

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 89 of 2020

BETWEEN : **VIDHOTMA WATI PRASAD AND RAVIKESH PRASAD** of
Lautoka, as the Executors and Trustees of the Estate of Ramendra
Prasad

Plaintiffs

AND : **NILENDRA ASHWIN** and the occupiers of Waimalika, Sabeto,
Nadi, Fiji, occupation unknown to Plaintiffs.

Defendant

Before : Master U.L. Mohamed Azhar

Counsels : Ms. M. Raga for the plaintiff
Ms. J. Singh for the defendant

Date of Judgment : 25.04.2023

JUDGMENT

01. The plaintiffs being the Executors and Trustees of the Estate of Ramendra Prasad summoned the defendant pursuant to Order 113 of the High Court Rules. The summons seeks the following orders:
 - a. An order for possession of the land comprised in Certificate of Title No. 22579 and
 - b. That the cost of this application be paid by the Defendant.
02. The summons is supported by an affidavit sworn by the plaintiff. The defendant is represented by Legal Aid Commission and he sworn the affidavit in opposition and opposed the plaintiff's summons.

03. The Order 113 rule 1, under which the current application was filed by the plaintiff, 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".

04. This Order provides for a procedure to recover of possession of a land which is in wrongful occupation by trespassers who have neither license nor consent either from the current owner or his predecessor in title. **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 ex-parte 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.

05. It is a simple and speedy machinery that is intended to operate with minimum delay, expense and technicality as opposed to plenary trial involving oral examination of witnesses. 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:

“(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;

(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)”.

06. In view of that, it is the duty of a plaintiff, who invokes the jurisdiction of the court under this Order, to firstly satisfy the court that, it is virtually a clear case where there is no doubt as to his or her 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 or her licence or consent or that of any predecessor in title. Once a 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 a defendant or the person occupies that property, if he or she wishes to remain in possession, to satisfy the court that he or she had consent either from the plaintiff or his or her predecessor in title or he or she 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.
07. Both plaintiffs are the Executors and Trustees of the Estate of Ramendra Prasad. The second named plaintiff sworn the affidavit that supports the summons. The plaintiffs seek the possession of the property comprised in State Lease No. 22579. However, the document marked as **RP3** and annexed to the supporting affidavit is not the copy of the said State Lease. The annexure is the copy of previous Crown Lease No. 5973 issued in respect of the same land. The said Crown Lease expired in 1994. In fact, this was highlighted by the defendant in his affidavit in opposition, and only after this, the plaintiffs annexed the copy of the current State Lease 22579 marking as **RP 7** with their affidavit in reply. Even that **RP 7** is not complete as only the front page of the State Lease is annexed and other pages not annexed at all. As it appears, there is a complete carelessness on part of the solicitors for the plaintiff in preparing documents for this matter.
08. The subject land is a state land. The late Ramendra Prasad was the last registered proprietor of the said land and the Crown Lease No. 5973 (**RP 3**) was transferred to him on 02.12.2005. The Lease was then renewed (State Lease No. 22579) for 99 years commencing from 01.01.2015 to the Estate of late Ramendra Prasad. The plaintiffs are

the Trustees of the Estate of Ramendra Prasad. Accordingly, there is no doubt as to the claim of the plaintiffs to recover possession of the subject property.

09. The defendant stated in his affidavit that, the late Ramendra Prasad brought his family to the subject property in 1991 and his family has been residing there for 29 years having spent substantial amount of money for improvement of the subject property. The defendant also annexed a copy of letter dated 08.12.2015 sent by Divisional Land Manager – West of Ministry of Lands to the plaintiff. The letter was the reply to the application made by the plaintiffs to renew the subject lease. The letter expresses the intention of Lands Department to formalize the occupancy of the defendant and to renew the lease to balance lands in favour of the Estate of Prasad. The defendant base his defence on the said consent he claimed and the letter issued by the Ministry of Land. If there was a consent by late Prasad as claimed by the defendant, it could be a valid defence for the defendant to remain in possession of the subject property. On the other hand, the plaintiffs denied any such consent either from them or from late Prasad.
10. The plaintiffs marked a copy of the Last Will of late Prasad as **RP1** and annexed with their affidavit in reply. The said Will was made on 30.04.2007. In the said Will, late Prasad bequeathed the subject property to number of people. However, nothing is mentioned about the occupancy of the defendant. Had late Prasad allowed the defendant in 1992 as claimed by him, he would have mentioned and or bequeathed the said portion occupied by the defendant to him. Furthermore, an investigation was conducted by the Office of the Prime Minister upon a complaint regarding the subject property. The report of the investigation was sent to the Permanent Secretary to the Ministry of Lands and Mineral Resources. A copy of the said report is marked as **RP 9** and annexed with the affidavit in reply filed by the plaintiffs. According to the said report, which was prepared on 21.09.2016, the defendant entered the subject property only 3 years after his mother asked late Prasad for assistance to stay for a while until she could find an alternative place for residence. The report further states that, the defendant took advantage of this permission given to his mother and approached the Ministry of Land to regularize his stay after death of his mother.
11. The above evidences completely rebut the claim of the defendant that he was given consent by late Prasad and he has been residing in the subject property since 1992 for last 29 years. Accordingly, the defendant did not have any consent either form the plaintiffs or from late Prasad to occupy the subject property. Nor the defendant has been occupying the subject property for 29 years as he claimed. Lord Denning in **Mcphail v Persons unknown** [1973] 3 All E.R.393 explained the term ‘squatter’ for purpose of Order 113 is as follows:

“What is a squatter? He is one who, without any colour of right, enters on an unoccupied house or land, intending to stay there as long as he can”.

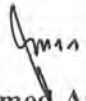
12. Lord Morris of Borth-Y-Gest in **British Railways Board V Herrington** (1972) A.C. 877 explained the term 'trespasser'. It is a case involving occupiers' liability and His Lordship said at page 904 that:

"The term 'trespasser' is a comprehensive word; it covers the wicked and the innocent; the burglar, the arrogant invader of another's land, the walker blindly unaware that he is stepping where he has no right to walk, or the wandering child - all may be dubbed as trespassers".

13. According to the above two decisions the defendant, who does not have consent either from the plaintiffs or late Prasad, is the squatter and trespasser to the subject property. He has no right whatsoever to defend the summons and to remain in possession of the subject property. He ought to be evicted with other occupants of the subject property with immediate effect.
14. Therefore, I make following final orders:
- a. The defendant and other occupants of the subject property are hereby ordered to immediately deliver the vacant possession of the subject property to the plaintiffs, and
 - b. The parties to bear the costs of this application.

At Lautoka
25.04.2023




U. L. Mohamed Azhar
Master of the High Court