

IN THE HIGH COURT OF FIJI
PROBATE JURISDICTION
AT SUVA

Probate Action No. 14 of 2012

IN THE ESTATE OF DAYA RAM of
Lomaivuna, Vunidawa, Fiji, Retired,
Deceased, Testate

BETWEEN : **DINESH KUMAR** of 432 of Ratu Mara Road, Samabula, Suva, in Fiji,
Mechanic

Plaintiff

AND : **RAJESH PRAKASH** of Lomaivuna, Vunidawa, Farmer

Defendant

Counsel : **Mr P Sharma of R Patel Lawyers** for the **Plaintiff**
Mr M Nand of Nands Lawyers for the **Defendant**

Date of Judgment: 10th September, 2013

JUDGMENT

1. Writ of summons filed on 15th June 2012 by the Plaintiff against the Defendant and sought the following orders:
 - (a) *A Declaration that the will dated 8th June 2007 is a forged instrument; and is deemed to be null and void and be set aside;*
 - (b) *That the Grant of probate No. 49692 issued by the Suva High Court on 16th November 2010 be revoked and set aside forthwith;*
 - (c) *That the Transmission of Death No. 751045 in favour of the Defendant in relation to the property comprised in Certificate of Title No. 10687 on 24th October 2011 be declared null and void; and set aside;*

- (d) *That the Transfer No. 753890 of the property comprised in Certificate of Title No. 10687 to the Defendant on 4th January 2012 be declared null and void; and set aside;*
- (e) *That the Defendant be ordered to pay into High Court Civil Registry, the monies he received from:*
- (i) *The National Bank of Fiji Account No. 022603331001-3; and*
 - (ii) *The National Bank of Fiji Account No. 022603331001-4.*
- (f) *That the Defendant pay interest on these monies at the same interest rate that the National Bank would have paid. The interest be paid from the date the Defendant received the monies from the National Bank of Fiji and to the date the Defendant pays the monies into the High Court Civil Registry;*
- (g) *That the Plaintiff be declared the sole Trustee of the Will dated 28th January 1997 and be permitted to apply for Grant of Probate for the Estate of Daya Ram pursuant to a copy of the Will dated 28th January 1997;*
- (h) *That upon Grant of Probate being issued to the Plaintiff, the monies paid by the Defendant into the High Court be released to the Plaintiff's Solicitors for distribution to the beneficiaries as bequeathed pursuant to the Will dated 28th January 1997;*
- (i) *In the alternative, an Order that the Plaintiff has an equitable interest in the larger flat and all the improvements and chattels in the said flat that he and his family occupy and utilize at 432 Ratu Mara Road, Samabula, Suva comprised in Certificate of Title No. 10687 on such terms as the Court deems appropriate;*
- (j) *An Order directing the Registrar of Titles to record the Plaintiff's such equitable interest on Certificate of Title No. 10687;*
- (k) *Damages against the Defendant;*
- (l) *That the Defendant pay costs on an indemnity basis; and*

- (m) *Such other relief as the Honorable Court deems just and equitable in the circumstances.*
2. Writ of summons was served on the Defendant on 22nd June 2012 and the Defendant filed acknowledgement of service on 29th June 2012, Statement of Defence was filed by the Defendant on 13th July 2013.
3. Inter-partes summons was filed by the Plaintiff on 11th July 2012 with the affidavit in support deposed on 10th July 2012 and sought the following Orders:
- (a) *That until the final determination of this matter, the Defendant by himself or by or through his servants and/or agents however be restrained from taking any action to evict the Plaintiff and his family from the residential premises at 432 Ratu Mara Road, Samabula, Suva comprised in Certificate of Title No. 10687;*
- (b) *That until the final determination of this matter, the Defendant by himself or by or through his servants and/or agents howsoever be restrained from taking any action to interfere with the quiet enjoyment of the Plaintiff and his family at the residential premises at 432 Ratu Mara Road, Samabula, Suva, comprised in Certificate of Title No. 10687;*
- (c) *That until the final determination of this matter, the Defendant by himself or by or through his servants and/or agents howsoever be restrained from selling, mortgaging, dealing with or otherwise disposing the residential premises at 432 Ratu Mara Road, Samabula, Suva, comprised in Certificate of Title No. 10687;*
- (d) *That the Registrar of Title endorse this Order on Certificate of Title No. 10687 and such endorsement to remain until the final determination of this matter;*
- (e) *Such further or other orders as this Honorable Court shall deem just; and*
- (f) *That the cost of this application be cost in the cause.*

