

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

CIVIL ACTION NO. HBC 217 OF 2023

BETWEEN : **JOSEPH MICHEAL** of Olosara Sigatoka, in the Republic of Fiji
Island
1ST PLAINTIFF

AND : **SAMUEL** of Kavanganasau of the Republic of Fiji Islands,
Farmer.
2ND PLAINTIFF

AND : **PUSHPA MANI SAMUEL** of Australia- Now holidaying in Fiji.
DEFENDANT

BEFORE : Mr. A.M. Mohamed Mackie- J.

COUNSEL : Mr. Tamanikasaqa I. on instruction of Sushil Sharma Lawyers, for
the Plaintiff
Ms. Khan N., for the Defendants

HEARING : On 24th October 2025.

W. SUBMISSIONS : Filed by the Plaintiffs on 5th May 2025.
Filed by the Defendant on 19th November 2025.

DATE OF RULING : 26th November, 2025

RULING

A. INTRODUCTION:

1. Before me is a SUMMONS (“the Application”) filed by the Defendant’s Solicitors on **16th October 2024** seeking for the following orders;
 1. *That Amended Writ of Summons filed by the Plaintiff on 29 September 2023 be wholly struck out for failure of the Plaintiffs to comply with the conditions of 0.76, r.2 of the High Court Rules 1988;*
 2. *An order pursuant to 0.12, r.7 of the High Court Rules 1988 that the action be struck out, dismissed or permanently stayed for lack of jurisdiction;*
 3. *An order pursuant to 0.18, r.18 (d) of the High Court Rules 1988 that the action be struck out, dismissed or permanently stayed;*
 4. *Alternatively, an order pursuant to the inherent jurisdiction of the Court that the action be struck out as an abuse of process, for lack of jurisdiction.*

Alternative Orders sought by the Defendant are as follows

5. *The Formal Proof Hearing date on 5th December 2024 against the Defendant be vacated and/or adjourned.*
 6. *That the Defendant be granted leave to file its Statement of Defence*
 7. *That there be an abridgement of service*
 8. *That the Plaintiff pays the Defendant costs incidental to this application hereto.*
2. The Application is supported by the affidavit of Pushpa Mani Samuel (the Defendant) sworn on 13th September 2024 and filed on 16th October 2024, together with annexures thereto marked as “PMS-1” to “PMS-5”
 3. The said Application came up on 05th December 2024 for inter-parte hearing, when the formal proof hearing also came up as the Defendant had failed to file the acknowledgement of service and/ or the Notice of Intention to Defend or the Statement of Defence within the specified time period.
 4. However, on the said date, Counsel for both parties, having discussed the possibility of a settlement, obtained an adjournment for one month time in order to explore further and inform the Court if the matter is to be settled, on which the court put on hold the formal proof application and the strike out application and adjourned the matter for 14th February 2025. When the matter was mentioned on 14th February 2025, it was again deferred to 26th March 2025 as the parties had moved for further time to consider settlement.
 5. The parties were not at variance on material facts averred in the Defendant’s Affidavit in support (*as to the existence of the last will, obtaining probate by the Defendant, parties’ relationship and the fact that the Plaintiffs including the late Steven Samuel are the surviving beneficiaries of the late ABRAHAM’s estate*). No affidavit in opposition was filed by the Plaintiffs, but resolved to address the legal issues only, however subject to the settlement talks.
 6. Eventually, as no settlement was arrived at, the Striking out application was taken up for hearing on 24th October 2025. At the hearing, Counsel for the Defendant made her oral submission and subsequently filed written submissions on 19th November 2025. Counsel for the Plaintiff opted to rely on the written submissions that had already been filed on 05th May 2025.

B. BACKGROUND:

7. The Plaintiffs, the Defendant and one Steven **Samuel** are the children of one late **Abraham** of Kavanganasau, Sigatoka, who had left behind his Last will and Testament dated 20th January 1976, appointing his elder son **Steven Samuel** and the Defendant as the Co- Trustees. The said Steven Samuel, who is a brother of the Plaintiffs and the Defendant, is said to be a deceased now
8. The Defendant **Pushpa Mani Samuel** lodged the application for probate in the year 2014 and obtained the same on 15th October 2024 with the consent and authority from her co-Trustee the late **Steven Samuel**.

9. The Plaintiffs, including the said late Steven Samuel, are the surviving beneficiaries of the Estate of Late **Abraham**. The Defendant and the said Steven Samuel were appointed as co-trustees as per the deceased Abraham's Last will.
10. After her appointment as a Trustee, along with the said Steven Samuel, the Defendant, with the consent of the said Steven Samuel, obtained the Probate in her sole name and subsequently obtained a 99 years Lease for the land, which is the part of the estate, in favor of the Estate since the former lease had expired on 31st December 2018.

