

IN THE COURT OF APPEAL FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 014 of 2020
[High Court at Lautoka Case No. HBC 190 of 2016]

BETWEEN : **MOHAMMED SHAHEEM KHAIRATI**

Appellant

AND : **MOHAMMED AIYUB**

MOHAMMED HASSAN

MOHAMMED FAREED KHAIRATI

MOHAMMED ABDUL GAFFAR KHAIRATI

Respondents

Coram : **Jitoko, VP**
Lecamwasam, JA
Sharma, JA

Counsel : **Mr. V M Mishra and Ms. P Prasad for the Appellant**
Mr. S F Koya and Mr S A Koya for the Respondents

Date of Hearing : **10 May 2023**

Date of Judgment : **26 May 2023**

JUDGMENT

Jitoko JA

- [1] I have had the advantage of reading the draft judgment of Lecamwasam JA in this appeal and I agree with the reasons and conclusions.

Lecamwasam JA

- [2] This appeal is preferred by the Appellant being aggrieved by the ruling dated 26th February 2020 made by the learned High Court Judge at Lautoka, on the following grounds of appeal:

1. *The Learned Judge erred in fact and/or in law in holding that the Appellant's application for assessment for rental for Certificate of Title No. 6225 by the Appellant was estopped and an abuse of process of the Court and that it could not be entertained when:*
2.
 - a. *The Terms of Settlement and order by consent of the 15th of February 2019 itself provided in clause 2 that the Estate of Khairati was to be distributed on the basis of settlement letter between all Estate beneficiaries dated 17th July, 2006;*
 - b. *That settlement letter dated 17th July, 2006 had provided for sale of CT 6225 and was the document pursuant to which the First Respondent had been appointed Trustee of the Estate of Khairati by the High Court.*
 - c. *The First Respondent refused to sell CT 6225 in 2006 despite pleas of the Appellant's late father and had rented CT 6225 out and collected rental and did not distribute a single cent of rental to the Appellant (period of over 10 years) up to his removal on the 15th of February, 2019 or provide any account for the same;*
3. *The Learned Judge erred in fact and/or in law in dismissing the Appellant's application for assessment for rental for Certificate of Title No. 6225 when:*
 - a. *The Terms of Settlement and order by consent of the 15th of February, 2019 itself provided in clauses 12 and 13 that:*
 12. *"the distribution of the shares between the beneficiaries shall be determined and assessed by the Court."*

13. *“That the Parties and the new trustee shall be at liberty to apply generally”*
- b. *When the First Respondent as Trustee of the Estate of Khairati had not provided any account for rental received by him despite order for accounts having been made by the Master of the High Court on the 15th day of February, 2018 which several months before the first trial dates in October, 2019;*
 - c. *The removal of the First Defendant as Trustee did not free him from his obligation to produce true and proper accounts for the period he was trustee and to pay over monies due to the Estate of Khairati;*
 - d. *True and proper accounts of the Estate of Khairati and an ascertainment of rental due to the Estate of Khairati for rental of CT 6225 was essential and necessary for the Court to determine distribution of Estate funds which the First Respondent had not provided at either of the trial dates;*
 - e. *The full and final settlement clause of the order by consent were be read together with the above clauses and as a whole and the purpose of the Action and order which was to complete administration and final distribution of the Estate of Khairati.*
 - f. *The settlement and consent order was entered in a proceeding for removal of the First Respondent as Trustee for breach of Trust and when an order for accounts had already been made against him by the Master on the 15th day of February, 2018 which he had refused to obey;*
 - g. *At trial and entry of the consent order the Appellant had no idea of what rental the First Respondent had received as he had not produced accounts and so an order could not be made about rental to be paid to the Appellant as had been done about cane proceeds in paragraph 9 of the consent order.*
4. *The Learned Judge erred in fact and/or in law in:*
- a. *Raising issues of estoppel and abuse of process when these issues had not been raised by the Respondents’ Solicitors;*
 - b. *When the First Respondent by his lawyers allowed the affidavit of Valuer, Ms Cavalevu as to what rental CT 6225 would fetch without cross examination and accepting the matter be dealt with by written submission;*
 - c. *When the First Respondent had accepted that he had to produce accounts for the period he was trustee;*