4. When the matter came up for hearing on 17th July 2012 Mr Nand counsel for the Defendant objected for the Orders being granted as per the inter-partes summons. Interim injunctive orders were granted under para (a) (b) and (d) of the summons with other directions as detailed below:
 - (i) *The Defendant has until 7th August 2012 to file an Answering Affidavit;*
 - (ii) *The Plaintiff has until 21st August 2012 to file an Affidavit in Reply, if necessary;*
 - (iii) *The application is listed for hearing on 11th September 2012 at 10.00am;*
 - (iv) *That until 11th September 2012, the Defendant by himself or by or through his servants and/or agents howsoever is restrained from taking any action to evict the Plaintiff and his family from the residential premises at 432 Ratu Mara Road, Samabula, Suva comprised in Certificate of Title No. 10687;*
 - (v) *That until 11th September, the Defendant by himself or by or through his servants and/or agents howsoever is restrained from taking any action to interfere with the quiet enjoyment of the Plaintiff and his family at the residential premises at 432 Ratu Mara Road, Samabula, Suva, comprised in Certificate of Title No. 10687;*
 - (vi) *That until 11th September 2012, the Defendant by himself or by or through his servants and/or agents howsoever is restrained from selling, mortgaging, dealing with or otherwise disposing the residential premises at 432 Ratu Mara Road, Samabula, Suva, comprised in Certificate of Title No. 10687;*
 - (vii) *That the Registrar of Titles endorsed this Order on Certificate of Title No. 10687 and such endorsement to remain until 11th September 2012.*
5. Statement of Defence was filed by the Defendant on 13th July 2012 and affidavit in reply in response to the inter-partes motion was filed by the Defendant on 6th August 2012.
6. Reply to the Statement of Defence was filed by the Plaintiff on 24th August 2012.

7. The injunctive orders described in paragraph 7 were valid till 11th September 2012 and hearing of the matter was taken up on 11th September 2012 and 19th September 2012 and this court made order that the orders made on 17th July 2012 to remain in force until the final order being made in this case.
8. The Affidavit in Support dated 10th July 2012, the Plaintiff deposed inter-alia:
- (a) *The Plaintiff and the Defendant are sons of Daya Ram deceased among 6 other children;*
 - (b) *The deceased operated a farm at Lomaivuna, Vunidawa comprised in Crown Lease No. 12288 which was owned by the deceased and the Defendant and the Defendant lives in the farm with his family (12288 marked as "DK1");*
 - (c) *The deceased also owned a farm comprised in Crown Lease No. 4945 at Watakolu, Naitasiri and same was sold to the Plaintiff's brother Mukesh Prakash for a sum of \$50,000.00 (4945 marked as "DK2" and the copy of Transfer No. 341561 marked as "DK3");*
 - (d) *On 25th January 2010 the said Mukesh Prakash transferred Crown Lease No. 4945 to the Defendant for a sum of \$15,000.00 (copy of Transfer No. 732460 was annexed as "DK4");*
 - (e) *The deceased was living with the Plaintiff and his family at 432 Ratu Mara Road, Certificate of Title No. 10687 and went for work in Vunidawa Farm (10687 marked as "DK5");*
 - (f) *The dwelling at 432 Ratu Mara Road consists of 4 bedroom flat and 2 bedroom flat and presently the Plaintiff occupies the larger flat (4 bedroom flat);*
 - (g) *The father died on 7th July 2007 and Certificate of Death annexed and marked "DK6".*
 - (h) *The properties and the Bank Accounts were disclosed in paragraph 14 of the Affidavit;*

(i) First cause of action was described under equitable interest in property at 432 Ratu Mara Road, Samabula by way of Promissory/Proprietary estopped in paragraphs 15 to 27 and deposed that the :

- i) deceased was living with the Plaintiff towards the end of his life and he advised and promised the Defendant that ½ share of No. 432 Ratu Mara Road would be left for the Plaintiff in deceased Will;*
- ii) On the belief that the Plaintiff made improved, developed and maintained the said property and particulars of such improvements were detailed in paragraph 18 and rates and utility bills were paid by the Plaintiff. Receipts for payment of rates annexed as “DK7”;*
- iii) For the reasons detailed in paragraph 22 to 26 under the headings honest belief and conscious silence of the deceased the Plaintiff stated that he is claiming equitable interest there is no bar to claim the relief.*

9. I find the above issues had to be addressed at the substantive Trial and not in the present application for the injunction.