Writ of Summons:

11. The Plaintiffs on 28th September 2023 filed their Writ of summons and the Statement of Claim, which was amended on 29th September 2023, seeking the following orders against the Defendant;
 - a. *The Defendant be ordered to provide outdated full and proper accounts of Administration in the Estate of Abraham from 13th day of October 2014 till to date.*
 - b. *Alternatively, the defendant to be removed as a trustee of the Estate and the Plaintiffs to be appointed as new trustees.*
 - c. *The Defendant shall be ordered not to assign, sublease, mortgage or engage in any dealing whatsoever in respect of the trust property without the prior written consent of the Plaintiffs.*
 - d. *General damages for breach of fiduciary duty by the defendants.*
 - e. *Costs on Solicitor Client indemnity basis.*
 - f. *Any other and/ or further relief that seem just to this honorable Court.*
12. Despite the admitted service of the amended Writ of Summons and the Statement of claim, the Defendant failed to file the Notice of Intention to defence and/ or the acknowledgement of service or the Statement of defence. Thus, an application for default judgment being filed on 23rd November 2023 and reportedly served on the Defendant, she did not respond to it. As a result, on 26th September 2024, the matter was fixed for formal proof hearing to be held on 5th December 2024. The Defendant denies the service of this Application for default Judgment.
13. It was at this juncture; the Defendant's Solicitors filed the Striking out Application in hand on 16th October 2024, seeking for the reliefs therein, which are reproduced in paragraphs 1(1) to (8) above.

**C. SUBMISSIONS:
By the Defence Counsel;**

14. The main objection raised by the learned Counsel for the Defendant is that the Plaintiffs have instituted the present action in the wrong jurisdiction. By relying on the Chief Registrar's Practice Direction No-2 of 1994, counsel argued that all probate

business, contentious and non-contentious, are to be dealt with at the probate Registry at Suva High Court.

15. Further, by referring to the case law authority in ***Kwan v Kwan [2015] HPP 14 of 2014***, cited by the Plaintiff, counsel for the Defendant also argued that since the plaintiffs' action is for the removal of the Trustee, it has to be filed and dealt with under order 85 Rule 2, and the action must be commenced by way of an origination summons in terms of Order 85 Rule 4 of the HCR 1988. In support of her contention, the defence Counsel relied on the learned Acting Master's ("Master") decision in ***Joseph v Smith [2023] HPP 73 of 2021 (12 April 2023)***, wherein the Master held "***My findings are that the Orders sought by the Plaintiff relates to administrative actions Order 85 of the High court rules and the proceeding should be by way of Originating summon***".
16. However, Counsel for the Defendant maintains his stern position that whether the action is brought under Order 76 or 85, the same needs to be instituted at the probate registry in Suva, and it has to be by way of an Originating summons, if it is filed under order 85.
17. In order to justify the alternative reliefs prayed for in the Defendant's Summons, Counsel for the Defendant also argues on the propriety of the reliance on Order 13 Rule 1 and Order 19 Rule 7 of the HCR 1988 by the Plaintiff in their SUMMONS filed on 23rd November 2023 seeking for default judgment against the Defendant. I find this argument by the defence counsel holds water as none of the above orders and rules (O13 r 1 & O19 r 7) would assist the Plaintiff since it is clear that the Plaintiff's action has to be under Order 85 of the HCR 1988.

Submissions by the Plaintiffs' Counsel:

18. Learned Counsel for the Plaintiff in his written submissions, while contending that the action for removal of Trustee and Executors does not fall within the definition of Probate Action pursuant to Order 76 Rule 2 of the High Court Rule 1988, conceded that they can file this Action by way of an Originating summons pursuant to Order 85 Rule 4 of the High Court Rules 1988.
19. Counsel also drew my attention to the case of ***Kawan n Kawan [2015] FJHC 381; HPP 14.2014 (27 May 2015)*** wherein the Plaintiff had filed a Notice of motion to remove the Executor and Trustee in which the Court observed as follows.

"15. I was not pointed out any statute or law that required the proceedings to be instituted in a particular manner in relation to removal of trustees or executors. The Trustee Act (Cap 65) of Succession Probate and Administration Act (Cap 60) deals with appointment and removal of trustees and or executors. The learned counsel for the Defendants was unable to provide such specifically prescribed provision in law. In the circumstances the 'Originating Motion' could be an appropriate means of approaching the Court for the removal of trustee and or executor in the absence of specifying procedure. This should not be considered as the exclusive manner in approaching the Court, but this is an option available to any litigant including the Applicant in this matter. The next issue is that the Applicant had not mentioned the motion as an 'Originating Motion' in its heading.

