

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CIVIL JURISDICTION**

**CIVIL ACTION NO: HBC 149 of 2014**

**IN THE MATTER** of an application under Order  
113 of the High Court Rules of Fiji, 1988.

**BETWEEN** : **ATTORNEY-GENERAL OF THE REPUBLIC OF FIJI** for and  
on behalf of the Director of Lands, Suvavou House, Level  
4, Victoria Parade, Suva.

**PLAINTIFF**

**AND** : **EMOSI SILIKIWAI** of Lami, P O Box 358, Lami.

**DEFENDANT**

**COUNSEL** : Ms. L. Ramoce for the Plaintiff  
Mr. K. Maisamoa for the Defendant

**Date of Hearing** : 4 February 2016

**Date of Judgment** : 25 April 2016

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**JUDGMENT**

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**Introduction and Background**

[1] This is an application made by the Plaintiff, in terms of Order 113 of the High Court Rules, 1988. The application has been made by way of Originating Summons, and seeks the following Orders:

1. The Defendant does forthwith give vacant possession of the State Land at Tiri Naqumu, Lami to the Plaintiff;
  2. For an order that the costs of this application be paid by the Defendant on an indemnity basis; and
  3. Such other Order and or Orders this Honourable Court deems fair and just to make in the circumstances of the case.
- [2] The Originating Summons was supported by an Affidavit deposed to and filed on 3 June 2014, by Thomas Fesau, a Senior Surveyor employed by the Minister of Lands. On 29 July 2014, the Defendant filed his Affidavit in Response. Subsequently on 24 November 2014, the Defendant filed a Supplementary Affidavit in Response. On 4 December 2014, the Plaintiff filed an Affidavit in Reply to the said Supplementary Affidavit in Response.
- [3] This matter was taken up for hearing before me on 4 February 2016. Both Counsel for the Plaintiff and the Defendant were heard. The parties also filed written submissions, and referred to case authorities, which I have had the benefit of perusing.

#### **The Affidavit in Support filed by Thomas Fesau**

- [4] The main issues that have been raised by the Plaintiff are found in the Affidavit in support filed by Thomas Fesau. The contents of the Affidavit, showing the very long history of these proceedings, can be detailed as follows:
1. He states that he is a Senior Surveyor employed by the Ministry of Lands and by virtue of his position he is qualified and duly authorised to depose to the particulars of the Affidavit on behalf of the Plaintiff.
  2. The Defendant was a tenant at will of the Crown Land situated at Tiri Naqumu, Lami. The Director of Lands (on behalf of the Plaintiff) and Pemo Fisherman's Co-operative Society Limited (The Defendant is the Managing Director of the said Co-operative

Society) entered into a Tenancy-At-Will (LD 60/462) (TWA,) which commenced on 17 August 1987. The TWA is said to have been terminated on 6 December 2004. A copy of the Tenancy-At-Will is annexed and marked as "TF1".

3. As per the said TWA the description of the State Land situated at Tiri Naqumu, Lami is as follows:

Land:	Tiri Naqumu, Lami.
Area:	860m <sup>2</sup>
Rent:	\$40.00 per annum with effect from 1 June 1985
Tikina:	Suva
Ownership:	Crown Land
Purpose:	Boat building and repairing

4. It is important to set out the terms and conditions of the said Tenancy-At-Will which are as follows:

- 1) The right to occupy and to use the land is not transferable.
- 2) The land described may be used solely for the Boat Building and repairing.
- 3) No Building what so ever shall be erected on the demised land without the prior written consent of the lessor first had and obtained.
- 4) In the event of failure on your part to pay the rental as aforesaid punctually this authority may be cancelled without further notice and will be required immediately to vacate the land.
- 5) The demise land shall be kept clear of refuse, weed and unsightly undergrowth to the satisfaction lessor.
- 6) This letter shall not operate to create a tenancy in respect of the said land and you may be required to vacate the land on receipt of notice to the effect.
- 7) The demised land is to be left in a neat and tidy manner to the satisfaction of the lessor at the end of the TAW. This would mean clearing the existing rubbish as



well as that occasional during the occupation. You would inform the lessor a joint inspection at the termination of the tenancy.

