IN THE COURT OF APPEAL, FIJI

[On Appeal from the High Court]

CIVIL APPEAL NO: ABU 0021 OF 2021

[Lautoka High Court: HBC 163 of 2020]

BETWEEN : **NAREND NAIR**

Appellant

AND : **MADHU KHAN**
UMA KANT

Respondents

Coram : **Jitoko, P**
Clark, JA
Winter, JA

Counsel : **Mr I. Matanitobua and Ms N. Singh for Appellant**
Mr C.B. Young for the Respondents

Date of Hearing : **9 February, 2024**

Date of Judgment : **29 February, 2024**

JUDGMENT

Jitoko, P

[1] This appeal is from the Decision in the High Court in Lautoka of Honourable Justice Stuart on an Order 113 High Court Rules application; a summary proceedings for possession of land.

[2] The Court, upon hearing the Originating Summons by the Plaintiffs, now Respondents, and the affidavit evidence from the parties, ordered immediate possession of the property by the Plaintiffs.

[3] This is the Defendant, now the Appellant's, appeal against Stuart J's Order.

Background

[4] The Respondents are brothers and are registered lessees to a piece of native land described as Taukomomo No.6 Subdivision Lot 1 in the Tikina of Sabeto, Ba province under an Instrument of Tenancy No.842 issued on 27 August 2002. The land area is approximately 4.6688 hectares (subject to survey) and the tenancy is for a term of 30 years commencing on 1 January 2000, with a yearly rental of $1,200.00.

[5] In his affidavit in support of the summons, the first-named Respondent Madhu Kant on behalf of his brother and himself, deposed to the facts above-mentioned, and asserted that at paragraph 3 thereof that:

> *"At all material times the Defendant had been occupying and using the property without our permission or consent."*

[6] The Respondents through their solicitor, had, on 28 June 2020, demanded of the Appellant, vacant possession, but the demand was unheeded.

[7] The Appellant in his affidavit in reply of 6 October, 2020 denied that he was occupying the property illegally and that the property which he presently occupies was previously occupied by one late Dhanbhagyam.

[8] The Originating Summons was heard on 3 November, 2020 and on 15 February, 2021 the Court ordered:

> *"That the Plaintiffs are entitled to an order against the defendant for the immediate possession of the property (including any dwelling thereof) held*

by the Plaintiff as tenants under Instrument of Tenancy 8421 described as Taukomomo No.6 Subdivision Lot 1 in the Province of Ba in the Tikina of Sabeto containing an area of 4.6688 hectares."

[9] In his Notice of Appeal filed on 16 March 2021, the Appellant set out 11 grounds of appeal, on issues of law and facts. As is frequently the case in the appeals before this Court, the grounds are repetitive and overlapping, but for the sake of completeness, I will set them out in full:

*"1. **THAT** the Learned Trial Judge erred and/or misdirected himself in law and in fact by determining in paragraph 3 of his decision that "that status of the Plaintiff or the existence of the lease is an admission since it is not a denial." This is incorrect as the Appellant/Defendant had not accepted the existence of the Lease. Rather in his affidavit, he neither **agrees nor denies** the contents of the particular paragraph of Respondent's affidavit and explains the reasoning behind so, he had simply mentioned that the copy of the Lease demonstrated who the Lessee was as per the copy of the lease which was provided for by the Respondent.*

*2. **THAT** the Learned Trial Judge erred and/or misdirected himself in law and in fact by relying on a copy of the lease provided by the Respondent in making his determination on the said application despite having recognised that the copy of the Lease tendered was not a Certified True Copy of the Lease provided by the Registrar of Titles and its authenticy would then be questionable. That, in making his decision the Learned Trial Judge has not made any inquiry as to whether the said Lease is still duly registered with the Registrar of Titles and whether or not the Respondents are the actual Lessee's under the said Lease.*

*3. **THAT** the Learned Trial Judge erred and/or misdirected himself in law and in fact by relying on the Affidavit of the Respondent which stated "at all material times the defendant came to be in occupation and using the property without our permission or consent" and further states that this is more of an allegation or a submission then it is an evidence. The Learned Trial Judge in considering this statement has not taken into consideration evidence provided by the Appellant that clearly established that the Respondents were at all material times aware of the Appellant's occupancy of the property and that such occupancy was with the consent of the predecessor being the Respondent's father.*

Additional, the letters tendered in by the Appellant also confirmed the particulars of the occupancy and the duration of the same respectively.

