

IN THE HIGH COURT OF FIJI
CENTRAL DIVISION
AT SUVA
PROBATE JURISDICTION

Probate Action No HPP 63 of 2023

IN THE ESTATE OF VIJAY CHAND
f/n Ram Sami of Lot 37, Rovadrau Rd,
Nakaulevu, Navua, Fiji Islands, Retired,
Deceased, Testate

BETWEEN : **ASHNEEL DIPAK CHAND and ANITRA CHAND** both
of 104 Nailuva Rd, Suva, Fiji Islands.
PLAINTIFFS

AND : **ASHISH PRANEEL CHAND** of Lot Rovadrau Road, ,
Navua, Fiji Islands, Mechanic, as the Executor and Trustee,
granted by the High Court pursuant to Probate No 71775.
1st DEFENDANT

AND : **REGISTRAR OF TITLES**, Civic Tower, Suva
2nd DEFENDANT

AND : **THE OFFICE OF THE ATTORNEY-GENERAL**
3rd DEFENDANT

BEFORE : **Banuve, J**

Counsel : Mr V.Kumar for the Plaintiffs
Mr A.Singh for 1st Defendant
Ms Harikishan for the 2nd and 3rd Defendants.

Date of Hearing : 27th March 2024
Date of Judgment : 16th April 2024

JUDGMENT

A. INTRODUCTION

1. There are 2 interlocutory applications before the Court, the first, a **Summons (For Urgent Injunction and Further Directions)** filed on 4th August 2023 by the Plaintiffs and a **Summons (Extension of time to file a Statement of Defence)** filed on 1st March 2024.
2. The interlocutory applications before by the Court were all that remained of a series of applications filed by the parties (mainly by way of Summons by the Plaintiffs)¹. The Court directed that both applications be heard together to avoid further delay.
3. A Chronology of Pleadings and Applications filed and Orders issued in this matter is necessary to understand the rationale behind the 2 outstanding applications before Court.

[Description]	[Date of Filing]
(i) <i>Writ of Summons.</i>	2nd August 2023.
(ii) <i>Summons (For Urgent Injunction and Further Directions).</i>	4th August 2023.
(iii) <i>Acknowledgment of Service by Counsels for the First Defendant.</i>	10th August 2023.
(iv) <i>Order of the Court</i> ²	6th September 2023.
(v) <i>Summons for Urgent Extension of</i>	7th October 2023 ³

¹ The matter was initially handled by Justice Liyanage, who left the jurisdiction prior to the **5th October 2023**, the date initially set for the hearing of the **Summons for Urgent Injunction** .

² (i) An Order that the 1st Defendant and/or 2nd Defendant whoever is in possession of Probate Grant No 71775 do deposit the same with the High Court Probate Registry upon filing of this action and for the purposes of revocation.

(ii) An Order that the High Court Probate Registry do disclose a copy of the 2nd Last Will prepared by the office of Messrs Nand Law, sometimes in the year 2010 and the Plaintiffs be given liberty to amend the claim to add particulars of the same should the need arise.

(iii) The Defendants (both) to file and serve their affidavits in opposition -31/8/2023 (The 2nd Defendant complied)

	<i>Caveat.</i>	
(vi)	<i>Summons to Enter Action for Trial</i> ⁴	27th October 2023.
(vii)	<i>Inter-Parte Summons (For Leave to issue contempt proceedings)</i> ⁵	7th November 2023.
(viii)	<i>Affidavit in Opposition (For urgent Injunction and further directions)</i>	29th January 2024.
(ix)	<i>Summons (Extension of Time to file a Statement of Defence.</i>	1st March 2024.
(x)	<i>Notice of Change of Solicitors</i>	21st March 2024.
(xi)	<i>Supplementary Affidavit of First Defendant.</i>	21st March 2024.

