

IN THE HIGH COURT OF FIJI
AT LABASA
CIVIL JURISDICTION

Civil Action No.: HBC 6 of 2018

BETWEEN : **MANSOOR ALI** of 11 Harwell Place, Colyton 2760, Australia.

1ST PLAINTIFF

AND : **KAMRUL NISHA** of Wailevu, Labasa, **SAIFUL NISHA** of Wailevu, Labasa, **GULSHAN NISHA** of Naduna, Labasa, **SAMRUL NISHA** of Suva, **AMIRAN NISHA** of Naduna, Labasa, **SAKIMUL NISHA** of Daku, Labasa.

2ND PLAINTIFFS

AND : **SHAMIMA** of Soasoa, Labasa, Domestic Duties and **SAMNA BANO** of Suva

3RD PLAINTIFFS

AND : **AZAM ALI** of Raviravi, Macuata, Vanualevu, Retired as the surviving executor and trustee in the Estate of Mohammed Ali and in purpura persona.

1ST DEFENDANT

AND : **ANTONIO LAVEKAU** aka **ANTONIO LAVEKAU**, Station Officer at Labasa Police Station.

2ND DEFENDANT

Counsel : **Mr. Ramarasi for the Plaintiff**
Ms. Mosiwaqa R. for the 1st Defendant
No Appearance for 2nd Defendant

Date of Hearing : **13th April, 2018**

Date of Ruling : **3rd May, 2018**

RULING

INTRODUCTION

1. The writ of summons was filed by the Plaintiffs against Defendants seeking 16 orders contained in the statement of claim. These orders vary, and inter alia contain injunctive orders, declaratory, directory, damages, interests, etc. The claims relate to an estate of a deceased. 1st Defendant was the executor of the estate, and had allegedly converted money belonging to estate to his personal account for use. The Plaintiffs are claiming

fraud against the 1st Defendant. The 2nd Defendant is a Police officer and is allegedly directed to make some payments out of 1st Defendant's account and interfered with the alleged fraudulent conduct of the Plaintiff. 2nd Defendant filed acknowledgments but none had filed a statement of defence. The Plaintiff filed summons for default judgment. 1st Defendant stated he had also filed Acknowledgement of Service on 2nd March, 2018.

2. In *Mansoor Ali vs Azam Ali and Shamina vs Azam Ali*, Consolidated Civil Action No. 38 and 43 of 2012; where the First Defendant was restrained from interfering with the monies of the estate. The Judgment was pronounced on 12th August, 2016 where his Lordship Justice Brito had made the following orders:-
 - i. I grant the Plaintiffs in Action Nos. 38 of 2012 and 43 of 2012, a declaration that the defendant has breached the provisions of the Will of the Mohammed Ali and the Succession, Probate and Administration Act.
 - ii. I grant the plaintiff in Action Nos. 38 of 2012 and 43 of 2012, a declaration that they are entitled to be paid their share, in terms of the Will of Mohammed Ali, by the defendant in his personal capacity.
 - iii. I decline the defendant's counterclaim.
 - iv. The defendant is ordered in his personal capacity, to pay cost summarily assessed of \$2000 to each of the plaintiffs.
3. According to the statement of claim the 2nd Defendant who is the Station Officer at Labasa Police Station had unlawfully assisted the 1st Defendant and unlawfully directed the Bank of Baroda to debit the trust account of Messrs. Maqbool & Company and transferred the same to the 1st Defendants personal account.
4. Plaintiffs allege that 2nd Defendant had unlawfully interfered with the rights and entitlement of the Plaintiffs and prevented the 2nd and 3rd Plaintiffs from lodging a complaint against the 1st Defendant at Labasa Police Station.

5. 2nd Defendants filed acknowledgments but had not filed a statement of defence. In the submissions 1st Defendant's counsel had indicated that an acknowledgment of service was filed on 2nd March, 2018, but I could not find it in the record.
6. The Plaintiffs through their counsel on 22nd March, 2018, had filed a Summons for an Order that a default judgment be entered against the Defendants with damages assessed.
7. The Orders sought in the statement of claim are as follows;
 - i. Injunction against the 2nd Defendant from stopping the 2nd and 3rd Plaintiffs from lodging a report against the 1st Defendant at Labasa Police Station.
 - ii. An Order that the Commissioner of Police with the assistance of the Professional Standard Unit be directed to do an investigation against the 2nd Defendant.
 - iii. A declaration that that action of the First Defendant are in contravention of Succession, Probate and Administration Act and contrary to section 295, 296 and 299 of the Crime Act.
 - iv. For an Order that the Second Defendant be investigated for a criminal offence and corruption.
 - v. For an Order that the Plaintiffs be entitled to trace the funds received by the First Defendant for sale of estate property namely CT 41/4093 and for monies deposited at Bank of Baroda account No. 91050100014163 and later withdrawn by him and deposited.
 - vi. For an Order that the sum of \$191,450.00 be transferred to the Trust Account of Messrs Maqbool & Company to be paid to the Plaintiffs in accordance with the accounts of administration presented by the First Defendant in High Court Civil Action Nos. 38 and 43 of 2012.
 - vii. For an Order for the First Defendant to provide a list of his personal assets and liabilities.
 - viii. Judgment in the sum of \$147,947.02.
 - ix. General damages.
 - x. Interests.
 - xi. Cost of this action on solicitor client basis.
 - xii. An Order that police enquiry be directed against the First Defendant for conversion of Estate Funds of Mohammed Ali received by him upon sale of CT No. 41/4093.
 - xiii. That the First Defendant be discharged and removed as executor and trustee in the Estate of Mohammed Ali, deceased who died testate on 6th March 1993.
 - xiv. That the Assets of the First Defendant be liquated to satisfy any Judgment or short fall after distribution of \$191,450.00.

