

IN THE HIGH COURT OF FIJI
IN THE CENTRAL DIVISION
CIVIL JURISDICTION

Civil Action No. 135 of 2024

IN THE MATTER of Order 113 of
the High Court Rules 1988 (as
amended)

And

IN THE MATTER of an
Application for Summary
Possession of all the land
comprised in Approval Notice of
Lease as comprised in Crown
Lease No. 1590 on land known as
Proposed Development Adjacent
to Lot 1 DP 1884 (part of
containing an area of 13 acres
(Approx.) in the district of Suva in
the province of Rewa in the island
of Viti Levu (hereinafter referred to
as the 'Property')

BETWEEN: **VICTORIA MARINE PTE LIMITED** a limited liability company
having its registered office at 2 MIS Building, 22 Tofua Street,
Walu Bay, Suva.

PLAINTIFF

AND: **PATERESIO FINAU** of Approval Notice of Lease as comprised in
Crown Lease No 1590 on the land known as Proposed Development
Adjacent to Lot 1 DP 1884 (part of) containing an area of 13 acres
(approx..) in the district of Suva in the province of Rewa in the island
of Viti Levu.

FIRST DEFENDANT

JALE LILI of Approval Notice of Lease as comprised in Crown Lease No 1590 on the land known as Proposed Development Adjacent to Lot 1 DP 1884 (part of) containing an area of 13 acres (approx..) in the district of Suva in the province of Rewa in the island of Viti Levu.

SECOND DEFENDANT

RAVE TAIPO of Approval Notice of Lease as comprised in Crown Lease No 1590 on the land known as Proposed Development Adjacent to Lot 1 DP 1884 (part of) containing an area of 13 acres (approx..) in the district of Suva in the province of Rewa in the island of Viti Levu.

THIRD DEFENDANT

VACISEVA TUBUNA of Approval Notice of Lease as comprised in Crown Lease No 1590 on the land known as Proposed Development Adjacent to Lot 1 DP 1884 (part of) containing an area of 13 acres (approx..) in the district of Suva in the province of Rewa in the island of Viti Levu.

FOURTH DEFENDANT

ASERI RAIBIRIKI of Approval Notice of Lease as comprised in Crown Lease No 1590 on the land known as Proposed Development Adjacent to Lot 1 DP 1884 (part of) containing an area of 13 acres (approx..) in the district of Suva in the province of Rewa in the island of Viti Levu.

FIFTH DEFENDANT

PAULA RAIBIRIKI of Approval Notice of Lease as comprised in Crown Lease No 1590 on the land known as Proposed Development Adjacent to Lot 1 DP 1884 (part of) containing an area of 13 acres (approx..) in the district of Suva in the province of Rewa in the island of Viti Levu.

SIXTH DEFENDANT

ISEI SOROLAGILAGI of Approval Notice of Lease as comprised in Crown Lease No 1590 on the land known as Proposed Development Adjacent to Lot 1 DP 1884 (part of) containing an area of 13 acres (approx..) in the district of Suva in the province of Rewa in the island of Viti Levu.

SEVENTH DEFENDANT

KOLETA MARAMA of Approval Notice of Lease as comprised in Crown Lease No 1590 on the land known as Proposed Development Adjacent to Lot 1 DP 1884 (part of) containing an area of 13 acres (approx..) in the district of Suva in the province of Rewa in the island of Viti Levu.

EIGHTH DEFENDANT

LUISA ADI WAQA of Approval Notice of Lease as comprised in Crown Lease No 1590 on the land known as Proposed Development Adjacent to Lot 1 DP 1884 (part of) containing an area of 13 acres (approx..) in the district of Suva in the province of Rewa in the island of Viti Levu.

NINTH DEFENDANT

LOROSIO LABAIVALU of Approval Notice of Lease as comprised in Crown Lease No 1590 on the land known as Proposed Development Adjacent to Lot 1 DP 1884 (part of) containing an area of 13 acres (approx..) in the district of Suva in the province of Rewa in the island of Viti Levu.

TENTH DEFENDANT

SEINI COKACIRI of Approval Notice of Lease as comprised in Crown Lease No 1590 on the land known as Proposed Development Adjacent to Lot 1 DP 1884 (part of) containing an area of 13 acres (approx..) in the district of Suva in the province of Rewa in the island of Viti Levu.

ELEVENTH DEFENDANT

MIKAELE NAOROSUI of Approval Notice of Lease as comprised in Crown Lease No 1590 on the land known as Proposed Development Adjacent to Lot 1 DP 1884 (part of) containing an area of 13 acres (approx..) in the district of Suva in the province of Rewa in the island of Viti Levu.

