

**IN THE HIGH COURT OF FIJI**  
**WESTERN DIVISION**  
**AT LAUTOKA**

**[CIVIL JURISDICTION]**

**Civil Action No. 08 of 2009**

**BETWEEN** : **TAHIR HUSSAIN MUNSHI** (father's name Munshi) of 346 Fletcher Road, Vatuwaqa, Suva in the Republic of Fiji Islands and **KHAIRUL NISHA BIRIBO** father's name Munshi of Waimanu Road, Suva in the Republic of Fiji Islands, Retired Civil Servant and Retired Health Sister respectively.

**Plaintiffs**

**AND** : **ABDUL MUNAF** father's name Abdul Rauf of Gallau, Ra and temporarily residing in Munshi Bungalow near Nanuku Sector Office, Rakiraki in the Republic of Fiji Islands

**Defendant**

Before : Master U.L. Mohamed Azhar

Counsels: Ms. Radhika Naidu for the Plaintiff  
The Defendant in person

Date: 15.03.2019

**DECISION**

(Assessment of damages)

01. This is the application by the plaintiffs for assessment of damages following the judgment delivered in their favour in this action. The facts of this case are that, the Plaintiffs are the children of the late Munshi and the registered proprietors of the property comprised and described in Certificate of Title No. 10318 being Lots 1 and 2 on deposited Plan No. 1886 and situated in the District of Rakiraki in the Island of Viti Levu. The plaintiffs claimed that Defendant lured the Deceased into signing an agreement dated 19th June 2003 and according to the said agreement the Deceased agreed to transfer the said property to the Defendant for free if the Defendant took care of him as the Deceased was old and sickly. However, the defendant failed to look after the deceased and breached the said agreement which led the deceased to move to the sisters of the plaintiffs. Thereafter, the deceased transferred the said property to the plaintiffs using the Power of Attorney given by the

defendant to transfer the said property in case of breach of the said agreement by the defendant. However, the defendant was unlawfully occupying it without vacating the same. The plaintiffs further claimed that, the deceased loaned a sum of \$ 7,000 to the defendant. Therefore, the plaintiff moved the court to grant following reliefs;

- (i) That the Defendant give the Plaintiffs immediate vacant possession of the property comprised in Certificate of Title No. 10318 leaving all the Deceased's belongings.
- (ii) Judgment in the sum of \$7000 for monies still owing.
- (iii) General Damages.
- (iv) That the Defendant pay costs of the action.
- (v) Such further and/or other relief as the Court deems just.

02. Conversely, the defendant while admitting the plaintiff were the registered proprietors of the said property stated that, the deceased Munshi transferred Certificate No. 10318 to him pursuant to an Agreement dated 10th June, 2003. Upon the said transfer the Deceased's Certificate of Title was released to the Defendant and he remained in his possession. The Defendant further claimed that he had been in occupation and cultivation of the subject property; he adhered to the terms and condition of the Agreement and the said Deceased did not at any time raise any issue in relation to the terms and conditions of the said deed. However, the plaintiffs on or about the month of October 2006 fraudulently and/or by undue influence and misrepresentation effected a transfer of the said property into their own names. Accordingly, the defendant prayed for the following reliefs;

- (i) The Plaintiffs claim be dismissed with cost on higher scale.
- (ii) The Transfer dated 30th October, 2006 and registered on 4th September, 2007 be forthwith revoked.
- (iii) The Plaintiffs be restrained whether by themselves, their servants and agents or whomsoever from interfering with the Defendant's peaceful and quiet enjoyment of all that piece of property contained within the Certificate of Title No. 10318.
- (iv) That the Plaintiffs pay costs on Solicitor/Client indemnity basis.

03. After the full trial, the court came to its conclusion and made the final orders in paragraphs 14 and 15 of the judgment.