4. The flurry of Applications by the Plaintiffs were necessitated by the tardiness of the First Defendant, (and his then counsel), from filing a Defence to the *Writ of Summons*⁶, and an Affidavit in Opposition to the *Summons for Urgent Injunction and Further Directions* as ordered by the Court of 6th September 2023;

- (i) *An Order that the 1st Defendant and/or 2nd Defendant whoever is in possession of Probate Grant No. 71775 do deposit the same with the High Court Probate Registry upon filing of this action for the purpose of revocation.*⁷
- (ii) *An Order that the High Court Probate Registry do disclose a copy of the 2nd Last Will prepared by the office of Messrs Nand Law, sometime in the year 2010, and the Plaintiffs be given liberty to amend the claim to add particulars of the same should the need arise.*
- (iii) *The Defendants (both) to file and serve their affidavit in opposition -31/08/2023.*
- (iv) *Plaintiff to reply, file and serve -11/09/23.*
- (v) *The interim orders will be valid till the hearing of the Summons.*

³ A Notice of Removal of Caveat No 921144 over Lot 1 DP 8273. District of Serua dated 13th October 2023 was received by the First Plaintiff.

⁴ Pursuant to Order 76, rule 10

⁵ Pursuant to Order 52, rule 2(2)

⁶ Service of the Writ acknowledged on 11th August 2023

⁷ This was not done until 18th January 2024 when lodged by the Registrar of Titles.

(vi) *The matter is adjourned to 5/10/23 for hearing.*

B. SUMMONS (Extension of Time to File a Statement of Defence)

5. On 1st March 2024 the First Defendant filed a Summons pursuant to Order 3, rule 4(1) and (2) of the *High Court Rules 1988* and the inherent jurisdiction of the Court seeking the following orders;
 - (i) *That the 1st Defendant be granted an extension of time to file a Statement of Defence.*
 - (ii) *The costs of this application be in the cause; and*
 - (iii) *Any other orders that the Court deems just and expedient.*

6. Written Submissions in support were provided by the First Defendant at the hearing of the Summons on 27th March 2024. The Plaintiffs relied on composite submissions filed on 26th March 2024.

7. The First Defendant in an Affidavit in Support deposes that the reasons for not filing a Defence included;
 - (i) Lack of familiarity with Court documents.⁸
 - (ii) Biological mother passed away on 10th August 2023, so was unable to provide instructions to his solicitor.⁹
 - (iii) Before his solicitors could file a Defence they were served with a Summons for Urgent Injunction and other Relief which was called on 15th August 2023¹⁰ and they were further bombarded with 4 other applications, that lead to their forgetting about the substantive matter.
 - (iv) Consent was not provided on 11th October 2023 by the Plaintiffs for the late filing of the Defence.¹¹
 - (v) Further delay was caused by the festive season and the solicitors firm being closed.

⁸ Despite filing Acknowledgment of Service of Writ on 11th August 2023, a day after service was effected

⁹ **The First Defendant contradicts himself in that he was able to instruct his solicitors that he was served on 10th August 2023, to enable them to file the Acknowledgement of Service on 11th August 2023.**

¹⁰ The First Defendant was represented by counsel on 15th August 2023 when orders were granted by the Court, 2 of which were not complied with by the Court, until later, and 1 on the filing of a response not complied with..

¹¹ Leave to file a Defence, out of time, was not sought then (October 2023), rather a **Summons to Extend Time** to do so was only filed on **1 March 2024** when a hearing date was assigned.

8. The Application for Urgent Injunction and Further Directions set for hearing on 5th October 2023 had to be vacated because the presiding judge had proceeded on leave pending resignation, a fortuitous turn of event for the First Defendant, since he had neither filed an Affidavit in Opposition nor a Statement of Defence on that date.
9. To date, the First Defendant has not filed a Statement of Defence. An Affidavit in Opposition to the Summons for Urgent Injunction¹² was only filed by the First Defendant on 29th January 2023,¹³ despite being earlier ordered by the Court to do so, by 31st August 2023.

