

In the High Court of Fiji at Suva  
Probate Jurisdiction

HPP Action No. 06 of 2018

In the matter of Jan Sahib aka Sheik Jan Sahib  
and an application under section 23 of the Succession,  
Probate and Administration Act and Or 85

Sheik Nizamul Sahib

Plaintiff

And

Zeena Tun Nisha aka Jinatun Nisha

First defendant

Fahiruna Nisha, Sheik MukhtarSaheb, Sheik Faruk Saheb,  
Nazmun Nisha, Sanina Bi Saheb as Adminstratrix of the  
estate of Sheik Liaquat Saheb

Second defendants

COUNSEL: Mr Shelvin Singh for the plaintiff  
Mr A. Nadan for the first and second defendants  
Date of hearing: 3<sup>rd</sup> December, 2018  
Date of Ruling: 15<sup>th</sup> May, 2019

**Ruling**

1. The first and second defendants move that the plaintiff's writ of summons and statement of claim be struck out on the grounds that it fails to comply with Or 76, r 2 (a) and (b), discloses no reasonable cause of action and is an abuse of process of the court. The plaintiff is a beneficiary of the estate of Jan Sahib aka Sheik Jan Saheb, (the estate). The first defendant is the administrator of the estate by Letters of Administration,(LA) granted on 11 January 2001.

*The determination*

2. On the failure to comply with Or 76 r 2 (a) and (b), Mr Singh, counsel for the plaintiff argued that this action can be maintained as presently constituted, as it is brought under Or 85, section 73 of the Trustees Act and section 6 of the Succession, Probate and Administration Act.
3. The plaintiff, in his statement of claim seeks the following reliefs, viz, that, the LA granted to the first defendant be revoked and she surrenders LA to Court; LA be granted to him; he distributes the estate; and, audited accounts of the estate be prepared and filed in Court.
4. Or 76, r 1(2) states a “*probate action*” means an action for the grant of probate of the will, or letters of administration of the estate, of a deceased person or for the revocation of such a grant or for a decree pronouncing for or against the validity of an alleged will, not being an action which is non contentious or common form probate business” (emphasis mine)
5. The primary relief sought by the plaintiff is a revocation of the grant of LA. It follows that the action must be begun by writ, as laid down in Or 76,r2(1).
6. The failure to comply with Order 76, r 2 of not obtaining the Memorandum signed by the Registrar is not fatal and can be cured under Or 2,r 2, by subsequent endorsement, as held in *Viveka Nand v Kavita Devi* [2004] HPP 61/96 L(23<sup>rd</sup> November,2014) and referred to in *Kaur v Singh*, [2015] FJHC 558; HBC198.2013L (29 July 2015) as cited by Mr Singh.
7. Byrne J(as he then was) in *Viveka Nand v Kavita Devi*, said:

*In the present case clear issues of fact are raised and I consider it would not be in the interest of justice to allow the action to be struck out on what on one view, may be regarded as something of a technicality. However, in allowing the action to proceed as I now do by ordering that the Registrar endorse the writ retrospectively, it is only fair to the Defendant that this should be done at some cost to the Plaintiff. The order I therefore make is that the writ be submitted to the Chief Registrar of the Court for endorsement under Order 76 Rule 2 of the Rules of the High Court but the Plaintiff must pay the Defendant's costs to-date which I fix at \$750.00. There will be orders accordingly.*