*“Accordingly, I hold that the Plaintiffs have been wrongly deprived of the use and occupation of the property comprised in Certificate of Title 10318 being Lots 1 and 2 since the death of Munshi on 8th November, 2006. As there is insufficient evidence to assess the claim of general damages sought by the Plaintiffs I hold that the matter should be remitted to the*

*Master of the High Court for the purpose of assessing general damages. Considering my findings and determinations as above, I conclude that the issue 7, 8 and 10 should be answered in favour of the Plaintiffs and that the Counter-Claim of the Defendant should be dismissed.*

**Final Orders**

*I hold as follows:*

- (a) The defendant's counter claim is dismissed,*
- (b) The Defendant to give the Plaintiffs immediate vacant possession of the property comprised in Certificate of Title No. 10318 leaving all the deceased belongings.*
- (c) Judgment in the sum of \$7,000.00 claimed by the Plaintiffs declined.*
- (d) General damages claimed by the Plaintiffs to be assessed by the Master of High Court and the Deputy Registrar to remit this file to the Master's Court for directions.*
- (e) The defendant shall pay to the plaintiffs costs summarily assessed in a sum of \$ 2,500.00."*

04. It reveals from the above conclusion of the judge that, the plaintiffs failed to adduce sufficient evidence at the trial for him to assess general damages sought by them. At the hearing of the summons for assessment of damages in this court, the plaintiffs relied on the affidavit sworn by the second named plaintiff and filed on 15.11. 2016 for the examination in chief. The affidavit has three annexures marked as "KNB 1" to "KNB 3". The annexure **KNB 1** contains copies of some receipts, and of which one is for the payment made to Sea Breeze Hotel and another for payment of the Trial Fee made to this court. All other receipts (9 receipts) are for the payment made by the plaintiffs to their solicitors (professional fee) and especially, only one (No. 28962 dated 07.10.2016) out of nine payments was made after the judgment delivered in this case. The annexure **KNB 2** is the copy the sealed order based on the judgment. The annexure **KNB 3** is a report jointly prepared by the second named plaintiff and another person by the name of Jainul Nisha Ali which is dated 15.05.2016 and addressed to the solicitor who was in carriage of this matter on 23.05.2016 (the report has two different dates). There are number of photographs of the property attached with the said report.
05. The defendant who appeared in person was given an opportunity to cross-examine the second named plaintiff and he did so. At the close of the hearing, the counsel for the plaintiffs informed that she would not file any written submission and the defendant wished to file the same. However, he did not file any such submission though he was given time for the same.

06. The second named plaintiff mentioned the heads of damages claimed in her affidavit in paragraphs 8 to 12 and they are:

8. ***WE** defended all proceedings, including the Appeal filed by the Defendant in the Fiji Court of Appeal. The first named Plaintiff is a stroke patient and is wheel chair confined with very limited mobility. We incurred substantial costs in defending all applications filed by the Defendant as well as going down to Lautoka twice for Trial, which are listed in the following schedule of Special Damages with relevant receipts and invoices annexed hereto and marked as "KNB1"*

**SCHEDULE OF SPECIAL DAMAGES**

- a. *Travelling to Lautoka on 7<sup>th</sup> September 2014 for Trial \$140.00 fuel money;*
- b. *Travelling to Lautoka for Trial from 21<sup>st</sup> April to 24<sup>th</sup> April 2015 Hotel Accommodation at Sea Breeze Hotel \$480.00;*
- c. *Meals for all witnesses and Plaintiff from 21<sup>st</sup> April to 24<sup>th</sup> April 2015 \$800.00;*
- d. *Fuel money \$200.00;*
- e. *Hearing fees of \$115.00*
- f. *Legal Costs \$28,847.31 [billed] and continue to incur costs.*

*Total - **\$30, 582.31***

9. ***THE** Defendant further has not paid any of the Court costs awarded against him, which orders are annexed hereto and marked as "KNB2" and are listed as follows:*

- a. *\$2500.00 on 17/11/15;*
- b. *\$500.00 on 10/03/16;*
- c. *\$500.00 on 27/04/16;*
- d. *\$500.00 on 02/05/16 and;*
- e. *\$1500.00 on 26/09/16*

