

IN THE HIGH COURT OF FIJI AT LABASA
CIVIL JURISDICTION

Civil Action No.: 46 of 2014

IN THE MATTER of the Trustee Act

IN THE MATTER of the **ESTATE OF KANDSAMI** aka **KANSAMI** late of Soasoa, Labasa, Fiji, Cultivator, Deceased, Intestate.

AND

IN THE MATTER of an application by **SOHAN SINGH** of Nasea, Labasa, Fiji, Businessman as the administrator in the estate of Kandsami aka Kan Sami deceased.

IN THE MATTER of an Application made pursuant to Order 31 of the High Court Rules.

IN THE MATTER of and Application pertaining to the sale of agreement for Lease TLTB Reference No. 4/9/8539.

BEFORE : **Justice Deepthi Amaratunga**
COUNSEL : **Mr. S. Sharma** for the Applicant
Date of Hearing : **9th September, 2014**
Date of Judgment : **15th October, 2014**

JUDGMENT

INTRODUCTION

1. The purported ‘origination (sic) summons (expedited form)’ filed by the administrator of the estate has not indicated the relief that he sought, but in the oral submissions as well as in the affidavit in support stated that he seeks a transfer of estate property to himself as the estate owes him . The summons is purportedly filed in terms of Order 31 of the High Court. The summons indicate only one party the Applicant, but has not stated explicitly as ex parte summons. It had not complied with Appendix 1 form 3 of the High Court Rules of 1988.

ANALYSIS

2. The Originating Summons (Expedited form) dated 5th August, 2014 seeks following orders
 - “1. An order that the property in Agreement for lease reference No 4/9/8539 Qawa subdivision section 3 Lot 67
 2. That any other expedient relief this Honourable Court may think fit.”
3. The order sought in above order 1 is not stated .Though I am inclined to strike out the summons for not stating the order sought, I will not do so considering the circumstances of the matter.
4. The Applicant’s counsel in his submissions to the court stated that he seeks transfer of estate property to the Applicant who had obtained the letters of administration de bonis non. At the oral hearing counsel for the Applicant, initially said there were no beneficiaries to the estate of deceased. This fact was not sworn in the affidavit in support and the application was also made on *ex parte*.
5. After inquiry from the court the counsel stated that deceased had no children and the widow of the deceased had also died, and the Applicant was appointed as the administrator of the estate. **After further inquiry from the court as to the existence of siblings the counsel stated that the deceased had a brother who was alive at the time of the hearing**, hence there is at least one beneficiary, whether there were any other siblings was not clear. These facts are not averred in the affidavit in support.
6. The Applicant had obtained default judgment against the estate for a sum of \$13,850 and \$81 as costs in Civil Action No 154 of 2000 in the Magistrate’s Court of Labasa. According to the paragraph 7 of the affidavit the Applicant had filed another civil action No 4 of 2000for a sum of \$14,576.43 but this action was adjourned *sine die*. So, at the time of this application there was only a sum of \$13,850 legally indebted to the Applicant from the estate of the deceased. The Applicant seeks the transfer of the estate property to him as a settlement of the said sum.

7. The summons mentions Order 31 of the High Court Rules of 1988 in support for the purported relief. The Order 31 of the High Court Rules deals with the sale of land by the order of the court, but strangely neither the summons nor the affidavit in support sought a sale of the estate property. In the paragraphs 13 and 14 of the affidavit in support the applicant is seeking transfer of a property described in the summons and there is no request for a sale even in the submissions.
8. The Order 31 of the High Court Rules deals with the power of the court to deal with the sale of a land. There is neither summons nor an oral application for a sale of the estate property. If such an application is made in the proper manner that can be dealt accordingly.
9. The Applicant had failed to reveal any beneficiaries of the estate in his affidavit in support. The Applicant is only an administrator of the estate and he is seeking transfer of the property to his name on the basis that estate owed a sum of the default judgment he obtained against the estate.
10. The Applicant had failed to mention any provision of law that grants him such right to transfer the estate property in his name or law that provides such a course of action. At the outset in the written submissions the Applicant stated that he sought transfer of the property described in the originating summons to him, but at the conclusion of the submissions he is seeking directions from the court apart from the said request to transfer the estate property to himself.
11. Neither the purported originating summons (expedited form) nor the affidavit in support sought directions from the court. I need not venture on such a request not supported by the purported originating summons or supporting affidavit.
12. The purported originating summons filed by the Applicant not only deficient of specific relief in its order 1 but, also it is headed as 'expedited form'. There is no material in the

affidavit in support to make it expedited form. Eg. Order 80 rule 9 of the High Court Rules of 1988, provides procedure where an Originating Summons in the expedited form is used when the parties seek concurrence of court for a settlement, in order to make it an order of the court. There are no such circumstances of settlement stated in the affidavit in support. Neither in the oral submissions nor in written submissions address the issue of the use of expedited form of originating summons.

13. In my judgment the originating summons needed to be struck off *in limine* for above deficiencies. Even if I am wrong on that, the Applicant should not be allowed to obtain an order for directions of the court not supported by the affidavit in support and or the purported originating summons. In the circumstances the directions sought by the Applicant in the concluding paragraph of the written submissions needs to be rejected.
14. Apart from that, the said directions are sought in terms of the Section 88(1) and 88(2) of the Trustees Act. Section 88(2) of the Trustee Act makes it mandatory to serve such application for direction to 'all persons interested' in the application. The Applicant had not revealed the status of the beneficiaries in the affidavit in support, but the counsel for the Applicant initially said there were no beneficiaries, but when the court inquired about the siblings of the deceased, changed the said position and said deceased had a brother who was living at the time of hearing. It is not clear whether there were any other siblings to the deceased. If so they needed to be added for any such application for directions in terms of Section 88(1) of Trustees Act. The applicant had failed to do so in this application and on that basis this ex parte application needs to be struck off.
15. In the written submissions the Applicant is relying on Section 92 of the Trustees Act, too. But again it need not be stated there was no such material in the affidavit in support and or in the summons supporting such request. The said Section 92 provides the court to deal in the absence of a party, when it is satisfied that diligent search made for a party to serve the process of the court. I cannot see any material to that effect and or the applicability of

the said provision. I need not venture on this further as there was no such order in the summons or in the affidavit in support.

CONCLUSION

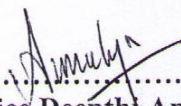
16. The Applicant had made an irregular and vague application. The purported originating summons does not contain specific order in order 1. It also states that it is made in expedited form but failed to state or justify such expedited procedure (eg. O.80 r.9). It had not complied with Appendix 1 form 3 of the High Court Rules of 1988. According to the purported originating summons the application is made in terms of Order 31 of the High Court Rules of 1988, but this provision of law relates to sale of land and there is no such request for a sale either in the purported Originating Summons or in the affidavit in support. The purported originating summons (expedited form) needs to be struck off in limine for irregularities. The written submissions of the applicant does not support the application and incoherent. Without prejudice to that, considering the affidavit in support which only sought to transfer the estate property for the satisfaction of the default judgment against estate cannot be acceded. The Originating Summons (expedited form) dated 5th August, 2014 struck off. Considering the circumstances of the case I will not award any cost.

FINAL ORDERS

- a. The Originating Summons (expedited form) dated 5th August, 2014 struck off.
- b. No cost.

Dated at **Suva** this **15th** day **October, 2014**.




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Justice **Deepthi Amaratunga**
High Court, Suva