

IN THE HIGH COURT OF FIJI  
AT LABASA  
CIVIL JURISDICTION

Civil Action Nos. HBC 38 of 2012  
Consolidated with HBC 43 of 2012

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

PLAINTIFF

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

DEFENDANT

**BEFORE:**       Hon. Justice V D Sharma

**COUNSEL:**     Mr. Sen A.         - for the Plaintiff  
                  Mr. Vulakouvaki J. - for the Defendant

**Date of Ruling:** 11<sup>th</sup> December, 2019 @ 9.30 am

**RULING**

*[Variation of Judgment Orders pursuant to Order 20 Rule 10 and Order 45 Rule 5(2)  
of the High Court Rules 1988 and Inherent Jurisdiction of this honourable court]*

## INTRODUCTION

- [1] Substantive Matters in Civil Action Nos. HBC 38 of 2012 and HBC 43 of 2012 were earlier on consolidated and accordingly heard on 09<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> of May, 2016.
- [2] On 12<sup>th</sup> August, 2016, Mutunayagam J delivered a Ruling in the matter and made the following Orders:
- (i) *I grant the Plaintiffs in Action Numbers 38 of 2012 and 43 of 2012 a Declaration that the Defendant has breached the provisions of the Will of Mohammed Ali and the Succession, Probate and Administration Act.*
  - (ii) *I grant the Plaintiffs in Action Numbers 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 costs summarily assessed of \$2000 to each of the Plaintiff's.*
- [3] Subsequent to the delivery of the Judgment of Court on 12<sup>th</sup> August, 2016, the Plaintiff filed a Summons on 21<sup>st</sup> May, 2019 coupled with an Affidavit in Support and sought for the following variation of Judgment Orders -
- (a) *That the Judgment of Honourable Justice A.L.B. Brito Mutunayagam dated 12<sup>th</sup> August 2016 be varied to include payment to the beneficiaries as per the evidence adduced at trial before this Honourable Court and further the monies standing at Bank of Baroda Account No. 91050100014163 to be paid into the Trust Account of Messrs Maqbool & Company for payment to the beneficiaries.*
- [4] This application is made pursuant to *Order 20 Rule 10 and Order 45 Rule 5(2) of the High Court Rules 1988 and the inherent jurisdiction of this Honourable Court.*
- [5] Both parties to these proceedings filed their respective Affidavits in court as was procedurally required by law of them to do so.
- [6] The entire contents of both parties Affidavits have been taken into consideration. However, the relevance of the contents of the Affidavits in terms of the current application is summarised hereunder.
- [7] The **Plaintiff** in her Affidavit stated that it was declared that monies in Bank of Baroda Account Number 9105010001463 did not belong to the Defendant. The Defendant continues to interfere with the affairs of the Estate and refuses to make payment to her Solicitors for payment to the Plaintiffs. The Court made an Order that the monies did not belong to the Defendant but it belonged to the Beneficiaries after full evidence was heard on entitlement of each beneficiaries. According to the Court Order, the monies were deposited into the Account of Messrs Maqbool & Company for distribution. The Trust Account of Messrs Maqbool & Company was reversed contrary to the Trust Account Act by the bank.
- That unless the Judgment of the High Court is varied, the Plaintiffs will have to re-litigate the entire hearing calling the same evidence already tendered in court. The Plaintiff has instituted a separate High Court Civil Action HBC 01 of 2018 and 06 of 2018 to prevent the Defendant from interfering with the Assets of the Estate and usage of the monies which are held in the bank. The action had determined the entire rights and entitlements of the Beneficiaries and for the sake of finality the Orders of the Court need to be varied to include the prayers as sought for in the Summons.



