

**IN THE HIGH COURT OF FIJI**  
**(WESTERN DIVISION) AT LAUTOKA**  
**CIVIL JURISDICTION**

**CIVIL ACTION NO. HBC 46 OF 2017**

**BETWEEN** : **RAJENDRA PRASAD** of Vuda Point, Lautoka, Farmer, as the sole Executor and Trustee of the **ESTATE OF NOKAIYA**, late of Vuda Point, Lautoka, Farmer, Deceased, Testate.  
**PLAINTIFF/RESPONDENT**

**AND** : **DEO SAGAYAM** of Vuda Point, Lautoka, Unemployed.  
**DEFENDANT/APPLICANT**

**Appearances** : Mr K. Maisamoa for the defendant/applicant  
Ms S. Ravai for the plaintiff/respondent  
**Date of Hearing** : 3 May 2018  
**Date of Ruling** : 3 May 2018

**R U L I N G**

[on leave to appeal out of time]

**Introduction**

[01] This is an application for leave to appeal out of time the decision of the learned Master (*the Master*) delivered on 13 October 2017 (*the order*), in relation to a summary proceeding for possession of land brought under Order 113 of the High Court Rules 1988 (*HCR*). By his order, the Master ordered that the defendant/applicant (*the defendant*) has to immediately deliver up possession of the property, the subject matter of the action to the plaintiff/respondent (*the plaintiff*).

[02] By his application filed on 21 December 2017, the defendant seeks leave of the court to appeal the order out of time. The application is supported by an affidavit sworn by Deo Sagayam, the defendant.

[03] The plaintiff filed an affidavit opposing the application. The defendant had filed an affidavit in reply to the affidavit filed by the plaintiff in opposition.

[04] At the hearing, both the parties orally argued the matter.

### **Background**

[05] The brief background facts are that: Rajendra Prasad, the plaintiff is surviving trustee and sole beneficiary of the estate of Nokaiya (*'the deceased'*). The deceased had a Crown Lease Ref. No. 4/7/2015 over the property in dispute (*'the property'*). Deo Sagayam, the defendant is in the occupation of the property. The plaintiff brought proceedings under Order 113 of the High Court Rules 1988 (*'HCR'*) to eject the defendant from the property on the ground that he (the plaintiff) did not permit or consent to the defendant's occupation. The defendant stated that he has been living on the property with his wife since 2008 when his father in law got sick. He also stated that his father in law, Vengtesu was also a beneficiary of the deceased's estate and his wife is paying rent to the Lands Department. The Master having heard the matter, by his order dated 13 October 2017, ordered the defendant to immediately deliver up possession of the property to the plaintiff. The Master found that:

*"The submission of the defendant that the plaintiff has no legal right is, therefore, misconceived and has no merit. On the other hand the plaintiff has proved his right to possess the said land and also proved the absence of any consent either by him or his predecessor in title, allowing the defendant to occupy the said property. It follows that, the plaintiff is entitled for the immediate possession of the land in issue. Accordingly, I make the following final orders:"*

[06] The defendant now seeks the leave of the court to appeal the Master's order out of time.

### **The Governing Principles**

[07] The governing principles for the granting of leave to appeal out of time are as follows:

*“The governing principles for the granting of leave to appeal out of time are as follows:*

- (i) Length of delay;*
  - (ii) Reason for the delay;*
  - (iii) Chance of appeal succeeding if time for appeal is extended; and*
  - (iv) Degree of Prejudice to the Respondent if application is granted.*
- [see Nair v Prakash [2013] FJCA 147]*

## **Discussion**

### *Delay and the reason for the delay*

- [08] An appeal lies from a final order or judgment of the Master to a single Judge of the High Court (O 59, R 8, HCR). Such an appeal has to be filed and served within 21 days from the date of the delivery of an order or judgment (O 59, R 9, HCR).
- [09] The Master delivered his order on 13 October 2017. This means an appeal against that order ought to have been filed and served on or before 3 November 2017. The defendant has filed his application for seeking leave to appeal out of time on 21 December 2017. The defendant is 48 days late in filing his appeal. He has acted in person without the assistance of a solicitor.
- [10] As for the reason for the delay, the defendant states that he was waiting for the outcome of his legal aid application but he did not get a reply from Legal Aid Commission. He was expecting them to assist him in drafting his appeal out of time papers. The defendant was unrepresented throughout the proceedings until the filing of the papers for leave to appeal out of time. There is nothing on the record to suggest that the defendant was informed of the appealable period as he was unrepresented. After the eviction order, the defendant approached the Legal Aid Commission in order to appeal the order and get assistance from them.
- [11] The previous appeal filed by the defendant on 3 November 2017 was dismissed on the ground that it was filed out of time. The defendant ought to have filed within 21 days from the date of the judgment as required by O 59, R 9 (a). The

