

IN THE HIGH COURT OF FIJI AT SUVA
PROBATE JURISDICTION

Probate Action No. HPP 47 of 2015

IN THE ESTATE of MAHESH
PRASAD, Deceased, Testate

BETWEEN : UGESH PRASAD MAHARAJ
Plaintiff

AND : SNEH LATA PRAKASH
First Defendant

AND : BINAY LATA MAHARAJ
Second Defendant

AND : RAMESH PRASAD
Third Defendant

Coram : The Hon. Mr Justice David Alfred

Counsel : Ms I. Lutu for the Plaintiff
Mr S Kumar for the Second and Third Defendant

Dates of Hearing : 20 and 27 July 2018

Date of Decision : 24 September 2018

DECISION

1. This is the Second and Third Defendants' Summons for an Order that the Plaintiff be compelled to comply with the terms of settlement annexed to the Order or in the alternative be granted leave to commit the Plaintiff for contempt of Court.
2. It is supported by the affidavit of the Third Defendant, Ramesh Prasad (Ramesh) who deposed:
 - (1) He has authority to swear the affidavit on behalf of the Second Defendant.
 - (2) On 22 November 2016 a consent order was recorded as per the terms of settlement, para 3 of which is "Nilesh Prasad (Nilesh) is permitted to reside on the property on a place to be designated by the Plaintiff for to reside upon and operate a garage from".
3. The Plaintiff in his affidavit in response deposes:
 - (1) In compliance with the terms of settlement he has provided an area to Nilesh to build a temporary structure on, and the area for him to build his residence was outside the road reserve.
4. Ramesh Prasad in his affidavit in answer deposes:
 - (1) The area provided to Nilesh is a land on the road reserve which is outside and or not a part of the estate of the deceased.
5. On 20 July 2018 the Plaintiff wholly discontinued this action against the First Defendant. Henceforth the Second and Third Defendants are referred to as the Defendants.
6. The hearing commenced with Mr Kumar submitting. He said he was proceeding under Order 52 rule 2 of the High Court Rules (HCR). The judgment does not specify the time within which the act is to be done. The Plaintiff is not complying with para 3 of the terms of settlement. He asked for the Plaintiff to give Nilesh space to occupy and operate his garage.
7. Ms Lutu then submitted. She said the Plaintiff has complied with para 3 of the terms of settlement.

8. Mr Kumar produced a letter from the office of the Acting Director of Town & Country Planning dated 26 July 2018 which states "that no dwelling or structure is allowed to be constructed within the 9.0 meter Building Line Restriction".
9. At the conclusion of the arguments I said I would take time for consideration. Having done so I now deliver my decision. This is a case where the legal position should have been clear to Counsel on both sides, from the start. Here we have terms of settlement (Terms) dated 22 November 2016 which were incorporated into a consent order. When the order was made by Hamza J, the Court became functus officio.
10. Further para 3 of the Terms benefit Nilesh exclusively and yet he was never a party to the action either as plaintiff or defendant. And in the Statement pursuant to O. 52 r 2 HCR the Applicant is NOT Nilesh but the Third Defendant. Indeed, if at all, it should have been Nilesh who is moving the court by a new action and not the Defendants.
11. Consequently there is no basis in law or in fact for this Summons to have been filed in the first place. In the result the Summons filed on 6 February 2018 is dismissed and each of the parties is to pay his own costs.

Delivered at Suva this 24th day of September 2018.



David Alfred
JUDGE
High Court of Fiji