

**IN THE HIGH COURT OF FIJI
(WESTERN DIVISION) AT LAUTOKA
CIVIL JURISDICTION**

CIVIL ACTION NO. HBC 13 OF 2022

BETWEEN : **AKILESH NITIN MAHARAJ** of 49 Bellingham Avenue, Glendenning New South Wales, Australia
1ST PLAINTIFF

AND : **SHERON SHANIL PRAKASH** formerly of 13 Tio Street Varadoli Ba but now residing in Auckland, New Zealand
1ST DEFENDANT

AND : **ANJULA DEVI** of Tio Street, Varadoi, Ba
2ND DEFENDANT

AND : **REGISTRAR OF TITLES**
3RD DEFENDANT

AND : **ITAUKEI LANDS TRUST BOARD** a statutory body duly constituted under Itaukei Land Trust Board and having its registered office in Suva.
4TH DEFENDANT

BEFORE : Hon. Mr. Mohamed Mackie- J.

APPEARANCES : Mr. Nazeem Khan- For the Plaintiff
Mr. N.Padarath – For the 1st & 2nd Defendants
Mr. Mainavolau- For the 3rd Defendant
Ms. Raitamata- For the 4th Defendant.

DATE OF HEARING : 01st July, 2022.

DATE OF DECISION : 30th August, 2022.

RULING

(On Application for Interim Injunction)

A. INTRODUCTION:

1. Before me is an Application, preferred by the Plaintiff hereof, by way of inter-partes Summons dated and filed on 30th March 2022 and supported on 08th April 2022, seeking orders , inter-alia, as follows;

- i) *For an injunction restraining the First and Second Defendants from selling, transferring disposing, encumbering and/or dealing with land more fully described as Native Lease*

No. 16073 Nakudrala Subdivision State 1 Lot 13 on DP Ba 2341 (the land) in any shape or form whatsoever and/or howsoever until the final determination of this action.

ii) *For an injunction restraining the 3rd and 4th Defendants from dealing with in any way whatsoever and/or howsoever land more fully described as Native Lease No. 16073 Nakudrala Subdivision State 1 Lot 13 on DP Ba 2341 until the final determination of this action.*

iii) *For an order that the First and Second Defendants deposit all rental received from downstairs flat on land more fully described as Native Lease No. 16073 Nakudrala Subdivision State 1 Lot 13 on DP Ba 2341, at 13 Tio Street, Varadoli Ba until the further Order of this Honourable Court into Court until the final determination of this action.*

2. The Application being vehemently objected by the Counsel for the Defendants, except for the Counsel for the 4th Defendant, the Court, having decided to hold a formal hearing prior to making any order, directed the competing parties (1st to 3rd defendants) to file their respective Affidavits in opposition and the same being duly filed, the Plaintiff has filed his Affidavit in reply as well.
3. At the hearing held on 1st July 2022, while making oral submissions, learned counsel for the Plaintiff and the 3rd Defendant filed their respective written submission, and the written submission for the 1st and 2nd Defendants was filed at the Registry on 08th July 2022.
4. Further written submissions on behalf of the 3rd Defendant being filed on 19th July 2022, two separate written submissions were filed on behalf of the Plaintiff on 20th and 25th July 2022 in reply to the written submissions of the 1st, 2nd Defendants and to that of the 3rd Defendant respectively. Accordingly, this ruling is pronounced today after considering the contents of the record, including the hearing transcripts, and the laws that govern the subject.

B. FACTS IN BRIEF:

Affidavit in Support by the Plaintiff.

5. As per the Affidavit in support sworn by the Plaintiff and filed along with the Summons for injunction orders on 30th March 2022 and the **Statement of claim** filed, the Plaintiff states, inter-alia;
 - a. THAT the Plaintiff's Father, Lekh Ram Maharaj, was the registered owner of the land more fully described as Native Lease No. 16073 Nukudrala sub division Stage 1 Lot 13 on Dp Ba 2341, upon which a substantial concrete double storied building, with 2 flats comprised of upstairs and a downstairs, was constructed .
 - b. THAT the Father was initially legally married to Manorama Margaret Pillay, aka Margaret Maharaj, however, she later died.

