

THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HPP 27 of 2019

IN THE MATTER OF AN APPLICATION
FOR APPOINTMENT/REMOVAL OF
EXECUTOR AND TRUSTEE IN THE
ESTATE OF LATCHMAN ALIAS
LACHMAN

BETWEEN : **SHAIENDRA and MAHENDRA CHAUDHARY a.k.a**
MAHENDRA PRASAD CHAUDHARY

PLAINTIFFS

AND : **ARUN PRASAD**
EXECUTOR OF THE ESTATE OF VISHNU PRASAD

FIRST DEFENDANT

: **MAHENDRA CHAUDHARY aka MAHENDRA PRASAD**
CHAUDHARY and ANIL PRASAD
INTENDED ADMINSTRATORS OF THE ESTATE OF
VIJENDRA PRASAD

SECOND DEFENDANTS

: RAJNESH PRASAD CHAUDHARY and NAVINESH PRASAD CHAUDHARY
EXECUTOR OF THE ESTATE OF GANESH PRASAD

THIRD DEFENDANTS

: SITA WATI
EXECUTOR OF THE ESTATE OF AJAY PRASAD

FOURTH DEFENDANT

: MAHENDRA PRATAP NARAYAN
EXECUTOR OF THE ESTATE OF PAN KUAR

FIFTH DEFENDANT

: BENEFICIARIES OF THE ESTATE OF RAM RAJI (CHANDRIKA PRASAD & JOSEPH PRASAD & RAAGNI ALI AS EXECUTORS OF THE ESTATE OF BASANT KUAR, RAKESH PRASAD AS THE ADMINISTRATOR OF THE ESTATE OF UDAY PRASAD)

SIXTH DEFENDANTS

BEFORE : M. Javed Mansoor, J

COUNSEL : Mr. A. Chand for the Plaintiffs
: Mr. A. Pal for the First, Fifth and Sixth Defendants
Mr. S. Fatiaki for the Third Defendant
Mr. A. Nandan for the Fourth Defendant

Dates of Hearing : 29 May 2020

Date of Judgment : 24 September 2021

DECISION

ADMINISTRATION: *Originating summons – Appointment of administrator – Removal of defendants – Section 35 of the Succession, Probate and Administration Act – Section 73 of the Trustee Act – Order 3, Rules 2, 3 & 4, Order 15 Rules 7 & 8, Order 21 Rule 3, Order 28 Rules 4 & 8, Order 76 and Order 85 of the High Court Rules 1988*

HIGH COURT RULES: *Amendment of pleadings – Application to strike out – Order 15 Rule 6, Order 18 Rule 18 and Order 20 Rule 5 of the High Court Rules 1988*

The following cases are referred to in this decision:

- a. Dhir Singh v Pratap Singh [2018] FJHC 1040; HPP 59.2017 (29 October 2018)*
 - b. In the matter of Estate of Kamal Shah and in the Estate of Shahidan [2014] FJHC 218; HBC 47.2009 (28 March 2014)*
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1. There are two applications before court. One application is by the plaintiffs to amend the amended originating summons, which has met with opposition by the majority of the defendants. The other is an application to strike out the defendant's originating summons.
2. By originating summons filed on 20 March 2019, the plaintiffs sought *inter alia* the following orders: (i) plaintiffs be appointed as the administrators in the estate of Latchman alias Lachman (ii) plaintiffs be registered as the administrators of the land in certificate of title number 9037 having an extent of 347 acres and one rood (iii) plaintiffs to administer the estate without any interference from the defendants (iv) plaintiffs to administer the estate pursuant to the last will and testament of Latchman alias Lachman.
3. The plaintiffs' case is this. The plaintiffs are the grandsons of the testator, Latchman, who died on 28 May 1962. Mr. Latchman had five sons and five daughters. By last will, he appointed two of his sons, Vishnu Prasad and Vijendra Prasad, as executors and trustees of his estate. The first plaintiff is the son of Vishnu Prasad. The second plaintiff is the son of Vijendra Prasad. Probate (bearing