TWELFTH DEFENDANT

AND: **THE OCCUPIERS** of Approval Notice of Lease as comprised in Crown Lease No 1590 on the land known as Proposed Development Adjacent to Lot 1 DP 1884 (part of) containing an area of 13 acres (approx..) in the district of Suva in the province of Rewa in the island of Viti Levu.

For the Plaintiff : **Mr Kumar P and Mr Singh. R**
For the Defendant : **Mr Romanu I.**
Date of Hearing : **16 October 2024**
Date of Decision : **5 February 2025**
Before : **Waqainabete -Levaci, S.L.T.T, Puisne Judge**

JUDGEMENT

*(APPLICATION FOR VACANT POSSESSION UNDER SECTION 113
OF THE HIGH COURT RULES)*

BACKGROUND

- 1.1 The Applicant had filed an Originating Summons seeking for vacant possession pursuant to Order 113 of the High Court Rules.
- 1.2 The Applicant was granted an Approval to Lease comprised of Crown Lease No 1590 effective from 1st January 2023 for a period of 5 years The Applicant has thereafter found that portions of the said land was occupied by the Defendants, not known to the Applicant.
- 1.3 The Applicant deposes that there was no consent granted for the Defendants to occupy the land.

- 1.4 There was however arrangements made by the Applicants for the Defendants to be re-located and resettled to another piece of property. However despite a verbal general consensus as per the Applicants, Defendants have refused to relocate and only one has done so. All the other Defendants have remained on the property.
- 1.5 The Defendants have argued otherwise. They have deposed that they should remain on the property as the manner of relocation and resettlement is under dispute. The lease conditions stipulate that the occupants were allowed to remain on the leased land until they relocated to another property.
- 1.6 As a result the Defendants have also obtained an ex-parte decision that the arbitrary eviction by the Applicants is contrary to their constitutional rights as their eviction was contrary to clause 4 (i) of the Crown Lease Approval to Lease terms and conditions.

2 AFFIDAVITS AND SUBMISSIONS

- 2.1 In their Submissions, the Applicant argues that they are entitled to claims for possession of land occupied by persons not being tenants, who are now illegally occupying the property without consent or authority and squatting on the land. Reference was made to the case of Orchid Flat Investments -v- Netani Bola CA 322 of 2014.
- 2.2 Furthermore, the Applicant argued that the Defendant had sort for ex-parte orders against the Plaintiff in other High Court proceedings to stay the eviction as it was contrary to section 39 of the Constitution. The Court granted these orders although it was made ex-parte. The matter has not proceeded inter-parte. The Plaintiff argued that the proceedings was prejudicial to the Plaintiff as they are not a party to the proceedings.
- 2.3 The Applicants also argue that they had complied with the lease conditions in clause 4 (l) as deposed in paragraph 10 and 11 of the Affidavit. The Applicant had bought a piece of land from Father Law Home. Three houses were built at the relocated site at Koroivonu where the Defendants were to relocate but these houses were never occupied. The annexures show a work plan undertaken with meetings from the Applicant together with the occupiers pertaining to the relocation. The Rewa Provincial office supported the application to change of water meters for some of the Defendants and the bond monies for these water meters were paid by the Applicant – this included Mr Naisoro. Payments were also made for power installation on the site by the Applicants for Mr Naisoro in September 2022. The relocation was stalled on 23 March 2023 by the Residents who refuse to relocate. The Applicants argue that the Defendants have no right to remain on the property as they have no license or consent by the Applicants. They are illegal

occupiers. Plaintiff argued that case precedents in Adarsh Sharma -v- Roy Kumar HBC 34 of 2013 provide that even previous owners and non-trespassers who initially were not trespassers are considered illegal occupants if they remain on the property without any consent or licence by the owner. Similarly this principle also applies in the case of Chandra -v- Kumari HBC 138 of 2013.

- 2.4 The Defendant argued that there is a pending matter before the Courts regarding the manner of relocation. The current annexures regarding electricity and water are from persons that are not Defendants to the proceedings. The Defendant denies any exchange of monies as part of the relocation agreement. Lastly the Applicants have commenced proceedings by way of Form 4 when it should have been Form 3 which is a non-compliance of the Rules as highlighted in the case of Virendra Singh and Kakua Maramatoko Gadakilakeba Singh -v- Saula Tawake and Ofa Mataihelotu HBC 210 of 2019 causing the application of vacant possession to be dismissed. In the annexed Affidavit which was used in the other High Court proceedings, it was deposed that the land offered for relocation was promised to another buyer. There are 10 occupiers on the property at Wailekutu having resided there from 15 to 30 years. The Respondent had offered monies to relocate and build houses. However to date none of them have relocated.
- 2.5 In response Counsel for the Applicant argued that the eviction process by the Court was the appropriate process to be adopted. Furthermore that the applicants for water and electricity supply were included in the word 'occupiers' as unnamed defendants. Finally that the Form 3 is the appropriate form to adopt.

