

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 108 of 2021

BETWEEN : **LILA WATI** of Nasoso, Nadi, and Widow.

PLAINTIFF

AND : **DHARMENDRA PRASAD** as the executor and trustee of the estate of Virendra Bihari aka Virendra of Votualevu, Nadi, Taxi Proprietor

DEFENDANT

Before : Master U.L. Mohamed Azhar

Counsels : Mr. S. Nand with Ms. D. Nair for the Plaintiffs
Mr. K. Siwan for the Defendant

Date of Ruling: 22.08. 2025

RULING

01. The plaintiff is the second wife of late Virendra Bihari. It was a legal marriage after death of late Bihari's first wife. The defendant is the stepson of the plaintiff. Late Bihari was the registered proprietor of Crown Lease No. 9499. Late Bihari died testate appointing the defendant as the Executor and Trustee by his Will dated 22 August 2006.
02. Late Bihari devised and bequeathed his real and personal properties in the following manner as pleaded in paragraph 07 of the statement of claim:

7. **THAT** the Deceased in his last will dated the 22nd day of August, 2006 bequeathed his property at Clause 3 as follows:-

I GIVE DEVISE AND BEQUEATH all my property both real and personal of whatsoever kind and nature and wheresoever situate at the time of death unto my trustee UPON TRUST:-

- (a) To pay all my jus debts, funeral and testamentary expenses including all estate succession and other incidental duties and expenses in respect of my estate.
- (b) To maintain my wife LILA WATI (father's name Durga Prasad) her life interest or until her remarriage.
- (c) To allow my wife to occupy the flat which she occupies at the time of my death for her lifetime or until her remarriage.
- (d) To pay all rentals for my flat no. 2 on Crown Lease No. 9499 situate at Nasoso, Nadi to my wife LILA WATI.
- (e) To transfer my Taxi Permit and Car No. LT 1252 to myson DAVENDRA PRASAD of Nasoso, Nadi.
- (f) To pay to my wife LILA WATI all sums owing to me by my sons DHARMENDRA PRASAD AND DAVENDRA PRASAD at the time of my death.
- (g) All the rest, remainder and residue of my estate to my son DHARMENDRA PRASAD absolutely.

03. The defendant obtained the Probate. However, he allegedly failed to administer the estate of late Bihari in accordance with his Will. The plaintiff, inter alia, alleged that, the defendant failed to pay her the rental income of Flat 2 situated on the Crown Lease No. 9499; the defendant failed to pay the plaintiff the moneys he owed to late Bihari as per the Will; and the defendant fraudulently transferred the Crown Lease No. 9499 to his name and thereby deprived the plaintiff of her income as per the Will of her late husband. The plaintiff also alleged that, she lost the use of the Crown Lease No. 9499 and also lost the income of Flat 2 situated on the said Crown Leasee. The plaintiff therefore sued the defendant and moved the court for certain declarations in relation to her entitlement and the alleged fraudulent transfer of the Crown Lease No. 9499. In the alternative, the plaintiff sought compensation equivalent to the value of Flat 2, in addition to damages and interests.

04. The defendant acknowledged the writ through his solicitors and immediately filed the current summons pursuant to Order 18 rule 18 of the High Court Rules. The summons is supported by an affidavit sworn by the defendant and relies on all four grounds to strike out the plaintiff's action.

05. The law on striking out of pleadings is well settled. The Order 18 rule 18 of the High Court Rule gives the discretionary power to strike out the proceedings for the reasons mentioned therein. The said rule reads:

18 (1) The Court **may** at any stage of the proceedings **order to be struck out or amend** any pleading or the indorsement of any writ in the action, or anything in any pleading 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 prejudice, 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.

- (2) No evidence shall be admissible on an application under paragraph (1)(a).
- (3) This rule shall, so 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 (emphasis added)

06. Megarry V.C. in *Gleeson v J. Wippell & Co.* [1971] 1 W.L.R. 510 made the following observation at 518:

“First, there is the well-settled requirement that the jurisdiction to strike out an endorsement or pleading, whether under the rules or under the inherent jurisdiction, should be exercised with great caution, and only in plain and obvious cases that are clear beyond doubt. Second, *Zeiss No. 3* [1970] Ch. 506 established that, as had previously been assumed, the jurisdiction under the rules is discretionary; even if the matter is or may be *res judicata*, it may be better not to strike out the pleadings but to leave the matter to be resolved at the trial”.

