

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 259 OF 2018

BETWEEN : **SISH NABI** as beneficiary in the Estate of Nabi Jan, of Votualevu Nadi, Retired.

PLAINTIFF

AND : **ABDUL AHMED AZAD NABI** as trustee in the Estate of Nabi Jan, of Kavuli, Tavua, Cultivator.

FIRST DEFENDANT

AND : **AHMED NABI** as beneficiary in the Estate of Nabi Jan, of Kavuli, Tavua, Cultivator.

SECOND DEFENDANT

AND : **FAZAL NABI** as beneficiary in the Estate of Nabi Jan, of Kavuli, Tavua, Cultivator.

THIRD DEFENDANT

AND : **GULZAR NABI** as beneficiary in the Estate of Nabi Jan, of Kavuli, Tavua, Cultivator.

FOURTH DEFENDANT

AND : **GUL NABI** as beneficiary in the Estate of Nabi Jan, of Kavuli, Tavua, Cultivator.

FIFTH DEFENDANT

Appearances : Ms Vreetika for the plaintiff
Mr A.A. Azad Nabi (a litigant in person) for the first defendant
Mr Gulzar Nabi (a litigant in person) for the fourth defendant

Date of Hearing : 24 May 2019

Date of Ruling : 24 May 2019

R U L I N G

[on setting aside]

[01] This is an application filed by the fourth defendant in person to set aside the judgment delivered on 19 March 2019 (the written reasons for the judgment was delivered on 10 April 2019) after hearing of the plaintiff's originating summons, however in the absence of the defendants. The judgment orders the first defendant who is the trustee in the Estate of Nabi Jan (their father) to distribute the estate property according to the Will of Nabi Jan.

[02] This application has been filed by the fourth defendant, one of the beneficiaries in the estate, but not by trustee, the first defendant. The application does not indicate which rule of the High Court Rules it is made under. I consider this application is made under O 28, R 5 (1) of the High Court Rules 1988, as amended ('HCR'), which provides:

5 (1) The Court by whom an originating summons is heard may, if the liability of the defendant to the plaintiff in respect of any claim made by the plaintiff is established, make such order in favour of the plaintiff as the nature of the case may require, but where the Court makes an order under this paragraph against a defendant who does not appear at the hearing, the order may be varied or revoked by a subsequent order of the Court on such terms as it thinks just.

[03] The applicant has filed affidavit in support where he says that he is authorised by other defendants to make the affidavit. The grounds relied upon by the applicant to have the judgment entered in the absence of the defendants are as follows [see paragraph 3, 4 and 5 of the supporting affidavit]:

"...

3. *That I was not aware of the hearing date.*

4. *That as per the Will, I do not have any issues of the subdivision of the plaintiff and him obtaining a separate title but there is also a clause in the Will the land cannot be sold to an outsider. (Emphasis added)*

5. *That the Executor and Trustee was just ensuring that the land is not sold to anyone else as specifically stated in clause 10 of the will of the late Nabi Jan.*

..."

[04] The applicant does not challenge the default judgment but it only states that the land should not be sold to an outsider.

- [05] There is no real challenge to the judgment entered against them in their absence. The trustee, the first defendant did not challenge the judgment. Even the applicant in his affidavit in support states that he has no issues with the subdivision (of the estate property) and the plaintiff obtaining a separate title, as per the will of the late Nabi Jan. His only worry is that the estate land should not be sold to anyone else as stated in clause 10 of the Will. The sale of the estate land to an outsider does not arise in these proceedings.
- [06] The applicant in the affidavit states that he was not aware of the hearing date. On the contrary, in court he admitted that he received a notice informing the hearing date and he signed it as acknowledgement of receiving the same.
- [07] For the foregoing reasons, I find that the applicant has failed to satisfy me why I should set aside the judgment entered in his absence. Therefore, I do not think just to vary or revoke the judgment. I would accordingly strike out and dismiss the application, but without costs.

The outcome

1. Setting aside application struck out and dismissed.
2. No order as to costs.

H.M. Mohamed Ajmeer
24/5/19
.....

M.H. Mohamed Ajmeer

JUDGE



At Lautoka

24 May 2019

Solicitors:

For the plaintiff: M/s Patel & Sharma, Barristers & Solicitors