

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. **HBC 19 of 2017**

BETWEEN : MCF HOLDING TRUST

APPELLANT

AND : DR KORINA WAIBUTA

RESPONDENT

BEFORE : M. Javed Mansoor, J

COUNSEL : Mr. S. Valenitabua for the appellant
Ms. N. Raikaci for the respondent

Date of Hearing : 23 July 2020

Date of Judgment : 6 October 2022

JUDGMENT

PROPERTY LAW *Action for possession of land – Occupier without consent of registered proprietor – Occupier disputing actual ownership of registered proprietor – Effect of title registration – Failure to reply affidavit – Order 113 (1), High Court Rules 1988*

The following decisions are cited in this judgment:

- a) *Raliwalala v Kaicola* [2015] FJHC 66; HBC 114.2014 (30 January 2015)
 - b) *Aadarsh Vikash Sharma v Rohit Kumar* [2013] FJHC 202; HBC 34.2013 (25 March 2013)
 - c) *Chandra v Sami* [2014] FJHC 234; HBC 138.2013 (4 April 2014)
 - d) *Baiju v Kumar* [1999] FJLawRp 23; [1999] 45 FLR 72 (31 March 1999)
 - e) *Rajendra Prasad v Wali Mohammed* [2005] FJHC 124; HBC 272.1999L (3 June 2005)
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1. The appellant filed action on 26 January 2017 to eject the respondent from a property situated in Knolly Street in Suva (the property). After hearing the parties, the acting master delivered judgment on 21 October 2019, dismissing the appellant’s action. This appeal is from the acting master’s judgment.
2. The originating summons filed by the appellant sought the following orders:
 - a. “A declaration that the defendant has not shown cause why she should not give up possession to the plaintiff of its property being certificate of title no. volume 38, folio 3727, lot 1 on plan SO 1230 at 69 Knolly Street, Suva.
 - b. An order that the defendant gives immediate vacant possession of the plaintiff’s property being certificate of title no. volume 38, folio 3727, lot 1 on plan SO 1230 at 69 Knolly Street, Suva”.

The application was made pursuant to Order 113 of the High Court Rules 1988 and the inherent jurisdiction of court. Surprisingly, the caption of the originating summons referred to “an application for possession of land under section 169 of the Land Transfer Act”. Submissions in court were on Order 113 of the rules.

3. Ratu Peni Volavola gave an affidavit in support of the appellant’s summons for ejectment. He averred that he is the chairman of the appellant, and that he is

authorised to depose on behalf of the appellant. He averred that the appellant is the last registered proprietor of the property. He said the respondent is in occupation of the property without the appellant's consent, and that there is no written contract between the parties. He was not aware how the respondent is in occupation of the property. The respondent, he said, does not pay rent. Mr. Volavola averred that the property is in a prime commercial area of 2 roods and 5 perches, and that it could fetch a minimum rent of \$12,000.00. He said the property was valued at \$2,400,000.00 in 2014. This was supported by a certificate of valuation issued on 5 December 2014. He said that the respondent was obstructing the imminent transfer of the property to a transferee. On 23 September 2016, the appellant issued the respondent a notice to quit within 30 days. He said the respondent failed to vacate the property, and continues to occupy it illegally.

4. Dr. Korina Waibuta, the respondent, filed an affidavit in response on 10 March 2017. She denied that Ratu Peni Volavola is the chairman of the appellant and stated that the deponent was not authorised to depose the affidavit in support of the summons for eviction. She averred that she has been a tenant of the property since 1998. She said that although the appellant is the last registered proprietor of the property, the genuine and rightful owner of the property is the Methodist Schools Old Students Association (MSOSA). She stated that though the Methodist Church of Fiji transferred the property to the holding trust, the Methodist Church of Fiji is aware that the property is owned by MSOSA. She admitted receiving the appellant's notice to quit, but says she was astonished to learn that the appellant continued to be the registered owner. There is no indication that the respondent replied the quit notice.
5. The respondent stated that when the property was purchased in 1978, the Executives of the Methodist Church of Fiji and of MSOSA agreed that the Methodist Church of Fiji would provide funding in a sum of \$43,000.00 to pay the purchase price to the previous registered proprietor, and MSOSA was to reimburse the Methodist Church of Fiji the full purchase price by installments. The respondent says the agreement was that the Methodist Church of Fiji would transfer the property to MSOSA upon full repayment of the purchase price. She

said that MSOSA has paid the Methodist Church of Fiji the purchase consideration of the property of \$43,000.00. The respondent stated that she has been a tenant of the property since January 1998, and that she was paying rent to MSOSA, and not to the appellant or to the Methodist Church of Fiji. In agreement with MSOSA, she has been paying monthly rent to the Suva City council to off-set the arrears of rates.