- 8) No compensation of whatsoever nature shall be payable as the termination of the tenancy.
5. As per Clause 6 of the TAW it specifically states that the arrangement shall not operate as to create a tenancy and that the Defendant may be required to vacate the land on receipt of notice to that effect.
6. On 6 December 2004, the Director of Lands wrote to the defendant stating that he had breached condition 2 of the TAW. The Plaintiff stated that a recent inspection revealed that the Defendant was using part of the land for shop, amusement centre, and panel beating garage purpose, and as such the Defendant has breached condition 2, which stipulates that the land be used specifically for boat building and repair. Furthermore, the Defendant was also informed that the Ministry of Fisheries and Forests has been allocated the land for the re-development of the Lami Fisheries Jetty. In line with condition 6 of the TAW, the letter served as a Notice to Vacate and accordingly that the said correspondence terminates the TAW. It is important to note that in terms of the notification the Defendant was given a period of 30 days to vacate the land. A copy of the said letter, dated 6 December 2004, is annexed and marked as "TF2".
7. Mr. Fesau deposes that, however, the Defendant continues to live illegally on the said State Land after the TAW was terminated and that he has never been granted a proper lease nor has any interest on the land.
8. On 26 January 2005, the Ministry of Lands again wrote to the Defendant giving him a period of 14 days to vacate the land. The Plaintiff further reiterated to the Defendant the need of the Ministry of Fisheries and Forest to use the land for the re-development of the Lami Fisheries Jetty. A copy of the said letter is annexed and marked as "TF3".

9. On 2 June 2005, the Ministry of Fisheries wrote to the Defendant requesting him to be present at a consultation meeting and reiterating that the TAW granted to him was now null and void. A copy of the said letter is annexed and marked as "TF4".
  
10. On 7 June 2005, the Ministry of Fisheries and Forests wrote to the Plaintiff stating that the Defendant was not willing to vacate the land despite official notices issued by the Ministry of Lands and Ministry of Fisheries. Even though the Defendant was illegally occupying the land, to facilitate the development of the Lami Fisheries Jetty and in the public interest, the Ministry of Fisheries and Forest was willing to pay reasonable compensation to the Defendant. The Ministry of Fisheries and Forest was also ready and willing to explore other options to ensure that the site was cleared. A copy of the said letter is annexed and marked as "TF5".
  
11. On 29 August 2006, the Office of the Auditor General wrote to the Plaintiff requesting for an explanation as to why the Defendant continued to occupy the land despite the fact that the TAW was terminated in 2004. The Office of the Auditor General queried as why no actions were taken to evict the Defendant. The Office of the Auditor General further reiterated that the land is urgently needed to accommodate the Lami Fisheries Jetty's administration block, a new 12 ton storage ice machine, and other public amenities. A copy of the said letter is annexed and marked as "TF6".
  
12. On 11 August 2006, the Legal Counsel for the Lami Town Council wrote to the Plaintiff requesting the assistance of the Plaintiff to regularize the Defendant's occupation of the land. Regularizing the Defendant's occupation would enable the Lami Town Council to charge town rates, and business license fees amongst other things. A copy of the said letter is annexed and marked as "TF7".
  
13. As per this communication the Lami Town Council acknowledged that the TAW was revoked in 2004 and thus that the Defendant has been occupying the land illegally. Inspection by the Lami Town Council inspectors revealed that more reclamation



work has been carried out on the land, there was spillage of diesel oil, overgrown grass and direct discharge and waste water into the sea. Even though the land is within the Lami Town Council boundary, the Council cannot act since the Defendant does not have any legal title or lease over the land.

