

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
EXERCISING CIVIL JURISDICTION

Civil Action No. HBC 28 of 2018

BETWEEN : **ANJALI DEVI PRAKASH** of 28, Kavika Street
Tavua, Businesswomen

PLAINTIFF

AND : **PETAIA BARI and AISAKE RAVUTUBANITU**
Both of Tavua, Domestic Duties, Clerk.

DEFENDANTS

BEFORE : Hon. A.M. Mohamed Mackie-j

COUNSEL : Mr. A. Dayal, with Ms. A. Kumar - for the Plaintiff.

: Mr. M. Degei – For the Defendants.

DATE OF HEARING : Held on 18th March 2025

WRITTEN SUBMISSIONS : Filed by the Plaintiff on 15th May 2025.
: No submissions filed by the Defendants.

DATE OF JUDGMENT : Delivered on 23rd June 2025.

J U D G M E N T

A. INTRODUCTION:

1. On 14th February 2018, the Plaintiff filed her Originating Summons (“the Application”) in hand against the Defendants for them to show cause why they should not vacate and deliver the immediate vacant possession to the Plaintiff, and seeking for the following Orders **THAT:**

1. **AN ORDER** that the Plaintiff do recover possession of ALL **THAT PIECE OF LAND** occupied by the Defendants of Instrument of Tenancy Number 10084 from the iTaukei Land Trust Board number 4/04/183 on PR No-651 of Land known as “Saunakavika” containing an area of 17 acres 1 rood and 0 perches (“the property”).

2. **AND** such further or other Orders as the Honorable Court may deem just and equitable.

3. **AN ORDER** that costs of this Application be paid by the Defendants.

2. The Application is supported by an Affidavit sworn by the Plaintiff, **Anjali Devi Prakash** ("Devi") on 13th February 2018 and filed along with the following annexures;
 - a. The '**Sale and Purchase Agreement**' between the Plaintiff, Devi, and the Plaintiff's Predecessors in Title namely "THE TRUSTEES- NAVUSABALAVU HOUSING SCHEME", marked as "**ADP-1**"
 - b. The '**Instrument of Tenancy**' by the Native Land Trust Board to the Plaintiff's predecessors, namely, "THE TRUSTEES- NAVUSABALAVU HOUSING SCHEME", and the Instrument **Transfer** in favor of the Plaintiff, both marked as "**ADP-2**".
 - c. The 'Interlocutory Ruling' dated 21st July 2026 pronounced by the Agricultural Tribunal in Reference No. WD 08 of 2015 wherein the 2nd named Defendant hereof, namely, **AISAKE RAVUTUBANITU** was the Applicant, the **iTaukei Land Trust Board** was the 1st Respondent and the **Plaintiff** hereof was the 2nd Respondent, marked as "**ADP-3**".
 - d. The Notice to vacate dated 03rd October 2015 sent by **VUATAKI LAW** on behalf of the Plaintiff addressed to the 1st named Defendant with copy to the 2nd named Defendant, marked as "**ADP-4**".
 - e. An Official receipt dated 30th June 2025 issued by the ILTB in respect of payment of various fees paid by "**The Trustees- Navusabalavu Housing Scheme**", the Plaintiff's predecessors in title, marked as "**ADP-5**".

B. SEQUENCE OF EVENTS:

3. For the purpose of easy comprehension, it is pertinent to describe bellow the sequence of events that had unfolded from 15th March 2018, being the Summons returnable / first hearing date before the then learned Master ("the Master"), till the matter ended up before me on **30th September 2024** for the hearing of the Originating Summons, after expiry of around seven and half (7 ½) years. This would also reveal the extent of the futile pursuit that the Defendants had engaged in by contributing to undue delay and causing unwarranted burden to the system with limited resources, and the expenditure of large sum of money and time for both the parties as well. The events are as follows;
 - a. The Originating Summons was filed by the Plaintiff on 14th February 2018.
 - b. The matter was mentioned before the then Master on 15th March 2018, being the Summons returnable/ first hearing date, wherein directions were given by the Master for the Affidavit in opposition and reply thereto be filed and for the matter to be mentioned on 18th April 2018.
 - c. Accordingly, when the matter was mentioned before the Master on 18th April 2018, due to the absence of and non-representation for the Defendants and failure to file their Affidavit in opposition, Orders in terms of the Summons were granted in favor of the Plaintiff.
 - d. Thereafter, the then Solicitors for the Defendants, on 24th April 2018 and 22nd May 2018 had filed two (2) consecutive Applications for setting aside of the default judgment, but due to their reliance on wrong Order and Rule of the HCR, both the said Applications, being withdrawn, were dismissed by

the Master on 18th May 2018 and 26th July 2018 respectively, with orders for costs to be paid to the Plaintiff.

