

**IN THE HIGH COURT OF FIJI
AT SUVA
PROBATE JURISDICTION**

Probate Action No. HPP 66 of 2025

BETWEEN: **AHMED RIAZ DEAN** also known as **AHMED RIYAZ UD-DEAN** of 489 Ratu Mara Road, Nabua, Medical Practitioner.

PLAINTIFF

AND: **ARIFA NISHA DEAN** of 33 Lachal Ave, Kogarah, New South Wales, 2217, Australia.

FIRST DEFENDANT

AND: **ZAIDUN NISHA** also known as **ZAIDUN NISHA DEAN** also known as **ZAIDA NISHA** of 33 Lachal Ave, Kogarah, New South Wales, 2217, Australia.

SECOND DEFENDANT

AND: **NAZRUL NISHA DEAN** also known as **NAZRUL NISHA IQBAL** of 10 Breyntia Street, Kingston, Queensland, 4114, Australia, Retired.

THIRD DEFENDANT

AND: **SHEIK JALAL-UD-DEAN** of 11a Ida Street, Sans Souci, New South Wales, 2219, Australia, Self Employed.

FOURTH DEFENDANT

AND: **SHEIK JAMAL-UD-DEAN** of 3015 East Bay Road, Redwood City, California, 94063, The United States of America, Professional Caregiver

FIFTH DEFENDANT

AND: **AHMAD AFTAB-UD-DEAN** of 27 Ratu Sukuna Road, Nasese, Suva, Businessman.

SIXTH DEFENDANT

AND: **SHEIK FEROZE-UD-DEAN** of 40 Grantham Road, Raiwai, Suva, Accountant.

SEVENTH DEFENDANT

Representation:

Plaintiff: Mr. E. Kumar (Emmanuel Lawyers).

1st to 5th Defendants: Mr. S. Fatiaki (Fatiaki Law).

6th Defendant: No appearance.

7th Defendant: Ms. A. Tuiteci (Prem Narayan Legal Practitioner).

Date of Hearing: 21st of January 2025

Ruling

A. Introduction

- [1] The Seventh Defendant filed summons seeking leave to appeal my interlocutory decision delivered on 29th September 2025. I had extended Caveat No. 963293 over the Grantham Road property until the hearing and determination of the substantive proceedings. The application brought by summons and is supported by affidavit sworn by the Seventh Defendant. The Plaintiff opposes the application and has filed an affidavit in opposition together with written submissions.

B. Submissions

- [2] I have considered all affidavits and submissions filed by the parties.

C. Determination

- [3] The Plaintiff submits that the application is procedurally defective, misconceived in law, and devoid of merit. It is argued that the Seventh Defendant has invoked inapplicable provisions of the High Court Rules, bypassed the mandatory statutory requirement for leave under section 12 (2) (f) of the Court of Appeal Act, and failed to demonstrate any exceptional circumstance justifying leave to appeal an interlocutory order.

- [4] The Seventh Defendant has purported to rely on Order 59 Rules 8 to 11 and Order 3 Rule 4 of the High Court Rules.

Order 59 governs appeals from decisions of a Master and has no application to interlocutory decisions of a Judge. These would not be applicable in the present case as the appeal relates to the decision of a Judge of the High Court and not the Master.

- [5] The right to appeal an interlocutory decision of a single Judge of the High Court is governed by section 12 (2) (f) of the Court of Appeal Act. That provision does not confer an automatic or unfettered right of appeal. An appeal against an interlocutory order lies only with leave, and in the absence of such leave, the Court of Appeal lacks jurisdiction to entertain the appeal.

- [6] Rule 26 (3) of the Court of Appeal Rules regulates the procedure by which such leave is to be sought. It stipulates that where an application may be made either to the High Court or to the Court of Appeal, the application must, in the first instance, be made to the court below, unless that court has no power to grant the relief sought. In the context of interlocutory appeals, the combined effect of section 12 (2) (f) of the Act and Rule 26 is that an application for leave to appeal must first be made before the single Judge of the High Court who delivered the decision.

- [7] Procedural rules do not create or enlarge a right of appeal. They operate only to regulate the manner in which a jurisdiction, conferred by statute, may be invoked. Accordingly, a party seeking to appeal an interlocutory decision must both identify the correct statutory source of jurisdiction and comply strictly with the procedural requirements governing the grant of leave. A failure to do so renders the application procedurally incompetent.

