IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 211 of 2018

BETWEEN	:	**KINISIMERE RANADI** of Buniwai Village, Rakiraki, Fiji, Domestic Duties.
		Plaintiff
AND	:	**JOANA BANIVETAU** of Lot 10, Natokowaqa, Josaia Street, Lautoka, occupation unknown to the plaintiff.
		Defendant
Before	:	Master U.L. Mohamed Azhar
Counsels	:	Mr. K. Chang of Legal Aid Commission for the plaintiff Mr. V. Rokodreu for the Defendant
Date of Hearing	:	05th June 2020
Date of Judgment	:	16th June 2020

JUDGMENT

01. The plaintiff took out the Originating Summons against the defendant, pursuant to Order 113 of the High Court Rules. The summons seeks an order on the defendant to give up immediate vacant possession to the plaintiff of the land comprised in Housing Authority Lease No. 196262, Lot 23 on DP 47378 (hereinafter called and referred to as **the subject property**) . The summons is supported by an affidavit sworn by the plaintiff and contains five documents marked as **"KR1"** to **"KR5"** respectively.

02. The defendant opposed the summons and filed the affidavit in opposition of the summons. It must be noted here that, the defendant in replying to most of the averments of the plaintiff's affidavit stated that, "no need for me to comment". When the matter was mentioned to fix for hearing, the counsel for the plaintiff informed the court that the defendant had already vacated the subject property. On the other hand, the defendant admitted that, the defendant vacated the subject property; however, he insisted that this summons should be heard. Accordingly, the summons was fixed for hearing. Few days before the hearing date, the defendant filed a summons for stay of this proceeding with a

supporting affidavit and the same summons was issued to the date of hearing as there was no sufficient time to separately hear that summons.

03. At the day fixed for hearing, the summons for stay was taken up first and the court dismissed that summons after hearing both counsels. The court then directed both counsels to proceed with the hearing and they made oral submission. The counsel for the plaintiff tendered his written submission too in addition to his oral submission.

04. The law relating to application of Order 113 of the High Court Rules is well settled and it does not need more elaboration. However, it is necessary to briefly the note the law for the purpose of this judgment. The Order 113 rule 1 reads;

> "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".

05. The genesis and introduction of this Order into the English civil practice clearly express the purpose for which it was intended. The English Court of Appeal in **Manchester Corp v Connolly** [1970] 1 All ER 961, [1970] Ch. D 420 held that, the court had no power to make an order for possession and give leave to issue a writ of possession on an interlocutory motion before final judgment had been obtained. The necessity then arose for a speedy and prompt procedure to summarily obtain a final order for possession where not every wrongful occupier can reasonably be identified (**The Supreme Court Practice 1988 (White Book)** states at paragraph **113/1-8/1** at page **1470**). This resulted in introduction of Order 113. Kennedy LJ explained this background in **Dutton v Manchester Airport** [1999] All ER 675 at 679 as follows:

> "**Order 113** was introduced in 1970 (by the Rules of the Supreme Court (Amendment No 2) 1970, SI 1970/944), shortly after the decision of this court in Manchester Corp v Connolly [1970] 1 All ER 961, [1970] Ch 420. It had been held in that appeal that the court had no power to make an interlocutory order for possession. **Order 113** provides a summary procedure by which a person entitled to possession of land can obtain a final order for possession against those who have entered into or remained in occupation without any claim of right--that is to say, against trespassers. The order does not extend or restrict the jurisdiction of the court. In University of Essex v Djemal [1980] 2 All ER 742 at 744, [1980] 1 WLR 1301 at 1304 Buckley LJ explained the position in these terms:

'I think the order is in fact an order which deals with procedural matters; in my judgment it does not affect in any way the extent or nature of the jurisdiction of the court where the remedy that is sought is a remedy by way of an order for possession. The jurisdiction in question is a jurisdiction directed to protecting the right of the owner of property to the possession of the whole of his property, uninterfered with by unauthorised adverse possession.'

