

AT THE HIGH COURT OF LAUTOKA
WESTERN DIVISION.
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 16 of 2024.

BETWEEN: **ASIF WALI MOHAMMED**
PLAINTIFF/APPLICANT

AND: **SATEN KUMAR**
DEFENDANT/RESPONDENT.

BEFORE : Hon. Mr. Justice Mohamed Mackie
APPEARANCE : Mr. R.R. Gordon -For the Plaintiff/Applicant.
: Defendant-Respondent absent and no representation.
DATE OF HEARING : On 9th December 2024.
DATE OF RULING : On 12th December 2024.

RULING

On Leave to Issue Writ of Possession
(Break- open Order)

A. **INTRODUCTION:**

1. Before me is an EX-PARTE NOTICE OF MOTION (“the Application”) preferred by the Plaintiff-Applicant (“the Plaintiff”) seeking for the following orders and/ or reliefs: -

1. *AN ORDER that leave be granted to issue or re – issue Writ of Possession against the Defendant and/or all other occupants and their families and any other occupant therein in respect of all that piece and parcel of Land comprised and described in Housing Authority Sub – Lease No. 400813 being Lot 1 on DP 6225 in the Province of Ba Tikina of Vuda with a total area of 919 square meters.*
 2. *AN ORDER that the Defendant do pay to the Plaintiff the costs of and incidental to the instituting of this application and further application for the execution of the Writ of Possession on an indemnity basis.*
 3. *AN ORDER that the Fiji Police Force do render assistance to the Sheriff for the purposes of entering into all and any house/home on Housing Authority Sub – Lease No. 400813 being Lot 1 on DP 6225 in the Province of Ba Tikina of Vuda with a total area of 919 square meters and for the purposes of maintaining the peace whilst the sheriff evicts, by force, the Defendants from Housing Authority Sub – Lease No. 400813 being Lot 1 on DP 6225 in the Province of Ba Tikina of Vuda with a Total area of 919 square meters.*
 4. *AN ORDER that the Fiji Police Force do render the services of a female Police Officer to the Sheriff for the Purposes of entering into all and any house/home of Housing Authority Sub – Lease No. 400813 being Lot 1 on DP 6225 in the Province of Ba Tikina Vuda with a total area of 919 square meters and for the purposes of maintaining the peace whilst the Sheriff evicts, by force, the Defendants from Housing Authority Sub – Lease No. 400813 being Lot 1 on DP 6225 in the Province of Ba Tikina Vuda with a total area of 919 square meters*
 5. *AN ORDER that the Sheriff be permitted to enter Housing Authority Sub – Lease No. 400813 being Lot 1 on DP 6225 in the Province of Ba Tikina Vuda with a total area of 919 square meters or any part thereof including any and all buildings thereon by force and, without limitation, to break, with force or with the use of cutters/ grinders or otherwise, all or any locks, padlocks, doors locks or other forms of restraint that precludes the Sheriff from entering Housing Authority Sub – Lease No. 400813 being Lot 1 on DP 6225 in the Province of Ba Tikina Vuda with a total area of 919 square meters or any part thereof including any and all buildings thereon.*
 6. *AN ORDER that costs of \$5,000.00 be paid by the Defendant to the Plaintiff for the flagrant disregard to Court orders that has precipitated this, and other applications, before this Court.*
 7. *SUCH further or other order(s) that the Honourable Court may deem fit, just, expedient and necessary in the circumstances.*
2. The Notice of Motion is supported by an Affidavit sworn by the Plaintiff and filed on 25th November 2024, along with an annexure marked as “AWM-01”, which is none other than the “SHERIFF EXECUTION REPORT” describing the resistance advanced by the Defendant’s Daughter by not opening the Gate to execute the writ of possession.
 3. The Application states that it is filed pursuant to Order 45 Rule 2(2) and 2(3) of the High Court Rules and under the inherent jurisdiction of this Court.

