

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
APPELLATE JURISDICTION

CIVIL ACTION NO. HBC 46 OF 2017

BETWEEN : **DEO SAGAYAM** of Vuda Point, Lautoka, Unemployed.

APPELLANT/ORIGINAL DEFENDANT

AND : **RAJENDRA PRASAD** of Vuda Point, Lautoka, Farmer, as the sole Executor and Trustee of the **ESTATE OF NOKAIYA**, late of Vuda Point, Lautoka, Farmer, Deceased, Testate.

RESPONDENT/ORIGINAL PLAINTIFF

Appearances : Mr K. Maisamoa for the defendant/appellant
Ms S. Ravai for the plaintiff/respondent

Date of Hearing : 15 June 2018

Date of Judgment: 20 August 2018

J U D G M E N T

Introduction

- [01] This is an appeal, with leave being granted to appeal out of time, against a decision of the Learned Master (*'Master'*) made on 13 October 2017, delivering possession of a property to the plaintiff/respondent (*'respondent'*) (*'the decision'*). The Master made the decision in the proceedings brought under O 113 of the High Court Rules 1988, as amended (*'HCR'*).
- [02] Both parties orally argued the appeal and filed their respective submissions. I am grateful to both counsel for their comprehensive submissions.
- [03] Subsequent to the conclusion of the hearing on 15 June 2018, I indicated that I would allow the appeal and set aside the Master's decision with summarily assessed costs of \$2,500.00 for the reasons to be given by me in writing. This judgment gives those reasons for that decision.

The Background to the Appeal

- [04] On 10 March 2017, Rajendra Prasad, the plaintiff/respondent (*'the respondent'* in this appeal proceedings), as the sole executor and trustee of the estate of late Nokaiya, brought proceedings under the HCR, O 113, against Deo Sagayam, the defendant/appellant (*'the appellant'*) in this appeal proceedings), seeking vacant possession of the property contained within Crown Lease Reference No. 4/7/2015, more particularly described as Lot 2, Plan LDSW 448 proposed S/D Lot 4 ND 5014 situated at Vuda (*'the land'*).
- [05] The appellant filed his affidavit in response and stated that he is occupying the land by reason of his marriage with Nirmala Devi, a.k.a Maya Wati daughter of Vengtesu, the respondent's brother and one of the beneficiaries to the estate of Nokaiya. The appellant specifically stated that he has been living on the land since 2008, when his father-in-law got sick. The appellant was unrepresented at the hearing before the Master. Having found the appellant is a trespasser, the Master ordered the appellant to deliver up vacant possession of the property to the respondent. The appellant, being dissatisfied with the order, appeals to this Court.

The Grounds of Appeal

- [06] The appellant has preferred this appeal on the following grounds:
1. *That Learned Master of the High Court erred in law and fact that his decision was solely based on the Reference of Crown Lease No. 4/7/2015 given by the Respondent/Plaintiff, which is totally different from the Crown Lease Number 5303 where the Appellant/Defendant and his wife were residing.*
 2. *That Learned Master of the High Court erred in law and fact for referring to the reference file number 4/7/2015 as Crown Lease Number, which is the subject of this proceeding.*
 3. *That Learned Master of the High Court erred in law and fact for not considering that the subject lease was expired therefore the Master has no jurisdiction to rule on the expired Crown Lease that has no legal effect in favour of the Respondent/Plaintiff.*

