

IN THE HIGH COURT OF FIJI
PROBATE JURISDICTION
AT SUVA

Probate Action No. 14 of 2012

IN THE ESTATE OF DAYA RAM of
Lomaivuna, Vunidawa, Fiji, Retired,
Deceased, Testate

BETWEEN : **DINESH KUMAR** of 432 of Ratu Mara Road, Samabula, Suva, in Fiji,
Mechanic

Plaintiff

AND : **RAJESH PRAKASH** of Lomaivuna, Vunidawa, Farmer

Defendant

Counsel : **Mr P Sharma of R Patel Lawyers** for the **Plaintiff**
Ms Vasiti M. & Mr M Nand of Nands Lawyers for the **Defendant**

Date of Judgment: 17th September, 2013

JUDGMENT

1. Notice of Motion filed by the Plaintiff on 19th February 2013 and sought the following Orders:

- (i) *that the Plaintiff be granted leave to issue an order of committal for contempt of court against the Defendant;*
- (ii) *that costs of the application be paid by the Defendant;*
- (iii) *any further or other orders this Honorable Court seems just.*

2. The said Notice of Motion was supported by the following Affidavit:
 - (a) *Affidavit of Edlyn Elvina Kumar dated 29th January 2013;*
 - (b) *Affidavit of Sweta Anjali Prakash dated 29th January 2013;*
 - (c) *Affidavit of Dinesh Kumar (Plaintiff) dated 29th January 2013;*
 - (d) *Affidavit of Sandeep Deepak Kumar dated 14th February 2013.*
3. The Notice of Motion was filed by the Plaintiff in pursuant to Order 52 Rule 2 of the High Court Rules 1988.
4. When the matter was taken up on 22nd March 2013, Mr R Nand appeared on behalf of the Plaintiff and Mr M Nand appeared for the Defendant. The Defendant's counsel requested time to respond to the Affidavits stated in paragraph 2.
5. Accordingly, directions were made:
 - (a) *The Defendant to file and serve the Affidavits in Response within 21 days on or before 12th April 2013;*
 - (b) *The Plaintiff to file Affidavit in Reply if any before 26th April 2013.*
 - (c) *The Notice of Motion filed on 19th February 2013 was fixed for hearing on 16th May 2013 and was taken up on 21st May 2013.*
6. Having considered the Affidavit evidence, the court grant leave to issue committal proceedings against the Defendant and the Prashika Devi Prakash and the matter was fixed for hearing on 14th August 2013 (*on the motion filed by the Plaintiff on 21st May 2013*).
7. Mr P Sharma, counsel appeared for the Plaintiff and Ms Vasiti with Mr M Nand counsel appeared for the Defendant. At the hearing, the counsel for the Defendant raised two(2) issues:
 - (a) *there was an incorrect procedure of serving the documents under Order 52 Rule (2) Sub rule (2) of the High Court Rules 1988;*
 - (b) *the failure of the Plaintiff to state the name of the Defendant's daughter's name i.e. **Prashika Devi Prakash** in the motion.*

8. Having raised the above two(2) issues, this court has to decide:
- (a) *As to whether there is a procedural defect and/or incorrect procedure of the service of the documents in pursuant to Order 52(2) (2) of the High Court Rules 1988?*
 - (b) *As to whether failing to state the Defendant's daughter Prashika Devi Prakash as a contemnor would restrict the Plaintiff from proceeding against her?*

Analysis and Findings

9. 9.1 Order 52 Rule (2) (2) of the High Court Rules states:

“(2) An application for such leave must be made ex-parte to a Judge in Chambers, and must be supported by a statement setting out the name and description and address of the person sought to be committed and the grounds on which his committal is sought, and by an affidavit, to be filed before the application is made, verifying the facts relied on.”

- 9.2 The Defendant's counsel's position was in pursuant to Order 52(2) the application for leave for order of committal should not have been served on the Defendant's solicitors (which was served on the Defendant's solicitors on 21st March 2013).

- 9.3 The Defendant's solicitors not only accepted the documents but also appeared in the court on 22nd March 2013 and moved to file response and serve the Affidavits, on the Plaintiff's solicitors.

- 9.4 The Defendant's counsel submitted:

- (a) *that the Plaintiff erred in procedure by serving the documents on the solicitors without leave to file and or serve the application for committal;*
- (b) *that the Plaintiff erred in procedure by serving the Notice of Motion seeking an Order for committal without leave for the same from the court;*

(c) *that the Plaintiff erred in procedure by serving the Affidavits in Support of the Notice of Motion by the Plaintiff and his 3 children respectively without leave for an application for committal by this court.*

10.5 It was submitted by the Defendant's counsel, the Plaintiff's solicitors under the notion that leave being granted at the time of serving the documents on 21st March 2013. However, I observe that in such an event the Defendant's solicitors would have noted the Order for Leave was not granted. It is serious lapse on the part of the Defendant's solicitors. I also observe when the matter was taken up on 22nd March 2013, the Defendant's counsel did not bring this issue before the court. The first time this issue was raised in this court was on 14th August 2013 at the hearing. This shows the Defendant's counsel and solicitors have acted negligently in this matter against the interest of their client. However, I am not holding Defendant's solicitors laches against him.