number 7499) in respect of Latchman's estate was granted on 24 November 1962. The executors of the estate, Vishnu Prasad and Vijendra Prasad died on 9 March 1989 and 4 August 1991 respectively. At the time of their death, the estate of Mr. Latchman was left un-administered. The estates of Vishnu Prasad and Vijendra Prasad are each entitled to 62 acres of land from the Latchman estate. Thereafter, Ganesh Prasad and Ramendra Prasad were appointed as administrators on 23 January 1993. Ganesh Prasad and Ramendra Prasad died on 15 August 2011 and on 27 January 2019 respectively. At the time of Ramendra Prasad's death in January 2019 the Latchman estate was yet to be administered. In the result, though probate for the Latchman estate was granted in 1962, the beneficiaries have not received their entitlements as the previous administrators did not take steps to administer the estate. These facts are not in dispute. The present status is such that there is no administrator to administer the estate and, therefore, the plaintiffs require the administrators to administer the estate and distribute shares to the beneficiaries.

4. The plaintiffs amended the originating summons with the amended originating summons having been filed on 14 May 2019. Subsequently, the plaintiffs sought to amend the amended originating summons by application filed on 9 August 2019. This met with opposition.
5. The first and second named sixth defendants sought to strike out the plaintiffs' action. Both applications were taken up for hearing together. This ruling will deal initially with the striking out application.

SUMMONS TO STRIKE OUT

6. By summons filed on 8 May 2020 the first and second named sixth defendants moved to strike out the plaintiffs' originating summons filed on 20 March 2019 and later amended without objection and filed on 14 May 2019.
7. The plaintiffs' action is based on Order 85 of the High Court Rules 1988, section 35 of the Succession, Probate and Administration Act 1970 and section 73 of the Trustee Act 1966. *Dhir Singh v Pratap Singh*¹ and *In the matter of Estate of Kamal Shah*

¹ [2018] FJHC 1040; HPP 59.2017 (29 October 2018)

*and in the Estate of Shahidan*² were cited by the plaintiffs in support of the mode in which this action has been instituted.

8. The thrust of the first and second named sixth defendants' contention is that the action should be struck off on the premise that a probate action has to be instituted by way of a writ of summons and not by originating summons in terms of Order 76³. It was submitted that section 73 of the Trustee Act was not applicable in respect of the appointment of an administrator. They submitted that section 35 of the Succession, Probate and Administration Act was not applicable because that made provision for the removal *and* appointment of an administrator; the provision did not apply, it was submitted, where an executor or administrator did *not* exist. Counsel for the other defendants concurred with the submissions made on behalf of the first and second named sixth defendants (this is qualified by what is stated below concerning the fourth defendant). The first and second named sixth defendants and the third defendants filed written submissions.

9. Before dealing with the substance of the applications, a development following the hearing on 29 May 2020 needs to be mentioned. A notice of motion dated 23 February 2021 was filed on 15 March 2021 by the law firm on record – Neel Shivam Lawyers – for the fourth defendant. Through this motion, the firm sought to withdraw from representing the fourth defendant. Annexed to the notice of motion were *inter alia* an affidavit in support of the withdrawal and a letter dated 29 May 2020 – being the hearing date – addressed by the fourth defendant to the law firm. The fourth defendant states in the letter that she gave clear instructions to support the plaintiffs' application and to object to the summons for striking off the originating summons. She also states that she is supportive of the plaintiffs' application for amendment. A copy of the letter was sent by the fourth defendant to the registry to be forwarded to me. This will mean that the objection voiced at the hearing by counsel on behalf of the fourth defendant against the plaintiffs' application cannot be considered in deciding the matter. The record shows that an affidavit dated 19 November 2019 signed by the fourth defendant in opposition to

² [2014] FJHC 218; HBC 47.2009 (28 March 2013)

³ High Court Rules 1988

the amendment of the amended originating summons was filed on her behalf by Neel Shivam Lawyers. No intervention of the court has been sought in the matter.

10. As submitted on behalf of the opposing sixth defendants, Order 76 (2) (1) of the High Court Rules requires a probate action to be started by writ. In the face of this requirement, it becomes necessary to examine whether the statutory provisions relied upon by the plaintiffs will entitle them to relief.