07. Marsack J.A. in his concurring judgment in *Attorney General v Halka* [1972] 18 FLR 210, explained how the discretionary power to strike out should be exercised by the courts and held that:

“Following the decisions cited in the judgments of the Vice President and of the Judge of the Court below I think it is definitely established that the jurisdiction to strike out proceedings under Order 18 Rule 18 should be very sparingly exercised, and only in exceptional cases. It should not be so exercised where legal questions of importance and difficulty are raised”.

08. In **Ratumaiyale v Native Land Trust Board** [2000] 1 FLR 284 (17 November 2000) the court held that:

“It is clear from the authorities that the Court's jurisdiction to strike out on the grounds of no reasonable cause of action is to be used sparingly and only where a cause of action is obviously unsustainable. **It was not enough to argue that a case is weak and unlikely to succeed**, it must be shown that no cause of action exists (**A-G v Shiu Prasad Halka** [1972] 18 FLR 210; **Bavadra v Attorney-General** [1987] 3 PLR 95”. (Emphasis added).

09. Accordingly, the general principle is that the order for striking out should only be made if it becomes plain and obvious that the claim or defence cannot succeed. The courts cannot strike out an action for the reason that, it is weak or the plaintiff or the defendant is unlikely to succeed in his or her claim or defence.
10. The court has to examine the allegations in the pleadings to come to a conclusion on reasonable cause of action (**Razak v. Fiji Sugar Corporation Ltd** [2005] FJHC 720; HBC208.1998L (23 February 2005)). The statement of claim contains several allegations as mentioned above. In nutshell, it is alleged that, the defendant fraudulently transferred estate property detrimental to the beneficial right of the plaintiff and in violation of the Will of the deceased. Accordingly, I hold that, the pleadings clearly demonstrate the cause of action against the defendant.
11. The defendant stated in his affidavit that, the deceased was not the owner/legal proprietor of the subject property. The defendant stated that, the plaintiff relied on a Family Deed dated 02 February 2005 between the deceased and his sons. However, the deceased entered into another Family Deed, later in year 2007. The defendant annexed copies of both Deeds with his affidavit. The defendant also annexed with his affidavit a copy of another deed executed by the deceased. It is a Deed of Gift dated 24 May 2011. The defendant claimed that, by the said Deed of Gift, the deceased gifted the subject property to him due to love and affection. The entire affidavit filed by the defendant contains several defences to the claim made by the plaintiff in her statement of claim.
12. Examination of the statement of claim of the plaintiff and the affidavit filed by the defendant reveals that, there are several questions to be determined in this matter. Some

of them are listed below. (a) Whether the defendant acted in accordance with the Will of the deceased? (b) Whether the defendant fraudulently transferred the property? (c) Whether the defendant deprived the plaintiff of her right to benefit from the estate of the deceased in accordance with his will? (d) Whether the defendant acted in violation of the Will of the deceased? (e) Whether the deceased was the lawful proprietor of the property in question? (f) Whether second Family Deed claimed to have been executed by the deceased is valid and enforceable? (g) Whether the Deed of Gift claimed to have been executed by the deceased in transferring the property in question is valid and enforceable?

13. These questions cannot be decided only on the affidavit. The court needs more extrinsic evidence refined by cross examination. It is well settled that, the Order 18 rule 18 does not apply when the extrinsic evidence is necessary to determine the issues between the parties. A.L. Smith L.J. in A.G. of Duchy of Lancaster v L. & N.W. Ry. Co [1892] 3 Ch 274, C.A, held at page 278 that:


It seems to me that when there is an application made to strike out a pleading, and you have to go to extrinsic evidence to shew that the pleading is bad, that rule does not apply. It is only when upon the face of it it is shewn that the pleading discloses no cause of action or defence, or that it is frivolous and vexatious, that the rule applies.

14. Accordingly, this is not plain or obvious case where the cause of action is plainly unsustainable. There are complicated issues which need to be determined through the evidence. Therefore, the court cannot exercise its jurisdiction under the Order 18 rule 18 in this case. As the result, I make the following orders:

- a. The summons filed by the defendant is dismissed;
- b. The defendant should pay a summarily assessed cost in sum of \$ 3,000 to the plaintiff within two weeks from today; and
- c. The matter to be mentioned before the Madam Master on 11.09.2025 for further directions on completing pre-trial steps.

At Lautoka
22.08.2025




U.L Mohamed Azhar
Master of the High Court