4. ***THAT*** *the Learned Trial Judge erred and/or misdirected himself in law and in fact when he had made an order under Order 113 rule 3 of the High Court Rules, however from the facts of the case on hand it was apparent that the Respondent had failed to meet the criteria stipulated under Order 113 rule 3 in his decision and has stated that the Respondent/Plaintiff's ought to have provided in the affidavit in support of the summons the following:*

   a) The circumstances the land has been occupied
   b) Without licenses or consent to which the claims possession arises
   c) And he does not know the name of the person occupying the land which is not named in the summons.

   Despite recognizing that the above mentioned elements are crucial the Learned Judge proceeded with making his determination whilst the Respondent was unable to properly satisfy the above mentioned elements and clearly withheld such disclosure. The Learned Judge in his decision has also correctly determined that the Respondent had satisfied the above mentioned with a bare margin. However, proceeded with making such an order without paying due consideration to the degree of satisfaction of the above mentioned elements.

5. ***THE*** *Learned Trial Judge erred and/or misdirected himself in law and in fact by contradicting in his own statement by stating in paragraph 4 that the Appellant/Defendant had not explained his presence in the land and his relationship with the Plaintiff/ Respondent but in paragraph 3 he later identified the fact in the letter given by the Sabeto Central Advisory Committee attached by the Appellant/Defendant in his Affidavit in Reply had in detail explained all issues pertaining to the Appellant's occupation of the Property. The Learned Judge later in paragraph 5 identifies the relationship of the parties and the presence of the Appellant on the said property which was properly outlined in the letters provided in the Appellant's affidavit and this is how the Learned Trial Judge was able to come to such a conclusion.*

6. ***THE*** *Learned Trial Judge erred and/or misdirected himself in law and in fact as in paragraphs 6, 7, 8 and 9 summarily as it was clear that the Respondent/Plaintiff ought to have proven that this is a clear case where there is no doubt as to his claim to recover the possession of the land in addition whether there was some alleged basis for occupation.*

It is evident that the Respondent/Plaintiff had as mentioned above deliberately not disclosed the following facts:

a) The relationship with the appellant/defendant
b) How long the appellant/defendant had, had the occupation of the subject property
c) The interest by virtue the appellant had resided on the property.

7. ***THE*** *Learned Trial Judge erred and/or misdirected himself in law and in fact in making a determination on the matter despite a clear dispute, which this application then clearly should have been brought by way of an alternative application being a Section 169 proceeding. The Learned Judge has correctly sited in this at paragraph 10 but has failed to exercise the same.*

8. ***THE*** *Learned Trial Judge erred and/or misdirected himself in law and in fact, at paragraph 14 when the Learned Trial Judge has mentioned that the Appellant has not denoted any legitimate basis for him to reside on the property however, he was through supporting letters from committees confirmed that he had an interest in the land which was legitimate and which was known to others in the community. Hence, the Learned Judge ought to have made a finding of dispute and interest of the Appellant to not part with possession of the property. If ought to be considered that given that members of the community were well aware of the Appellant's occupancy of the property, the Respondent in this case ought to have known the same. However, they have misled this Honourable Court by not disclosing this information.*

9. ***THE*** *Learned Trial Judge erred and/or misdirected himself in law and in fact in holding that the Respondent/Plaintiff was entitled to an order under order 113 of the High Court Rules when the Respondent/Plaintiff and had failed to satisfy the necessary elements of the said Order. He further made an assumption on the founding document of this case by relying on a copy of the Lease which was objected to on Trial thereby assuming that the details as per the Lease was correct. However, the Learned Trial Judge then went on to state that the Appellant had not provided sufficient information to confirm its interest in the property and reasons as to why the Appellant ought not to release possession of the same.*