- c. THAT the 1st Defendant is **not** a biological son of the Plaintiff's Father, Lekh Ram Maharaj, but son of the Second Defendant, with whom the Father had a de-facto relationship.
- d. THAT the Father on the 30th May 2012 made a will (the said will) , the terms of which, among other things, had made provisions for number of beneficiaries and the terms thereof were;
1. *"I HEREBY REVOKE all my former will and Testamentary dispositions heretofore made by me and declare this to be my last will and Testament.*
 2. *I, NOMINATE , CONSTITUTE AND APPOINT my sons AKILESH NITIN MAHARAJ and AVINASH MAHARAJ both of Sydney, Australia, Surveyor and Bank Officer respectively and my defacto wife ANJULA DEVI of 13 Tio Street, Varadoli, Ba, Fiji, Domestic Duties to be the executors and Trustees of this my last Will.*
 3. *I GIVE DEVISE AND BEQUETH all and singular my real and personal property of whatsoever kind or nature and wheresoever situate or being or any property over which I may have a power of appointment or disposition to and unto my trustees upon trust that is to say:-*
 - a. *To give upstairs flat out of my double storey concrete dwelling house situated at 13 Tio Street, Varadoli, Ba, Fiji, to and unto my defacto wife ANJULA DEVI of Tio Street, Varadoli, Ba, Fiji, Domestic Duties for her life and after her death to and unto SHARON PRAKASH, SHEENA KUMAR and SHELVIN PRAKASH all children of Ashoke Prakash in equal shares and shares alike absolutely.*
 - b. *To give downstairs flat out of my double storey concrete dwelling house situated at 13 Tio Street, Varadoli, Ba, Fiji, to and unto my sons AKILESH NITIN MAHARAJ and AVINASH MAHARAJ both of Sydney, Australia , Surveyor and Bank Officer respectively and my daughter RESHMA SHIVANI SHARMA in equal shares and shares alike absolutely.*
 - c. *To give all my rest and residuary property including my life insurance proceeds and my monies deposited in any Banks to and unto my defacto wife ANJULA DEVI of 13 Tio Street, Varadoli , Ba, Fiji, Domestic Duties for her life and after her death to and unto my sons AKILESH NITIN MAHARAJ and AVINASH MAHARAJ both of Sydney, Australia, Surveyor and Bank Officer respectively ; my daughter RESHMA SHIVANI SHARMA and SHARON PRAKASH and SHEENA KUMAR both Children of Ashoke Prakash in wquel shares and shares alike absolutely".*
6. THAT as per the will, the second Defendant was and is entitled to the upstairs flat for her and after her death to three of her children, who are not the biological children of the Plaintiff's deceased Father.
7. THAT as per the said will, the Plaintiff together with his siblings, namely, **Avinash Maharaj and Reshma Shivani Sharma**, all being the biological children of his father late Mr. Lekh Ram Maharaj aka Lekhram Maharaj, are entitled to the downstairs flat.
8. THAT his father had suffered a massive stroke in or about the month of December 2013 and died on 8th January 2014 and the death certificate of his father is incorrect to the extent it refers to **Shalvin Sanil Prakash, the first Defendant and Sheena Shalini Devi** as being issues of the marriage of his father when they are not.
9. THAT he found out about the said will when he came to Fiji in or about May 2019 and he had suspicion that some kind of fraud had been committed when he attended the Birth, Death and Marriage Registry in Ba. The reason for his visit to Birth, Death and Marriage Registry in

Ba, was that when he and his wife had gone to Ba Mission Hospital to access his Father's Medical Records , they were advised by the Hospital to prove that he was actually a biological child of late Mr. Lekh Ram Maharaj .

