

**IN THE HIGH COURT OF FIJI**  
**WESTERN DIVISION**  
**AT LAUTOKA**

**[CIVIL JURISDICTION]**

**Civil Action No. HBC 45 of 2022**

**BETWEEN**                    **SANDEEP KRISHNEEL CHETTY and PRAVEEN LATA DATT** both  
of Qalitu, Vitogo, Customs Clerk and Domestic Duties.

**PLAINTIFFS**

**AND**                            **NIRMAL PRASAD** of Qalitu, Vitogo, occupation unknown to the  
Plaintiffs.

**1<sup>ST</sup> DEFENDANT**

**AND**                            **RAI MATI** of Qalitu, Vitogo, occupation unknown to the Plaintiffs.

**2<sup>ND</sup> DEFENDANT**

**AND**                            **PRANEEL PRASAD** of Qalitu, Vitogo, occupation unknown to the  
Plaintiffs.

**3<sup>RD</sup> DEFENDANT**

**AND**                            **ASHNEEL PRASAD** of Qalitu, Vitogo, occupation unknown to the  
Plaintiffs.

**4<sup>TH</sup> DEFENDANT**

**AND**                            **BINESH PRASAD** of Qalitu, Vitogo, occupation unknown to the  
Plaintiffs.

**5<sup>TH</sup> DEFENDANT**

**AND**                            **NAREND PRASAD** of Qalitu, Vitogo, occupation unknown to the  
Plaintiffs.

**6<sup>TH</sup> DEFENDANT**

**BEFORE**                    **Master P. Prasad**

Counsels:                    Mr. R. Charan for Plaintiffs  
   Ms. S. Ben for Defendants

Date of Hearing:            4 November 2024

Date of Decision:        7 February 2025

## JUDGMENT

(Vacant possession – Order 113)

1. The Plaintiff has instituted this action pursuant to Order 113 of the High Court Rules 1988 for immediate vacant possession of the land comprised in Instrument of Tenancy No. 10141 (TLTB Ref No. 4/7/6863), land known as Lolobalavu No.7 Lot 1, situated in the Province of Ba, in the Tikina of Vitogo having an area of 2.2039 hectares (**Property**). The Instrument of Tenancy No. 10141 (TLTB Ref No. 4/7/6863) was registered with the Registrar of Deeds on 5 September 2005 (**IOT**).
2. The IOT was issued to Biran Wati for a term of 30 years with effect from 1 July 2004. On 29 January 2015, Biran Wati endorsed a transfer of undivided half share of the IOT to the Plaintiffs and the said instrument of transfer was registered with the Registrar of Deeds on 25 May 2015.
3. The Plaintiffs through their joint Affidavit in Support and Affidavit in Reply aver that:
  - a. The occupation of the Defendants is without any consent or authority.
  - b. The Defendants were not brought onto the Property and have never worked on the farm thereon.
  - c. The Plaintiffs served a Notice to Vacate dated 7 December 2021 (**Notice**) on the Defendants.
  - d. Despite being served with the Notice the Defendants have refused to vacate the Property.
  - e. The Defendants are in unlawful occupation of the Property and have no rights or interests over the same.
  - f. The Defendants are preventing the Plaintiffs from working and accessing the Property.
4. The 3<sup>rd</sup> Defendant filed an Affidavit in Opposition stating that he has the authority of the other co-Defendants to depose the said affidavit however, no such authority was annexed. The 3<sup>rd</sup> Defendant in the Affidavit in Opposition states as follows:
  - a. That Biran Wati had given the Defendants consent and authority to build and stay on the Property.
  - b. He acknowledged that they were served with the Notice.
  - c. The Defendants have been on the Property for 50 years and have built a house.
  - d. That the 1<sup>st</sup> and 5<sup>th</sup> Defendants have been working as farmers on the Property for 35 years and they were paid \$40.00 a week and rest of the money was deducted as payment for the share of land where they have built their house.
  - e. The Defendants have been paying utility bills.

- f. That the only reason why the Plaintiffs are trying to evict the Defendants is because the Defendants have been demanding payment for works they have done on the farm.