judgment was delivered on 13 October 2017. The 21-day appealable period expired on 2 November 2017. At that time, the defendant was one day out of time that the court dismissed the appeal.

- [12] He was expecting a reply from Legal Aid Commission but he did not. I am satisfied with the explanation given by the defendant for the delay.

*Chance of appeal succeeding if the time for appeal is extended*

- [13] The Master has granted the eviction order on the basis that the defendant is a trespasser and he is occupying the property without the authority or consent of the plaintiff. The Master has heavily relied upon the case authority of *Baitu v Kumar* [1999] FJHC 20; Hbc0298j.98s (31 March 1999), where Justice Pathik, explaining the scope of O 113 of the High Court Rules, stated:

*"This action is brought under Or 113 of The High Court Rules which inter alia in Rule 1 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."*

*The question for Court's determination is whether the plaintiff is entitled to possession under this Order. To decide this the Court has to consider the 'scope' of the Order. This aspect is covered in detail in The Supreme Court Practice, 1993 Vol 1, O.113/1-8/1 at page 1602 and I state hereunder the relevant portions in this regard:*

*"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." (emphasis mine)*

*As to the application of this Order it is further stated thus:*

*"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."*

*This Order is narrowly confined to the particular remedy stated in r.1. It is also to be noted, as the White Book says at p.1603:*

*"this Order would normally apply only in virtually uncontested cases or in clear cases where there is no issue or question to try, i.e. where there is no reasonable doubt as to the claim of the plaintiff to recover possession of the land or as to wrongful occupation on the land without licence or consent and without any right, title or interest thereto."*

- [14] It is abundantly clear that O 113 is effectively applied to evict squatters or trespassers.
- [15] I have carefully considered the application and the intended grounds of appeal. The proposed grounds of appeal raise two important issues namely:
- (i) *Whether the plaintiff/respondent was entitled to make an application for eviction under O 113 of the HCR, especially when the Crown Leave relied upon by the plaintiff had expired; and*
  - (ii) *Whether a person staying on the property for a long time as far back in 2008 and paying rent to the Lands Department falls within the definition of 'trespasser'.*
- [16] In my opinion, the appeal raises important legal issues, which I consider arguable in the appeal and has a chance of succeeding if the time for appeal is extended.
- [17] I cannot see any prejudice to the plaintiff if leave is granted to appeal out of time.

## Conclusion

[18] It is for these reasons; I provisionally find that the appeal has a chance of succeeding if leave to appeal out of time is granted. I would, therefore, grant leave to the defendant to appeal the Master's decision of 13 October 2017 outside of the appealable period. The defendant/the applicant must file and serve grounds of appeal within 7 days of this Ruling and a summons for direction within 21 days. The costs shall be in the cause.

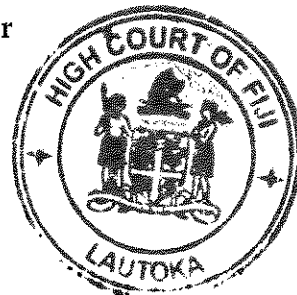
## The Result

1. Leave to appeal out of time granted.
2. The defendant will file and serve grounds of appeal within 7 days of this ruling.
3. The defendant will file and serve a summons returnable before a Judge for directions and a date for the hearing of the appeal.
4. Costs shall be in the cause.

*M. H. Mohamed Ajmeer*  
3/5/18

M. H. Mohamed Ajmeer

JUDGE



At Lautoka

3 May 2018

Solicitors:

For the defendant/applicant: Messrs Maisamoa & Associates, Barristers & Solicitors

For the plaintiff/respondent: Messrs Fazilat Shah Legal, Barristers & Solicitors