

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

CIVIL ACTION NO.: HBC 170 of 2018

BETWEEN : **TOMASI VOSAICAKE** **PLAINTIFF**

AND : **TIMALETI KANIAKANA & OCCUPIERS** **DEFENDANTS**

APPEARANCES/REPRESENTATION

PLAINTIFF : Ms T Waqanika [Waqanika Law]
DEFENDANTS : Timaleti Kaniakana in person [Not represented]
JUDGMENT OF : Acting Master Ms Vandhana Lal
DELIVERED ON : **08 November 2019**

JUDGMENT
[Order 113 Application]

1. This is the Plaintiff's application where he filed an originating summons dated 8 June 2018 seeking orders:

- i. *That Defendant and Occupiers be vacated from the land known as "Waibau" subdivision Lot 1 in the Tikina of Vuna in the Province of Naitasiri of which the Plaintiff is the registered lessee on the ground that the Defendant have remained in the occupation without authorisation and/or consent of the Plaintiff.*

Two affidavits were filed in support of the application:

- i. Affidavit of one Semesa Tuibure sworn on 8 June 2018;
- ii. Affidavit of Tomasi Vosaicake sworn on 8 June 2018.

2. As per the affidavit of service filed on 27 June 2018, the server Michelle Fong on 23 June 2018 personally served the Defendant Timaleti Kaniakana with the originating summon. Later on 26 June 2018 the two affidavit in support were served on Timaleti.
3. On 29 August 2018 another affidavit of service was filed. The server deposed following:
 - i. *That I did on the 28th of August 2018, personally serve the Defendants and Occupiers a true copy of the Originating Summons and the Affidavits of Tomasi Vosaicake and Semesas Tuibure dated 8th June 2018 and filed on 11 June 2018 respectively, which was issued out of the High Court of Fiji at Suva on 19 June 2018;*
 - ii. *That the Second service was necessary given the Court order dated 2 August 2018 that the Plaintiff serve other Occupiers. The service on the Occupiers was required on the basis that the Defendant **TIMALETI KANIAKANA** had stated in Court that she was not occupying "Waibau" Subdivision Lot 1 on the Tikina of Vuna in the Province of Naitasiri;*
 - iii. *That today in the presence of our client, the Plaintiff, a two others who accompanied us and the Police Officer, PC 5432 Sanil Kumar, I served the Occupiers who were illegally staying in the two farm houses at Waibau Subdivision Lot 1 in the Tikina of Vuna in the Province of Naitaisiri. The Occupier was Timaleti Kaniakana;*
 - iv. *That the Defendant and the Occupiers refused to accept service and so I left the legal documents on the doorstep of the farmhouse in the presence of Police Officer, PC 5432 and others;*
 - v. *That as I moved towards the other Occupiers to serve our legal documents, the Defendant, Timaleti Kaniakana said that the*

Occupiers are her children, grandchildren and husband and that they will not receive any legal documents from me;

- vi. That we took photos of the property and the photos also showed the Defendant and the other occupiers occupying the said leased property of the Plaintiff;*
- vii. That a served copy of the Originating Summons and the both Affidavits is annexed hereto marked with the letter "MF4", "MF5" and "MF6".*
- viii. That at the time of the said service the Originating Summons and the both Affidavits, copies thereof were subscribed in the manner and form prescribed by the rules of the said Court;*
- ix. That I got the Police Officer Sanil Kumar PC 5432 to sign on the back page of the Originating Summons to show proof that he was present on the date of service and has supported the service with a Statement. Annexed hereto and marked with the letter "MF7" is a Statement from Police Officer PC 5432.*

4. On 20 November 2018 Timaleti Kaniakana filed an affidavit opposing the application.
5. The Plaintiff on 7 December 2018 and 08 February 2019 filed his affidavit in reply.

The Plaintiffs' Case

6. The Plaintiff and his wife Laisa Keresi are the registered lessee of 11,6900 hectares of native land known as Waibau Subdivision Lot 1 in the Tikina of Vuna in the province of Naitasiri. A registered lease was annexed marked as Annexure A to the affidavit in support.

The lease is for 50 years commencing from 1 January 2012. The Plaintiff and his wife acquired the lease with the intention to do farming.

The piece of land subject to the lease is known as Waibau Subdivision Lot 1 in the Tikina of Vuna in the Province of Naitasiri having an area of 11,6900 hectares owned by Yavusa Solia.

The Plaintiff and his wife are Australia Citizens and reside in Australia.

The land owners of the lease are Yavusa Solia with whom the Plaintiff and his wife have a respectful relationship. They have always dealt with Yavusa Solia Clan elder Mr. Eroni Tagicakitai who is the Chairperson of the Yavusa Solia Trust Committee of all leased land under the Yavusa Solia.