10. On receipt of his Father's Death Certificate , he found that the 2nd Defendant's Son's name was on his Father's Death Certificate as an issue of Marriage and further his suspicion was strengthened when he read the instructions that had been given by the 2nd Defendant in the Medical records at the Ba Mission Hospital to the effect ***"Not to release the reason of the deceased's death to his children"***
11. THAT in or about August 2019, by an email, for the 1st time it came to his attention, shock and horror that the said land, with the double storied building, was transferred to the 1st Defendant and subsequent researches carried out, revealed to him that the said land and double storied building were transferred pursuant to a forged transfer document dated 11th November 2013 and on a forged application for the consent to assign dated 18th November 2013.
12. THAT the signature of his late Father in both on transfer document dated 11th November 2013 and application for consent to assign dated 18th November 2013 were forged . In order to substantiate this he has drawn the attention to his father's , purported, signatures in the impugned transfer document and the consent to assign the transfer marked as "J" and "K" and to the signatures of his Father in various other documents marked as marked as "L" to "Q". He has also filed as annexed as "S" a forensic report on his deceased father's signatures.
13. That the First and Second Defendants' unlawfully and / or fraudulently colluded in defrauding him and other beneficiaries under the said Will , by fraudulently transferring the said Land to the First Defendant and subsequently to the Second Defendant to defeat the interest of the beneficiaries under the said Will. The fraudulent transfer of the Land was registered on 30th January 2014, which was after the demise of his Father on 8th January 2014, since when the first and second Defendants are in occupation and control of the land and double storey of the building including the downstairs of the flat, who knew or ought to have known about the beneficiaries of the downstairs flat.
14. That the first and second Defendants, contrary to the terms of the will in effect, treated and/or held themselves out as the sole beneficiaries regarding the downstairs flat and unlawfully obtained, utilized and continue to do so the monies received therefrom, which they should refund and/or compensate on account of all monies so received since the demise of his Father or alternatively pay \$1,000.00 per month since the demise of his Father.
15. That the first and the second defendants have also withdrawn money from and out of the Father's Bank Account at BSP for about 6 weeks from the date of the death of his Father on 8th January 2014.
16. That unless the First and Second Defendants are restrained by this Court , they may and/or could dispose their properties including the land and premises in question once they become aware of this claim filed is served on them and he will suffer irreparable harm and/ or injury

and the first and second Defendants would not be able to satisfy any judgment either monetary and/or otherwise that he may obtain in this matter at the final determination of the substantive matter, particularly when the first Defendant is living out of the jurisdiction of this Court and the second Defendant is at the age of 59 without any employment.

17. The Plaintiff has given his usual undertaking for damages as per the averments in paragraphs i to viii of paragraph 51 of his Affidavit in support.

Affidavits in Opposition by the 1st & 2nd Defendants.

18. The 3rd and 4th Defendants, through their respective counsel, opted not to file any Affidavit in opposition. However, Counsel for the 3rd Defendant, while objecting for any injunction orders being issued against the 3rd Defendant, reserved his right to address the court on the issue orally and in writing and accordingly, having addressed the court orally at the hearing, has filed his written submissions as well. I thank the learned counsel for his short, but useful submissions on the law in relation to the subject in hand.
19. The learned Counsel for the 4th Defendant, I TAUKEI LANDS TRUST BOARD, at the hearing affirmed, as intimated initially, that they will not be dealing with the subject land and in fact they have taken internal steps to ensure that they won't be doing any dealing should they receive an application for any transaction in relation to the subject land, unless the Court otherwise orders.
20. The 1st Defendant in his Affidavit in opposition, among other things, states that ;
- a. He knows the Plaintiff as a biological son of the deceased **Lek Ram Maharaj**, and though he (the 1st Defendant) is not a biological son of the deceased, he became the deceased's step son when his Mother, the 2nd Defendant, married him on the 5th of January 2011. (paras 4&5)
 - b. All his (the 1st Defendant's) biological siblings started treating the deceased like a father, they looked after him when he got sick and had a stroke and none of the deceased's biological children, except for his daughter, **Reshma Shivani Sharma**, looked after him when he suffered. (para-6)
 - c. The Plaintiff did not have a good relationship with the deceased, and he did not help him in any way. He did not attend the Deceased's funeral or any of the Hindu religious rituals. (para 7)
 - d. He cannot make any comments on the purported Last Will and Testament referred to in paragraphs 11 to 15 of the Plaintiff's Affidavit and he is advised that this is an unreliable document as it has not been proved (para 10)
 - e. He does not accept, that the transfer or the application for consent or any other documents executed by the deceased for the transfer of the property into his name was forged. He was present when the deceased signed the documents and the deceased was fully aware of what he was doing and the deceased wanted to transfer the property into his name. (para-14)

f. He cannot make any comments on the Handwriting expert report and the reliability of it would be addressed by his Lawyers at the hearing. If needed, he too will engage his own handwriting expert to look into this.(para-15)