- e. Subsequently, the new Solicitors, who had then come on record for the Defendants on 27th July 2018, filed the 3rd Application for setting aside and when the matter had come up before the Master on 20th August 2018, same was dismissed as the Defendants and their Solicitor had failed to appear to support their Application. A sum of \$200.00 was ordered to be paid before filing the next Summons, if any, within 14 days.
- f. Thereafter, the Defendants' Solicitors filed their 4th Summons on 23rd August 2018 pursuant to Order 113 Rule (8) of the HCR, seeking to set aside the impugned default judgment that had been entered by the Master, upon which when the matter had come up for hearing before the Master on 18th June 2020, parties were directed to file written submissions and subsequently, the Master by his Ruling dated **26th August 2022** dismissed the Defendants' 4th Application, with a further Order to pay costs in a sum of \$2,000.00 by both the Defendants unto the Plaintiff.
- g. Being dissatisfied of the said Ruling, the Defendants on **05th September 2022**, by appearing in person, filed their Notice of Intention to Appeal, together with the Grounds of Appeal. However, when the Appeal was on foot and a new firm of Solicitors, namely, "**Law Parmendra**" had come on record for the Defendants on 24th October 2022, the Defendants once again, by appearing in person, filed a Notice of Motion on the same date i.e. 24th October 2022, seeking, inter alia, for the consolidation of this matter with the Civil Action **HBC 124 of 2016** that had been filed by them by naming one **OVINI BOKINI** as the 1st Defendant, the **Plaintiff** hereof as the 2nd Defendant, the **ITaukei Land Trust Board** as the 3rd Defendant and the **Registrar of Title** as the 4th Defendant.
- h. However, on 11th April 2023, when the matter had come up before Hon. Justice L. Seneviratne-J (as he then was), the Defendants had informed that they are not pursuing the Application for consolidation. Accordingly, after the appointment of a new firm of Solicitors, namely Messrs. "**Fortis Lawyers & Consultants**" for the Defendants on 19th May 2023, after hearing the Appeal on 13th September 2023 and entertaining written submissions from both parties, Hon Seneviratne -J delivered his judgment on 19th October 2023 allowing the Appeal and setting aside the Ruling pronounced by the Master on 26.08.2022.
- i. Accordingly, pursuant to the said Appeal judgment, the Plaintiff's Originating Summons filed on 14th February 2018 came up for hearing before me, as the former Master (presently Judge), who had entered the impugned default judgment on 18th April 2018, and the present Master, who claimed that the Plaintiff is known to the Court, had recused themselves from hearing this Originating Summons as per their minutes entered in case record on 21st June 2024 and 23rd July 2024 respectively.

C. CAUSE OF ACTION FOR THE PLAINTIFF:

4. The plaintiff's cause of action and/or the grounds for making this Application, as summarized in the Originating Summons, is that she was the Registered Lessee of the **Instrument of Tenancy Number 10084** issued by the iTaukei Land Trust Board (number 4/04/183 on PR No-651) for the land known as "**Saunakavika**" containing an area of 17 acres 1 rood and 0 perches which was Registered on 1st August 2005, and then was transferred in her favor and Registered with the Registrar of Deeds on 29th

July 2015 . That she despite through her solicitors had issued Notice to vacate to the Defendants on 23rd October 2015 as they were illegally trespassing and occupying the property, without the consent of the Plaintiff , and particularly after the Defendants' Application for declaration of Tenancy was struck out and dismissed by the Agricultural Tribunal , and when the Defendants' claim in Action No- HBC 124 of 2016 had been struck out on 6th December 2017 , they (the Defendants) still in occupation and refusing to vacate the said property.