4. *That Learned Master of the High Court erred in law and fact for not taking into consideration that the Respondent/Plaintiff has no legal standing to bring this action against the Appellant/Defendant since the subject Crown Lease has expired.*
5. *That Learned Master of the High Court erred in law and fact that even though the Appellant/Defendant admitted that there was a Will, but the content of the Will was not thoroughly explained to the Appellant/Defendant together with its legal effects.*
6. *That Learned Master of the High Court erred in law and fact for not considering that the Appellant/Defendant clear stated that by virtue of his legal married to Nirmala Devi the daughter of Vengtesu a.k.a Yenkataiaya that made him not a trespasser in the subject land.*
7. *That Learned Master of the High Court erred in law and fact for not considering that Respondent/Plaintiff should have brought this proceeding against the Nirmala Devi and not the Appellant/Defendant because the Appellant/Defendant was only occupying the said property by virtue of his legal married to Nirmala Devi who holds a Letter of Administration issued by the High Court to administer the property of his late father.*
8. *That Learned Master of the High Court erred in law and fact for not considering that the Respondent/Plaintiff admitted that Basaiya a.k.a Vengtesu was his brother and one of the beneficiaries of the Estate of Nakaiya therefore Nirmala Devi who is the legal wife of the Appellant/Defendant therefore the Appellant/Defendant was not a trespasser in the said property.*
9. *That Learned Master of the High Court erred in law and fact for not taking into account that the Appellant/Defendant was not legally represented.*
10. *That the execution of the ruling by the Learned Master of the High Court to be stayed until the determination of this appeal is finalised.*
11. *That if your Lordship's Court finds that the subject Crown Lease is expired therefore your Lordship's Court should declare that the proceedings brought by the Respondent/Plaintiff against the Appellant/Defendant is null and void.*

The Issue at Appeal

[07] The appeal concentrated on two key issues:

1. Whether an application for vacant possession of land under O 113 of the HCR is possible based on an approval of lease granted subject to certain conditions by the Director of Lands, when those conditions were not fulfilled before making such an application and such approval was to be deemed cancelled as a result of Crown Lease which had expired before making such an application.
2. The meaning of trespasser to the land, specifically, whether a person who enters into a property with the consent or approval of the owner of the land or its predecessor or a person who has beneficial interest in that property.

The Submissions

[08] *Appellant*

The appellant's primary submission was that in seeking possession of the property, the respondent relied on reference of Crown Lease No. 4/7/2015, which was issued to the respondent on 15 February 1989, while the Crown Lease No. 5303, LD 4/7/2015 was still valid or active. The Reference Crown Lease No. 4/7/2015, which the Learned Master was referring to was not a lease number, but it was a file reference number LD 4/7/2015 in relation to the Crown Lease No. 5303 which expired on or about 2003. The Reference Crown Lease No. 4/7/2015 was a letter notifying the respondent that his application for a piece of Crown Land has been approved subject to certain terms and conditions. The respondent had failed to comply with the terms and conditions of that letter of offer. On that basis, the appellant submits that the respondent had no *locus* to bring eviction proceedings under O 113 against the appellant.

[09] It is also submitted on behalf of the appellant that the Learned Master had failed to take into consideration the fact that the appellant has been occupying the

property by reason of the marriage with Nirmala Devi, the daughter of Vengtesu a.k.a Yenkataiaya and that made him not a trespasser in the subject land.

Respondent

- [10] The respondent's submission is that the lease in question in fact approval for Lease Reference No. LD 4/7/2015: there was evidence presented before the Learned Master regarding Crown Lease Reference No. 4/7/2015 commencing 1988; the Notice of Approval for Lease being Reference No. LD 4/7/2015 gives him legal authority standing to bring proceedings against the appellant. In essence, the respondent submits that the appellant's failure to establish any legal or equitable right renders him a trespasser and as such the Learned Master was correct in his judgment in granting order for vacant possession against the appellant.

The Law

- [11] The jurisdiction of the High Court to grant vacant possession to the persons entitled to possession of the land is found in Order 113 of the HCR which provides:

"Proceedings to be brought by originating summons (O 113, R 1)

1. 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 or her licence or consent or that of any predecessor in title of his or her, the proceedings may be brought by originating summons in accordance with the provisions of this Order."

The decision

- [12] As the sole Executor and Trustee of the Estate of Nokaiya, the respondent brought proceedings under O 113 for possession of the land which is occupied by the appellant. Before I get into the issues, I would like to think that I should briefly explain the procedures to be followed in summary proceedings under this Order for possession of the land which is occupied solely by a person or persons, not being a tenant or tenants holding over after termination of a tenancy or who

entered into or remained in occupation without the licence or consent of the person making the claim or that of any predecessor in title of his.