- xv. That this action be consolidated with High Court Civil Action Nos. 38 and 43 of 2012 and Civil Action No. 1 of 2018 for the purpose of determination of entitlement of the Plaintiffs in the event of any clarification.
- xvi. Such further and/or other relief as his Honourable Court may deem just and expedient."

8. The summons filed by the Plaintiff seeks following orders

'For an order that default judgment be entered against the defendants with damages assessed'

According to the said summons it was 'made pursuant to Order 19 rule 7 and other applications under order 19 of the High Court Rules'.

9. The application was made in pursuant to Order 19 Rule 7 and Order 19 of the High Court Rules:-

Default of Defence: other claims (O.19, r. 7)

- (1) *Where the plaintiff makes against a defendant or defendants a claim of a description not mentioned in rules 2 to 5, then, if the defendant or all the defendants (where there is more than one) fails or fail to serve a defence on the plaintiff, the plaintiff may, after the expiration of the period fixed by or under these Rules for service of the defence, apply to the Court for judgment, and on the hearing of the application the Court shall give such judgment as the plaintiff appears entitled to on his statement of claim*
- (2) *Where the plaintiff makes such a claim as is mentioned in paragraph (1) against more than one defendant, then, if one of the defendant makes default as mentioned in that paragraph, the plaintiff may-*
 - (a) *If his claim against the defendant in default is severable from his claim against the other defendants, apply under that paragraph for judgment against that defendant, and proceed with the action against the other defendants; or*
 - (b) *Set down the action on motion for judgment against the defendant in default at the time when the action is set down for trial, or is set down on motion for judgment, against the other defendants.*
- (3) *An application under paragraph (1) must be summons or motion.(emphasis is mine)*

10. In the statement of claim there are claims that are not mentioned in Rule 2 to 5 of Order 19 of the High Court Rules of 1988. The claims against the defendants are fraudulent conversion of the estate property of the deceased, disobedience of the court orders and also wrongful direction and or interference with the lawful acts of the Plaintiffs, by 2nd Defendant.
11. The Supreme Court Practice (1988) (White Book) at page 338 states as follow
19/7/7 Application for judgment by summons- In the Q.B.D as well as in the Ch.D the application for judgment in default of defence under this rule is made by summons to the Master. This practice more convenient and tends to be cheaper than applying by motion for judgment, and this is the proper practice in all such applications. For thereby much saving in time and costs will be affected.
The summons must be served on the defendant (O.65, r.5). 'Two clear days' notice is necessary (O.32, r3)'
12. There is no appearance for the 2nd Defendant and there is no evidence of service of the summons for default judgment dated 22nd March, 2018. It needs to be served on him as well.
13. As stated earlier the 1st Defendant in the submission had stated that an acknowledgment was filed but this is not to be found in record. This is a matter that needs to be ascertained, by the Master and or Deputy Registrar, too.
14. In the submissions as well as at the hearing the counsel for the 1st Defendant is seeking to file a statement of defence, The discretion of the court can be exercised to grant extension of time to file a statement of defence. (See White Book (1988) 19/7/12 p339).
15. It should also be noted that any order made in pursuant to Order 19 rule 7 can be set aside by Order 19 rule 9 of the High Court Rules of 1988.
16. The Supreme Court Practice (1988)(UK)(White Book Vol I) p339 states (19/7/12)

“Discretion of the Court – Although para(1) of rule is expressed in mandatory terms, the rule is not mandatory but directory, and the Court retain discretionary power whether to give judgment or to extend a party’s time to plead when it is just to do so. (Wallersteiner v Mair [1974] 3 All 217 C.A [1974] 1 WLR 991. It may, for instance, where there are matters affecting other parties waiting to be decided, order motion to stand over until trial (Verneg v Thomas (1888) 36 W.R. 398) or to stand over generally (Jenny v Mackintosh (1886) 61 L.T. 108).

17. Considering the above circumstances. The summons filed on 22nd March, 2018 is to stand over generally till it is served to the 2nd Defendant. This matter is to be listed before the Master for necessary directions including granting the 1st Defendant to file a Statement of Defence if such an application is made formally. No costs ordered.

FINAL ORDERS

- a. The Summons to be served to the 2nd Defendant.
- b. 1st Defendant is granted 14 days to file and serve an application for extension of time to file statement of defence.
- c. Matter is to be listed before the Master for necessary directions.
- d. No costs.

Dated at Suva this 3rd day of May, 2018

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Justice Deepthi Amaratunga
High Court, Suva