10. The Interim Injunction Orders were granted by this Court considering the second cause of action under the heading “Revocation of Grant of Probate on the grounds of Fraud and Forgery” described in paragraph 28 to 43.

10.1 The Plaintiff had referred to the Will dated 28th January 1997 witnessed by Tamara Jayalilleke Solicitor was annexed to the Affidavit marked “DK8”. In terms of the said Will, the Plaintiff’s entitlement was stated as:

“(i) The larger flat in equal shares to my two sons Rajesh Prakash (f/n Daya Ram) and Dinesh Kumar (f/n Daya Ram);

(ii) *The smaller flat to my daughter Sharda Devi (f/n Daya Ram).*

I observe that paragraph (ii) was scribbled out but wording can be seen. The witnesses had not witnessed this change.

3.

(i)

(ii) *Money in National Bank of Fiji Suva Branch Account Number 022603331001-3 (Pass Book Account) to and unto my sons Rajesh Prakash (f/n Daya Ram) and Dinesh Kumar (F/n Daya Ram) in equal shares”.*

10.2 The deceased had given a copy of the said Last Will dated 28th January 1997 for safe keeping and ensured the Plaintiff’s interest in 432 Ratu Mara Road property is protected. When their father died on 7th July 2007, all funeral expenses were born by the Plaintiff.

10.3 Within the period of August 2007 and 2010, the Plaintiff had requested the Defendant to instruct MC Lawyers to take out the probate in the father’s estate, and at no stage the Defendant mentioned of any Will that the deceased purportedly made on 8th June 2007. The Defendant had obtained Grant of Probate No. 49692 on 16th November 2010 on the Will alleged to have been made on 8th June 2007 (“DK9”).

10.4 Probate No. 49692 was annexed marked “DK10”.

10.5 The Plaintiff was not aware of the Will dated 8th June 2007.

10.6 Having obtained Probate No. 49692, Defendant transmitted to himself the Property at 432 Ratu Mara Road as the sole executor and Trustee and transferred to himself on 4th January 2012 as the sole beneficiary. Copy of transmission by death annexed to the Affidavit marked “DK11” and the Plaintiffs Solicitor’s clerk, attempted to obtain a copy of the Transfer No. 753890 from the Registrar of Titles Office but was informed the said document was missing or misplaced.

10.7 The Plaintiff presumed pursuant to Grant of Probate No. 49692 the monies in the Bank Accounts of the deceased would have got released to himself and used for his benefit.

10.8 The Plaintiff alleged that the Will was used by the Defendant to obtain a Grant of Probate No. 49692 is a forgery and further alleged that the signatures in the said Will dated 8th June 2007 were forgeries and particulars of the forgeries were described under particulars of forgeries inter-alia:

- (a) *Will dated 8th June 2007 was not made by a lawyer;*
- (b) *No record as to who drafted the Will dated 8th June 2007;*
- (c) *No record of giving instructions to draw up a Will on 8th June 2007;*
- (d) *Signature is different from the deceased signatures on the Will dated 28th January 1997 in Memorandum dated 10th June 1998 and his Passport Nos. 210609 and 409133;*
- (e) *The Will dated 8th June 2007 was typed with date as well as the names of the two witnesses before it was even signed;*
- (f) *The signature of the witness Sarju Prasad in the Will dated 8th June 2007 is different from an Agreement he signed on 29th April 1994;*
- (g) *Sarju Prasad was crippled at the date the Will was allegedly signed on 8th June 2007;*
- (h) *Ram Dayal, the other witness of the Will 8th June 2007 had already suffered a stroke at the date the Will was allegedly signed on 8th June 2007;*
- (i) *Sarju Prasad and Ram Dayal were already dead by the time the Defendant applied for Letters of Probate in 2010. Mr S Prasad died on or about 9th November 2008; and Mr R Dayal died on or about October 2007;*
- (j) *The Defendant waited until the two alleged witnesses were dead before applying for Probate or alternatively used the names of two dead persons as witnesses in the Will;*

