

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CIVIL JURISDICTION**

Company Case No. **HBE 38 of 2021**  
**HBE 39 of 2021**  
**HPP 40 of 2020**

**IN THE MATTER** of **NAIR'S**  
**TRANSPORT COMPANY PTE LIMITED**

AND

**IN THE MATTER** of the Section 176 of  
the Companies Act 2015

---

**BETWEEN:**           **SALESH SACHIN NAIR** of 18 Orde Place, Prospect, NSW 2148,  
Australia, Audit Manager and Shareholder in **NAIR'S TRANSPORT**  
**COMPANY PTE LIMITED** by virtue of the Will of the late Kunjan Nair  
**1<sup>st</sup> APPLICANT**

**AND:**               **NILESH RISHI NAIR** of Wainibuku, Nausori, Director and Shareholder  
of **NAIR'S TRANSPORT COMPANY PTE LIMITED** by virtue of the Will  
of the late Kunjan Nair.  
**2<sup>nd</sup> APPLICANT**

**AND:**               **RITESH RISHI NAIR** of Lot 81 Kings Rad, Wainibuku, Nausori, Sole  
Director and Shareholder of **NAIR'S TRANSPORT COMPANY PTE**  
**LIMITED** as per Companies Office Business Profile last updated 3<sup>rd</sup>  
February 2021

**RESPONDENT**

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

**COUNSELS:**       **Mr. O'Driscoll** for the 1<sup>st</sup> and 2<sup>nd</sup> Applicants  
**Mr. Cava B.** for the Respondent

**DATE OF DECISION:** 24<sup>th</sup> September, 2024 @ 9.30 am.

**DECISION**

**[Striking Out, Security for Costs and Injunction]**

## Introduction

1. There are altogether four (4) Interlocutory applications filed by the Respondent in Company Case HBE No. 38 of 2021 as follows:
  - (1) Summons to struck out Applicants case wholly [27/11/2023],
  - (2) Summons to strike out Applicants case wholly [13/12/2023];
  - (3) Notice of Motion seeking an order to restrain Second Applicant from interfering with operations of Nairs Transport Company Pte Limited [07/11/2021]; and
  - (4) Summons for Security for Costs [14/09/2021]
2. One (1) Interlocutory application filed by the Respondent in Company Case HBE No. 39 of 2021 respectively, as hereunder:
  - (1) Summons to strike out Applicants case wholly [13/12/2023],
3. The First and Second Applicants opposed the Respondent's entire applications.
4. Hence, both counsels representing respective parties to the proceedings furnished Court with their written submissions and made oral arguments.

## Respondents Contention

5. The grounds upon which the application for the Applicant's seeking the summons to be struck out are:
  - (a) The Applicants does not have *Locus Standi* to initiate the within matter until the Probate action in HPP 40 of 2020 is determined.
  - (b) It discloses no reasonable cause of action.
  - (c) The claim is scandalous, frivolous and vexatious as the applicants are exerting certain rights in the Company as members which they have not acquired and the Registrar of Companies in their letter dated 4 March confirmed the share structure of the Company.
  - (d) The Claim will prejudice, embarrass or delay the fair trial of the action in view of the pending probate action HPP 40 of 2020 initiated by the Applicants and is pending determination in HBC 364 of 2017 - the shares held by the estate of Kunjan Nair in the Company is disputed.
  - (e) The Claim is an abuse of the process as Section 176 of the Companies Act, 2015 only gives the members of the Company to seek redress with the Registrar of Companies.

6. The Notice of Motion is seeking for an Interim Injunction to restrain the Second Applicant from Interfering with the operations of Nair's Transport Company Pte Limited.
7. Summons for Security for Costs is sought against the first and second Applicants since they reside overseas.

