

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 191 of 2021

BETWEEN : **HASRAT BEGG** trading as Hasrat Rashidun Fauzan Investments,
Meigunyah, Nadi, Fiji, Businessman.

Plaintiff

AND : **ABBAS ALI** and the occupiers of Lot 34, Nasau, Nadi, Occupants.

Defendants

Before : Master U.L. Mohamed Azhar

Counsels : Mr. M. Hussain for the plaintiff
Mr. Adish K. Narayan for the defendant

Date of Judgment : 22.08.2025

JUDGMENT

01. The plaintiff is the registered proprietor of all that land comprised in the Certificate of Title No. 894381, being Lot 34 (LD 4/10/6776) Nasau, Part of formerly Lot 8 SO 3865 in the District of Nadi, in the Province of Ba, in Viti Levu and having an area of 1311m². The plaintiff summoned the defendant pursuant to Order 113 of the High Court Rules by an Originating Summons supported by his affidavit.
02. The summons seeks the following orders:
 1. **AN ORDER** for possession of all that land comprised in Certificate of Title No. 894381, being Lot 34 (LD 4/10/6776) Nasau, Part of formerly Lot 8 SO 3865 in the District of Nadi, in the Province of Ba, in Viti Levu and having an area of 1311m²;
 2. **AN ORDER** that the defendant pays the cost of this application which is summarily assessed at \$ 2,000.00.

03. The defendant opposed the summons and filed the affidavit and supplementary affidavit. The defendant annexed 24 documents with his both affidavits. The plaintiff replied to the defendant.

04. 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". (Emphasis is added).

05. 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 either from the current owner or any of his predecessor in title. **The Supreme Court Practice 1988 (White Book)** describes the nature and application of this Order in paragraph 113/1-8/1 at page 1470 in the following manner:

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.

06. It is simple and speedy machinery 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)”.

07. In view of this, a plaintiff, who invokes the jurisdiction of this court under this Order, should pass two-limb threshold to obtain an order in his or her favour. Firstly, the plaintiff should 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, the plaintiff must be able to show to the court his or her right to claim the possession of the land. Secondly, the plaintiff should satisfy the court 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. Once a plaintiff passes this threshold, he or she shall be entitled for an order against the defendant/s or the occupier/s. 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 any of 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.
08. The counsel for the plaintiff submitted that, the plaintiff is the last registered proprietor of the subject property. He neither gave consent to the defendant and other occupants, nor did he license them to occupy the subject property. The plaintiff described the defendant and other occupants as trespassers and moved the court for the orders as prayed in his summons.
09. The counsel for the defendant, on the other hand, submitted that, he is director and shareholder of the company called Juxta Beach (Fiji) Pte Limited (Juxta) that was the previous proprietor of original land. The plaintiff purchased and developed it. The agreement between Juxta and the plaintiff was that, the plaintiff would transfer Lot 6 and 34 to Juxta after sub-division. The subject property in this case is Lot 34. The plaintiff failed to honour his agreement and Juxta sued the plaintiff for specific performance. The defendant is not personally occupying the property. His employees have been in possession.

10. The plaintiff annexed a true copy of the State Lease No. 894381 certified by the Registrar of Title with his affidavit. It is conclusive evidence that the plaintiff is possessed of the property by virtue of the section 18 of the Land Transfer Act. The plaintiff has the right to claim the possession of the property as he is the registered proprietor. The plaintiff has passed the first limb. There is no dispute that the plaintiff did not consent, nor did he give license to the defendant and other occupants who are the employees of the defendant to occupy the property. In fact, the plaintiff asserted this in his affidavit and his summons is founded on the ground that, the defendant and other occupants have entered into and remained in possession of the property without his license or consent. However, this is not sufficient to discharge his duty under the second limb. The second limb requires the plaintiff to establish that, the predecessor in title too did not license or consent to the occupation of the defendant and or others.
11. The counsel for the plaintiff argued that the history of the proprietorship is not necessary as the plaintiff is the last registered proprietor. It appears that, the counsel for the plaintiff considered the procedure under Order 113 as similar to the procedures for vacant possession under section 169 of the Land Transfer Act. Both are similar in terms of the outcome. However they are different in terms of application and the test. The procedure under section 169 of the Land Transfer Act is based on the Torrens System of registration which cuts off the retrospective or derivative character of the title upon each transfer or transmission, so as that each freeholder is in the same position as a grantee direct from the Crown (*per*: Windeyer J at pages 399 and 400 in **Breskvar v. Wall** (1971-72) 126 CLR 376). That is why the first requirement is that the application should be the “last registered proprietor”. The examination of previous proprietors is not necessary unless the fraud is alleged in the course of transfer.
12. On the other hand, the procedure under Order 113 was introduced to evict the trespassers who have no right, title or interest whatsoever to occupy a subject property [**Dutton v Manchester Airport** (supra)]. The absence of consent or license from the plaintiff only is not sufficient to decide whether an occupier is a trespasser or not. The occupier could have obtained consent or license from any of the predecessor in title. Therefore the phrase “...**that of any predecessor in title of his**” is added in the Order. If the consent or license from any predecessor in title is established, the result is two-fold. Firstly, the occupant/s cannot be considered as trespasser/s. Secondly, there would be issues and questions to try in order to determine the right or interest of the occupant/s, and as a result this Order does not apply. Thus, it becomes necessary in an application under Order 113 to examine whether any right to possession does derive from any predecessor in title. This necessitates examination of the dealings of the previous proprietors, in relation to the property.
13. Originally, Juxta purchased the Crown Lease No. 6158, Lot 8, Plan ND 5134, part of Nasau in the District of Nadi, in the Province of Ba, containing an area of 4.0010 hectares, from one Balendra Prasad. Thereafter, the plaintiff, on 8 October 2015 entered into an agreement

