

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 159 of 2019

IN THE MATTER of an Application of
Order 113 High Court Rules

BETWEEN: ANARETA VIRIVIRI CAMA of 28A Cape Hill Road, Pukekohe South
Auckland, New Zealand.

PLAINTIFF

AND: LOLOHEA MANU NACOKE of Veikura No. 1 (Part of), Veisari, Lami, Fiji.

DEFENDANT

BEFORE: Hon. Mr Justice Vishwa Datt Sharma

COUNSEL: Mr. Suveinakama J for the Plaintiff
Mr. Niubalavu P for the Defendant

Date of Ruling: 7th December, 2023 @ 9.30am

DECISION

[Order 113 - Recover possession of Land]

Introduction

1. The Plaintiff filed further Amended Originating Summons on 10th November 2022 and sought for the following orders:
 - 1) An order under Section 113 of the High Court Rules of Fiji that the Plaintiff do recover possession of the land known as Veikura No.1 (part of) in the Tikina of Suva in the Province of Rewa with an area of 0.4061 Hectares (subject to survey) - TLTB No. 4/16/40306 on the grounds that it is entitled to possession and that persons in occupations are in occupation without any proper legal documentation or legal consent of the Plaintiff.
 - 2) An Order that costs of this Application be paid by the Defendant by herself, her servants and/or agents to the Plaintiff.
 - 3) Such further and/or other relief(s) as the Honourable Court may deem just and expedient.
2. The Plaintiff relied on the Affidavit in Support to the Further Amended Originating Summons deposed by Law Clerk, Ruci Waqa.
3. The Defendant filed its Affidavit in Opposition on 25th July 2019.

Plaintiffs Case

4. The Plaintiff is the registered proprietor of the property situated at Veikura No. 1 (part of) TLTB No. 4/16/40306, an Agreement for Lease and seeks to recover the possession of the said property.
5. The Defendant has been in occupation of the Plaintiff's property and no record of any rental paid by the Defendant. How the Defendant is in occupation of the property is not clear to the Plaintiff.
6. Notice to quit was served and acknowledged by the Defendant on 14th October 2018 and till to date, the Defendant continues to occupy the property without any lawful authority and/or Consent of the Plaintiff.
7. The Amended originating summons was accordingly served onto the Defendant which was acknowledged by the Defendant.

Defendant's Contention

8. The Plaintiff is not the registered proprietor of the land occupied by the Defendant and his family.
9. The Defendant had occupied the land and living on for more than 20 years.

10. The Plaintiff is only relying on an Agreement for Lease purportedly issued in July 2018.

Determination

11. This action is brought under Order 113 Rule 1 of the High Court Rules 1988 which deals with summary proceedings for possession of land and Rule 1 reads as follows:

"where a person claims possession of land which he or she 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 or her licence or consent or that of any predecessor in title of his or her, the proceedings shall be brought by originating summons in accordance with the provisions of this Order

12. The Question for this Court to determine is whether the Plaintiff is entitled to possession under this order? To make a determination, the Court has to consider the scope of the order. The Supreme Court Practice, 1993 Vol, Order 113 1-8], at page 1602 refers and the relevant portion reads as:

'This order does not provide a new remedy, but rather a new procedure for the recovery of possession of land which is in wrongful occupation by trespasses.'

13. As to the application of this order, it further states as:

"The application of this order is narrowly confined to the particular circumstance described in rule 1, i.e. to the claim for possession of land which is occupied solely by a person or persons who entered into or remain in occupation without the Licence or consent of the person in possession or of any predecessor of his. The exceptional machinery of this order is plainly intended to remedy an exceptional mischief of a totally different dimensions from that which can be remedied by a claim for the recovery of land by ordinary procedure by Writ followed by Judgment in default or under Order 14. The Order applies where the occupier has entered into occupation without licence or consent; and this order also applies to the person who has entered into possession of land with a licence but has remained in occupation without a licence, except perhaps where there has been the grant of a licence for a substantial period and the licensee holds over after the determination of the license (*Bristol Corp v Persons Unknown*) [1974] 1 WLR 365, [1974], 1 ALL ER 593."