- (k) *There was no reason for the deceased to give the Defendant the whole of the 432 Ratu Mara Road property since the Defendant did not live at this property and did not pay for any maintenance, repairs, renovations or utilities bills;*
- (l) *The bequests made to the Plaintiff's mother Kiran Devi and his sister Shakuntala Devi are hollow bequests because neither of them were in resident in Fiji in June 2007. Neither or these two persons were dependent on the deceased or were being provided for by the deceased as at 8th June 2007;*
- (m) *In the Will dated 8th June 2007, the deceased did not explain why he had changed his Will dated 28th January 1997, and refused to leave anything to the Plaintiff; his mother; and his sisters Reshma Devi and Sharda Devi; and*
- (n) *In 2004, the deceased only left a copy of the Will dated 28th January 1997 with the Plaintiff. He did not in June or July 2007, leave a copy of the Will dated 8th June 2007 with the Plaintiff.*

10.9 The Plaintiff claim since the Defendant solely benefitted from the Will dated 8th June 2007, it is logical to infer that he prepared the Will and forged the signatures of the deceased and other 2 witnesses Sarju Prasad and Ram Dayal.

10.10 By letter dated 25th March 2012, the Plaintiff's solicitors requested the Defendant to transfer the 432 Ratu Mara Road property to him and copy of the letter marked as "DK 13". By the said letter, it was informed to the Defendant to reply to the purported fraud of obtaining Grant of Probate and Defendant had failed to reply the queries raised by the Plaintiff's solicitors.

10.11 In the above circumstance, the Plaintiff had sought the Injunctive relief.

11. The Defendant replied to the Affidavit in Support, by his Affidavit dated 6th August 2012 inter-alia:

11.1 Admitted the contents in paragraphs 3.4.5.6.7.8 and 9, i.e. the siblings, Crown Lease No. 1228 ("DK1"), the Defendant resides in the farm and his source of income is from the farm, Crown Lease No. 4945 owned by the Defendant, ("DK2", "DK3" and "DK4").

- 11.2 In replying to paragraph 10 of the Affidavit admitted that he bought the property Crown Lease No. 4945 from his brother Mukesh Prakash and the Defendant was paying the loan to Fiji Development Bank.
- 11.3 The contention of the Plaintiff in paragraph 11 of the Affidavit was denied by the Defendant and stated the Deceased was living with him and he went to No. 432 Ratu Mara Road property to collect the rent and stayed sometimes with his daughter Sharda Devi who was occupying the larger flat.
- 11.4 The Defendant had admitted paragraphs 12 and 13 of the Plaintiff's Affidavit with regard to the occupation and number of flats. The Defendant also admitted his father expired on 7th July 2007.
- 11.5 In replying to paragraph 14 of the Affidavit the Defendant stated that he was unaware of the Bank Accounts stated in paragraphs 14(c) and 14(d) however admitted paragraphs 14(a) and 14(b) and stated:
- (a) *that the deceased's share of the property comprised in CL No: 12288 came to the Defendant as the property has been bequeathed to him under the Last Will of the deceased;*
 - (b) *the residential dwelling comprised in CT No: 10687 was left to the Defendant pursuant to the Last Will of the Deceased dated 8th June 2007.*
- 11.6 In replying to paragraph 15 of the Affidavit the Defendant stated that the deceased was living with the Plaintiff towards end of the deceased's life.
- 11.7 The Defendant deposed that the deceased mentioned to him he may leave half of the property to the Plaintiff provided he looks after the deceased and the Plaintiff didn't do so and the deceased was looked after by the Defendant.
- 11.8 In response to paragraph 17, the Defendant stated the flat was rented prior to 2005 and the Plaintiff forced the tenants to vacate the premises and the deceased agreed to let the Plaintiff to stay provided the Plaintiff pay the bills, rent and maintained the property. The Plaintiff too agreed to vacate the premises when he finds another house to reside in.
- 11.9 In response to paragraph 28 the Defendant stated that if any improvements done (*which was denied*) it was as per initial agreement that the Plaintiff was to maintain

the property and his stay was temporary. The Defendant further stated certain improvements were done by the deceased. If any improvements done by the Plaintiff was from the rent monies received after the deceased passed away.