5. In other words, the Plaintiff complains that the Defendants remain in occupation and/or possession of the said property in dispute without the consent, permission, license or authority from the Plaintiff and continuing to do so, as trespassers, illegally and unlawfully not being the Tenants or Lessees of the Plaintiff and/or tenants or Lessees of the Plaintiff holding over after termination of tenancy or lease.
6. The Plaintiff's Affidavit in support carries overwhelming evidence in detail, supported by documents annexed thereto marked as "**ADP-1**" to "**ADP-5**", in order to substantiate her position against the Defendants. This (Application) is made by the Plaintiff pursuant and under Order 113 of the High Court Rules 1988.

D. THE DEFENCE:

7. As the Defendants were initially embroiled in making their repeated unsuccessful setting aside Applications before the Master, their Affidavit in opposition to the Plaintiff's Affidavit in Support for the Originating Summons, was filed before the Master only on 11th September 2019, along with the following annexures;
 - a. *Instrument of Tenancy issued by the Native Land Trust Board unto the **Trustees, Navusabalavu Housing Scheme** (the Plaintiff's predecessors in title) – marked as "**AR-1**".*
 - b. *The Deed of Trust dated 20th April 1999 created for the said Trustees, Navusabalavu Housing Scheme marked as "**AR-2**".*
 - c. *The letter dated 26th July 2020 sent by the 2nd named Defendant **Waisake Ravutubananitu** to the Manager **Native Land Trust Board** claiming ownership to the Land in question and requesting not to entertain anyone else for the property – marked as "**AR-3**".*
 - d. *Letter dated 22nd July 2015 sent by the 2nd named Defendant addressed to then Prime Minister, requesting investigation to be conducted into the alleged illegal practices at the TLTB -Marked as "**AR-4**".*
 - e. *A letter dated 31st July 2015, sent by Nawaikula Esquire, addressed to Manager TLTB, informing about the interest of the 2nd named Defendant in the subject property and about the pendency of the Reference No- WD 08/15 before the Agriculture Tribunal between the 2nd named Defendant and TLTB- Marked as "**AR-5**".*
 - f. *A letter dated 28th September 2015 sent by Nawaikula Esquire addressed to the Manager TLTB protesting about granting of consent to three different persons to sell the property- Marked as "**AR-6**".*
 - g. *The Application for Consent to assign -Marked as "**AR-7**".*
 - h. *The Letter dated 1st October 2015 sent by the TLTB addressed to Registrar of Title – Marked as "**AR-8**".*
 - i. *The memo dated 25th September 2015 from the Tavua Police Station confirming the receipt of a complaint- Marked as "**AR-9**".*
 - j. *The letter dated 17th Nov, 2015 sent by the 2nd named Defendant addressed to FICAC– Marked as "**AR-10**".*
8. In his said Affidavit in opposition, the 2nd named Defendant took up the position, inter alia, as follows:
 - a. That the land in question in the extent of 17 acres, with an Iron and wooden building of two flats is under occupation by him, his wife Petaia Bari (the 1st named Defendant) and their children. (**Vide para 3 of Affidavit**)

- b. That their occupation began in year 2000 after he built the subject house at the cost of \$40,000.00 and the **Title to the Land is under the Trustees - Navusabalavu Housing Scheme**, as per “**AR-1**”, which is the true copy of instrument of Tenancy No- 6409. (Vide para 4 of the Affidavit)
- c. That he has been in occupation in his capacity as a **Trustee of Navusabalavu Housing Scheme**” and being one of the signatories to the Title as per Deed of Trust dated **28th April 1999**, marked as “**AR-2**”. (Vide para 5&6 of the Affidavit)
- d. That he denies the Plaintiff’s claim that the Plaintiff is the registered lessee of the subject land, but admit that the instrument of Tenancy No-10084 annexed as “ADP-2” to the Plaintiff’s Affidavit is over the same land that he is occupying it as the Trustee of “**Navusabalavu Housing Scheme**”. That he cannot recall ever surrendering the current title as stated in “**ADP-2**”. (Vide para 7 of the Affidavit).
- e. That on 26th July 2010, he wrote to the Manager of the ITLTB to remind him not to entertain any dealings of his Land as he is also on customary and beneficiary’s occupation. **Vide “AR-3”**. (Vide para-8)
- f. That he is not aware of the sale and purchase agreement, but he questions the status of the Vendors **Manasa Naiceru, Ovini Bokini and Setareki Tinalevu** as they are not the Trustees of **Navusabalavu Housing Scheme** nor had any authority to transfer the Land that he currently occupies. (Vide para -9)
- g. That he cannot recall having surrendered the Instrument of Tenancy No-6409 (former Tenancy) to issue the new Tenancy No- 10084 in favor of the Plaintiff and the purported Transfer on 29th July 2015 is wholly wrong. (Vide para-11 of the Affidavit)
- h. That the Agricultural Tribunal ruled that he cannot seek relief under its jurisdiction because he was a Trustee (Vide para-17 of the Affidavit).
- i. That the issues in action **No- HBC - 124 of 2016** are still very much alive, because he is currently appealing the decision of the Master therein and the Fiji Court of Appeal under Appeal bearing No; **ABU 119 of 2018** is currently considering issues in relation to that. (Vide para 18 of Affidavit)
- j. That the Plaintiff is not the owner as the purported Trustees lacked capacity to transfer unto her, consent was revoked by the ITLTB and the Plaintiff’s purported Title is defective. (Vide para 20 of the Affidavit)
- k. That he has the right to be on his land, he was not in the land by the consent of the previous owner as he is the previous owner, and in any event, there are many triable issues concerning the subject land, as such the process under Order 113 is not appropriate. (Vide para 21 of the Affidavit)

