

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 227 OF 2021

BETWEEN : **KAZAMA ALI KHAN** of Lovu, Lautoka, Fiji, Welder and
MOHAMMED AFIF KHAN of Drasa Avenue, Lautoka,
Fiji, Property Manager as Administrators and Trustees
of Estate of **HAZRA BIBI.**
PLAINTIFFS

AND : **SHIU KUMAR aka SHIU PRASAD** aka **SHIU** of
Kalacraft Industrial Subdivision, Lautoka.
DEFENDANT

Before : Master P. Prasad

Counsels : Ms. N. Khan for Plaintiffs
Defendant in Person

Date of Hearing : 8 August 2024

Date of Decision : 13 September 2024

JUDGMENT

(Vacant possession – Order 113)

1. The Plaintiffs' have instituted this action pursuant to Order 113 of the High Court Rules 1988 for immediate vacant possession of all that piece of land contained within Housing Authority Sublease No. 479012 more particularly described as Lot 03 on DP 6561 in the District of Vuda and Province of Ba having an area of 1278m² (Property).
2. The Plaintiffs are the Administrators of the estate of Hazra Bibi. Hazra Bibi's estate currently owns one undivided half share in the Property. The other undivided half share is owned by the Plaintiffs' brother, Mohammed Aslam.
3. The Plaintiffs argue that the Defendant has been unlawfully occupying their Property without consent since 2017.

4. The Defendant in his Affidavit in Opposition states that he was brought onto the Property in September 2016 by Mohammed Aslam as a caretaker and was advised that the Defendant would be paid \$7,000.00 per month as remuneration for looking after the Property. The Defendant further avers that if Mohammed Aslam pays him his alleged outstanding salary of \$49,000.00, he is willing to vacate the Property.
5. Both parties admit that Mohammed Aslam had filed legal proceedings to evict the Defendant in 2017. However, this case was dismissed because Mohammed Aslam was out of the country at the time and was not represented in court. The Defendant acknowledged that there was an eviction proceeding initiated by Mohammed Aslam but he was not aware what happened thereafter in those proceedings.
6. The Plaintiffs issued separate notices to the Defendant to vacate the property on 9 January 2017, 8 February 2017, 16 February 2017, and 18 March 2021(Notices). The Defendant acknowledges receiving the Notices.
7. Order 113 states that:

“Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being tenants of tenants holding 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 provision of this Order”

8. Footnote 113/1-8/1 of the 1997 Supreme Court Practice at page 1653 reads:

“The application of this Order is narrowly confined to the particular circumstances described in r.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 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 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 licence (Bristol Corp. v. Persons Unknown) [1974] 1 W.L.R. 365; [1974] 1 All E.R. 593). The Court, however, has no discretion to prevent the use of this summary procedure where the circumstances are such as to bring them within its terms, e.g. against a person who has held over after his licence to occupy has terminated (Greater London Council

v. Jenkins [1975] 1 W.L.R. 155; [1975] 1 All E.R. 354) but of course the Order will not apply before the licence has expired (ibid.). The Order applies to unlawful sub-tenants (Moore Properties (Ilford) Ltd v. McKeon [1976] 1 W.L.R. 1278)."

9. Order 113 outlines a summary procedure for possession of land and Master Azhar (as he then was) in **Prasad v Mani** [2021] FJHC provided a detailed analysis of its purpose and application which I gratefully adopt. Master Azhar further stated that *"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 the current owner or his predecessor in title."*

10. Thus Order 113 is in essence applied for eviction of squatters or trespassers.

11. Goulding J in **Department of Environment v James and others** [1972] 3 All E.R. 629 said that:

"where the plaintiff has proved his right to possession, and that the defendant is a trespasser, the court is bound to grant an immediate order for possession".

12. Master Rajasinghe (as he then was) in **Raliwalala v Kaicola** [2015] FJHC 66 on the application of Order 113 stated as follows:

"6. In view of Order 113, a person who has a legal right to claim the possession of a land could institute an action, claiming the possession of said land against a person who has entered into or remains in occupation without his license or consent or that of any predecessor in title.