- 11.10 In response to paragraphs 19 and 20, utility and city rates were paid by the Plaintiff after the deceased passed away and for such payments the Plaintiff used the rent monies.
- 11.11 In response to paragraph 21, the Defendant stated that the improvements not objected by the deceased since the Plaintiff did not pay the rental as agreed.
- 11.12 Paragraphs 22 and 23 were denied by the Defendant and stated that the flat was never gifted to the Plaintiff by the deceased he approached the deceased to stay in the property temporarily.
- 11.13 Paragraph 25 and 26 of the Affidavit were denied by the Plaintiff.
- 11.14 In replying to paragraph 27 of the Affidavit the Defendant replied by repeating the contents of paragraph 14 of his Affidavit.
- 11.15 The Defendant also denied the contents of paragraph 27 and stated that the Plaintiff does not have any equitable interest on the property and the Plaintiff was a temporary tenant.
- 11.16 The Defendant responding to paragraph 28 and 29 of the Plaintiff's Affidavit stated that he had no knowledge on the same and that the Plaintiff came into occupation of the property in 2005, Will was made in 1997 (*which was denied*), the Plaintiff was aware that the larger flat of the property to be shared between the Plaintiff and the Defendant, cannot assume that the entire flat was gifted to him by the deceased. The Defendant was advised that the alleged Will was made in 1997 and it is a copy with scribbles which was not witnessed.
- 11.17 Contents of paragraph 30 was denied and stated the funeral expenses of the deceased were borne by all children and other relatives not solely by the Plaintiff as he claims.
- 11.18 The Defendant denied that after the deceased's funeral there was a meeting with the Plaintiff with regard to Grant of Probate.

- 11.19 Replying paragraphs 32 and 33, Grant of Probate are the Will dated 8th June 2007 was admitted and stated that the advertisement was published in the newspapers and the Plaintiff did not respond and further he never used the opportunity of placing a caveat. It is noted by this court although advertisement was pleaded in the Affidavit it was not tendered to this court.
- 11.20 Replying to paragraph 34, the Defendant stated in the Will dated 8th June 2007 the Defendant was the sole beneficiary of the deceased estate and no provision made for the Plaintiff.
- 11.21 The Defendant admitted the content of paragraph 35 and 36 of the Affidavit and he was unaware of the contents of paragraph 37.
- 11.22 Referring to paragraph 35, he had no knowledge nor received monies from any Bank Account of the deceased.
- 11.23 Paragraph 39 was admitted.
- 11.24 Replying paragraph 40 of the Affidavit, the Defendant denied the contents and stated:
- (i) *He was not aware of the content of paragraphs 40(a) and 40 (b);*
 - (ii) *The Defendant was unaware of 40 (c) and the deceased would have given instructions on the Last Will dated 8th June 2007;*
 - (iii) *Denying paragraph 40 (d), the Defendant stated signatures of the deceased in the Will was similar to Statutory Declaration dated 14th October 2004, a letter dated 28th December 2004 and in a letter dated 16th December 1997 purported to be annexed and marked collectively as annexure "A". No annexure marked "A" was annexed to the Affidavit of the Defendant.*
 - (iv) *The contents of the paragraphs 40(e) was not responded by the Defendant in his Affidavit;*

(v) *Contents in paragraphs (f); (g) and (h) were denied by the Defendant;*

(vi) *Contents in paragraph "(i)" was admitted that the two witnesses were dead.*

