

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No HBC 249 of 2020

BETWEEN : **RIDGEVIEW ESTATE PTE LTD** a limited liability company
having its registered office at 51-55 Foster Road, Walu Bay,
Suva, in the Republic of Fiji.

PLAINTIFF

AND : **THE OCCUPANTS**

DEFENDANTS

Coram : **Banuve, J**

Counsels : **V. Filipe for the Plaintiff**
B.Ram and V.Bukayaro for the Defendants

Date of Hearing : **26th July 2024**

Date of Ruling : **09th December 2024**

RULING

A. Introduction

1. On 20 August 2020, the Plaintiff filed an Originating Summons pursuant to section 169 of the *Land Transfer Act* [Cap 131] and Order 113 of the *High Court Rules* 1988 in which the following orders were sought against the Defendants:
 1. **AN ORDER** that the Defendants by themselves, their servants and/or agents and/or tenants in their capacity as squatters or squatter landlords or tenants provide the Plaintiff vacant possession of all that piece and parcel of land showing iTaukei Lease No. 33510 known as Tacirua East [part of] showing Lot 1 on Plan SO 7076 and iTaukei Lease No. 33059 known as Tacirua East [part of] showing Lot 2 on Plan SO 7076 in the Tikina of Naitasiri, in the Province of Naitasiri with respective areas of 5.7973 hectares and 3.3582 hectares respectively situated at Khalsa Rd, Nasinu.
 2. **AN ORDER** that the Sheriff of the Court and/or his officers clear the said premises and remove the Defendants by themselves, their servants and/or agents and/or tenants in their capacity as squatters, landlords or tenants, and their families together with their dwelling houses, cultivated crops, all electricity and water posts, mains, pipes, meters, taps, switches and connections illegally connected to the illegal squatter housing dwellings through trespass.
 3. **AN ORDER** that the Sheriff of the Court and/or his officers with police assistance supervise the occupants to safely disconnect remove and dismantle all electricity and water posts, mains, pipes, meters, taps, switches and connections illegally connected to the illegal squatter housing dwellings through trespass.
 4. **AN ORDER** that costs of this Application be paid by the Defendants by themselves, their servants and/or agents to the Plaintiff.
 5. And for any other Order or Relief this Honorable Court deems just.
2. The Originating Summons was supported by an affidavit of Anthony Eugene Ah Koy who deposes, as follows;
 - (i) He is a Director of the Plaintiff Company and is authorized to depose the affidavit in the capacity.

- (ii) THE Plaintiff's interest is the proprietor of registered iTaukei Lease No 33510 known as Tacirua East [part of] being Lot 1 on Plan SO 7076 and iTaukei Lease No 33509 known as Tacirua East [part of] showing Lot 2 on Plan SO 7076 in the Tikina of Naitasiri, in the Province of Naitasiri with respective areas of 5.7973 hectares and 3.3582 hectares respectively, situated at Khalsa Road, Nasinu pursuant to the respective leases for Commercial Purposes, duly executed and stamped. Copies of the 99 years leases for Commercial Purposes were appended and marked 'AAK2' and 'AAK3'
- (iii) THE Plaintiff can bring section 169 and/or an Order 113 summary application for vacant and/or summary possession respectively, to be heard and determined by the Court.
- (iv) THAT he deposes matters in support of section 169 and/or Order 113 Originating Summons for orders that the Defendants and their respective families do not and did not ever have the Plaintiff's consent or approval or issued them individually with subleases, licenses or tenancies with the consent of the iTaukei Land Trust Board.
- (v) THAT the Defendants are squatters or trespassers at the said premises and they and their families /occupants have no rights to continue to stay in possession and that the Sheriff of the Court clear the said premises and remove the Defendants together with their dwelling house, cultivated crops, water pipes and meters, power lines and posts erected within the said premises.
- (vi) He has been shown section 169 of the *Land Transfer Act* [Cap 131] and advised by his solicitors that the Defendants cannot show cause why they should remain in occupation of the said premises.
- (vii) Personal service of the Defendants is impossible as their identities, details, house numbers and occupants are unknown to the Plaintiff and who have never consented to their occupation of the premises..
- (viii) He has been shown Order 113 of the High Court Rules 1988 and advised by his solicitors that Notices to Quit are not required to be served on the Defendants.
- (ix) The Plaintiff does not know of the names of any persons occupying the said premises.
- (x) Orders prayed for.