Procedures for summary proceedings under O 113

- [13] The HCR, O 113 sets out procedures to be followed in summary proceedings brought under this Order.
- [14] An application for summary judgment against wrongful occupiers of land under Order 113 must be brought by way of originating summons, and no acknowledgment of service is required. The plaintiff must file a supporting affidavit stating:
1. his or her interest in the land (*O 113, R 3 (a)*);
 2. the circumstances in which the land has been occupied without licence or consent and in which his or her claim to possession arises (*O 113, R 3 (b)*); and
 3. that he or she does not know the name of any person occupying the land who is not named in the summons (*O 113, R 3 (c)*).
- [15] Every copy of an originating summons for possession of land under O 113 for service must be sealed with the seal of the High Court out of which the summons was issued (*O 113, R 3*). Order 25 Rule 4 (admissions and agreement to be made) does not apply to proceedings under this Order (*O 113, R 4(4)*). The method of service of such originating summons differs somewhat according to whether any wrongful occupier is named in it. Where any person in occupation of the land is named in the originating summons, the summons together with a copy of the supporting affidavit must be served on him (1) personally (*O 113, R 4 (1) (a)*), or (2) by leaving a copy of the summons and of the supporting affidavit or sending them to him or her, at the premises (*O 113, R 4(1) (b)*) or (3) in such other manner as the court may direct (*O 113, R 4(1) (c)*). In addition to being served, unless the Court otherwise directs, (a) by affixing a copy of the summons and a copy and of the supporting affidavit to the main door or other conspicuous part of the premises (*O 113, R 4(2) (a)*), and (b) if practicable, by inserting through the letter

box at the premises a copy of the summons and a copy of the affidavit enclosed in a sealed envelope addressed to “the occupiers.”(O 113, R 4 (2) (b)).

- [16] Any person not named as a defendant who is in occupation and wishes to be heard on the question whether an order of possession should be made may apply at any stage of the proceedings to be joined as a defendant (O 113, R5).
- [17] A final order for possession of land under O 113 must be made by a Judge in person. It must not be made less than 5 clear days after the date of the service of the summons, except in case of urgency and by laws of the Court (O 113, R 6 (1)). The court has power to order possession to be given on a specified date, in the same way as it has such power in respect of a claim for possession in action begun by writ (O 113, R 6 (2)).
- [18] The leave of the Court is not required to issue a writ of possession to enforce an order for possession in proceedings under O 113. However, the leave of the Court is necessary to enforce such an order after the expiry of 3 months from its order. An application for leave may be made *ex parte* unless the Court otherwise directs.
- [19] Any order made in proceedings under O 113 may be set aside or varied by the Judge on such terms as he or she thinks just (O113, R 8).
- [20] The appellant did not raise any procedural issues, such as service of the summons and the supporting affidavit either here or in the court below.
- [21] It should be noted that the Chief Justice by his directive dated 5 October 2009, has extended the Master’s jurisdiction to hear contested applications in respect of possession of land under section 169 of the Land Transfer Act 1971 and Orders 88 and 113. The Master in effect may make any orders the Judge would possibly make in proceeding under Orders 88 and 113 and section 169, whether contested or not.

Scope of Order 113

- [22] It would be appropriate to quote Halsbury’s Laws of England, Vol. 37 (4th Ed), para 425, which succinctly explain the scope of O 113:

“(iii) Summary Proceedings for the Possession of Land

425. Scope of Order 113. The procedure for summary judgment under Order 113 of the Rules the Supreme Court applies to a claim for possession of land which is occupied solely by a person or persons, not being a tenant or tenants holding over after the termination of a tenancy, who entered into or remained in occupation without the licence or consent of the person making the claim or that of any predecessor in title of his. The procedure applies to the wrongful occupier who has entered into, or who has remained in, occupation without licence or consent of the owner, it applies to unlawful sub-tenants, and it applies not only where the wrongful occupier is known or can be identified but also where not every wrongful occupier is known or can be identified, and even where all the occupiers are unknown and no person can be named as a defendant.

The procedure does not apply to a claim for possession of land against a tenant holding over after the termination of the tenancy.

The procedure operates not by way of the grant of interlocutory relief but by way of a final judgment or order.