10. ***THE*** *Learned Trial Judge had erred in Law and Fact in making assumptions on the case of the Respondent whereas for the Appellant, the Learned Trial Judge has went ahead to state that the Court has no power to make assumptions or fill in the gaps of evidence. In doing the Learned Trial Judge has acknowledged that it is the role of each party*

to submit to the court evidence sufficient enough to the satisfaction of the Court. The facts of this case clearly establishes that evidence provided by the Respondent was questionable and ought not to have been relied on. Furthermore, that the Appellant had deliberately withheld the disclosure of evidence which was relevant to this matter at hand which ought to have been taken into account by the Learned Judge when making its decision.

*11. **THE** Learned Trial Judge's decision is wrong and erroneous and tantamount to a wrongful exercise of discretion having regard to all the facts and circumstances of the case and evidence on the whole."*

Order 113 Proceedings

[10] It is useful before considering the merit or otherwise of this appeal to understand the scope and the purpose or objective of Order 113 of the High Court Rules. It is in essence, a summary proceeding for possession of land akin to summary procedure under section 169 of the Land Transfer Act.

[11] The rules relevant to this appeal are as follows:

"1. Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant holding over after the termination of the tenancy) who entered into and remained in occupation without licence or consent or that of any predecessor in title of his, the proceedings maybe brought by originating summons in accordance with the provisions of this Order.

2. . . . . .

3. The plaintiff shall file in support of the originating summons an affidavit stating –

(a) the 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 any person occupying the land who is not named in the Summons . . ."

[12] The application of this Order is confined only to the particular circumstances set out under rule 1 above, as follows:

> *"1. The proceedings is by Originating Summons as provided in Form No.3 in Appendix [1];*
> *2. The proceedings is brought by any person who has a legal right to possession of lands in law and who alleges that it is unlawful occupied by a person or persons, known and unknown;*
> *3. That the occupiers have entered and remained in occupation without a licence or consent."*

[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.

[14] I will now deal with each ground of appeal as set out by the Appellant.

Ground 1 of the Appeal

[15] This ground challenges the interpretation the Court had put on the Appellant's affidavit in reply where at paragraph 2, he stated that "*I neither admit nor deny the contents" of paragraph 2 of the Respondent's affidavit in support that sets out the details of the Instrument of Tenancy as issued by the ITLTB. The Court offered the view that since the Appellant "neither admits nor denies the status of the Plaintiff or the existence of the lease (since it is not a denial) this must be taken to be an admission."*

[16] It is always open to the Court to make its own conclusion from the evidence including statements before it. In this instance, the presumption of the Appellant's admission is easily established from his own statement and knowledge at paragraph 2 of his affidavit, which immediately follows his non-admission and denial of the same.

[17] He states:

> *"That as far as I am aware and I am led to believe through the document annexed and marked as: "MK-1" in the affidavit of Madhu Kant, the plaintiff is a tenant and the subject property . . . by virtue of an instrument of tenancy . . . ."*

At the very least, the statement admits that the Appellant is aware of the existence of the Instrument of Tenancy in the names of the Respondents.

This ground is without merit.

Ground 2 of the Appeal

[18] Counsel submitted under this ground, that the Court should not have accepted the Respondent's copy of the lease since it was not a certified true copy provided by the Registrar of Titles. Furthermore, Counsel submitted, that the Court should have enquired whether the lease was duly registered with the Registrar of Titles.