5. 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 of 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"*

6. 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)."*

7. Order 113 invokes a summary procedure for possession of land and the purpose and application of the said Order has been comprehensively surmised by Master Azhar (as his Lordship then was) in **Prasad v Mani** [2021] FJHC which I gratefully adopt. Master Azhar had 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."*

8. In the Court of Appeal case of **Nair v Khan** [2024] FJCA 40, wherein the Honourable Justice Jitoko, P in dismissing the appeal stated that “*the purpose or objective of Order 113 of the High court Rules ...in essence, a summary proceeding for possession of land akin to summary procedure under section 169 of the Land Transfer Act*” [see paragraph 10]. The Honourable Justice Jitoko, P further stated that “*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 claims of damaged or even an injunction may be joined in the claim*” [see paragraph 13].

9. 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”.*

10. Master Rajasinghe (as he then was) in **Raliwalala v Kaicola** [2015] FJHC 66 on the application of Order 113 stated as follows:

*“6. In view of Order 113, a person who has a legal right to claim the possession of a land could institute an action, claiming the possession of said land against a person who has entered into or remains in occupation without his license or consent or that of any predecessor in title.*

*7. The main purpose of Order 113 is to provide a speedy and effective procedure for the owners of the lands to evict persons who have entered into and taken the occupation of the land without the owner's license or consent. They can be defined as trespassers or illegal occupants. These trespassers or illegal occupants have sometimes been referred to as squatters. In **Mcphail v Persons unknown**, (1973) 3 All E.R.394) Lord Denning has observed “the squatter” as a person who without any colour of right, enters into an unoccupied house or land and occupies it. His Lordship found that in such instances, the owner is not obliged to go to court to regain his possession and could take the remedy into his own hands, which indeed, recommended as an unsubstantial option. Therefore, Order 113 has provided the owners a speedy and effective procedure to recover the possession instead of encouraging them to take a remedy of self-help.*

8. *The proceedings under Order 113 encompass two main limbs. The first is the onus of the plaintiff. The Plaintiff is first required to satisfy that he has a legal right to claim the possession of the land. Once the plaintiff satisfies the first limb, the onus will shift towards the defendant, where the Defendant has burdened with to satisfy the court that he has a licence or consent of the owner to occupy the land.*"

11. Justice Stuart in **Kant v Nair** [2021] FJHC 89 held that:

*"Because of the summary nature of an application under Order 113, and because of the wording of the rule itself, it is clear that the court does not, in an application for possession, embark on an assessment of the balance of convenience. Instead, if the defendant is able to present evidence and/or argument that reaches the 'serious question' level as to both fact and law, he is entitled to have the application under section 113 dismissed, so that the plaintiff pursues its application for possession in ordinary proceedings where the issues raised can be properly explored and decided."*

12. Therefore, only in situations where there arises in the Court's view, triable issues, would an Order 113 application be refused: **Nair v Khan** [Supra]; **Baiju v Kumar** [1999] 45 FLR 79.

13. Hence a plaintiff seeking relief from this Court under this Order must demonstrate that: (i) they have the right to possess the land in question; (ii) they are claiming possession of the land currently occupied by the defendant; and (iii) the defendant, whom the plaintiff aims to evict, is someone who has entered and remained on the land without the plaintiff's (or any predecessor in title) permission or consent.

14. While the Defendants dispute the Plaintiffs' ownership of undivided half share of the Property, the Plaintiffs have attached to their Affidavit in Support a certified true copy of transfer of the undivided half share of the Property from Biran Wati to the Plaintiffs. The said transfer document also includes a copy of the IOT. Therefore, the Court is satisfied that the Plaintiffs have the right to possess the Property.

15. The Defendants have refused to vacate the Property based on the claim that the predecessor in title and the current owner of the undivided half share of the Property, Biran Wati, had consented to and authorized the Defendants to occupy and build on the Property.

16. Accordingly, the main issue to be determined is whether the Defendants have entered or remained on the Property without consent (from the Plaintiffs or any predecessor in title) to occupy the same and/or whether there are triable issues in this matter.