6. The respondent produced a letter dated 17 June 2016 written by the president of the Methodist Church of Fiji stating that the property has been transferred to MSOSA, and stated that the decision to transfer the property to MSOSA was taken at the annual conference of the church held in 2013. The respondent states that the letter was written in the honest but mistaken belief that the property was rightly transferred to MSOSA.
7. The appellant did not reply the respondent's affidavit in response.
8. By judgment dated 21 October 2019, the acting master made a finding that the appellant – the registered proprietor – has a right to claim possession of the property. However, the acting master held that she did not find the respondent to be a mere trespasser of the property, and, therefore, denied the appellant's claim under Order 113 of the High Court Rules. The appellant was ordered to pay costs in a sum of \$1,000.00.
9. The appellant's grounds of appeal are reproduced below:
 - 1) "The Learned Master erred in law and in fact in failing to hold that the Respondent was a mere trespasser under Order 113.
 - 2) The Learned Master erred in law and in fact in failing to consider that the Appellant was entitled to order in terms of the Order 113 application that was before the Master's Court.
 - 3) The Learned Master erred in law and in fact in not holding that the Appellant has satisfied the two limbs under Order 113 of the High Court Rules to entitle it to an order for eviction against the Respondent.

- i. The Appellant has to satisfy that he has a legal right to claim possession of the land.
 - ii. Once that is proven, the burden is on the Respondent who needs to satisfy the court that he has a licence or consent of the owner or predecessor to occupy the land.
 - 4) The Learned Master erred in law and in fact in failing to consider the overwhelming documentary evidence to title by the Appellant at as the last registered proprietor of the property on CT no. volume 38 folio 3727 since 28 June, 2006.
 - 5) The Learned Master erred in law and in fact in failing to hold that there was no proof from the Respondent that the Appellant gave her the right to possession, or absolute possession of the land.
 - 6) The Learned Master erred in law and in fact in making its findings the way she did”.
10. At the hearing of this appeal, the appellant submitted that as the registered proprietor to the property, it is entitled to the orders sought in its originating summons, and that the acting master erred in refusing its application. The appellant said that the previous proprietor was the Trustees of the Methodist Church of Fiji. The appellant submitted that MSOSA do not have legal rights to the property, and that the association’s name has never been on the certificate of title.
11. The appellant relied on the decisions in *Raliwalala v Kaicola*¹, *Aadarsh Vikash Sharma v Rohit Kumar*² and *Chandra v Sami*³. In these decisions, the High Court of Fiji affirmed the principal that an occupier must have the consent of the registered proprietor to continue in occupation.

¹ [2015] FJHC 66; HBC 114.2014 (30 January 2015)

² [2013] FJHC 202; HBC 34.2013 (25 March 2013)

³ [2014] FJHC 234; HBC 138.2013 (4 April 2014)

12. The respondent submitted that her averments have not been opposed, and that this was an admission on the appellant's part. The respondent relied on the decision in *Baiju v Kumar*.⁴ An application made in that case for possession under Order 113 of the rules was refused. The defendant came to the land with his father and lived there continuously for 30 years and made improvements to the house he was occupying. The court observed that the facts did not reveal the defendant to be a trespasser of the land, and he continued living there as a licensee even after his father's death. The court determined that there were triable issues in that case which could not be resolved in a summary manner by affidavit alone. In the course of his judgment, Pathik, J described Order 113 as an effective and speedy relief to property owners in cases where tenants or other persons have no right to continue to stay in possession.

Is the appellant entitled to vacant possession of the property?

13. The appellant's application or possession is under Order 113 (1) of the High Court Rules. The rule:

"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 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"

14. In *Baiju v Jai Kumar*, cited by the respondent, the High Court referred to the decision in *Bristol Corp v Persons Unknown* ([1974] 1 All E.R 593 at 596), which quoted a note from the Supreme Court Practice concerning Order 113 of the rules:

"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

⁴ [1999] FJLawRp 23; [1999] 45 FLR 72 (31 March 1999)

remain in occupation without the licence or consent of the person in possession or of any predecessor of his”.