06. Accordingly, this Order does not provide a new remedy, rather a new procedure for the recovery of possession of land which is in wrongful occupation by trespassers who have neither license nor consent from either the plaintiff or his predecessor in title. 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 rule 1, no other cause 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. The Order is narrowly confined to the particular remedy described in rule 1. **The Supreme Court Practice 1988 (White Book)** states at paragraph **113/1-8/1** at page **1470** that:

> 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 O.15 r.1, no other cause of action can be joined with such a claim in proceedings under this Order, and no other relief or remedy can be claimed in such proceedings, whether for payment of money, such as rent, mesne profits, damages for use and occupation or other claim for damages or for an injunction or declaration or otherwise. The Order is narrowly confined to the particular remedy described in r.1.

07. This Order not only applies where the occupier has entered into occupation without licence or consent, but also applies to a person who has entered into possession of land with a licence but has remained in occupation without a licence, Pennycuick V-C in **Bristol Corporation v. Persons Unknown** [1974] 1 W.L.R. 365; [1974] 1 All E.R. 593 held at page 595 that:

> Looking at the words of that rule, it seems to me to be clear that the order covers two distinct states of fact. The first is that of some person who has entered into occupation of the land without the licence or consent of the person entitled to possession or any predecessor in title of his, and secondly that of the person who has entered into occupation of the land with a licence form the person entitled to possession of the land or any predecessor in title of his but who remains in such occupation without the licence or consent of the person entitled to possession or any predecessor in title. That that is the true construction appears to be perfectly clear from the use of the word 'or' and if the rule did not cover the second state of

affairs which I have mentioned, that is to say of entry with licence and remaining in occupation without licence, then the words 'or remained' would, so far as I could see, have no significant meaning at all. Obviously there never could be proceedings against someone who had entered, but did not remain in occupation of the land.

08. It must be noted that, Pennycuick V-C in that **Bristol Corporation v. Persons Unknown** (supra) expressed in obiter that, the court has discretion whether to permit this summery procedure to be used in cases where there had been a licence to occupy. However, the Court of Appeal in **Great London Council v Jenkins** [1975] 1 W.L.R 155; [1975] 1 All E.R 354, unanimously disapproved that obiter and held that, the court has no discretion to refuse to allow the summary procedure to be used, even where the respondent had been in occupation under the licence for a substantial period and the court is bound to grant an order for possession in such circumstances. Cairns LJ., held at page 359 that:

> With respect to Pennycuick V-C, that opinion, expressed obiter, appears to me one which it would be difficult to sustain. It may well be that a local authority or other responsible landlord would be reluctant to use this summary procedure against a former licensee with whom good relations have been maintained over a long period. But if the procedure is adopted, I do not consider that there is any discretion for the court to say: 'I shall not make an order for possession, because I do not think this is the sort of defendant against whom the procedure should be used.'

09. **The Supreme Court Practice 1988 (White Book)** further states at paragraph **113/1-8/1** at page **1470** that:

> For the particular circumstances and remedy described in r.1, this Order provides a somewhat exceptional procedure, which is an amalgam of other procedures, e.g., procedure by exparte originating summons, default procedures and the procedure for summary judgment under O. 14. Its machinery is summary, simple and speedy, i.e. it is intended to operate without a plenary trial involving the oral examination of witnesses and with the minimum of delay, expense and technicality. Where none of the wrongful occupiers can reasonably be identified the proceedings take on the character of an action in rem, since the action would relate to the recovery of the res without there being any other party but the plaintiff. On the other hand, like the default and summary procedures under O.13 and O.14, 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 of the land without licence or consent and without any right, title or interest thereto.