17. The Plaintiffs and Biran Wati own the Property are tenants in common. As tenants in common, each co-owner of a property has the right to possess and enjoy the whole of the land and this right includes the right to invite someone to live on the premises.<sup>1</sup> As such, each tenant in common is entitled to the possession of the whole land, and yet, unlike a joint tenant, is entitled only to a distinct share thereof, a combination of concepts possible only because the physical boundaries of his or her share, called an undivided share, have not yet been determined.<sup>2</sup>

18. Justice Amaratunga in ***Singh v Singh*** [2023] FJHC 464 in dealing with an application under Section 169 of the Land Transfer Act 1971, discussed the essence of tenancies in common and His Lordship stated:

*"11. So, as the registered owner of undivided share of the Property Plaintiff is entitled to possession of the Property in proportion to the share he holds, as there are no boundaries to demarcate his share, he is entitled to possess the Property only subject to the other half shareholders rights. If the other co-owner does not object, he can evict any person who has no right to the Property, such as Defendant.*

*12. Plaintiff is not required to obtain consent of all the co-owners for the institution of an action in terms of Section 169 of Land Transfer Act 1971, which is based on the Torrens system of Land Law where the central issue is the registration of the title. So there is no requirement for Plaintiff to obtain consent of remaining half shareholders, but the Defendant should derive a right to possess from the said co-owners to show a right to possession of the property."*

19. In this regard, the Plaintiffs being the owners of undivided half share of the IOT have the right of possession and enjoyment of the same and entitled to bring this action for vacant possession. It was incumbent on the Defendants to show a right of possession of the Property derived from the other co-owner, which the Defendants have failed to do.

20. While the Defendants' counsel has referred to case laws in her written submissions, supporting the contention that there should be some evidence either establishing a right and/or supporting an arguable case for such a right to remain in possession of the Property, the Defendants have failed to annex any documents in their Affidavit in Opposition to provide such evidence to Court. Moreover, the Defendants have not provided any evidence to substantiate the Defendants' occupation of the Property, nor have they tendered any proof of any dwellings that the Defendants claim to have

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<sup>1</sup> See B J Edgeworth et al., Sackville and Neave Australian Property Law, 8<sup>th</sup> ed., LexisNexis Butterworths Australia, 2008 at page 642.

<sup>2</sup> Ibid at page 631.

constructed on the Property. As mentioned earlier, no documentation of any prior or current consent from Biran Wati authorising the Defendants to enter and remain on the Property and so forth have been submitted to the Court either.

21. The Plaintiffs on the other hand have annexed documents such as the Notice which was sent to the Defendants from both tenants in common being the Plaintiffs and Biran Wati. The said Notice indicates that Biran Wati is not consenting to the Defendants occupation of the Property and seeking for the Defendants to vacate the same.
22. Furthermore, the Defendants' counsel in her written submissions has relied on cases relating to Estate matters wherein eviction proceedings involved beneficiaries of Estates. The Defendants' counsel further submitted that the *"Defendant is a rightful beneficiary has the right to remain on the said land and the defendant humbly submits to this honourable Court that he has satisfied the principles of section 172 of the Land Transfer Act. ...defendant submits that the plaintiff knew from the Will of late Urmila that the defendant is a beneficiary, ...the defendant was reminded of this fact when the defendant filed a notice of motion to set aside the default judgment plaintiff entered...the plaintiff should have withdrawn this eviction proceeding and failure to do so is misusing the court process."*
23. The above written submissions by the Defendants' counsel are entirely unrelated to the issues at hand in the current case. The Court expects parties to file submissions based on correct facts and relevant applicable legal principles to support their respective arguments.
24. Filing of such unhelpful and impertinent submissions by the Defendants' counsel is reflective of counsel's lack of diligence in preparation, which not only wastes the Court's time in going through such material but also verges on disrespect towards the Court.
25. Justice Jitoko in ***Nairs Transport Co Pte Ltd v Devi [2024] FJCA 146***, clearly stated that the Court will agree to grant relief under Order 113:

*"only in the clearest of cases" (see: **Bavindra Kumar v. Agheshwar Kumar & Others [2010] HBC 157/08L**). Where there are disputes over the right to occupancy, the matter is best left to a proper writ proceedings rather than originating Summons under Order 113."*
26. I find that this is a clear case where the Defendants have not obtained any consent or a license to occupy or remain in occupation of the Property.

27. Accordingly, I make the following orders:

- (a) The Defendants are ordered to immediately deliver to the Plaintiffs vacant possession of land comprised in Instrument of Tenancy No. 10141 (TLTB Ref No. 4/7/6863) land known as Lolobalavu No.7 Lot 1 situated in the Province of Ba, in the Tikina of Vitogo having an area of 2.2039 hectares.
- (b) There is no order as to costs.

**At Lautoka  
7 February 2025**



**P. Prasad  
Master**