

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

**CIVIL ACTION NO.: HBC 210 of 2019**

**BETWEEN : VIRENDRA SINGH & KAKUA MARAMATOKO  
GADEKILAKEBA SINGH  
PLAINTIFFS**

**AND : SAULA TAWAKE  
FIRST DEFENDANT**

**: OFA MATEIHEILOTU  
SECOND DEFENDANT**

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**APPEARANCES/REPRESENTATION**

**PLAINTIFFS : Ms. S. Prasad [M. A. Khan Esq]**

**DEFENDANTS : Mr. R. Vananalagi [R. Vananalagi & Associates]**

**RULING BY : Acting Master Ms Vandhana Lal**

**DELIVERED ON : 22 April 2022**

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**JUDGMENT**

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**Application**

1. The Plaintiffs are seeking orders for vacant possession of property comprised in agreement for lease dated 15<sup>th</sup> June 2017 over iTaukei Land Trust Board reference number 4/3/40311 known as Tacirua (part of) in the Tikina of Naitasiri and have made an application pursuant to Order 113 of the High Court Rules.
2. They have filed an affidavit sworn by them both on 25<sup>th</sup> June 2019.

**Provision of the law and whether the Plaintiffs are in compliance**

**Order 113 Rule 1**

3. Order 113 Rule 1 of the High Court Rules allows a person/s to bring proceeding against *“person or persons (not being a tenant or tenants holding over the termination of the tenancy) who entered into or remained in occupation without his or her license or consent or that of any predecessor in title of his or her, the proceeding may be brought by originating summons in accordance with the provisions of this order”*.

**Forms to use**

4. The form of the summons *“shall be in Form 3 in Appendix 1 and no acknowledgment of service is required”* - Order 113 Rule 2.
5. In the current proceedings, the Plaintiff have failed to abide by the requirement in Order 113 Rule 2.

The form used by the Plaintiffs in initiating the proceedings is form 4 expedited form of originating summon and not form 3 general form.

**Requirement of affidavit in support**

6. Pursuant of Order 113 Rule 3 *“the plaintiff is required to file an affidavit in support stating—*
- a. His or her interest in the land;*
  - b. The circumstances in which the land has been occupied without licence or consent and in which his or claim to possession arises; and*
  - c. That he or she does not know the name of any person occupying the land who is not named in the summons”*.
7. The Plaintiffs claim to be lessees of agreement for lease dated 15<sup>th</sup> June 2017.

8. The said lease is not a certified true copy of the original lease neither has it been registered with the Registrar of Titles.

**Does an unregistered Agreement for lease gives the plaintiffs' interest in land?**

9. Section 21 of the Land Transfer Act reads:

*(1) Every instrument of title shall be deemed and taken to be registered under the provision and for the purposes of this Act as soon as the same has been signed by the Registrar and marked with a serial number in the register, and every instrument purporting to transfer or in any way to affect land subject to the provisions of this Act, or any estate or interest therein, shall be deemed to be so registered as soon as a memorial thereof as herein described has been entered in the register upon the folium constituted by each existing instrument of title affected by such dealing”.*

10. The term “instrument” is defined as “including every document registered or capable of registration under this Act or in respect of which any memorial is by this Act directed, required, or in the Register Book, or endorsed on any registration instrument”.

11. And as per the interpretation section of the Land Transfer Act “instrument of title” includes “a certificate of title, state grant, lease, sublease, mortgage, or other encumbrances as the case may be”.

12. Pursuant to Section 18 of the Land Transfer Act:

*“Every duplicate instrument of title duly authenticated under the hand seal of the Registrar shall be received in all courts as evidence of the particulars contained in or endorsed upon such instrument .....*”.

13. The copy of the agreement for lease annexed to the affidavit in support is not a duplicate copy “*authenticated under the hand of the Registrar*” as required under Section 18 and 21 of the Land Transfer Act
14. Furthermore, in their affidavit the Plaintiffs have failed to outline circumstances in which the said land has been occupied without licence or consent by the Defendants.

**Service of the application**

15. Pursuant to Order 113 Rule 4 service of the originating summons and affidavit is to be done in the following manner:
  - (a) *Personally or 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; or*
  - (c) *In such other manner as the court may direct.*
16. Sub rule (2) further requires for the summons to be served 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”.*
17. In **Narsaiya & Ors v Narsaiya a Suva High Court Probate Action No. HPP 36 of 2017** (delivered on 12th January 2018) Amaratunga J. on page 3 paragraph 9 of the judgment laid out the mandatory provision of Order 113:
  9. *Order 113 is specifically 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 Dalemal and others [1980] W.L.R. 1301; [1980] 2 ALL ER 743.*

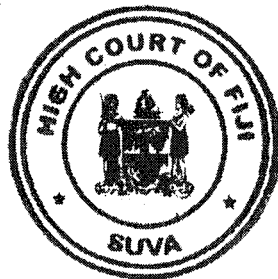
10. *"So, in order to safeguard rights of the people who are subjected to an order made in terms of the said provision in the High Court Rules, special procedural safeguards are in place and these are mandatory. One such provision is regarding the service of the originating summons, not only to the defendant but also for other party "interested"."*
  
18. In the said case, Amaratunga J. found the Plaintiff had not complied with Order 113 rule 4 (2) (a) and (b) of the High Court Rules and neither was there any court order to deviate from the procedure. Hence he held the said provision of the rule was *"mandatory and that it gave notice not only to the named defendant but also for any other person as the order obtained under said High Court Rules can be applied to any person and not only to the defendant"*.
  
19. He further went on to state:  
  

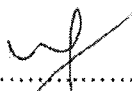
*"(14) Any order for possession obtained in terms Order 113 of the High Court Rules of 1988 can be an order in character of an action in rem. An order can be obtained in relation to the premises as opposed to a named defendant. So Order 113 rule 4 (2) is a mandatory provision and lack of evidence of such compliance of that is fatal irregularity for this action."*
  
20. In the current proceedings, the plaintiff's solicitors had initially served R Vananalagi & Associates with the summon and affidavit. This service was not accepted and they were directed to reserve the documents.

21. As per the affidavit of service filed on 01<sup>st</sup> August 2019, the documents were served on the Defendants personally.
22. There is no evidence that the plaintiffs have complied with Order 113 Rule 4(2) of the High Court Rules.

**Orders**

23. The application is dismissed on the grounds of Plaintiffs failing to comply with requirements under the provision of the law as highlighted earlier.
24. The Plaintiff shall pay the Defendants costs summarily assessed at \$500 for both the Defendants jointly. The said costs is to be paid by 4pm on 06 May 2022.



  
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Vandhana Lal [Ms]  
Acting Master  
At Suva.

22 April 2022

**TO:**

1. Suva High Court Civil Action No. HBC 210 of 2019;
2. M.A. Khan Esq, Solicitors for the Plaintiffs;
3. R. Vananalagi & Associates, Solicitors for the Defendants.