IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 325 of 2022

IN THE MATTER of an Application under Order 113 of the High Court Rules 1988.

BETWEEN: **SIVANJINI** of 8 Madho Crescent, Razak Road, Lautoka, Domestic Duties.

PLAINTIFF

AND: **RAJNESH SHARMA** aka **RAJNESHWAR PRASAD** of Saru, Lautoka, Priest.

DEFENDANT

BEFORE : **Master P. Prasad**

Counsels : Messrs Millbrook Hills Law Partners for Plaintiff
Messrs Ravneet Charan Lawyers for Defendant

Date of Hearing : 25 November 2024

Date of Decision : 28 March 2025

JUDGMENT

1. The Plaintiff has instituted this action by filing a Summons pursuant to Order 113 of the High Court Rules 1988 (**HCR**) thereby seeking an order for the Defendant to give immediate vacant possession of all the piece of land comprised in Agreement for Lease, TLTB Reference No. 4/7/54619, Registrar of Deeds registration number 2046, more particularly described as 'Tutuvakaduruka' (part of) in the Tikina of Vuda in the province of Ba having an area of 0.0823 ha, owned by Mataqali Tabua Tokatoka Korovatu (**Property**). The Plaintiff filed an Affidavit in Support and a Supplementary Affidavit in Support.

2. The Defendant opposed the Summons and filed an Affidavit in Opposition.

3. At the hearing of the application both counsels made oral submissions as well as relied on their filed written submissions filed. The Plaintiff's counsel filed additional submissions on 13 December 2024.

4. 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 or 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"*

5. 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)."

6. 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 explanation of its history. 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.*"

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

8. 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".*

9. Master Wickramasekara in ***Singh v Koi [2024] FJHC 57*** on the application of Order 113 stated as follows:

> *"40. The onus is on the Plaintiff to satisfy Court that there is no doubt as to his or her claim to recover the possession of the land. In that process, he/she must be able to show the Court the right to claim the possession of the land and then to satisfy that the Defendant/s (not being a tenant or tenants holding over after the termination of the tenancy) entered the land or remained in occupation without his or her license or consent or that of any predecessor in title. Once a Plaintiff satisfies these two factors, he or she shall be entitled for an order against the Defendant or the occupier.*
>
> *41. Then, it is incumbent on a Defendant, which the Plaintiff alleges to be in occupation of the land, if he or she wishes to remain in possession, to satisfy the Court that he or she had consent either from the Plaintiff or his or her predecessor in title or he Page 10 of 14 or she has title either equal or superior to that of the Plaintiff. If the Defendant can show such consent or such title, then the application of the Plaintiff ought to be dismissed."*

10. Master Wickramasekara further explained that for Order 113 to be applicable, it is a requirement that a plaintiff establish that the occupiers have entered into occupation without license or consent of the plaintiff. It is also applicable in the event a person who has entered into possession of land with a license but has remained in occupation without a license.

11. The Plaintiff has annexed to her Supplementary Affidavit in Support a certified true copy of the Agreement for Lease registered by the Registrar of Deeds as Deed No. 2046 (**AFL**), which is issued to the Plaintiff for a term of 99 years with effect from 1 July 2021. The AFL was executed on 18 July 2022 and registered as a Deed on 21 July 2022. The Plaintiff claims that the Defendant is an unlawful *ab initio* sub-lessee residing on the Property pursuant to a tenancy agreement between the Plaintiff and the Defendant. The Plaintiff further states that since the Plaintiff has not obtained the consent of the iTaukei Land Trust Board (**TLTB**) for the sub-lease, the Defendant has no colour of right to be in occupation of the Property hence the Defendant's occupation of the Property is illegal. The Plaintiff then served a Notice to Vacate to the Defendant on 11 October 2022 and the Defendant responded through his legal counsel on 13 October 2022. The Plaintiff's legal counsel replied on 2 November 2022.

12. Accordingly, the main issue to be determined is whether the Defendant (**not being a tenant or tenants holding over after the termination of the tenancy**) has a licence or consent of the Plaintiff (or any predecessor in title) to occupy the subject Property.