- d. *When the accounts produced by the First Respondent were not proper or adequate accounts of the Estate of Khairati and when the same had discrepancies and revealed misuse and/or abuse of funds.*
5. *The Learned Judge erred in fact and/or in law in not awarding a greater amount of costs to the Appellant in particular when the amount incurred for air fares and travel of himself and witnesses and associated costs was provided with legal costs incurred and did not take into full account fact as such as:-*
- a. *The Appellant had to produce eight witnesses as part of a contested hearing; apply for accounts for an order; oppose adjournment; produce Fiji Sugar Corporation Limited; prepare and tender a large number of Exhibits and partially cross examine the First Defendant before he and the other Defendants agreed that he be removed as trustee;*
 - b. *A trustee must always be ready with his accounts and produce the same to the beneficiaries and the Court;*
 - c. *A deed was sought to be produced by the Respondents by way of their defence which the Appellant had to produce expert opinion on that it was fraudulent and not signed by the Appellant's late father.*

[3] The Appellant now seeks an order as per orders 37, 38, 43 and 44 of the High Court Record, for rental and interest due to be assessed. In the same application, the Appellant also challenges the order made by the learned High Court judge regarding the order of costs on the basis that the amount is not sufficient.

[4] Accordingly, I find that the crux of this application revolves around costs and assessment of rental. Therefore, I will confine myself to addressing only the issues pertaining to costs and assessment of rental, the definitive resolution of which will determine the outcome of this appeal. It will also save this court the redundant exercise of addressing the other superfluous matters that have been raised.

[5] I will first deal with the issue of costs ordered by the learned High Court Judge. The learned High Court Judge in dealing with issues of costs had ordered F\$9500.00 to the Plaintiff. However, at paragraph 34 of his judgment, the learned judge states that as the Plaintiff is a party to the proceedings, which necessitates him to be present in court to give evidence in

support of his claim, he is not entitled to claim the cost of air tickets from New Zealand to Fiji to attend the trial. The learned High Court Judge however conceded that the Plaintiff is entitled to claim the costs associated in calling his witnesses to court for his trial.

[6] I cannot agree with the learned judge in regard to the above position. The plaintiff was compelled to visit Fiji in order to file action to assert his rights. He incurred the expense of the air ticket in relation to the action, which therefore cannot be excluded. I consider it a factor that needs to be taken into consideration in assessing costs of this case.

[7] As per the submissions made by the Appellant, I find that the costs incurred for the air ticket is around FJD\$2,000.00. Therefore, it is nothing but correct to allow the expenses incurred in regard be paid by the Respondent to the Appellant. The addition of the cost of the air ticket to the costs already ordered by the learned High Court Judge brings the total costs to F\$11,500.00. However, as the Appellant has indicated in his written submissions at paragraph 128 that he will be satisfied with the amount of F\$9,790.00 as costs, instead of the full F\$11,500.00 I have calculated, I award F\$10,000.00 payable by the 1st Respondent to the Appellant.

[8] Another pertinent fact in relation to the substantive matter of this application is that, the parties in the substantive case arrived at a settlement towards the end of the proceedings. The learned high court judge, having accepted the terms of the settlement, entered the orders accordingly. The consent order is as follows:

1. *THAT the Deed dated 6 May, 2009 shall be unenforceable.*
2. *THAT the Estate of Khairati shall be distributed on the basis of the settlement letter dated 17 July, 2006.*
3. *THAT the First Defendant; Mohammed Aiyub shall be removed as the Trustee of the Estate of Khairati.*
4. *THAT Mr. Faizal Hussein Khairati, Project Manager of Jacks of Fiji (son of the beneficiary and previous Trustee of Nadi, Fiji Mr Mohammed Hussein) is hereby appointed the Trustee of the Estate of Khairati to complete the administration of the Estate of Khairati.*

5. *THAT Certificate of Title No. 6225 and 7200 shall be sold to the highest bidder after:-*

a. Two consecutive English Newspaper advertisements allowing fourteen (14) days for Tenders to be received with \$200.00 deposit with all tenders to go to the Deputy Registrar of the High Court, Lautoka and he shall open the same in the presence of both party's lawyers and/or the parties themselves.

b. The properties (each of them) shall be offered to each beneficiary at the highest tender received. If there is more than one beneficiary wanting to buy then it shall be sold to the one who offers the highest price.

c. The person(s) awarded the tender shall pay a deposit of the (10%) percent to be paid within 10 days of the tender acceptance into Court and sale and purchase agreement shall be done by a lawyer chosen by the new Trustee.

d. If the highest tenderer for either property does not settle or come up with the funds to settle with 42 days from time of acceptance that the deposit shall be forfeited and the property be offered and sold to the second highest tenderer with the same procedure being followed and so on until the property is sold.