14. The Plaintiff's Contention is that the persons are in occupation of the Land without any proper legal documentation or Legal Consent of the Plaintiff.

15. However, the Defendants Contention is that -

- The Plaintiff is not the registered proprietor of the land occupied by the Defendant and his family.
- That she has occupied the land that she is living in for more than 20 years.

- The Plaintiff is only relying on an Agreement for lease purportedly issued in July 2018.
16. It is for the Defendant to establish that he entered into or remained in occupation with the Plaintiff's consent or licence.
 17. The Defendant does not explain how she came to occupy the said land for over the period of 20 years.
 18. The photocopy Agreement for lease doesn't show that the Defendant has any equitable interest.
 19. This Court has perused the affidavit in support filed in support of originating summons and has taken into consideration that when the Initial application was filed, Ruci Waqa in her capacity as a Law Clerk had deposed the Affidavit in Support to the Originating Summons on the authority of the Plaintiff. this founding Affidavit filed in Support of the application annexed with a duplicate copy of the photocopy Agreement for Lease impressed with the word 'Cancelled' stamp and not duly authenticated under the hand and seal of the Registrar [Section 18 of the Land Transfer Act refers]. The Certified True Copy needs to be freshly obtained at the time of filing/commencement of the application that has not been done.
 20. However, it is noted that the Instrument of Title establishing evidence of proprietorship [Agreement for Lease] does show that the Plaintiff Anareta Viriviri Cama is the Lessee therein
 21. Order 113 is effectively applied with regard to eviction of squatters or trespasses. 'A Trespasser' is a person who has neither right nor permission to enter on premises.
 22. The initial affidavit in support of the originating summons filed on 27th May 2019 states that:
 - The Defendant has occupying the Plaintiff's property for a long time and the Plaintiff holds no record of any rental paid.
 - The Exact term of occupancy is not clear to the Plaintiff nor how the Defendant is in possession of the property
 - The Defendant has not been paying any rental to the Plaintiff and must now immediately give vacant possession to the Plaintiff.
 23. The application was amended twice together with the affidavit in support. The initial affidavit filed into court on 27 May 2019 was deposed by the Plaintiff Anareta Viriviri Cama and subsequent affidavits were deposed by Law Clerk Ruci Waqa.
 24. None of the affidavits upon perusal show or establishes that fact that the Defendant is occupying the Plaintiff's land without licence and/or consent, nor does it state that the Defendant is a Trespasser as per the requirements of order 113 rule 3(c) of the Land Transfer Act. Further, the founding affidavit deposes that the Defendant has been occupying the Plaintiff's property for a long time and is unaware of the exact term of occupancy nor does he know how the Defendant got in possession of the said property.

25. It is also interesting to note that the Agreement for lease was issued to the Plaintiff on 08th November 2018 whilst it is noted that the Plaintiff's affidavit suggest that the Defendant has been occupying the property for a long time and exact term of occupancy is unknown to the Plaintiff and therefore it can be concluded that the Defendant has been occupying the land in question way before the Plaintiff was issued with the Agreement of Lease on 08th November 2018.
26. The Defence Counsel also raised the issue of the swearing of affidavits by the Law Clerks Ruci Waqa.
27. The initial affidavit was correctly deposed and filed by the Plaintiff. However, the subsequent application sought for the amendment and the application twice. On both occasions, the affidavits were deposed by Ruci Waqa in her capacity as a Law Clerk. No doubt she was authorized to do so by the Plaintiff, however in law there are court case precedents which states otherwise.
28. Order 41 Rule 5 of the High Court Rule states -
- 5.-(1) Subject to Order 14, rules 2(2) and 4(2), to Order 86, rule 2(1), to paragraph (2) of this rule and to any order made under Order 38, rule 3, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove.
- (2) An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof.
29. This Rule clearly permits deponents of affidavit in Interlocutory matters to swear contrary statements of information or belief with the sources and grounds thereof. However, there are authorities siting where the law clerks cannot swear affidavits.
30. Reference is made to the Case of Civil Appeal No. CBV 0018 of 2019 Paul v Director of Lands which states at paragraph 16 as follows:
- '16. When Third Party (including Law Clerks/Legal Executives/Litigation Clerks) depose Affidavit on behalf of a party to the proceedings then he/she:-
- (i) must be authorised in writing by that party to depose such Affidavits;
 - (ii) must depose as to why that party and if a Company than why its director or authorized officer cannot depose the Affidavit;
 - (iii) must not depose Affidavits on basis of information or belief but depose facts the deponent has knowledge of those facts except where:
 - (a) Affidavit is in support of or in opposition to Application for Summary Judgment;
 - (b) Affidavit verifying facts in respect to action for specific performance pursuant to Order 86 of HCR only if directed by Court to do so;