E. APPLICABLE LAW, RULES AND DISCUSSION:

- 9. The Plaintiff brings this action under and pursuant to Order 113 of the HCR, 1988, which facilitates the recovery of possession of a land and premises alleged to be occupied or held illegally and unlawfully by person or persons, without any right, authority or license to do so.

10. The Defendants are, admittedly, not the tenants and/or lessees of the Plaintiff holding over under and/or from any termination of tenancy or lease with the Plaintiff, with the consent and authority and license of the Plaintiff or that of the Plaintiff's predecessor in title, namely, "The Trustees- Navusabalavu Housing Scheme". **The 2nd named Defendant in paragraph 21 of his Affidavit in opposition, contrary to his initial position that he was a trustee, has now claimed that he is the owner of the subject land and he is in the land not with the consent of the previous owner.**
11. I find with no reservation that the Plaintiff is the rightful and the Registered owner of the entire land known as " **Saunakavika**" containing an area of 17 acres 01 rood and 0 perches by virtue of her Instrument of Tenancy No-10084 being duly issued by the ITLTB and Registered on 1st August 2005, which has been transferred to her and registered with the Registrar of Deeds on 29th July 2015. This transfer has been effected by none other than the majority of the **Trustees of Navusabalavu Housing Scheme**.
12. The Plaintiff has not, at any time, granted consent, authority or license to the Defendants or any others to take possession of or occupy the land in suit, and they were neither tenants / lessees of the Plaintiff with the consent, authority and license of the Plaintiff nor an over holding Tenants or lessees after the termination of a Tenancy or lease.
13. Accordingly, the Plaintiff moves for an Order that the Plaintiff do recover possession of all that piece of land occupied by the Defendants of Instrument of Tenancy Number 10084 from the iTaukei Land Trust Board, number 4/04/183 on PR No- 651 of Land known as "Saunakavika" containing an area of 17 acres 1 rood and 0 perches ("the property") as prayed for in her Originating Summons.
14. The Plaintiff has filed an Affidavit in Support pursuant to Order 113 Rule 3. However, I do not find any averment in the Affidavit in terms of paragraph (C) of the Order 113 Rule 3. This compliance is required, in my view, only when there are other occupants in the Land in question, whose name/s are not known to the Plaintiff. However, no objection whatsoever was taken by the 2nd named Defendant in his Affidavit in opposition in relation to absence of evidence in this area, and there is no even a suggestion that there are any other, unnamed persons participating with the Defendant's occupation in the land in question. Thus, non-compliance of paragraph (C) of Order 113 Rule (3) is not fatal to the Plaintiff's Application.
15. The issues that beg adjudication here Summarily, without resorting to a formal trial or following the regular procedure, according to the pleadings, are;
 - 15.1. Who has the rightful title to the land in question, and whether such title is a valid one?
 - 15.2. Whether there has been an unlawful occupation on the part of the Defendants as alleged by the plaintiff?
 - 15.3. And if the answers to issues No: 15.1 & 15.2 are in favor of the Plaintiff, whether the Defendants have any right to be in possession and occupation of the subject land?
 - 15.4. Whether the plaintiff is the only party who can legally possess and occupy the land in question?
16. The Plaintiff brings this Originating Summons under Order 113 Summary proceedings for the recovery of land, whereby it is stated under Rule 1 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 license 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'

