

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 322 of 2014

BETWEEN: ORCHID FLAT INVESTMENTS LIMITED a limited liability company
having its registered office in Suva.

PLAINTIFF

AND: NETANI BOLA, SUMAN PRASAD, KAMAL PRASAD, KUAR PRASAD,
BINESH PRASAD, HARI PRASAD, JEKE MACANAWAI, JOE
DURUSOLO, JALE CAMA, JONACANI BIAU, MANJU KUMAR,
QICA, AMINO Q, REV MOSESE KOLAIA VULOLO, NILESH
PRATAP, RAJESH PRASAD and their dependants, servants, agents
together with all others whose names are unknown to the Plaintiff but
occupying all that land comprised and described in Certificate of Titles
No. 25233 at Veisari.

DEFENDANTS

COUNSEL: Mr Savou for the Plaintiff
Mr. Shelvin Singh for 2nd, 3rd, 5th, 6th, 10th, 11th, 15th and 16th Defendants
Mr. Tuitoga for 12th and 13th Defendants.

BEFORE: Master Vishwa Datt Sharma

Date of Hearing: 08th December, 2015

Date of Ruling: 27th October, 2016

R U L I N G

*[Originating Summons seeking possession of the Land
pursuant to Order 113 of the High Court Rules, 1988]*

APPLICATION

1. The Originating Summons filed by the Plaintiff, ORCHID FLAT INVESTMENT LIMITED against the Defendants seeks the following orders:
 - (i) That the Defendants vacate all that portion of land comprised and described in Certificate of Title 25233 which they occupy and to give up vacant possession thereof to the Plaintiff forthwith.
 - (ii) That the Defendants demolish and remove from the land comprised and described in Certificate of Title 25233 all structures including dwelling houses they have erected thereon forthwith.

GROUND

2. The grounds for the Plaintiff's application are:
 - (i) That the Defendants are in unlawful occupation of the land without any license or consent or colour of right to occupy it or remain in occupation of it; and
 - (ii) That the Plaintiff is a bona fide purchaser for value of the land whose Title is acknowledged by all the Defendants in their affidavits and thus the Plaintiff holds title to the land free of all encumbrances which are not notified in the register under the Land Transfer Act?
 - (iii) That the Plaintiff's Title to the land is indefeasible under the Land Transfer Act and therefore the Plaintiff's right to exclusive and uninterrupted possession of the land is paramount and protected under the Land Transfer Act.

AFFIDAVITS FILED

3.
 - (i) Plaintiff's Affidavit deposed by Gopal Pillay.
 - (ii) Affidavit of Ishwarlal Govind Parmar.
 - (iii) Affidavit of Sophie Khan.
 - (iv) Affidavit of Meli Baleinatabua.
4. The following ten (10) Defendants opposed the application and filed their respective Affidavits in Opposition-

D2. Suman Prasad

- D3. Kamal Prasad
- D4. Kuar Prasad
- D5. Binesh Prasad
- D6. Hari Prasad
- D11. Manju Kumar
- D12. Rusiate Qica
- D13. Aminio Taburewa
- D15. Nilesh Pratap
- D16. Rajesh Prasad

- 5. The first named Defendant (D1) Netani Bola has vacated the land.
- 6. The following Defendants have not opposed the Application:

- D7. Jeke Macanawai
- D8. Joe Durusolo
- D9. Jale Cama
- D14. Rev. Mosese Kolaia Vuloko

PRACTICE AND PROCEDURE

- 7. Order 113 of the High Court Rules, 1988 provides a summary procedure for possession of Land, whereby it states 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 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.'