- [8] The **Defendant** in his Affidavit in Opposition stated that he was one of the Executors and Trustees of the Estate of Mohammed Ali together with Usman Ali and Hasim Ali pursuant to his last Will executed on 14<sup>th</sup> June 1988. That the High Court on 14<sup>th</sup> October 2004 gave a Probate Grant No. 42539. That his share of the proceeds in the sum of \$200,000 was retained in the Bank of Baroda by way of a Court Order and the said sum remains there pending an Order of the Honourable Court for release of the said sums of money. Every person entitled to a share from the Estate of Mohammed Ali has been duly paid out their shares. That the monies standing to the credit of his account in Bank of Baroda is his share of the sale proceeds since all other Beneficiaries have been paid out as outlined in his Affidavit. Further, the court made no findings and or determination that the monies belonged to the Plaintiff as that was not contained in the prayer sought therein. There was never any Orders made for monies to be deposited into the Trust Fund Account of Messrs Maqbool & Company. This is misleading and distorted to have to create ambiguity and confusion. The Bank had committed fraud by transferring his monies into the Trust Account of the Solicitor only to reverse it upon his complaint to the relevant authorities. That the Order of the Judge cannot be varied now as this Court does not have the Jurisdiction to do so. That he has been denied access to that money given the freezing of the said account and prays for a just and fair decision of the Honourable Court and for the Plaintiff's Application to be struck out with costs.
- [9] The **Plaintiff** in his Affidavit and Supplementary Affidavit in Reply stated that from the court proceedings it became clear that Azam Ali had approximately \$350,000 in his account at Bank of Baroda and the Court Injuncted a sum of \$200,000. He withdrew the balance and advised the Court that not a single cent has been left. The Defendant was not entitled to sell any Estate property of the Beneficiaries without obtaining their written consent first. The Defendant was bound by Succession, Probate and Administration Act and owed a fiduciary duty to every Beneficiary to distribute their correct share. The Court ruled that none of the monies standing in the account of Bank of Baroda belongs to the Defendant. However, the Court declared that the Defendant had acted fraudulently with moral turpitude to defeat the Beneficiaries share. The court has made a specific finding that the Defendant has got no right over any money and it must be distributed to each of the Plaintiffs. The court concluded that the Plaintiff sought to be paid their share and the Defendant had no right over the monies deposited at Bank of Baroda.
- [10] The contention of the Plaintiff herein is a two-fold -
- (i) *That the Judgment of Honourable Justice A.L.B. Brito Mutunayagam dated 12th August 2016 be varied to include payment to the beneficiaries as per the evidence adduced at trial before this Honourable Court; and*
  - (ii) *Further the monies standing at Bank of Baroda Account No. 91050100014163 to be paid into the Trust Account of Messrs Maqbool & Company for payment to the beneficiaries.*
- [11] The **Plaintiff's** counsel submitted that this determined the entire rights and entitlements of the Beneficiaries and for the sake of finality, the Orders of the Court needs to be **varied** to include the prayers sought therein. Further, the court has not declared as to the amount that must be paid to each of the Beneficiaries of the Estate.
- [12] However, the **Defendant** submitted that the Plaintiffs contention is that he is still owed certain amounts of money derived from selling of the land at Niurua. He is now claiming that the Order granted of 12<sup>th</sup> of August 2016 did not encompass the Orders that he is now seeking as the Plaintiff claims that the evidence was led and tendered on this issue. However, the trial Judge did not include this in the Order. He further submitted that the Orders made were purely based on the prayers pleaded in the action. The Court in Functus and has no Locus to vary the Orders of the Judgment made on 12<sup>th</sup> of August 2016.



[13] The **Plaintiff's Application** is asking the Court to **vary the Judgment** of the Hon. Presiding Judge delivered on 12<sup>th</sup> of August 2016 to include two further Orders as per his Summons as hereunder.

(i) *That the Judgment of Honourable Justice A.L.B. Brito Mutunayagam dated 12th August 2016 be varied to include payment to the beneficiaries as per the evidence adduced at trial before this Honourable Court; and*

(ii) *Further the monies standing at Bank of Baroda Account No. 91050100014163 to be paid into the Trust Account of Messrs Maqbool & Company for payment to the beneficiaries.*

[14] The Orders made in the Judgment of Mutunayagam J on 12<sup>th</sup> of August 2016 are **final Orders** which had been determined on the Merits and the facts of the substantive case before him.

[15] This Court does not have any **Jurisdiction** and fails to find any mechanism to **vary the Orders** of the Judgment delivered on 12<sup>th</sup> of August 2016.

[16] However, **Order 20 Rule 10 of the High Court Rules 1988** empowers a court of 1<sup>st</sup> instance to vary its own Orders and the Rule provides as follows -

*"Amendment of judgment and orders (O 20, R 10)*

*Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omissions, may at any time be corrected by the Court on motion or summons without an appeal."*

[17] This **Rule** is not in any way applicable to the Plaintiff's current Application before this Court.

[18] Further, if any party to the proceedings was dissatisfied with the Orders made by the Court in its Judgment of 12<sup>th</sup> of August 2016, then the party had a recourse to revert to the **Appeal process** and thus Appeal the Judgment delivered on 12<sup>th</sup> of August 2016. However, the Plaintiff chose not to Appeal the Decision rather seek for **Variation of Orders** by the current Summons instead.

[19] The final Order made cannot be varied and/or amended as sought for by the Plaintiff in his Application since the Court is now **Functus and does not have the Locus** to do so.

[20] The Plaintiff was at liberty to resort to **Appeal process** if he was dissatisfied with the Orders made within the Judgment delivered on 12<sup>th</sup> of August 2016.

[21] For the aforesaid rationale, the Orders made within the Judgment of the Presiding Judge of 12<sup>th</sup> of August 2016 is a **final and specific Order** which was determined by the Presiding Judge on **facts and merits** of the case before him. Therefore the Orders of 12<sup>th</sup> August 2016 stands undisturbed.

[22] The current matter proceeded for Hearing and therefore the **Defendant** is entitled to summarily assess costs of \$1000.

[23] Following are the **Final Orders** -

A. **The Summons and the Affidavit in Support filed by the Plaintiff on 21<sup>st</sup> May, 2019 is accordingly dismissed.**

B. The Plaintiff to pay the Defendant summarily assessed costs of \$1000.

C. Orders accordingly.



A handwritten signature in blue ink, appearing to read "VISHWA DATT SHARMA".

VISHWA DATT SHARMA  
JUDGE  
LABASA  
11th Day of December 2019

cc: Messrs Maqbool & Company, Labasa  
Jiten Reddy Lawyers, Nakasi