C. ANALYSIS.

10. The primary grievance of the Plaintiffs as pleaded in the Statement of Claim indorsed in the Writ of Summons filed on 2nd August 2023, is that a Will dated 21st of January, 2023 of the testator Vijay Chand, be invalidated on the grounds of fraud, deceit, forgery and lack of testamentary capacity and that the First Defendant took advantage of the testator's mental and physical incapacity to have this will drafted.
11. The Plaintiffs *inter-alia* seek as relief an injunction and/or restraining order against the First Defendant from transferring the estate property to himself or to a third party or alternatively that the Second Defendant (the Registrar of Titles) be restrained from transferring the said property to the First Defendant or a third party,¹⁴. A Summons (For urgent injunction and further directions) was filed also on 4th August 2023, seeking the same restraining order, pending the determination of the substantive proceeding.
12. It would have been obvious to the First Defendant, and his counsel, from the urgent relief sought in both the Writ and Summons for Injunctive Relief that the immediate concern of the Plaintiffs was to have both proceedings dealt with, as soon as possible, necessitating that the First Defendant file his responses within the time allowed.

¹² An Affidavit in Opposition

¹³ The late filing was directed on 27th November 2023 to expedite hearing of the interlocutory proceedings.

13. Neither the substantive nor the injunctive proceeding have progressed because of the failure of the First Defendant to file his responses. The reasons provided and repeated by his current solicitors are unacceptable to the Court as would be noted from its comments¹⁵ on the grounds advanced by the First Defendant for not filing a Defence or response, on time.
14. Further, the Court notes that whilst an **Acknowledgement of Service** of the Writ was filed by his counsel on **11th August 2023**, the First Defendant, as the sole Executor and Trustee of the Estate of Vijay Chand, contrary to the difficulty expressed for the delay in filing a Defence, was actively seeking to have Caveat No 921144 lodged by the First Plaintiff over Lot 1 on DP 8273 removed, as evident from a Notice of Removal of Caveat¹⁶ dated **13th October 2023**.
15. The evidence of the Notice¹⁷ detracts from the rationale provided by the First Defendant for not filing a Defence, and rather gives rise to an insinuation that compliance with directions issued by the Court, pursuant to the *High Court Rules 1988* was of secondary import to the First Defendant, and rather his focus was on having the estate property transferred, despite this being an issue that were to be addressed in the substantive proceedings.
16. The various summons issued by the Plaintiffs laid out in paragraph 3 herein *Urgent Extension of Caveat*¹⁸, *Enter Action for Trial*¹⁹, *Leave to Issue Contempt Proceedings*²⁰ may have been triggered by the suspicion of the Plaintiffs that the delay in the filing of responses by the First Defendant were caused by his focus on transferring estate property, despite the subsistence of legal proceedings, challenging this issue.

¹⁵ See paragraph 6

¹⁶ Affidavit of the First Plaintiff (in support of urgent extension of caveat and other orders) filed on 7th November 2023 - **Annexure C**

¹⁷ The Application for Removal of Caveat was made by the First Defendant whose address is provided as Benjamin Ram Lawyers, Suite 2, Level 2, Nina House.

¹⁸ Filed on 7th November 2023 pursuant to s 109-110 and 112 of the *Land Transfer Act 1971*.

¹⁹ Filed on 27th October 2023 pursuant to O. 76, r 10

²⁰ Filed on 7th November 2023 pursuant to O.52, r 2(2)

The Law

17. The Summons (Extension of time to file a Statement of Defence) was filed pursuant to Order 3, Rule 4(1) and (2) of the *High Court Rules 1988* and supported by;
 - (i) Affidavit in Support of the First Defendant filed on 1st March 2024.
 - (ii) Supplementary Affidavit of the First Defendant filed on 21st March 2024.

18. The supplementary affidavit was filed by new solicitors engaged by the First Defendant on or about 19th March 2024,²¹ however counsel relied on the *Summons (Extension of Time to file a Statement of Defence)* filed by their predecessor on 1 March 2024, so the Court's comments would apply to them also, on that basis.

19. Order 3 rule 4 states;

(1) The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorized by these rules, or by any judgement, order or direction, to do any act in any proceeding.

