

**IN THE HIGH COURT AT SUVA**  
**CENTRAL DIVISION**  
**CIVIL (PROBATE) JURISDICTION**

HPP Action No. 48 of 2022  
(LA No. 67323)

**BETWEEN:**

REHANA KHANUM KHAN and RUKSHANA  
KHANUM KHAN as the INTENDED  
ADMINISTRATRIX OF ESTATE OF JAMILA  
KHATOON

**PLAINTIFF**

**AND:**

BASHIR AHMAD KHAN

**DEFENDANT**

Date of Hearing : 15 August 2023  
For the Plaintiff/Respondent: Mr. Singh  
For the Defendant/Applicant: Mr. Gordon  
Date of Decision: 13 October 2023  
Before: Levaci SLTTW, A/J

## R U L I N G

### (APPLICATION FOR STRIKING OUT OF ORIGINATING SUMMONS)

#### Cause and Background

1. The Applicant/Defendant is the son of the deceased and the Respondent/Plaintiffs are the daughters of deceased. The Applicant/Defendant initially made an application for grant of probate on the Estate of deceased relying on a 'purported will' of the deceased dated 6<sup>th</sup> September 2018.
2. The Respondent/Plaintiffs challenged the 'purported will' as bearing a signature that was not true. On 4th February 2020 the High Court declared Rehana Khan and Anr -v- Bashir Ahmed Khan HPP Action number 79 of 2018 that the 'purported will' was invalid and void.
3. The Defendant thereafter obtained Letters of Administration of the Estate of Jamila Khatoon number 67323 issued on 14 June 2021.
4. On making an application, the Respondent/Plaintiffs argued that the Applicant/Defendant failed to disclose he was not in residence in Fiji and was arranging for joint application for Letters of Administration. Furthermore that the Deceased held a property in New Zealand which would have raised the value of the Estate to more than \$1 million.
5. The Respondent/Plaintiffs now seeks removal of the Applicant/Defendant as Administrator as he has failed to provide full and frank disclosure of all bank accounts held by the Deceased and record of monies withdrawn by the Defendant. The Plaintiff filed an Originating Summons seeking the following orders:
  1. That BASHIR AHMAD KHAN be removed as Administrator in the Estate of Jamila Khatoon.
  2. That the Defendant be restrained from dealing with any assets of whatsoever kind and nature owned by the Estate of Jamila Khatoon.
  3. That Letters of Administration of the Estate of Jamila Khatoon being granted number 67323 issued on the 14<sup>th</sup> day of June 2021 be revoked.
  4. That BASHIR AHMAD KHAN within 7 days file an inventory of the Estate of Jamila Khatoon.

5. That BASHIR AHMAD KHAN within 7 days provide full and frank disclosure of all the bank accounts held by the late Jamila Khatoon and the Estate of Jamila Khatoon in Fiji and abroad.
6. That BASHIR AHMAD KHAN within 7 days provide all particulars of monies withdrawn by him from any bank account kept under the name of Jamila Khatoon and the Estate of Jamila Khatoon.
6. That BASHIR AHMAD KHAN deposit all monies withdrawn by him from any bank account kept under the name of Jamila Khatoon and the Estate of Jamila Khatoon into this Honorable Court within 3 days of orders being made to do so.
7. That the Plaintiffs be appointed as Administrators in the Estate of Jamila Khatoon in place of the Defendant or the Plaintiffs be at liberty to apply with this Honorable Court for issuance of Letters of Administration in the Estate of Jamila Khatoon.
8. That orders be made for the mode of distribution of the Estate of the Deceased.
9. Any other orders or relief as this Honorable Court may deem fit in the circumstances.
10. Costs on client Solicitor indemnity basis.

**Summons to strike out**

6. The Applicant/Defendant thereafter filed a Summons seeking to Strikeout the Plaintiff's Originating Summons.
7. The Applicant/Defendant had made the application pursuant to Order 3 Rule (4), Order 5 rule (2), Order 17 Rule 2 (1), Order 18 Rule 2 and Rule 18, Order 28 Rule 2 (5) and Rule 2 (6), Order 29 Rule 1, Order 62 Rule 7 and Rule 8, Order 76 Rule 1 (2), Rule 2 (1) and Rule 2 (2) (b) of the High Court Rules 1988 and under the Inherent Jurisdiction of the High Court.
8. The Applicant/Defendant is seeking the following orders:
  1. That the time within which the Defendant is required to file an Affidavit is required to file an Affidavit as ordered by the Honorable court on 30 May 2022 and/or pursuant to and under Order 28 Rule 2 (5) of the High Court Rules 1988 be suspended and/or be held in abeyance pending the hearing

of the rest of the orders as sought in the this application and then, and/or, if necessary and required, be extended depending on the outcome of the rest of the orders as sought in this application.

