IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. 8 of 2009

BETWEEN : **TAHIR HUSSAIN MUNISHI** of 346 Fletcher Road, Vatuwaqa, Suva in the Republic of Fiji Islands and **KHAIRUL NISHA BIRIBO** of Waimanu Road, Suva in the Republic of Fiji Islands, Retired Civil Servant and Retired Health Sister respectively.

PLAINTIFFS

AND : **ABDUL MUNAF** of Gallau Ra temporarily residing in Munshi Bangalo near Nanuku Sector office, Rakiraki in the Republic of Fiji Islands.

DEFENDANT

Mr. Wasu Sivanesh Pillay for the Plaintiffs
Mr. Eroni Maopa for the Defendant

Date of Hearing : - 26th April 2016
Date of Ruling : - 29th June 2016

RULING

(1) The matter before me stems from the Plaintiffs Summons for Assessment of Damages, dated 05th February 2016, made pursuant to Order 37, rule 1 (1) and Order 59, rule 2 (d) of the High Court Rules, 1988.

(2) The Counsel for the Plaintiffs raised by way of a preliminary issue that the Defendant is in contempt and he is not entitled to be heard for the purpose of resisting the Plaintiffs Summons for Assessment of Damages.

(3) It was contended by the Plaintiffs that the Defendant is in contempt of the Court due to his failure to comply with the Order of the Court, dated 17th November 2015.

(4) The Order is relevantly;

> a. ……
> b. *The Defendant to give the Plaintiffs immediate vacant possession of the property comprised in Certificate of Title No. 10318 leaving all the Deceased's belongings;*
> c. ……
> d. ……
> e. *The Defendant shall pay to the Plaintiffs costs summarily assessed in the sum of $2,500.00.*

(5) The Counsel for the Plaintiffs heavily relied on a passage in the English Court of Appeal decision, **Hadkinson v Hadkinson (1952) 2 AL ER 567**. The passage is this;

> *It is plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of the obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void. Lord Cottenham LC said in* ***Chuck v Cremer*** *(**1 Coop temp Cott 342**):*
>
> > *" A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it... It would be most dangerous to hold that the suitors or their solicitors, could themselves judge whether an order is null or valid ... whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That a course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed".*
>
> *Romer L.J. also observed as follows;*
>
> > *Such being the nature of this obligation, two consequences will, in general, (follow from its breach. The first is that anyone who disobeys an order of the court (and I am not now considering disobedience of orders relating merely to matters of procedure) is in contempt and may be punished by committal or attachment or otherwise. The second is that no application to the court by such a person will be entertained until he has purged himself of his contempt.*

(6) Moreover, Counsel for the Plaintiffs took me through two reported High Court decisions, viz, **Credit Corporation (Fiji) Ltd v Qamer (2015) FJHC 995** and **BP South West Pacific Ltd v Pratap (2004) FJHC 374.**

(7) Counsel for the Defendant acknowledges that the costs as ordered have not been paid and vacant possession of the land in question has not been given up.

(8) It was contended by the Defendant that the 'Hadkinson' rule is much restricted in scope and the rule does not apply in the instant case because there are other effective means of securing the compliance of the order of the Court dated 17th November 2015.

(9) Let me now move to consider the preliminary objection raised by the Plaintiff.

(10) It was contended by the Plaintiff that;

(Reference is made to paragraphs (9), (10), (11) and (12) of the Plaintiff's written submissions)

> *Para 9. The Plaintiffs are objecting to the Defendant being heard on the Summons for Assessment of Damages or on any application in Court because the Defendant has failed to comply with any of the Court Orders of 17/11/15.*
>
> *10. Firstly the Defendant has not given up immediate vacant possession of the said property. There is no stay of any orders and neither is there any appeal on foot, as such the Defendant is in breach of all court orders made on 17/11/15. The Plaintiff has taken enforcement proceedings in relation to the vacant possession of the property. On the face of it, the Defendant is in contempt of court orders.*
>
> *11. The costs of $2,500.00 is also unpaid till to date and as such the Court cannot hear the Defendant and/or have any representation on his behalf in Court.*
>
> *12. The Plaintiffs object to the Defendant and/or his Counsel appearing in Court and submitting to the Court, until the court orders of 17/11/15 are complied with and costs of $2,500.00 is paid.*

For this argument, heavy reliance was placed on **'Hadkinson v Hadkinson' (1952) 2 All E.R. 567;**

Let me have a closer look at '**Hadkinson v Hadkinson**'.