During the Plaintiff's last visit in March 2018 he and his wife agreed that their church members and family friends namely Semesa Tuibure and Mrs Merelesita Tiko and their children to be caretakers of the property.

Upon his return to Australia, Mr. Tuibure informed the Plaintiff that Mr. Tuibure had gone to the leased property on 31 March 2018 and were chased away by the Defendant.

On 23 May 2018, the Plaintiff came to Fiji and went to the property on 25 May 2018. There were two structures on the property occupied by the Defendants.

According to the Plaintiff, neither did he or his wife authorise the Defendant, her family and Occupiers to occupy the land.

The Defendant is said to be trespassing on the property and illegally occupied the land.

When asked to vacate the Defendant's male relatives threatened the Plaintiff's agent Eroni Tagicakitai with a cane knife and swore at him. The Plaintiff sought Police assistance but were asked to get a court order.

On 30 November 2018, the Plaintiff with his legal Counsel had a meeting with I-Taukei Land Trust Board who confirmed to the Plaintiff that they did a GPS navigation on the leased property and found the two dwellings to be within the leased land.

Annexure A2 to the affidavit in reply filed on 8 February 2019 is letter from the I-Land Trust Board dated 4 November 2018 confirming the above.

The dwellings were on his property since 2012. These were occupied by the Plaintiff and caretakers he had placed on the land. The farm caretaker left in 2015. The squatters moved on the land in 2016 without his consent or knowledge or that of his wife.

The Plaintiff and his wife have been trying to evict the Defendant since 2016. The Defendant is not residing on the reserved land but on his leased land.

Timaleti Kaniakana's case

7. According to her, she resides on Reserved Land which is not part of the leased land.

She is a member of the Yavusa Solia 381 who are the owners of the Reserved Land.

She has resided on the Reserved Land since 2010 and the house was built with the approval of the land owners Yavusa Solia 381.

Eroni Tagicakitai is not a member of Mataqali Solia nor member of Yavusa Solia nor is he the clan elder.

Mr. Tagicakitai did not consult Yavusa Solia 381 concerning the sale of land Lot 1 nor was any consent given.

On 31 March 2018 Semesa had met Timaleti and since he had conversed with her, he did not go to the property. There was no hostile conversation held with or threats made to Semesa.

There was no violence towards Eroni who came only once on 28 August 2018 to serve the application.

Timaleti maintain she does not reside on Lot 1 neither is her dwelling on Lot 1.

Who can bring proceeding under Order 113?

8. Pursuant to Order 113 rule 1 of the High Court Rules *"a person who claims possession of land which he or she alleges is occupied solely by a person or persons (no being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his or her licence or consent or that if any predecessor in title of his or her"* can bring proceedings.

How service is to be effected?

9. Order 113 Rule 4 outlines how service of the summon with affidavit in support ought to be done and it reads:
- i. 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 or her –*
 - a) Personally in accordance with Order 10 rule 5;*
 - b) By leaving a copy of the summons and of the affidavit or sending them to him or her at the premises;*
 - c) In such other manner as the court may direct.*
 - ii. 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 direct, 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 by 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".*

10. In *Narsaiya v Narsaiya* a Suva High Court Probate Action No 36 of 2017, Amaratunga J. found that:

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.*

11. According to the affidavit of service sworn on 28 August 2018, the server on 28 August 2018 served the Defendant and Occupiers with the originating summons and affidavit in support.

On paragraph 3 the server states she "*served the occupiers who are illegally staying in the two farm houses..... The occupier was Timaleti Kaniakana*".

Since the Defendant refused to accept service, the server left the documents on the doorsteps of the farmhouse.

12. According to the Plaintiff, there are two dwellings on the property. The Plaintiff in his summons seeks orders against "*the Defendant and the Occupiers*".
13. There are no court orders directing the Plaintiff to effect service either wise than as stated under Order 113 rule 4(2).
14. I do not find that the service done in this case is in compliance of Order 113 rule 4 2(a) that is affixing copies of the documents to the main doors of the two dwellings.
15. I also note that the instrument of tenancy annexed [annexure A] is registered with the Registrar of Deeds. However the copy is not certified true copy by the Registrar of Titles.
16. After perusal of the affidavits, I also find that there are dispute as to the facts.

The Defendant claim the two dwellings do not form part of the boundary of the property which the Plaintiff seeks vacate possession of. The Plaintiff states either wise:

I do not find it is prudent for this Court to make a determination of this on affidavit evidence. Oral evidence should be heard with witnesses cross-examined.

17. Hence the application fails and is dismissed due to:

- a. irregularities;
- b. there being serious dispute as to the location of the dwellings;

18. The Plaintiff shall pay cost summarily assessed at \$850 to Timaleti Kaniakana in 14 days.





Vandhana Lal [Ms]
Acting Master
At Suva.