

BACKGROUND

1. The substantive application is a Claim against the Applicant/Defendants as the Administrator of the Estate of Jamila Khatoon alleging that the Applicant/Defendants had acted contrary and in detriment to the interests of the Estate by failing to inform the Plaintiff /Respondent of his appointment as the Administrator, failing to render Accounts of the Estate when asked, no disclosure of the manner of administration, dissipated monies in the bank account of the Estate of Deceased into accounts located in foreign banks and there has not been any distribution of the Estate.
2. The Plaintiff/Respondents seeks the removal of the Administrator, restraint orders be imposed against the Defendants, the grant number 67323 be revoked and there be a full and frank disclosure of the accounts of Estate of Jamila Khatoon.
3. The Applicant/Defendant thereafter filed a Summons to Strike out the Writ on the basis that the Plaintiff had contravened Order 6 Rule 6 (1) of the High Court Rules 1988 for a Writ served outside of jurisdiction and the Plaintiff has no locus as beneficiary to bring these proceedings.
4. The Court affixed the application for hearing and allowed parties time to file their Written submissions as well as responses to the supporting Affidavit.

AFFIDAVITS

Applicant/Defendant's Affidavit

5. The Applicant/Defendant deposes that he seeks that the Court strike out the Writ on the basis that the Writ was issued on 17 October 2023 prior to leave being sort to issue and serve Writ outside of jurisdiction.
6. He deposes that he confirms residence as 16 Heron place, Pakuranga Heights, Auckland contrary to what the Plaintiffs have alleged in their attempted service on him.
7. Furthermore, the Plaintiffs are not residents of Fiji and therefore seeks security for costs against them.

Respondent/Plaintiff's Affidavit

8. The Applicant/Defendant had deposed in an Affidavit filed and served for another proceeding (HPP 48 of 2022) that he was residing in Fiji since 2018 and occasionally travels to New Zealand.
9. The Respondent/Plaintiff also deposes that the grant of Letters of Administration No 67323 to the Applicant/Defendant confirms he is residing in Main Street, Nadi enabling the issuance of Letters of Administration.
10. The Plaintiff/Respondent deposed that in an attempt to extract probate in the Estate their mother Jamila Khatoon for which the Applicant/Defendant pro offered a purported Will dated 6 September 2018, this Will was later rendered invalid by the High Court in HPP 79 of 2018.
11. That eventually the Defendant was served with all documents within Fiji after he was found at the local address in Nadi.
12. The Plaintiff/Respondent also deposed that the Defendant/Applicant had sworn the Affidavit for Letters of Administration undervaluing the Estate to \$1 million when it was more than this because:
 - (a) their late mother had shares and was a previous director in Khans Spares and Auto Services Limited at 20,000 shares, the Estate of Mubarak Ahmed Khan 70,002 shares for which the Defendant had 20,001 shares;
 - (b) Their mother, the late Jamila Khatoon is also the Trustee and Executrix in the Estate of Mubarak Khan, which owns land known as CT 17501.
 - (c) The deceased owned 1 share, Estate of Mubarak Khan owns one share and Bashir Khan owns one share from the 200,000 ordinary shares in Newak Investment Limited.
 - (d) Newak Investment Ltd owns land CT 111156.
13. Finally, they depose they are able to pay Security of Costs if required.

Defendants/Applicants Affidavit in Response

14. The Affidavit in response deposed that his address had changed after the Letters of Administration had been granted and that at the time of service, his address in New Zealand suffices.
15. Affidavit also argued that the Plaintiff/ respondent had flouted the Court Rules.

