

**IN THE HIGH COURT OF FIJI**  
**AT LABASA**  
**CIVIL JURISDICTION**

**Civil Action No. 1 of 2018**  
**Consolidated with Civil Action No. 6 of 2018**

**BETWEEN** : **MANSOOR ALI** **1<sup>st</sup> PLAINTIFF**

**AND** : **KAMRUL NISHA, SAIFUL NISHA, GULSHAN NISHA,**  
**SAMRUL NISHA, AMIRAN NISHA, SAKIMUL NISHA** **2<sup>nd</sup> PLAINTIFFS**

**AND** : **SHAMIMA and SAMNA BANO** **3<sup>rd</sup> PLAINTIFFS**

**AND** : **AZAM ALI** **1<sup>st</sup> DEFENDANT**

**AND** : **ATONIO LAVEKAU aka ANTONIO LAVEKAU** **2<sup>nd</sup> DEFENDANT**

**Appearances** : Maqbool & Co. for the Plaintiffs  
Jiten Reddy Lawyers for the 1<sup>st</sup> Defendant

**Ruling** : 13 January 2023

## **RULING**

### **Introduction**

1. By this application, the Plaintiffs seek the following orders:
  1. That the 1<sup>st</sup> defendant give answer to the proposed interrogatories by affidavit served with this summons within a period specified by the Court;
  2. That an account and/or inquiry be taken against the 1<sup>st</sup> defendant for the expenses claimed by the 1<sup>st</sup> defendant as variable expenses

and trustee expenditure in his accounts of administration as attached in the first defendant's supplementary bundle of documents dated 19<sup>th</sup> August 2021.

3. The defendant to disclose the sums of money paid to his solicitors at source of his funds.
  4. That the responsibility be relieved from the 1<sup>st</sup> respondent as an executor and trustee in the estate of Mohammed Ali as from the date of making of this order in accordance with the judgment of Honourable Justice Brito delivered on 12 August 2016 in High Court Civil Action Nos. 38 and 43 of 2012 and this action be continued against Azam Ali in purpura persona.
  5. The 1<sup>st</sup> plaintiff be at liberty to be appointed as administrator in the said estate of Mohammed Ali and be at liberty to make an application for Letters of Administration de bonis non.
  6. Such further and/or other orders as this Court may deem fit to make in the circumstances.
2. The application is made pursuant to Order 26 Rule 1 and Order 43 rr 1-3 of the High Court Rules, 1988.
  3. The 1<sup>st</sup> Defendant opposes the application.
  4. On interrogatories, the 1<sup>st</sup> the Defendant admits that the questions are relevant but nevertheless opposes the application on the ground that every issue raised in the proposed interrogatories can be threshed out at trial where he and witnesses can be subjected to cross-examination. He deposes that every beneficiary has been paid their share.

#### The law

#### On interrogatories:

5. Order 26 of the High Court Rules deals with interrogatories as follows:

#### *Discovery by interrogatories (O.26, r.1)*

- (1) A party to any cause or matter may apply to the Court for an order-
  - (a) giving him leave to serve on any other party interrogatories relating to any matter in question between

- the applicant and that other party in the cause or matter,  
and
- (b) requiring that other party to answer the interrogatories on affidavit within such period as may be specified in the order.
- (2) A copy of the proposed interrogatories must be served with the summons, or the notice under Order 25, rule 7, by which the application for such leave is made.
- (3) On the hearing of an application under this rule, the Court shall give leave as to such only of the interrogatories as it considers necessary either for disposing fairly of the cause or matter or for saving costs; and in deciding whether to give leave the Court shall take into account any offer made by the party to be interrogated to give particulars or to make admissions or to produce documents relating to any matter in question.
- (4) A proposed interrogatory which does not relate to such a matter as is mentioned in paragraph (1) shall be disallowed notwithstanding that it might be admissible in oral cross-examination of a witness.

6. In *Huang Tzung-Hao & Yang Man-Hwa v A Team Corporation Limited & Yu-Shin-Ho* [2003] HBC 346/98 Decision 2 September 1999, Shameem J summarised the principles relevant to the granting of leave as follows:

Interrogatories relating solely to credit are not permitted (Order 26 Rule 1(4) and *Kennedy -v- Dodson* (1895) 1 Ch 334, 341).

Interrogatories are permitted provided they are relevant to the facts in issue or relevant to the existence of facts in issue (per Lord Esher M.R. in *Marriot -v- Chamberlain* (1886) 17 QBD 154, p 163.