2. That pending the hearing of the rest of the orders as sought in this application the plaintiffs be restrained from taking steps to obtain any judgment and/or any default judgment or take any other adverse step (s) or obtain any other adverse order(s) against the Defendant.
3. That the Plaintiff's action including the Originating Summons and the affidavit of Rehana Khanum Khan be struck out on the grounds, inter alia, that:
  - a. The proceedings and/or actions and/or claim by the plaintiffs are a probate action as defined by Order 76 Rule 1 (2) of the High Court Rules 1988 and such cannot be commenced by way of an Originating Summons but by way of a Writ of Summons only as mandated and required by Order 76 Rule 2 (1) of the High Court Rules 1988 and/or
  - b. The proceedings and/or action and/or claim by the plaintiffs are a nullity and/or defective as they allege a breach of duty on the part of the Defendant and as such must be commenced by way of a Writ of Summons and not an Originating Summons as mandated and required by Order 5 Rule 2 © of the High Court Rules 1988 and/or
  - c. The proceedings and/or action and/or claim by the plaintiffs are a nullity by reason of a failure to have the Originating Summons indorsed with a memorandum signed by the Registrar showing that the Originating Summons has been produced to him for examination prior to the Originating Summons being issued, as required by Order 76 Rule 2 (2) (b) of the High Court Rules 1988 and/or
  - d. The proceedings and/or action and/or claim and/or Originating Summons by the plaintiffs are a nullity by reason of a failure be way of Form 3 as contained in Appendix A of the High Court Rules 1988 as stipulated and mandated by Order 7 Rule 2 (1) of the High Court Rules and/or
  - e. The plaintiffs have no locus standi to bring these proceedings and/or action as the 'intended administratrix' (sic) in (sic) the Estate of Jamila Khatoon and/or

- f. The plaintiffs have no locus standi to bring these proceedings and/or action as against the Defendant in his personal capacity and/or
- g. The Defendant has been improperly joined in his personal capacity as a Defendant and/or
- h. The Originating Summons and/or pleadings disclose no and/or no reasonable cause of action against the Defendant and/or
- i. The Originating Summons and/or pleadings is scandalous, frivolous, vexatious and/or
- j. The Originating Summons and/or pleadings may prejudice, embarrass, or delay the fair trial of the action and/or
- k. The Proceedings and/or the Originating Summons and/or pleadings are otherwise an abuse of the process of the Court.

9. Both parties had filed their Affidavit which they relied upon and the Court perused in determining this matter.

**Law on striking out**

10. Order 18 Rule 18 of the High Court rules provides that the -

‘Court may at any stage of the proceedings order to be struck out or amended any pleadings for the indorsement of any writ in any action or anything in any pleadings or in the indorsement on the ground that –

- (a) It discloses no reasonable cause of action or defence, as the case may be; or
- (b) It is scandalous, frivolous or vexatious or
- (c) It may be prejudicial, embarrass or delay the fair trial of the action or
- (d) It is otherwise an abuse of the process of the court;

And may order the action to be stayed or dismissed or judgment to be entered accordingly as the case may be.

(3) this rule shall, as far as applicable, apply to an originating summons and a petition as if the summons or petition as the case may be, were a pleading’.

11. In Supreme Court Practice 1988 (Vol 1 Sweet and Maxwell, London) pg 312-313, paragraph 18/19/1 which states –

'This rule constitutes a wide and general provision both useful and necessary to enforce the rules of pleadings. It empowers the Court

- (i) By summary process i.e. without a trial in a normal way, to stay or dismiss an action or enter judgment against the defendant, where the pleading discloses no reasonable cause of action or defence or where the action or defence is shown to be frivolous or vexatious or otherwise an abuse of the court and
- (ii) To strike out the pleadings or endorsement or any matter contained therein which does not conform with the overriding rule that a pleading must contain only material facts to support a party's claim or defence, and must not therefore be, or contain any matter which is scandalous, frivolous or vexatious or which is prejudicial, embarrassing or delay the fair trial of the action or is otherwise an abuse of the process of the court.

Apart from this rule, the Court has an inherent jurisdiction to stay or dismiss actions to strike out pleadings which are vexatious or frivolous, or in any way an abuse of the process of the Court under which it could deal with all the cases included in this rule (Reichel -v- Magrath (1889) 14 App.Cas. 665; Remington -v- Scoles [1897] 2 Ch. 1, CA; Stephenson -v- Garnett (1898) 1 QB 677). There has been considerable extension in the inherent jurisdiction of the Court to protect itself from abuse (Metrop. Bank -v-Pooley (1885) 10 App.Cas 210).'