16. *There is 'Notice of Motion for Application for Removal of Executors and Trustees' instead of 'Originating Motion' filed in this court. The objection of the counsel for the Defendants was more of a technical nature. Order 2 rule 1 of the High Court Rules of 1988 specifically deals with irregularities and noncompliance and states that such an act would not nullify the proceedings. A fortiori, it is late in the day to make such a technical objection and Order 2 rule 2 expressly deals with such situation and states as follows.*

'2(1) An application to set aside for irregularity any proceedings, any step taken in any proceedings or any documents, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.

(2) An application under this rule may be made by summons or motion and the grounds of objection must be stated in the summons or notice of motion.'(emphasis added)

17. *Firstly, there was no summons seeking striking out of the 'Notice of Motion' for alleged irregularity or any specific non-compliance and secondly such application to set aside the 'Notice of Motion' for irregularity should have been made within a reasonable time and before the Defendants had taken any fresh step after becoming aware of the irregularity. In this matter the Defendants had opted to file an affidavit in opposition, and the matter was fixed for hearing. Now, the Defendants cannot raise objection regarding the alleged irregularity of the title being 'Notice of Motion for Application for Removal of Executors and Trustees'.*

18. *There was no prejudice or misapprehension due to the heading been a 'Notice of Motion for Application for Removal of Executors and Trustees' instead of 'Originating Motion'. The request of the Applicant is only for an order for Removal of executors and trustees from the estate of Kwan Chew Kuan and this was clear enough for the parties who had acknowledged the service and had also retained a solicitors firm to act on their behalf. The Applicant is appearing in person, hence the alleged irregularity in the 'Notice of Motion' cannot be considered as fatal irregularity to deny a party's access to justice. If the Respondents desired to raise this issue as an irregularity they should have filed such an application prior to taking any step as required in the law. The first preliminary objection is overruled".*

20. Referring to the absence of an Application by the Defence under Order 2 Rule 2 to point out the alleged irregularity, Counsel for the plaintiff referred to the latter part of paragraph 15 above in ***Kawa v Kawa*** (supra) which states;

"This should not be considered as the exclusive manner in approaching the Court, but this is an option available to any litigant including the Applicant in this matter. The next issue is that the Applicant had not mentioned the motion as an 'Originating Motion' in its heading".

21. Counsel for the plaintiff, by illustrating the decision in the said action, also emphasized that instituting action for removal of Trustee and Executor need not be necessarily by way of Originating summons only , but it is an option available to litigants, who can file by way of Motion, Originating Summons or Writ of summons and it is the discretion of the court to cure any irregularity in that regard pursuant to Order 2 Rule 2 of the High court rules 1988.

22. Counsel for the plaintiff also made convincing submissions as to why the Plaintiffs need not have relied on the Order 76 rule 2 of the High Court Rules 1988.

D. DECISION:

23. On careful perusal of the Orders 76 and 85 and the related Rules thereto in the High Court Rules 1988, it is abundantly clear that the Plaintiffs need not have relied on the Order 76 of the High Court Rules 1988 for the purpose of this action.

24. The substantive reliefs sought by the plaintiffs, as per their Statement of Claim, is an order directing the Defendant to provide audited full and proper accounts of Administration of the Estate, which squarely falls under Order 85 Rule 2 sub-rule (3) (a) of the HCR. The alternative relief of removal of trustee does not fall under the ambit of "**Probate Action**" for the Plaintiffs to have commenced this action under Order 76 (2) of the HCR.

25. The definition of '**Probate Action**' is found in Order 76 Rule 1(2) of the HCR, which reads as follows;

*(2) In these Rules "probate action" means an action for the **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 probate business.*

26. It is clear that the above Order 76 Rule 1 (2) only recognizes actions for grant of probate on wills, or Letters of administration of the estate of the deceased or for the revocation of such grant or for a decree pronouncing for or against the validity of the will.

27. The Plaintiffs, at paragraph 4;11 of their written submissions, have clearly stated that their action does not fall under Order 76 Rule 2, which caters only to a probate action. They conceded that it is found under Order 85 of the HCR falling into the category of "**Administrative and similar Actions**". Since this action is founded under order 85 of the HCR, it need not necessarily be filed at Suva to involve the Chief Registrar and the related procedures adopted for the Probate actions under order 76 of the HCR.