- [8] As such, I am satisfied with the Plaintiff that the application is procedurally defective. The Seventh Defendant has invoked inapplicable provisions of the High Court Rules and has failed to properly anchor the application within the statutory framework mandated by section 12 (2) (f) of the Court of Appeal Act. That defect alone is sufficient to dispose of the application.
- [9] The caveat was lodged pursuant to section 106 of the Land Transfer Act 1971 and extended under section 110 (3). In extending the caveat, I was satisfied that there were serious questions to be tried, that the proceedings were not barred by res judicata, and that preservation of the status quo was appropriate pending trial.
- [10] The Seventh Defendant contends that the decision extending the caveat was wrong in law and in fact. He submits that the Deed of Family Arrangement relied upon by the Plaintiff was rejected in HPP 46 of 2022, that the Plaintiff is disentitled to equitable relief by reason of delay, and that the continuation of the caveat causes prejudice to beneficiaries awaiting distribution of the estate.
- [11] The Plaintiff submits that the application is misconceived. It is argued that the decision itself is of interlocutory and preservatory, that no final rights were determined, and that the Seventh Defendant has failed to demonstrate any error of law or substantial injustice warranting appellate intervention.
- [12] The decision under challenge was interlocutory. It extended a caveat to preserve the subject property pending the hearing and determination of the substantive proceedings. It did not determine the validity of the Deed of Family Arrangement, proprietary entitlements, or any final issue between the parties. As reiterated by the High Court in **Padayachi v Gounder & Ors [2018] FJHC 936; HBC 228.2016 (28th Sept 2018)**, the settled law is that interlocutory orders will seldom justify appellate intervention and appeals against them will only rarely succeed unless exceptional circumstances are shown.
- [13] Leave to appeal against an interlocutory decision is not granted as of right. The threshold is a high one. The applicant must demonstrate an arguable error of law or principle and that substantial injustice would result if leave were refused. The applicable test was succinctly stated in **Niemann v Electronic Industries [1978] VR 431** and has been consistently applied in Fiji.
- [14] I am not satisfied that any arguable error of law or principle has been identified. The issue of res judicata was squarely addressed in my decision. I distinguished the issues determined in HPP 46 of 2022 and concluded that the matters now raised were not finally determined in those proceedings. That conclusion was open on the material before the Court. It does not render the interlocutory decision wrong.
- [15] The doctrine of res judicata is not to be applied mechanically. It applies only to matters which were finally adjudicated between the same parties. As in **Fiji Peacekeeping Action Trustee Association v Minister for Home Affairs & Ors [2016] FJHC 70; HBC 101.2014 (8 February 2016)**, the plea of res judicata is confined to issues upon which the court was required to form an opinion, or which properly belonged to the subject of the earlier litigation. Where an issue was not finally determined, the doctrine has no application.

- [16] The reliance on delay and equitable considerations fares no better. Responsibility for the distribution of the estate rests with the executor. The assessment of delay involved an evaluative judgment on the facts. Disagreement with that assessment does not disclose an error of law.
- [17] In **Goundar v Minister for Health [2008] FJCA 40; ABU0075.2006S (9 July 2008)**, the Fiji Court of Appeal confirmed that interlocutory decisions of the High Court are subject to appellate review only by leave, and that leave should be granted where the discretion was exercised on a wrong principle or was plainly wrong in law.
- [18] The Seventh Defendant has not demonstrated substantial injustice. The continuation of a caveat does not divest ownership or effect a final determination of rights. Any prejudice relied upon is interim and remediable. By contrast, the removal of the caveat at this stage would risk dealings with the property that could defeat the Court's ultimate determination.
- [19] Many of the matters relied upon by the Seventh Defendant are matters for trial. To permit an appeal at this stage would result in fragmentation of the proceedings. That would be undesirable. In **Sea Pilots (Fiji) Ltd v Peckham [2025] FJCA 12; ABU055.2024 (17 February 2025)** the Court warned against piecemeal interlocutory appeals that disrupt proceedings without finally determining the parties' rights. The same considerations apply in the present case.
- [20] I am not satisfied that the decision is wrong or that substantial injustice would result if leave is refused. The threshold for leave to appeal an interlocutory decision has not been met.
- [21] For the reasons given, I refuse the application for leave to appeal. The Seventh Defendant is to pay the Plaintiff \$1000.00 as costs within 21 days. The costs have been summarily assessed.

Court Orders

(a) The application for leave to appeal against the interlocutory decision delivered on 29th September 2025 is dismissed.

(b) The Seventh Defendant is to pay the Plaintiff \$1000.00 as costs within 21 days.



A handwritten signature in blue ink, appearing to read "Chaitanya S. C. A. Lakshman".

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Hon Justice Chaitanya S. C. A. Lakshman
Puisne Judge

30th January 2026