

**IN THE HIGH COURT OF FIJI AT SUVA**  
**FAMILY DIVISION**

**Civil Action No. HBC 335 of 2012**

**IN THE MATTER** of an application under Section 169 of Part XXIV of the Land Transfer Act Cap 131 for an Order for **Immediate Vacant Possession.**

**BETWEEN** : **SHAINAZ BIBI** of 509 Ratu Mara Road, Nabua, Domestic Duties.

**PLAINTIFF**

**AND** : **MUKESH NAIDU** and **VARSHA PRIYA YANTESH** both of 119 Sawau Road, Bayview Heights, Suva, Businessman and Domestic Duties respectively.

**DEFENDANTS**

**Counsels** : **Mr O'Driscoll** for the **Plaintiff**  
**Ms Tabuakuro L** for the **Defendants**

**RULING**

1. Ex-parte Notice of Summons filed by the Plaintiff on 29<sup>th</sup> May 2013 in pursuant to Order 45 Rule 2(2) of the High Court Rules 1988 and sought the following Orders:
  - (i) *Writ of Possession be issued in this matter with Leave pursuant to Order 45 Rule 2(2) of the High Court Rules 1988;*
  - (ii) *The costs of the application be paid by the Defendants.*

2. This matter was taken up on 31<sup>st</sup> May 2013 and the Plaintiff's counsel submitted that all the documents being issued by the Registry; in pursuant to motion filed on 20<sup>th</sup> May 2013 which amounts to leave being granted by the Court. However, the Defendants objected for the ex-parte motion filed on 31<sup>st</sup> May 2013 and Court directed that:
  - (a) *The Defendant to file affidavit in oppose and submissions within 7 days;*
  - (b) *The Plaintiff to file affidavit in reply within 3 days and submissions within 3 days.*
3. The Defendants filed their submissions on 6<sup>th</sup> June 2013 and the Plaintiff filed her submissions on 10<sup>th</sup> June 2013, no Affidavit was filed by the Defendant.
4. The consideration of the submissions:
  - 4.1 The Defendants submissions dispute the Plaintiff's argument that leave is not required for issuing Writ of Possession and stated under Order 45 Rule 2(2) of the High Court Rules Writ of Possession "*shall not be issued without the leave of the Court*";
  - 4.2 Order 45 Rule 2(2) reads:
    - (2) *A writ of possession to enforce a Judgment or Order for giving of possession of any land shall not be issued without the leave of the Court except where the Judgment or Order was given or made in a Mortgage action to which Order 88 applies.*
  - 4.3 In replying to above submissions, the Plaintiff's counsel submitted that the standard documents filed when it was sought to enforce the Order for eviction the Affidavit includes at para 6 the words "*that I hereby request the Court to seal the Writ of Possession against the Defendants directed to the Sheriff of Fiji to remove the said Defendants Mukesh Naidu and Varsha Priya Yanktesh and all such persons as may be in illegal occupation of the said land*". As such there was no necessity to make separate application as argued by the Defendants. I agree with the Plaintiff's submissions for the following reasons:

- (a) *The Affidavit in support of Application to enforce order for possession dated 18<sup>th</sup> March 2013 was filed by the Plaintiff;*
- (b) *Further Affidavit of Service was filed by the Plaintiff on 17<sup>th</sup> January 2013 states that the Summons for Ejectment, Acknowledgement of Service and Affidavit in support of the Plaintiff were served on the Defendants on 31<sup>st</sup> of December 2012.*

As such, I conclude the requirements under Order 45 (2) and (3) were satisfied by the Plaintiff and there is no necessity to seek leave from this Court on the Ex-parte Notice of Motion filed on 20<sup>th</sup> May 2013.

- 4.4 I further observe in the Affidavit dated 26<sup>th</sup> March 2013 filed by the 1<sup>st</sup> named Defendant on the same day, had pleaded a Stay of Execution of the order that was pronounced on 26/2/2013; which clearly shows he was well aware of the execution of the Writ of Possession and further established the Plaintiff's had met the requirements in pursuant to Order 45 Rule 2(2) and 2(3) of the High Court Rules 1988.
- 5. The Defendant also submitted that Writ of Possession ought to be stayed until determination of the Defendant's application for Leave to appeal out of time under Order 45 Rule 2(3). The said application for Leave to appeal was dismissed by this court on 6<sup>th</sup> August 2013 and there is no necessity to consider the submission made on this issue.
  - 6. The submissions made by the Defendant's counsel that Ex-parte Notice of Motion was not supported by an Affidavit do not carry any merits for the reasons stated in paragraph 4.3 of this Ruling.
  - 7. The Defendant's counsel also made submissions with regard to costs in the sum of \$3,500 which was reserved on the basis that the Defendant are still occupying the premises and they ought to be granted sufficient time to vacate the premises. There is no merit in the argument since the Defendants are occupying the premises against the order made by the Learned Master on 26<sup>th</sup> February 2013 and there was no stay granted. As such the occupation of the premises is unlawful and costs order stands.

8. Accordingly, I make the following Orders:

- (a) *The objection made by the Defendants in pursuant to order 45 Rule 2(2) and (3) is over-ruled and leave granted to the Plaintiff to proceed with the Ex-parte Notice of Motion filed on 29<sup>th</sup> May 2013;*
- (b) *Costs of \$3,500 reserved until determination of summons to leave to appeal against the order delivered on 13<sup>th</sup> May 2013, by the Defendant.*

Delivered at Suva this 7<sup>th</sup> Day of August, 2013.

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**C. Kotigalage**  
**JUDGE**