

IN THE HIGH COURT OF FIJI
AT SUVA
PROBATE JURISDICTION

Probate Action No.: HPP 36 of 2017

BETWEEN : **SHIREEN NITA NARSAIYA and JOSEPH EMMANUEL NARSAIYA** of 1/34 Ferguson Avenue, Wiley Park, NSW Australia and Lot 156 Matanikorovatu Road, Makoi, Nasinu as the Executors and Trustees of the **ESTATE OF RUTH LILA WATI NARSAIYA** aka **RUTH NARSAIYA**

PLAINTIFF

AND : **JOASH HERALD PRAKASH NARSAIYA** Lot 156 Matanikorovatu Road, Makoi, Nasinu

DEFENDANT

Counsel : **Mr. Singh K. for Defendant**

Ms. Naidu S. for Plaintiff

Dates of Hearing : **1st December, 2017**

Date of Judgment : **12th January, 2018**

JUDGMENT

INTRODUCTION

1. The Plaintiffs filed Originating Summons in terms of Order 113 of the High Court Rules of 1988 for vacant possession of premises comprised in Housing Authority Sub Lease 244387 being Lot 21 on DP 5218 (the Premises). The Originating Summons contained determination under Section 11(3) of the Succession Probate and Administration Act and also Section 23 of Trustee Act. The Plaintiffs sought orders of the court to sell the property to Rakesh Pal through a private sale for a sum agreed between them. The Defendant who is in possession of part of the Premises object to the sale price and also to a private sale. The Plaintiffs also sought an order of the court to distribute sale proceeds from said private sale. The Premises belonged to the deceased parent of Plaintiffs and Defendant. According to the Last Will, Plaintiffs were appointed as Executors, and Defendant is a beneficiary, too.

ANALYSIS

2. The Defendant had filed an affidavit in opposition and object to the sale of the property. According to him it was not advertised for sale through a transparent process. He also dispute the valuation dated 20th November, 2016.
3. The method adopted by the Plaintiffs for institution of this action is by way of Originating Summons in terms of Order 113 of the High Court Rules of 1988 and also Section 11(3) of the Succession Probate and Administration Act and also Section 23 of Trustee Act.
4. At the outset it is important to ascertain whether the Plaintiffs had adopted correct procedure. When this matter was first called before me, without any appearance for the Defendant, I have inquired about the procedure adopted, but since then Defendant had retained a lawyer and had also filed an affidavit in opposition.
5. Order 113 of the High Court Rules of 1988 was meant for special purpose and special procedural methods are in place to mitigate special circumstances, and consequences of an eviction order, in terms of said provision.
6. Looking at the Originating Summons the Executors had filed this action in court seeking several Orders. They are as follows:
 - “1. An Order that the property comprised in Housing Authority Sub Lease 244387 being Lot 21 on DP 5218 be sold to Rakesh Pal at a price of FJD 180,000.00 (One Hundred and Eighty Thousand Dollars) pursuant to the Sale and Purchase Agreement dated 15 February 2017 between the Plaintiff and Rakesh Pal;
 2. An Order that Joseph Emmanuel Narsaiya and the Defendant deliver vacant possession of the property comprised in Housing Authority Sub Lease 244387 being Lot 12 on DP 5218 to the Plaintiff within 14 days of this Order.
 3. An Order that the proceeds of the sale of the property comprised in Housing Authority Sub Lease 244387 being Lot 12 on DP 5218 be distributed in accordance with the last will of Ruth Lila Wati Narsaiya aka Ruth Narsaiya as contained in Probate No. 57108.
 4. An Order that the Defendant pay to the Plaintiff the costs of this application.
 5. Any further orders that this Court deems just and fair.”

7. The Plaintiffs are not only seeking a sale of property belonged to the deceased parent where both Defendant and second named Plaintiff are living, but also seeking eviction of the Defendant, though summary procedure laid down in Order 113 of the High Court Rules of 1988.
8. The Plaintiff's Originating Summons are irregular and should be struck off in limine for two reasons.
 - a. For non-compliance of mandatory procedure in terms of Order 113 of the High Court Rules of 1988.
 - b. Only claim under Order 113 of the High Court Rules of 1988 is recovery of possession and other claims cannot be combined with such recovery of possession.
- a. **Non-compliance of Mandatory provisions contained in Order 113 of High Court Rules.**
9. Order 113 is specially designed for recovery of possession of a premises. The order obtained through this method not only can be applied to the Defendant or his agents but also for everybody whether that person had obtained possession independently of defendant. See *University of Essex v Dajemal and others* [1980] W.L.R 1301; [1980] 2 All ER 743.
10. So, in order to safeguard rights of the people who are subjected to an order made in terms of said provision in the High Court Rules, special procedural safeguards are in place and these are mandatory. One such provision is regarding the service of the Originating Summons, not only to the defendant, but also for any other party interested.
11. Order 113 rule 4 deals with the service of the Originating Summons and it states as follows
 - '4(1) *Where any person in occupation of the land is named in the Originating summons, the summons together with a copy of the affidavit in support shall be served on him-*
 - a. *Personally or in accordance with Order 10, rule 5 or*
 - b. *By leaving a copy of the summons and of the affidavit or sending them to him , at the premises; or*

c. *In such other manner as the Court may direct.*

(2) *The summons shall, in addition to being served on the named defendants, if any, in accordance with paragraph (1) be served, unless the Court otherwise directs by-*

