

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

HBC 190 of 2016

BETWEEN: **MOHAMMED SHAHEEM KHAIRATI** of formerly of Yalalevu, Ba, Fiji but presently of 179B Kaniere Road, Hokitika 7811, Westcoast, South Island, New Zealand, Businessman and the Trustee of the Estate of MOHAMMED IBRAHIM (father's name Khairati) of Yalalevu, Ba, Businessman.

PLAINTIFF

A N D: **MOHAMMED AIYUB** of 6262 Prince Albert Street, Vancouver, BC, Canada in his personal capacity and as the Trustee of the Estate of Khairati, Hotel Worker.
Director. **FIRST DEFENDANT**

A N D: **MOHAMMED HASSAN aka MAHMUD HASSAN** of 13547 66 Avenue Surrey BC, Canada, V3W 2B6, Driver. **SECOND DEFENDANT**

A N D: **MOHAMMED FAREED KHAIRATI** of 14582 85 Avenue Surrey BC, Canada V3S5T6, Driver. **THIRD DEFENDANT**

A N D: **MOHAMMED ABDUL GAFFAR KHAIRATI** of 14333 84th Avenue, Surrey BC Canada, V3W OW3, Cleaner. **FOURTH DEFENDANT**

Appearances: Mr. Mishra for the Plaintiff
Ms. Nisha for the third Defendant
Ms. A. Chand for the Interested Party
Date of Hearing: 08 April 2024
Date of Ruling: 17 April 2024

R U L I N G

1. This matter concerns the estate of Khairati. There are seven beneficiaries of the estate of Khairati. They are:

- (i) the four defendants in this matter.
- (ii) the plaintiff (the estate of Mohammed Ibrahim of which the plaintiff, Mohammed Shaheem Khairati (“**Shaheem**”) is the trustee).
- (iii) the estate of Mohammed Hussein.
- (iv) the estate of Ahmed Ali.

2. The original trustee of the estate of Khairati was Mr. Mohammed Aiyub (“**Aiyub**”). He was trustee of the estate of Khairati from July 2006. Aiyub became trustee pursuant to a Terms of Settlement which all seven beneficiaries had entered into on 14 July 2006. By this **2016 Terms of Settlement**, the seven beneficiaries had agreed *inter alia* that Aiyub would sell the main estate property which is all comprised in **Certificate of Title 6225** and that the proceeds of sale be shared equally between them.
3. However, Aiyub and the defendants colluded and agreed between themselves to rent CT 6225 and its substantial premises
4. In 2016, Shaheem had instituted this action against Aiyub on allegations that Aiyub had misconducted himself and committed a breach of trust in executing his duties as trustee.
5. Notably, in early 2018, this matter had proceeded to trial before Mr. Justice Ajmeer. The main relief sought were (i) the removal of Aiyub as trustee on allegations of misconduct and breach of trust (ii) accounting of estate assets by Aiyub (iii) distribution of estate income from the rental of CT 6225 and also from cane proceeds of an estate cane farm.
6. After the plaintiff closed his case, the trial was then adjourned to another day for the defendants to present their case. On the continuation of trial, Aiyub gave evidence and was cross-examined.
7. Thereafter, the parties entered into a Terms of Settlement. Consent Order was entered on 15 February 2018. The one thing the parties could not agree on was the costs.
8. As part of the Consent Orders, Faizal Hussein Khairati (“**Faizal**”) was appointed the trustee of the Estate of Khairati to replace Mr. Mohammed Aiyub (“**Aiyub**”). It was also agreed by the parties that the estate assets be sold and that the proceeds be distributed between the seven beneficiaries equally.
9. In due course, Faizal was able to sell the major estate property (namely all that property comprised in Certificate of Title 6225) in the sum of \$525,000 – 000. The balance of the proceeds of sale, after some deductions, has been paid into court.