21. The averments from 16.1 to 16.14 in his Affidavit in opposition are on the events that took place from the point the deceased's, purported, instructions to Messrs. Samuel K.Ram Lawyers till the lodgment of the Transfer with the Title Office for registration.
22. It is observed that 1st Defendant, in his Affidavit in opposition, has not opted to response to the averments in paragraphs 20 to 23, 27 to 47 of the Plaintiff's Affidavit in support. However, in paragraph 18 he says that he has taken no steps to dispose the land after being served with the claim in this matter.
23. **The 2nd Defendant**, in her Affidavit in opposition admits that late Lekh Ram Maharaj was the registered owner of the land on which a double storey dwelling house stands, that the Plaintiff's Father Lekh Ram Maharaj had 3 children by the marriage with Plaintiff's Mother Mrs. Manoramma Margaret, that the first Defendant is not the Biological son of the deceased. The 2nd Defendant also admits that she had started de-facto relationship with the deceased in the year 2006, pursuant to which she married him on or about 5th January 2011. (as per paragraphs 4 to 9 of her Affidavit in opposition)
24. From paragraph 10 to 21 of her Affidavit in opposition, what the 2nd Defendant avers is that the Deceased's biological children did not care for him or look after or visit him or attended the funeral of the deceased , except for the daughter Reshma Shivani Sharma and none of them attended the rituals after the funeral.
25. That she was not aware of the existence of a will dated 30th May 2017 by the deceased as the deceased had never spoken to her about it. She denies the contents in paragraphs 20 to 22 as to the allegations of fraud as averred therein, as she had not given any such instructions. While not responding the contents in para 23 to 26 , the 2nd Defendant also refutes the allegation of fraud as averred in paragraphs 27 to 32.
26. She takes up the position that the deceased had expressed his disappointment and anguish in relation to the way the Plaintiff and his siblings had treated him and the behavior of them towards the deceased had become really bad from November 2012 and the property was transferred by the deceased unto the 1st Defendant out of his natural love and affection as the 1st defendant had always treated the deceased and looked after him well. Accordingly, she moves to strike out the Summons by the Plaintiff.

C. THE LAW & DETERMINATION:

THE TEST APPLIED IN GRANTING OR REFUSING INJUNCTION:

Is there a serious question to be tried?

27. This is the test set out in *American Cyanamid Ltd. V. Ethicon Ltd. [1975] AC 396*. The plaintiff does not have to establish a prima facie case that he will gain a permanent injunction after trial. He must adduce in his affidavits sufficiently precise factual supporting evidence to

satisfy the court that his claim is not frivolous, vexatious or hopeless Re **Lord Cable (dec'd), Garratt v. Waters [1976] 3 All ER 417; Mothercare Ltd. V. Robson Books Ltd. [1979] FSR 464.**

28. In deciding this question, I need not go much further into the facts or the law of the substantive matter. I must be satisfied, *prima-facie*, there are serious issues to be tried here. The issues of law and fact are manifold. They concern, *inter alia*, whether there was a Last Will and Testament made on 30th May, 2012 and left behind by the deceased without revoking and/or cancelling. Whether there was fraud practiced by the 1st and the 2nd Defendants, as alleged by the Plaintiff, during the process of the purported Transfer of the land in favor of the 1st Defendant on 11th November 2013 and made a forged application for consent to assign dated 18th November 2018 as particularized in paragraph 14 of the Statement of Claim.
29. On careful perusal of the averments in the Plaintiff's Affidavit and those of the 1st and 2nd Defendants, number of questions arise as alluded herein that begs answers, which, undoubtedly, would guide the court in arriving at the most justifiable final decision. In my view, none of these issues appear frivolous. The matters cannot be resolved simply on the affidavits at this stage. Lord Diplock in the **American Cyanamid case (supra)** made several observations during the course of his speech on the court's role, which is hard to improve on. At 407H he said"

"It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party May ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial."

30. His Lordship had earlier in the speech commented (at 406G):

"In those cases where the legal rights of the parties depend upon facts that are in dispute between them, the evidence available to the court at the hearing of the application for an interlocutory injunction is incomplete. It is given on affidavit and has not been tested by oral cross-examination."

and at 409C

"The court is not justified in embarking upon anything resembling a trial of the action upon conflicting affidavits in order to evaluate the strength of either party's case."

and finally on the extent of evaluation at the interlocutory stage (at 410D) he concluded:

"In view of the fact that there are serious questions to be tried upon which the available evidence is incomplete, conflicting and untested, to express an opinion now as to the prospects of success of either party would only be embarrassing to the Judge who will have eventually to try the case."