*Total - **\$5500.00***

10. ***THAT** we the Plaintiffs further submit that we have been deprived of the sugar cane proceeds from 2006 when the property was transferred under our names. The said Transfer was registered on 4<sup>th</sup> September 2007 and as such on an average the cane proceeds would be \$3000.00 per annum. The Defendant eventually vacated the said property on the 13<sup>th</sup> of May 2016 but the state of the property was left in ruins. For almost 9 years we were deprived of the cane proceeds estimated to be around \$27,000.00. at the hearing of this Summons, we will produce the previous cane payment which needs to be extracted from FSC.*

11. ***WE** have also been deprived the usage and peaceful enjoyment of the said property from 2006 and the Defendant on the other hand has been renting out his own house in Gallau between \$150.00 to \$200.00 per month and staying free of costs at our property from 2006 till 13<sup>th</sup> May 2016. We are claiming for loss of usage and possession of the said property at the rate of \$200.00 per month from 4<sup>th</sup> September 2007 till 13<sup>th</sup> may 2016 [8 years and 8 months] estimated at \$20, 800.00.*

12. ***THE** said property was repaired in 2005 by us and the condition of the property was deplorable since the Defendant took up occupation. He has not carried out any repairs and has damaged the property in the process of vacating it. The costs of repairs can be assessed at \$45, 000.00 and the same are being claimed from the Defendant. Annexed hereto is a Report prepared after we first inspected the property when the Defendant vacated on 13<sup>th</sup> May 2016 together with relevant photos showing the state of the property marked as "KNB 3".*

07. The total amount claimed under the first head is \$ 30,582.31 and this includes mainly the legal cost of \$ 28,847.31 and other amount spent for travelling and accommodation of witness, and hearing fees paid to the court etc. The second head too is the cost, however it was ordered by the court on different occasions in this case, and it amounts to a sum of \$ 5,500. The plaintiffs claimed that the defendant failed to pay it and therefore they seek to include the same into the assessment of damages.
08. Since the first two heads relate to the costs (both the costs incurred by the plaintiffs and the costs ordered by this court) involved in this matter, I take both heads together for the discussion, as some obvious, but necessary points to be made regarding both heads. Firstly, the court, at the time of delivering its judgment, ordered the defendant to pay a summarily assessed cost in sum of \$ 2,500 to the plaintiffs. This cost was granted based on the prayer (iv) of the plaintiff's statement of claim which states that, the defendant should be ordered to pay costs of the action. Accordingly, the court summarily assessed the same in sum of \$ 2,500 and ordered the defendant to pay.
09. The list of litigation costs is long, and it embraces number of necessities for trial preparation, and the trial itself. For examples the cost to hire expert witnesses, as well as the fees of consultants, specialists, and private investigators. Other examples of litigation costs include but are not limited to barristers and solicitors fees, court fees, copy fees, deposition fees and costs related to obtaining medical, government, and other records. In this case, after the proper trial and considering the cases of both the plaintiffs and the defendant, the judge decided to impose a summarily assessed cost as opposed to the indemnity cost. In fact, the Order 62 rule 7 (4) of the High Court Rules gives discretion to the court to summarily assessed cost called as "gross sum" in lieu of the taxed costs. In this case, the summarily assessed cost ordered by the court was to cover all the expenses of the cost of litigation in

this case. Had the court satisfied that this matter warranted indemnity cost, it would have ordered so, rather the court exercising its discretion decided to grant summarily assessed cost in lieu of taxed cost. The plaintiffs submitted the copies of invoices for the payment they made to their solicitors and claimed they continue to incur such costs under the first head. In fact, this is an attempt to invite this court to re-visit the cost again and to induce it to order for indemnity cost under the disguise of damages. However, plaintiffs are not entitled now to claim the same as the judge had already granted the cost in a gross sum.