B. The Law

3. Whilst the Originating Summons have been filed pursuant to section 169 of the *Land Transfer Act* [Cap 131] and Order 113 of the *High Court Rules* 1988, the primary focus of the Plaintiff has been the application under Order 113.
4. Order 113 is entitled ‘**Summary Proceedings for Possession of Land**’

Order 113, Rule 1 states:

Proceedings to be brought by originating summons

1. *Where a person claims possession of land which he alleges is occupied solely by a person (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 license or consent or that of any predecessor in titles of his or hers], the proceedings may be brought by originating summons in accordance with the provisions of this Order.*
5. The primary issue that the Court has to determine is whether the summary process for obtaining possession of land pursuant to Order 113 of the *High Court Rules* 1988, as sought in the Originating Summons filed on 20th August 2020, is appropriate, given the peculiar circumstance of this case.
6. The Plaintiff filed written submissions on 2nd August 2024 to support its position that the orders it seeks in the Originating Summons pursuant to Order 113 be granted and relies on a ruling of the Court of Appeal in *Nair v Kant* –Civil Appeal No ABU 21 of 2021 for the following propositions;
 - (i) *The proceedings is by Originating Summons as provided in Form No 3 in Appendix [1];*
 - (ii) *The proceedings is brought by any person who has a legal right to possession of land in law and who alleges that it is unlawfully occupied by a person or persons, known or unknown;*
 - (iii) *That the occupiers have entered and remained in occupation without a license or consent.*

- (iv) *Order 113 proceedings is a summary proceeding intended to remedy an exceptional mischief different from the usual remedy of recovery of land under section 169 of the Land Transfer Act [Cap 131].*
- (v) *Its primary purpose is the recovery of possession of land, no other cause of action such as a counterclaim, or any other relief or remedy such as rent, mesne profits or claim of damages or injunction may be joined in the claim.*

7. Whilst the Court finds the general position espoused by the Court of Appeal in *Kant* as applicable, it finds it practical to refer to a series of cases from the High Court in Lautoka on the ambit and application of Order 113, which it cited in a ruling delivered in *ILTB v Kasanita Liku & Others* –Civil Action No 258 of 2022,¹as identifying certain propositions to consider when determining whether the summary procedure provided by Order 113, is appropriate for application to a particular factual matrix;

- (i) *It is necessary for the Plaintiff to show that there is no basis upon which the occupier/defendant is entitled to remain on the property (eg; the right of occupation has been terminated – NLTB v Veisamasama –HBC No 34 of 2011)*
- (ii) *If the Plaintiff cannot do so, or if there is a factual dispute about the effectiveness of the termination or if there is some other alleged basis for occupation which is contentious, an application for Order 113 will probably be not appropriate.*
- (iii) *When it comes to the Defendant's opposition under Order 113, the burden of showing that they have a case that justifies refusing the plaintiff's summary application is not particularly high, if it is based on a factual dispute. The summary nature of the jurisdiction is not suited to resolving contested issues of fact requiring evidence, cross examination etc*
- (iv) *Due to the summary nature of an application under Order 113 and because of the wording of the rule itself, the court does not embark on an assessment of the balance of convenience. If the Defendant is able to present evidence and/or argument that reaches the serious question level (neither frivolous or vexatious) as to both fact and law, he is entitled to have to have the application under Order 113 dismissed, so that the Plaintiff pursues its application for possession in ordinary proceedings where the issues raised can be properly explored and decided.*

¹ *Kant v Nair* –Civil Action No 163 of 2020; *Nadhan v Reddy* – Civil Action No HBC 131 of 2016 and 30th September 2016; *ILTB v Webb & 7 Others*-Civil Action No HBC 271 of 2019

8. In *Liku*, this Court had ruled that there was a serious question to be examined against the ILTB, as to why it had allocated a leasehold property to a lessee despite clear evidence that the same property described as '*Nairairaikikalabu (part of) Lot 34 formerly R1527 (part of) , Naitasiri*' with an area of 85 square meters had been occupied for over 18-20 years by 3 named Defendants, who had paid a specific amount for initial occupancy and a monthly amount thereafter, to the Mataqali Naulukaroa, which warranted that the matter be dealt with pursuant to ordinary proceedings, rather than by summary proceeding under Order 113,

C. Have the Defendants raised a serious issue in this instance?

9. The issues of contentious raised by the Defendants are;
- (i) There are 58 families who have built their dwelling and are currently residing on the land.
 - (ii) The Defendants have been residing on the property, to date, for more than 15 years. Prior to the i-Taukei Lease No 33509 and 33510 being granted to the Plaintiff on 6th September 2017, the land was owned by the mataqali and that all the Defendants were given consent to reside on the property after payment of certain sums of money, which differed from person to person, to the mataqali.
 - (iii) The mataqali also gave further consent to the Defendants to gain access to water and electricity for their own use as mataqali consent is a mandatory requirement. At no point in time were the Defendants advised by the mataqali that the land was to be leased to the Plaintiff. The mataqali kept coming to the Defendants for money until the Defendants received notices to vacate.

D. Analysis

10. In a brief affidavit filed on 20th August 2020 the Plaintiff deposes that it has held registered **ITaukei Lease No 33510** over land described as **Tacirua East (Part of), Lot 1, Plan SO 7076, Naitasiri** and **ITaukei Lease No 33509** known as **Tacirua East [part of] Lot 2, Plan SO 7076, Naitasiri**, with respective areas of 5.7973 and 3.3582 hectares, being 99 year leases for commercial purposes registered on 13th September 2017 and further state that the Defendants and their respective families have never received the Plaintiff's consent or approval or ever been issued a sublease, license or tenancy with the consent of ILTB, and are therefore squatters or trespassers of the said premises.