14. The Plaintiff attempted to regularize the Defendant's occupation of the land but this was met with strong objections from the relevant authorities. By a letter dated 31 January 2008, a copy of the which is annexed and marked as "TF8", the Ministry of Primary Industry was objecting to the granting of a formal lease to the Defendant on the following grounds:

- a) Any state development on the State Land, in this case the proposed fully legitimate OHS civic upgrade of the existing Fisheries Lami Jetty require priority consideration over any proposed private interest within the said location. The Department is pursuing the completion of jetty upgrade with the cooperation of Ministry of Foreign Affairs and Japanese Government. Furthermore, the application by the Department of Fisheries and Forests for Lot 3- SO1145 was pending with the Director of Lands.
- b) The said tenant is nowhere identified on Lami Town Planning scheme.
- c) The said tenant is in defiance of three [3] official warning notices from the Lami Town Council regarding illegal development. To make matters worse the illegal activity continues to date without the appropriate intervention from both the Town Council and the Department of Lands. The said tenant is in defiance of several official warning notices from Director of Lands directly related to several breaches to the agreed terms and conditions of the TAW.
- d) A special Investigation instituted by Office of the Auditor General into circumstances surrounding the aborted implementation of state sponsored fisheries management and development infrastructure, namely of Fisheries Lami

Jetty Redevelopment project, resulting in the loss of \$4.8 million of taxpayer's funds to Japanese authorities for breach of contract is pending. The said tenant is implicated in the same special investigation.

- e) The said tenant is in breach of TAW by putting claim to the Department of Fisheries slipway area. The said tenant is known to be illegally collecting slipway fees from members of the public and State Departments, including the Department of Fisheries.
- f) The said tenant is in clear breach of environmental and health laws regarding sewerage disposal and other sanitary measures. Furthermore the said tenant despite his many verbal assurances has failed to produce an acceptable Scheme Plan for consideration by relevant authorities.
- g) In light of monitoring on the said tenants increased business activities on the said State Land, again clearly outside TAW terms, FIRCA was being directed to undertake a probe into allegations of tax misappropriation. The said tenant is known to be receiving a steady income from Fiji Development Bank for custody of a number of FDB seized vessels in the said area. One such vessel the Waimanu Catcher' continues to be berthed on State infrastructure, namely the Fisheries Lami Jetty, with no berthing fees being duly paid to date. The said tenant is also known to be collecting payment from FDB for vessels tied to Fisheries Department mooring facility located off Draunibota Bay.
- h) In light of monitoring on the said tenant's increased business activities on the said state land, again clearly outside TAW terms, FNPF was directed to verify allegations of failure to pay FNPF dues to his employees as required by law.
- i) The said tenant has clearly failed to reciprocate the goodwill the State has rendered to him over the years. Furthermore the said tenant's claim to the State for the sum of \$250,000.00 for Acquisition of State land remains unresolved.



15. On 05 January 2010, the Plaintiff wrote to the Defendant stating that the Defendants TAW was cancelled in 2004. The Plaintiff unequivocally and in no uncertain terms reiterated that the Defendant must vacate the land. The Plaintiff gave the Defendant another 30 days' notice to vacate the land. A copy of the said notice is annexed and marked as "TF9".
16. On 18 March 2013, the Plaintiff wrote to the Defendant addressing the issue of the Defendant occupying the land without the consent of the Director of Lands. The Plaintiff advised the Defendant that the land would be better utilized if it is developed with the approval of the appropriate planning authorities. The Plaintiff in stating the above was echoing the sentiments expressed by the Lami Town Council and the Ministry of Primary Industries. A copy of the said letter is annexed and marked as "TF10".
17. Furthermore, by this correspondence the Plaintiff forewarned the Defendant to prepare for relocation and relocate or the Government will forcefully remove the Defendant from the land. The Defendant was warned to cease charging fees from members of the public using the jetty, since he has no legal interest in the land. The Defendant was given seven [7] days to vacate the land failing which legal proceedings will be instituted without delay.
18. The Plaintiff via a correspondence dated 17 June 2013, directed the Defendant to cease all illegal activities on the site. The Plaintiff made these directives on the grounds that the Defendant does not have any legal rights on the land. The letter was also copied to the Police Southern and Maritime Division. A copy of the said letter is annexed and marked as "TF11".
19. For all the reason outlined above, the Plaintiff was seeking an Order in terms of the Summons filed, together with Costs of this application and for Court to grant such



other relief that the Court may deem fit, just, expedient, equitable and necessary in the circumstances of this case.