17. Therefore, it is necessary to consider this matter under the applicable law and in the light of reported decisions in relation to the principles governing the summary Application for eviction under Order 113 of the High Court Rules, 1988.
18. Out of the line of authorities that govern the subject in hand, I propose to set out hereunder few important citations, which I consider to be the guidance.
19. Order 113 of the High Court Rules, 1988 provides a summary procedure for possession of Land as observed in paragraph 16 above. Justice **Pathik in "Baiju v Kumar (1999) FJHC 20; HBC 298 J.98**, succinctly stated the scope of the order as follows;

"The question for (the) Courts determination is whether the plaintiff is entitled to possession under this Order. To decide this, Court has to consider the scope of the Order. This aspect is covered in detail in the Supreme Court Practice, 1993 Vol 1, O.113/1-8/1 at page 1602 and I state hereunder the relevant portions in this regard"

"This Order does not provide a new remedy, but rather a new procedure for the recovery of possession of land which is in wrongful occupation by trespassers".

20. This Order is narrowly confined to the particular remedy stated in r.1. It is also to be noted, as the White Book says at p.1603:

"This Order would normally apply only in virtually uncontested cases or in clear cases where there is no issue or question to try i.e. where there is no reasonable doubt as to the claim of the plaintiff to recover possession of the land or as to wrongful occupation on the land without license or consent and without any right, title or interest thereto".

21. 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...."

22. Goulding J. said that:

".....where the plaintiff has proved his right to possession, and that the defendant is the trespasser, the Court is bound to grant an immediate order for possession"

23. Another definition of "trespasser" is as set out in **Clerk & Lindsell on Torts (15th Ed. 1982) page 631:**

"A trespasser is a person who has neither right nor permission to enter on premises".

24. Also as was said by Lord **Morris of-Borth-Y-Gest in British Railways Board v. Herrington [1972] UKHL 1; [1972] A.C. 877 at 904:**

“The term ‘trespasser’ is a comprehensive word; it covers the wicked and the innocent; the burglar, the arrogant invader of another’s land, the walker blindly unaware that he is stepping where he has no right to walk, or the wandering child – all may be dubbed as trespassers.”

25. I refer to **Sir Frederick Pollock’s** statement in the case of ***Browne v. Dawson [1840] EngR 898; (1840) 12 Ad. & El 624*** where his Lordship said;

“..... A trespasser may in any case be turned off land before he has gained possession, and he does not gain possession until there has been something like acquiescence in the physical fact of his occupation on the part of the rightful owner.....”