(a) *affixing a copy of the summons and a copy of the affidavit to the main door or other conspicuous part of the premises,*
and

(b) *if practicable, inserting through the letter-box at the premises a copy of the summons and a copy of the affidavit enclosed in a sealed envelope addressed to "the occupiers".* (*emphasis added*)

12. The affidavit of service does not indicate compliance of Order 113 rule 4(2) (a) and rule 4(2)(b) of the High Court Rules of 1988. There is no order of the court to deviate from such procedure, hence it is a mandatory provision.
13. Order 113 rule 4(2)(a) is specifically designed to give notice not only to the named Defendant but also for any other person as the order obtained under said High Court Rule can be applied to any person and not only to the Defendant.
14. Any order for possession obtained in terms Order 113 of the High Court Rules of 1988 can be an order in character of an action *in rem*. An order can be obtained in relation to the said premises as opposed to a named defendant. So, Order 113 rule 4(2) is a mandatory provision and lack of evidence of such compliance of that is fatal irregularity for this action.
15. Apart from the said non-compliance it is mandatory to comply with Order 113 rule 2 of the High Court Rules of 1988. This is a mandatory provision since the procedure adopted in Order 113 was for a special purpose for recovery of possession of a premises which may affect basic human right of such person, that has guaranteed in the Bill of Right of the Constitution of Fiji. No acknowledgement of service is required and this is a deviation for normal procedure. It is imperative to comply with such provisions.

16. It is clear that the Order 113 of the High Court Rules of 1988 was for special purpose and it can be used for that special purpose only. If not it would lead to an abuse of process and denial of due process for the affected parties including defendant.

b. Combination of other claims in an application made under Oder 113

17. In this application the Plaintiffs had attempted to combine claims made in terms of provisions contained in Succession Probate and Administration Act and also Trustees Act for sale of the Premises and also for distribution of the proceeds. This is not possible when one resort to obtain vacant possession in terms of Order 113 of the High Court Rules of 1988, as it is a specific provision only designed for recovery of possession. If a special provision is made for a specific claim that invariably excluded from general provision and this is evident from express provisions (ie. O.113r2, O.113r4 (2), O.113r4 (4), O.113r5, O.113r6, O.113r7 (1) and O.113r8).

18. In the Supreme Court Practice 1988 (White Book) 113/1-8/1 describing the scope of analogous provision in UK at p1470 stated;

'In proceedings under this Order, the only claim that can be made in the Originating Summons is for the recovery of possession of land; notwithstanding O15.r.1, no other clause of action can be joined with such a claim in proceeding under this Order, and no other relief or remedy can be claimed in such proceedings, whether for payment of money..... The Order is narrowly confined to the particular remedy described in r. 1.

For the particular circumstances and remedy described in r.1, this Order provides a somewhat exceptional procedure, which is an amalgamation of other proceedings.....' (emphasis added)

19. So, the Originating Summons of the Plaintiffs which contains other claims needs to be struck off, on that ground too. An order made in terms of Order 113 can be varied or set aside by the same judge and this also makes it anomaly to combine other claims to this provision, as this is not possible in an *inter partes* Originating Summons not made under Order 113 of High Court Rules of 1988.

20. Supreme Court Practice 1988 (White Book) 113/1-8/1 describing the scope of analogous provision in UK at p1470

'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 licence, except perhaps where there has been the grant of a licence for a substantial period and the licence holds over after the determination of the licence. (...)' (emphasis added)

21. The Premises belonged to the estate of deceased parent of the parties and all of them are beneficiaries of the estate. While one person is living abroad, the Defendant and 2nd Plaintiff are living on the said premises.
22. So in my judgment the Plaintiffs who are beneficiaries and executors cannot resort to Order 113 rule 1 to evict another beneficiary who is in possession of part of the Premises.

CONCLUSION

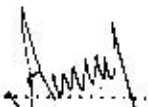
23. Special procedure in terms of Order 113 contains mandatory procedure that the Plaintiffs had not complied. There is no evidence of compliance of mandatory service requirement contained in Order 113 rule 4(2) or an order of court that dispensed such requirement. The Plaintiffs had also combined other claims for sale of the Premises and also for distribution of the proceeds in terms of Trustees Act and also Succession Probate and Administration Act, which is irregular and also an abuse of process. Proceedings for vacant possession in terms of Order 113 cannot be combined with other claims as it was designed for specific 'mischief' only. The Originating Summons is struck off in limine for said fatal irregularities. The cost of this application is summarily assessed at \$3,500 to be paid by the Plaintiffs, within 21 days. No fresh action against the Defendant be instituted without payment of cost ordered and I have considered circumstances of this matter for the order of costs.

FINAL ORDERS

- a. The Originating summons filed on 11th July, 2017 is struck off.
- b. Cost summarily assessed at \$3,500.

Dated at Suva this 12th day of January, 2018




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Justice Deepthi Amaratunga
High Court, Suva