8. Pursuant to *Order 113*, a person who has a legal right to claim the possession of a *land* could institute an action, claiming the possession of land against a person who has entered into or remains in occupation without his licence or consent or that of any predecessor in title.
9. The main purpose of *Order 113* is to provide a speedy and effect procedure for the owners of the lands to evict persons who have entered into and taken the occupation of the land without the owner's licence or consent.
10. The proceedings under *Order 113* encompass two (2) main limbs. The First limb places the burden on the Plaintiff. The Plaintiff is first required to satisfy that he has a legal right to claim the possession of the Land. Once the Plaintiff satisfies the first limb, the onus will shift towards the Defendant, where the Defendant has the burden to satisfy the Court that he has a licence or consent of the owner to occupy the land.

PLAINTIFF'S CASE

11. The Plaintiff is the registered proprietor of all that parcel of land comprised and described in Certificate of Title 25233 (the land) situate at Veisari about 6 kilometres towards out of Lami Town on the Queens Road towards Navua.
12. A copy of Certificate of Title 25233 is exhibited marked "Exhibit A".
13. The First named defendant, Netani Bola entered the land on the week starting 3rd November, 2014 and proceeded to erect a temporary dwelling.
14. Despite complaints to the Lami Police who have served him with warnings of criminal trespass he was persisted with constructed his dwelling.
15. The remainder of the named Defendants entered the land at various times in the last few years, unknown to Plaintiff, and are in occupation of portions of the land without any license or consent and have constructed dwellings and other structures.
16. The Plaintiff sought the help of Lami Police to direct the Defendants to leave the land and gave them sufficient time to take down the structures they have erected on the land, however the Defendants have not left the land.
17. The Plaintiff does not know the names of any person occupying the land who is not named in the Summons.
18. The Plaintiff states that as registered proprietor of Certificate of Title 25233 is entitled to free and uninterrupted possession of the land.

19. The Plaintiff seeks the Orders sought in the Summons filed herewith.
20. A written submission was filed by the Plaintiff in support of its case.

DEFENDANT'S CASE

21. Defendants 2,3,5,6,10,11,15 and 16 opposes the application and relies on their Affidavit in Opposition.
22. Their respective Defences fall into three (3) categories and state they had Consent to occupy the said land; they did not have anyone's Consent but were subsequently granted the Consent to occupy the said land; and they rely on the doctrine of adverse possession.
23. Defendant 4 states in his Defence that he has a licence and consent to occupy the said land.
24. Defendants 12 and 13 state that they had obtained Consent from the Mataqali Nakaubeqa in 1986 and 1987 who were the land owners then.
25. Defendant 1 has voluntarily vacated the land as confirmed by the Plaintiff's counsel.
26. Defendants 7, 8, 9 and 14 did not file any Affidavit in Opposition and therefore did not oppose the application.
27. A written submission was also furnished to the Court by Defendants 2, 3, 5, 6, 10, 11, 15 and 16.

DETERMINATION and ANALYSIS

28. The question or issue for this court to determine is only the following:
 - (a) Whether the Plaintiff is entitled to recover the possession of the land pursuant to Order 113 of the High Court Rules, 1988?
29. The Plaintiff has filed an Affidavit deposed by Gopal Pillay in support of its application and sought the orders as enumerated in the Originating Summons filed herein.
30. Order 113 Rule 1 of the High Court Rules, 1988 is reproduced herein which reads as follows:

"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."

30. The *Supreme Court Practice, 1993 Vol 1, O.113/1-8/1* at page 1602 outlines the scope of the above *Order 113* as follows-

"This Order does not provide a new remedy, but rather a new procedure for the recovery of possession of land which is in wrongful occupation by trespassers."

*"The application of this Order is narrowly confined to the particular circumstances described in r.1. i.e. to the claim for possession of land which is occupied solely by a person or persons who entered into or remain in occupation without the licence or consent of the person in possession or of any predecessor of his. The exceptional machinery of this Order is plainly intended to remedy an exceptional mischief of a totally different dimension from that which can be remedied by a claim for the recovery of land by the ordinary procedure by writ followed by judgment in default or under O.14. The Order applies where the occupier has entered into occupation without licence or consent; and this Order also applies to a person who has entered into possession of land with a licence but has remained in occupation without a licence, except perhaps where there has been the grant of a licence for a substantial period and the licensee holds over after the determination of the licence (*Bristol Corp. v. Persons Unknown*) [1974] 1 W.L.R. 365; [1974] 1 All E.R. 593." (Reference is also made in terms of the scope of the application of Order 113 with the case of *Baiju -v- Kumar (1999) FJHC 20; HBC 298j.98*).*