12. In Singh -v- New India Assurance Co Ltd [2023] FJCA 40; ABU102;2019 (24 February 2023) Basnayake JA, Lecamwasam JA and Jameel JA stated –

'1] The law relating to **striking out** of a Statement of Claim reflects two principles, one is that frivolous, vexatious actions ought not to be entertained, and that the discretion of the court to strike out proceedings should be used very sparingly, and only in exceptional cases where legal questions of importance and difficulty are raised. If there are triable issues which merit the adducing of evidence during the trial whether it is the plaintiffs or the defendants, and is not open to a defendant to take up a position extracted in cross-examination, and to then found a "*preliminary objection*". Whilst courts must ensure that their processes are not being abused, no court would prevent access to it if failure to do so would result in a miscarriage of justice. The Respondent stated in its Written Submissions in the court below that the application for **striking out** is made on the ground that, "*there is no reasonable cause of action, it is frivolous vexatious scandalous and otherwise an abuse of the process of court, as the plaintiff is not the rightful party in the matter*". This was later reflected in the findings of the learned High Court Judge.' (underlining my emphasis).

## **Analysis**

13. The Applicant/Defendant contends that the proceeding or action is a probate action under Order 76 of the Fiji High Court Rules requiring that where the Plaintiff/Respondent seeks revocation of the grant of letters of administration, the application must commence by Writ issued from the Registry.

### ***Order 76 of the Fiji High Court Rules***

14. Order 76 Rule (1) sub-rule (2) of the Fiji High Court Rules defines 'probate action' to mean-

'an action for 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 of probate business.'

15. In the Supreme Court Practice 1988 (Vol 1 Sweet and Maxwell, London) pg 1167 and 1168, paragraph 76/1/3 and 76/1/5 –

'Any person whose interest in the in the estate of a deceased person is prejudiced by a testamentary document may compel the executor or other person seeking to propound it to do so in an action and establish it by the examination of one or more of the attesting witnesses.

**Actions for revocation of grants-** These arise, after grant has been made under the non-contentious procedure, on such ground as the alleged invalidity of the will, or that the person who obtained the grant is not entitled to it.'

### ***Order 85 Rule 2 of the High Court Rules***

16. The Plaintiff/Respondent on the other hand, relied upon Order 85 of the Fiji High Court Rules that provide for Administration and Similar Actions. Rule 2 states –

'(1) Any action may be brought for the determination of any question, or for any relief which could be determined or granted, as the case may be, in an administration action and a claim need not be made in the action for the administration or execution under the direction of the Court of the estate or trust in connection with which the question arises or the relief is sought.

(2) Without prejudice to the generality of paragraph (1), an action may be brought for the determination of any of the following questions:-

- (a) Any question arising in the administration of the estate of a deceased person or in the execution of a trust;
- (b) Any question as to the composition of any class of persons having a claim against the estate of a deceased person or a beneficial interest in the estate of such a person or in any property subject to a trust;
- (c) Any question as to the rights or interests of a person claiming to be a creditor of the estate of a deceased person or to be entitled under a will or on the intestacy of a deceased person or to be beneficially entitled under a trust.'

17. The Plaintiff/Respondent contests that pursuant to Order 85 Rule (4) of the Fiji High Court Rules, an originating summons can be used for the purposes of raising questions regarding the grant of letters of administration and therefore any grant of relief to which the plaintiff is entitled by reason of a breach of trust or wilful default or other misconduct of the defendant notwithstanding that it began by originating summons, but it is without prejudice to the power of the Court to make an Order under Order 28 rule 9 of the Fiji High Court Rules.

18. In the Supreme Court Practice 1988 (Vol 1 Sweet and Maxwell, London) pg 1244-1245, paragraph 85/1/1 explained the scope of the Order as follows -

'This Order deals with the actions of the administration of the estate of a deceased person, for the execution of a trust, for the determination of any question arising in the course of administration or in connection with a trust and cognate matters. The Order emphasizes that the list of questions and orders set out therein are not intended to be comprehensive.