20. The provision vests a discretion on the Court on whether or not to extend time to allow the First Defendant to file a Defence. This Court in cases such as *Veilave v Naicker-Civil Action HBC 159 of 2013* and *Rabendra Kumar v Praveen Kumar & Others-Civil Action HBC 163 of 2015* (per Amaratunga J) have comprehensively restated the factors governing the exercise of the discretion at common law, and it is not necessary to restate them, other than to acknowledge that they are not exhaustive and cannot be rigidly applied so as to deny a party its right to come before the Court, and in the interests of justice. It has also been asserted that the paramount consideration for the exercise of discretion is *merit*, though an explanation as to delay is needed.²²

21. The Court does not find the reasons provided by the First Defendant through counsels for not filing a Defence, on time, acceptable, however after a careful consideration of all factors, particularly the denial of access to the Court to the First Defendant, that the parties to the substantive matter are 3 siblings, together

²¹ Notice of Change of Solicitors filed on 21st March 2024.

²² *Veilave v Naicker* -Civil Action HBC 159 of 2013

with their stepmother, the existence of 2 wills whose terms appear diametrically opposed and which allegations of fraud and undue influence have surfaced around the second version. It also accepts that part of the blame for the delay in filing a Defence is attributable to the First Defendant's former counsel. The Court has decided in the exercise of its discretion and, in the interest of justice, to allow the First Defendant an extension of 7 days from the date of this ruling, to file its Defence subject to the payment of costs, within the same period, to the Plaintiffs.

22. The Court is aware of practice that an extension would normally be allowed once, on an application pursuant to Order 3, rule 4, with costs to follow the event²³, however, in this instance, the First Defendant's tardiness in filing a Defence has caused prejudice to the Plaintiffs, in their incurring additional costs in filing proceedings either to maintain the status quo (*urgent extension of caveat*), to progress the hearing despite non-compliance (*summons to enter action for trial*) and for enforcement (*summons for leave to issue contempt proceedings*) and the Court deems it appropriate that costs be awarded, summarily assessed at \$800, as compensation.

D. SUMMONS FOR URGENT INJUNCTION AND FURTHER DIRECTIONS.

23. A Summons for Urgent Injunction and further directions was filed on 4th August 2023 seeking the following;
1. *An order that the 1st Defendant and/or the 2nd Defendant whoever is in possession of Probate Grant No. 71775 do deposit with the High Court Probate Registry upon filing of this action for the purposes of revocation.*
 2. *For an order that there be injunction and/or restraining order against the 1st Defendant from proceeding to transfer the estate property unto himself and/or to a third party's name and/or alternatively the 2nd Defendant be restrained from transferring the said property to the 1st Defendant's name and/or a third party's name; the estate properties being:-*

²³ Mohammed Ashraf Khan v Rabia Shabnam –HBC No 93 of 2017 (per Amaratunga J)

- a. *Certificate of Title No.14907 being Lot 1 Deposited Plan No.4069 situated in the district of Navua in the island of Viti Levu containing an area of 2 roods and 32.6 perches.*
 - b. *Certificate of Title No. 32354 being Lot 1 on Deposited Plan No. 85273 situated in the district of Navua, in the island of Viti Levu having an area of 2 hectares and 234 sq mtr.*
 - c. *2 vehicles registration No. FF 781 and DI 308*
 - d. *A tractor*
 - e. *A Speed Boat*
 - f. *A gold diamond ring worth \$9,000.00 (Nine Thousand Dollars)*
3. *An order that the 1st Defendant give proper and full account of rental proceeds to date; an order that he is not allowed to use the same but rather to either deposit the same in court and/or an estate account with interest bearing until this action is determined.*
 4. *An order that the High Court Probate registry do disclose a copy of the 2nd last will prepared by the office of Messrs Nands Law , sometime in the year 2010 and the Plaintiffs be given time to amend the claim and add particulars of the same should the need arise.*
24. The Summons was heard by Liyanage, J on 15th August 2023 and Orders 1 and 4 were issued on 6th September 2023. Whilst the orders were issued on 6th **September 2023**, Order 1 was not complied with until **18th January 2024**²⁴. Order 4 is still to be complied with.

