

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

Civil Action No. **HBC 323** of **2023**

**BETWEEN:**            **MOHAMMED FAROOQ AKA MOHAMMED FAROOD** of 31 Greenmeadows  
Ave Manurewa, Auckland, New Zealand, Taxi Proprietor.

**PLAINTIFF**

**AND:**                 **ALL OCCUPIERS AND/OR TENANTS AND/OR FAMILY MEMBERS OF**  
**MAIMUN NISHA AKA MEHMUN NISHA** of 21 Nasilivata Road, Nadera,  
Suva, property described as Certificate of Title No. 17598 being Lot 21 on  
Deposit Plan No. 4257 situated in the District of Naitasiri on the island of  
Viti Levu.

**DEFENDANTS**

**BEFORE**            :        **Hon. Justice Vishwa Datt Sharma**

**COUNSEL**        :        **Mr. Kumar V. for the Plaintiff**

**Ms. Singh N. with Mr Khan S.A. for the Defendants**

**DATE OF JUDGMENT:** 24<sup>th</sup> September, 2024

**JUDGMENT**

*[Summary Possession of Land under order 113 of the High Court Rules  
1988]*

On the outset, the substantive originating Summons seeking for Vacant Possession is against all the occupiers, tenants and family members of Maimun Nisha. Vacant Possession Order was already granted by consent against Maimun Nisha on 19<sup>th</sup> October, 2022.

**A. Introduction**

- (1) The Plaintiff commenced proceedings for Summary possession of Land under the provisions of order 113 of the High Court Rules, 1988 occupied by **all occupiers and/or Tenants and/or family members of Maimun Nisha aka Mehmun Nisha being the property of the Plaintiff described as Certificate of Title No. 17598** being Lot 21 on Deposit Plan No. 4257 situated in the District of Naitasiri in the Island of Viti Levu.
- (2) The Defendants filed an affidavit in Opposition.
- (3) Both parties to the proceedings furnished Court with their respective written submission.

**Plaintiff's Contention**

- (4) That Mohammed Farooq is the registered proprietor of the said property Certificate of Title No. 17598, on Lot 21 on Deposit Plan No. 4257.
- (5) I have already obtained order against Maimun Nisha for Vacant Possession.
- (6) During Maimun Nisha's stay, she allowed other people, her family, other occupants and even had a portion of the premises on rent to tenants without Plaintiff's knowledge, without Plaintiff's consent and approval to persons unknown to the Plaintiff, despite injunctive orders made against her.
- (7) By consent, subsequently writ of possession order was granted and she vacated the Land.
- (8) Notice to quit and deliver vacant possession dated 04<sup>th</sup> October 2023 against Occupiers and/or Tenants and/or Family members of Maimun Nisha were served on 05<sup>th</sup> October 2023.

- (9) That the Plaintiff's Solicitors also pasted and affixed the notice on the walls of the dwelling on Plaintiff's property.
- (10) Occupiers and/or Tenants of Family members of Maimun Nisha are 'Trespassers' and have continued forceful possession of Plaintiff's property and are in continued occupation of the property and failed to comply with the Notice to Quit.

**Defendant's Contention**

- (11) The affidavit in opposition is deposed by lawful spouse of Maimun Nisha.
- (12) Whilst the title acknowledges that the Plaintiff is the owner of the property, Mohammed Yunus has been residing on the property with his wife Maimun Nisha and son for the last 30 years since Maimun was entitled to the said property by way of a Will dated 17<sup>th</sup> April 2012.
- (13) The said property was not Sub-let to any Tenants, not developed since Injunctive Orders were in place.
- (14) We were authorized to stay in this property by his late father in law - Mohammed Hanif.
- (15) Maimun Nisha does not reside on the property.
- (16) He did not see any notices affixed on the said property.
- (17) He possess proprietary interest in the property since he has carried out substantial on investment in alterations and extension of the property and maintenance of the property over numerous years. The maintenance of the property was done with Plaintiff's authorization.
- (18) Diligently discharged Town Council Rates and other utility Bills.
- (19) Apart from his spouse, Maimun Nisha [until order made for Vacant possessions], his son along with his spouse and children, reside within the premises in question and no other individuals occupy the said property.

(20) The Plaintiff's decision to pursue the application under Order 113 is utterly unwarranted given that we do not fall under category of 'Trespassers'. Application to be made in terms of Section 169 instead.

(21) Plaintiff is aware that I have been occupying the property with the family and spent substantial amount of money to maintain and repair this property and have proprietary estoppel.