Interrogatories are admissible which go to support the applicant's case or to impeach the respondent's case.

Interrogatories are only allowed if they are necessary for disposing fairly of the case or for saving costs, and interrogatories are not allowed which relate solely to the evidence the party intends to adduce.

Finally the allowing of interrogatories is a discretionary matter.

#### The claim

HBC 1 and HBC 6 of 2018

7. The Plaintiffs are beneficiaries in the estate of Mohammed Ali, (the deceased) who died testate on 6 March 1993. Pursuant to his will, his sons Usman Ali, Hasim Ali, Azam Ali and Yusuf Ali were appointed executors and trustees.
8. Yusuf Ali, Hasim Ali and Usman Ali died intestate, entitling the Plaintiffs to a share and interest in the estate of the deceased.
9. The 2<sup>nd</sup> Defendant is a Police Officer based at the Labasa Police Station.
10. On 14 October 2004, probate was granted to the 1<sup>st</sup> Defendant and his brother Usman Ali. Yusuf Ali died on 2 June 1996, leaving the 1<sup>st</sup> Defendant as the sole surviving trustee in the Deceased's estate.
11. The Deceased was the registered proprietor of whole of the land known as Raviravi situated in Niurua CT No. 41/4093 containing 1200 acres. The will made provisions for the beneficiaries.
12. According to the Plaintiffs, the 1<sup>st</sup> Defendant with knowledge and notice of the Plaintiffs' rights and entitlements under the Deceased's will, failed to administer the estate in accordance with the terms of the Will and, with intent to destroy and/or deprive the Plaintiffs of their rights and entitlements, transferred the whole sum of \$1,750,000.00 into his account or alternatively joint with his wife, Hamida.
13. The Plaintiffs plead fraud for
  - conversion of funds from the estate of the Deceased to 1<sup>st</sup> Defendant's account or alternatively in the joint name of his wife, Hamida.
  - providing fictitious accounts of administration of the estate of Mohammed Ali.
  - converting the entitlements of the Plaintiffs to his own use.
  - failing to pay the Plaintiffs their share and entitlements under the Deceased's will.

14. In Civil Action No. HBC 38 and 43 of 2012 (consolidated), Judgment was pronounced on 12 August 2016 as follows:
1. I grant the plaintiffs in Actions nos. 38 of 2012 and 43 of 2012 a declaration that the defendant has breached the provisions of the Will of Mohammed Ali and the Succession, Probate and Administration Act.
  2. I grant the plaintiffs in Actions nos. 38 of 2012 and 43 of 2012, a declaration that they are entitled to be paid their share, in terms of the Will of Mohammed Ali, by the defendant in his personal capacity.
  3. I decline the defendant's counterclaim.
  4. The defendant is ordered in his personal capacity, to pay costs summarily assessed of \$2000 to each of the plaintiffs.
15. The Plaintiffs plead that notwithstanding the declaration by the High Court in HBC No. 38 of 2012 that the monies in the personal account of the 1<sup>st</sup> Defendant at Bank of Baroda did not belong to him, the 2<sup>nd</sup> Defendant as Station Officer directed the Bank of Baroda to debit the trust account of Messrs Maqbool & Company and transfer the same into the 1<sup>st</sup> Defendant's personal account. The transfer was contrary to the orders of the Court in Civil Action Nos 38 and 43 of 2012.
16. It is alleged that the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs had gone to the Police Station to report conversion and fraud by the 1<sup>st</sup> Defendant but were chased and sent away by the 2<sup>nd</sup> Defendant who was aware that the 1<sup>st</sup> Defendant had committed these acts in contravention of the various provisions of the Crimes Act.
17. The Plaintiffs seek the following reliefs against the 1<sup>st</sup> Defendant in person and as the surviving executor and trustee of the estate of the Deceased, and also against the 2<sup>nd</sup> Defendant:
1. Injunction against the 2<sup>nd</sup> Defendant from stopping the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs from lodging a report against the 1<sup>st</sup> Defendant at the Labasa Police Station.