#### **The Affidavit in Response filed by Emosi Silikivai**

[5] The matters stated in the Defendant's Affidavit in Response and his Supplementary Affidavit in Response can be summarized as follows:

1. The Defendant states that Thomas Fesau as a Senior Surveyor employed by the Ministry of Lands is not qualified to depose an Affidavit in Support of the Plaintiff. He states that the proper person to have deposed the Affidavit would have to be the Director of Lands, as legal custodian of Crown Lands or person authorised by the Director of Lands for such purpose.
2. The Plaintiff is wrong in stating that the TAW (LD 60/462) commenced on 17 August 1987. The Defendant states that the TAW commenced on 10 July 1985. He also states that the description of the land area is not 860m<sup>2</sup> but 480m<sup>2</sup>. He categorically denies breaching the terms and conditions of the TAW.
3. The Defendant denies living illegally on the said State Land as he is said to have relocated to an agreed portion adjacent to Lot 3 S1145. As such, he states that he is no longer occupying the State Land described on LD 60/462 (480m<sup>2</sup>) now registered and deposited to Lot 3 S1145.
4. The Defendant reiterates that he has vacated the said land LD 60/462 with 480m<sup>2</sup> and that the authorities have failed to pay him any compensation.
5. Along with his Supplementary Affidavit, the Defendant has filed a copy of the survey plan showing the determined boundaries of Lot 3 S1145, which includes the TAW (LD 60/462) and has a total area of 1224m<sup>2</sup>.

#### **The Affidavit in Reply filed by Thomas Fesau**

[6] The Affidavit in Reply responds to the facts deposed in the Supplementary Affidavit filed by the Defendant. The deponent denies in its entirety the contents of the said

Supplementary Affidavit. He reiterates that the Defendant is in illegal occupation of the State Land described herein and situated at Tiri Naqumu, Lami. The Defendant has breached the conditions of the TAW and has been notified that the TAW has been terminated and that he has to vacate the said land. The Defendant however has ignored the numerous notifications made to him and he continues to occupy the State Land illegally.

### **The Tenancy-At-Will**

- [7] As indicated earlier, the Tenancy-At-Will entered into between the Director of Lands and Pemo Fisherman's Co-operative Society Ltd had 8 clauses, which are deemed to be the terms and conditions of the said TAW. Clause 6 of the TAW specifically states that the letter shall not operate as to create a tenancy and that the Defendant may be required to vacate the land on receipt of notice to that effect. As per Clause 8 it is stated that no compensation of whatsoever nature shall be payable at the termination of the tenancy.
- [8] As per Clause 2 of the TAW it has been stipulated that the land may be used solely for boat building and repairing purposes. The Plaintiff states that a recent inspection revealed that the Defendant was using part of the land for a shop, amusement centre, and panel beating garage purpose, and as such the Defendant has breached condition 2. As such, on 6 December 2004, the Director of Lands wrote to the Defendant stating that since he had breached Clause 2 of the TAW he was being given a notice to vacate the land within 30 days. Furthermore, the Defendant was also informed that the Ministry of Fisheries and Forests has been allocated the land for the re-development of the Lami Fisheries Jetty.
- [9] The Defendant has taken up the position that the wording used in Clause 2 of the TAW is 'may' and as such is discretionary or non mandatory. Therefore, the Defendant takes up the position that he, as the tenant, has the discretion to use the land for purposes other than solely for boat building and repairing. Even if this



argument is to be accepted there is no denying the fact that this is a Tenancy-at Will, and the tenant is occupying State land purely at the will and pleasure of the State. This is further fortified by Clause 6 of the TAW which specifically provides that the letter, establishing the TAW, shall not operate as to create a tenancy and that the Defendant may be required to vacate the land on receipt of notice to that effect.