8. The second defendant, in her affidavit in support of the summons states that the plaintiff's case raises no reasonable cause of action and is an abuse of process for the following reasons.
9. Firstly, she is well and willing to administer the estate. She is physically and mentally fit to carry out her duties as Administrator of the estate. She has been medically examined by Dr. V.C. De Asa, who issued a medical report certifying that she is generally well physically and of sound mind. The plaintiff has produced no credible evidence to challenge her capacity to administer the estate. Second, she is unable to transfer the estate property to the beneficiaries, as a result of the on-going proceedings. Thirdly, the plaintiff previously instituted HPP Action No. 4 of 2016 seeking revocation of the LA and other orders. The plaintiff's actions are unnecessarily depriving the beneficiaries of their interest. Fourthly, there was no income from the estate property between 2001 to October 2013. The estate property was improved at her cost. She does not have income to pay for audited accounts.
10. The plaintiff, in his statement of claim states that the first defendant is not a fit and proper person to be Administrator. He moves that the LA be revoked and granted to him for the following reasons. Firstly, the first defendant, since obtaining the LA has mortgaged the estate property. Secondly, she has failed to discharge her duties, distribute the estate, pay city rates and maintain accounts. Thirdly, she has permitted unauthorized construction, extension and occupation of the property without the payment of rent. No income has been generated by the estate from 2011 to October, 2013. Fourthly, she is not lucid and does not have the mental capacity to effectively administer the estate. She has acted under the undue influence of her caretakers to the detriment of the estate and its beneficiaries. Finally, the plaintiff states that the first defendant resides with the beneficiaries on the estate property and has instituted action to sell it. All the beneficiaries except the plaintiff have consented to the sale.
11. The first and second defendants, in their written submissions submit that the plaintiff's claim does not raise any particular issues of fact or law that needs investigation and determination.

12. The plaintiff is a beneficiary of the estate. He claims that the estate has not been administered, since 2001 and alleges reasons in support of his claim for removal of the first defendant, as administrator.

13. In my view, the statement of claim raises triable issues, which have to be proved by evidence.

14. As the judgment of the court declared in *National MBF Finance (Fiji) Ltd v Buli*, [2000] FJCA 28; ABU0057U.98S (6 July 2000) and cited in the written submissions of the defendants:

*The law with regard to striking out pleadings is not in dispute. Apart from truly exceptional cases the approach to such applications is to assume that the factual basis on which the allegations contained in the pleadings are raised will be proved. If a legal issue can be raised on the facts as pleaded then the courts will not strike out a pleading and will certainly not do so on a contention that the facts cannot be proved unless the situation is so strong that judicial notice can be taken of the falsity of a factual contention. It follows that an application of this kind must be determined on the pleadings as they appear before the court.* (emphasis added)

15. The written submissions of the defendants also refer to the case of *Walton v Gardiner*, (1993)177 CLR 378. In that case, Mason C.J., Deane and Dawson J.J., at pg 393 elucidated that “proceedings will constitute an abuse of process if”:

*they can be clearly seen to be foredoomed to fail,  
the court is, ...a clearly inappropriate forum to entertain them.  
it is sought to litigate anew a case which has been disposed of by earlier proceedings.*

16. The plaintiff's prior action for revocation of LA was dismissed on the ground that it was incorrectly brought by way of originating summons. In my view, that does not constitute an abuse of process.

17. In *Dey v Victorian Railways Commissioners*, (1948-49) CLW 62 at page 84 -85 Latham CJ said:

*..the summary procedure.. was appropriate only to cases which were plain and obvious, so that any master or judge could say at once that the statement of claim was insufficient, even if proved, to entitle the plaintiff for what he asked. .If, as a result of argument, the court reaches a clear decision which could not be altered by any evidence which could be adduced at the trial, then it is proper in the interests of both parties to dismiss the action instead of allowing the parties to incur completely useless expense.*(emphasis added)

18. Lord Pearson in *Drummond -Jackson v. British Medical Association*, [1970]1 All ER 1094 at 1101 said *"the power to strike out a statement of claim as disclosing no reasonable cause of action is a summary power which should be exercised only in plain and obvious .I think reasonable cause of action' means a cause of action with some chance of success"*.(emphasis added)

19. The application to strike out the statement of claim is declined.

20. **Orders**

- (a) The plaintiff shall submit the writ to the Chief Registrar for endorsement under Or 76, r 2 for further proceedings.
- (b) The application of the defendants to strike out the statement of claim is declined.
- (c) The plaintiff shall pay the defendants cost summarily assessed in a sum of \$ 600 within 15 days of this Ruling.



*A.L.B. Brito-Mutunayagam*

A.L.B. Brito-Mutunayagam

Judge

15<sup>th</sup> May, 2019