with Juxta to purchase the said Lease. In the meantime, the original lease expired and new Development Lease was granted to Juxta. Eventually the sale was completed. The plaintiff developed the property and sub-divided it. The defendant's position is that, the plaintiff and Juxta agreed in their Sale and Purchase Agreement that Juxta would retain Lots 6 and 34 after sub-division. The said Lot 34 is the subject property in this case.


14. The defendant is the director and the shareholder of Juxta. The defendants' employees have been occupying the said Lot 34. The defendant has been in constructive possession. Juxta has given authority to the defendant to defend this matter. The plaintiff vehemently denied any such agreement between him and Juxta that the said two lots, namely Lot 6 and 34 would be transferred to the defendant. Even though the plaintiff denied such provision in their agreement, the defendant and his employees derive their right of possession of the property from Juxta – the predecessor in title which claims the right to retain the said Lot 34 - the subject property in this case. Accordingly, the plaintiff failed to fully satisfy the second limb of the threshold. The plaintiff was only able to satisfy that, he did not consent to the defendant and his employees. However, he failed satisfy that the defendant and his employees have been in possession of the property **without licence or consent of any predecessor in title of his**. The plaintiff partially complied with second limb.
15. Furthermore, Juxta had already commenced a proceeding in this court against the plaintiff before this action was brought by the plaintiff. It is Civil Action HBC No. 131 of 2021. Juxta alleged in that case that, the plaintiff failed to honour the agreement dated 08 October 2015 and subsequent variations and representation in relation to transfer of Lot 6 and 34 to it. Juxta moved the court for an order on the plaintiff for specific performance of the agreement between them. The plaintiff is defending that action and it is ready for trial now. The main issues to be tried in that case are: (a) Did Juxta and Plaintiff agree that, Lots 6 and 34 would be transferred the plaintiff to Juxta after sub-division? (b) Did the plaintiff breach such agreement and representations? (c) Should the specific performance of the alleged agreement be granted with damage and cost or not?
16. It is well settled that, this Order would normally apply only in virtually uncontested cases or in clear cases where there is no issue or question to try. Since Juxta had already brought the plaintiff to the court in that Civil Action 131 of 2021 to determine those issues between it and the plaintiff, this court cannot make an order for possession under this Order. In fact the plaintiff should not have invoked jurisdiction of this court at all under this Order, when that Civil Action 131 of 2021 was pending before the court. The plaintiff, by bringing this summary procedure, tried to circumvent the determination of court in that Civil Action 131 of 2021 in order to get the possession of the subject property through this summary procedure.
17. The plaintiff, in few paragraphs of his supporting affidavit, had simply stated that, the defendant and other occupants are squatters or trespassers, and they have no rights to occupy or to stay in possession the subject property. The plaintiff surreptitiously

suppressed the full information to the court about the dispute between him and Juxta over the subject property and even that case (Civil Action 131 of 2021) which is pending before the court. In these circumstances, employment of this Order by the plaintiff is an abuse of the process of the court which should be denounced. Accordingly, the summons filed by the plaintiff should be dismissed with the costs to the defendant.

18. As a result, I make following final orders:

- a. The originating summons filed by the plaintiff is dismissed, and
- b. The plaintiff should pay summarily assessed costs in sum of \$ 3,000 to the defendant within two weeks from today.




U. L. Mohamed Azhar
Master of the High Court

At Lautoka
22.08.2025