[10] The Defendant points out that unlike Clause 4 of the TAW which stipulates that “In the event of failure on your part (Defendant’s part) to pay the rental as aforesaid punctually this authority may be cancelled without further notice and will be required immediately to vacate the land”, a breach of Clause 2 does not grant the Plaintiff with the right to issue him with a notice to vacate.

[11] This Court cannot agree with the above submission. Clause 4 of the TAW can be distinguished from all the other Clauses in the TAW. As per Clause 4, if the rents are not paid punctually, the Plaintiff has the right to cancel the TAW “without notice”. In such situations the tenant at will is required to immediately vacate the land. However, if there is a breach of any other provisions in the TAW, then a notice to vacate can be issued in terms of Clause 6 of the TAW, as has been done in the present case.

### **Legal Provisions and Analysis**

[12] This application is made pursuant to Order 113 Rule 1 and 3 of the High Court Rules, 1988. Order 113 Rule 1 reads as follows:

“where a person claims possession of the 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 proceeding may be brought by originating summons in accordance with the provisions of this Order”.

[13] In terms of Order 113 Rule 3:

The Plaintiff shall file in support of the originating summons an affidavit 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 any person occupying the land who is not named in the summons.

[14] The legislative history of Order 113 was summarized in **Dutton v Manchester Airport** [1999] All E.R. 675 at 679 by Chadwick LJ, where it was held as follows:

*“Order 113 was introduced in 1970 (by Rules of the Supreme Court (Amendment No.2) 1970, S1 1970/44), shortly after the decision of this court in **Manchester Corp v Connolly** [1970] 1 All E.R. 961, [1970] Ch 420. It had been held in that appeal that the court had no power to make the interlocutory order for possession. Order 113 provides a summary procedure by which a person entitled to the possession of land can obtain a final order for possession against those who have entered into or remained in occupation without any claim of right- that is to say, against trespassers. The order does not extend or restrict the jurisdiction of the court”.*

[15] It was further held in the **Dutton v Manchester Airport** case by Kennedy LJ:

*“In **Wiltshire CC v Frazer** (1983) 47 P. & C.R. 69 at 76 Stephenson LJ said 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 (at 77) went on 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 of any predecessor in title of his]”.*



[16] The Plaintiff submits that as the owner and custodian of all State Land in Fiji, it has an absolute title and exclusive possession to the subject land. On this basis the Plaintiff submits that it has the locus standi to apply for an Order for possession of land against the Defendant, who remains in occupation of the land without his licence or consent.

[17] As further held in ***Dutton v Manchester Airport***:

*"In every case the question must be, what is the reach of the right, and whether it is shown that the defendant's acts violate its enjoyment. If they do, and (as here) an order for possession is the only practical remedy, the remedy should be granted. Otherwise the law is powerless to correct a proved or admitted wrongdoing, and that would be unjust and disreputable. The underlying principle is in the Latin maxim (for which I make no apology) 'ubi ius, ibi sil remedium (where there is a right then it is a remedy)' "*

[18] The defendant submits that Order 113 Rule 1 is only applicable and relevant to trespassers or squatters who are adversely occupying the said land. The Defendant states that he is neither a trespasser nor a squatter and that he is presently occupying the land by virtue of the TAW. This Court cannot accept this argument as the Plaintiff has clearly established that the TAW has been terminated and that the Defendant remains in occupation of the land without his licence or consent.

#### **Receipt of Rental Payments after the Termination of the Tenancy**

[19] The Counsel for the Defendant highlighted the fact that the Plaintiff had accepted the land rental during and after the expiry date of the notice to vacate. In his view, by operation of law this creates new terms of tenancy and thus gives the right to the Defendant to remain on the land.