B. THE LAW:

4. Order 45 Rule 2(1), 2(2) and 2(3) state as follows;

Enforcement of judgment for possession of land (O.45, r.2)

2.-(1) *Subject to the provisions of these Rules, a judgment or order for the giving of possession of land may be enforced by one or more of the following means that is to say-*

- (a) writ of possession;*
- (b) in a case in which rule 4 applies, an order of committal;*
- (c) in such a case, writ of sequestration.*

*(2) A writ of possession to enforce a judgment or order for the giving of possession of any land shall not be issued **without the leave of the Court** except where the judgment or order was given or made in a mortgage action to which Order 88 applies.*

*(3) Such leave shall not be granted unless it is shown that every person in actual Possession of the whole or any part of the land **has received such notice of the Proceedings as appears to the Court sufficient to enable him to apply to the Court for any Relief to which he may be entitled.** (Emphasis added)*

C. HISTORY IN BRIEF.

5. The Plaintiff on 30th January 2024, filed his Originating Summons (Expedited Form) seeking reliefs, *inter alia*, requiring the Defendant, SATEN KUMAR, and/ or all other occupants and their family and any other occupants therein:

- i. **DO GIVE** immediate vacant possession to the Plaintiff of all that piece and parcel of land of which the Plaintiff is the registered lessee comprised and described in Housing Authority Sub-Lease No- 400813 being lot 1 on DP 6225 in the province of Ba Tikina of Vuda with total area of 919 square meters.*
- ii. **ALTERNATIVELY**, to show cause why he and/ or they their family and any other occupant therein should not give immediate vacant possession to the Plaintiff of all that piece and parcel of land of which the Plaintiff is the registered lessee comprised and described in Housing Authority sub-lease No- 400813 being lot 1 on DP 6225 in the province of Ba Tikina of Vuda with total area of 919 square meters.*

6. The above Originating Summons, seeking the vacant possession, was filed by the Plaintiff subsequent to his purchase of the subject property from **Westpac Bank** on a Mortgage Sale, which

had eventuated as the Defendant hereof had defaulted the repayment of the loan he had obtained from the said Bank.

7. The averments in the Affidavit in support sworn and filed by the Plaintiff, along with his Originating Summons for vacant possession, amply demonstrate the facts and circumstances that led him to purchase the subject property and file the Originating Summons seeking for the ejectment of the Defendant and vacant possession.
8. Having summarily heard the matter on 26th February 2024, this Court promptly granted the Orders in terms of the Originating Summons for the Defendant to deliver the vacant possession of the subject property unto the Plaintiff.
9. Subsequently, an Application for writ of possession being filed on 12th March 2024 and supported inter-parte on 3rd April 2024, this Court, after hearing the counsel for both parties, granted order for the execution of the writ of possession, however to be executed after the expiry of 21 days. The Court also made an order for costs in a sum of \$5,000.00 to be paid by the Defendant.
10. Though, the Defendant had preferred an Appeal to the Court of Appeal against the aforesaid Orders made by this Court, so far, the Defendant has not furnished this Court with any order/s, particularly, and a stay order from the Court of Appeal, despite the sheriff of this Court had attempted to execute the writ of possession issued by this Court.
11. However, the Defendant on 7th May 2024 filed a Notice of Motion seeking Injunctive and Stay Orders against my Order pending the, purported, Appeal to the Court of Appeal and the same being heard inter-parte on 14th May 2024, the ruling thereof was pronounced by this Court on 7th October 2024 dismissing the said Notice of Motion. By this dismissal, the injunctive and stay orders sought by the Defendant were refused. This Ruling, as per the record, also remains un-assailed by a higher forum.