13. The Defendant in his Affidavit in Opposition stated that the Plaintiff had entered into 2 separate Tenancy Agreements with the Defendant with the 1st being for a term of 6 months entered on 1 May 2021 (**Agreement 1**) and the 2nd one for a minimum term of 1 year entered on 9 November 2021 (**Agreement 2**). The said Agreements were annexed to the Defendant's Affidavit. The Defendant also stated that it was the Plaintiff's obligation to obtain the necessary consents from TLTB, which the Plaintiff failed to do yet collected the rent.

14. The Defendant further stated that the Plaintiff only issued the Notice to Vacate when the Defendant refused to pay an increased rental of $400.00 instead of the $300.00 as per Agreement 2 and that the Plaintiff was intending to sell the Property as advertised through the Plaintiff's social media Facebook account.

15. In her Affidavit in Reply, the Plaintiff states that the Property belonged to her father who bequeathed it to her and that she has been in control of the Property before the issuance of the AFL. The Plaintiff further agrees and states that "*it was only after I received the letter from the Defendant's lawyers ... that I went to TLTB and found out about the need to get consent for sub-leasing.... I admit that I had collected rent from the Defendant but only up to the time I was consenting to his tenancy. I have*

not accepted rent since then...". In regards to the advertisement for the sale of the Property, the Plaintiff states that the Property has not been sold.

16. The Plaintiff's counsel's argument primarily revolves around the claim that since there was no consent of the TLTB for the 2 Tenancy Agreements, the Defendant is not a tenant and his occupation of the Property is illegal.

17. The Plaintiff's counsel relied on ***Dayal v Kumar*** [2019] FJHC 525. In ***Dayal v Kumar***, the defendant had, subject to a sale note between the plaintiff and the defendant, occupied property which was leased to the plaintiff by the TLTB. The Court held that the defendant could not rely on the sale note which was in breach of section 12 of the iTaukei Land Trust Act 1940 and was null and void to claim interest of the property.

18. ***Dayal v Kumar*** [supra] is distinguishable on the facts from the present case. In this matter there is an issue of Tenancy Agreements which the Plaintiff has entered into prior to being issued with the AFL by TLTB. The Plaintiff in her own Affidavit admits that she had had control of the Property even before being issued with the AFL and that she had consented to the Defendant's tenancy.

19. In response to the above, the Defendant's counsel in their written submissions stated that the Defendant had entered the Property with the consent of the Plaintiff and has also executed tenancy agreements. The Defendant's counsel further submitted that Agreement 2 had not been terminated and since the Defendant had occupied the Property legally through the tenancy agreements and remained in occupation as a tenant with the consent of the Plaintiff, an application under Order 113 of the HCR was not the appropriate application. The Defendant relied on **Nadan v Reddy** [2020] FJHC 798 and in particular in the following paragraph where Hon. Justice Stuart J held at paragraph 8:

> *"This is clear from the exclusion from the rule of tenants holding over after termination of their tenancy, who – although their right to occupy is:*
>
> *i. clearly defined (i.e. by the lease, or tenancy agreement), and*
> *ii. has clearly – by definition since they are tenants 'holding over' – come to an end –*
>
> *cannot be the subject of an O.113 application, presumably because even though such cases may be clear-cut in evidential terms, so that the court can say with a high degree of confidence that the right of occupation has come to an end, there remains the*

possibility of applications for relief against forfeiture, or arguments about renewal, waiver etc. This exclusion shows how the rule is intended to operate. It applies only to clear cases of trespass, and is not a means of resolving cases where there are contentious issues as to the basis upon which the defendant remains in occupation. A vivid illustration of this distinction can be seen in the decision of the Court of Appeal in England in Greater London Council v Jenkins [1975] 1 All ER 354. In that case an order under the rule (in identical terms to that in our O.113, r.1) was refused by the Court of Appeal where the owner had arguably, and without intending to do so, extended the respondent's licence to occupy to a date after the application was filed. Although it was clear that, by the time of the appeal hearing, the licence had expired and the respondent – if he remained in occupation – did so as a trespasser, nevertheless the application for possession could not succeed, because at the time it was filed the respondent's licence to occupy was still current. What emerges from the decision of the Court of Appeal is the necessity for the plaintiff to show that there is no basis upon which the occupier/defendant is entitled to remain on the property. Where the original entry into occupation was with the consent or licence of the owner, the plaintiff must show that the right of occupation has been terminated. That is much easier for the plaintiff to do if it is clear how the right of occupation arose in the first place. If the occupation arose from a tenancy or licence, the plaintiff must show that that tenancy or licence has been properly and unequivocally terminated. 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 under Order 113 will probably not be appropriate."