10. On 27 July 2023, the four defendants, who are four out of seven beneficiaries of the estate of Khairati, filed a Summons seeking that they be paid out their share of the \$525,000 -00.
11. On 08 November 2023, Messrs Anishni Chand Lawyers filed a Notice of Motion filed pursuant to Order 22 Rule 8, Order 15 Rule 6, Order 15 Rule 17 of the High Court Rules 1988 and also pursuant to section 73 of the Trustees Act 1966, seeking the following Orders:
 - (i) that the Court appointed Trustee Faizal Hussein Khairati as trustee of the estate of Khairati be joined as party to this action.
 - (ii) that the estate of Ali Ahmed and the estate of Mohammed Hussein be joined as parties to this action.
 - (iii) that the sum of \$9,622.50 be paid out to the Court appointed Trustee Faizal Hussein Khairati from the estate funds held in the judicial trust account for payment of Accountancy and Legal Fees incurred by the estate
 - (iv) the costs be costs in the cause
 - (v) any other Orders which this Court deems just.
12. As for the four defendants application to be paid out their share, I decline their application for the following reasons after having read the affidavits of Faizal Hussein Khairati sworn on 15 September 2023 in support of the 08 November 2023 Motion and also after having read the affidavit of Mohammed Shaheem Khairati sworn on 22 December 2023. Drawing from these, I agree that, before any distribution can be made to all beneficiaries, the following will have to be settled or sorted out first and foremost:
 - (i) that Faizal will have to be joined as a party as he is the trustee of the estate of Khairati
 - (ii) the question of whether or not Aiyub owes rental and sugar cane monies to the estate of Khairati and if so, how much, needs to be determined first.
 - (iii) taxes (including CGT which the estate may owe upon disposal of estate property) will have to be assessed and determined. Applications for exemption will have to be made first.
 - (iv) costs of solicitor and accountants.

- (v) there are costs imposed by the Fiji Court of Appeal against the defendants personally in favour of the plaintiff in the failed appeal of Ajmeer J's refusal to grant leave for committal proceedings against the plaintiff. Assuming this is not being appealed further to the Supreme Court, these may need to be deducted against defendants' respective shares in the estate. In any event, there is currently an appeal before the Supreme Court.

13. As for the application by Anishni Chand Lawyers , I grant the following Orders, after being satisfied of the facts deposed to in the affidavit of Faizal Hussein Khairati sworn on 15 September 2023:

- (i) that the Court appointed Trustee Faizal Hussein Khairati as trustee of the estate of Khairati is hereby joined as a party to this action.
- (ii) that the estate of Ali Ahmed and the estate of Mohammed Hussein are hereby joined as parties to this action.
- (iii) that on account of the fact that this court had earlier ordered on 08 April 2024 that the sum of \$2,622.50 be paid out of the funds held in Court on account of fees owing to Ernst & Young, that the sum of \$7,000.00 only be released to Anishni Chand Lawyers on account of legal fees owing.
- (iv) the costs be costs in the cause

14. I do note that Mr. Mishra had suggested in Court on 08 April 2024 that the sum of \$50,000 be released to Faizal to be applied towards the purposes of the administration of the estate. I do note however, that Faizal had not sought such an Order. I do note that Faizal has taken monies out of his own pocket to settle certain debts of the estate:

(for example, he had paid \$8,000 of the \$15,000-00 bill of costs rendered by Anishni Chand Lawyers; he also settled an invoice of \$4,233-00 by Ernst & Young for accounting services for the estate's 2019 to 2020 financial year, he also paid \$1,000 out of the \$3,622.50 invoiced by Ernst & Young for work on the estate's 2021 to 2022 financial year accounts).

15. While I do not see any reason to decline this prayer, I will err on the side of caution and require Anishni Chand Lawyers to file a Motion, now that their client is properly joined as a party, seeking payment out of the said \$50,000 -00 to Faizal.

ORDERS

- (i) that the Court appointed Trustee Faizal Hussein Khairati as trustee of the estate of Khairati is hereby joined as a party to this action.
- (ii) that the estate of Ali Ahmed and the estate of Mohammed Hussein are hereby joined as parties to this action.
- (iii) that on account of the fact that this court had earlier ordered on 08 April 2024 that the sum of \$2,622.50 be paid out of the funds held in Court on account of fees owing to Ernst & Young, that the sum of \$7,000.00 only be released to Anishni Chand Lawyers on account of legal fees owing.
- (iv) Anishni Chand Lawyers to file an application seeking the payment out of \$50,000 to Mr. Faizal Hussein Khairati in his capacity as trustee of the estate of Khairati, which funds are to be applied towards the administration of the estate.
- (v) the costs be costs in the cause.
- (vi) the distribution of the shares of the beneficiaries is to be postponed until the questions set out above are resolved.



Anare Tuilevuka
JUDGE
17 April 2024