31. The Plaintiff ORCHID FLAT INVESTMENT LIMITED state the following by way of the affidavit evidence and submissions to the Court in order to establish the first limb of *Order 113* in terms of the legal right to claim the possession of the said land in Question from the Defendants-

- (a) It states that the Plaintiff is the **registered proprietor** of all that parcel of land comprised and described in Certificate of Title 25233 (the land) situate at Veisari about 6 kilometres towards out of Lami Town on the Queens Road towards Navua.
- (b) That the Plaintiff is a bona fide purchaser for value of the land whose Title is acknowledged by all the Defendants in their affidavits and the Plaintiff holds the Title to the Land free of all encumbrances which are not notified in the Register under section 39 (1) of the Land Transfer Act, Cap 131.
- (c) The affidavits filed by the Defendants do not show a right to occupation of the Plaintiff's land as none of the Defendants show that they have obtained the Consent of the Plaintiff (who is the current owner of the land) to occupy the land.

32. The Plaintiff further submitted to the Court that the Defendants have no legal right to occupy the Plaintiff's land since the Plaintiff did not give any of the Defendants any Consent to occupy the land nor does any previous owners consent give the Defendant right at law to remain in possession of the land without the Plaintiff's consent once the Plaintiff has acquired the ownership of the land.

Reference was made to the following cases in support of the above submissions-

- (i) *Chandra and Kumari -v- Sami Civil Action HBC 138 of 2013 wherein Hon. Justice Kumar said-*

"Even though the Defendant resided on the property with consent of the predecessor on title he has no right to occupy the property if it is not consented to by the present owners of the subject property."

- (ii) *Adarsh Vikash Sharma & Another v. Rohit Kumar & Ors Civil Action No. HBC 34 2013 wherein Hon. Justice Amaratunga said-*

"...The words 'remained in occupation' covers any previous owners and non-trespassers whose initial entry to the premises could not be categorized as trespasser. The phrase 'remained in occupation' denotes that their initial entry may or may not be legal but their remaining in occupation is the illegality and the basis of the action for eviction in terms of the Order 113 is the illegal 'remaining' of the property and there is no mention as to the initial entry to property may or may not be legal and the consideration of that is irrelevant to the Order 113, and in order to satisfy this requirement what the Plaintiff who claims possession has to establish is that the Defendants are remaining on the property without their consent or licence."

33. I have perused the Certificate of Title No. 25233 as annexure marked "A" and within the Affidavit in Support of Gopal Pillay. The Title confirms that the same was transferred to the Plaintiff Orchid Flat Investment Limited via transfer folio No. 592349 on 04th August 2006 and that the Plaintiff is the registered proprietor of all that parcel of land comprised and described in Certificate of Title No. 25233. Therefore, the Plaintiff has successfully established the first limb test in terms of Order 113 of the High Court Rules, 1988.

31. Now, the onus shifts towards the Defendants, wherein the Defendants have the burden to satisfy the Court that they have a licence or consent of the owner (in this case the Plaintiff- Orchid Flat Investment Limited) to occupy the said land.

1st Defendant

34. The **First Defendant**, Netani Bola according to the Plaintiff's Counsel has already vacated the said land in question. Still, this Court will proceed to make an order for vacant possession against him in terms of the Plaintiff's application.

2nd, 3rd 5th 6th 10th 11th 15th and 16th Defendants

35. These Defendants were represented by the Legal Counsel. According to the 2nd 3rd 5th 6th and 16th Defendants, they submitted to the Court that they did not have anyone's Consent but were subsequently granted the Consent to occupy the said land by Parmar family.