- 11.25 In response to 40(j) to 40(l), the Defendant stated the decision to bequeath the property to the Defendant was entirely at the wish of the deceased and the Defendant cannot comment and further stated the Defendant's daughter Preshika Prasad was residing on the property until May 2012 and her belongings were still locked in her room in the subject property.
- 11.26 The Defendant denied contents of paragraph 40(n) and stated deceased had left his Last Will dated 8th June 2007 with the Defendant.
- 11.27 In response to paragraph 4, the Defendant denied the contents thereof and stated he did not forged signatures of the deceased and witnesses on the Will dated 8th June 2007.
- 11.28 The Defendant further deposed that he did not reply the letter dated 25th March 2012 since the Plaintiff's letter was not with any substance responding to paragraphs 42 and 43 of the Plaintiff's Affidavit.
- 11.29 In response to contents of the paragraph 44 of the Affidavit, the Will dated 8th June 2007 was not forged and hence the Probate No. 49692 is valid and the Orders sought by the Plaintiff to be dismissed with costs.
- 11.30 Paragraphs 45, 46 and 47 were admitted.
- 11.31 The Defendant responding to paragraph 48 of the Affidavit it was stated the Plaintiff does not have any equitable interest on the property and the Injunctive Orders would affect the rights being the registered owner of the property.
- 11.32 Further responding to paragraph 49 of the Affidavit, the Defendant stated damages would be adequate remedy in this matter.
12. Submissions were filed by both parties and oral submissions were made on 11th September 2012.

Analysis and Conclusions

13. This court has to decide as to whether the Interim Injunctive Orders should be continued, or varied, or dissolved, and Permanent Injunction should be granted until the substantive matter is decided.

13.1 Having granted the Interim Injunction Orders now this court has to look into the principles behind the Grant of Injunctive Orders. The test used in Fiji is formulated by Lord Diplock in the case of *American Cyanamid Co. v. Ethicon Limited* (1975) 1ALL ER 504.

The principles adopted in this case were followed in Fiji cases over a period of time. At the outset, I state that the onus is on the Plaintiff as held in the case of *Westpac Banking Corporation v. Prasad* [1999] FJCA 2: [1999] 45 FLR1 at page 6:

“it will not be for the Defendant to establish why the injunction should be dissolved. It carries no onus. Instead, the Plaintiff has the task of persuading the court that the circumstances of the case are such as to require the injunction to be continued.”

As such it is the Plaintiff who should establish to the court why the Interim injunction reliefs should be continued.

13.2 Having stated above, it is now the duty of this court to consider the principles adopted in American Cyanamid case in regard to the present case:

- (a) *Is there any serious issue to be tried?*
- (b) *Are damages an adequate remedy, if not, where does the balance of convenience lie?*
- (c) *Is there any material non disclosures?*
- (d) *Is there any irregularity or defect in the proceedings?*
- (e) *Is there an adequate undertaking to damages?*

(a) Is there any serious issue to be tried?

13.3 The Plaintiff had submitted referring to paragraph 40 of the Affidavit in Support that there is a forgery with regard to Will dated 8th June 2007. What the Defendant submitted was that the signatures of the deceased and/or the 2 witnesses were not forged and further submitted that the Plaintiff failed to claim or object at the time when the probate was applied by the Defendant. Further the Plaintiff failed to register a caveat. Apart from the said submission, the Defendant had stated there was an Annexure marked “A” referred to in paragraph 27 (c) which was not in fact attached to the Affidavit. This court cannot merely rely on the statement of denial it should be supported by material. *(I also made my comments in preceding paragraph 11.24 (iii) in this Judgment).*

This court had considered the following matters with regard to alleged forgery:

- (i) *the Will dated 8th June 2007 was filed for the purpose of obtaining the Grant of Probate in November 2010. There was no reason adduced by the Defendant with regard to the delay of taking steps to obtain the Grant of Probate either in the Affidavit;*
- (ii) *the Defendant also admitted in his Affidavit in paragraph 27(d) that the witnesses to the Will dated 8th June 2007 were dead at the time of the application was made to obtain Grant of Probate i.e. S Prasad died on or about 9th November 2008 and Mr R Dayal died in or about October 2007;*
- (iii) *the Defendant too admitted in paragraph 27(j):*

“27(j) I deny the contents of paragraph (n) and say that the deceased had left his Last Will dated 8th June 2007 with me.”