31. The court of Appeal (Fiji) in **Lakshmi Prasad Pandey v. Narend Singh [1986] 32 FLR 135 at 137B** said :

"While it was not necessary for the appellants to establish a prima facie case, the learned Judge had to be reasonably satisfied that a similar injunction sought in the action would probably be granted." (Emphasis added)

At 137F the court quoted the test set by the House of Lords in the American Cyanamid case:

"So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favor of granting or refusing the interlocutory relief that is sought." (Emphasis added)

32. Hon. Justice Anthony Gates, as his Lordship then was, observed in ***Arula Investment Co. Ltd Vs Sailosi Saoalu Josefa & others HBC-0274 of 2000 L decided on 2nd November 2020*** that *"the two tests, though similar, do differ slightly. With respect, the Pandey test may give a litigant the impression that a judge granting an interlocutory injunction against him has made up his mind against that litigant for the trial. The undertaking as to damages was meant to avoid this situation so that "it aided the court in doing that which was its great object viz. abstaining from expressing any opinion upon the merits of the case during the hearing." Wakefield v. Buke of Buccleugh (1865) 12 LT 628, 629. In conclusion, it can be said here that the Plaintiff has disclosed material that shows it has a prospect of succeeding in its claim for a permanent injunction at the trial".*
33. For the sake of clarity, at the expense of verbosity, let me reproduce below the questions formulated by the learned counsel for the Plaintiff, which are, undoubtedly, serious enough to be gone into at the substantial trial;
- a. Whether the signature of the purported transferors in the Transfer document in transferring the subject property to the 1st Defendant was forged?
 - b. Whether the purported signature of the Applicant on the Native Land Application for Consent to assign to transfer the property to the 1st Defendant is forged?
 - c. If the answer to a) and b) or either of them is "yes" then the rest of the purported dealings with the land must also be rendered unlawful and/or wrongful, fraudulent and or illegal and be set-aside?
 - d. Whether the purported Transfer of the property to the 1st Defendant could have been registered after the death of the Transferor without Probate or Letters of Administration?
 - e. Whether both the 1st and 2nd purported Transfers were done to defeat the interest of the plaintiff under the properly executed Will of the Transferor?
 - f. Other relevant issues to consider are as to the motive or reason for the 2nd Defendant have her name on the Death Certificate as wife when she was not married to the Transferor?
 - g. Why did the 2nd defendant have her siblings form a different marriage endorsed in the Death Certificate as the siblings of the deceased?
 - h. If Probate or Letter of Administration was not granted pursuant to the lawful will of the testator, under what authority did the 2nd Defendant continue to operate and withdraw the deceased's money from his account up to 6 weeks after his death?
 - i. Should the Honorable Court Order, as will be submitted, that the Estate of the deceased be distributed as per the valid Will of the deceased, the Plaintiff will suffer irreparable and unrecoverable loss?

34. However, the question (f) above may have to be reformulated, in view of the disclosure that she married the deceased on 5th January 2011, which has been registered belatedly on 14th January 2012. This raises the question as to motive of the 2nd Defendant.
35. Another pertinent question that arises is , would the deceased have taken such a quick and drastic decision on 11th November 2013, when he was apparently ill , to deprive his own children of the subject property, by giving entirety of it only unto the 1st Defendant, while the deceased had, on 30th May 2012, executed a Last Will bequeathing the property in question rationally to the 2nd Defendant and, to his (deceased's) own children , including the Plaintiff, and unto the 2nd Defendant's children by her former marriage as well , including the 1st Defendant. The answer to this question may assist in ascertaining the alleged fraud, if any.
36. The claim by the Plaintiff, that the signatures on the Transfer document and Application for Consent to assign are forged, is a serious allegation. As such it cannot be disregarded or lightly taken, particularly, in view of the prima-facie evidence adduced through the report of the Forensics Handwriting Expert. This alone, in my view, entitles the Plaintiff for an Injunction as there is nothing before me to question or challenge the said forensic report.
37. Further, it is observed that the existence of the impugned Will is not disputed by the 1st and 2nd Defendants, which appears to have been executed when the deceased was in their care, control and custody. According to the 1st & 2nd Defendants, neither the Plaintiff nor his siblings were anywhere close to the deceased during the time material. Then, the questions arise as to how could the Plaintiff have treated the deceased badly and verbally abused him for same to have been witnessed by the 2nd Defendant as she averred in paragraph 10 of her Affidavit in opposition. This, together with the other issues raised above, compels the court to examine the whole scenario with an injunction order in place to maintain the status quo as it is.
38. As alluded in the decision of *Sigatoka Club V. Sharma [2020] FJHC 252; HBC 85.2018 (31st March 2020)* at this state the purpose is to regulate the position until the trial or other final determination of those underlying proceedings.
39. At this stage, the Court will not be in a position to know whether the party applying for that interim relief will ultimately win or lose at trial – and it will rarely, if ever, be appropriate for a Court to undertake at this interim stage a mini-trial. I find that the Plaintiff has demonstrated as alluded above that there are serious questions to be tried by the Court at the substantial trial of this matter.
40. In order to have an interim injunction in his favour, the Plaintiff is bound to show not his entitlement for a permanent injunction at the end, but the interim orders he seeks have necessary nexus to the final orders or determination and the questions that decide it should be serious issue to be tried. Vide Sigatoka Club case (Supra)