- 1. RSC Ord. 113, r.1 Order 113 provides an exceptional procedural machinery for the speedy and summary recovery of possession of land which is in the wrongful occupation of trespasses or "squatters", without proceeding to a trial. It is intended to remedy an exceptional mischief of a totally different character or dimension from that which can be remedied by an ordinary claim for the recovery of possession of land by the ordinary procedure of the issue of a writ followed by a judgment in default of notice of intention to defend or under Ord.14.*
- 2. See Greater London Council v Jenkins [1975] 1 All ER 354, [1975] 1 WLR 155, CA, where a licence to occupy was terminated.*
- 3. Moore Properties (Ilford) Ltd v McKeon [1977] 1 All ER 262, [1976] 1 WLR 1278.*
- 4. See Re Wykeham Terrace, Brighton, Sussex, ex parte Territorial Auxiliary and Volunteer Reserve Association for the South East [1971] Ch 204. See also Ex parte Amalgamated West End Development and Property Trust Ltd (1969) Times, 18th September; Ex parte London Diocesan Board of Education Inc (1969) Times, 25th September. Where the wrongly occupiers are known, the proceedings take on the character of an action in rem, since the action would then related to the res itself without there being any other party but the plaintiff.*

5. *RSC Ord. 113, r.1. As to the holding over by a license after the termination of his licence granted for a substantial period, see Bristol Corpn v Persons unknown [1974] ALL ER 593, [1974] 1 WLR 365.*
6. *This overcomes the difficulty arising out of Manchester Corpn v Connolly [1970] Ch 420, [1970] 1 All ER 961, CA. In a case of emergency or urgency, as where there is real, immediate danger to life or property, the court has power to grant an immediate ex parte or interlocutory injunction until a writ of possession under RSC Ord. 113 is executed."*

[23] The grounds of appeal are interrelated. I would, therefore, consider them together.

The respondent's entitlement to bring proceedings under O 113

- [24] I turn to the first issue whether the respondent was entitled to seek possession of the land which is occupied by the appellant from 2008. In other words, it is that whether the respondent had established his interest in the land.
- [25] In summary proceedings under O 113, the plaintiff must state in the supporting affidavit his or her interest in the land and the circumstances in which the land has been occupied without licence or consent and in which his or her claim to possession arises.
- [26] The respondent in his supporting affidavit states that he has interest in the land which is occupied by the appellant. He relies on the letter of approval of lease issued by the Director of Lands subject to conditions stated therein.
- [27] Mr Maisamoa of counsel for the appellant argued that there was no evidence before the court that the respondent had ever complied with the conditions upon which the approval for lease was granted. On the other hand, Ms Ravai counsel for the respondent did not address the court on the issue of non-compliance with the terms and conditions which the approval for lease was given under. Instead, she only submitted that the Master was correct in granting eviction order in favour of the respondent based on Crown Lease Reference No. 4/7/2015.
- [28] The Crown Lease Reference No. 4/7/2015 which the respondent relied on for bringing summary proceedings under O 113 for possession is not a lease number by itself. It is only a file number under which approval for lease was given. It

appears that the Master has accepted it to be an unconditional offer for lease of a piece of Crown Land.

[29] Of his interest in the land, the respondent in his supporting affidavit states that:

"He is the sole surviving Trustee of the Estate of Nokaiya, the deceased testate. Estate of Nokaiya currently owns Crown Lease Reference No. 4/7/2015 more particularly described as Lot 2, Plan LDSW 448 proposed S/D of Lot 4 ND 5014 in the District of Vuda and Province of Ba having an area of approximately 2000m² more or less. He is the beneficiary as well as the sole surviving trustee of the lease."
(paras 2, 3 and 4 of the supporting affidavit)

[30] What the respondent refers to in his affidavit is the approval for lease. By his letter dated 15 February 1989, the Director of Lands approved the respondent's application to lease a piece of Crown Land: Lot 2, Plan LDSW 448 proposed S/D of Lot 4 ND 5014 in the District of Vuda and Province of Ba having an area of approximately 2000m² more or less for residential purpose without title [for] 50 years from 22 February 1988. The approval was subject to certain terms and conditions ('RP2'). These include:

1. *To pay the estimated survey fee, together with rent assessed on the estimated area of the land;*
2. *Not to occupy the land approved for lease until the aforesaid rent be estimated [and] balance of survey fee have been paid;*
3. *If the rent and the estimated balance of survey fee is not paid within [...] (not clear) months from the date of this notice, the approval of the lease will be cancelled without further notice.*
4. *In the event of it being shown by survey that the land approved for form part of any land the subject of an existing freehold or leasehold this notice of approval of lease shall be deemed to be cancelled.*
5. *C. L. 5303 to be surrendered.*