[19] In support of this proposition Counsel for the Appellant relied on two (2) decisions of the High Court. First in **Vosaicake v Kanakana** [2019] FJHC 1067; HBC 170.2018, the Court dismissed an application under O.113 on various grounds of non-compliance with rule 4(2) on the service of the summons and the supporting affidavit and that the Instrument of Tenancy was not certified by the Registrar of Titles as required under Section 18 of the Land Transfer Act. In an earlier case of **Panil v. Vankataiya** [2017] FJHC 876; HBC 118.2016, at s.169 Land Transfer Act application for vacant possession, the Court interpreted section 18 of the Act as follows (at paragraph 13 of its Ruling):

> *"A careful reading of section 18 hereinabove makes it very clear that every duplicate and/or copy of title needs to be endorsed with a seal of the Registrar of Titles and can then only be admitted to prove a conclusive evidence unless the Registrar is produced into Court to prove the Instrument and/or a certified true copy of the Title/Lease is filed with the Court."*

[20] Both cases interpreted section 18 of the Act and the requirement of certification by the Registrar of Titles as mandatory before a copy of title or Instrument of Tenancy, can be introduced before the Court.

[21] Section 18 states:

> *"18. Every duplicate instrument of title duly authenticated under the hand and seal of the Registrar shall be received in all courts as evidence of the particulars contained in or endorsed upon such instrument and of such particulars being entered in the register and shall, unless the contrary be proved by the production of the register or a certified copy thereof, be conclusive evidence that the person named in such instrument or in any entry thereon as seized of or as taking an estate or interest in the land described in such instrument is seized or possessed of such land for the estate or interest so specified as from the date of such certificate or as from the date from which such estate or interest is expressed to take effect."*

[22] This Court does not agree with the interpretation of section 18 in both the above cases.

[23] A duplicate or copy of the title registered with the Registrar of Titles or Registrar of Deeds would already have the stamps and seal of their offices on the documents. Section 18 adds that a certified copy by the Registrar of such document is "conclusive evidence" of the instrument and its contents. It does not state that unless it is certified by the Registrar of Titles, it cannot be admitted into Court. A duplicate copy may still be admitted as evidence, but it will not be conclusive of the instrument or its contents.
This interpretation finds support in section 11 of the Civil Evidence Act.

[24] The Respondents' counsel in response to this ground, referred to section 11 of the Civil Evidence Act that states:

> *"11. A document which is shown to form part of the records of a business of public authority maybe received in evidence in civil proceedings without further proof."*

A copy of a title or instrument of tenancy registered in the registries of Titles or Deeds falls within Section 11, qualified by Section 18 of the Land Transfer Act.

[25] Counsel for the Respondent had correctly pointed out, the Instrument of Tenancy is registered with the Registrar of Deeds, not the Registrar of Titles. But even if it were the responsibility of the Registrar of Titles, section 18 of the Land Transfer Act only states that an instrument of title authenticated by the Registrar is conclusive evidence in all

courts. It does not prevent the tendering of an instrument of title without the Registrar of Titles' certificate, although it will not be "*conclusive evidence*," and the relevant consideration by the Court will be the question of weight.

Ground 3 of the Appeal

[26] This ground avers that the Court had not taken into account, in considering the Respondent's claim that *"at all material times, the Defendant had been occupying and using the property without our permission or consent,"* the Appellant's own affidavit that affirms that his own occupation of the land is with the approval of the iTaukei landowners (by a letter addressed to the iTLTB as the landlord), and also given the fact that the Appellant, and his family have been in occupation of the land for at least 50 years.

[27] On the contrary, the High Court had referred to the Appellant's submission and reference to the letters by the landowners and the Sabeto Central Advisory Committee, in particular, as to their status *visa vis* the legal interests vested in the Respondents. Furthermore, the Appellant had the opportunity, but failed to elaborate on the 50 years he alleged his family resided on the property (refer to paragraphs 3 and 4 of the Decision).
This ground is also without merit

Ground 4 of the Appeal

[28] This ground avers that the High Court had misdirected itself in fact and in law when it made an Order for possession without it being first satisfied that the requirements of Order 113, Rule 3 as to contents of the Affidavit in Support had been fully complied with, that is, to say:

- the Respondents' interest in the land
- the circumstances in which the land has been occupied without licence or consent
- that the Respondents are not aware of the person's name occupying hence it is not stated in the Summons.