2. An order that the Commissioner of Police with the assistance of the Professional Standards Unit be directed to do an investigation against the 2<sup>nd</sup> Defendant.
3. A declaration that the actions of the 1<sup>st</sup> Defendant are in contravention of the Succession Probate and Administration Act and contrary to ss. 295, 296 and 299 of the Crimes Act.
4. For an order that the 2<sup>nd</sup> Defendant be investigated for criminal offence and corruption.
5. For an order that the Plaintiffs be entitled to trace the funds received by the 1<sup>st</sup> Defendant for sale of estate property namely CT 41/4093 and for monies deposited at Bank of Baroda account no. 91050100014163 and later withdrawn by him and disposed.
6. For an order that the sum of \$191,450.00 be transferred to the trust account of Messrs Maqbool & Company to be paid to the Plaintiffs in accordance with the accounts of administration presented by the 1<sup>st</sup> Defendant in High Court Civil Action Nos. 38 and 43 of 2012.
7. For an order for the 1<sup>st</sup> Defendant to provide a list of his personal assets and liabilities.
8. Judgment in the sum of \$147,947.02.
9. General damages.
10. Interests.
11. Costs of this action on solicitor client basis.
12. An order that Police enquiry be directed against the 1<sup>st</sup> Defendant for conversion of estate funds of Mohammed Ali received by him upon sale of CT No. 41/4093.
13. That the 1<sup>st</sup> Defendant be discharged and removed as executor and trustee in the estate of Mohammed Ali, Deceased who died testate on 6 March 1993.
14. That the assets of the 1<sup>st</sup> Defendant be liquidated to satisfy any judgment or shortfall after distribution of \$191,450.00
15. That this action be consolidated with Civil Action Nos. 38 and 43 of 2012 and Civil Action No. 1 of 2018 for the purposes of

determination of the entitlements of the Plaintiffs in the event of any clarification.

16. Such further and/or other relief as this Honourable Court may deem just and expedient.
18. The 1<sup>st</sup> Defendant admits the Plaintiffs are the children of the Deceased's sons and that the Deceased was the registered proprietor of the whole of the land known as Raviravi, described in the statement of claim.
19. The 1<sup>st</sup> Defendant pleads that the property was sold for \$1,750,000.00 but that he had only received a cheque of \$1,419,918.00 after deductions for legal and real estate agent fees. The money was deposited into his joint account with his wife as he had not been aware that it was to be deposited into a trust account.
20. He says the injunction in the High Court was only in respect of the sum of \$200,000. The High Court made no order for the transfer of \$191,450.00 from Bank of Baroda to Messrs. Maqbool & Company and the transfer was therefore unlawfully made. He raised his concerns with the Bank and the money was transferred back into his account. He takes issue with and disputes the entitlements of the Plaintiffs as set out in the statements of claim.

#### Analysis

21. The first issue for determination is whether leave ought to be granted for the Plaintiffs to serve the proposed interrogatories on the 1<sup>st</sup> Defendant.
22. For the purposes of Order 26, any interrogatories to be served must be relevant to any matter in question between the Applicant and the 1<sup>st</sup> Defendant in this matter.
23. The 1<sup>st</sup> Defendant admits that "every issue raised" in the interrogatories is relevant to these proceedings and objects only on the basis that these issues can be dealt with at trial. (Paragraph 22, 1<sup>st</sup> Defendant's Affidavit in Opposition)

24. Order 26 and the authorities (Marriot -v- Chamberlain; Huang Tzung-Huo & Yang Man-Hwa, supra) are clear that interrogatories may be ordered provided they are relevant to facts in issue, or relevant to the existence of facts in issue. That the issues can be dealt with at trial is no ground to resist an application for leave to serve interrogatories which are otherwise relevant to the facts in issue. *A fortiori* where relevance of the proposed interrogatories is admitted by the 1<sup>st</sup> Defendant himself.
25. Given the concession as to the relevance of all the proposed interrogatories, I would grant the application for leave to issue interrogatories with the following qualifications:
26. Question 4 is allowed to the extent only as to whether a tax refund was given by FIRCA. The request for evidence of refund is not allowed.
27. Interrogatories in respect of evidence which a party relies on, are not permitted. (Marriott v Chamberlain (1886) 17 Q.B.D. 154, CA; Bidder v Bridges (1885) 29 Ch.D. 29; Re Strachan [1895] 1 Ch. 439 at 445, CA))
28. For the same reason, Question 5 is not allowed.
29. Questions 7, 10, 11, 12, 13 ask for proof of authority or mandate which is evidence. Interrogatories in respect of evidence which a party relies on are not allowed. (Marriott v Chamberlain (1886) 17 Q.B.D. 154, CA; Bidder v Bridges (1885) 29 Ch.D. 29; Re Strachan [1895] 1 Ch. 439 at 445, CA)) These questions are accordingly refused.
30. The meaning of Question 23 is ambiguous and unclear. I disallow it.
31. Question 24 is made up of a question and a number of statements. An interrogatory is a written question requiring of the party interrogated, an answer.
32. Clearly, statements do not require an answer. As for the question on whether or not the 1<sup>st</sup> Defendant's account did or did not on 10 July 2012 show that he had \$377,307.40 when an injunctive order was made requiring him to pay \$200,000 into Court, the question, though not in respect of a fact directly relevant to the facts in issue, is relevant