20. The issue of consent has been discussed clearly in the Supreme Court decision of ***Naicker v Chand*** [2024] FJSC 11; CBV0002.2023 (26 April 2024), that dealt with section 13 of the State Lands Act 1945, which is the equivalent provision for State Land as section 12 of the Act is for iTaukei land. Hon. Justice Brian Keith JSC held as follows:

"22. The enforceability of the agreement. The grounds of appeal are difficult to follow. For the most part, Mr Naicker's solicitors rely on the unfairness of the outcome without stating where things went wrong. However, the

one argument which they clearly advance for restoring the order for specific performance is that the Director of Lands' consent was not a precondition for the enforceability of an agreement for the transfer of a lease. I do not agree. The absence of consent meant that the agreement could not take effect. It could only take effect when consent to the transfer of the lease had been obtained. Putting it in another way, its enforceability was subject to a condition subsequent, namely the grant of consent for the transfer. The agreement could not be enforced until then. How could you enforce an agreement which required consent when that consent had not been obtained? Suppose the Director of Lands would not have given his consent to the transfer of the lease to Mr Naicker, could Mr Naicker really have avoided that outcome by arguing that the agreement for the transfer of the lease to him could be enforced nevertheless? So I entirely agree with the Court of Appeal that the order for specific performance sought by Mr Naicker – which ignored the need for the Director of Lands' consent to the transfer – could not be made.

23. However, that does not mean that a suitably worded order for specific performance could not have been made. If the order for the transfer of the lease had been made subject to the prior consent of the Director of Lands to its transfer having been obtained, there could have been no objection to it. As I have said, it may be that that was what Ajmeer J had in mind. It is unfortunate that he did not spell out his thinking on the topic in both his judgment and the order he made. The lesson to be learned is that when a court makes an order for specific performance, it must spell out in clear and precise language what it is that the defendant is being required to do. The failure to do that in this case has resulted in an appeal which might otherwise have been avoided. For these reasons, I would make an order which has the effect of resurrecting the order for specific performance made by Ajmeer J, but making it clear that it can only take effect once the Director of Lands has given his consent to the transfer of the new lease to Mr Naicker, and I would order Mr Chand to take all steps necessary to enable the Director of Lands to give that consent.

24. I have not overlooked the argument that the absence of consent made the agreement to transfer the lease not merely unenforceable, but null and void. Had it been null and void, the subsequent consent of the Director of

Lands to the transfer of the lease could not have saved the agreement. This argument tracks the actual language of section 13 which is that

"any sale, transfer, sublease, assignment, mortgage or other alienation or dealing effected without such consent shall be null and void."

The mere fact that the consent of the Director of Lands to the transfer had not been obtained could not on its own have rendered the transfer null and void. *As the Privy Council said in Chalmers v Pardoe [1963] 1 WLR 677, a decision of the Privy Council on appeal from the Court of Appeal of Fiji concerning section 12 of the iTaukei Land Trust Act 1940 (which was the equivalent provision for iTaukei land as section 13 of the State Lands Act is for State land)*

*" ... **it would be an absurdity to say that a mere agreement to deal with land would contravene Section 12, for there must necessarily be some prior agreement in all such cases. Otherwise there would be nothing for which to seek the Board's consent."***

25. Moreover, in Kulamma v Manadan [1968] AC 1062, the Privy Council said that the parties "should be presumed to contemplate a legal course of proceeding rather than an illegal [one]". Neither Mr Chand nor Mr Naicker ever contemplated that the transfer of the lease would take effect without the Director of Lands' consent as the agreement for the transfer of the lease was in the very document in which the Director of Lands' consent to the transfer was being sought. There was, therefore, no question of the proposed transfer being null and void simply because the Director of Lands' consent to the transfer had not been obtained earlier. That is the effect of a series of cases including the decision of the Court of Appeal in Jai Kissun Singh v Sumintra (1970) 16 FLR 165, the decision of the Court of Appeal in D B Waite (Overseas) Ltd v Wallath (1972) 18 FLR 141, and the decision of the Supreme Court in Reggiero v Kashiwa [1998] FJSC 8.