[29] If there is an issue that was very clearly analysed by the High Court, it was the particular requirements under Order 113. The Court looked at each Rule under order 113 that was relevant to the proceedings, their histories, as set out in *Dutton v Manchaster Airport* [1999] 2 AllER 675: how the Courts have interpreted, and applied, them in the past: *Nandan v. Reddy* [2019] FJHC 894, HBC 131.2016 and, the discretionary powers vested in the Court: in the Privy Council decision of *Eng Mee Yong v Letchumanan* [1979] 3 WLR 373.

[30] The Court established that the Respondents were the legal tenants to the land, that the land has been occupied by the Appellant without licence or the consent of the Respondents, and that the third requirement under O.113 r.3 does not apply, as the trespasser is known to the Respondents. It could very well be that the Court had described the evidence provided by the Respondents as "*bare minimum*," given the nature of O.113 proceedings but they do nevertheless, meet all the requirements of the Order.
This ground is without merit.

Grounds 5 and 6 of the Appeal

[31] These two grounds are inter-woven through the Appellant's assertions that the Court had not paid heed or seriously considered the background history of the occupation of the land by the Appellant and his family.

[32] There was very little information in both the affidavits by the Respondents and the Appellant to enlighten the Court of the background history. It was left to the Court at paragraph 5 of its judgment to piece together through oral submissions of Counsel a somewhat disjointed account of how the Appellant happened to be living on the land. The Court had pointed out that the Respondent's affidavit in support of their Originating Summons of 23 July 2020 for vacant possession, barely had sufficient details, but it was adequate to sustain their claim. The Appellant had the opportunity, when he filed his affidavit in reply, to inform the Court fully as to the history of the occupation and the

nature of the personal relationship between the parties. There was nothing to be gleaned by the Court as to this matter from the Appellant's very brief admission at paragraphs 7 and 8 of his affidavit which merely stated:

> *"7. THAT the said property on which I reside is also occupied by Mr Gyanendra Nambiar and was previously occupied by the late Dhanbhagyan.*
>
> *8. THAT I do not wish to make any comments in relation to paragraph 7 of the said affidavit."*

[33] Again, it was left to the Court in its questioning of the Appellant's Counsel, to establish that the said Dhanbhangyan was the Appellant's mother and was in a de facto relationship with Ram Baran, the Respondent's father.

Grounds 5 and 6 are without merit.

Ground 7 of the Appeal

[34] This ground is premised on the submission that the High Court had erred in fact and law in entertaining an O.113 application instead of a section 169 of the Land Transfer Act application.

[35] It is as well to understand that the scope of the Order is confined, to the particular circumstances described in O.113 r.1 in shortening the process it takes to obtain a final order for possession of land. Once the Court is satisfied from the evidence through the affidavit in support that the requirements under O.113 r.3 have been met, it has no discretion to prevent the use of this summary procedure, by the Respondents. In this case, the Respondents had satisfied the Court that the facts and circumstances justified the O.113 summary proceedings. Only where there arises in the Court's view, triable issues, would the application be refused: **Baiju v Tai Kumar** [1999] 45 FLR 79.

This ground of appeal is without merit.

Ground 8 of the Appeal

[36] The Appellant submits that the Court had misdirected itself in law and in fact in disregarding the support letters from the local/rural committees and/or the iTaukei landowners as proof of his *"interest in the land which was legitimate and known to others in the community."*

[37] The support of the local communities and/or the iTaukei landowners, do not lend any form of legitimacy whatsoever to the Appellants. This legitimacy may only be obtained, through the consent of the iTLTB or by the application of the law.

[38] In analyzing the content of these support letters the Court had correctly determined that they do not in any way or form help establish the legitimacy of the presence of the Appellant on the land. The claim as alleged by the Appellant that the Respondents knew of the support but did not inform the Court, does not help his case.
There is no merit on this ground.

Ground 9 of the Appeal

[39] This ground is again on the High Court's acceptance of proceeding under O.113 and allowing as evidence the unauthenticated lease (Instrument of Tenancy), which have already been considered and decided under Grounds 2 and 7 above.