28. The Defendant too in her submissions conceded that for the relief of removal of Trustee, as prayed for by the Plaintiff, the action should be commenced under Order 85 of the HCR.

29. The fact that the Plaintiffs have filed the action as a writ action before this Court, need not necessarily have deprive them from seeking the relief pursuant to Order 85 of the HCR, since no Probate business is involved hereof. In my view, the Plaintiff has filed this action in the correct jurisdiction and this court can proceed with it as a writ action.

30. As argued by the Defence Counsel, the proper mode of filing may have been by way of an Originating Summons by relying on the Order 85. However, even if the action is filed by way of originating Summons, the Order 85 .4 of the HCR empowers the Court

to act under Order 28 Rule 9 of the HCR to convert it as a writ action. It appears to me that there are some contentious issues with regard to the administration and the Defendant also may need to put in some issues in her Statement of Defence for the same to be tried at a formal trial.

31. The Defendant waived her right and the first opportunity she had to raise the question of irregularity with regard to the mode of the commencement of the action. She admitted that the Amended writ of Summons was served on **29th September 2023** during her short stay in Fiji, and she could not act promptly as she was leaving for Australia. However, she has made the application in hand for Strike out only on **16th October 2024** after the laps of a time period little more than one year and did not promptly make use of the Order 2 rule 2 of the HCR. I find that the plaintiff can rely on Order 2 Rule 1 sub-rule (3) to safeguard their action.
32. A pertinent point that draws my attention here is that the Defendant, who took a stern position in their written submission to the effect that this Court has no jurisdiction to entertain and hear this action, in her Summons in hand filed on 16th October 2024, by moving for alternative reliefs 5, 6th, 7th & 8th, has tacitly admitted that this court has jurisdiction by calling up on this Court to vacate the formal proof hearing, to grant leave to file the statement of defence, and costs incidental to this application. In view of this, I don't think that the defendant can hold on to her initial position to resist the Plaintiff's action.
33. Before ending this ruling, I also would like to put on record that the Plaintiff's Summons for default judgment, pursuant to Order 13 Rule 1 cum Order 19 Rule 7, which has been put on hold, will not serve any purpose for the following reasons.
 - a. Order 13 Rule 1 serves for liquidated claim. The Plaintiffs' claim is obviously not a liquidated one.
 - b. Plaintiffs' claim is on the Defendant's alleged failure to duly administer the Estate.
 - c. The Order 85 of the HCR, which serves for the actions in relation to the Administration of the Estate, does not make any provision for granting of damages, except for granting reliefs enumerated therein, particularly making order requiring the executor, administrator or trustee to furnish accounts and verify accounts.
 - d. It provides only for payment of money into Court held by a person in his/ her capacity as an executor, trustee etc.
34. Order 19 Rule 7 comes into play only when the plaintiff makes a claim of a description not mentioned under Order 19 Rules 2 to 5. A claim or relief in relation to Administration of the estate is clearly identified under Order 85 only for specific reliefs which are mentioned therein. Thus, Order 19 Rule 7 cannot be relied on by the Plaintiffs as they are at liberty to come under order 85.
35. Thus, maintaining the Plaintiffs' Summons for Default judgment under said order and rules will not serve any constructive purpose. I find it as the waste of precious time and resources. Accordingly, in the interest of Justice to both parties, who are siblings and to avoid the waste of precious time and resources of this Court, I decide to dismiss the same.

36. Further considering the circumstances and the reasons adduced by the Defendant for her failure to file the statement of Defence, I decide to allow the Defendant to file her statement of Defence and to proceed with the matter inter-parte.

37. For the aforesaid reasons, I decide to reserve the order for costs.

E. FINAL ORDERS:

1. The relief sought by the Defence, in the Summons filed 16th October 2024, to strike out the Plaintiffs' action, is declined.
2. The alternative relief Nos. 5 and 6 sought by the Defendant, in the said summons, are granted.
3. This action will continue before this court as a writ action, commenced under Order 85 of the High Court Rules 1988.
4. The Summons filed by the Plaintiff on 23rd November 2023 seeking to enter judgment pursuant to Order 13 Rule 1 and Order 19 Rule 7 is hereby dismissed.
5. The Defendant is at liberty to file and serve the Statement of Defence within 28 days.
6. Reply to Defence to be filed and served within 14 days thereafter.
7. Order on costs reserved.


A.M. Mohamed Mackie
Judge



At the High Court of Lautoka on this 26th day of November 2025.

SOLICITORS:

For the Plaintiff Messrs. Sushil Sharma Lawyers, Barristers & Solicitors
For the Defendant Messrs. Natasha Khan Associates, Barristers & Solicitors