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IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

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FIJI COURT OF APPEAL NO. ABU0049
(High Court Civil Action No. HBC0

BETWEEN:

BRIJ RAM — **APPELLANT**

-and-

MICHAEL BAN DEO — **RESPONDENT**

Mr. G. P. Shankar for the Appellant
Mr. S. Maharaj for the Respondent

Date & Place of Hearing : 15th November, 1994, Suva
Date of Delivery : 17th November, 1994

D E C I S I O N

The applicant seeks leave to appeal against a judgment of the High Court on the ground that the trial Judge should have struck out the action before him because it was a probate action and had been commenced by originating summons instead of by writ of summons.

Mr Shankar provided me with a copy of the originating summons. By it the respondent as plaintiff expressly sought revocation of a grant of probate made to the applicant, a declaration that probate had correctly been granted to the respondent and consequential remedies, including an injunction to restrain the applicant from evicting the respondent from land forming part of the estate to which the two grants of probate related. Before His Lordship the parties concentrated on the

application for the injunction. Probably for that reason he held that the action commenced by the originating summons was not a probate action. Clearly he was wrong; the injunction was sought as consequential upon the revocation of the grant of probate to the applicant and confirmation of the grant of probate to the respondent. (As His Lordship observed, it is ludicrous that two grants of probate of different wills have been made concurrently in respect of the same estate). The action was undoubtedly a probate action (see O.76 r.1(2) of the High Court Rules 1988).

Mr Shankar drew attention to the mandatory terms of O.76 r.2(1) which reads:-

> *"A probate action must begin by writ, and the writ must be issued out of the Registry."*

"Registry" is defined in O.1 r.2(1) in a manner applicable to action of all types. There is nothing in the High Court Act (Cap.13) or the **Succession Probate and Administration Act** (Cap.60) to indicate that "Registry", when used in O.76 r.2(1), bears a meaning different from its meaning as defined in O.1 r.2(1). The originating summons in this instance was issued out of the Registry of the High Court in Lautoka.

The action should have been commenced by writ of summons. However, O.76 r.1(1) provides that the other provisions of the High Court Rules apply to probate actions subject to the

provisions of O.76. O.2 r.1(1) provides that failure to comply with the requirements of the Rules, including requirements as to form or content, is to be treated as an irregularity and does not nullify the proceedings. O.2 r.1(3) reads:-

> *"(3) The Court shall not wholly set aside any proceedings or the writ or other originating process by which they were begun on the ground that the proceedings were required by any of these Rules to be begun by an originating process other than the one employed." (Emphasis added)*

Mr Shankar submitted, however, that O.76 r.2, because of its mandatory nature, overrides O.2 r.1, so that the use of any originating process for a probate action other than a writ of summons renders the proceedings null and void. I do not accept that that is so. O.5 r.2 contains mandatory provisions, similar to that in O.76 r.2, in respect of actions of the types specified there. The provision in O.76 r.1(1) that the Rules apply to probate actions subject to the provisions of O.76 does not, in my view, prevent the application of O.2 r.1. Its ameliorating provisions are as much required in respect of probate actions as in respect of any other proceedings. There is nothing in the nature of probate actions that renders the application of those provisions inappropriate or that is likely to lead to it impeding the proper adjudication of the claims in those actions.

Because of O.2 r.1 the learned trial Judge was correct not to strike out the claim because of the originating process by

which it was commenced. However, he should have required the plaintiff (the respondent in these proceedings) to put his house in order by lodging a writ of summons and taking such other steps thereafter as were required of him by O.76. Any costs incurred by the defendant (the applicant in these proceedings) as a result of the plaintiff's failure to commence the action by the proper originating process should have been borne by the plaintiff.

The application for leave to appeal is dismissed. However, as the reason for the application was the failure, first, of the respondent to commence his proceedings in the High Court correctly and, second, of the learned trial Judge to require the respondent to put his house in order, it is fair that each party should bear his own costs of these proceedings and I so order.

Decision

Application refused.
Each party to bear his own costs.

I. R. Thompson
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Mr. Justice Ian R. Thompson

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