

MOHD ZUHAIRI BIN ZAKARIA v ROSNI ANITA BT ARIFFIN & ANOR

CaseAnalysis
| [2020] MLJU 1724

Mohd Zuhairi bin Zakaria v Rosni Anita bt Ariffin & Anor [2020] MLJU 1724

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HIGH COURT (SHAH ALAM)

ALICE LOKE YEE CHING JC

SAMAN PEMULA NO BA-24NCVC-1679-11 TAHUN 2019

6 October 2020

*Abd Muiz bin Samsuri (Muiz Samsuri & Co) for the plaintiff.
Muhammad Zahir Sanjay bin Abdullah (Muhammad Zahir) for the defendant.*

Alice Loke Yee Ching JC:

GROUPS OF JUDGMENTIntroduction

[1]By an Originating Summons filed on 25.11.2019, the Plaintiff seeks the following principal orders:-

- (a) That the Defendants and other occupants of the apartment known as G-3-11, Storey No. 3, Building No. G Pangsapuri Seri Perantau, Persiaran Sireh Junjung/KS 4, 42000 Pelabuhan Kelang, Selangor Darul Ehsan (“**said premises**”) do deliver vacant possession within 14 days from the date of the order for vacant possession given by this Honourable Court;
- (b) That in the event the Defendants fail to deliver vacant possession of the said premises within 14 days of being ordered to do so, the Plaintiff, his agent and servants be given the right to use force to secure vacant possession of the said premises, and in so doing, will not be liable for any loss occasioned to the Defendants caused by the use of such force; and
- (c) That the damages suffered and loss occasioned by the Defendants’ unlawful occupation of the said premises be assessed by the Deputy Registrar and paid to the Plaintiff.

[2]The Plaintiff’s application is made under O 89 of the Rules of Court 2012 providing for summary proceedings for possession of land.

Background facts

[3]The main facts are not in dispute. The Plaintiff successfully bid for the said premises at a public auction conducted on 29.8.2015. He paid a price of RM 36,000 for it.

[4]The property was sold at an auction conducted by Ambank (M) Berhad as the Assignee pursuant to a loan cum assignment together with a Power of Attorney executed between Rubiah Binti Bahrin and Ambank (“**LACA auction**”). Rubiah defaulted in the loan repayment which then allowed Ambank to exercise its rights to sell the said premises.

[5]To finance the purchase of the said premises, the Plaintiff obtained financing from Maybank Islamic Berhad. He has since fully repaid the loan.

[6]On 22.4.2017, he went to the said premises and was shocked to discover the presence of several persons including the 1st Defendant. The 1st Defendant was not known to him and neither were the other occupants, but he believed them to be the family members of the 1st Defendant.

[7]He made several subsequent visits to the said premises. His efforts to recover vacant possession was not successful as the 1st Defendant refused to vacate. He then instructed his solicitors to demand the Defendants to vacate by letter dated 6.11.2019.

[8]The Defendants have not till today, delivered vacant possession, hence the present suit. The law governing Order 89 Rules of Court 2012

[9]The Plaintiff invokes the summary process for vacant possession of land under O 89 rule 1 of the Rules of Court 2012. The provision states,

Proceedings to be brought by originating summons (O. 89, 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 tenant 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.

[10]This rule has been likened to summary judgment proceedings. In *Chiu Wing Wa & Ors v Ong Beng Cheng* [1994] 1 MLJ 89), the Supreme Court held,

The summary procedure under O 89 is governed by the same principles as those under O 14 of the RHC 1980. To entitle a defendant to a trial, all he needs to do is to show that there is a triable issue of law or fact. It is only in clear cases of trespass that a summary order can be made under O 89.

[11]The rationale for the summary procedure in O 89 was explained in *Bohari bin Taib & Ors v Pengarah Tanah Galian Selangor* [1991] 1 MLJ 343 where the Supreme Court recognized that the procedure under O 89 is intended to be summary, simple and speedy without the necessity of a trial involving witnesses. It further held,

In our opinion, for the purpose of the summary procedure, a distinction should be made between squatters simpliciter who have no rights whatsoever and occupiers with licence or consent, and as well as tenants and licensees holding over. It may be impossible to establish the existence of any triable issue in the case of bare squatters, but the position of tenants and licensees holding over or persons occupying with implied or express consent of the owner may be different.