26. By her supporting Affidavit dated 13th February 2018 the Plaintiff, “DEVI” has satisfied this Court and proved by her convincing evidence therein that she is the rightful owner of the subject matter land known as ‘Saunakavika’ containing an extent of 17 acres, 01 Roods and 0 perches situated in TIKINA, TAVUA in the District of Ba, bearing NLTB Reference No- 4/4/183 PR No-651.
27. The Plaintiff has substantiated that the subject property, which as per the **Instrument of Tenancy** marked as “ADP-2” was on 12th May 2005 leased by the ITLTB in favor of, THE Trustees – Navusabalavu Housing Scheme and registered on 1st August 2005, was agreed to be sold to her as per the **“Sale And Purchase Agreement”** dated 30th June 2015 marked as “ADP-1” entered into by and between the authorized 3 Trustees of the said **“Navusabalavu Housing Scheme”**, namely, **Mr. Manasa Naiceru, Mr. Ovin Bokini & Mr. Setareki Tinalevu** – and the Plaintiff, **Anjali Devi Prakash**, and the same being duly transferred by them in favor of the Plaintiff on 25th June 2015, has now been registered in her name on 29th July 2015.
28. The Defendants do not seriously challenge this Agreement for Sale and the Transfer in favor of the Plaintiff. Instead, what the 2nd named Defendant in paragraph 7 and 11 of his Affidavit in opposition filed on 11th September 2019 states is that he cannot recall ever surrendering the instrument of Tenancy No-6409. He appears to be in a self-centered move in order to deny the fact that the Instrument of Tenancy No-6409 issued to the **“Navusabalavu Housing Scheme”**, was surrendered for the issual of the new Tenancy No- 10084 in favor of the Plaintiff for it to be transferred to her subsequently.
29. Careful perusal of the contents of the pleadings and those of the documents tendered, particularly , that of the Ruling pronounced by the Agricultural Tribunal Marked as “ADP-3”, clearly demonstrate that the 2nd named Defendant , who initially came before this Court claiming to be the representative on behalf of the Mataqali’s and that of the **“Navusabalavu Housing Scheme”**, subsequently changed his stance claiming the right , title and interest in the subject matter land in his favor. Vide the contents of paragraph 21 of his Affidavit in opposition. The Agricultural Tribunal, after an extensive analysis on the 2nd named Defendant’s claim for Tenancy, by its decision dated 21st July 2016, has struck out the same on the basis that while claiming to be a Trustee, the 2nd named Defendant cannot claim such a declaration from the Tribunal and it has no jurisdiction to grant such a relief.
30. The pivotal question for Court’s determination is whether the Plaintiff is entitled to possession of the land under Order 113 of the High Court Rules. To decide this, the Court has to consider the ‘scope’ of the Order 113. What is the scope of Order 113 of the High Court Rules 1988? The scope of Order 113 of the High Court Rules is discussed in the Supreme Court Practice, 1993 Volume 1, 0,113/1 – 8/1 at page 1602. The relevant paragraph is as follows:

“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 license 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 license or consent; and this Order also applies to a person who has entered into possession of land with a license but has remained in occupation without a license, except perhaps where there has been the grant of a license for a substantial period and the licensee holds over after the determination of the license (Bristol Corp. v. Persons Unknown) [1974] 1 W.L.R. 365; [1974] 1 All E.R. 593.”

31. The Court in **“Ralinalala v Kaicola” (2015) FJHC 66** said;

“Order 113 of the High Court Rules provides a summary procedure for possession of land, where it states that:

“Where a person claims possession of land which he alleges is occupied solely 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 license 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”.

32. 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.

33. 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 **Mcp hail 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.

34. 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 Defendants have to satisfy the Court that they have a license or consent of the owner to occupy the land.

35. In **Moto v Nakauta [2013] FJHC 30; HBC 262.2012 (11 February 2013)**, the Plaintiff was granted immediate possession in terms of their originating summons as per Order 113 and the Defendants were ordered to pay costs of the application, whereby it was stated that;

‘to evict an occupant what is important is not whether the Plaintiff was actually in possession or had any exclusive possession but Plaintiff should have a better title than Defendants.’

36. The case made further reference to **“Danford v McAnulty (1883) 8 App Case 456” at 462** where Lord Blackburn had proclaimed as follows:

'... in ejectment, where a person was in possession those who sought to turn him out were to recover upon the strength of their own title; and consequently, possession was at law a good defence against any one, and those who sought to turn the man in possession out must show a superior legal title to his.'

37. In **"Housing Authority v Muniappa [1988] FJSC 177; Civil Action 25 of 1977 (7 April 1977)"**, it was held that the plaintiff, Housing Authority, who held a registered lease so that it may be characterized as the 'last registered proprietor'. The Plaintiff in this case has also established prima facie right to possession.

38. In the Supreme Court of Fiji case of **"Morris Hedstrom v Liaquat Ali Action No. 153 of 1987"**, at paragraph 2 it was clearly stated that:

"Under Section 172 the person summonsed may show cause why he refused to give possession of the land and if he proves to the satisfaction of the Judge a right to possession or can establish an arguable defence the application will be dismissed with costs in his favour. The Defendants must show affidavit evidence some right to possession, which would preclude the granting of an order for possession under Section 169 procedure. That is not to say that final or incontrovertible proof of a right to remain in possession must be adduced. What is required is that some tangible evidence establishing a right or supporting an arguable case for such right, must be adduced."

39. When reduced to its essentials, the law in relation to Order 113, as I understand from the aforesaid is this;

- a. A person who has a legal right to claim the possession of a land could institute an action under Order 113 against a person who has entered into or remains in occupation without his license or consent or that of any predecessor in title.
- b. This Order also applies to a person who has entered into possession of land with a license but has remained in occupation without a license.