- (c) Affidavit verifying evidence of facts during trial when directed by Court to do so pursuant to Order 38 Rule 3 of HCR.
- (iv) may depose Affidavits in support of or in opposition to interlocutory application but must do so on the basis of information received which they believe to be true and must disclose the source of such information or beliefs in addition facts that is within their personal knowledge.
31. In the current case the Deponent, Ruci Waqa has deposed facts akin to the substantive proceedings and is to the contrary of the High Court Rules 1988.
32. She has included the Agreement for Lease at annexure 'C' which is not in compliance of Section 18 of the Land Transfer Act, which requires her to annex a fresh original and/or a Certified True Copy duly endorsed by the Registrar of Titles in order to confirm the Registered lessee and/or proprietor of the property in question. Instead, the Agreement for Lease annexed is a photocopy of the Certified True Copy with no date endorsed as well.
33. Further, the amended affidavit in support of the Law Clerk filed on 24th February 2021 does not mention anything about the Defendant's occupation of the Plaintiff's property without licence or consent and whether the Defendant is a Trespasser.
34. Order 113 Rule 3 of the High Court Rules, 1988 provides that the Plaintiff shall file in supports of this originating summons and affidavits stating:
- a. His interest in the land;
 - b. The circumstances in which the land has been occupied without licence or consent and in which his claim to possession arises;
 - c. That he does not know the name of any person occupying the land who is not named in the summons [The originating summons application states 'Defendants' and 'Persons no occupation.']

In Conclusions

35. Order 113 of the High Court Rules 1988 was meant for special purpose and special procedural methods are in place to mitigate special circumstance and consequences of an eviction order, in terms of the said property.
36. Special procedures in terms of Order 113 contains mandatory procedures-as discussed hereinabove that the Plaintiff has not complied in the current application. The Plaintiff has adopted a wrong provision of the Law in seeking possession and had failed to establish a right over the property.
37. For the aforesaid rational, I find that the Plaintiff's application is fatal and proceed to dismiss the application accordingly.

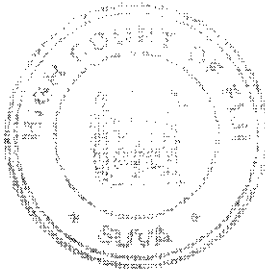
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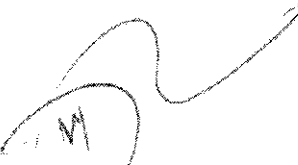
38. Although the application proceeded to full hearing, it is at the discretion of this Court that the parties to the proceedings bear their own costs of the action accordingly.

Orders

- i. Plaintiff's amended originating summons filed on 10th November 2022 is dismissed.
- ii. The parties to this proceedings to bear their own costs at the Discretion of this Court.

Dated at Suva this 7th day of December, 2023.




VISHWA DATT SHARMA
JUDGE

Cc: Toganivalu Legal, Suva
Oceanica IP, Suva