D. PRESENT APPLICATION & DISCUSSION::

12. The present application has been filed before me after an unsuccessful attempt by the Sheriff of this Court to execute the writ of possession issued by this Court on 3rd April 2024. The report filed by the Sheriff describes the resistance offered by the daughter of the Defendant for the execution of the writ of possession.
13. On careful scrutiny of the contents of the Sheriff's Report, I am satisfied that the resistance offered to the execution is a despicable act on the part of the Defendant, who appears to have instigated his Daughter to resist the execution in this manner, which warrants condemnation and even levelling of charges for contempt of Court. They cannot do so other than in a manner recognized by the law. This kind of resistance to the execution of Court orders is an interference with the functions of the Court and it should not be condoned or tolerated. This is a threat to the authority of the court and to the independence of the judiciary, which, if allowed to prevail, would set a bad precedent adversely

affecting the due administration of justice. They should have complied with the Orders and complained, if needed.

14. This application was made ex-parte and I decided to hear and dispose it ex-parte. The Defendant knows very well as to what had occurred from the inception. The Defendant proceeded to the Court of Appeal against my initial orders, and subsequently made applications before me for injunctive and stay orders and also filed a writ action seeking injunctive orders before a different bench of this Court, but nothing brought relief to the Defendant. I need not go into the details of when those applications were made and what transpired on those occasions for everything is in the case record. Finally, the orders for execution of the writ of possession being made on 3rd April 2024, when the Sheriff attempted to execute it, he was resisted. Thus, an order for Break-open was warranted, which in my view can be made ex-parte. All that was required to be done was that the Defendant comply with the said order for vacant possession. The Defendant was well aware of the nature of the orders, which were as clear as crystal.
15. I understand the situation the Defendant is in. He had the benefit of legal advice and representation when he was before this Court. He had tacitly admitted the registered ownership of the Plaintiff by making an offer to buy the property in question from the Plaintiff, which did not materialize for the reason best-known to the Defendant.
16. In fact, the Defendant made several attempts to stop the Plaintiff taking the vacant possession of the property in dispute. Having failed in his I attempts, finally resisted the execution compelling the Plaintiff to seek an order for break opening. The Defendant knew all along what transpired on previous occasions. I have taken judicial notice of a separate proceeding; that the Defendant has commenced before a different bench of this Court, seeking damages from the parties concerned.
17. There is no reason for this Court to disallow the application made by the Plaintiff for the break-opening order and the other ancillary reliefs. In fairness to the Defendant, for the avoidance of any surprise or embarrassment or inconvenience, I decide to allow this execution only after the expiry of 7 days from the date of service of this Orders on the Defendant personally or by affixing the same on a conspicuous part of the premises in suit.
18. The Plaintiff is at liberty to proceed to continue with the execution of the said writ of possession ordered on 3rd April 2024, by obtaining the required Police assistance and by break opening the Gates, Doors or any other similar barricades. The Plaintiff shall be entitled to recover costs and expenses from the Defendant, on account of this application, as stated in the orders bellow.

ORDERS:

- a. Orders sought in terms of paragraphs 3, 4, and 5 are granted.
- b. As for the relief prayed for in paragraph 01 of this Notice of Motion, the Order granted by this Court on 3rd April 2024 for the execution of the writ of possession will serve and remain in force.
- c. The Plaintiff is entitled to recover the charges incurred in the process of the execution of the writ of possession, however subject to taxation by the Deputy Registrar.
- d. The Plaintiff is also entitled to recover \$750.00 (Seven Hundred and Fifty Dollars) being the summarily assessed costs for filing this Application.
- e. However, for the reasons stated in this Ruling, the writ of possession is **not to be executed**, till the expiry of 7 days from the date of service of this Order.
- f. This Order shall be sealed and served on the Defendant personally and/or by pasting it on a conspicuous part of the subject property.
- g. A copy of the sealed Order be also served on the Police.

On this 12th Day of December 2024 at the High Court of Lautoka.



Sgd.
A.M. Mohamed Mackie.
Judge
High Court (Civil)
Lautoka.

SOLICITORS:

Messrs. Gordon & Company- Barristers & Solicitors- For the Plaintiff.

The Defendant absent and unrepresented (as the Application is made on Ex-parte basis)