10. It is evident from the decisions and the commentary in the **White Book** cited above that, this is the procedure to recover the possession of a land occupied by a trespasser or a squatter. It is simple and speedy machinery that is intended to operate without a plenary trial involving the oral examination of witnesses and with the minimum of delay, expense and technicality. Where none of the wrongful occupiers can reasonably be identified the proceedings take on the character of an action in rem, since the action would relate to the recovery of the res without there being any other party but the plaintiff. Kennedy LJ., in **Dutton v Manchester Airport** (supra) said at page 689 that:

> The wording of Order 113 and the relevant facts can be found in the judgment of Chadwick LJ. In Wiltshire C.C. v Frazer (1983) PCR 69 Stephenson LJ said at page 76 that for a party to avail himself of the Order he must bring himself within its words. If he does so the court has no discretion to refuse him possession. Stephenson LJ went on at page 77 to consider what the words of the rule require. They require:
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> "(1) of the plaintiff that he should have a right to possession of the land in question and claim possession of land which he alleges to be occupied solely by the defendant;
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> (2) that the defendant, whom he seeks to evict from his land (the land) should be persons who have entered into or have remained in occupation of it without his licence or consent (or that any predecessor in title of his)".

11. It is clear beyond peradventure that, in a summons made under this Order 113 the courts must be satisfied that there is no reasonable doubt on, (a) the claim of the plaintiff and (b) on the wrongful occupation of the defendant. The court has no discretion to refuse to allow the summary procedure to be used, even where the respondent had been in occupation under the licence for a substantial period and the licence has been terminated. Accordingly, it is the duty of the plaintiff, who invokes the jurisdiction of this court under this Order, to firstly satisfy the court that, it is virtually a clear case where there is no doubt as to his claim to recover the possession of the land. In that process, he/she must be able to show to the court his or her right to claim the possession of the land and then to satisfy that the person or persons (not being a tenant or tenants holding over after the termination of the tenancy) entered into the land or remained in occupation without his licence or consent or that of any predecessor in title. Once the plaintiff satisfies these two factors, he or she shall be entitled for an order against the defendant or the occupier. Then, it is incumbent on the defendant or the person occupies that property, if he wishes to remain in possession, to satisfy the court that he had consent either from the plaintiff or his predecessor in title or he has title either equal or superior to that of the plaintiff. If the defendant can show such consent or such title, then the application of the plaintiff ought to be dismissed.

12. The plaintiff asserts in the supporting affidavit that, she is the registered proprietor of the property in this case. As per the affidavit and the annexure marked as **"KR1"** which is a copy of Last Will and Probate, one Simione Nacagilaba bequeathed all his real and personal estate of all kind to his wife Torika Ranadi and the plaintiff Kinisimere Ranadi. After death of Torika Ranadi – the wife of the testator, the plaintiff became the registered proprietor of the Housing Authority Sub-Lease, previously belonged to late Simione Nacagilaba. She annexed a copy of her Housing Authority Lease marked as **"KR2"**. It is evident from that document that, she became the proprietor of the subject property through the transfer registered on 27.07.2017. The **"KR2"** is a copy of instrument of title and is certified by the Registrar of Title. The section 18 of the Land Transfer Act specifically provides that, duly certified copy of Instrument of title to be evidence of proprietorship and it reads:

> **18.** Every duplicate instrument of title duly authenticated under the hand and seal of the Registrar shall be received in all courts as evidence of the particulars contained in or endorsed upon such instrument and of such particulars being entered in the register and shall, unless the contrary be proved by the production of the register or a certified copy thereof, be conclusive evidence that the person named in such instrument or in any entry thereon as seized of or as taking an estate or interest in the land described in such instrument is seized or possessed of such land for the estate or interest so specified as from the date of such certificate or as from the date from which such estate or interest is expressed to take effect.

13. The plaintiff thus proved to the court of her right to possess the subject property comprised in that Housing Authority Sub Lease. The plaintiff further asserted that, the defendant occupies that property without her consent and the consent of her predecessor in title. As a result the burden now shifts to the defendant to satisfy the court that she has licence or consent either from the plaintiff or her predecessor in title or to show a title that is either equal or superior to that of plaintiff, in order to remain in possession of the subject property.