### **Determination**

(22) The Plaintiff filed this action under *Order 113 of the High Court Rules, 1988* which inter alia in Rule 1 provides:

*"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."*

(23) The issue for Court's determination is **'whether the Plaintiff is entitled to possession as sought for in his application under Order 113?'**

(24) In Order to determine the above issue, this Court needs to consider the scope of the order which can be found in *'the Supreme Court Practice 1993 Vol. 1, Order 113/1-8/1 at page 1602* and relevant portions are stated in this regard - As per Pathik J in *Baiju v Kumar [1999] Fiji Law Report 23; [1999] 45 FLR 74 (3) (31 March 1999)*:

*"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 Trespassers."*

*"This 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.](#)"*

*This Order is narrowly confined to the particular remedy stated in r.1. It is also to be noted, as the White Book says at p.1603:*

*"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 on the land without licence or consent and without any right, title or interest thereto."*

- (25) I have carefully heard the parties to the proceedings to their oral submissions. I have also perused their written submission and the affidavit evidence in Court file and taken all into consideration.
- (26) In terms of the facts that I have found before me is that initially an application for Vacant Possession order was sought against Maimun Nisha and accordingly granted by this Court on 19<sup>th</sup> October 2022.
- (27) Subsequently, the Writ of Possession was accordingly granted.
- (28) However, the Defendant remained on the said property and filed an application for leave to appeal and stay of Writ of Possession which accordingly was dismissed by this Court.
- (29) Subsequently, Maimun Nisha filed an application for Setting Aside Consent Orders and sought for an Interim Stay which was also dismissed.
- (30) However, the Defendant stated in his affidavit in opposition that his legal spouse Maimun Nisha, him and son have been in occupation of the said property for the last 30 years since Maimun Nisha was entitled to the property by way of her father's a Will dated 17<sup>th</sup> April 2012.

- (31) Whether Maimun Nisha, other occupiers of the property were trespassers or not had not been encountered by Maimun Nisha and other occupiers?
- (32) Whether at the time the application for a Probate Grant was sought by the Plaintiff, if Maimun Nisha had challenged the Will or not? There is no evidence of this as such before me.
- (33) She further stated that she has incurred expenditure on the property in order to maintain the property and paid town rates and utility Bills.
- (34) It is a fact that after this Court granted an order for Vacant Possession against Maimun Nisha by consent that she had a afterthought and made sure that the Plaintiff is unable to completely have the said premises vacated instead get other occupiers and or Tenants and or family members onto the premises to block the Plaintiff from acquiring the vacation of the said property and premises.
- (35) Hence, above prompted the Plaintiff to file the current application and seek orders for summary possession of land.
- (36) Mohammed Yunus asserts and has deposed that "I, along with other occupants being his son and children, possess a **proprietary interest** in the said property." This is substantiated by substantial investment in alterations to the property preceding the injunction, as well as extended maintenance of the property over numerous years." He raises a Defence of '**Proprietary Estoppel**'.
- (37) The Counsel representing the Defendants emphatically asserted that a pivotal consent was granted by the deceased, Mohammed Hanif who was the father of the Defendant's spouse, Maimun Nisha. The consent pertained to the perpetual occupation of the property by her and her family.
- (38) The Defence Counsel submitted that "the Plaintiff has portrayed the Defendants and their family as trespassers, despite the fact that they are, in fact, rightful members of his family with legitimate entitlement to the property in question."

(39) The Defence also asserts that "the Plaintiff's application be dismissed with costs due to failure to comply and inability to meet the requirements of Order 113, Rule 3 (c) and appropriate cause if action would have been to initiate proceedings under Section 169 of the Land Transfer Act, 1971.

### **Proprietary Estoppel**

(40) The concept of proprietary estoppel is to provide a person with rights in land that they were led to believe they had by another party.

(41) The Defence of Proprietary and Promissory estoppel were raised by Maimun Nisha [Defendant] in her Civil Case No. HBC 133 of 2017.

(42) However, she was represented by Legal and Commission and consented to Vacant Possession Order which the Court granted on 19<sup>th</sup> October 2022 accordingly. Therefore, the Defence of Proprietary and Promissory Estoppel cannot be challenged in the current proceedings.

(43) By virtue of consent entered for Vacant Possession order, the Defendants have waived their rights to plead this defence as a triable issue in the current case.

### **Trespasses**

(44) In *Department of Environment v James and others* (1972) 3 All E.R. 629 **Squatters and Trespassers** are defined as:

"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..."

There Goulding J. said that:

"--- where the Plaintiff has proved his right to possession, and that the Defendant is the Trespasser, the Court is bound to grant an immediate order for possession....."