to facts the existence or non-existence of which is relevant to the existence or non-existence of facts directly in issue. It is necessary for disposing fairly of the matter and also for saving costs and is therefore allowed. However, the statements as to the withdrawal of \$147,307.00 by cheque and \$30,000.00 by cash for the purposes of the 1<sup>st</sup> Defendant repairing his house, purchasing a fridge, etc, and the fact of his being dependant on social welfare do not require an answer and are disallowed.

33. Question 33 is taken from the Judgment in the earlier action and is not a matter in issue between the parties. This question is refused.
34. Questions 34 and 36 are of limited, if any relevance to the issues in this action. They are disallowed.
35. The first part of Question 37 is relevant and necessary to disposing fairly of the matter. This part is allowed. His being a fit and proper person to be executor and trustee however essentially goes to credibility when he gives evidence. This part is not allowed.
36. The question in respect of monies sitting in the Bank of Baroda is answered in paragraphs 13-15 of the 1<sup>st</sup> Defendant's affidavit in opposition and is therefore disallowed.
37. Questions 39, 40, 41, 42 and 43 have no direct relevance to the issues, nor are they necessary for disposing of the matter fairly, and/or for saving costs. They are disallowed.

#### Application for accounts

38. The Plaintiffs also seek an account and/or inquiry against the 1<sup>st</sup> Defendant for expenses claimed by him as variable expenses and trustee expenditure in his accounts of administration as attached in the supplementary bundle of documents dated 19 August 2021.
39. Order 43 provides for accounts and inquiries as follows:

*Summary order for account (O.43, r.1)*

- (1) Where a writ is indorsed with a claim for an account or a claim which necessarily involves taking an account, the plaintiff may, at any time after the defendant has acknowledged service of the writ or after the time limited for acknowledging service, apply for an order under this rule.
- (2) A defendant to an action begun by writ who has served a counterclaim, which includes a claim for an account or a claim which necessarily involves taking an account, on-
  - (a) the plaintiff, or
  - (b) any other party, or
  - (c) any person who becomes a party by virtue of such service may apply for an order under this rule.
- (3) An application under this rule must be made by summons and, if the Court so directs, must be supported by affidavit or other evidence.
- (4) On the hearing of the application, the Court may, unless satisfied by the defendant that there is some preliminary question to be tried, order that an account be taken and may also order that any amount certified on taking the account to be due to either party be paid to him within a time specified in the order.

*Court may direct taking of accounts, etc. (O.43, r.2)*

- (1) The Court may, on an application made by summons at any stage of the proceedings in a cause or matter, direct any necessary accounts or inquiries to be taken or made.
- (2) Every direction for the taking of an account or the making of an inquiry shall be numbered in the judgment or order so that, as far as may be, each distinct account and inquiry may be designated by a number.

*Directions as to manner of taking account or making inquiry (O.43, r.3)*

- (1) Where the Court orders an account to be taken or inquiry to be made it may by the same or a subsequent order give directions with regard to the manner in which the account is to be taken or vouched or the inquiry is to be made.
- (2) Without prejudice to the generality of paragraph (1), the Court may direct that in taking an account the relevant books of account shall be evidence of the matters contained therein with liberty to the parties interested to take such objections thereto as they think fit.

40. In opposing the application for an account and/or inquiry, the 1<sup>st</sup> Defendant deposes that he has submitted proper accounts prepared by an accountant for the estate. The 1<sup>st</sup> Defendant is willing for the Court to appoint an independent accountant or auditor to verify the estate accounts and furnish a report to the Court.

41. In *Digicel (Fiji) Ltd v Tecraft Engineering (Fiji) Ltd* [2012] FJHC 18; HBC30.2011 (20 January 2012) at [12], Tuilevuka M (as then was) referred to the application of Order 43 Rule 2 (1) as stated in the White Book as follows:

Application of rule – whereas r.1 only applies in an action for account, this rule applies in any action. It is probably most frequently used to decide the interests of parties in joint ownership cases, but there are many other instances where it can be invoked to decide the rights of the parties and avoid a long trial.

