IN THE HIGH COURT OF FIJI AT SUVA
PROBATE JURISDICTION

Probate Action No. HPP 79 of 2021

IN THE MATTER OF THE ESTATE OF BHARTI KUMARI of Lot 2 Nadawa, Dakudakulaci road, Nadawa, Nasinu, Deceased, Intestate.

BETWEEN : **SURYA NARAYAN PANDE** of Valelevu, Nasinu, Businessman.

FIRST PLAINTIFF

A N D : **LINA LIANSHIKA NARAYAN** of Valelevu, Nasinu, Minor, represented by her father, **SURYA NARAYAN PANDE** of Valelevu, Nasinu, Businessman as her next friend and Guardian Ad Litem for the purpose of conducting the cause herein.

SECOND PLAINTIFF

A N D : **ROPAL RASKHA KUMAR** of Lot 2 Dakudakulaci, Nadawa, Nasinu, Businesswoman, as the **ADMINISTRATOR OF THE ESTATE OF BHARTI KUMARI**

FIRST DEFENDANT

A N D : **RAVINDRA NARAYAN** of Laucala Beach Estate, Nasinu, Police Officer and **ASHWIN SINGH** of Lot 76 Daniva Road, Valelevu, Nasinu, Self Employed.

SECOND DEFENDANT

A N D : **MOHAMMED ZAMIR KHAN** of Lot 2 Dakudakulaci, Nadawa, Nasinu, Businessman.

THIRD DEFENDANT

Appearance **:** Mr. Asheesh Prasad for the Plaintiffs
Mr. Meru Etuate for the Defendants

Decision **:** Friday, 9th September at 9:00am

DECISION

(A) INTRODUCTION

[1]. The matter before me stems from the notice of motion filed by the defendants seeking the following orders:

(i) That the defendants be granted leave to vary the order which was made on 10th day of February 2022.

(ii) That the defendants be granted leave to deposit assets in court as the defendants had invested from the proceed of the sale.

(iii) That leave be granted that the assets will remain in custody with the defendants and will not dispose the assets until the determination of this matter.

[2]. The following affidavits have been filed:

(i) The affidavit of Ropal Raskha Kumar, the first defendant sworn on 23.03.2022. (The affidavit in support).

(ii) The affidavit in opposition of Surya Narayan Pande, the first plaintiff, sworn on 19.05.2022.

[3]. The application is opposed.

(B) BACKGROUND

[4]. The background to this case is set out in detail by Justice Seneviratne in his ruling delivered on 10.02.2022. Although it is not necessary to restate all the matters to which reference was made in his ruling, it is appropriate to provide some background in order to put the present application in context. Bharti Kumar died intestate in 2013. At the time of her death, she had three children, the first defendant, Bhawish Shamal Kumar and the second plaintiff.

[5]. The deceased Bharti Kumar and the first defendant (daughter) were owners of the property comprised in Housing Authority Sub-lease No. 442040 owing half a share each.

[6]. The first defendant applied for and obtained letters of administration for the estate. In May 2021, the first defendant sold the property to a third party for FJD 190,000. The first defendant kept the entire sale proceeds. Half of the sale proceeds belonged to the estate.

[7]. The plaintiffs instituted these proceedings against the defendants seeking the following orders:

a). An order for the accounts of the estate as at 5th May 2021.

b). An order that the 1st defendant pay to the plaintiffs their entitlement from the net value of the estate pursuant to section 6 of the Succession, Probate and Administration Act.

c). An order that the 2nd defendants pay to the plaintiffs any entitlements from the estate not paid to the plaintiffs within 30 days of judgment.

d). Exemplary damages.

e). Punitive damages.

f). Pre and post judgment interest at 8% per annum. Pre-judgment interest to be calculated from 5th May 2021.

g). Legal costs on a full Solicitor Client indemnity basis.

h). Such other and further relief as the court may deem just and reasonable

[8]. On 15th November 2021 the plaintiffs filed summons pursuant to Order 29 Rule 2 of the High Court Rules and section 6 of the Succession, Probate and Administration Act, seeking the following orders:

1) The time for service of this summons be abridged and this summons be returnable instanter.

2) An order that the 1st defendant deposit into court the sum of FJD 61,667.67 (Sixty-one thousand six hundred sixty-seven dollars and sixty seven cents) pending the determination of this action.

3) The cost of this application be cost in the cause.

4) Any other order that this Honourable Court deems fair and just.

[9]. The plaintiffs instituted the proceedings on the basis that the first plaintiff was in a de facto relationship with the deceased Bharti Kumar until her demise and the second plaintiff is a child born as a result of the said relationship.

[10]. There is no dispute that the second plaintiff is a daughter of the deceased Bharti Kumar. However the defendants deny that the first plaintiff was in a de facto relationship with the deceased Bharti Kumar.

[11]. After hearing the plaintiffs' application filed on 15.11.2021, the court ordered the first defendant to deposit FJD 61,667.67 into court pending the determination of the substantive application. The court made the order for deposit on 10.02.2022. The order was sealed on 18.02.2022.