[12]Similarly, in *Cheow Chew Khoon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman* [1995] 1 MLJ the Court of Appeal expressed the purpose of summary proceedings in O 89 **as follows**,

Prior to the introduction of this provision into the Rules, the only proper procedure available in all cases for the recovery of possession of immovable property was a writ action: *Yap Hong Thin v Seenevasam*. Indeed this continues to be the case save and except in the very limited category of cases to which O 89 applies. It is, as I have said, a summary procedure meant primarily for the eviction of squatters. For, it frequently happens that the land or even building is occupied by persons who are essentially trespassers whose identities are often unknown to the plaintiff. To require a plaintiff, in those circumstances, to commence a writ action and name the defendants would constitute an imposition of an intolerable burden upon him. It is to meet this problem that the rules committee passed O 89.

The Defendants' contention

[13]The Plaintiff's claim is resisted on the following grounds. The 1st Defendant contends that the said premises which was sold at a public auction belonged to her mother, Rubiah binti Bahrin, who had bought the property from Perbadanan Kemajuan Negeri Selangor ("PKNS").

[14]Pursuant to the sale and purchase between Rubiah and PKNS, parties also entered into Surat Ikatan Waad Waad Bersalingan (*Deed of Mutual Covenant*) with wherein section 4.04 of the Deed provides that any transfer, lease, or tenancy in respect of the said premises must be with the prior consent of PKNS. The Defendant contends that it was incumbent on the Plaintiff to show that he had obtained the consent of PKNS to have the said premises transferred.

[15]The Defendant also contends that as a buyer, it was incumbent upon the Plaintiff to make the necessary enquiries and the principle of 'buyer beware' applies in this case.

[16] In addition, the Defendant has also raised several other issues pertaining to the respective parties' rights under the loan cum assignment and the LACA auction. I regard these as attempts to raise triable issues to the Plaintiff's application under O 89.

Decision of this court

[17] To defeat the Plaintiff's claim, the onus lies on the Defendants to raise triable issues to the claim. The Defendants have not done so here.

[18] The provisions of the Deed of Mutual Covenant between Rubiah and PKNS are irrelevant to the proceedings herein. This agreement was entered into between Rubiah as the purchaser of the property developed by PKNS, spelling out the rights and obligations of the respective parties. The provisions therein are only relevant to Rubiah and PKNS.

[19] Section 4.04 which was referred to by the Plaintiff, imposes an obligation on Rubiah to obtain the consent of PKNS for any transfer, lease, tenancy or other dealings. Presumably, Rubiah would have done that when she assigned all her rights to the property to Ambank to obtain financing.

[20] The obligation to obtain consent rests on Rubiah, not the Plaintiff. The Defendant's contention that consent must be obtained by the Plaintiff from PKNS is wholly misconceived.

[21] Next, the principle of buyer beware or *caveat emptor* has no application in this case. This is not a case of disclaimer of warranty as to the quality/nature of the property sold. I fail to see the relevance of the principle as a defence to a claim for summary possession. Contrary to the contention of the Defendants, the mere fact that the Plaintiff ought to be aware of the Defendants' presence at the said premises before he bid at the auction does not give the Defendants the right to continue to occupy the premises.

[22] Finally, the issues pertaining to the sale of the said premises by Ambank to the Plaintiff are irrelevant to the proceedings here. This is not the forum to question Ambank's rights to sell the property at LACA auction. Further if at all, it is for Rubiah, not the Defendants, to raise these questions. I therefore do not find these issues merit any consideration. Nor do I consider them to be triable issues.

[23] The Defendants' right to occupy the said premises ended when the said premises was bought by the Plaintiff in the auction. All the rights of ownership of the said premises became vested in the Plaintiff. He is prima facie entitled to vacant possession of the premises.

[24] The Defendants were not tenants or tenants holding over after the termination of the tenancy. They were persons who entered into or remained in occupation without his licence or consent, within the meaning of O 89 rule 1. The Defendants' presence on the said premises is without the Plaintiff's consent. They are clearly trespassers on the said premises.

Conclusion

[25] Based on the foregoing reasons, the Plaintiff has shown that he has a right to summary possession of land. I therefore allow prayers (a), (b) and (c) of the Originating Summons. The Defendants are ordered to deliver vacant possession of the said premises within 14 days from the date hereof.

[26] However, prayer (d) for damages is disallowed. O 89 does not envisage an order for damages as assessed to be made. Damages are not recoverable in proceeding under O 89. The court is only empowered to grant an order for vacant possession. However the Plaintiff is not precluded from recovering damages by instituting a separate action to recover the same. I also order that costs of RM 3000 subject to allocator to be paid to the Plaintiff.