10. Secondly the duty of this court at this stage is to assess the general damages as it is clear from the final order (d) of the judge which read that “General damages claimed by the Plaintiffs to be assessed by the Master of High Court”. Accordingly, this court’s task is to assess the damages caused to the plaintiffs by the conduct of the defendant for which he was sued. If this court is to grant any cost in this case, it would be the only cost for whatever incurred by the plaintiff to conduct this proceedings of assessing the damages and nothing else. Thirdly, the costs claimed by the plaintiffs under the second head are the costs, as mentioned above, that were summarily assessed by the court from time to time. As such there is nothing to decide the quantum of those costs already awarded, and what the plaintiffs to do is to take steps to enforce those cost orders under the relevant rules of this court.
11. Finally and most importantly, the distinction drawn by the courts from early time till now between the damages and the costs. As a matter of principle the successful plaintiff cannot obtain, in the guise of damages, any costs, even though the defendant’s wrongful act caused the plaintiff to incur those costs. Any cost sought under guise of damages is disallowed by the taxing master. There are ample authorities which establish this principle and **Cockburn v Edwards** (1881) 18 Ch.D 449 was the oldest case which set this principle. In that case Jessel MR held at page 459 that:

*“The most important point is as to the costs as between solicitor and client. I am of opinion that it is not according to law to give to a party by way of damages the costs as between solicitor and client of the litigation in which the damages are recovered. The law gives a successful litigant his costs as between party and party, and he cannot be said to sustain damage by not getting them as between solicitor and client”.*

12. The decision of Jessel MR In **Cockburn v Edwards** (supra) was later followed and affirmed by Chancery Division again in **Ross v Caunters** (1980) Ch. D 297 where Sir Robert Megarry V.C., held at page 324:

*“It also seems to me that there is ample authority for saying that a successful plaintiff cannot obtain, in the guise of damages, any costs*

*which, on a party and party taxation of costs, are disallowed by the taxing master. It is not enough for the plaintiff to claim that such costs were incurred by him as a result of the defendants' negligence. I think that this is sufficiently established by Cockburn v. Edwards (1881) 18 Ch. D. 449. I am saying nothing about damages which fall outside the particular form in which they are claimed in this case, namely, the legal expenses of investigating the plaintiff's claim up to the date of the issue of the writ. It seems to me that both on authority and on principle those legal expenses can be recovered by the plaintiff only as costs, and not in the form of damages. In so far as the plaintiff can persuade the taxing master that the items incurred should be allowed as costs on a party and party taxation, then the plaintiff can recover them; but so far as they are not allowed by the taxing master, then I think that they cannot be recovered in the shape of damages.*

*Accordingly, on the inquiry as to damages which counsel agree should be ordered, no head of damage for the legal expenses of investigating the plaintiff's claim up to the date of the issue of the writ will be allowable as damages”.*

13. The Federal Court of Australia in Gray v Sirtex Medical Limited [2011] FCAFC 40 followed, inter alia, the above mentioned two leading English decisions in Cockburn v Edwards (supra) and Ross v Caunters (supra) and affirmed the distinction between the damages and the costs. The court further held that, the a plaintiff's ability to recover its costs of the proceedings from a defendant depends instead upon the exercise of a judicial discretion; and the amount (if any) that the plaintiff recovers is not assessed in the same way as damages, but “taxed” according to the applicable rules of Court. The paragraph 15 of the judgment is as follows:

*“A distinction has long been drawn between damages and legal costs, such that a successful plaintiff cannot recover its costs of the proceedings from the defendant as damages, even though the defendants wrongful act caused the plaintiff to incur those costs: Cockburn v Edwards (1881) 18 Ch D 449 per Jessel MR at 459, per Brett LJ at 462 and per Cotton LJ at 463; Ross v Caunters [1980] 1 Ch 297 at 324E-G; Hobartville Stud Pty Ltd v Union Insurance Co Ltd (1991) 25 NSWLR 358 at 365F-366B; Seavision Investments S.A. v Evennett & Clarkson Puckle Ltd (The “Tiburón”) [1992] 2 Lloyd's rep 26 at 34; Queanbeyan Leagues Club Ltd v Poldune Pty Ltd [2000] NSWSC 1100 at [45] and [46]; McGregor on Damages, 18<sup>th</sup> ed (Sweet & Maxwell, London, 2009) at [17-003]. A plaintiff's ability to recover its costs of the proceedings from a defendant depends instead upon the exercise of a judicial discretion; and the amount*