40. The title to the subject land hereof, which was, undisputedly, with the **"Navusabalavu Housing Scheme"**, pursuant to the Sale and Purchase Agreement dated 30th June 2015, marked as "ADP-1" entered into by and between the Trustees thereof (namely, **Mr. Manasa Naiceru, Mr. Ovini Bokini & Mr. Setareki Tinalevu**) and the Plaintiff hereof, has now stands duly transferred in favor of the Plaintiff and she has become the last registered proprietor/ owner thereof. Thus, she has all the right to have this action filed and proceeded with seeking the vacant possession thereof from the Defendants and all those holding under them (if any), who hold no any lawful right, title or interest for them to continue in occupation. I am satisfied that the Plaintiff has a legal right to claim the possession of the land, pursuant to Order 113 of the High Court Rules, 1988.

41. The onus now stands shifted to the Defendants to satisfy that they have better title, license or consent of the Plaintiff or her predecessor in title of the Land in question, but they have failed to discharge their burden in order to justify their continued occupation of the land in suit. The mere assertion by the Defendants of fraud does not defeat the title of the Plaintiff.

42. At this stage, it is pertinent to refer to some observations made by the then learned Acting **Master Mohamed Azhar**, in his Ruling dated 6th December 2017, wherein he correctly struck out the action **No-HBC 124 of 2016** filed by **Aisake Ravutubananitu** (the 2nd named Defendant hereof) by naming one **OVINI BOKINI, ANJALI DEVI PRAKASH**, and the **ITAUKEI LAND TRUST BOARD** as 1st, 2nd and 3rd Defendants respectively in relation to the same subject matter land.

43. The contents of the said Ruling, in the said action No-HBC 124 of 2016, clearly demonstrate as to how the Plaintiff thereof (the 2nd named Defendant in this action) commenced the said action in his purported capacity as a Trustee of the “**Navusabalavu Housing Scheme**” claiming to be safeguarding the interest of the Trust of the said housing Scheme and that of the Mataqalis, finally changed his stance claiming personal right, title and interest for him in relation to the subject property.
44. For the sake of clarity and easy comprehension as to where the 2nd named Defendant hereof stands as far as his purported defence is concerned, I shall reproduce bellow some salient parts of the said Ruling dated 6th December 2017 pronounced by the Acting Master.

18 “..... If the plaintiff still claims that, he is the trustee of the said Mataqali, he should have asserted his position and got the said Deed of Trust (OB 1) cancelled through an appropriate action.....”.

19 “.....I am of the view that, though the plaintiff was initially appointed as the trustee with Viliame Batidegei, their trusteeship had already been cancelled by the said Deed of Trust marked as OB 1 and the plaintiff and his co-trustee ceased to be the trustees from the date on which the Mataqali declared and executed OB 1”.

21. “It follows from the above analysis that, the contention of the plaintiff, that he brought this action as the trustee of Navusabalavu Trust, cannot be accepted. Though he was originally appointed as the trustee, his trusteeship ceased following the declaration by the majority members of Mataqali and signing the Deed of Trust marked OB 1. He was, therefore, not the trustee at the time of filling this action”.

“24 “..... The final relief sought by him is purely for his benefit and surely not for the benefit of the members of Mataqali. Therefore, the plaintiff fails to pass the test for the representative action. Furthermore, the said Native Lease No. 4/4/183. IT No. 6409 does not exist now, as it had already been surrendered to the 3rd defendant and it had issued a new lease to the 2nd defendant. In fact, the plaintiff tries to get personal benefit out a Native Lease which was granted to Navusabalavu Trust and was surrendered to the 3rd defendant. Thus, he loses the locus standi to bring this action as the representative action on behalf of the majority members of Mataqali. He is suing the defendants to establish a tenancy for himself under the guise of common interest of Mataqali. Even in the application he filed before the Agricultural Tribunal, which was finally struck out by the Tribunal, he sought the tenancy for his benefit and not for the benefit of Navusabalavu Housing Scheme Trust. It follows that, the plaintiff was neither the trustee; nor he passed the test for representative action when he filed this case against the defendants. As a result, he lacks the locus standi to bring this action in the way and the manner it has been instituted”.