Are Damages an Adequate Remedy?

41. The next question, once the Court finds that there is/ are serious issue/s to be tried, is that if the Plaintiff is to succeed at trial in establishing his right to a permanent injunction/ relief, would he be adequately compensated by an award of damages for the loss he would have sustained as a result of the Defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. As Lord Diplock held at 408B-C:

"If damages.....would be an adequate remedy and the defendant would be in a financial position to pay them, no interim injunction should normally be granted, however strong the claimant's claim appeared to be at that stage".

42. There are 2 key and vital elements and/or limbs according to the Judgment of Lord Diplock on the issue:

- a. *The first is whether damages is an adequate remedy?; and*
- b. *The second is whether the 1st and 2nd Defendants would be in a financial position to pay the Plaintiff?*

43. It is submitted on behalf of the Plaintiff that matters complained of by the Plaintiff are not in the nature of pure financial losses that can be compensated by awarding damages. The property was, undisputedly, built by the Plaintiff's now deceased biological parents and has a huge sentimental value attached to it according to the Plaintiff. This may not be merely valued in financial terms as no value can be attached to sentiment of that nature. Further, the Plaintiff is alleging fraud being perpetrated against him and that of course is not compensable in damages. Thus, for those 2 reasons it is argued that damages would not be an adequate remedy in this matter, with which I readily agree.

44. Further, if the injunction is not granted it would be prejudicial to the Plaintiff and in fact defeat the Plaintiff's claim, if succeeded at the end, and it would become nugatory as the property would be lost if the house is sold to an outsider, who would purchase the same as a bona-fide purchaser for value without notice or the property is encumbered. Thus it is clear that the status quo must remain.

45. In the circumstances, I am of the view that the prejudice and the damages that will be suffered by the Plaintiff if the injunction is not granted will be much greater than any other consideration. In fact the 1st or the 2nd Defendants would not suffer any prejudice or damages at all if the injunction is granted.

46. As far as the Plaintiff is concerned, it is not a matter of mere financial loss, but about having lost the right to a house built by both biological parents of the Applicant, which has a huge sentimental value to the Applicant and which cannot be assessed and compensated by any monetary value.

47. Further, even if this court decides that damages would adequately compensate the Plaintiff, pursuant to the second limb of Lord Diplock's judgment, there is no evidence of the ability of the 1st and 2nd Defendant's to compensate the Plaintiff. The position will be made worse if a

loan is taken on the property in issue or a charge or pledge created as the consent of the Board is no more required as per the latest Amendment to the Act.

48. The 1st Defendant resides in New Zealand and any Judgment in favour of the Plaintiff against him inter-alia by way of damages will only be a paper judgment and extremely difficult if not impossible for the Plaintiff to execute, leave alone the question of it being extremely expensive and cumbersome.
49. As for the 2nd Defendant, it is said that she is 59 years old and unemployed (vide her Affidavit in opposition), thus making it virtually impossible for her to repay any Judgment by way of damages.
50. Thus, it is clear that pursuant to the aforesaid second limb of Lord Diplock's Judgment, that damage is not an adequate remedy in this case. However, both the Defendants have failed and/or neglected to satisfy the court that they would be in a financial position to pay any damages awarded against them for the aforesaid reason.
51. I am convinced that the damages will not be a sufficient remedy to compensate the Plaintiff, if he succeeds at the end. Instead, the granting of the injunctive relief as prayed for right now is most desirable. Thus, the Plaintiff has satisfied this test as well for an injunctive relief pending the final determination of the substantial matter.

Who does the Balance of Convenience Favour?