[31] The approval was granted to the respondent on 15 February 1988. The approval expressly prohibits occupation of the land approved for lease until the rent is estimated and balance survey fee have been paid. As counsel for the appellant contends, there was no evidence before the court to prove that the respondent duly fulfilled the conditions mentioned in the approval letter. The respondent would not have occupied the land until he had paid the estimated survey fee

together with rent assessed on the estimated area of the land. Further, the approval was granted subject to the surrender of C. L. 5303, which is now expired. Counsel for the appellant submitted that upon search he found out that C. L. 5303 expired sometime in 2003. This was not disputed by the respondent. There was no proof that the respondent ever surrendered C. L. 5303.

- [32] In the absence of any evidence that the respondent had fulfilled the conditions under which the approval was granted, the court may infer that the deeming clause (clause 3 and 4 of the approval) that the approval of the lease will be cancelled without further notice had been triggered. The approval of the leave given to respondent must be considered cancelled disentitling the respondent's interest in the land. This translates that at the time of bringing the summary proceedings under O 113 the respondent did not have interest in the land which was occupied by the appellant. In other words, the respondent was not entitled to possession of the land which was occupied by the appellant. The Master had overlooked the fact that the approval of the lease was given subject to conditions and that such conditions were not fulfilled by the respondent which disentitled him to claim possession of the land.
- [33] In *Logessa v Pachamma* (1980) FJCA 2, Civil Appeal No. 59 of 1979, the Court of Appeal held that a notice of lease and in this case a Notice of Approval for Lease constitutes a valid lease under the Crown Lands Act or under law of equity. This has no application to the respondent's case, for the approval granted had been deemed cancelled as a result of non-compliance of the conditions under which the approval was granted.

Whether respondent is a trespasser

- [34] Before the court below, the appellant stated that he has been occupying the land by virtue of his marriage with Nirmala Devi, the daughter of Vengtesu, the respondent's brother, since 2008.
- [35] It will be noted that the respondent did not explain in the supporting affidavit the circumstances in which the appellant came into occupation of the land without licence or consent. The respondent simply states that the respondent is occupying the land without his (respondent's) licence or consent. The HCR, O 113, R 3 (b) requires that the plaintiff who seeks possession of the land which is

occupied by the defendant must explain the circumstances in which the land has been occupied without licence or consent and in which his or her claim to possession arises.

- [36] An application for vacant possession under HCR O 113 was refused where issues are contested, defendants showed they derived their right of possession by licence and/or consent of a beneficiary of the estate of James Miller, a continuity of interests and Court cannot deal with application summarily-Robinson, M in *Anna Lilac Miller v John Tawake Nasa Tawase Miller, David MacLaren & Mereoni Semanakadavu* [2010] HBC 193 – 195/09B Ruling 27 May 2010.
- [37] The plaintiff who allowed defendants to enter the land and remained there until expiration of the lease with his consent does not have any legal or equitable right over the land after expiration of his lease where the defendant obtained a new 30 year lease and is not a trespasser” per Amaratunga, M in *Hans Raj v Ajay Kumar* [2011] HBC 167/10S Ruling 12 May 2011.
- [38] An affidavit in support in O 113 proceedings need not show evidence of a prior notice to quit if there is no right to occupy the land and the defendant is not a former tenant. A notice to quit need not be served or proved to found jurisdiction: per Gates. J (as he was then) in *Indar Prasad & Bidya Wati v Pusup Chand* (2001) FLR 164 at 168.
- [39] In *Secretary of State for Environment, Food, and Rural Affairs (Respondent) v Meier and another (FC) (Appellant) and others and another (FC)(Appellant) and another* [2009] UKSC 11 (On appeal from: [2008] EWCA Civ 903), UK Supreme Court held (at para 8):

“8. The intention behind the relevant provisions of Rule 55 remains the same as with Order 113: to provide a special fast procedure in cases which only involve trespassers and to allow the use of that procedure even when some or all of the trespassers cannot be identified. These important, but limited, changes in the rules cannot have been intended, however, to go further and alter the essential nature of the action itself: it remains an action for recovery of possession of land from people who are in wrongful possession of it. I should add that in the present case the defendants do not dispute that they are – or, at least, were at the relevant time - in possession, rather than mere occupation, of the Commission’s land at Hethfelton.

