

**IN THE HIGH COURT OF FIJI**  
**AT LABASA**  
**CIVIL JURISDICTION**

**Civil Action No. HBC 50 of 2016**

**BETWEEN** : **FIJI PUBLIC SERVICE ASSOCIATION**

**PLAINTIFF**

**AND** : **BUREITA NABONG, TESIRIA, PECELI NIULACA, PETER PICKERING, ILAITIA RACAKAU, ELENOA GAUNAVOU, EREA MEAAG, ALLEN STEVE, JONI VAKAMINO, BOB, MINUTE, PAULA, TERAHA TAKE, PIO NABONG** by themselves, their families and other occupants of Nayavita Settlement, Savusavu, Fiji.

**DEFENDANTS**

**Appearances** : Mr. Singh R., for the Plaintiff  
Lomaloma Esq for the Defendants

**Judgment** : 24 July 2017

## **JUDGMENT**

1. By an originating summons filed 30 August 2016, the Plaintiffs seek an order for the Defendants by themselves, their families and other occupants to give to the Plaintiff vacant possession of the properties comprised and described in certificates of title bearing numbers 25501, 25502, 25503, 25497, 25504, 25505, 25506, 25498, 25507, 25508, 25509, 25510, 25500, 25511, 25512, 25514, 25515, 25516, 25517, 25518, 25519, all situated at Nayavita Settlement, Savusavu.
2. The Plaintiff is the last registered proprietor of all the properties the subject of this action. The certificates of title annexed to the affidavit in support of Rajeshwar Singh, General Secretary, bear this out. According to Singh, the Defendants, their families and other

occupants are illegally and unlawfully occupying the said properties and refuse to leave. Attempts by the Plaintiff to survey and redefine the pegs on the properties for the purpose of selling them were unsuccessful as the Defendants threatened the surveyors to leave. Notices to quit were prepared and had to be served by a security company as the occupants of the properties were violent and volatile. Despite being served with the notices, the Defendants refuse to leave. As a result, the Plaintiff has not been able to exercise its rights as registered proprietor of the properties.

3. The Defendants did not file an answering affidavit, the only one filed being that sworn by one Aren Joseph Nunnink. Their counsel filed written submissions but neither he nor the Defendants appeared at the hearing.

#### Preliminary objections

4. Mr. Singh for the Plaintiff objects to Nunnink's affidavit on the bases that Nunnink is not a party to these proceedings, that the affidavit has been filed without authority from the Defendants, and also on the basis that the jurat is isolated from the rest of the affidavit.
5. In Chandra v Tuisawau Civil Action No. HBC 388 of 2002 in an application for vacant possession under section 169 of the Land Transfer Act, the Plaintiff took issue with the defendant's affidavit on the basis, inter alia, that it was sworn by the 3<sup>rd</sup> Defendant who, though a party, was not in occupation of the property. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants who were in occupation of the property did not file an affidavit and had relied solely on the 3<sup>rd</sup> Defendant's affidavit. The Court (per Jitoko J) stated:

Generally there is nothing to stop a person from swearing an affidavit in support of a cause notwithstanding that he or she is not a party to the case, as long as the contents are material and personally known to the deponent. In this case, D3 had been the link between the Plaintiff and D1 and D2, and while it would have

been desirable to have their affidavit evidence, D3's affidavit in support of their cause, given the circumstances of this case, is acceptable.

6. In *Registration Officer for Suva City Fijian Urban Constituency v Ah Koy* Civil Appeal No. Abu0023 of 1992, a preliminary objection was raised that a person not a party to those proceedings had sworn an affidavit in support of the stay application by the appellant; the affidavit did not state that the deponent was authorised by the appellant to make the affidavit on its behalf, nor did it state that it was filed on behalf of the appellant. The Court (per Sir Moti Tikaram AP), stated:

Bearing in mind that [the deponent] is not a party to these proceedings a substantial part of his affidavit is, in my view, either irrelevant, inappropriate or objectionable. I, therefore, propose to ignore all those paragraphs dealing with legal arguments, his thought processes and his attacks on the Supervisor of Elections. Indeed I order paragraphs Nos. 11, 12, 13 and 15 ... to be struck out. **I shall, however, take cognisance of only those parts which are factual in nature and at the same time relevant to these proceedings.** (Emphasis mine)