25. “Now I turn to examine whether the plaintiff has any cause of action in terms the claim he made against the defendants through his statement of claim. As mentioned above, the plaintiff claims the tenancy of the subject land for himself personally. In paragraph 13 of his statement of claim, he stated that, since 1998 he built his house, connected the electricity and water; has been in continuous occupation and cultivation to the date of filling the action. He further stated that, the property was not transferred to his name due to the iTLTB's assurance that, no one will remove him as he has been cultivating and occupying as a member of Mataqali and invested money on the land. This averment obviously indicates that, the claim of the plaintiff is for his personal benefit. It is admitted that, plaintiff entered the said Native Lease, when it was originally granted, as the trustee of Navusabalavu Housing Scheme. The vital question, therefore, is whether a trustee can claim benefit out of the trust property?”

30. “..... As per the admission of the plaintiff and the defendants in this case, this is the trust property acquired by the trust for the benefit of the members of the Mataqali. However, the plaintiff built a house and obtained the public utility connections to his house and now claims that his interest to the said land be restored. The plaintiff having entered the said property as the trustee had tried to abuse his position to make it means of profit for himself. What he claims is purely for his personal benefit. His abuse of power started from the day he started to build his own house on the trust property. In *Keech v Sandford*(supra) the court did not allow the trustee to take the lease on his name, even though the lessor refused to renew to the beneficiary.....Therefore, the plaintiff's attempt to unjustly enrich out of the trust property does not give him any cause of action in this case”.

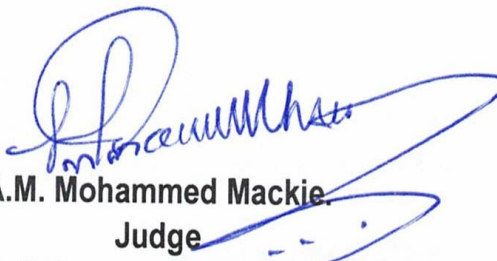
45. In view of my analysis above and the observations made by the learned Acting Master in his Ruling in the connected action No-HBC 124 of 2016, as highlighted above, this Court stands fully convinced that the Defendants do not have any valid defence to remain in possession of the subject matter land and oppose the reliefs sought in the Plaintiff's origination Summons. Considering the circumstances, I decide to Order the Defendants to pay the Plaintiff a sum of \$3,500.00 being the summarily assessed costs.
46. I have taken judicial notice of the Ruling pronounced by the Court of Appeal on 22nd January 2025 in **Ravutubananitu v Bokini [2025] FJCA 1; ABU119.2018 (22 January 2025)**, dismissing the Appeal preferred by the Appellant therein, who is the 2nd named Defendant in this matter, on the ground of non-prosecution of the Appeal. It is also revealed, as per the said Ruling, that despite the Appellant had passed away in September 2023, no steps had been taken to substitute in place of him for the purpose of prosecution of the Appeal. The Solicitors for the deceased 2nd named Defendant in this matter too have not informed this Court about the demise of the 2nd named Defendant and moved for substitution in place of him. Thus, in fairness to Plaintiff, I need not delay the judgment in this matter any further, as it could prejudice the Plaintiff. The absence of a cause of action in his former action No. HBC 124/2016 as the Plaintiff is also the absence of defence for him in the action hereof as a second-named Defendant.

F. FINAL ORDERS:

- a. The Plaintiff's Originating Summons, filed against the Defendants on 14th February 2018, succeeds.
- b. The relief prayed for in terms of paragraph 1 of the said Originating Summons is hereby granted.
- c. The Plaintiff is entitled to recover the vacant possession of the Land in dispute and the Defendants are ordered to hand over the same unto the Plaintiff within 28 days from today.
- d. The Defendants shall pay the Plaintiff a sum of \$3500.00, being the summarily assessed costs of this Originating Summons, within 28 days of this judgment.

On this 23rd day of June 2025 at the Civil High Court of Lautoka.




A.M. Mohammed Mackie.
 Judge
 High Court (Civil Division)
Lautoka.

SOLICITORS:

Messrs. Dayal Lawyers- Barristers & Solicitors – for the Plaintiff.

Messrs. Fortis Lawyers & Consultants – Barristers & Solicitors- For the Defendants.