52. **At the outset, it has to be emphasized that the injunction sought in this matter is not preventing any business form being continued or held up or have the effect of evicting the Defendants or anyone under them or interfering with the occupation and quiet enjoyment of the property in question. Injunction is sought merely to keep the status quo as it is until after the hearing of the matter.**
53. Is there a doubt as to the adequacy of damages? As Lord Diplock held at 408E:

“It is where there is a doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of the balance of convenience arises”
54. By definition, once the investigation has reached this third stage, the decision of the Court, whether in favour of or against an injunction, will inevitably involve some disadvantage to one or the other side which damages cannot compensate. The extent of this “uncompensable damages” either way is often a significant factor in determining the “balance of convenience”.
55. The courts exercise their power to issue injunctions judiciously, and only then necessity exists. An injunction is usually issued only in cases where irreparable injury to the rights of an individual would result otherwise.
56. The balance of convenience includes: (1) relative hardships that would be visited upon the parties; (2) whether irreparable harm to the plaintiff will follow; (3) undertakings by the plaintiff as to damages; (4) impossibility or futility of performance; (5) unclean hands. The

pecuniary damage that would be incurred from the threatened action need not be great, however. If a loss can be calculated in terms of money, there is no irreparable injury.

57. The Plaintiff has proved that:

- a. The relative hardships that would be visited upon him if the injunction is not granted.
- b. That he will suffer irreparable harm if he is not granted the injunction in this matter;
- c. He has provided more than sufficient undertaking as to damages and proffered evidence of it;
- d. He has addressed the issue if the impossibility or futility of performance;
- e. He has also addressed the issue of unclean hands of the 1st and 2nd Defendants; by alleging forgery on the part of the 1st and the 2nd Defendants, and
- f. Any loss to him cannot be calculated in terms of money, if injunction is not granted.

58. The plaintiff would be severely prejudiced and in fact it would defeat and make the Plaintiff's claim and any judgment nugatory, if the injunction is not granted.

59. In the "Cyanamid" case it was held that, *"It is where there is a doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of the balance of convenience arises"*

60. However, in this matter, not only there exist a serious question to be tried, but also I am satisfied that the damages is not a sufficient remedy and nor the Applicant could be compensated if he succeeds at the end and that there is clearly a doubt on the adequacy of the respective remedies available to the Plaintiff if injunction is not granted. I find that the balance of Convenience also favour the Plaintiff.

61. No prejudice, damage or any kind of inconvenience, would be suffered by the 1st and /or the 2nd Defendants, if the injunction is granted. Conversely, the same will be much greater on the Plaintiff, if the injunction is not granted.

Undertaking as to Damages.

62. It is submitted that the Plaintiff has provided more than sufficient undertaking as to damages and proffered sufficient evidence of his assets and income in the matter.

63. This is not a case of an active business concern which may result in loss if injunctive relief is granted but a principal place of abode of the 1st and 2nd Defendants. This is also not an injunction neither restraining the First and Second Defendants from occupation or even quiet enjoyment of the property nor depriving them of any income.

64. Thus, there is hardly any possibility for the 1st and the 2nd Defendants to incur damages owing to the injunction being granted as sought by the Plaintiff, in order to call upon the Plaintiff to give such an undertaking for damages.

65. However, without prejudice to the Plaintiff's given undertaking as to damages, which appears to be sufficient and proffered with sufficient evidence, I find that the absence of undertaking

for damages or the deficiency of undertaking as to damages need not be necessarily fatal to the application for injunction. This is in respect of a residential property and not a commercial one.

66. There are plethora of case law authorities cited in page 43 in volume 2 of Marie Chan's amended annotated High Court Rules, where it is stated that the failure to 'proffer sufficient evidence of their financial position' is not determinative of whether or not an injunction should be granted or maintained. Vide *Janifa Bi V Rehana Ali*.
67. In the case of *Mohamed Ali V Rahat Ali*, as surviving trustee of Mohamed ali & Director of Lands [2016] HBC 179/15 L by Ruling dated 6th May 2016 Master. Jude Nanayakkara, dealt at [D6] as to sufficiency of damages. He ruled that the Plaintiff's failure to give an undertaking as to damages should not debar him from obtaining an injunction to restrain the Defendant from transferring the land, on a strong prima facie case to maintain the status quo, when the Defendant Trustee has flagrantly and continued to breach a will by conferring an advantage to himself at the expense of other beneficiaries.

The Injunction sought against the 3rd and 4th Defendants.