26. Could it be said that there had been some other "dealing" with the land which had had the effect of rendering the agreement for the transfer of the lease null and void because consent to the transfer had not been obtained – for example, the various things which Mr Naicker had done to improve the land? In my view, such an argument cannot succeed. The judge made no

findings, one way or the other, whether the improvements which Mr Naicker had made to the land had been made for himself in anticipation of the lease being transferred to him, or for Mr Chand pursuant to the power of attorney and in his capacity as the caretaker of the farm. In any event, what constitutes "dealing" with land within the meaning of section 13 is not spelled out in the State Lands Act, but however wide it is, I do not believe that what Mr Naicker did can be regarded as the sort of dealing with the land which required the prior consent of the Director of Lands." [Emphasis mine].

21. In light of the above, this Court finds that the Plaintiff's claim that the absence of TLTB consent makes the Tenancy Agreements unenforceable is unconvincing. It is undisputed that there were 2 Tenancy Agreements between the parties thereby making the Defendant a tenant of the Plaintiff. Having entered into the Tenancy Agreements, it was the Plaintiff's responsibility to then secure TLTB's consent for the said tenancy. The Plaintiff, by virtue of the said Tenancy Agreements continually accepted rent in exchange for her approval for the Defendant's occupation of the Property up until the time the Plaintiff issued a Notice to Vacate.

22. This then is a scenario of holding over after a tenancy and not a situation involving squatters or trespassers.

23. It is clear that Order 113 proceedings are not available against the tenants holding over after termination of the tenancy. In ***Silikiwai v Attorney-General*** [2022] FJCA 13, Hon. Justice Basnayake JA in explaining Order 113 held as follows:

"[10] The Order 113 speaks not only of the tenants, but also of the over holding tenants after termination. The Agricultural Landlord and Tenant Act defines "tenancy" to include a lease, sub tenancy, a sub-lease or a tenancy at will. The Order 113 Rule 1, clearly excludes an over holding tenant from its application after termination of the tenancy. The Order 113 is specifically confined to trespassers who occupy a land without consent or the licence of the lawful owner. However, a tenant holding over after termination of his tenancy is excluded from the ambit of Ord.113 r.1, and is not a trespasser. He may have a valid defence to put forward which cannot be decided in a summary manner by way of affidavits and submissions. That kind of case has to be by way of writ of summons where after filing pleadings the

contesting parties give evidence in court and provide an opportunity to test the witnesses. When one is in possession, and another occupies without the consent or licence of the owner, in such a situation the person who is claiming the land could file a originating summons under Order 113 Rule 1, and initiate proceedings. In such a situation the person in occupation has to show under what authority he is in occupation. If he has a valid licence, he could produce it as a defence. If there is none, the court may issue a writ of eviction. It cannot apply to a holding over tenant after termination. He will not be a trespasser after termination of tenancy. If that is the case, landlords could throw out the tenants by terminating their tenancies and filing originating summons instead of filing writ of summons."

[emphasis added]

24. The Defendant is not identifiable clearly as "trespasser," on the affidavit material provided in this proceeding, rather, this Court is satisfied that the Defendant was a tenant pursuant to a tenancy agreement and had come onto the Property with the consent of the Plaintiff.

25. As such, a proceeding for vacant possession cannot be brought under Order 113 of the HCR.

26. Therefore, the Plaintiff has failed to successfully establish her rights to claim vacant possession of the Property pursuant to Order 113.

27. Accordingly, I make the following orders:

(a) The application is dismissed.

(b) Costs of this action summarily assessed at $2,000.00 to be paid by the Plaintiff within 28 days.

HIGH COURT OF FIJI
LAUTOKA

P. Prasad
Master of the High Court

At Lautoka
28 March 2025