

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 34 of 2011

BETWEEN : **NATIVE LAND TRUST BOARD**, a body corporate duly constituted under
the Native Land Trust Act, Cap. 134.

PLAINTIFF

AND : **VILISI VEISAMASAMA** of Colo-i-Suva, Domestic Duties.

DEFENDANT

BEFORE : **Acting Master Thushara Rajasinghe**

COUNSEL : **Ms. Komaitai A. L. C.** for the Plaintiff
Mr. Nawaikula for the Defendant

Date of Hearing : **21st October, 2013**

Date of Ruling : **18th November, 2013**

RULING

A. INTRODUCTION

1. The plaintiff filed this ex parte notice of motion in pursuant of Order 113 rule 7 (1) of the High Court Rules seeking following orders inter alia,

- i. That leave be granted to the plaintiff to issue writ of possession against the Defendant; and
- ii. Cost of this application,

2. The plaintiff for a reason that best known to them, served a copy of this notice of motion to the defendant without obtaining leave of the court, though o 113 r 7 states that an application for leave may be made ex parte unless the court otherwise directs.

Accordingly, the defendant appeared upon being served with this ex parte notice of motion wherefore, I allowed this summons to be treated as inter-parte.

3. The defendant filed her affidavit in opposition and the plaintiff then filed their affidavit in reply. Subsequently, the matter was set down for the hearing, where the learned counsel for the plaintiff and the defendant made their oral submissions. At the conclusion of the oral submissions, I invited the counsel to file their respective written submissions which they filed accordingly.
4. Having considered the notice of motion, respective affidavits of the parties and their respective oral and written submissions, I now proceed with my ruling as follows;

B. BACKGROUND

5. The plaintiff stated that the decision of the substantive matter was delivered by Justice Amaratunga on the 6th of October 2011. The defendant then filed her notice of appeal in the High Court on the 26th of October 2011; however, the appeal was abandoned by the defendant. The plaintiff was formally informed the status of the appeal by the Registry via a letter dated 6th of November 2012. The plaintiff pleaded that filing of notice of appeal by the defendant prevented them to execute the writ of possession within three months time as stipulated in o 113 r7 (1).
6. The Defendant contended that the circumstances which was prevailed before the decision of Justice Amaratunga has now changed. More particularly, the defendant has rectified the issues raised by Justice Amaratunga in his said decision. Having stated that, the defendant sought orders to dismiss this notice of motion and to refuse the leave to issue writ of possession.

C. THE LAW

7. Having considered the submissions of the plaintiff and the defendant, I now turn to review the relevant law on the issue of granting leave to issue writ of possession under o 113 r7 of HCR.

8. Order 113 rule 7 (1) states that

“Order 45, rule 2(2) shall not apply in relation to an order for possession under this Order but no writ of possession to enforce such an order shall be issued after the expiry of three months from the date of the order without the leave of the court”.

9. White Book on the Supreme Court Practice 1995 at 113/1-8/10 page 1626 states that

“the reason for this requirement is to discourage the use of proceedings under O113 except in case of emergency. The procedure under O113 is meant to be truly summary and it loses this character if a plaintiff were to employ this extraordinary machinery to obtain his order for possession and then delay enforcement, especially if he does so for a considerable time”.

10. In view of the above-mentioned citation of the White Book on the Supreme Court Practice, I find the purpose of o113 r7 (1) is to provide a judicial supervision on the implementation of the o 113 and to prevent the abuse of this special summary procedure by the litigants.

11. On the other hand Lord Denning MR in McPhail v Persons, Names unknown, Bristol Corporation v Ross and Another (1973) 3 All E.R 395) held that

“it is an order that the Plaintiff “do recover” possession. That order can be enforced by a writ of possession immediately.... There is no provision for giving any time. The court cannot give any time. It must, at the behest of the owner, make an order for recovery of possession. It is then for the owner to give such time as he thinks right to the squatters. They must make their appeal to his goodwill and consideration, not to the court”.

12. According to Lord Denning’s observation in McPhail (supra), I find that the court is required to consider whether the delay of execution of the writ within three months time would amount to an abuse of this extraordinary summary procedure in order to gain undue advantage than obtaining of immediate vacant possession of the land.

D. ANALYSIS

13. The plaintiff specifically stated that the delay was due to the notice of appeal filed by the defendant against the Decision of Justice Amaratunga. Moreover, the plaintiff acknowledged the defendant's contention that she tried to renegotiate the issue of lease with the plaintiff and the traditional land owners however, it was not succeeded.
14. I do not find any changes of circumstance of the status of the defendant as no authority was subsequently granted to her to possess the land. However, I do not wish to venture much into the said contention of subsequent changes between the defendant and land owners as I find that will amount to revisit the factual consideration of justice Amaratunga's decision. The defendant failed to satisfy the court that this delay was unreasonable and plaintiff has abused this summary procedure to obtain an order for vacant possession.

E. CONCLUSION

15. Having considered the reasons set out above, I am of the view that the plaintiff has satisfied the court that the delay is not unreasonable. Accordingly I make following orders, that;
 - i. Leave is granted to the plaintiff to issue Writ of Possession against the Defendant.

Dated at Suva this 18th day of November, 2013.

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R.D.R. Thushara Rajasinghe
Acting Master of High Court, Suva

