

IN THE HIGH COURT OF FIJI
AT LABASA
CIVIL JURISDICTION

Civil Appeal No. HBM 02 of 2022

BETWEEN: **SOBHNA LATA and ASHLIN SHAYAL SINGH** of Nagigi, Labasa and Suva respectively and both being the Executrix and Trustees of the Estate of Arvind Singh.

PLAINTIFFS

AND: **ARVIND SINGH** of Nagigi, Labasa, Cultivator being the surviving Executor and Trustee of the Estate of Raj Bali Singh.

DEFENDANT

BEFORE: **Hon. Mr. Justice Vishwa Datt Sharma**

COUNSELS: **Mr Robinson on instruction Mr Sadiq for the Plaintiffs**
Ms Bale N. for the Defendant

Date of Decision: **06th July, 2022 at 9.30am**

DECISION

*[Summons to strike out the Plaintiff's claim pursuant to Order 18 Rule (1) (d),
Order 5 Rule 3 of the High Court Rules 1988]*

INTRODUCTION

1. The Plaintiffs in their capacity as the Executrix and Trustees of the Estate of Arvind Singh, commenced proceedings by filing a Notice of Motion and an Affidavit in Support for the following orders:-
 - (i) To hand over the Original copy of the State Lease No. 23001 to the Plaintiffs forthwith to enable the Plaintiffs to register the Transmission by Death in the Estate of Arvind Singh.
 - (ii) To hand over the original copy of the Certificate of Registration (cane contract) No. 825 in Bucaisau Sector to the Plaintiffs forthwith to enable the Plaintiffs to transmit the said contract onto the names of the said Plaintiffs as the Trustees of the Estate of Arvind Singh.
 - (iii) To pay the Plaintiff's forthwith the sum of \$1,744.48 being the balance amount of money for the cane harvested in 2020 harvesting season and sent on the cane contract No. 825 in Bucaisau Sector which is being held by the Defendant.
2. The Plaintiffs' application is made pursuant to Inherent Jurisdiction of the Court and not made under any of the provisions of the ***High Court Rules, 1988***.
3. Subsequently, the Defendant filed a Summons and sought for an order to strike out the Plaintiff's claim on the following grounds:-
 - (i) That the Plaintiffs' Notice of Motion and Affidavit in Support of Sobhna Lata against the Defendant be struck out;
 - (ii) That all proceedings herein be stayed pending the determination of this application
 - (iii) An order for costs of this application on an indemnity basis.

On the following grounds

 - (i) The Plaintiff's claim against the Defendant via Notice of Motion and Affidavit in Support of Sobhna Lata is an abuse of Court Process.
 - (ii) The Plaintiffs' claim via Notice of Motion is the wrong procedure as there is no pending action.
 - (iii) The Plaintiffs' claim via Notice of Motion is improper as it is not an originating process.
4. Both parties to the proceedings furnished Court with their respective written submissions and orally argued the striking out application at the Hearing.
5. Defendant's Submission
 - Rely on written submission
 - Abuse of process
 - Wrong procedure used to begin proceedings

- Order 18 High Court Rules refers
- No substantive matter before Court rather motion only which is Interlocutory
- Seeking striking out

6. Plaintiff's Submission

- Rely on written submission
- No Reply filed to Submissions
- Seek Dismissal

Determination

7. The issue that this Court needs to determine is:-

(a) **Whether proceedings can be initiated by filing a Notice of Motion together with an Affidavit In Support?**

(b) **Whether Defendant's application seeking striking out of the notice of motion should succeed?**

8. **Order 5 Rule 1 of the High Court Rules 1988** provides that court proceedings in the High Court may be begun by Writ, Originating Summons, Originating Motion or Petition. Therefore, substantive proceedings must be begun in conformity with **Order 5 Rule 1** since the proceedings will identify the cause of action therein.

9. However, **Order 2 Rule 1 [O.2,r.1]** deals with 'Effect of Non-Compliance' and provides as follows:-

"1(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or other therein.

(2) Subject to paragraph (3), the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1), and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein or exercise its powers under these Rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it things fit.

(3) The Court shall not wholly set aside any proceedings or the writ or other originating process by which they were begun on the ground that the proceedings were required by any of these Rules to be begun by an originating process other than the one employed."

10. In the current case, the Plaintiffs have chosen to initiate the proceedings by way of filing a Notice of Motion and an Affidavit in Support to seek the orders therein rather than commencing proceedings in conformity to **Order 5 Rule 1 [O5, r.1]** which provides the '**mode of commencing civil proceedings**' in the High Court.

11. Beginning or instituting proceedings by Notice of Motion and an Affidavit in Support is not an originating procedure in terms of the **High Court Rules 1988** and therefore tantamounts to a fundamental kind and cannot be cured under **Order 2 Rule 1(3) of the High Court Rules 1988** which provides:-

"The Court shall not wholly set aside any proceedings or the writ of other originating process by which they were begun on the ground that proceedings were required by any of these Rules to be begun by an originating process other than the one employed."

12. The proceeding has not been begun procedurally in terms of the **High Court Rules 1988** by filing a **substantive action showing a cause(s) of action**.
13. In **absence of the substantive action**, the Plaintiff cannot institute proceedings by way of an **Interlocutory Notice of Motion**. Failure in compliance with the procedural compliance will only result in application being struck out accordingly.
14. For the aforesaid reasons, I have no alternative but to accede to the **Defendant's application to strike out the Plaintiff's Notice of Motion and the Affidavit in Support** accordingly.

Costs

15. The application proceeded to hearing with both parties filing written submission and orally argued the application.
16. The Plaintiff in the like is ordered to pay a **summarily assessed costs of \$650** to the Defendant within 7 days timeframe.

Orders

- (i) The Plaintiff's Notice of Motion together with the Affidavit in Support is dismissed.
- (ii) The Plaintiffs to pay the Defendant a sum of \$650 as summarily assessed costs within 7 days.

Dated at Suva this 06th day of July 2022.



VISHWA DATT SHARMA
JUDGE

cc: *Mohammed Sadiq Lawyers, Labasa.*
Lal Patel Bale Lawyers, Labasa.