Order 2 – Urgent Injunction

25. Plaintiffs had filed the Summons and an Affidavit of the First Plaintiff on 4th August 2023.²⁵ They also filed comprehensive written submissions on 26th March 2024 to support their application for urgent relief. The First Defendant filed an Affidavit in Opposition on 29th January 2024 but did not file written submissions to clarify his position. Brief submissions were made by the First Defendant's current counsel during the hearing that the application for injunction is no

²⁴ Lodged by the Registrar of Titles.

²⁵ Further Affidavits of the First Plaintiff (In support of Summons for Urgent Extension of Caveat) filed on 7th November 2023 and Affidavit in Response to Opposition filed on 29th January 2024.

longer necessary now that the Probate Grant has been provided to the Probate Registry on 18th January 2024.

26. The primary intent of the Plaintiffs in filing the Application for Interim Relief against the First and Second Defendants were to restrain them from transferring the estate properties *to (the First Defendant) and/or to a third party*. Subsequent events have made the application unnecessary.
27. Order 76, rule 4 (1)(b) mandates that at the commencement of an action for the revocation of a grant of probate of the will of the estate of a deceased person any defendant to the action who has the probate in his possession or under his control shall lodge it with the Probate Registry within 14 days .
28. As stated in *Naikavou & Anor v Raditora*- Civil Case No HBC 30 of 2009²⁶ the Plaintiffs need not have applied to this Court to have Order 76, rule 4 complied with by the Defendants given its mandatory terms. An Application had to be made however, by the Plaintiffs and an order issued on 6th September 2023. The Grant of Probate ought to have been lodged by the Defendants on or before **20th September 2023**. It was not done until **20th January 2024**.
29. As the Grant has now been lodged with the Probate Registry this Court directs the First Defendant must not hold himself out under the grant²⁷ as being able to deal with the estate properties, the subject of the Grant, until further orders of the Court, these being;
 - (i) *CT 14907, Lot 1, DP 4069, situate in the District of Navua (2 roods, 36 perches)*
 - (ii) *CT 32354, Lot 1, DP 85273, situate in the District of Navua (2 hectares, 234 sq mtr)*
30. The Court also notes the assurance provided by the Second Defendant in her Affidavit in Response filed on 26th August 2023 that she would abide by the orders of the Court²⁸and this is supported by endorsements entered on CT 32354

²⁶ *per Wati, J*

²⁷ See *Naikavou v Raditora*

²⁸ Paragraph 10

and 14907 on 27th November 2023 that no further dealings over these properties will be accepted by the Second Defendant, until ordered by the Court.


31. The primary injunctive orders (Orders 2 (a) and (b) sought in the Summons for Urgent Injunction of 4 August 2023 are dismissed.
32. This does not fully dispose of the Summons. The Court has reviewed the submissions made by the parties for the grant of interlocutory injunction pursuant to Order 29, rule 1 of the *High Court Rules* 1988, the application of the principles laid out *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 to the facts of the case and note that the First Defendant does not contest the grant of injunction *generally*, other than as applicable to estate land. Consequently, the Court grants the interlocutory injunction sought by the Plaintiffs in terms of Orders 2(c), (d), (e), (f) and 3 of the *Summons for Urgent Injunction* of 4 August 2023.
33. Parties will bear their own costs as they have both succeeded partly and compliance by the Defendants with Order 76, rule 4(1)(b) which negated the need for an injunction dealings with estate land was considerably delayed in contravention of the period of lodgment mandated therein.

E. ORDERS OF THE COURT

1. **The orders sought in the *Summons (Extension of Time to file a Statement of Defence)* filed on 1st March 2023 are granted subject to the following conditions;**
 - (i) **The First Defendant is to file a Statement of Defence within 7 days, and**
 - (ii) **Costs be paid by the First Defendant to the Plaintiffs, summarily assessed at \$800, to be paid within 7 days.**
 - (iii) **Plaintiffs to file a Reply, if any, within 7 days thereafter.**

2. For the Summons (Urgent Injunction and Further Directions) filed on 4th August 2023;
- (i) Orders 2(a) and (b) are dismissed, and
 - (ii) Orders 2 (c), (d),(e), (f) and 3 are granted.
 - (iii) Parties to bear their own costs.




Savenaca Banuve
Judge

16th April, 2024.