In absence of any reasons being set out by the Defendant’s delay in applying for the Grant of Probate the inference and the conclusion that this court can make at this stage is that there is a serious question to be tried with regard to fate of the Last Will dated 8th June 2007 made in favour of the Defendant:

I also find that:

- (a) the Last Will dated 8th June 2007 was left with the Defendant;
 - (b) the Defendant had waited to file the application for Grant of Probate until the death of the witnesses;
 - (c) the failure to refer the previous Will dated 28th January 1997 in the Will dated 8th June 2007.
- (iv) *the Plaintiff had attempted to prove that Defendant's contention that he didn't know about the Bank Accounts was wrong, by annexing the letter dated 2nd August 2012 marked as "DK15" to the Affidavit in Reply filed on 24th August 2012, I don't agree. This letter is addressed to Daya Ram the deceased and it was Daya Ram who had to include the said Accounts in the Last Will and the Plaintiff had failed to substantiate the position that the Defendant had knowledge on the Bank Accounts. As such the Plaintiff fails on this argument.*

14. I also cite Lord Diplock in the said case of American Cyanamid:

"The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious questions to be tried".

As concluded in paragraphs 13.3 (i), (ii), and (iii), I conclude that there are serious issues to be tried.

15. The Defendant cited the case of *Vivras Development Ltd v. Fiji National Provident Fund* (2001) FJHC 303 (2001) 1FLR 260 where Pathik J had stated that the question that looms large is whether the interim injunction ought to continue or not on the facts in the exercise of court's discretion or whether the Plaintiffs should be left to their remedy in damages. **Having concluded that there are serious issues to be tried I determine the discretion of this court should be exercised in favour of the Plaintiff.**

16. **The Defendant in his submissions quoted Lord Diplock’s statement in the case of American Cyanamid which I determine in favour of the Plaintiff for the reasons set out in the preceding paragraphs.**
17. Submissions were made by the Defendant quoting Section 39 and 40 of the Land Transfer Act. Whilst agreeing on the submissions that there is a protection for the registered proprietor under Section 39(1), applicability of these sections should be considered at a proper trial and not at this stage. The submissions made on the issue of fraud by quoting *Assets Company Limited v. Mere Roihi & Others* (1905) A.C. 176 at 210 and *Wainuka Sawmilling Co. Ltd v. Waqiore Timber Co. Ltd* (1923) NZLR 1137 at p.117 cited in the Fiji case *Shah v. Fifita* [2004] FJHC 299 HBC 0392.2003S (unreported) decided on 23rd June 2004 are not relevant at this stage of the case.

I conclude, the Plaintiff had established a prima facie case before this court with regard to the purported fraud by the Defendant. As submitted by the Defendant inaction by the Plaintiff on certain instances will not assist the Defendant to overcome the Charge of Fraud, which he should satisfy this court at the proper trial. The Defendant cannot merely say that he is the registered proprietor and refute alleged charges of fraud.

I conclude that the Plaintiff had satisfied this court there are serious issues to be tried with regard to the fraud committed on the Will dated 8th June 2007.

(b) Are damages an adequate remedy if not where does the balance of convenience lies?

18. 18.1 The Plaintiff had paragraph (13) of the Judgment in *Honeymoon Island [Fiji] Ltd v. Follies International Ltd* Civil Appeal No. ABU 0063 of 2007S, High Court Civil Action No. HBC 225/07L (unreported); decided on 4th July 2008. It was quoted in this case the following paragraph from American Cyanamid case:

“As prelude to considering the balance of convenience, the court must consider whether or not the applicant will suffer irreparable loss, being loss for which an award of damages would not be an adequate remedy, either because of the nature of the threatened loss, or because the party sought to be restrained would not be in a position to satisfy on order for damages, if damages.....would be an adequate remedy and the defendant would be in a financial position to pay them; no

interlocutory injunction should normally be granted “American Cyanamid (supra) at 408”

18.2 I don't agree with the proposition since the Defendant is the registered owner of the property and there is no fraud and the damages would be an appropriate remedy. The main question to be decided is the Will dated 8th June 2007 is a forgery or not. If the question is decided in favour of the Plaintiff, the ownership of the Defendant becomes void and the Defendant sized to be the owner. Further there were improvements to the property effected by the Plaintiff which was denied by the Defendant and such denial should be proved at a proper trial. Most importantly if the Defendant dispose the property in absence of the restraining order irreparable loss and damage would be caused to the Plaintiff which cannot be remedied by way of damages and balance of convenience lies in favour of the Plaintiff.

(c) Is there any material non disclosure?