14. The defendant does not dispute the proprietorship of the plaintiff. The plaintiff in paragraphs 5 and 6 of her affidavit filed on 25.09.2018 specifically averred how she became the proprietor of the subject property. The defendant in reply to these two paragraphs stated in 6 of her affidavit that, 'there is no need for me to comment on paragraphs 5 & 6 of Ranadi's affidavit'. Accordingly, the fact that, the plaintiff became and remained as the owner of the subject property is not disputed by the defendant in her affidavit. The defendant claims in her affidavit in opposition that, she is the biological sister of late Simione Nacagilaba. However, she has not tendered any evidence to show that late Simione Nacagilaba licensed or consented to her to remain in possession of the subject property. The defendant in most of the paragraphs of her affidavit states that, she does not need to comment on the affidavit of the plaintiff which supports her summons

for ejection. At hearing of this summons, the court specifically asked the counsel for the defendant to show an averment in the affidavit of the defendant for the proof that, either the plaintiff or her predecessor in title consented and or licensed the defendant to occupy the subject property. The counsel reluctantly admitted there was none. There is no single evidence in the affidavit of the defendant which can indicate any right to possess the subject property.

15. The defendant in paragraph 5 of her affidavit stated that, the Last Will of Simione Nacagilaba dated 09.11.1998 is null and void. Three important facts must be noted here. Firstly, the defendant has not adduced any reason for that averment. Secondly, the said Last Will was deposited in court and the court after due process granted probate in 2002 according to that Will. Therefore, mere averment of the defendant will not make that Will null and void. Thirdly, the defendant did not, even though she had opportunity to do so in her affidavit, dispute the ownership of the plaintiff which derived from that Will. Therefore, her mere assertion that the said Will is null and void has no value. It appears that, the defendant entered the subject property only on the basis of her being the biological sister of late Simione Nacagilaba. However, being a biological sister of late Simione Nacagilaba will not confer any right to her to possess the subject property.

16. If a plaintiff, in an action for ejectment, proves his legal title in possession, he is, as of right, entitled to an immediate judgment for possession. The common law courts under common law rules have no discretion delay him: **Department of the Environment v. James and Others** [1972] 3 All E.R 629. The plaintiff too in this case, as of right, is entitled to an immediate judgment for possession of the subject property, as she proved her title and absence of consent or licence for the defendant and others, and the defendant failed to show any right equal or superior to that of the plaintiff to possess the subject property.

17. At the time of fixing this matter for hearing (on 28.01.2020), it was informed that the defendant had already vacated the subject property. However, the defendant's counsel informed the court that he had instruction to still go for hearing of the summons even though the defendant vacated the subject property. The legal aid counsel who appeared for the plaintiff put the defendant on notice that, they would seek cost from the defendant after hearing (see: page 12 of the Transcript of proceeding on 28.01.2020).

18. Now the question is whether this court can make a cost order in favour of the plaintiff who is supported by the legal aid commission or alternatively any cost order can be made in favour of Legal Aid Commission. This question needs brief study on cost and the principles behind it. ***"I have found in my experience that there is one panacea which heals every sore in litigation, and that is costs"***. That is the observation of **Lord Justice Bowen** in **Cropper v Smith** (1884) 26 Ch. D. 700 (CA) at page 710. The general principle of awarding cost is that, 'the costs follow the event'. This means that the costs of an action are usually awarded to the successful litigant. Unless there are exceptional

circumstances in a special instance, the rule is that, the costs should follow upon success. Bowen LJ in **Forster v Farquhar and Others** [1893] 1 Q.B 564 stated at page 569 that:

> We can get no nearer to a perfect test than the inquiry whether it would be more fair as between the parties that some exception should be made in the special instance to the rule that the costs should follow upon success.