7. In *Stevens v Nunnink* Civil Action No. HBC of 204 of 2004, the Plaintiffs applied for partial dissolution of an injunction. The 1<sup>st</sup> Defendant objected to the affidavit in support on the basis, inter alia, that the deponent was not a party to the proceedings, and did not state that he was authorised by the Plaintiffs to swear the affidavit. Though the Court agreed the affidavit was defective, it was of the view that the objection was technical and could be cured.
8. I take my cue from the authorities above. I shall take note of only those facts in Nunnink's affidavit that are relevant to these proceedings. Of course, an affidavit sworn by the Defendants or one of them would have been desirable, but the absence thereof does not preclude the Court from taking note of the relevant facts in Nunnink's affidavit.

9. The Plaintiff also objects to Nunnink's affidavit on the basis that the jurat is separated from the rest of the affidavit. In Bi v Seru HBC 100 of 2014 (3 December 2015) at [17], Seneviratne J said:

But in my view this cannot be a ground to reject an affidavit unless the validity of the affidavit is challenged by the person who is alleged to have deposed the said affidavit. When the deponent admits that it is his signature that is found in the affidavit and the depositions are his there is no reason for the Court to reject such an affidavit.

10. Here, there is no contention that the signature on the affidavit is not the deponent's and as it is, there is no reason for me to reject the affidavit on the basis only that the jurat is separated from the rest of the affidavit. For the foregoing reasons, I reject the Plaintiff's preliminary objections.

#### Nunnink's affidavit

11. Mr. Nunnink is a licensed real estate agent in Savusavu and is the managing director of a company primarily engaged in the business of property investment and development. His affidavit covers, inter alia, the history of the properties which are the subject of these proceedings, which he traces back to one Tom Nabong.
12. Nunnink deposes that through his work, he has been involved with the freehold properties in Savusavu which had at one time belonged to one Tom Nabong, amongst which the properties the subject of this application number. Nunnink's involvement appears to have begun from when he had first tendered for the mortgagee sale of eight lots of properties which had belonged to Nabong. This tender led to his subsequent searches at the Office of the Registrar of Titles and discoveries in respect of the said properties, as well the 21 titles in this action.

13. These discoveries included, inter alia, the transfer of titles to one Edmund March and his "cronies"; a Judgment by Coventry dated 12 May 2006 which, inter alia, declared that the said March had obtained CT 18999 (from which the 21 titles in the present action emanated) in his name fraudulently and in breach of trust; the acquisition of CT 21857 by one Vijay Parmanandam from March during the period which was later found by Coventry J to be the time that March had fraudulently dispossessed Tom Nabong of the latter's lands; the \$5,000 consideration paid by Parmanandam for the lots he bought, being in stark contrast to the \$1,400,000 loan advanced to him by the Mortgagee Bank against the said lots; the registration of dealings for the subdivision of Lot 1 on DP 4580 (from which the 21 titles in this were derived) for the creation of 26 new titles while there was an absolute caveat on it forbidding the registration of any transfer or other instrument; that one of the joint executors and trustees in the estate of Vijaya Parmanandam had notice that under the 2006 Judgment against March, the land owned by her husband (which included the 21 titles in this action) had been acquired by fraud; that Vijaya Parmanandam's daughter was on notice that the dispossessed proprietors, namely, the Nabong family, occupied the 21 subdivided lots, wanted their land back, and would pursue these once they obtained the 18 titles in the March case; that the local FPSA organiser and representative Suresh Narayan had been told of the Court's judgment in respect of the said lands and of the intention of the estate of Nabong to go after the Parmanandam land; that the FPSA had notice of the fraudulent manner in which the lands were transferred before purchasing the 21 titles for \$500,000.
14. It appears that Nunnink alleges fraud not only against Edmund March but also against Parmanandam and the Plaintiff.