Law, Submissions and Analysis

16. The Application relies upon Order 18 Rule 18 (1) (d) of the High Court Rules seeking Court to exercise their powers to strike out the Writ of Summons for non-compliance with Order 6 Rule 6 (1) of the High Court Rules.
17. Order 6 Rule 6 (1) of the High Court Rules states that no Writ is to be served outside of Jurisdiction unless leave is granted for it to be issued out of Court.
18. Section 76 (2) of the High court Rules requires that a probate action must be issued out of the Registry and must be indorsed with a statement of the nature of the interest of the Plaintiff and the Defendant in the Estate of the deceased and a Memorandum signed by the Registrar showing the Writ has been produced for his examination.
19. In this instance, the Writ was issued on 17 October 2023 by the Registry after a Statement of interest of the Plaintiff as well as a Memorandum was signed by the Registrar.
20. The Plaintiff then filed their Summons on 17 January 2024 seeking Leave for the Writ to be issued and served outside of jurisdiction having found that the Defendant was no longer able to be served within Fiji.
21. The Applicant/Defendants have argued that through out previous proceedings i.e HPP 48 of 2022 that was later struck out on 13 October 2023, that Gordon and Company had informed the Counsels for the Plaintiff/Respondent that he be served personally at 16 Heron Place, Pakuranga Height Auckland 2010, NZ. At that time the Applicant/Defendant was residing in Fiji with travel entitlement to Auckland.
22. They argued that the onus was on the Plaintiff/Respondent to find where the Defendant resided at that time prior to the issuance of the Writ. The argument is that

the orders for issue of Writ outside of jurisdiction are retrospective and contrary to the High Court Rules.

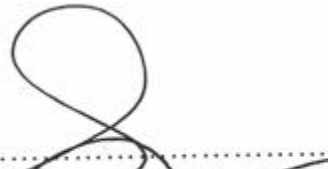
23. Given that no leave was granted for the Writ to be issued overseas, the Defendant/Applicant argued that the Writ was therefore invalid and required to be struck out by the Court.
24. The Plaintiff in their submissions argued that since it became apparent that the Defendant was residing overseas, leave to issue and serve was sort from Court. They knew he resided in Nadi because he had applied for Letters of Administration 2 years prior and swore on oath his residential address as Nadi.
25. Acknowledging the assistance of Counsel, Habib Bank Limited -v- Mehboob Raza -v- Mohammed Sahid Ali and Mehboob Raza and Associates and Horizon Travels Limited CA 53 of 2005 (21 February 2019) Kumar, K (referred to as (Supra) elucidated the principles as follows:
 - (i) Leave to issue Writ for service out of jurisdiction is mandatory.
 - (ii) Order 6 Rule 6 (1) of HCR does not apply to original jurisdiction of the Court by enactment which allows for service to be issued without leave.
 - (iii) Failure to obtain leave cannot be cured by Order 2 rule (1) of HCR as it is a fundamental defect and not irregular.
 - (iv) Failure to obtain leave to issue Writ for service out of jurisdiction makes the proceedings voidable and struck out on an application by the Defendant as of right;
 - (v) Application to setaside a Writ issued without leave must be made before Defendant takes the fresh step and before Acknowledgement of Service.
26. The Plaintiff has argued that the Defendant was served in Fiji in February 2024, a few days after leave was granted. Hence the leave to issue and serve the Writ outside of Jurisdiction by mail was moot.
27. Taking into consideration the principles laid down by Habib Bank -v- Mehboob Raza, I find that in this instance the Defendants argument was correct. Even though the Defendant was a resident in Fiji, where the Writ was to be issued outside of jurisdiction, as was applied for by the Plaintiff, leave to issue should have been obtained in the first instance prior to the issuance of the Writ.
28. The failure of the Plaintiff to seek leave in the first instance rendered the Writ defective.

29. Therefore from the time the Writ was issued, since leave was not granted, until when the date of this Ruling, the Writ is fundamentally defective.
30. Hence although the Plaintiff can argue that they eventually served the Writ, given that it was defective, rendered the service in Fiji null and void.
31. Therefore in accordance with Order 18 Rule 18 (1) (d) of the High Court Rules, the Plaintiff had abused the court processes by seeking both a leave to issue retrospectively when they knew that the Defendant had his residence also in New Zealand, given the previous legal proceedings.
32. The retrospective leave granted is therefore also null and void and devoid of effect.
33. The court will therefore strike out the proceedings.
34. Costs awarded to the Defendants for the sum of \$2500.

ORDERS

35. The Court orders as follows:
 - (i) **The Writ and Statement of Claim is struck out;**
 - (ii) **Costs of \$2500 awarded to the Defendants.**




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Ms. Seriteba LTT Waqainabete-Levaci
Puisne Judge