The Plaintiff has filed an affidavit deposed by Ishwarlal Govind Parmar who confirms and '*Categorically denies promising them lots in the land or gave them Consent to occupy the land.*' Further, each of these Defendants were aware and admit in their respective Affidavits in Opposition at paragraphs 15 (a) and 14 (a) that the Plaintiff as the current owner did not give any **Consent** to them.

36. According to the 10th 11th and 15th Defendants, they confirm not taking anyone's permission; no one has questioned their right or title to occupation in the last 20 years or so. The 15th Defendant further says that he sought the mataqali's permission. Each of them rely on the **doctrine of Adverse Possession**.

The Plaintiff states that each did not have the **Consent** of the present owner and were aware of the new ownership of this land. No evidence of any **Consent** has been produced and proved to this Court.

4th Defendant

37. According to the 4th Defendant, Kuar Prasad, he purchased the 6 Bedroom house from one Raj Kumari and John Shiu Chand on the understanding that the portion of the land that the house sits on will later be transferred to me by Veisari Land Development Limited who fully authorised the same and made substantial contributions and improvements therein.

The Plaintiff submitted that he did not obtain any Consent from the current owner of the land and there is no documentary evidence of what he alleges in terms of his occupation of the land.

Further, there is an Affidavit deposed by Ishwarlal Govind Parmar who confirms that 'the allegations are not true and deny promising any lots to him.'

7th 8th and 9th Defendants

38. Defendants 7th 8th and 9th did not file any Affidavit in Opposition and were not present in the Court during the hearing. Therefore, the non-filing and serving of any Affidavit in Opposition gives a clear indication to this Court that they did not oppose the application in terms of the orders sought in the Originating Summons. Therefore, this Court will proceed to make the orders sought accordingly against 7th 8th and 9th Defendants.

12th and 13th Defendants

39. These two (2) Defendants were represented by the Legal Counsel. According to the Affidavits in Opposition filed herein, they inform the Court that they took occupation of the land with the owner's Consent and Licence. In support they state as follows;- that Mataqali Nakaubega was the Traditional Land Owners who gave them Consent to occupy the land subject to certain agreements. They moved on to the property in 1986 and 1987. The Title in question was transferred to the Plaintiff in 2006, as can be ascertained from the Certificate of Title. There is no evidence that the Title was a freehold the entire time before it was transferred in 2006. It is unclear as to who the land actually belonged to before the transfer to the Plaintiff in 2006.

The Plaintiff stated that there is no evidence that Mataqali Nakaubega were the previous owners of this land in question and the land is a freehold land to which the Title is annexed in the Affidavit of Gopal Pillay. He stated that there is no evidence that the land is foreshore land owned by the State and pointed out to the Court the provisions of **section 23 of the Crown Lands Act**. Further, he appraised Court to **Section 24 of the State Land Act** exempts land next to rivers and streams from foreshore restrictions and a Registered Surveyor was engaged by the Plaintiff that confirms that 12th Defendants house intrudes onto the Plaintiff's land and a Site Plan is annexed as Exhibit 'C' to the Affidavit of Meli Baleinatabua dated 11th May, 2015. Finally, the Plaintiff reiterates that there is no evidence that the Plaintiff **consented** to 12th Defendant's occupation of the Land. The Plaintiff once again relied on the case of Chandra and Kumari-v- Sami Civil Action No. 138 of 2013 which deals with the absence of the Plaintiff's Consent the Defendant doesn't have any right to remain in occupation of the Plaintiff's Land.