*7. The main purpose of Order 113 is to provide a speedy and effective procedure for the owners of the lands to evict persons who have entered into and taken the occupation of the land without the owner's license or consent. They can be defined as trespassers or illegal occupants. These trespassers or illegal occupants have sometimes been referred to as squatters. In **Mcphail v Persons unknown**, (1973) 3 All E.R.394) Lord Denning has observed "the squatter" as a person who without any colour of right, enters into an unoccupied house or land and occupies it. His Lordship found that in such instances, the owner is not obliged to go to court to regain his possession and could take the remedy into his own hands, which indeed, recommended as an unsubstantial option. Therefore, Order 113 has provided the owners a speedy and effective procedure to recover the possession instead of encouraging them to take a remedy of self-help.*

8. The proceedings under Order 113 encompass two main limbs. The first is the onus of the plaintiff. The Plaintiff is first required to

satisfy that he has a legal right to claim the possession of the land. Once the plaintiff satisfies the first limb, the onus will shift towards the defendant, where the Defendant has burdened with to satisfy the court that he has a licence or consent of the owner to occupy the land.”

13. Justice Stuart in **Kant v Nair** [2021] FJHC 89 held that:

“Because of the summary nature of an application under Order 113, and because of the wording of the rule itself, it is clear that the court does not, in an application for possession, embark on an assessment of the balance of convenience. Instead, if the defendant is able to present evidence and/or argument that reaches the ‘serious question’ level as to both fact and law, he is entitled to have the application under section 113 dismissed, so that the plaintiff pursues its application for possession in ordinary proceedings where the issues raised can be properly explored and decided.”

14. Therefore, a plaintiff seeking relief from this Court under this Order must demonstrate that: (i) they have the right to possess the land in question; (ii) they are claiming possession of the land currently occupied by the defendant; and (iii) the defendant, whom the plaintiff aims to evict, is someone who has entered and remained on the land without the plaintiff's (or any predecessor in title) permission or consent.
15. The Plaintiffs have attached a certified true copy of Housing Authority Sublease No. 479012 to their Affidavit in Support. This Sublease was issued to Hazra Bibi and Mohammed Aslam, and the Plaintiffs are the Administrators of Hazra Bibi's estate. A copy of the Letters of Administration (with the Will annexed) is also attached to the Affidavit in Support.
16. The Defendant acknowledges and does not dispute that the Plaintiffs own an undivided half share of the Property.
17. Furthermore, the Defendant admits to receiving the eviction notices but has refused to vacate the Property, based on the claim that Mohammed Aslam, who allegedly owes him payment for taking care of the Property, allowed him to be on the Property.
18. Accordingly, the main issue to be determined is whether the alleged arrangement between the Defendant and Mohammed Aslam qualifies as either a consent or a license to occupy the Property.
19. As the Plaintiffs' counsel correctly argued during the hearing, the Defendant has not presented any evidence of an agreement with Mohammed Aslam. On the contrary the Plaintiffs have shown evidence to the Court of an earlier eviction proceedings having been filed by Mohammed Aslam against the

Defendant and multiple Notices thereafter for the Defendant to vacate the Property.

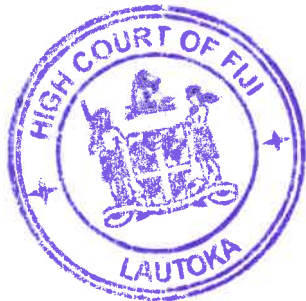
20. If the Defendant believes that Mohammed Aslam owes him money, then the Defendant has a claim "*in personam*" but not for the possession of the Property. The Defendant has the option to pursue a separate legal action against Mohammed Aslam. However, in the current proceedings, the Defendant cannot assert a right to remain on the property without demonstrating any legal basis for his claim.

21. Therefore, I find that the Defendant has not obtained any consent or a license to occupy or remain in occupation of the Property.

22. Accordingly, I make the following orders:

(a) The Defendant is ordered to immediately deliver to the Plaintiffs vacant possession of Housing Authority Sublease No. 479012 more particularly described as Lot 03 on DP 6561 in the District of Vuda and Province of Ba having an area of 1278m².

(b) There is no order as to costs.



**At Lautoka
13 September 2024**

**P. Prasad
Master**