

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 303 of 2012

BETWEEN: **NASINU LAND-PURCHASE AND HOUSING CO-OPERATIVE SOCIETY LIMITED** a co-operative society duly incorporated pursuant to the Co-operative Societies Ordinance Cap 219 and having its principal place of business at 68 Suva Street, Suva.
PLAINTIFF

AND: **THE OCCUPIERS** of Certificate of Title No. 3213 being Lot 1 on Deposit Plan No. 3130 Stage 9, Phase 1.
DEFENDANTS

COUNSEL: Ms Devan - for the Plaintiff
 Ms Mary Chan - for the Defendant

BEFORE: Master Vishwa Datt Sharma

Date of Ruling: 30th July, 2018 @ 9am

RULING

(Amended Originating Summons pursuant to Order 113 of the High Court Rule, 1988 and the Inherent Jurisdiction seeking an order for vacant possession.)

INTRODUCTION

1. The Plaintiff by his **Originating Summons** dated 01st November, 2012 seeks the following orders-
 - (i) An order under Order 113 of the High Court Rules, 1988 of Fiji that the Plaintiff do recover possession of the land comprised in Certificate of Title No. 3213, being Lot 1 on Deposit No. 3130, Stage 9, Phase 1 in the Republic of Fiji having an area of 326 acres 2 roods on the ground that it is entitled to possession and that the persons in occupation are in occupation without license or consent.
 - (ii) Such further or other relief as this Honourable court may deem fit.
2. This application is made pursuant to **Order 113** of the High Court Rules, 1988 and the Inherent Jurisdiction of this Honourable Court.
3. The **Defendants** opposed the application and filed **Affidavits in Opposition**.
4. The Defendant's only filed written submissions and the matter was accordingly heard for determination of the orders sought by the Plaintiff.

THE LAW

5. The Plaintiff has made his application pursuant to **Order 113** of the High Court Rules, 1988 which deals with summary proceedings for possession of land and provides as follows-

Proceedings to be brought by originating summons (O.113, r.1)

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.

PLAINTIFF'S CASE

6. That the Plaintiff is in the process of subdividing, developing and selling part of the land which the Defendants or occupiers are presently illegally occupying. The area which is being developed and illegally occupied by the Defendants/ occupiers is delineated and marked as per the approved development plan.
7. The Defendants named herein and other unnamed occupiers are currently illegally occupying the Plaintiff's land without license, consent or authority from the Plaintiff by squatting on the land.
8. The Plaintiff is unaware of the names of the persons who are illegally occupying the land. Despite numerous enquiries to ascertain the names, the unnamed occupiers are wilfully refusing from

divulging their names in order to frustrate the Plaintiff's actions to recover its land from the occupiers.

9. Seeks for the orders accordingly.

DEFENDANT'S CASE

10. Defendant's Counsel stated as follows-

- Freedom from arbitrary evictions;
- Order 113 should be applied in the instance where the matter is the clearest of the cases. This case is not clear as there is conflicting evidence of service, and serious issues of a triable nature raised in the affidavits, requiring trial;
- HCT Order admittedly can be used to evict squatters or trespassers if no estoppel or equitable right is claimed or found;
- The Defendants are claiming that Mr Parmanandam, then Secretary offered the land and invited to build their dwelling. Thus the Defendants cannot be classified as squatters or trespassers;
- The later board members of the Plaintiff are refusing to honour the terms of Mr Parmanandam's words, without a reasonable explanation, no explanation has been given in the affidavit in support. The Prime Minister's Office has intervened and offered to buy the land from the Plaintiffs to accommodate the Defendants, and asked the Plaintiff to disclose its list of members, but the Plaintiff has refused to do so;
- Writ of Summons is a proper way to deal with this case;
- Defendants claiming Equitable and or Promissory Estoppel;
- Defendants have vested interest on the land in occupation;
- Defendant's affidavits have raised equitable interest or promissory estoppel or legitimate expectation or constructive trust. They have raised triable issues, which the Plaintiff does not dispute;
- Defendants are seeking for the action to be struck out.

ANALYSIS AND DETERMINATION

11. The issue for Court's determination is whether the plaintiff is entitled to possession of the property comprised in Certificate of Title No. 3213, being Lot 1 on Deposit No. 3130, Stage 9, Phase 1 in the Republic of Fiji having an area of 326 acres 2 roods on the ground that it is entitled to possession and that the persons in occupation are in occupation without license or consent.
12. Reference is made to the Case of "*Baiju v Kumar (1999) FJHC 20; HBC 298 J.98*, wherein Justice Pathik succinctly dealt with the scope of the order as hereunder-

"The question for Court's determination is whether the plaintiff is entitled to possession under this Order. To decide this 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."

"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."

13. The Plaintiff's contention is that the Defendants are occupying the said property without her consent or without any licence from her and she doesn't know personally any of the Defendants correct names, and names of all the defendants residing on the property or they are refusing to give and furnish their names.
14. The Defendant's contention is that "Mr Parmanandam, then Secretary offered the land and invited to build their dwelling. Thus the Defendants cannot be classified as squatters or trespassers; Further, the later board members of the Plaintiff are refusing to honour the terms of Mr Parmanandam's words, without a reasonable explanation, no explanation has been given in the affidavit in support. The Prime Minister's Office has intervened and offered to buy the land from the Plaintiffs to accommodate the Defendants, and asked the Plaintiff to disclose its list of members, but the Plaintiff has refused to do so.
15. Obviously, prima facie, these claims and allegations by the Defendants raises dispute and triable issues within the Defendants' respective Affidavits.
16. Therefore, I find there is dispute and these are clearly issues which cannot be resolved by affidavit evidence summarily and parties ought to go to trial to resolve these Dispute and issues.
17. In conclusion, since the Substantive Claim of the Plaintiff has been commenced by an **Originating Summons**, seeking an order for immediate Vacant Possession pursuant to Order 113 of the Land Transfer Act, and bearing in mind that here exists Dispute and Triable issues, it is not possible to grant an order on the Originating Summons without hearing the entire evidence at a hearing.

18. In these circumstances, it has become appropriate that without making an order for dismissal of the Originating Summons that now I invoke the provisions of *Order 28 Rule 9 (1) of the High Court Rules, 1988* and order that this matter be entered for trial as if the Originating Summons was a Writ Action accordingly.
19. Taking into consideration the above circumstances, it is only appropriate that at this stage of the proceedings, I make no order as to costs but leave it to the end of the disposition of this matter.
20. I now proceed to make the following Final Orders-

FINAL ORDERS

- A. The Plaintiff's Originating Summons seeking an order for the Plaintiff do recover possession of the land comprised in Certificate of Title No. 3213, being Lot 1 on Deposit No. 3130, Stage 9, Phase 1 in the Republic of Fiji having an area of 326 acres 2 roods on the ground that it is entitled to possession and that the persons in occupation are in occupation without license or consent fails.
- B. The current Originating Summons is now converted to a Writ action and entered for a trial.
- C. There will be no order for Costs at this stage of the proceedings until the final disposition of the matter.

DATED AT SUVA THIS 30th DAY OF July 2018



MASTER
VISHWA DATT SHARMA

cc: Messrs Neel Shivam Lawyers, Suva
M Chan Law, Suva