19. Considering the Affidavit filed by both parties, I find there had been no material non disclosure and certain issues to be endured at a proper trial. There is no necessity to consider the authorities cited in this regard.

(d) Is there any irregularity or defect in the proceedings?

20. The Defendant had not addressed any irregularity or defect in the proceedings and I concur with the Plaintiff.

(e) Undertaking to damages?

21. 21.1 The Plaintiff in paragraph 49 of his Affidavit in support had undertaken to pay damages had stated inter-alia:

(i) *He is full time employment in Tavenai Development Limited and earns regular wages and operates 2 taxis;*

(ii) *The property is occupied by him all utilities are also being paid by him.*

21.2 The Defendant had replied the contents of this paragraph by stating that damages are adequate in this matter as the Plaintiff is being his equitable rights on the property in terms of the maintenance (as alleged) in this matter. This statement did not address the undertaking to damages however in the submission the issue was addressed by the Defendant stating that no supporting documents or assets being declared by the Plaintiff.

21.3 The Plaintiff in his supplementary submissions stated the Defendant had not challenged the undertaking to damages which I agree.

21.4 However, it is my duty to address this issue with available material and state that:

(a) *If the Defendant succeeds in the substantive matter there would be substantial damages awarded to the Defendant;*

(b) *If the Plaintiff succeeds, he will own only half share of the large flat. Presently, he is occupying the flat, and one of the flats is occupied by his son and other flat is rented out and the whole property is enjoyed by him.*

(c) *Although the Defendant had not taken up this issue in his Affidavit, I take judicial notice and state there should be adequate undertaking for damages by the Plaintiff, which should be substantiated by the Plaintiff and I conclude that the Plaintiff should provide security deposit for undertaking to damages.*

22. I also considered the submissions made by the Defendant with regard to present occupation of the property and make orders accordingly, giving attention to the final outcome of this case as stated in paragraph 21.4 of this Judgment.

23. Having made my conclusions and determinations as stated above, I make the following Orders:

(a) *Order until the final determination of this matter, the Defendant by himself or by or through his servants and/or agents however be restrained from taking any action to evict the Plaintiff and his family from the residential premises at 432 Ratu Mara Road, Samabula, Suva comprised in Certificate of Title No. 10687;*

- (b) *Order until the final determination of this matter, the Defendant by himself or by or through his servants and/or agents howsoever be restrained from taking any action to interfere with the quiet enjoyment of the Plaintiff and his family at the residential premises at 432 Ratu Mara Road, Samabula, Suva, comprised in Certificate of Title No. 10687;*
- (c) *Order until the final determination of this matter, the Defendant by himself or by or through his servants and/or agents howsoever be restrained from selling, mortgaging, dealing with or otherwise disposing the residential premises at 432 Ratu Mara Road, Samabula, Suva, comprised in Certificate of Title No. 10687;*
- (d) *Order the Registrar of Title endorse this Order on Certificate of Title No. 10687 and such endorsement to remain until the final determination of this matter;*
- (e) *Having made my conclusions in preceding paragraph 21.4, I Order the Plaintiff should make a Security Deposit of FJ\$7,500.00 with the Chief Registrar of this court within one week from the date of this Judgment as undertaking for damages. If the Plaintiff fails to make the said deposit within the stipulated period of time i.e. before 17th September 2013, the Orders made under paragraph (a); (b);(c) and (d) deemed to be dissolved;*
- (f) *Order the monthly rental of \$200.00 on Flat 3 occupied by the tenant be deposited with the Registrar of this court with effect from the date of this Judgment until final determination of this case;*
- (g) *Order the son of the Plaintiff who occupies the Flat 2 of the property should pay monthly rental of \$350.00 and the said sum should be deposited with the Chief Registrar of this court with effect from the date of this Judgment until final determination of this case.*
- (h) *It is further ordered that all taxes and rates pertaining to the premises No. 432 Ratu Mara Road shall be paid by the Plaintiff until final determination of this case.*

- (i) *The Plaintiff is further ordered to take all steps to fix this matter for Trial within 3 months from the date of this Judgment;*
- (j) *The costs in this matter shall be costs in suit.*

Delivered at Suva this 10th Day of September, 2013.

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C. Kotigalage
JUDGE