19. In **Shirley v Wairarapa District Health Board** [2006] NZSC 63, [2006] 3 NZLR 523 the Supreme Court of New Zealand summarized the principle as "the loser, and only the loser, pays" unless there are exceptional circumstances. However, awarding of costs is at the discretion of the Court and this discretion is recognized in Order 62 rule 3 (3) of the High Court Rules. The costs awarded may include fees, charges, disbursements, expenses and remuneration. The court must be mindful of the purpose of awarding cost when exercising its discretion to award cost.

20. The primary purpose of awarding cost is to compensate a successful party and it is neither punishment nor reward. Further the cost awards are also a check on unmeritorious litigation and to encourage litigants to consider cost-effective alternatives to court litigation. However, award of costs should not prevent litigants from accessing to justice and seeking to enforce their rights through the courts. Edwards J in **Taylor v Roper** [2019] NZHC 16 (21 January 2019) discussed the purpose of awarding costs in paragraphs 6 and 7 and said:

> The primary purpose of a costs award is to compensate a successful party for the costs they have expended in having their legal rights recognized and enforced in a court of law.6 Costs are not ordered as punishment against the losing party, nor as a reward for the winner.7 An award of costs is generally linked to the conduct of the proceeding and its result but is not usually concerned with what happened before the proceeding.
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> An award of costs also serves a number of other policy objectives. The prospect of an adverse costs award acts as a check on unmeritorious litigation being pursued through the courts. An award of costs also encourages litigants to consider whether there are cost-effective alternatives to court litigation to resolve the underlying dispute. Of course, counterbalanced against those objectives is the public interest in ensuring that an award of costs does not inhibit litigants from seeking to enforce their rights through the courts.

21. The overriding objective in awarding cost is to do justice between the parties. The nature of representation offered to a litigant such as pro bono basis makes rare difference to that

party's right to recover costs. In **R (Boxall) v Waltham Forrest London Borough Council** (2000) 4 CCLR 258, Scott-Baker J said:

> "It would ordinarily be irrelevant that the claimant is legally aided. The overriding objective is to do justice between the parties without incurring unnecessary court time and consequently additional costs."

22. Lord Neuberger in **R (M) v Mayor and Burgess of the London Borough of Croydon** [2012] EWCA Civ 595; [2012] 1 WLR 2607; [2012] 3 All E.R 1237 set out the general principle in awarding costs after trial in ordinary civil litigation and said at pages 1247 and 1248 that:

> ".....the basis upon which the successful party's lawyers are funded, whether privately in the traditional way, under a 'no win no fee' basis, by the Community Legal Service, by a Law Centre, or on a *pro bono* arrangement, will rarely, if ever, make any difference to that party's right to recover costs".

23. Lord Justice Irwin in **King's Lynn and West Norfolk Council v. Michelle Paula Bunning** [2016] EWCA Civ 1037 discussed several cases including the last mentioned two cases and stated at paragraph 39 that:

> I accept also that it is important for costs orders to be made in favour of successful legally-aided parties. We were told that such an order makes a very considerable difference to those acting, who receive a very much reduced rate if paid by the Legal Aid Agency rather than the unsuccessful party. It will also be evident that if successful legally-aided parties do not obtain costs orders when they should, a false picture will emerge as to the care the Agency takes of public money: legal aid litigation will appear to be less effective and the judgements of the Agency less well-considered than they should.

24. A litigant who is in receipt of legal aid assistance obviously does not pay for the solicitors of the Legal Aid Commission. The only expenses that may be borne by such litigant would be the cost incurred for the transport to the Legal Aid Office and contacting the solicitors via telecommunication methods. Even though such litigant does not suffer pecuniary loss for the litigation, such person may have to spend reasonable time to come Legal Aid Office and even to the court, and that time could be utilized for the wellbeing and welfare of him or herself or family. This factor would be more severe if such person lives in interior where less facility available compared to towns and cities. Sometimes, a person may have to spend the whole day in coming to Legal Aid Office and court and going back home due to limited transport facilities available to such particular area. This factor should not be ignored when the court exercise its discretion in awarding cost. It

must be noted here that, Order 62 rule 18 allows the taxing officer to award not exceeding $ 4.00 per hour in respect of time reasonably spent by a litigant in person even though it appears to such officer that, the litigant in person has not suffered any pecuniary loss in doing any item of work.