[12]. Nothing happened until 23.03.3022. On 23.03.2022, the defendants filed notice of motion to vary the orders of the court made on 10.02.2022.

(C) PRELIMINARY ISSUE

[13]. The following preliminary objections to the hearing of the defendants'' application were raised by the plaintiffs.

i). The application of the defendants should be that they are clearly dissatisfied with the order and not disagree with the order. The recourse is an appeal to the Fiji Court of Appeal and not this application.

ii). The court is functus. The court cannot revisit the order.

iii). The application of the defendants is filed by way of a notice of motion and this in a breach of Order 32, Rule 1 of the High Court Rule, 1988.

iv). The defendants in their application did not cite the rules or the law on which the defendants found their application.

v). The first defendant has disrespected the court orders made on 10.02.2022 by non-compliance with the orders and therefore should not be permitted to continue with the application.

[14]. The plaintiffs' principal opposition to the defendants' application to vary the court orders is in these terms.

a). The first defendant was accorded the full opportunity to explain the use of the estate funds at the time of the plaintiffs' application for preservation of property. She chose not to. Having squandered the opportunity, the first defendant is seeking a second bite at the cherry.

b). The first defendant's failure to disclose the charges on the assets to the court is deliberate and attempt to mislead the court.

c). In prayer (2) in the notice of motion the defendants seek to deposit assets in court and in prayer (3) seeks to retain the assets with the defendants. The two prayers contradict each other.

[15]. The plaintiffs' argument under the first preliminary issue is that if the defendants are not satisfied with the orders of this court made on 10.02.2022, the recourse is an appeal to the Fiji Court of Appeal and not an application to revisit the application and vary the orders.

[16]. In reply, the defendants rely on Order 24, Rule 17 of the High Court Rules, 1988 which is in the following terms:

> *Any order made under this Order (including an order made on appeal) may, on sufficient cause being shown, be revoked or varied by a subsequent order or direction of the Court made or given at or before the trial of the cause or matter in connection with which the original order was made.*

[17]. I do not accept the argument of the defendants which in my view is fundamentally misconceived.

[18]. The said Order 24, Rule 17 pertains specifically to *"Discovery and Inspection of Documents".* It has no application to the matter before me.

[19]. Further to above, the defendants say that under the inherent jurisdiction of the court they seek to vary the orders of Justice Seneviratne made on 10.02.2022 and sealed on 18.02.2022.

[20]. As a starting point, it must be noted that the High Court has inherent jurisdiction as a superior court of general jurisdiction. The High Court exercises general authority over all matters of jurisdiction. A ruling by the High Court is conclusive, subject only to rights of appeal to the Court of Appeal and Supreme Court; a superior court of general jurisdiction.

[21]. Generally, a court in 'functus officio' once a judgment has been finally recorded. However, the High Court retains inherent jurisdiction to set aside its own order if that order can properly be described as nullity[1]. The judgment may be set aside without the necessity of appeal[2].

[22]. The procedural impropriety is the linking thread between most 'Nullity' cases. A judgment may be described as a nullity if it was entered by default in breach of the relevant rules of the court, or where the original process was not served upon the defendant[3].

[23]. The counsel for the defendants did **not** seek to persuade the court that the orders of J. Seneviratne dated 10.02.2022 is a nullity. **The defendants say that they are not able to comply with the orders and hence they made the application for variation of order. This could not be a foundation or justification for reopening the decision that the court had entered in the record**.

[24]. The court may also set aside its own order where the court sets out on the wrong inquiry[4]; or where there has been a breach of natural justice, such as where an order has been made against a party who has not had an opportunity to be heard[5].

[25]. The English courts have also confirmed that they have jurisdiction to rescind or vary an earlier order where the earlier decision was made following procedural unfairness. The failure to hear parties is fundamental failure which impugned the orders as nullities. The Court of Appeal decision in **R v Smith**[6] is the leading

[1] R v Nakia (No. 2) 1974 NZLR 453, 455 (C.A)
[2] Craig v Kansenn [1943] 1 K.B. 256
Kofi Forfie v Seifah [1958] AC 59. 67(PC)
[3] Cameron v Cole [1944] HCA 5, [1944] 68 CLR 571 see also Keith Manson on "The inherent Jurisdiction of the Court" [1983] 57 Australian Law Journal 449, 450. This article describes the foundation of inherent jurisdiction and it endeavours to shed light on the mysterious and shadowy concept which is so fundamental to the administration of Justice.
[4] Butterfield v R [1997] 3 NZLR 760
[5] Utah Construction & Mining Co v Watson [1969] NZLR 1062
[6] [2003] 3 NZLR 625 (CA)

decision in New Zealand. The Court of Appeal set aside a decision which was held to be 'Nullity' because of a fundamental breach of natural justice.