68. The learned counsel for the 3rd Defendant, from the inception of the proceedings, has raised and maintained an issue / or objection that under the Crown Proceedings Act no injunction could be issued against the Crown or its Officers, thus the Orders sought against the 3rd Defendant cannot be granted.
69. Section 15 of the Crown Proceedings Act ("the Act") provides that:

*15.-(1) In any civil proceedings by or **against the Crown** the court shall, subject to the provisions of this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require: (emphasis mine).*

Provided that-

*(a) where in any proceedings **against the Crown** any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; and*

(b) ...

*(2) The court shall not in any civil proceedings grant any injunction or make any order **against** an officer of the Crown if the effect of granting the injunction or making the order would be to give any relief against the Crown which could not have been obtained in proceedings against the Crown. (Emphasis mine)*

70. Much has been said and argued on this in the oral and written submission by the Counsel for the Plaintiff and the 3rd Defendant. It is observed that the above section speaks about the action **against** the Crown and its Officers. The action in hand is not against the State and/ or

its Officers. The Plaintiff has not moved for any substantial or final relief against the 3rd or 4th Defendants, which, in any event, is to be considered at the end of the trial.

71. Though, the said provision of the Act does not prohibit an action against the Crown or its Officers for a declaratory right, the Plaintiff hereof has not moved for even such a right against the 3rd Defendant.
72. Generally, when any substantial final relief is not sought for by the Plaintiff against any party defendant, an injunction will not lie against such a Defendant. The Plaintiff hereof has not averred any cause of action and/or prayed for any substantial relief against the 3rd or 4th Defendants. Thus, seeking an injunction against the 3rd Defendant, with no final relief claimed against it, is a futile exercise on the part of the Plaintiff. However, granting injunction against the 1st and the 2nd Defendant would effectually safeguard the right of the Plaintiff, if any, and no necessity would arise to issue injunction against the 3rd and 4th Defendants.

Position taken by the Counsel for the 1st & 2nd Defendants.

73. Learned Counsel for the 1st and 2nd defendants, while refuting the allegation of fraud, has submitted orally and in writing that when an investigation is done in relation to the merits of the facts, he finds no serious question to be tried. But, in view of what has transpired through Affidavit evidence and contents of the documents annexed thereto, I am of the firm view that there are serious issues to be tried, particularly as to the allegation of fraud.
74. Counsel has also drawn my attention to the definition of "Fraud" from a text and a case law authority. I am of the view that this is best suited argument to be considered at the substantial trial. What matters for the time being is whether the Plaintiff has passed the test in deciding the injunctive relief prayed for, for which my answer is affirmative.
75. It is also submitted that the Plaintiff has no locus to file this action. This is not found in the pleadings of the 1st and 2nd Defendants. The Plaintiff, who claims to be a beneficiary in terms of the impugned Will, should have the unfettered right to vindicate his entitlement. When the fraud is alleged in extinguishing this right of the Plaintiff, the court should intervene and make necessary orders to preserve the status quo and to protect the Plaintiff's right, if any, from being distanced beyond his reach.
76. The matters raised by the learned counsel for the 1st and 2nd Defendants with regard to the expert opinion on the signatures of the deceased, have to be addressed at the trial when the relevant witness testifies before the Court and through the legal submissions at the appropriate stage.
77. The allegation of fraud by the Plaintiff appears to be with merits. Thus, justice demands injunctive order prayed for by the Plaintiff.

D. FINAL OUT COME:

- a. An injunction order is granted against the 1st and 2nd Defendants, as prayed for in paragraph (i) of the prayer to the Summons dated 30th March 2022.

- b. The Plaintiff's application for injunction order against the 3rd and 4th Defendants, as per paragraph (ii) of the prayers to the said Summons, is hereby declined.
- c. The 1st and 2nd Defendants shall pay unto the Plaintiff a sum of \$1,500.00 being the summarily assessed costs of this application, within 14 days from today.
- d. The Plaintiff shall pay \$300.00 unto the 3rd Defendant within 14 days being the summarily assessed Costs.
- e. The matter shall take its normal course.



A.M. Mohamed Mackie
Judge

At High Court Lautoka, on this 30th August day of 2022.

SOLICITORS:

For the Plaintiff	:	Nazeem Lawyers.
For the 1 st & 2 nd Defendants:		Samuel Ram Lawyers
For the 3 rd Defendant:		Office of the Attorney General
For the 4 th Defendant;		In-house Lawyers- iTaukei Lands Trust Board