3 LAW ON ORDER 113 OF THE HIGH COURT RULES

- 3.1 Order 113 rule 1 of the High Court Rules is as follows:

"Where a person claims possession of land which he alleges is occupied 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."

- 3.2 Order 113 rule 3 of the High Court Rules requires an Affidavit of facts and evidences be filed supporting the originating summons stating –

"stating –

- (a) His interest in the land;

- (b) The circumstances in which the land has been occupied without licence or consent and in which his claim to possession arises; and
- (c) That he does not know the name of the person occupying the land who is not named in the summons.'

3.3 In explaining the essence of the Order 113 High Court Rules, in Nair -v- Khan [2024] FJCA 40; ABU 0021.2021 (29 February 2024) the President of Court of Appeal Justice Jitoko (As he was then), and Justices of Appeal, Her Ladyship Justice Clark and His Lordship Justice Winters stated:

[13] It is a summary proceeding that is intended to remedy an exceptional mischief totally different from the usual remedy of claim of recovery of land by the ordinary procedure as found under section 169 of the proceedings of the Land Transfer Act. Its primary and only 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 even an injunction may be joined in the claim."

"

3.4 In the Supreme Court Practice (Sweet and Maxwell, London, Vol 1 1988) in page 1470 in para 1131-81 provides –

"The application of this Order is narrowly confirmed 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 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 a grant of licence for a substantial period and the licensee holds over after the determination of the licence (Bristol Coporation -v- Persons Unknown [1974] 1 W.L.R 365; [1974] 1 All ER 593). The court has no discretion to prevent the use of this summary procedure where the circumstances are such 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 ER 354 but of course the Order will not apply before the licence has expired (ibid.) The Order applies to unlawful sub-tenants (Moore Properties (Ilaford) Ltd -v- McKeon & Others [1976] 1 WLR 1278.)

3.5 In Baiju -v- Kumar [1999] FJHC 20; hbc 298j.98s (31 March 1999) Pathik J held that:

Order 113 is effectively applied with regard to eviction of squatters or trespassers. 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"

4 **Analysis**

- 4.1 The principles behind Order 113 of the High Court Rules have been emphasized as a summary proceedings to evict squatters and trespassers and recover possession of land.
- 4.2 Unlike the application under section 169 of the Land Transfer Act, Order 113 rule 3 of the High Court Rules, enables an Applicant, who is has an Approval to Lease or an Agreement to Lease to be recognized by the Court as having established their interest on the said land to seek vacant possession.
- 4.3 In this instance the Approval by Notice to a Crown Development Lease registered with the Registrar of Deeds and annexed in the Affidavit duly certified by the Registrar of Titles, is sufficient to establish interest over the said lands.
- 4.4 The Applicant argues that the Defendants are unlawful occupiers on the said land as they have refused to vacate the premises despite the Applicants' offer of resettlement and relocation to another premises and arrangement of water and electricity.
- 4.5 The Defendants argue otherwise relying upon section 4 (i) of the Approval to Development Lease conditions which states:

The Leasee shall within the period of this Development Lease carry out and complete to the satisfaction of the leassor and the Lai Rural Local Authority/ Lami Town Council all sub-divisional works as required by the lessor in the following manner-

"The leasee shall not carry out any development adjacent to the old queens road unless or until the relocation or resettlement of the informal settlers is finalized by the lease."

- 4.6 These conditions were approved upon by the Applicant together with the Director of Lands, the Leasor.
- 4.7 This clause was also referred to by Yohan J in the case of Paterisio Finau and Ors. -v- Victoria Marines Ltd HBM 102 of 2022 and was of the view that the only allowable processes were through relocation and resettlement and not eviction.
- 4.8 Clause 4 (i) of the Approval to Development Lease which the Applicant had approved, places responsibility on the Applicant to finalize resettlement and relocation of the Defendants.