6. *THAT the costs of the advertisements shall be paid by the Defendants.*

7. *THAT the Estate tractor parked at the residence of Faizal Hussein Khairati shall be sold in same manner by the Trustee to the highest tenderer.*

8. *THAT the money from all the sales shall be paid into Court.*

9. *THAT the loss of income for the Estate of Mohammed Ibrahim as prayed for in relief F of the statement of claim is agreed at \$20,000.00.*

10. *THAT the costs of this action shall be paid to the Plaintiff and the same to be assessed by the Court, if not agreed and whether the same is paid by the First Defendant personally to be also determined by the Court.*

11. *THAT the Plaintiff shall be at liberty to file affidavit with the bills of costs and fees incurred by him for the present hearing as well as other costs such as air flights.*

12. *THAT the distribution of the shares between the beneficiaries shall be determined and assessed by the Court.*

13.THAT the parties and the new Trustee shall be at liberty to apply generally.

14.THAT this settlement shall be the full and final settlement between the parties.

[9] Having concluded the case thus, the Appellant filed summons dated 12th September 2019 (which date was mentioned as 21 August 2019 at Tab 10 of the main High Court Record) for rental assessment of damages and prayed for the following reliefs:

- 1. That the court do assess the amount of rental due to the Estate of Mohammed Ibrahim as its one seventh share of the Estate of Khairati for the renting of Certificate of Title No. 6225 and the premises situated thereon from the 1st of January, 2008 to the 15th of February, 2019 when the first defendant was removed as trustee of the estate of Khairati;*
- 2. Whether there should be interest paid thereon and whether the plaintiff is entitled to damages from either the first defendant or the first to fourth defendants;*
- 3. The parties be at liberty to call witnesses to give evidence on this issue on a date given by the Court;*
- 4. The First Defendant and/or the First to Fourth Defendants do pay the costs of this assessment on an indemnity basis so that his travelling, Solicitors costs incurred by him be fully met.*

[10] In view of the above, the Respondent has taken up the position that the rental due to the Estate of Ibrahim has not been pleaded in the Appellant's writ of summons and statement of claim. They further claim that no direction was made in the order dated 15th February 2019 to have the rental assessed. As such, the Respondents are of the view that once the substantive matter is concluded and orders by consent are entered into, the Appellant is precluded from making a separate application in the same proceeding. They maintain that if the Appellant was of the view that rental should be assessed and the 1st Respondent be held liable for the loss of rental to the estate of Mohammed Ibrahim, the Appellant should have first made an application to set aside the consent order of 15th February 2019, which

he has failed to do. Be that as it may, I find the position of the Respondents untenable as the Appellant had pleaded the assessment of rental in the very first line of his summons.

[11] Respondents also cite the observations of Byrne J in Wilding v Sanderson [1897] 2 Ch534, 544 to fortify their position. They further take up the position that the application filed on 21 August 2019 was an abuse of process as the orders sought were firstly not part of the substantive matter and/or related orders made thereunder. The 1st Respondent specifically states that damages cannot be assessed against him for any loss of rental in respect of the estate since the consent order does not grant the appellant a right to have rental assessed against the 1st Respondent or suggest that the 1st Respondent had breached his fiduciary duties as the trustee of the estate of Khairati.

[12] The above positions taken up by the Appellant and the Respondents make it necessary to scrutinize the terms of the settlement entered into on 15 February 2019. Even though the terms of settlement do not contain a direct order to have rental assessed, a closer examination of item No. 12 of the terms of settlement reveals otherwise. The said paragraph reads thus:

“THAT the distribution of the shares between the beneficiaries shall be determined and assessed by the Court.”

[13] The phrase “distribution of the shares” in the above paragraph denotes the value of each share to which a beneficiary is entitled. For the distribution of such shares the court will have to determine the entitlement of each beneficiary which necessarily entails an assessment of the value of each share. Such an assessment invariably includes any income that the parties can derive from the said property.