11. The Plaintiff further deposes that personal service on the Defendants is impossible as their identities, details, house numbers and occupation are unknown to the Plaintiff and who have never acquiesced to their occupation.
12. Some of the Defendants have deposed affidavits in opposition. There is similarity in the content deposed, in that whilst they do not deny the existence of ITaukei Leases No. 33510 and 33509 held by the Plaintiffs since 2017, they state that their occupation of the land preceded the grant of the said leases with the approval of representatives of the landowning mataqali, and further they had not been informed, when the subject land was given to the Plaintiff.
13. In contrast with the situation described in *Liku* the following findings are relevant, in this instance;
 - (i) The Defendants are not named, or known to the Plaintiff.
 - (ii) It is not specified which part **or** area of the land covered by ITaukei Leases No 33510 and 33509, are occupied by the Defendants.
 - (iii) It is unclear whether there is a specific number of occupants who are named as Defendants, or whether there has been a variation in numbers over time, with people leaving or others moving onto the subject land.
 - (iv) The decision of the ILTB to allocate land to the Plaintiff in 2017, instead of the Defendants, is not in issue in this proceeding as ILTB has never been joined as a party in this proceeding.
 - (v) The role of the landowning mataqali in legitimizing the occupation by the Defendants of the subject leasehold cannot assist the Defendants, as the mataqali is not joined as a party in this proceeding
14. Whilst the burden to be discharged by the Defendants of showing that they have a case that justifies refusing the Plaintiff's summary application, is not particularly high, the court is not credulous and it is not the court's function to make assumptions to fill in gaps in evidence left by the parties. In *Eng Mee Yong v Letchumanan* [1979] 3 WLR 373 the Privy Council made the following comment in a case involving the removal of a caveat;

“Although, in the normal way it is not appropriate for a Judge to attempt to resolve conflicts of evidence in an affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be. In making each order on the application as he may think just the judge is vested with a

discretion which he must exercise judicially. It is for him to determine in the first instance whether statements contained in affidavits that are relied upon as raising a conflict of evidence upon a relevant fact have sufficient prima facie plausibility to merit further investigation as to their truth “

15. This Court in *Kant v Nair* –Civil Action No HBC 163 of 2020 applied the following statement in principle from *Eng Mee Yong* to applications under Order 113.
16. The Court finds the cautionary approach advised by the Privy Council, as timely when considering its finding in this matter
17. It also notes a useful summary by the Plaintiff in its Submissions in Reply filed on 20th September 2024, on why this was a matter that was appropriate for disposal under Order 113, rather than by examination under ordinary trial process;

8. The Plaintiff further responds and asks Mr Ram and his clients, as to what different evidence or outcome would be achieved from whatever forum or litigation they appear to suggest. They do not have ILTB consent or matters raised above in paragraph 7. Are we to accept that the triable issue is that there is no need for ILTB consent for ITaukei land dealings? Are we to accept that the triable issue is the informal illegal arrangements override the ITaukei Land Trust Act? Are we to accept that the triable issue is the deviation from the Torrens system where registration is everything....”

18. In short, the Plaintiff states that there is no basis made out by the Defendants to warrant that this matter be dealt with other than by summary process under Order 113 of the *High Court Rules 1988*.
19. The Court concurs with the position espoused by the Plaintiff

ORDERS:

The orders sought in the Originating Summons filed on 20th August 2020 are granted as follows;

1. **AN ORDER that the Defendants by themselves , their servants and/or agents and/or tenants in their capacity as squatters or squatter landlords or tenants provide the Plaintiff vacant possession of all that piece of land showing on ITaukei Lease No 33510 known as Tacirua East [part of] showing Lot 1 on Plan SO 7076 and ITaukei Lease No 33509 known as Tacirua East [part of] showing Lot 2 on Plan SO 7076 in the Tikina of Naitasiri, in the Province of**

Naitasiri with area of 5.7973 hectares and 3.3582 hectares respectively, situated at Khalsa Road, Nasinu.

2. AN ORDER that the Sheriff of the Court and/or his officers clear the said premises and remove the Defendants by themselves, their servants and/or agents and/or tenants in their capacity as squatters or squatter landlords or tenants and their families together with their dwelling houses, cultivated crops, all electricity and water posts, mains, pipes, meters, taps, switches and connections illegally connected to the illegal squatter housing, dwellings through trespass.
3. AN ORDER that the Sheriff of the Court and/or his officers with police assistance supervise the Occupants to safely disconnect, remove and dismantle all electricity and water posts, mains pipes, meters, taps, switches and connections illegally connected to the illegal squatter housing dwellings through trespass.
4. Parties to bear their own costs.



Savenaca Banuve
Savenaca Banuve
Judge

At Suva
09th December 2024