[26]. A court is functus officio once it has delivered its decision. A court is said to finally dispose of a matter before it when the court has no residual discretion to review or revisit its orders. The Canadian Supreme Court case of **Chandler v Alberta Association of Architects**,[7] aptly places the state of finality at that point when there is:

> *"..nothing to be judicially determined or ascertained thereafter, in order to render it effective and capable of execution, and is absolute, complete and certain". (George Spencer Bower and A. K. Turner, The Doctrine of Res Judicata, 2nd ed. (London: Butterworths 1969), at page 132, as cited in Judicial Review of Administrative Action in Canada).*

[27]. That state of finality is reached at the point when a decision maker is barred from revisiting the decision, other than to correct clerical or other minor errors under the slip rule being Order 20 Rule 10 of the High Court Rules. At common law, that point happens when the judgement is perfected – that is – when it is formally drawn up (see Scutt J's Ruling in **Naigulevu v National Bank of Fiji** (No. 2)[8] , see also **Pitatails & Ors v Sherefettin**[9] cited by Scutt J in **Naigulevu**).

[28]. Once perfected, and sealed with the judicial seal, all the issues between the parties are then deemed to have been disposed off, finally.

[29]. The public policy underlies the principle of finality. That principle is aptly described by Lord Wilberforce in **Ampthill Peerage** [10]:

> *"English law .... place(s) high in the category of essential principles that which requires that limits be placed upon the right of citizens to open or to reopen disputes. [It]...is the same principle as that which requires judgments in the courts to be binding, and that which prohibits litigation after the expiry of limitation periods. Any determination of disputable fact may, the law recognises, be imperfect: the law aims at providing the best and safest solution compatible with human fallibility and having reached that solution it closes the book. The law knows, and we all know, that*

[7] [1989] 2.S.C.R 848 at pages 861 – 862
[8] [2009] FJHC 65; Civil; Action 598.2007 (10 March 2009)
[9] [1986] QB 868
[10] (1976) 2 WLR 777

sometimes fresh material may be found, which perhaps might lead to a different result, but, in the interest of peace, certainty and security it prevents further inquiry. It is said that in doing this, the law is preferring justice to truth. That may be so: these values cannot always coincide. The law does its best to reduce the gap. But there are cases where the certainty of justice prevails over the possibility of truth (I do not say that this is such a case), and these are cases where the law insists on finality. For a policy of closure to be compatible with justice, it must be attended with safeguards: so the law allows appeals: so the law, exceptionally, allows appeals out of time: so the law still more exceptionally allows judgments to be attacked on the ground of fraud: so limitation periods may, exceptionally, be extended. But these are exceptions to a general rule of high public importance, and as all the cases show, they are reserved for rare and limited cases, where the facts justifying them can be strictly proved."

[30]. In **Merchant Finance & Investment Co. Ltd v Lata** [11], Almeida Guneratne JA relied on Jowitt's interpretation as follows:

> ***'Jowitt's Dictionary of English Law*** *(2nd ed, 1977) defines* ***functus officio*** *as "having discharged his duty", as an expression applied to a Judge, Magistrate or Arbitrator who has given a decision or made an order or award so that his authority is exhausted. In re: V.G.M Holdings Ltd. [1941] 3A11ER 417 (Ch.D.) it had been said that,* ***"where a judge has made an order for a stay of execution which has been passed and entered, he is functus officio and neither he nor any other judge of equal jurisdiction has jurisdiction to vary the terms of such stay. The only means of obtaining any variation is to appeal to a higher tribunal".*** *(per Morton, J. vide: the Head Note)*

[31]. The foundation of a court's jurisdiction to revisit decisions and the exceptional circumstances have been clearly enunciated above. The power is to be exercised 'with great caution' in view of the public interest in the finality of legal proceedings. As noted, the defendants did not seek to persuade the court that the decision of Justice Seneviratne dated 10.02.2022 is a nullity. The court's inherent jurisdiction or inherent power is the foundation of the jurisdiction to revisit decisions and it will not be exercised unless the defendants can show that;

[11] Court of Appeal Case No. ABU0034 of 2013

(1) there had been a procedural impropriety (2) there had been a breach of natural justice. The defendants did not advance arguments on this aspect.

[32]. The decision of Justice Seneviratne cannot be varied or rescinded on the sole ground that the defendants are not able to comply with the orders. The public interest in finality carries very less weight in this circumstances particular. The recourse of the defendants was an appeal and not this application. The court's decision dated 10.02.2022 is perfected, and sealed with the judicial seal, all the issues between the parties are then deemed to have been disposed off finally. The court has no residual discretion to vary its own final orders.

[33]. I hold that the first preliminary objection to the application is well founded. That really concludes the matter and thus, it will be at best a matter of academic interest only or at worst an exercise in futility to express my conclusion on the other preliminary issues and the merits of the defendants' application to vary the orders made by this court.

[34]. The defendants have not met the threshold to enable the court to exercise its inherent jurisdiction to revisit the case and vary the previous orders made. The application should be dismissed in limine.

[35]. Let me add this. The first preliminarily objection to the application is not purely technical. I think costs must be allowed.

ORDERS

1) The preliminary objection to the jurisdiction is upheld.
2) The application to vary the order made on 10.2.2022 is refused.
3) The defendants are ordered to pay costs of FJ$ 1,250.00 [summarily assessed) to the plaintiffs within seven (07) days hereof.

HIGH COURT OF FIJI
SUVA

.....
Jude Nanayakkara
[Judge]

High Court - Suva
Friday, 9th September 2022