15. The property is freehold and known as Frances Tolly House. The appellant describes it as prime commercial land within the city of Suva. On 8 September 1978, the Trustees of the Methodist Church of Fiji was registered as the proprietor of the property. The appellant became the property’s registered proprietor after the trustees of the Methodist Church of Fiji transferred it to the appellant. The transfer was registered on 28 June 2006. The appellant is the last registered proprietor of the property. This is not disputed by the respondent. What the respondent says is that although the appellant is the registered owner, the actual owner is MSOSA.
16. There is no evidence that the property was at any stage transferred to MSOSA. The certificate of title does not show the association’s name. The agreement between the Methodist Church of Fiji and MSOSA is said to have occurred somewhere in 1978. According to the respondent the purchase consideration was paid to the Methodist Church of Fiji, which financed the acquisition of the property. It is not clear when the sum of \$43,000.00 was settled. That detail is not relevant.
17. The respondent’s position is that that the appellant should transfer the property to its rightful owner, MSOSA. She averred in her affidavit that the intended transferee of the property should be, “our association, the Methodist Schools Old Students Association, and not the Methodist schools Old Scholars Association, a fact well known by the deponent of the plaintiff’s affidavit”.
18. The respondent says she is a member of MSOSA. Her mother is said to be a founding member. She has produced a letter from MSOSA saying that she is a member. The letter is signed by the president and secretary of the association. The letter does not authorise her to represent MSOSA, which, in any event, is not a party to these proceedings. The averments concerning the purchase of the property by MSOSA, settlement of purchase consideration and claims to title by the Association are made by the respondent, and not by MSOSA.

19. Differences concerning the property between the Methodist Church of Fiji and MSOSA are not in issue in this proceeding. The agreement said to have been entered between the Methodist Church of Fiji and MSOSA and their financing arrangement are not issues before this court.
20. The respondent says that the Methodist Church of Fiji has acquiesced in the arrangement between itself and MSOSA, and that this represented consent to MSOSA to occupy the property. Accordingly, the respondent submitted, MSOSA consented to the respondent's occupation of the property. However, the respondent has not shown that MSOSA had rights to the property at any stage. The respondent says that the letter by the president of the Methodist Church of Fiji was written in the mistaken belief that the property was transferred to the MSOSA. That belief is not reflected in the certificate of title.
21. Section 38 of the Land Transfer Act 1971 states:

“No instrument of title registered under the provisions of this Act shall be impeached or defeasible by reason or on account of any informality or in any application or document or proceedings previous to the registration of the instrument of title”.

22. The Land Transfer Act provides that once title is registered, it is indefeasible except in the case of fraud. In this case there is no allegation of fraud. In *Rajendra Prasad v Wali Mohammed*, Gates J (as he then was) said:

“In Fiji, under the Torrens system of land registration, the register is everything; *Subaramani & Ano v Dharam Sheela & 3 Others* [1982] 28 Fiji LR 82. Except in the case of fraud, the title to land is that as registered with the Registrar of Titles under the *Land Transfer Act* [see sections 39,41 and 42]: *Fels v Knowles* (1906) 26 NZLR 604; *Assets Co Ltd v Mere Roihi* [1905] AC 176, PC”⁵.

⁵ [2005] FJHC 124; HBC 272.1999L (3 June 2005)

23. The respondent does not allege fraud on the appellant's part in trying to discredit the appellant's title to the property. An allegation of actual fraud would have required a closer examination of the appellant's claim for possession through summary proceedings.
24. The respondent submitted that the appellant's failure to reply her affidavit should be taken as an admission of her position. While there is force in that argument, the respondent's affidavit does not establish a legal right upon which she could continue to occupy the property.
25. Once the appellant established ownership, it was for the respondent to show that she has a right to remain on the property. The respondent does not say she has the consent of the appellant to occupy the property. If the respondent could impeach the appellant's title or show that she has a right to occupy the property, the court could have considered making a direction to continue this proceeding as a writ, so that the parties could produce their evidence. The respondent's case does not show anything to that effect.
26. There is nothing in the affidavit of the respondent to challenge the title of the appellant, and to persuade court to hold in favour of the respondent. Her claim is that the rightful owner is MSOSA. The respondent's claim that rightful ownership should be with a third party, MSOSA, is not one that can be successfully sustained. The respondent cannot claim rights that prevail over the registered proprietor's rights to possession under the law.
27. In these circumstances, the appellant's application for vacant possession must succeed. The court sets aside the judgment of the acting master, and allows the orders sought in the appellant's originating summons.

ORDER

- A. The appeal is allowed.
- B. The judgment of the acting master is set aside.
- C. The respondent is directed to hand over to the appellant vacant possession of the property within three months of this judgment.
- D. The respondent is to pay the appellant costs summarily assessed in a sum of \$1,000.00 within three weeks of this judgment.

Delivered at **Suva** on this 6th day of **October, 2022**



A handwritten signature in blue ink, appearing to read "M. Javed Mansoor".

M. Javed Mansoor
Judge