Wonnacott, Possession of Land (2006), p 27, points out that defendants rarely dispute this. But here, in any event, the defendants' possession is borne out by their offer to cooperate to allow the Commission's ordinary activities on the land not to be disrupted. This is inconsistent with the Commission being in possession. So the preconditions for an action for recovery of land are satisfied."(Emphasis supplied)

- [40] Plainly, the appellant came into occupation of the land in 2008 as a result of his marriage to Nirmala Devi, the daughter of Vengtesu (the brother of the respondent) who was one of the beneficiaries of the land. Basically, the appellant's occupation of the land was not wrongful. The appellant, in my view, is not a trespasser of the land. At the relevant time he came to occupy the land with the consent or authority of one of the beneficiaries (the beneficial interest may be life or otherwise) of the land or its predecessor in title. The crucial point in the present case was whether the respondent was entitled to possession of the land which the defendant occupies. In my opinion, the respondent was not entitled to possession of the land occupied by the appellant. The reasons being the approval for lease (which the respondent relied on) granted to the respondent is deemed cancelled for non-compliance of the conditions under which the approval was granted. There was no evidence establishing that the respondent had ever complied with the conditions mentioned in the approval. The approval has specifically stated that the respondent must not occupy the land unless and until the rent is estimated and balance of survey fee is paid. There was no evidence at least to confirm that the rent was estimated and that the respondent paid the rent and the balance of survey fee. The approval for lease was also subject to the surrender of C.L. 5303 which has now expired. There was no proof adduced by the respondent that he ever surrendered that instrument of tenancy.
- [41] The appellant's occupation of the land is not wrongful. He has been in such occupation since 2008. At the relevant time he came into occupation with one of the beneficiaries of the land. It means that he came to occupy the land with the consent or authority of its predecessor in title. In the circumstances, he is not a trespasser. The summary proceeding under O 113 for possession of land is intended to evict the person or persons who are in wrongful possession of it. It is

a special procedure which only involves trespassers. Most importantly, the respondent was not entitled to claim possession of the land which is occupied by the appellant as the approval for lease granted to the respondent had been deemed cancelled on account of non-compliance of the conditions upon which the approval was granted.

Conclusion

[42] For the foregoing reasons, I would say the Master had erred in law and in fact in granting order for possession in the summary proceeding under O 113 which remains an action for recovery of possession of land from people who are trespassers and who are in wrongful possession of it.

[43] Therefore, I would allow the appeal and set aside the possession order made by the Master, with the costs of \$2,500.00, which I have summarily assessed.

Consequential order

[44] I would like to think that I should make a consequential order. It is that an order for the appellant to be put back into occupation of the land. It has become necessary because of the respondent's submission. Before me it was submitted on behalf of the respondent that the Master's order has been executed and appellant had already vacated the land. However, counsel for the appellant told me that the appellant is still in occupation of the land. Therefore, in order to safeguard the appellant's interest, I order that the appellant shall be entitled to be put into occupation of the land, if he was evicted from the land on the strength of the Master's order.

The outcome

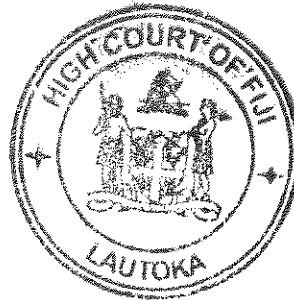
1. Appeal allowed.
2. Master's order for possession dated 13 October 2017 be set aside.
3. The appellant shall be entitled to be put into occupation of the land if he was evicted from the land following the Master's order dated 13 October 2017.

4. The respondent shall pay the summarily assessed costs of \$2,500.00 to the appellant.

M.H. Mohamed Ajmeer
20/8/18

.....
M.H. Mohamed Ajmeer
JUDGE

At Lautoka
20 August 2018



Solicitors:

For the defendant/appellant: M/s Maisamoa & Associates, Barristers & Solicitors

For the plaintiff/respondent: M/s Fazilat Shah Legal, Barristers & Solicitors