[20] In support of his assertion the Defendant produced statements of account and land rental payment receipts in proof of the payment of rents over a period of several years

and to establish that such rents have been paid and accepted even after the original notice to vacate was issued on 6 December 2004. It is also established that the land rental for the year 2016 has also been fully paid and accepted.

[21] The Plaintiff does not deny the fact that the said rents were paid and accepted. The Plaintiff states that after the notice of the termination of the TAW was served on the Defendant, the Department of Lands had inadvertently received rental payments for the subject land from the Defendant. The Defendant has submitted that the acceptance of the rent payments by the Department of Lands implies a waiver of the State's intention to forfeit the TAW and revives or creates a new tenancy. The Plaintiff denies this assertion and submits that all the evidence produced before this Court clearly indicates that the State through the Director of Lands had absolutely no intention at all to revive or create a new tenancy with the Defendant.

[22] Furthermore, Section 36 of the Crown Lands Act (Chapter 132) states that, "the acceptance by or on behalf of the Crown of any rent shall not be held to operate as a waiver by the Crown of any forfeiture accruing by reason of the breach of any covenant or condition, express or implied, in any lease or licence under this Act". While the arrangement between the Director of Lands and the Defendant in the present case is that of a Tenancy at Will, the purpose of Section 36 is clear in its intention that the acceptance of any rent by the State should not be held to operate as a waiver of the State's intention to forfeit.

[23] Section 100(2) of the Property Law Act (Chapter 130) provides thus "After the giving of a notice to quit acceptance of rent expressed to be without prejudice to the notice shall not operate as a waiver of the right to enforce the notice or create or revive a tenancy".

[24] In the case of *Clarke v Grant & Another* [1950] 1 K.B. 104; [1949] 1 All E. R. 768, the tenant had been given notice to quit and the tenant subsequently paid a month's rent which the landlord's agents mistakenly accepted. The Court of Appeal of England held



that when a landlord brings a tenancy to an end by a notice to quit, a payment of rent after that date will only operate in favour of the tenant if it can be shown that the parties intended that there should be a new tenancy. It was held that the parties had not intended that there should be a new tenancy. The landlord wanted possession of the premises at all times, that is why he had given his notice to quit. The landlord's agent's mistake could not be used to establish that the landlord was agreeing to a new tenancy.

[25] A similar position was taken in the case of *Legal & General Assurance Society Limited v General Metal Agencies Limited* (1969) 20 P. & C.R. (Property, Planning & Compensation Reports) 953, where the landlord had served a notice to the tenant terminating the tenancy. An automatic notification from the landlord's computer system was mistakenly sent to the tenant for the payment of the rent for the December quarter and the tenant paid the rental sum. The Court held that a new tenancy had not been created. It was held that the demand and receipt of rent was not conclusive evidence of the grant of a new tenancy.

[26] The Plaintiff submits that the Department of Lands had issued numerous notices to the Defendant to vacate the land as the Defendant had breached the conditions of the TAW. As such, the acceptance of the rental payment by the Department of Lands does not create any intention between the Department of Lands and the Defendant for the continuation of the tenancy or the creation of a new tenancy.

## **Conclusion**

[27] For all the aforesaid reasons this Court is of the view that the tenancy granted to the Defendant in terms of the TAW has been duly terminated and as such that the Defendant remains in occupation of the land without the Plaintiff's licence or consent. Accordingly, the application made by the Plaintiff for the immediate vacant possession of the land should be granted.

[28] Accordingly, I make the following Orders:

**ORDERS**

1. The application made by the Plaintiff in terms of the Originating Summons that the Defendant does forthwith give vacant possession of the State Land at Tiri Naqumu, Lami to the Plaintiff is granted.
2. Accordingly the Defendant shall give vacant possession of the said State Land at Tiri Naqumu, Lami to the Plaintiff, within 30 days from today.
3. The Defendant shall pay the Plaintiff costs summarily assessed at \$1000, within 30 days from today.

Dated this 25<sup>th</sup> day of April 2016, at Suva.

  
Riyaz Hamza

JUDGE

HIGH COURT OF FIJI

