

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

**Civil Action No: HBC 156 of 2022**

**BETWEEN** : **ARJESH SAMI** and **ATISH SAMI** both of Vuci Road, Waituri, Nausori,  
Salesperson and Driver respectively.

**PLAINTIFF**

**AND** : **ALENA QIQI** of Vuci Road, Waituri, Nausori, Occupation unknown.

**DEFENDANT**

**Counsel:** Plaintiff: Mr. B. Ram

Defendant: In person

**Date of Hearing:** 11.04.2023

**Date of Judgment:** 31.05.2023

**JUDGMENT**

**INTRODUCTION**

1. Plaintiffs had instituted this action for eviction in terms of Order 113 of High Court Rules 1988(HCR). Plaintiff state there are other occupants whose names were not known to Plaintiff in submission. Defendant had filed an affidavit in opposition and stated that she had invited Plaintiff's mother to the premises in 2003, when they were destitute, and had also with the help of neighbours built a house close to hers. Plaintiffs state that they obtained an Agreement for Lease for an area of '1172 square meters ( Subject to Survey)' for Residential Purpose in terms of Regulation 12 of Itaukei Land Trust (Leases and Licences) Regulation 1984 . Plaintiff had not complied with mandatory requirement in terms of Order 113 rule 4(2)(a) and (b) of HCR. Apart from that Order 113 of HCR, cannot be resorted by one illegal occupant who stole a march over another, on an 'agreement to sale' where the area is not certain and had remained 'subject to survey' since 2010 in undefined state. Defendant state that she had invested in the land where she lived since 1997, prior to arrival of Plaintiffs as young children to her house as squatters.

**FACTS AND ANALYSIS**

2. According to Defendant she had come in to the occupation of the land in 1997 and had allowed Plaintiffs' mother to reside when she was a destitute as single mother in 2003 when they arrived to the land they were assisted by Defendant to set up a dwelling close to her-house.

3. After that Plaintiffs were able to obtain an agreement to lease on the land already occupied by Defendant since 1997.
4. Plaintiffs obtained an Agreement for Lease from iTaukei Land Trust Board for a period of fifty years from 2007, for an area of '1172 square meters(subject to survey)' for residential purposes.
5. Order 113 rule 1 of HCR states
 

“Where a person claims possession which he or she alleges solely occupies by a person or persons (.....) who entered in to or remained in occupation without his or her licence or consent...”
6. Plaintiffs claim for possession is based on Agreement for Lease entered in 2010.
7. It is undisputed that Defendant had been in occupation of the premises since 1997 and she had invited Plaintiffs' mother to the land on or around 2003 and Defendant had remained in her possession.

Non-compliance of Mandatory provisions contained in Order 113 of High Court Rules.

8. Order 113 is specially 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 Dajemal and others* [1980] W.L.R 1301; [1980] 2 All ER 743.
9. So, in order to safeguard rights of the people who are subjected to an order made in terms of Order 113 of HCR, special procedural 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 any other party interested and or in occupation.
10. Plaintiff stated in affidavit in support that there were other parties in occupation and they were causing nuisance to Plaintiffs.
11. Order 113 rule 4 of HCR, deals with the service of the Originating Summons and it states as follows

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‘4(1) 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-

Personally or in accordance with Order 10,rule 5 or

By leaving a copy of the summons and of the affidavit or sending them to him, at the premises; or

In such other manner as the Court may direct.

(2) 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 directs 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"**. (emphasis added)