15. In reply to the contents of Nunnink's affidavit, the Plaintiff merely says he is not familiar with them, and that his solicitors have advised him that they are not relevant to these proceedings.

#### The law

16. The application for vacant possession is brought pursuant to Order 113 of the High Court Rules which provides:

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.

17. In Australasian Conference Association Limited v Mere Sela & Ors Civil Action No. 357 of 2006, Decision on 3 April 2006, Coventry J stated at p. 11:

Order 113, in my judgment, is primarily aimed at people who come onto land as squatters or are given licence which is terminated and then refuse to depart. The envisaged term of occupation in Order 113 is a matter of months or a few years.

18. Proceedings under Order 113 are summary in nature and must be taken only in the clearest of cases. (Kumar v Kumar Civil Action No. HBC 157 of 2008L per Inoke J)

#### Analysis

19. The issue for the Court's determination is whether an order for vacant possession ought to be made against the Defendants. In Orchid Flat Investments Ltd v Bola HBC 322 of 2014, Sharma M stated that in an application under Order 113 for vacant possession, the plaintiff must first prove he has a legal right to claim for possession of the land. Thereafter, the onus shifts to the defendant to show that he has a licence or the consent of the owner to occupy the land.

20. In this case, I find it established that the Plaintiff has a right to bring these proceedings, it being the last registered proprietor of the 21 properties comprised in the 21 certificates of title annexed to the affidavit in support of the originating summons. The Defendants therefore need to show that they have licence or the consent of the owner, or any predecessor in title.

21. In Dutton v Manchester Airport [1999] 2 All ER 675 at 690, Kennedy J stated:

What matters, in my judgment, is that the plaintiff has a right to possession which meets the first of the requirements set out by Stephenson LJ, and the defendants have no right which they can pray in aid to justify their continued possession. If it is said that such an approach blurs the distinction between different types of right and different types of remedy it seems to me that it is the effect of the wording of Ord 113, and the understandable object of the law has always been to grant relief to a plaintiff seeking possession who can rely on a superior title.

22. In this case, Nunnink's affidavit raises serious allegations of fraud against not only March, but also against Parmanandam and the Plaintiff who are successors in title. The Judgment of Coventry J in Civil Action No. 127 of 1994, amongst other things, declared that March had obtained CT 18999 in his name fraudulently and in breach of trust. Nunnink in his affidavit alleges that Parmanandam, the successor in title, had acquired CT 21857 (purportedly derived from CT 18999, and from which the 21 titles in the current action emanated) during the period which Coventry J later held to have been the time that March had fraudulently dispossessed Nabong of his properties. There is evidence also that an executor and trustee in the estate of the said Paramandan had known that the properties had

been obtained by fraud; as did the representatives of the Plaintiff prior to its purchase of the titles.

23. One would have thought that given the serious attack on the Plaintiff's title to the properties, there would at least be some mention of it in the Plaintiff's reply. However, the deponent of the affidavit in reply simply referred to Nunnink's affidavit as irrelevant.
24. It is now well settled that in evaluating affidavit evidence, the failure to contradict an issue, or reply specifically to a material allegation, is treated as an acceptance or admission of the said issue or allegation. Said Blackburn J in Dawkins v Prince Edward of Saxe Weimar [1875]-76] 1 QBD 499 at 501, of the failure of the plaintiff there to reply to the defendants' affidavits:

Upon that I can come to no conclusion, except that the defendants' affidavits are strictly true, and are admitted to be strictly true.

25. In Dutton (supra), the Court cited Danford v McAnulty (1883) 8 App Cas 456 at 462 where Lord Blackburn said:

...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 shew a superior legal title to his.

26. Similarly, in Moto v Nakauta Civil Action No. 262 of 2012 at [7], Amaratunga J stated:

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 better title than Defendants.