- (45) The Defendants herein are occupants, Tenants and/or family members of Maimun Nisha who was already evicted by Consent whilst in occupation of the same property in question on 19 October 2022.
- (46) The Defence reliant on the affidavit in opposition filed and deposed on behalf of the Defence has failed to establish that the occupiers, tenants and/or family members including Mohammed Yunus, the Legal spouses of Maimun Nisha are not trespassers and/or was given licence by the Plaintiff to occupy and reside on the said property even if Mohammed Yunus the Legal spouse of Maimun Nisha asserts that they have lived on the said property for last 30 years, whether if they had any right and entitlement in Law should have made an application for a 'vesting order'. There is no evidence that any vesting order application was made by anyone before this Court.
- (47) The other issue raised by defence was fulfillment of requirements of Order 113 rule 3 (c) which has a mandatory requirement when seeking for vacant possession order where other occupiers whose names are unknown to the Plaintiff but occupying the said property in question as occupiers'.
- (48) The affidavit in support of Mohammed Farooq deposes all relevant facts with regards to occupiers, tenants and/or Family members of Maimun Nisha.
- (49) Even an affidavit of service is filed into Court by one Suresh Prasad who deposes that:
1. Personally served a lady at the said premises who claimed to be the sister of the within named Plaintiff and was having issued regarding the land. She received all three (3) documents [originating summons, affidavit in support, acknowledgement of service and but refused to acknowledge the receipt of the service.
  2. Personally pasted and affixed all three (3) documents on the wall of the dwelling at the most conspicuous part of premises in front of the lady.
- (50) Therefore, I find that the requirements of Order 113, Rule 3 (c) was fully complied with by the Plaintiff.



### **In Conclusion**

- (51) The occupiers, tenants and/or the family members including Mohammed Yunus (as the Legal spouse of Maimun Nisha) did not have any **licence** and/or **consent** of the Plaintiff to occupy and continue occupation of the said property and premises in question i.e. **Certificate of Title no. 17598 being lot 21 on Deposited Plan no. 4257** situated in the District of Naitasiri in the Island of Viti Levu.
- (52) By virtue of the consent by Maimun Nisha for grant of vacant possession order in Civil Case No. 133 of 2017, the occupiers, tenants and family members of Maimun Nisha including the Legal spouse Mohammed Yunus have all waived their rights to plead any triable issues, including the **defence of proprietary and promissory estoppel**.
- (53) The Plaintiff has fully complied with the requirements of *Order 113, rule 3 (c) of the High Court Rules, 1988*.
- (54) Further, the Plaintiff has complied with the requirements of *Order 113, rule (4) (2) of the High Court Rules 1988* in terms of "service of the originating summons, affidavits and other documents including 'Notice to Quit'."
- (55) If there was any authorization given to Maimun Nisha in her deceased father's Will, then she should have challenged the Will when the grant of probate was being sought by the Plaintiff in the deceased estate.
- (56) Not only that, but I do not find and the defence has failed to establish that there was any 'authorization' for Maimun Nisha leave alone other occupiers, Tenants and family members of Maimun Nisha having any **authority, licence and/or consent** to occupy and reside on the Plaintiff's property in question.
- (57) Taking above into consideration, I have no alternative but proceed to grant the order the Plaintiff seeks in his substantive originating summons filed on 24 October 2023 as follows:
- (58) 'The Plaintiff to recover possession of premises situated at 21 Nasilivata Road, Nadera, Suva, property described as **Certificate of Title No. 17598 being Lot 21 on Deposited Plan no.**

**4257** situated in the District of Naitasiri in the Island of Viti Levu on the ground that the Plaintiff is entitled to possession and the person (s) in occupation 'all occupiers, tenants and/or family members of Maimun Nisha, in occupation are in occupation without licence or consent and if I add without any authorization of either the deceased and/or the Plaintiff respectively.

### **Costs**

- (59) The matter proceeded to full hearing on the summary proceedings (originating summons) and parties to the proceedings furnish court with written submissions and argued the matter orally, further, there has been a couple of application made prior to the filing of the current HBC No. 323 of 2023 and taken a long time for its disposition and vacation of the Plaintiff's property in question.
- (60) Accordingly, this Court imposes a summary assessed costs on the occupiers/tenants and family members of Maimun Nisha fixed at \$3,000 [if the Plaintiff is able to identify the defendants]
- (61) Following are the orders of this Court.

### **Orders**

- (i) The Plaintiff's originating summons of 24<sup>th</sup> October 2023, succeeds.
- (ii) The Plaintiff to recover possession of premises situated at 21 Nasilivata Road, Nadera, Suva property described as **Certificate of Title No. 17598 being Lot 21 on Deposited Plan no. 4257** situated in the District of Naitasiri in the Island of Viti Levu on the grounds that the Plaintiff, Mohammed Farooq aka Mohammed Farood is entitled to possession of the said property and that the persons in occupation "all occupiers, tenants and/or family members of Maimun Nisha" are in occupation without licence and/or any consent.

- (iii) All occupiers, tenants and family members including Mohammed Yunus to pay the Plaintiff a summarily assessed costs of \$3,000 accordingly.

Dated at **Suva** this **24<sup>th</sup>** day of **September** ,2024.



VISHWA DATT SHARMA  
PUISNE JUDGE

CC: SUNIL KUMAR ESQUIRE, NAUSORI  
MESSRS. NAMBIAR LAWYERS, SUVA