A Order 85 High Court Rules

11. Order 85 of the High Court Rules refers to an administration action; meaning an action for administration under the direction of the court of the estate of the deceased or for execution under the direction of the court of a trust. A beneficiary is entitled to bring an administration action in respect of the estate of a deceased. All persons having a beneficial interest in or claim against the estate need not be made parties to the action⁴.
12. In an administration action, the court can grant relief to which a plaintiff may be entitled to by reason of any breach of trust, willful default or other misconduct of the defendant “notwithstanding that the action was begun by originating summons”⁵. This rule permits an administration action initiated by originating summons on those limited grounds. This is without prejudice to the power of the court to make an order under Order 28 Rule 8 of the High Court Rules. The defendant in these situations would be an executor, administrator or trustee.
13. In *Dhir Singh v Pratap Singh*, the High Court dismissed the defendant’s preliminary objection to the plaintiff’s application by originating summons seeking an order for the removal and discharge of the executor and trustee. The court allowed the action begun by originating summons to stand in terms of Order 85 of the rules.

B Section 35 Succession, Probate and Administration Act

14. Section 35 of the Succession, Probate and Administration Act states:

⁴ Order 85 Rule 3 *ibid*

⁵ Order 85 Rule 4 *ibid*

“The court may for any reason which appears to it to be sufficient, either upon the application of any person interested in the estate of any deceased person or of its motion on the report of the Registrar and either before or after a grant of probate has been made-

- (a) make an order removing any executor of the will of such deceased person from office as such executor and revoking any grant of probate already made to him or her;
- (b) by the same or any subsequent order appoint an administrator with the will annexed of such estate; and
- (c) make such other orders as it thinks fit for vesting the real and personal property of such estate in the administrator and for enabling the administrator to obtain possession or control thereof; and
- (d) make such further or consequential orders as it may consider necessary in the circumstances”.

15. By this provision, the High Court is granted the discretion “*for any reason which appears to it to be sufficient*” to make an order removing any executor of the will and revoking a grant of probate already made to him, and by the same or subsequent order to appoint an administrator.

C Section 73 Trustee Act

16. Section 73 of the Trustee Act deals with the power of court to appoint new trustees. Section 73 (1) confers power on the High Court to make an order for the appointment of a trustee or new trustees , either in substitution for or in addition to any existing trustee or trustees. The court is empowered to order such appointment although there is no existing trustee. However, section 73 (4) is explicit in stating that the court is not conferred the power to appoint an executor or administrator.
17. Section 35 of the of the Succession, Probate and Administration Act and Section 73 of the Trustee Act came up for discussion in *In the matter of Kamal Shah*. In that case, the plaintiff filed an originating summons seeking to appoint himself as the administrator and trustee of the two estates after removal of the defendant as

executor and trustee. The High Court, whilst noting that section 73 (4) of the Trustee Act did not confer power on the court to appoint an executor or administrator, held that section 35 of the Succession, Probate and Administration Act could be used to substitute an executor, but to do so clear evidence was required to the effect that the testator's choice should be disregarded. Tuilevuka, J concluded that that there was no such clear evidence and dismissed the originating summons. In the course of his judgment, his Lordship stated that evidence of hostility, delay and misconduct on the part of the executor was relevant, but such evidence was not necessarily conclusive.

18. The decisions mentioned in the preceding paragraphs are supportive of the position that the removal of an executor and the appointment of an administrator otherwise than by writ action is procedurally acceptable. The phrase "*upon the application of any person interested in the estate of any deceased person*" suggests that relief may be sought by originating summons. Proceedings by which an application is to be made to the High Court or a judge under any Act must be begun by originating summons unless it is expressly required or authorised to be made by some other means⁶. What the court must decide is whether it is appropriate to grant the reliefs that have been sought in the circumstances pleaded by the plaintiffs.
19. The plaintiffs' supporting affidavit makes mention of numerous matters of contention involving the beneficiaries. The plaintiffs averred that the last administrator, Ramendra Singh Prasad, acting as sole administrator, had left an approved scheme for the transfer of 20 lots of land, but that this scheme had excluded another plot of land that belonged to the estate of Vishnu Prasad. Ramendra Prasad, they said, did not consult any of the beneficiaries in determining these lots of land. The scheme, it was averred, was designed in 2017 at the discretion of Ramendra Prasad and Mahendra P Narayan (the second named appears to be that of the fifth defendant). Although the last administrator had identified 20 beneficiaries, they declared, there should only be 10 beneficiaries in terms of the last wills of Latchman and Ram Raji and in terms of the deeds executed by the executors and trustees of the Latchamn estate in 1987. Moreover,