12. From the above it is clear that personal service and compliance of Order 114 rule 4(2) (a) and (b) are essential, unless specific direction sought from court.
13. The affidavit of service does not indicate compliance of Order 113 rule 4(2) (a) and rule 4(2)(b) of the HCR. This is a mandatory, unless court had made directions to deviate. Affidavit of service only state that several attempts were made before successfully personally served the Defendant. So there is no evidence of compliance of mandatory requirements.
14. Plaintiff's solicitor had not sought any order from court for directions to deviate from mandatory requirements under Order 113 rule 4(2) (a) and (b) of HCR.
15. There is no request by Plaintiff or for an order of the court to deviate from such procedure, hence no deviation from additional, specified method of service as stated in Order 113 rule 4(2) (a) and (b) of HCR.
16. Order 113 rule 4(2)(a) and (b) of HCR, is specifically designed to give notice not only to the named Defendant but also for any other person as the order obtained under said Rule can be applied to any occupant, and not confined to the Defendant.
17. So, Order 113 rule 4(2) HCR, is a mandatory provision and lack of evidence of such compliance of that is fatal irregularity for this action.
18. This is a mandatory provision since the procedure adopted in Order 113 of HCR was for a special purpose for recovery of possession of a premises which may affect basic right to shelter, that has guaranteed in the Bill of Right of the Constitution of Fiji.

19. It is imperative to strict compliance considering the serious consequences to occupants who had been in occupation for over twenty five years as their only place of living, being taken over by a person who was invited to the premises by Defendant.
20. Any order for possession obtained in terms Order 113 of HCR can be an order in character of an action *in rem* and this is an additional reason to give all the occupants notice of action. Apart from that this nature of the action also requires that the *rem* to be clearly defined at the execution due to application of Order 113 rule 7 HCR, which overrides the general provision for execution, found in Order 45 rule 2 of HCR. These are specific provisions for speedy, summary eviction, which needs strict compliance.
21. It is clear that the Order 113 of the High Court Rules of 1988 was for special purpose and it can be used for that special purpose only. If not it would lead to an abuse of process and denial of due process for the affected parties including defendant.
22. Supreme Court Practice 1988 (White Book) 113/1-8/1 describing the scope of analogous provision in UK at p1470

‘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 licence, except perhaps where there has been the grant of a licence for a substantial period and the licence holds over after the determination of the licence. (...)’ (emphasis added)

23. An order can be obtained in relation to the premises as opposed to a named defendant. So the uncertainty of the premises considering that area of land is confined to ‘1172 square meters **subject to survey**’ also makes the *rem* being uncertain due to several factors. One main factor is that the area of the land is small hence not clear to execute without interference with Defendant’s occupation as the area remained undefined as it is ‘subject to survey’.
24. It is undisputed that Plaintiffs and Defendants were in occupation as squatters for a considerable time and Plaintiffs were able to obtain an ‘Agreement to Lease’ for an area ‘subject to survey’ and that area is 1172 square meters. Defendant had invested in the premises by building a house prior to Plaintiffs came to the land as squatters.
25. Supreme Court Practice (UK) 1988(White Book) at p 1470 113/1-9/1 stated

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“..... 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”

26. In my mind considering the circumstances of this case one cannot state it as uncontested and clear case. Defendant in her affidavit in opposition stated that she had come to the possession of the land in 1997 and had occupied in her house investing money over the years and also making improvements. She had made improvements to the land and had allowed Plaintiffs' mother to occupy her house, till a house was constructed close to her house. So it is not a clear case for Plaintiff to seek eviction in terms of Order 113 of HCR, due to the circumstances.
27. Plaintiffs had obtained the 'Agreement to Lease' executed in 2010. Parties had remained in possession as they did prior to 2010 for more than 12 years and no survey was done.

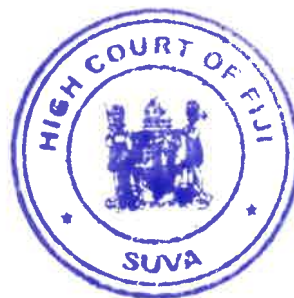
#### CONCLUSION


28. Plaintiffs had admitted that there are occupants other than Defendant in the affidavit in support. Plaintiffs had not complied with Order 113 rule 4(2)(a) and (b) of HCR which are mandatory to obtain a summary eviction in terms of Order 113 of HCR. Originating Summons struck off. Considering circumstance of the case no cost awarded.

#### FINAL ORDERS

- a. Originating summons filed on 10.5.2022 struck off.
- b. No costs.

DATED this 31<sup>st</sup> day May, 2023.



  
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Justice Deepthi Amaratunga  
Judge High Court, Suva