The Originating Summons has a life of its own under O.5 r.1 and can be used for any appropriate purpose. Unless the plaintiffs claim is based on allegation of fraud originating summons will normally be the correct document for initiating proceedings with regard to the domestic affairs of an estate or trust (o 85, r.4). If however, the proceedings relate to a breach of trust or wilful default on the part of a trustee which can be specified with some precision and there is likely to be a substantial dispute of facts, the proceedings should be commenced by writ so that the trustee shall have available to him the full machinery for discovering precisely the charges against him (Re Sir Lindsay Parkinson & Co Ltd Settlement Trusts (1965) 1 WLR" (underlining my emphasis)

19. Having considered these two Orders in the High Court Rules the Court considered the application before it.

20. The Plaintiff/Respondent's originating summons seeks revocation of the grant, removal of the appointment of the Applicant/Defendant as Administrator and appointment of new administrators, themselves, to administer the Estate.



21. In fact these are orders seeking that the Trustee has wilfully defaulted in his duties. It therefore requires the Trustee to provide evidence.
22. In order to do so, appropriately the Plaintiff/Respondent should have filed their application by Writ.
23. Hence the application to seek revocation of the grant of Letters of administration is a contentious probate action which seeks that the Court consider the administration of the Estate and the inability of the Trustee to wilfully conduct the affairs of the Estate appropriately.
24. My brother Brito J had already determined by a Ruling that it would not grant that this application be converted into a Writ and rightfully so. He already foresaw these difficulties in dealing with the matter in the current form.
25. Hence given the application before me, the Court finds that the application by Originating summons is misconstrued.
26. This Application is properly dealt with under Writ rather than by Summons.
27. There are a number of prayers for relief regarding the manner in which the Trustee has conducted the affairs of the Estate. However in doing so, ultimately the final relief sort are orders to revoke the Grant, remove the Trustee and appoint new Trustees. The Court finds that this is a contentious matter and better to initiate proceedings by Writ.
28. In the case of Singh -v- Singh [2018] FJHC 1040; HPP59.2017 (29 October 2018) Sharma V.D J held that the application to remove a Trustee was not embodied in Order 76 of the High Court Rules.
29. It is correct that the provision does not specifically provide for this. However, in an application initiated by Writ, where the Court finds that the Trustee has breached their duties, rightfully the relief of removal would automatically follow. I find that this is not a good enough reason that Order 76 of the High Court Rules should not apply in this instance.
30. Furthermore, the Applicant/Defendant argues that the originating summons relied upon is not in accordance with Order 85 of the High Court Rules. The originating summons is a hybrid and does not comply with either Form 3 or Form 4.
31. In Singh -v- Singh (Supra) Justice Sharma V stated :

In terms of **Order 7 Rule 2 of the High Court Rules, 1988**, the present **Originating Summons** is not made ex-parte but **inter-parte** and therefore the correct Form to use would be **Form No. 3** or, if so authorized or required, in Form No. 4. This provision of the law allows the Plaintiff to either use Form 3 and or Form 4 depending on the type and requirement of the application that would be made.

**“Form of Summons, etc. (O.7, r.2)**

***2.-(1) Every originating summons (other than an ex parte summons) shall be in Form No. 3 or, if so authorized or required in Form No. 4 in Appendix A, and every ex parte originating summons shall be in Form No. 5 in Appendix A.”***

32. When considering the Originating Summons of the Plaintiff/Respondent, the Court finds that the Originating Summons is in accordance with Form 3 with some missing parts. I agree with Counsel for the Applicant/Defendant, there was no caution as to the manner in which the Originating Summons was prepared. The document did not reflect either Form 3 or Form 4 and is irregular.
33. Hence the Court finds that the application is a frivolous and vexatious and also unreasonable cause of action.
34. The Applicant/Defendant has also argued that the description of the application against them is against him in person which is wrongfully instituted.
35. I find that the Applicant/Defendant is correct. The Defendant should be sued in his capacity as the Administrator and not in person. To institute an action against him personally for his conduct as the Administrator for the Estate of the Deceased is incorrect.
36. There are instances where the Masters Court had removed from the prayers the reliefs which were contrary to the required reliefs applicable under Order 85 of the High Court Rules. However in that case, the matter was a non-contentious probate application and hence Order 85 was applicable.
37. The Court will thus exercise its powers to strike out the application.
38. The Plaintiff/Respondent is at liberty to initiate its actions by Writ.

### **Costs**

39. The Court will award costs to the Applicant/Defendant for the sum of \$1000.00.

### **Orders of the Court**

40. The Court orders:
- (i) Grants the application for striking out and order in terms of the application;
  - (ii) Costs of \$1000 awarded to the Applicant/Defendant.



A handwritten signature in black ink, appearing to be "Mrs SLTT W Levaci", written over a horizontal dotted line.

**Mrs SLTT W Levaci**  
**Acting Puisne Judge**

**13 October, 2023**