⁶ Order 5 Rule 3 *ibid*

several lots of land have been allocated though such conveyances are not contemplated in Latchman's will, and as such "...it needs to be established if there was any *bone fide* agreement signed by all beneficiaries of Latchman estate to allot land as stated in paragraph 24 by the new administrator and any amendment of the original agreement has been agreed by all...". Questions seem to remain, according to the plaintiffs, regarding the proposed conveyance of the balance properties.

20. The plaintiffs contend that it would be better that the sixth defendants – though the named parties are said to be beneficiaries – be excluded from being a party to this action, and that being excluded as such would not deprive the defendants of their shares. The removal of the second defendants as a party appears to be sought on the basis of an agreement reached between the plaintiffs and the second defendants. No appearance was made on behalf of the second defendants and the record does not show they were served notice of this action.
21. The matters raised by the plaintiffs merit the court's careful attention. The plaintiffs submitted that close upon 60 years have passed since the grant of probate to the executor of the estate. Enough time has lapsed for circumstances to materially change; that is also evident by the contentions in the plaintiffs' affidavit which depose to incorrect allocations of the bequeathed property. Within that period the initial executors and the succeeding administrators died without completing their duties in administering the estate. At present, there is no administrator; the last person vested with the duty having died in January 2019, and the claim is that the last appointee had prepared an unreliable scheme of distribution of the Latchman estate. The nature of these claims, and the circumstances, make it prudent for the court to have regard to essential facts concerning the estate in disposing the plaintiffs' main prayers for relief.
22. The mode of beginning civil proceedings are prescribed by Order 5 of the High Court Rules. Civil proceedings in the High Court may be begun by writ, originating summons, originating motion or petition. Subject to any provision of an Act or the High Court Rules, Order 5 Rule 2 specifies the proceedings to be begun by writ. Proceedings by which an application is to be made to the High

Court or a judge under any Act must be begun by originating summons except where such application is expressly required or authorised to be made by some other means⁷. Except where proceedings are required to be begun by writ or originating summons or are required or authorised to be begun by petition, proceedings may be begun either by writ or by originating summons as the plaintiff considers appropriate⁸. Proceedings in which there is unlikely to be any substantial dispute of fact are appropriate to be begun by originating summons⁹.

23. The estate has slipped through two generations of administrators without fruitful steps to satisfy the beneficiaries. It is evident that the plaintiffs are dissatisfied with the prevailing state of affairs including the conveyances and allocations said to have been made out of the estate in the past. Significant disputes of fact are likely in these circumstances. In my view, a fuller inquiry with material evidence may reveal the steps needed to be taken by the eventual administrators in satisfying the various beneficiaries who may or may not be before court.
24. Order 2 Rule 1 (3) of the High Court Rules provides that the court shall not wholly set aside any proceedings or the writ or other originating process by which they were begun on the ground that the proceedings were required by any of these rules to be begun by an originating process other than the one employed. The effect of this rule is that an action, which was not initiated by writ, though required to be so initiated by the rules, could survive and continue notwithstanding the omission.
25. Provision is made available where the originating mode adopted by a party is not the most appropriate. Order 28 Rule 8 (1) of the High Court Rules provides:

"Where, in the case of a cause or matter begun by originating summons, it appears to the court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause or matter had been begun by writ, it may order the proceedings to continue as if the cause or matter had been so begun and may, in particular, order that any affidavit shall stand as pleadings, with or without liberty to any of the parties to add thereto or to apply for particulars thereof."