42. The Master in *Digicel* (supra) was of the view that Order 43 Rule 2 was

... not necessarily limited to cases where the defendant is an accounting party (such as in matters concerning the administration of estates, or trusts). Rather, Order 43 Rule 2 applies to all **other actions where the provision of an account by one or both of the parties will decide their respective rights and avoid a long trial.**

43. The 1<sup>st</sup> Defendant is an executor and trustee of the Deceased's estate, of which the Plaintiffs are beneficiaries.

44. *Halsbury's Laws of England* (Vol 48, 4<sup>th</sup> ed.,) sets out the duty of a trustee to provide information to a beneficiary as follows:

A trustee must furnish to a beneficiary, or to a person authorised by him, on demand, information ... as to the mode in which the trust property or his share in it has been invested or otherwise dealt with, and as to where it is and full accounts respecting it, whether the beneficiary has a present interest in the trust property or only a contingent interest in remainder, or is only an object of a discretionary trust.

45. Of the duty of a trustee to beneficiaries, the Court in Re Watson (1904) 49 Sol. Jo. 54 stated:

The duty of a trustee is three-fold: there is a duty to keep accounts, the duty to deliver accounts and the duty to vouch accounts ... The duty to keep accounts is an essential duty, he must keep such accounts so as to be able to deliver a proper account within a reasonable time showing what he has received and paid.

46. Earlier in Kemp v Burn (1863) 141 RR 225, 226, the Court opined:

... where an account is demanded of trustees ... by a residuary legatee, there seems no doubt what the duty of the (trustee) is. Their duty is to keep proper accounts, and to have them always ready when called upon to render them.

47. In this case, the 1<sup>st</sup> Defendant has provided accounts of administration, however, the Plaintiffs by this application require an account of what is stated as variable expenses and trustee expenditure in the said accounts.

48. I consider that the accounts sought will assist the Court decide the respective rights of the parties and avoid a long trial. I would grant the application for accounts

#### Disclosure of source of funds

49. On the papers before the Court, I am not satisfied the orders sought under (iii) of the application ought to be granted. It is not supported in any way by the affidavit material and in any event, are not orders that can be granted under Order 26 and Order 43 of the High Court Rules.

#### Removal of 1<sup>st</sup> Defendant as executor and trustee, and appointment of 1<sup>st</sup> Plaintiff as administrator

50. Apart from seeking an order for the removal of the 1<sup>st</sup> Defendant and the appointment of the 1<sup>st</sup> Plaintiff in his stead as administrator in the estate of the Deceased, the Plaintiffs have not deposed anything in support of this part of the application, sufficient to grant the orders sought.

51. Further, the 1<sup>st</sup> Plaintiff has not indicated consent to being appointed executor and trustee in the estate of the Deceased. For these reasons, the orders sought in (d) and (e) of the summons are refused.

Final orders

52. The orders of the Court therefore are:

1. Leave is granted for the Plaintiffs to serve interrogatories on the 1<sup>st</sup> Defendant. The following questions in the proposed interrogatories are allowed:
  - (i) Questions 1 – 3.
  - (ii) Question 4 is allowed to the extent only as to whether a tax refund was given by FIRCA. The request for evidence of refund is not allowed.
  - (iii) Questions 6, 8, 9, 14, 15, 16 – 22.
  - (iv) Question 24 only to the extent as to whether or not the 1<sup>st</sup> Defendant's account did or did not on 10 July 2012 show that he had \$377,307.40 when an injunctive order was made requiring him to pay \$200,000 into Court.
  - (v) Questions 25, 26, 27, 28, 29, 30, 31, 32, 35.
  - (vi) The first part only of Question 37 is allowed.
  - (vii) Question 38, 44 and 45.
2. The 1<sup>st</sup> Defendant is to provide answers to the above questions on oath in affidavit form, to be filed and served on the Plaintiffs within 21 days of service of the said interrogatories on him by the Plaintiffs.
3. The 1<sup>st</sup> Defendant to, within 21 days, furnish the Plaintiffs with proper accounts specifically to address expenses claimed by the 1<sup>st</sup> Defendant as variable expenses and trustee expenditure in the accounts of administration in its supplementary bundle of documents.

4. The applications for disclosure of sums of money paid to solicitors; for the removal of the 1<sup>st</sup> Defendant as executor; and for the appointment of the 1<sup>st</sup> Plaintiff as administrator in the estate of Mohammed Ali, are refused.
5. Costs to be in the cause.

  
Sainiu F. Bull  
Master



**Solicitors:**

Maqbool & Co. for the Plaintiffs

Jiten Reddy Lawyers for the 1<sup>st</sup> Defendant