[14] According to the material before court, the property in relation to which the dispute at hand has arisen CT 6225, is about One Acre in extent. There is no evidence of the existence of any plantation or cultivation on the said property from which parties can derive any income. The only income generating structure is the building(s) standing thereon, which must be taken into account in relation to the distribution of shares in respect of CT6225. The only income that can be derived from the said building is rental. Therefore, when parties signed

the terms of settlement, they consented to item No. 12 which deals with the distribution of shares including in relation to CT6225. As a result, by extension they consented to the assessment of rental from the building, which is income generated from CT6225 and thus constitutes part of the “shares” in property to which each party is entitled. As such, I find that despite the absence of the word ‘Rental’ in the consent order, the parties had agreed to the assessment of rental in respect of the building standing on CT6225.

[15] On the strength of the above, I reject the position taken up by the Respondent. While I have taken due note of the submissions of the learned counsel for the Respondent, who strenuously expressed his views from different aspects leaving no stone unturned, I find that I cannot agree with the learned counsel for the Respondents. I hold that Item No. 12 of the terms of settlement subsumes rental of the building, which precludes the Respondents from denying the Appellant the right to an assessment of the rental from the property in question.

[16] However, I am also not unmindful of the authorities cited by the Respondents in their lengthy written submissions, especially **Henderson v Henderson [1843] 3 Hare 100** cited at paragraph 79, where it was held that a party to litigation must make its whole case when the matter is before the Court. The party will not be permitted to reopen the case in respect of new grounds or new arguments which could have been dealt with at the time. This in essence is an exposition of the doctrine of *res judicata*, which not only applies to issues which have been decided but also for issues which could have been brought in the case.

[17] Whilst I wholeheartedly agree with the above submission in so far as the elucidation of the doctrine of *res judicata* goes, a distinction has to be drawn between the instant case and a situation to which *res judicata* applies. As I have already held in the matter at hand that item No.12 of the settlement contained in the consent order subsumes the rental of the property, there is no question of the expectation of an assessment of rental forming a new argument or a new form of litigation on the same facts. Therefore, it would be erroneous to presume that the present matter attracts the application of the doctrine of *res judicata*.

[18] In conclusion, I hold that there was no abuse of process as found by the learned High Court Judge at paragraph 60 of his judgment. Therefore, I set aside the judgment of the learned high Court judge in so far as his findings in respect of “ASSESSMENT OF RENTAL DUE TO ESTATE” at paragraph 35 of his judgment are concerned.

[19] At the same time, I take cognizance of the extensive submissions made by the learned counsel for the appellants, citing Halsbury’s Laws of England pertinent to trustees’ duties together with ten other judgments regarding liability of trustees, duty to give information to beneficiary, enforcement of duty, estoppel etc. It is a *sine qua non* of trusteeship for trustees to maintain accurate accounts and be ready to render those when required. However, as this court has decided to allow the assessment of rental as pleaded by the Appellant, it is not necessary to address the duties of trustees and similar concerns at length.

[20] In view of the above reasons given, I answer the cumulative grounds of appeal in the affirmative. In relation to Ground of Appeal 3(f), it is important to bear in mind that the Respondent had already violated the order of the Master dated 15 February 2018 requiring him to tender accounts. Hence, this court shall not be of any assistance to a person who had blatantly disobeyed an order of court.

[21] Accordingly, I set aside the ruling of the learned High Court Judge dated 26th February 2020 and allow the appeal. Further, I order F\$5000.00 as costs payable to the Appellant by the Respondents.

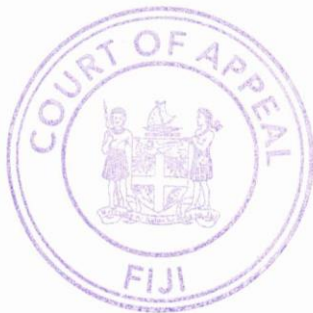
Sharma JA


[22] I have read the judgment together with the reasons therein, and agree with the orders made by this court accordingly.


[23] **Orders of the Court**

1. *Ruling of the learned High Court judge dated 26th February 2020 is set aside.*
2. *Appeal allowed.*
3. *First Respondent to pay F\$5,000.00 to the Appellant as costs.*


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Hon. Justice F. Jitoko
VICE PRESIDENT, COURT OF APPEAL




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Hon. Justice S. Lecamwasam
JUSTICE OF APPEAL


.....
Hon. Justice V. D. Sharma
JUSTICE OF APPEAL

Solicitors

Mishra Prakash & Associates for the Appellant
Siddiq Koya Lawyers for the Respondent