*(if any) that the plaintiff recovers is not assessed in the same way as damages, but “taxed” according to the applicable rules of Court”*

14. The Supreme Court of Tasmania too in **Johnstone, Mcgee & Gandy Pty Ltd v Hockey Tasmania Incorporated** [2012] TASSC 12 affirmed the same principle and held at paragraph 20 of its judgment that:

*“It is clear that a successful plaintiff cannot recover its costs of the proceedings from the defendant as damages, even when the defendant’s wrongful act has caused the plaintiff to incur those costs”*: *Cockburn v Edwards* (1881) 18 Ch D 449 at 459, 463; *Hobartville Stud Pty Ltd v Union Insurance Co Ltd* (1991) 25 NSWLR 358; *Queanbeyan Leagues Club Ltd v Poldune Pty Ltd* [2000] NSWSC 1100 at par[45]; *Gray v Sirtex Medical Ltd* (2011) 193 FCR 1 at par[15].”

15. The above decisions of various courts, starting from early times to recent past, have clearly laid down the principle that, the damages are different from the costs and that a successful plaintiff cannot recover its costs of the proceedings from the defendant as damages, even though the defendant’s wrongful act caused the plaintiff to incur those costs. Thus, a plaintiff’s ability to recover the costs of the proceedings from a defendant rests upon the exercise of a judicial discretion. And the quantum of costs recoverable, if any, by a successful plaintiff is not assessed in the same way as damages but ‘taxed’ according to the applicable rules of court. Accordingly, the plaintiffs’ claim for costs under first two heads fails.
16. The plaintiffs claim a sum of \$ 27,000 being the loss of sugar can proceeds for 9 years based on the calculation of \$ 3,000 a month under the third head. They claim for loss of usage and possession of the said property at the rate of \$ 200 per months from 4<sup>th</sup> September 2007 till 13<sup>th</sup> May 2016 and estimated at \$ 20,800 under the fourth head. The base of the claim is that, the plaintiffs were deprived the usage and peaceful enjoyment of the property from 2006 and the defendant was renting his own house at the rate between \$ 150 and 200 and staying their house free of costs. The total damages claimed under the fifth head is a sum of \$ 45,000 being the cost of repair of the house.
17. The court gave judgment in favour of the plaintiffs in this case and came to the conclusion that, they have wrongly been deprived of the use and occupation of the property comprised in Certificate of Title 10318 being Lots 1 and 2 since the death of their father on 8th November, 2006. The wrongful act of the defendant had been established. However, the question is the quantum of the damages caused to the plaintiffs by the said wrongful act. The elementary principle in an action for damages is that, the plaintiff to prove the damages to



the satisfaction of the court. delivering the judgment of House of Lord, Viscount Jowitt said in Carslogie Steamship Co. Ltd and Royal Norwegian Government 1952 A.C.(H.L.) 292 at 300:

*"... I think it is well to bear in mind the elementary principle that it is for the plaintiff in an action of damages to prove his case to the satisfaction of the Court. He has to show affirmatively that damages under any particular head have resulted from the wrongful act of the defendant, before he can recover those damages."*

18. The second named plaintiff stated in her affidavit that, the average cane proceeds would be \$ 3,000 per annum. However, there is nothing in her affidavit to substantiate the said amount. In order to receive the damages in this nature, the plaintiff should have produced some evidence in relation to the extent of land used for sugar farming, total tons of the sugar cane harvested and the payments made in past by the Fiji Sugar Cooperation (FSC). Though the second named plaintiff stated in her affidavit that, she would produce the previous cane payment details extracted from FSC, she failed to do so. If the plaintiffs claim a specific amount for sugar cane proceeds they lost, they should have produced the full details of the sugar cane proceeds in the past and affirmatively established the damages. In the absence of any such evidence before the court which can substantiate the claim, the assessment of damages under this third head cannot be done under speculation. They failed to discharge the onus of establishing the extent of the damages under this head.
19. The estimate of damages incurred to the plaintiffs for being deprived of usage and peaceful enjoyment of the property, under the fourth head, is based on the probable income the defendant would have had after renting his own house. Firstly, I do not think that this estimation is correct, because the estimation of the damages should be based on the rental amount that would have been received by the plaintiffs if the particular property was rented. The plaintiffs cannot base their claim based on the speculated amount of income the defendant would have received in renting his different house. How the rental received by the defendant from his different house could be compared to the rental that this house might have generated? Secondly, the plaintiffs should have established before this court as to how much rent would have been per month, had the particular property been rented. Thirdly, even the plaintiffs' argument, that damages be calculated based on the defendant income from another house, is accepted that, they failed to establish that the defendant received such amount from his own house. Thus, I consider that the plaintiffs failed to establish the damages under the fourth head too.
20. The final head is for the estimated cost for repairing the house in a sum of \$ 45,000. The second named plaintiff tendered the annexure "**KNB 3**" substantiate their claim. The **KNB 3** is the report prepared by the second named defendant and another person by the name of