On a petition by a wife for the dissolution of her marriage, a decree nisi was granted, and it was directed that the child of the marriage should remain in the custody of his mother, but that he should not be removed out of the jurisdiction without the sanction of the court. On the decree being made absolute, the mother re-married, and without the sanction of the court she removed the child to Australia. On a summons by the father, and order was made directing the mother to return the child within the jurisdiction. On an appeal by the mother against the order the father objected that, as she was in contempt, she was not entitled to be heard.

The Court held;

> *"It was the plain and unqualified obligation of every person against, or in respect of, whom an order was made by a Court of competent jurisdiction to obey it unless and until it was discharged, and disobedience of such an order would, as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt; where an order related to a child the court would be adamant on its due observance, for such an order was made in the interests of the welfare of the child, and the court would not tolerate any interference with or disregard of its decisions on those matters; and least of all would permit disobedience of an order that a child should not be removed outside its jurisdiction; in the present case the mother was not entitled to prosecute or be heard in support of her appeal until she had taken the first and essential step towards purging her contempt of returning the child within the jurisdiction".*

(11) As I understand the argument, the rule which I am asked to invoke is that a party in contempt will not be heard.

What is the history of this rule?

The classical exposition of the history of that rule was given by Denning L.J. in '**Hardkinson v Hardkinson**' (*supra*) as follows at page 573,

> *I need hardly say it is very rare for this court to refuse to hear counsel for an appellant. No matter how badly a litigant has behaved, nevertheless, generally speaking, if he has a right of appeal, he has a right to be heard, for the simple reason that, if he is not heard, his right of appeal is valueless. The present case is, I believe, the first occasion on which this court, since it was set up eighty years ago, has refused to hear an appellant who has been heard by the court below. Our course requires, therefore, to be justified.*
>
> *The rule which we are asked to invoke – that a party in contempt will not be heard – was never a rule for the common law. It was a rule of the canon law which was adopted by the ecclesiastical courts and the chancery courts. Those courts exercised jurisdiction in personam, not in rem.* ***They had no writ of fieri facias or elegit by which they could forcibly execute their orders, and so they adopted this rule as a means of getting the parties to obey the orders of the court.*** *If an order of the chancery court or the ecclesiastical court was disobeyed, the party was held to be in contempt. This disobedience was not a criminal misdemeanour, but only what is called in the books contempt in procedure. The common law courts had for centuries*

punished criminal contempt, such as interference with the judges or the course of justice, but they did not punish contempt in procedure of other courts. It was left to the ecclesiastical courts and the chancery courts to enforce their own orders in their on way. The chancery court used to issue writs of attachment or orders for committal, to imprison the parties who disobeyed its orders. The ecclesiastical court used to excommunicate its recalcitrant. But each of those courts also adopted the rule of the canon law that they would not hear a party who had disobeyed its orders.

(Emphasis Added)

(12) How far does this rule apply?

I keep well in my mind the classical exposition of the scope and the width of the rule given by Denning L.J.;

It is a strong thing for a court to refuse to hear a party to a cause and it is only to be justified by grave considerations of public policy. It is a step which a court will only take when the contempt itself impedes the course of justice and there is no other effective means of securing his compliance. In this regard I would like to refer to what Sir George Jessel, M.R. said (46 L.J. Ch. 383) in a similar connection in ***Re: Clements & Costa Rica Republic v. Erlanger***

"I have myself had on many occasions to consider this jurisdiction, and I have always thought that necessary though it be, it is necessary only in the sense in which extreme measures are sometimes necessary to preserve men's rights, that is, if no other pertinent remedy can be found. Probably that will be discovered after consideration to be the true measure of the exercise of the jurisdiction."

Applying this principle, I am of opinion that the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues, it impedes the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make, then the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed.

(Emphasis Added)

(13) Applying those principles to the present case and carrying those principles to its logical conclusion, I have no hesitation in holding that the 'Hadkinson' rule has no application to the instant case even by any stretch of imagination. **Because there are other effective means of securing the compliance of the court order.** The

judgment or order for the giving of possession of land may be enforced by a Writ of possession pursuant to Order 45, r.2. An application to the Court for committal pursuant to Order 52, r.2. can be made for the failure to pay the costs ordered to be paid.

Therefore, I cannot uphold the preliminary objection. I acknowledge the force of the submission of the counsel for the Defendant; '*the 'Hadkinson' rule is much restricted in scope and the rule does not apply in the instant case because there are other effective means of securing the compliance of the order of the Court dated 17th November 2015'.*

(14) FINAL ORDERS

(i) The preliminary objection is overruled.
(ii) I make no Order as to costs.

HIGH COURT OF FIJI
LAUTOKA

29/06/2016.

Jude Nanayakkara
Master

At Lautoka
29th June 2016