there are very minimum dispute of facts, an originating summons seeking Court Orders suffices.
- 2.13 In response the Defendants depose that the Originating Summons and Affidavit is wrong in law and irregular, defective in form and in breach of the Rules of this honorable Court. Order 2 rule 2 of the High Court Rules (referred to as HCR) cannot cure the defect and the Summons does not refer to what rule that the Applicant is relying on.
- 2.14 Furthermore the Affidavit contains annexures of the property that is unregistered with the Registrar of Titles or Deeds and is therefore not certified as to the veracity of its copy.
- 2.15 Lastly the Plaintiff cannot seek vacant possession without the consent of the other proprietor. Therefore the Applicant has no locus to bring this action.
- 2.16 This action can be appropriately dealt with by Order 113 of the HCR as a summary proceedings and not by Originating Summons outright. Order 113 of the HCR in rule 4 requires application to be made by Form 3 when initiating an Originating Summons, as it is a summary proceeding and does not require an Intention to Defend response.
- 2.17 Finally the Defendant argues that this application should be struck out for abuse of process as it does not satisfy the requirements for Originating Summons.

3 APPLICATIONS FOR VACANT POSSESSION

- 3.1 Vacant possession is a summary proceedings specifically allocated in the HCR as Order 113 rule 1 of the High Court Rules. It states as follows:

“Where a person claims possession of land which he alleges is occupied 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.”

- 3.2 Order 113 rule 3 of the High Court Rules requires an Affidavit of facts and evidences be filed supporting the originating summons stating –

“stating –

- (a) His interest in the land;
- (b) The circumstances in which the land has been occupied without licence or consent and in which his claim to possession arises; and
- (c) That he does not know the name of the person occupying the land who is not named in the summons.’

- 3.3 In explaining the essence of the Order 113 High Court Rules, in Nair -v- Khan [2024] FJCA 40; ABU 0021.2021 (29 February 2024) the President of Court of Appeal Justice Jitoko (As he was then), and Justices of Appeal, Her Ladyship Justice Clark and His Lordship Justice Winters stated:

[13] 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 claim of damages or even an injunction may be joined in the claim.”

- 3.4 In this application, no other cause of action is sort nor any other relief or remedy but for recovery of possession of land.

4 **Analysis**

- 4.1 The principles behind Order 113 of the High Court Rules have been emphasized as a summary proceedings to evict squatters and trespassers and recover possession of land.

- 4.2 The current application before me stems from an originating summons under Form 4 seeking for reliefs to recover possession. The cause of action is unknown.
- 4.3 Considering that the application does not specify the cause of action relied upon, the Court finds therefore that the basis of the application is irregular.
- 4.4 The Applicant argued in their submissions that there are minimum facts in dispute and therefore can be dealt with by way of originating summons.
- 4.5 The fact that the Applicant has refused to rely on Order 113 of HCR as the basis of their Orders, renders this application defective as there is no proper cause of action for which such proceedings can render the only relief for Possession of land.
- 4.6 However, even if the Court were to consider whether this application, can be treated as an Originating Summons under Order 113 of HCR, the Court finds it can, although the current application does not comply with the speedy procedures under rule 2 of Order 113 of the HCR.
- 4.7 The deviation from compliance is irregular but does not render it defective.
- 4.8 The Application is for the property which is under occupation by the Defendants. The argument is that the Defendant's late partner was granted occupation by the Applicants late mother, who is a joint owner of the Agreement to Lease.
- 4.9 Given that there is no probate on the portion of the property owned by the Estate of the late mother of the Applicant to consent to the Applicant seeking vacant possession, the Applicant, cannot file this application on their own.
- 4.10 Lastly, the Court finds that although the Applicant has established her interest in her portion of the property as a joint owner, she cannot make this application for vacant possession unless the interest of her late mother is also reflected.
- 4.11 It is therefore on this first limb of the criteria to establish recovery of vacant possession that the Applicant has failed.
- 4.12 In the second limb, there are disputes as to how the land was occupied by the Defendant. The Defendant argues that an oral agreement was made between the parties, her late partner and the late mother of Applicant for occupation till life. They had invested monies into building their house on the property including assisting in payment of leases as well as utility bills and plumbing.

- 4.13 These issues cannot be dealt with effectively under this application as the Order 113 of HCR application is a special procedure for vacant possession.
- 4.14 The court finds therefore that the Applicant has failed to establish the second limb of the criteria in Order 113 r 3 of the HCR.
- 4.15 The Court will therefore refuse the application for vacant possession if it were to be treated as an Order 113 application.
- 4.16 As an originating summons on its own, because of lack of particularization of the cause of action in the claim nor the reliefs sort, the Court finds that the Originating Summons on its own lacks substance and therefore is defective and void.
- 4.17 Furthermore as an originating summons, given that the Applicant has failed to obtain consent and authority from the joint owner, who is now the Administrator of the Estate of her late mother, she does not have the authority to bring about this action.

5.0 **Orders**

5.1 **The Court Orders as follows:**

- (i) **Application for Vacant Possession by Originating Summons is hereby dismissed;**
- (ii) **Costs against the Applicant for the sum of \$800 payable in 30 days.**


Senileba L.T.T. Waqainabete-Levaci
Judge



5th February 2025

Counsel for Applicant: Messrs Sunil Kumar Esquire, Old Court Building, Nausori
Counsel for Defendant: Emmanuel Lawyers, 258 Rewa Street, Samabula, Suva.