10.6 The Defendant's counsel had cited the case of *State v. Fiji Times Ltd ex-parte Attorney General* [20123] FJHC 1347 (unreported) decided on 1st October 2012 with regard to the procedure. Whilst agreeing on the submission in this matter, I state that the issue was not taken up at the earliest opportunity by the Defendant's counsel and solicitors.

10.7 On the other hand, the Plaintiff's counsel submitted that referring to Order 2 Rules (1) and (2):

“(i) An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, 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”

“(ii) An application under this rule made by summons or motion and the Grounds of objection must be stated in the summons or Notice of Motion.”

10.8 Having quoted Order 2, Rule 2(2) of the High Court Rules 1988, the Plaintiff submitted:

- (a) *the Defendant had not taken steps within reasonable period of time and before the party applying has taken any fresh step after becoming aware of the irregularity as such application for set aside on irregularity should not be allowed;*
- (b) *if the Defendant was unhappy with the Court's Order on 21st May 2013 to grant the Plaintiff to apply for an Order of Committal then he should have filed an appeal against that Order. The Defendant had not filed an appeal to that effect.*

I am not agreeing with the above submissions. The Plaintiff was also aware of the irregularity and he too should have taken corrective action at the earliest opportunity. I also find that the Defendant raised the issue before making a decision by this court on this matter and before the hearing. As such although the Defendant's solicitors had accepted the documents and condoned to the action by the Plaintiff, I hold that the issue was taken up within a reasonable period of time, (*before taking any fresh step by the Plaintiff*). The Plaintiff's argument fails and there is no necessity to consider the submissions under para (b) above with regard to failure to lodge an appeal, (*since the finding was made on paragraph (a) above*).

10.9 I also refer to Order 52 Rule 3(3) which states:

"Order 52 Rule 3 (3) subject to paragraph (4), the Notice of Motion, accompanied by a copy of the Statement and by a copy of the Statement and Affidavit in Support of the application for Leave under Rule 2, must be served personally on the person sought to be committed."

10.10 Order 52 Rule 3(4) states:

"without prejudice to the powers of the court or judge under Order 65 Rule 4 the court or judge may dispense with service of the Notice of Motion under this rule if it or he thinks it just to do so".

I emphasize the words ***"must be served personally on the person sought to be committed"***. In this matter documents were not served personally and accepted by

the solicitors under wrong pretext. Although, Order 52 Rule 3(4) had given the discretion to the court to dispense with the Rule 52 3(3), considering series of irregularities in the procedure in this case if the discretion exercised by this court it shall cause grave prejudice to the Defendant and the said Prashika Devi Prakash. I refer and quote the Supreme Court Practice 1988 (White Book) 52/3/1 page 782 in this regard:

“52/3/1 – Personal service – No order will normally be issued for the committal of a person unless he has been personally served with the order, disobedience to which is said to constitute the contempt, or, if the owner is directed to a group of persons or a corporation, some appropriate member has been personally served. Furthermore, the prosecutor must give each person sought to be committed the fullest notice that an application is being made for his committal (*R. v. Poplar Borough Council (No. 2)* [1922] 1K.B. 95 – *e.g.* by inserting his name in the notice of motion and serving personally upon him a copy of the notice and of the affidavit in support, showing what is alleged against him. Personal service of the notice of motion, enjoined by the rule, requires not merely the personal service of a copy, but an opportunity of inspecting the original (see *Parker v. Burgess* (1843) 3N. & M. 36). But the court may dispense with personal service where the respondent is evading service. Service may be dispensed with only where there is no other court available to uphold the authority of the court and protect the applicant; the dispensation should be recorded in the committal order (*Wright v. Jess, The Times*, March, 1987. C.A.).

10.11 The above paragraph as stated is pertaining to order 52 Rule 3 of the Supreme Court Practice 1988 of U.K. which is identical to Order 52 Rule 3 of the High Court Rules 1988 of Fiji. As such it is evidently clear that in this matter:

(a) The Notice of Motion, accompanied by a copy of the Statement and Affidavit in Support of the Application for Leave under Order 52 Rule 2 was not served on the Defendant and alleged contemnor Prashika Devi Prakash; I also concur with the submission made by the Defendant’s counsel, the Plaintiff failed to specifically seek leave to file application for contempt against the Defendant’s daughter Prashika Devi Prakash.

(b) *The Plaintiff's counsel had not taken any action to remedy the default and/or irregularity;*

(c) *Although, documents were accepted by the Defendant's solicitors that said action cannot be considered as fulfillment of the mandatory requirement of serving the documents personally to proceed under committal proceeding for contempt of court.*

10.12 As such this court conclude and determine the committal procedure instituted by the Plaintiff was incorrect and the Plaintiff's application for committal has no merits. I further find the Plaintiff having not followed correct procedure now rely on the actions by the Defendant to overcome the irregularity, onus lies on the Plaintiff. I determine the issues raised in paragraph 8(a) and 8(b) in favour of the Defendant and purported contemnor Prashika Devi Prakash.

10.13 Accordingly, I make the following **Orders**:

(a) *Plaintiff's application for committal by motion dated 19th February 2013 is dismissed. All Orders made on the said application for committal are rescinded;*

(b) *Plaintiff has liberty to file fresh application for committal if necessary;*

(c) *Plaintiff should pay summarily assessed costs of \$500.00 each to the Defendant and Prashika Devi Prakash within 7 days of this Judgment.*

Delivered at Suva this 17th Day of September, 2013.

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C. Kotigalage
JUDGE