14th Defendant

40. This Defendant did not file any Affidavit in Opposition and therefore did not oppose the Plaintiff's application. This Court will in the circumstances proceed to grant the orders sought against him in the Plaintiff's Originating Summons.
41. Taking consideration the Plaintiff's Application in terms of the Originating Summons and the Affidavit in Support coupled with the Defendant's Affidavit in Opposition together with the Written and Oral submission's, I find the following:
 42. That the Plaintiff, **ORCHID FLAT INVESTMENTS LIMITED** is the bona fide purchaser for value.
 43. Each of the Defendants herein therefore became trespassers on the subject property of the Plaintiff by remaining on the property without the **consent** of the Current Plaintiff **ORCHID FLAT INVESTMENTS LIMITED** after they became aware of the Plaintiff's ownership of the subject property.
 44. No matter how much any of the Defendants say that they were unaware who the new owner of the subject property is and whether they were supposed to obtain his consent to continue with the occupation of the land or the subject property, after all they were served with the Notice to Quit by the current owner and should have acted in order to obtain the consent from the current or new owner, the Plaintiff accordingly.
 45. Further, may be that the Defendants resided and were in occupation of the property with the consent of the predecessors on the Title, they have no right or entitlement to continue with the occupation of the property when no consent of the present or current owner of the subject property was obtained or given.
 46. If any of the Defendants had obtained Consent of the predecessors holding Title and if they desired to have any legal Title to the land, then the most appropriate action they should have taken then was to apply to the Court of Law for a Vesting Order accordingly.
 47. In the present matter before me, it is evidently clear that the Defendants have been and are continuing with the occupation of the subject property without the any consent

whatsoever of the Plaintiff, ORCHID FLAT INVESTMENTS LIMITED, the current owners of the subject property.

48. Since Defendant 1 vacated the land voluntarily there will be no order as to costs made against him. Defendants 7, 8, 9 and 14 did not oppose the application, therefore likewise there will no order as to costs made against them. Defendants 2, 3, 5, 6, 10, 11, 12, 13, 15 and 16 vigorously opposed the application therefore this Court will order costs to be summarily assessed against them accordingly.

49. Therefore, I proceed to make the following orders:

ORDERS

- (i) Each of the Defendants herein is to vacate all that portion of the land comprised and described in Certificate of Title 25233 which they occupy and give up vacant possession to the Plaintiff within one calendar month's time.
- (ii) All Defendants herein are directed to demolish and remove from the land comprised and described in Title 25233 all structures including the dwelling houses that they have erected their own within one calendar month's time.
- (iii) There will be no order as to costs made against Defendants 1,7,8,9 and 14 for the reasons stated hereinabove.
- (iv) Costs is summarily assessed against the remaining Defendants 2, 3, 5, 6, 10, 11, 12, 13, 15 and 16.

DATED at Suva on 27th October, 2016

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VISHWA DATT SHARMA
Master of the High Court
Suva

whatsoever of the Plaintiff, ORCHID FLAT INVESTMENTS LIMITED, the current owners of the subject property.


48. Since **Defendant 1** vacated the land voluntarily there will be no order as to costs made against him. Defendants 7, 8, 9 and 14 did not oppose the application, therefore likewise there will no order as to costs made against them. Defendants 2, 3, 5, 6, 10, 11, 12, 13, 15 and 16 vigorously opposed the application therefore this Court will order costs to be summarily assessed against them accordingly.
49. Therefore, I proceed to make the following orders:

ORDERS

- (i) Each of the Defendants herein to vacate and give vacant possession to the Plaintiff all that portion of the land comprised and described in the Certificate of Title 25233 within one calendar month's time.
- (ii) All Defendants herein are directed to demolish and remove from the land comprised and described in the Certificate of Title 25233 all structures including the dwelling houses that they have erected therein within one calendar month's time.
- (iii) Execution is suspended until 27th November, 2016 at 4.00 pm.
- (iv) There will be no order as to costs made against Defendants 1, 7, 8, 9 and 14 for the reasons stated hereinabove.
- (v) Costs is summarily assessed against each of the remaining Defendants: 2, 3, 5, 6, 10, 11, 12, 13, 15 and 16 at \$300 each. Total sum of \$3000 and to be paid within 14 days.

DATED at Suva on 27th October, 2016




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VISHWA DATT SHARMA
Master of the High Court
Suva