Mrs. Jainul Nisha Ali. It narrates the condition of the house as at the time the plaintiffs entered and also states about some missing fixtures and furniture. There are several photographs of the house and the compound attached to it. It is more like an observation of the second named plaintiff who entered the property after the judgment. The **KNB 3** however, does not give any estimated cost for the repairing the house, though the second named plaintiff uses the same to claim such a huge amount of \$ 45,000. It is neither an estimate for repair nor a quotation by a builder or a qualified person to repair the houses. If this annexure is to be accepted as an estimate for \$ 45,000 notwithstanding its notable silence on the figures, the next question is the competency of the second named plaintiff and other lady who prepared it, to prepare such a technical report. The report mentions about several missing properties, however, there is nothing to establish that all those properties claimed to be missing were available at the time the defendant took the possession of the house and the premises. Furthermore, the second named plaintiff stated in paragraph 12 of her affidavit that they repaired the house in 2005. I am unable to accept this averment as the defendant entered the property pursuant to an agreement signed in 2003. Therefore, it is not probable that the plaintiffs had repaired it in 2005. In any event, there is nothing to substantiate such claim. The plaintiffs can recover the damages only if such loss can be established with the sufficient certainty and is the direct and probable result of the defendant's wrongful actions. The damages are not awarded if no evidence existed from which they could be reasonably determined.

21. Deane J in The Commonwealth Of Australia V Amann Aviation Pty Limited [1991] HCA 54; (1991) 174 CLR 64 at 111-112 explained the burden cast on the plaintiff in proceedings for damages and held:

*"The frequent inability of curial procedures to determine with certainty what has happened in the past, let alone what would have been or what will be, necessarily gives rise to a need for a number of subsidiary rules governing the determination of the loss or injury which a plaintiff has actually sustained by reason of a wrongful act. One such subsidiary rule is that ... a plaintiff bears the onus of establishing the extent of his loss or injury on the balance of probabilities. To satisfy the requirements of that rule, a plaintiff must, if he is to recover more than a nominal amount in such an action, affirmatively establish assessable damage, that is to say, loss or injury which is capable of being measured in monetary terms.*

*.... In particular, it may be appropriate that damages be assessed by reference to the probabilities or the possibilities of what would have happened or will happen rather than on the basis of speculation that probabilities would have or will come to pass and that possibilities would not have or will not."*

22. The plaintiffs' claim of \$ 45,000 for the repair of the said house is based on their mere speculation and the evidence adduced by the second named plaintiff through her affidavit lacks sufficient evidence to establish the assessable damages on balance of probabilities. If the plaintiffs are to recover the amount they claim in this action, they should affirmatively establish assessable damage, that is to say, loss or injury which is capable of being measured in monetary terms. However, they failed to discharge their burden. It follows that this court cannot award any damage under the any of the five heads of damages claimed by the plaintiffs in this case.


23. In result I make the following orders.

a. The Summons for Assessment of Damages filed by the plaintiffs on 04.02.2016 is dismissed, and

b. The parties to bear their own cost.



At Lautoka  
15.03.2019

  
U.L. Mohamed Azhar  
Master of the High Court