⁷ Order 5 Rule 3 *ibid*

⁸ Order 5 Rule 4 (1) *ibid*

⁹ Order 5 Rule 4 (2) (b) *ibid*

26. These factors persuade me to conclude that an action by writ would be the most appropriate in this case to consider the reliefs sought by the plaintiffs and, therefore, this action should continue as if the matter had been begun by writ. In the event the parties agree upon a compromise, there is provision to hear the trial on affidavits¹⁰

AMENDMENT OF AMENDED ORIGINATING SUMMONS

27. The defendants, at the outset, did not object to amendment of the originating summons filed on 20 March 2019, when the case was mentioned on 24 April 2019. The amended originating summons was filed on 14 May 2019. Thereafter, the plaintiffs made a further application by summons dated 9 August 2019 to amend the amended originating summons. This was supported by affidavits dated 9 and 22 August 2019.
28. When the case was called on 12 September 2019, the plaintiffs' application for amendment of the amended originating summons was opposed, and time was granted to the defendants for the filing of objections.
29. By this amendment the plaintiffs sought to remove the second defendants and the sixth defendants after having once made changes to the composition of the second and the sixth defendants.
30. The plaintiffs averred that the majority of the beneficiaries of the estate of Vishnu Prasad and the estate of Vijendra Prasad have agreed to the appointment of the plaintiffs as the administrators to administer the affairs of the estate of Latchman, and that the surviving beneficiaries of Ram Raji's estate are agreeable to appoint them as administrators of the estate. Ram Raji was the wife of Mr. Letchman. The sixth defendants are described as the beneficiaries of Ram Raji's estate. The sixth defendants, the plaintiffs submitted, need not be a party, but would be entitled to their share of the estate as beneficiaries.

¹⁰ Order 76 Rule 12 *ibid*

31. The first and fifth defendants did not file affidavits in opposition, but opposed the amendment at the hearing. The third defendants filed an affidavit objecting to the application to amend on 6 December 2019, and also filed written submissions on 29 May 2019 in respect of both applications. The fourth defendant filed an affidavit opposing the amendment on 25 November 2019. The sixth defendants did not file pleadings in opposition, but made submissions opposing the amendment. The plaintiffs' submissions were filed on 29 May 2019.
32. The third defendants submitted that the plaintiffs were aware of the necessary information when the action was first filed, and that this application to amend the originating summons for a second time was made *mala fide*. They submitted that the plaintiffs have adopted the wrong procedure, and that the amendment would not resolve the controversy between the parties. Although counsel for the fourth defendant concurred with the submissions of the third defendants, these submissions will not be taken into consideration in view of what has been mentioned concerning the fourth defendant. On behalf of the opposing sixth defendants it was submitted that the plaintiffs' application to remove the second and the sixth defendants was unfair and unjust, as they were beneficiaries to the estate.
33. The originating summons dated 20 March 2019 as filed at the outset described the second defendant as the executor of the estate of Vijendra Prasad without naming a person. The amended originating summons filed on 14 May 2019 named Phul Mati as executor in the estate of Vijendra Prasad. Phul Mati did not make an appearance, and there is no evidence that notice of this action was served.
34. Thereafter, by 9 August 2019, the plaintiffs amended the originating summons to change the second defendant's name to Mahendra Chaudhary aka Mahendra Prasad Chaudhary and Anil Prasad Chaudhary as the intended administrators in the estate of Vijendra Prasad. The defendants submitted that there was no evidence that Mahendra Chaudhary aka Mahendra Prasad Chaudhary and Anil Prasad Chaudhary are the intended administrators of the Vijendra Prasad estate, and that there was also no evidence that the first and second named second

defendants have the authority – not being the lawful representative of Vijendra Prasad’s estate – to consent to the plaintiffs’ application.