27. In this case, I am not satisfied that the Plaintiff has a superior title. A fortiori in the absence of any attempt to rebut the allegations of fraud, and notice thereof. In Assets Company Ltd v Mere Roihi [1905] AC 176 at p. 210, the Board stated:

...it appears to their Lordships that the fraud which must be proved in order to invalidate the title of a registered purchaser for value, whether he buys from a prior registered owner or from a person claiming under a title certified under the Native Land Act, must be brought home to the person whose registered title is impeached or to his agents. **Fraud by a person from whom he claims does not affect him unless knowledge of it is brought home to him or his agents...But if it be shown that his suspicions were aroused, and that he abstained from making inquiries for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him.** (Emphasis mine)

28. The evidence before the Court is that the officers of the Plaintiff association had had notice of the earlier fraud tainting the titles it subsequently purchased.

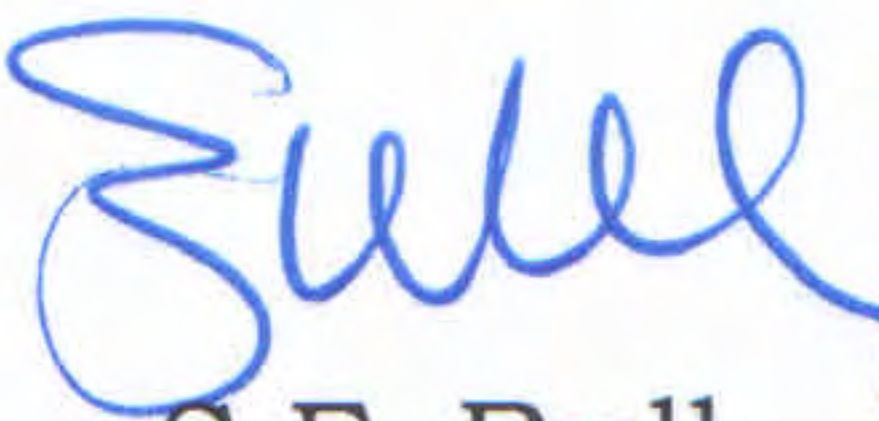
#### Indefeasibility of title

29. Sections 39 – 42 of the Land Transfer Act, and the Torrens system of land registration which operates in Fiji make it clear that the title of the registered proprietor is indefeasible and unimpeachable, unless actual fraud is proved. (See Subramani v Sheela [1982] FJCA 11; [1982] 28 FLR 82 (2 April 1982); Assets Company Ltd v Mere Roihi [1905] AC 176 at p.210; Fels v. Knowles 26 N.Z.L.R. 608, at page 620)
30. Where fraud is alleged, a bare allegation is not enough. There must be some evidence in support of such an allegation pointing to the need for a fuller investigation. (Singh v Singh [1987] FJLawRp 12; [1987] 33 FLR 63 (25 September 1987))

31. Here, the Plaintiff does not rebut the allegations of fraud of which Nunnink deposes the Plaintiff had had notice before it purchased the 21 titles from the estate of Parmanandam. The undisputed allegations of fraud, the Judgment of Coventry J declaring that March had obtained CT 18999 fraudulently and in breach of trust, the documentary evidence of unsigned memoranda on various instruments and the registration of title when an absolute caveat prohibiting such registration was in place, together with evidence that officers of the Plaintiff had known of the earlier fraud allegedly touching the 21 titles it later purchased appears to me to warrant a fuller investigation.
32. In view of this and of Roihi (supra), I am not satisfied that the Plaintiff has shown a superior title such as to warrant the making of an order for vacant possession in its favour.
33. In Kumar v Kumar – Civil Action No. HBC 157 of 2008, Inoke J stated:
- The procedure under O 113 is a summary procedure and it is only in the clearest of cases should it be used...
34. In Singh v Hoit Civil Action No. 370 of 2011 at [36], Sharma M cited the White Book saying:
- 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 licence or consent and without any right, title or interest thereto.
35. This is not such a case. The material before the Court points to the existence of triable issues which cannot be resolved in a summary manner on affidavit evidence alone. In view of this, I am unable to grant the orders that the Plaintiff by this application, seeks.

**Orders:**

1. The application for vacant possession is dismissed.
2. Costs for the Defendants, summarily assessed at \$750.

  
S.F. Bull  
**Acting Master**