Ground 10 of the Appeal

[40] This ground questions the exercise of the discretionary powers of the Court in making assumptions and in arriving at its own conclusions and disregarding evidence, as presented before it. There were no specific details of what *"evidence provided by the Respondents"* that *"were questionable*" but accepted by the Court, that would sustain this ground by claiming that the Court had misdirected itself and erred in law and fact in making assumptions for the Respondent but not for the Appellant.
This ground is without merit.

Ground 11 of the Appeal

[41] This is a general submission that the High Court's decision is *"wrong and erroneous and tantamount to a wrongful exercise of discretion having regard to all the facts and circumstances of the case and evidence on the whole."*

Additional New Ground of Appeal – Application of the Agricultural Landlord and Tenant Act

[42] This ground is new and was introduced by Counsel for the Appellant in his submission filed on 10 January, 2024. It is premised on the application of section 9(2) of ALTA, to the Instrument of Tenancy. It reads:

> *"9(2) Every contract of tenancy shall be deemed to contain the following clause –*
>
> > *This contract is subject to the provisions of the Agricultural Landlord and Tenant Act and may only determine, whether during its currency or at the end of its term in accordance with such provisions. All disputes and differences whatsoever arising out of this contract for the decision of which that Act makes provision shall be decided in accordance with such provisions."*

[43] As this ground had not been raised in the Court below and additional arguments and evidence would have been necessary, to be produced in support or against it, this Court will not allow the new ground to be entertained at this appeal stage.

[44] In any case, it is the preliminary view of this Court that the provisions of ALTA will only apply where there already exists a valid contract or instrument of tenancy between the Respondent and the Appellant. In this case there is no contract or tenancy agreement between the parties, except that between the Respondents and the iTLTB.
This ground is dismissed.

Conclusion

[45] This Court accepts the finding of the High Court that the Instrument of Tenancy No.8421 issued by the iTLTB to the Respondents, Madhu Kant and Uma Kant dated 7 August, 2002 is a proper and legal proof of their ownership of the land known as Taukomomo No.6 Subdivision Lot 1 in the Tikina of Sabeto, Province of Ba. There is no dispute to the Respondents' legal right to possession of the land, that would have persuaded the Court to exercise its discretion in favour of s.169 of the proceedings.

[46] This Court furthermore accepts that the Appellant has no right to stay on the land or portion of the tenancy that he presently occupies even, although he may have been living with Dhanbhagyam, her mother, under a licence granted to her by the Respondents' father, Ram Baran. This licence expired upon the death of the mother and even if there was a licence granted to the Appellant, thereafter, it was terminated by the Respondents. *Notice to Vacate* of 25 June, 2020.

[47] For the purpose of O.113 proceedings therefore, the Appellant is deemed to be in occupation of the Respondents' land without licence or their consent.

[48] All the O.113 requisite elements are satisfied and this Court accepts that the High Court had correctly entertained the Respondents' Originating Summons under it.

[49] There remains only the issue of compensation for the dwelling house which was not raised in the hearing of the Summons. It is accepted by both parties that the Appellant's mother Dhanbhagyam, had been allowed by the original lessee, the Respondent's father, to move into a portion of the property and in the process had constructed a dwelling house on it. Order 113 proceedings however, only deals with the specific and sole purpose of recovery and possession of land. Because of its summary nature in shortening the steps and time taken for obtaining a final Order for possession of land, the claim under it, is only limited to that purpose alone. (White Book, The Supreme Court Practice [1991 Ed.] Vol. 1 p.1596).

[50] In conclusion, this Court finds that the appeal is without merit and makes the following Orders:

Orders:

1) *The appeal is dismissed.*
2) *Costs of $2,000.00 against the Appellant to be paid within 21 days of the judgment.*

Clark, JA

[51] I have read in draft the judgment of Jitoko P and agree with the orders made for the reasons set out in the judgment.

Winter, JA

[52] I agree.

COURT OF APPEAL FIJI

Hon Mr Justice Filimone Jitoko
PRESIDENT, COURT OF APPEAL

Hon Madam Justice Karen Clark
JUSTICE OF APPEAL

Hon Mr Justice Gerard Winter
JUSTICE OF APPEAL