

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

**CIVIL ACTION NO. HBC 190 OF 2016**

**BETWEEN** : **MOHAMMED SHAHEEM KHAIRATI** formerly of Yalalevu, Ba, Fiji but presently of 179B Kaniere Road, Hokitika, 7811 Westcoast, South Island, New Zealand, Businessman and the Trustee of the **ESTATE OF MOHAMMED IBRAHIM** of Yalalevu, Ba, Fiji, Businessman.

**PLAINTIFF**

**AND** : **MOHAMMED AIYUB** of 6262 Prince Albert Street, Vancouver, BC, Canada, in his personal capacity and as the Trustee of the Estate of Khairati, Hotel Worker.

**FIRST DEFENDANT**

**AND** : **MOHAMMED HASSAN** a.k.a **MAHMOOD HASSAN** of 13547 66 Avenue Surrey BC, Canada, V3W 2B6, Driver.

**SECOND DEFENDANT**

**AND** : **MOHAMMED FAREED KHAIRATI** of 14582 85A Avenue Surrey BC, Canada, V3S 5T6, Businessman.

**THIRD DEFENDANT**

**AND** : **MOHAMMED ABDUL GAFFAR KHAIRATI** of 14333 84<sup>th</sup> Avenue Surrey, BC Canada, V3W 0W3, Cleaner.

**FOURTH DEFENDANT**

**AND** : **FAIZAL HUSSEIN KHAIRATI** of Malolo, Nadi, Fiji, Project Manager and Trustee of the Estate of Khairati.

**RESPONDENT**

**Appearances** : Mr S. F. Koya with Ms J. Takali for first defendant/applicant

**Date of Hearing** : 23 January 2020

**Date of Ruling** : 27 January 2020

# R U L I N G

[on leave to issue committal proceedings]

- [01] This is an *ex parte* application for leave to issue committal proceedings.
- [02] By his application filed on 21 January 2020, supported by an affidavit of Mohammed Aiyub, the first defendant/applicant (“the *applicant*”) applies for an order granting leave to issue committal proceedings against Mohammed Shaheem Khairati, the plaintiff/respondent (“the *plaintiff*”) and Faizal Hussein Khairati (“the *respondent*”) for violating a court order made on 15 February 2019 by consent (“the *order*”) (“the *application*”).
- [03] The application is made under O 52, R 2 of the High Court Rules 1988, as amended (“*HCR*”), which provides:

*Application for order of committal (O 52, R 2)*

- 2 (1) *No application for an order of committal against any person may be made unless leave to make such an application has been granted in accordance with this Rule.*
- (2) *An application for such leave must be made ex parte to a judge in chambers, and must be supported by a statement setting out the name and description of the applicant, the name, description and address of the person sought to be committed and the grounds on which his or her committal is sought, and by an affidavit, to be filed before the application is made, verifying the facts relied on.*
- (3) *The applicant must give notice of the application for leave not later than the preceding day to the Registry and must at the same time lodge at the Registry copies of the statement and affidavit.*

[04] An application for leave to apply for an order of committal could be made *ex parte* to a Judge in Chambers (HCR, O 52, R 2).

[05] The applicant alleges that the plaintiff and the respondent (the Trustee appointed by the court) had violated the consent order, in that:

(a) *The plaintiff failed to put in a tender with the deposit of \$200.00 addressed to the Deputy Registrar for the purchase of Certification of Title No. 7200 and therefore breaching and being in contempt of order 5a of the Consent Order made on 15 February 2019 and sent his offer to purchase CT No. 7200 directly to the respondent.*

(b) *The respondent accepted the plaintiff's offer sent directly to the respondent for purchase of CT 7200 and therefore was in breach and in contempt of the consent order made on 15 February 2019.*

(c) *The plaintiff and respondent are in contempt of a legal and legally binding consent order when they failed to abide with order numbered 5a.*

[06] The consent order paragraph 5, so far as relevant, reads:

*"a. Two consecutive English Newspaper advertisements allowing fourteen (14) days for tenders to be received with \$200.00 deposit with all tenders to go to the Deputy Registrar of the High Court, Lautoka and he shall open the same in the presence of both party's lawyers and/or the parties themselves.*

*b. The properties (each of them) shall be offered to each beneficiary at the highest tender received. If there is more than one beneficiary wanting to buy then it shall be sold to the one who offers the highest price."*

[07] The allegation for seeking leave to issue committal proceedings against the plaintiff and the respondent is that:

*"8. It has come to my attention that the Plaintiff had not placed any tender for the purchase of Certificate of Title No. 7200 to the Deputy Registrar of the High Court as stated in order number 5 a and has breached the Court Order despite knowing the procedures of the tender.*

...

10. *The Respondent knowing that the Plaintiff had not followed the tender process accepted the Plaintiff's offer and proceeded with the sale of Certificate of Title No. 7200 and in doing so breached the Court Order. (see paras 8 and 10 of the affidavit in support).*

...”

- [08] The order under 5a directs the parties that the properties shall be sold to the highest bidder after two consecutive English Newspaper advertisements allowing fourteen (14) days for tenders to be received with \$200.00 deposit.
- [09] The grounds on which the committal is sought against the plaintiff and the respondent, as stated in the Statement for Committal and the evidence on the affidavit in support, do not demonstrate that the plaintiff had violated the requirement of the publication of notice calling for tenders as directed in the order in paragraph 5a.
- [10] I now turn to the next allegation that: the respondent (Trustee appointed by the court with the consent of the parties over the Estate of late Khairati) knowing that the plaintiff had not followed the tender process accepted the plaintiff's offer and proceeded with the sale of CT No. 7200 and in doing so breached the order.
- [11] The order in paragraph 5b clearly states that: *“the properties (each of them) shall be offered to each beneficiary at the highest tender received. If there is more than one beneficiary wanting to buy then it shall be sold to the one who offers the highest price...”*
- [12] The plaintiff has purchased the property in question as a beneficiary. The court order does not preclude the plaintiff as a beneficiary to purchase the property at the highest tender received. Such purchase by the plaintiff is possible without himself placing a tender for the purchase. What the order (5b) requires is that the beneficiaries must purchase the property at the highest tender received. If only there is more than one beneficiary willing to purchase then it must be sold to the one who offers the highest price.
- [13] The affidavit evidence does not demonstrate that there was more than one beneficiary who wished to purchase the property. Since other beneficiaries did not express their willingness to purchase it, it was permissible for the plaintiff to purchase it at the highest tender required. It was lawful for the plaintiff to

purchase the property at the highest tender received without he himself placing a tender when other beneficiary did not want to purchase the property at the highest tender received.

- [14] It is not alleged that the plaintiff purchased the property at a price lower than the highest tender received or that the respondent sold it to the plaintiff at a price lower than the highest tender received in breach of the court order (5b).
- [15] Having perused the application and having heard the submission of counsel for the applicant, I am not satisfied that there are grounds which militates the granting of leave to issue committal proceedings against the plaintiff as well as the respondent (Trustee appointed by the Court). Further, in my view, the public interest in the case does not militate in favour of granting leave for committal proceedings to be brought against the plaintiff and the respondent.
- [16] For the reasons set out above, I would refuse to grant leave to issue committal proceedings.

#### **The result**

1. Leave to issue committal proceedings against the plaintiff and the respondent refused.
2. No order as to costs.

*M. H. Mohamed Ajmeer*  
27/1/20

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M. H. Mohamed Ajmeer

JUDGE



At Lautoka  
27 January 2020

Solicitors:

Siddiq Koya Lawyers, Barrister & Solicitor for the applicant