25. Furthermore, the resources of the Legal Aid Commission, which are being exhausted in providing free legal service to the members of the public, cannot be overlooked. The Legal Aid Commission is a constitutionally recognized statutory body, which provides variety of free legal services to the members of public all over the country. It is the largest law firm in this country having number of branches in order to achieve its mission. However its resources, whether it is financial or human or logistic are limited as it is mainly managed by the fund appropriated by the Parliament from the taxpayers' money every year. Hence, regard should also be had to the impact of a case on the resources of the Commission. Those resources are not infinite and for every case handled by the Commission, the resources for another case are potentially reduced and the Commission is compelled to limit its services. That is why the section 6 (1) of the Legal Aid Commission Act provides that, the Commission shall provide, **subject to the resources available to it**, legal assistance to impoverished persons. Further the Commission provides its services only if it is satisfied that, the person who applies for legal aid has reasonable prospect of success in his matter as provided in section 9 of the Act. The rational for this filtering process is to save the limited resources of the Commission.

26. When the Commission provides its services within its limited resources to the meritorious cases chosen by it, any attempt by either the defendant or the opposing party to drag such cases in a censurable manner with an meritless defence or knowing very well that there is no defence at all, will be an utter waste of resources of the Commission, and in turn it is a waste of public fund. In addition such attempt stands in the way of other more deserving cases being handled by the Commission. Sometimes, some litigants might continue to defend some proceedings knowing that they have significantly weak cases, but nevertheless confident that, even if they lose, they will be immunized from any cost order as the Legal Aid Commission provides free services to other party. This attitude must be denounced for the very reason that, the Legal Aid Commission spends the public fund in providing such services for the impoverished people of the country, to fulfil the obligation of the state under section 15 (10) of the Constitution of Republic of Fiji. Hence, award of a reasonable cost payable to the Legal Aid Commission will be restitution to the Commission, and also will signify that the court denounces such attitude.

27. As stated above, the counsel for the defendant in this case admitted on 28.01.2020 that the defendant vacated the subject property and further stated her (defendant's) daughter and some relatives were occupying subject property and she (defendant) had been often visiting them at the subject property (see: pages 4 and 5 of the Transcript of proceeding

on 28.01.2020). However, she instructed her solicitors to continue to defend this matter. It shows that, the defendant knew that she did not have valid defence to occupy the subject property and therefore she vacated on service of summons for ejectment. However, she instructed her solicitors to continue to defend this matter for sake of it, and allowed some others to occupy that property, whilst preventing the plaintiff, who is legally entitled for possession, from enjoying occupation of subject property. The reprehensible conduct of the defendant in this case not only wasted the resources of the Legal Aid Commission, but also time and resources of this court which could have been used for some other deserving cases.

28. Furthermore, the defendant in this matter evaded service of the originating summons for ejectment. The Legal Aid Commission filed an ex-parte motion seeking leave for substituted service. The court, having satisfied with the affidavit that supported the said motion, granted leave and the originating summons was finally served on the defendant. This further shows that, how the resources of the Commission were exhausted in this case. As a result, I am of the view that, this is an ideal case for the court to exercise its discretion and award costs payable both to the plaintiff and the Legal Aid Commission as well.

29. Accordingly, I make following final orders:

a. The defendant and all other occupants of the subject property are ordered to immediately deliver to the plaintiff the vacant possession of the subject property mentioned in the originating summons, and

b. The defendant is also ordered to pay a summarily assessed cost of $ 2,000 to the Legal Aid Commission of Fiji and $ 200 to the plaintiff within a month from today.

HIGH COURT OF FIJI
LAUTOKA

U. L. Mohamed Azhar
Master of the High Court

At Lautoka
16.06.2020