35. The sixth defendants originally named are the beneficiaries of the estate of Ram Raji (executors of the estate of Basant Kuar, executors of the estate of Phul Kuar, Kamala Singh of London and Nirmala Devi of America and executors of the estate of Udaya Prasad). These defendants were not given notice of the action. The amended originating summons showed the sixth defendants as the beneficiaries of the estate of Ram Raji (Chandrika Prasad, Joseph Prasad & Raagni Ali as executors of the estate of Basant Kaur, Rakesh Prasad as the administrator of the estate of Uday Prasad). The first, second and fourth named sixth defendants are before court.
36. By the present amendment the plaintiffs propose to remove the sixth defendants. The summons dated 9 August 2019 seeks an order that the “sixth defendants be removed and/ or this action be withdrawn against the sixth defendants”. But, the affidavit in support filed on 22 August 2019 has the deponent declaring his wish to “remove all the names of the sixth defendants and leave the sixth defendants as the estate of Ram Raji”. The reason given by the plaintiffs for the proposed exclusion is that they cannot locate the executors of the Ram Raji estate.
37. Ordinarily, a plaintiff is entitled to decide upon the persons to be made defendants in a proceeding. Order 85 makes it clear that in an action for administration it is not necessary for the beneficiaries to be made parties, but the plaintiff may make such of those persons, whether all or anyone or more of them, parties as, having regard to the nature of the relief or remedy claimed in the action, he thinks fit¹¹. An important factor to consider is whether exclusion of a party would adversely affect that party’s interest. The second defendants are not before court. One of the plaintiffs has been named a second defendant. Both these defendants have been described as intended administrators of the estate of Vijendra Prasad. In these circumstances, I am of the view that the second defendants could be excluded from these proceedings as prayed for by the plaintiffs. On behalf of the sixth defendants it was submitted that they would be prejudiced by their removal from

¹¹ Order 85 Rule 3 (2) *ibid*

these proceedings, but the potential prejudice to them has not been explained. Order 85 Rule (3) (2) would equally apply to these defendants. Although I cannot, at this point, foresee any prejudice to them, the first, second and fourth named sixth defendants are before court and resist their exclusion from these proceedings. The third named sixth defendant was not before court, and there is no evidence that service was effected on this defendant. I cannot agree with the plaintiffs that the presence of these sixth defendants will cause them unnecessary difficulty. They have been noticed by the plaintiffs; they are before court and wish to participate in the proceedings. Taking these factors into consideration, it would be proper to hold that the sixth defendants before court may continue in this action. Beyond these proceedings on the summons already filed, however, they must not complain of or expect costs in the ordinary course. In deciding the main case, they will be taken as parties before court at their own choice. The third named sixth defendant is not before court and this defendant may be excluded from the action.

38. Counsel for the opposing defendants raised issue with the procedure adopted by the plaintiffs to amend the originating summons. The application to amend the pleadings, it was submitted, was not proper as it was based on Order 20 Rule 5 of the High Court Rules – which relates to the amendment of pleadings – instead of Order 15 Rule 6 which provides for the addition, removal or substitution of a party. However, a claimant’s incorrect reference to a rule should not be a bar to the obtaining of relief unless there are other contributing factors. What the plaintiffs have asked for can be understood from their affidavits in support, and no prejudice is caused to the defendants by reference to an inapplicable rule. The third defendant submitted that the amended originating summons incorrectly amends the probate number to 27979 instead of the correct 7499. Although the summons dated 9 August 2019 gives it as 27979, the probate number is stated as 7499 in the caption to the affidavit in support given by Shailendra and filed on the same day as the summons and also in the affidavit in support dated 22 August 2019. Nevertheless, this is a matter that can be resolved prior to the completion of pleadings in respect of the substantive matter.

39. The matter of costs was raised on behalf of the defendants more than once. I have taken into consideration the several dates that were taken by the plaintiffs in complying with necessary steps to amend the amended originating summons.

ORDER

- A. The strikeout applications by the first and second named sixth defendants are dismissed.
- B. The proceedings to continue as if begun by writ in terms of Order 28 Rule 9 (1) of the High Court Rules 1988. Affidavit in support filed on behalf of the plaintiffs shall stand as the statement of claim. Further pleadings are to be filed and served in terms of the rules.
- C. The plaintiffs' application to amend the originating summons by excluding the second defendants is allowed.
- D. The plaintiffs' application to amend the originating summons by excluding the sixth defendants is declined, and the first, second and fourth named sixth defendants are permitted to remain as defendants.
- E. The plaintiffs to pay \$500 each to the first, third, fifth and the sixth defendants.

Delivered at Suva this 24th day of September 2021



M. Javed Mansoor
M. Javed Mansoor
Judge