- 4.9 This clearly means that there is a consent given by the Applicants for the Defendants to remain on the property until resettlement and relocation is finalized.
- 4.10 The Applicants had argued that they had located a property near father law home for the occupants to re-settle. However even this property is earmarked for further developments and sale and has not been agreed upon by the settlers.
- 4.11 The Applicant argued that despite their meetings with the Defendants and the arrangements thereafter, the Defendants have refused to relocate and resettle, therefore rendering the consent to allow them to remain on the land as being removed.
- 4.12 The Defendants, in their Affidavit, argue that they had not agreed to the Approval for the Development Lease to be issued nor have agreed to be relocated nor re-settled.
- 4.13 The issuance of an Approval to a Development Lease by the State is an exercise of the States discretion. Hence whether or not the State gives weight to the refusal of the occupiers, the State has the mandate and powers solely to issue the Approval to a Development Lease.
- 4.14 The Approval for Development Lease contains conditions for relocation or resettlement. It requires the Applicant to re-settle and relocate the occupiers. It also places responsibility on the Applicant to finalize resettlement and relocation prior to Development Works.
- 4.15 Hence the attempts by the occupiers to refuse to re-settle or relocate outright because they do not agree to the current land identified, they have not been properly compensated nor agree to the land being leased out to the Applicant, indicates to this Court their intentions not to relocate and resettle at all. Such intentions will also delay the process on Development works for the Applicants.
- 4.16 The lease conditions do not require the Applicant further responsibility to relocate or re-settle occupants on pieces of land for which the Defendants can later own. Clause 4 (i) in the Approval to Development Lease only requires the Applicant to resettle and relocate the occupants.
- 4.17 Therefore when the Defendants re-reneged on the proposals offered by the Applicant, the Applicant had begun these proceedings by issuing eviction notices.
- 4.18 The Defendants thereafter applied for Orders that the action of the Applicants were arbitrary eviction, contrary to clause 4 (i) of the Approval to Development Lease seeking reliefs for vacant possession. This matter is pending before the Courts.

- 4.19 I find that the Applicant has satisfied the Court that the Applicant has interest in the said land.
- 4.20 As to whether the Defendant has shown that there is a genuine dispute that requires the Court to consider hearing the contested facts on evidence, the Court is guided by the case of Kant v Nair [2021] FJHC 89; HBC 163.2020 (15 February 2021) where Stuart J held:

In dismissing an appeal against the decision in Nadhan v Reddy ([2020] FJHC 798) I said at paragraph 8: What emerges from the decision of the Court of Appeal [in Greater London Council v Jenkins [1975] 1 All ER 354] 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.

1. When it comes to the defendant's opposition to an application under Order 113, the burden of showing that they have a case that justifies refusing the plaintiff's summary application is not particularly high, particularly 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. But 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 its decision in **Eng Mee Yong v Letchumanan** [1979] 3 WLR 373 the Privy Council (per Lord Diplock) made the following often quoted 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 on 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 such 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.

- 4.21 The Court finds that given the issues involved regarding the resettlement and relocation and whether this is sufficient to establish clause 4 (i) of the condition, these issues cannot be determined by these summary proceedings.
- 4.22 These are issues that require further deliberation of the evidences from all parties. The Court finds that these are contentious issues of fact and law and require further consideration by the Court.
- 4.23 Despite the contention of the Applicant that the parties have not accepted their offer of resettlement or relocation which enabled the Applicant to issue an eviction notice, these are contested issues of facts as to the conditions of resettlement in light of the constitutional rights of the Defendants.
- 4.24 The Court finds that this application is therefore misconstrued as it pre-empts the Defendants rights of occupation as having been negated. This is an issue to be determined by the Court in proper hearing and not within the summary proceedings.
- 4.25 The application for vacant possession under Order 113 of the HCR does not limit the number of applications that can be made. However when such an application is made again, the Court will carefully examine whether the requirements have been met and the reasons for another application to be made.

Consolidation

- 4.26 The Applicant has also sort for consolidation of this application with the application for breach of constitutional rights. According to the Supreme Court Rules of UK, this redress is only available as a sole remedy and cannot be sort as a remedy together with other causes of action.

Forms

- 4.27 The Defendants have argued that the Forms used in this instance are incorrect rendering the application irregular. I have read the decision by Master Lal and find

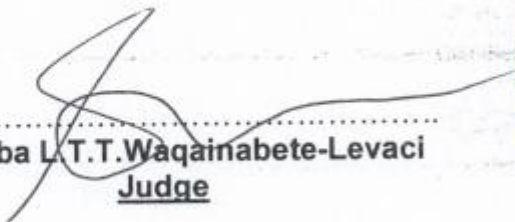
that despite the wrong form being used, the Master did not dismiss the action based on the irregularity of the form. It was based entirely on the lack of adequate and proper service of the Order 113 proceedings that rendered the application defective.

4.28 I therefore find that the wrong Form does not of itself render the application defective. It is only wrong in form but not in substance.


4.29 I will therefore dismiss this action and allow for the current proceedings for Constitutional redress to take its own course.

5.0 **Orders**

- (i) **Application for Recovery of lands by Vacant Possession under Order 113 of the High Court Rules is dismissed;**
- (ii) **Costs awarded to the Defendant to the sum of \$1000.**



Senileba L.T.T. Waqainabete-Levaci
Judge



5th February 2025

Counsel for Plaintiff: Messrs Kumar Legal, Pacific Conference of Churches Building, Suva.

Counsel for the Defendant: MIQ Lawyers, Flat 2 Lot 24 Sikeci Pl, LBE, Suva.