#### **First and Second Applicants Contention**

8. Both applicants are shareholders of the Company by virtue of either of their late father's Will.
9. Section 181 (3) of the Companies Act gives powers to bring in action on behalf of the Company.
10. This application is filed under oppression - Three brothers have interest and arises from father's Will.
11. Shareholders under the Deceased's Will, There are two Wills.
12. Locus is derived as shareholders from the father's Will.
13. Section 180 of the Companies Act has no consequences and does not apply.
14. Shareholder wants to take Company case of shareholders to Court. Can apply for winding up.
15. First and Second Applicant's not interfering in operations of S. Nair's Transport Co. Ltd.
16. No need for restraining order to be sought in injunction application.
17. The Second Applicant is in person and not an entity/Company.
18. Seek Striking Out and Restraining Orders.

#### **Determination**

19. The Respondent has filed three (3) Interlocutory **Striking Out application** of the first and second Applicants substantive Company Case HBE No. 38 of 2021 and 39 of 2021 respectively.
20. There is also one (1) **Notice of Motion** filed by the Respondent to restrain the second Applicant from interfering with the operations of the **Nairs Transport Company Pte Limited**.
21. One (1) **further Summons for Security Cost** filed by the Respondent against the **First and Second Applicants** respectively.

22. This Court needs to determine all the above Five (5) Interlocutory Application in totality accordingly.
23. The parties to the proceedings have a substantive matter **HPP Action No. 40 of 2020** impending before the Acting Master scheduled on 27<sup>th</sup> August 2024. *In that action, the First and Second Plaintiffs have alleged FRAUD: that on or about 29<sup>th</sup> May 2020, the Defendant unlawfully and fraudulently obtained the Grant of Probate in the Estate of Kunjan Nair pursuant To the Will dated 05<sup>th</sup> July 2015 for Probate application No. 65701 based on the Advertisement placed by the Solicitors for the First Plaintiff. Altogether, the deceased allegedly had three (3) Wills dated 06 July 2007, 05 July 2015 and 19 March 2020 respectively.*
24. The Grant of Probate No. 65701 in the Estate of **Kunjan Nair** was deposited into Court in terms of **citation order** signed on 04<sup>th</sup> April 2020 under the hand and seal of the Chief Registrar.
25. This Court has taken Judicial notice of the contexts of the Will of the Deceased Kunjan Nair at paragraph 4 of the Will dated 07<sup>th</sup> May 2015: **"Give Devise and Bequeath 20% of all the Deceased's real and personal estate to Nilesh Rishi Nair and Salesh Sachin Nair absolutely and 60% of his real and personal estate to Ritesh Rishi Nair absolutely."**
26. However, the beneficiaries will only be entitled to the Real and Personal Estate of the Deceased and can only be entitled and distributed to them once the presiding Court had determined the **Civil Action No. HPP 40 of 2020** in terms of the **pronouncement for and against the Wills** dated [06 July 2007, 05 July 2015 and 19 March 2020] purported to have been executed by Deceased, Kunjan Nair.
27. Apart from above, there is also a **Companies Action No. HBE 364 of 2017** impending Hearing and determination of the substantive pending issue which has nexus with the current **companies cases HBE No. 38 and 39 of 2021** pending before this Court and the determination made therein will certainly have some impact on the current two (2) cases before me in terms of the orders sought herein.
28. The question that arises herein is:
  - (i) whether the Respondent, **Ritesh Rishi Nair** is currently the **sole Director and Shareholder** of Nairs Transport Company Pte Limited since the substantive originating summons filed has been issued by the First and Second Applicants in his capacity on the **Sole Director and Shareholder** of the Company?
  - (ii) From where and since when did the Respondent, Ritesh Rishi Nair derive his entitlement / Title of the **'Sole Director and Shareholder of Nairs Transport Company Pte Limited'**?
  - (iii) Do the First and Second Applicants then have any legal capacity to initiate as these proceedings when they are yet to be transferred with any shares of the Company, Nairs Transport Co. Pte Ltd?

29. As far as this Court is concerned **Civil Action No. HPP 40 of 2020** once heard by the Court will determine the pronouncement of the respective Will of the Deceased Kunjan Nair which will then reflect the entitlement and share of the personal and reals estate of the deceased and then the distribution may be done accordingly entitling Locus and/or empowering them to file proceedings as they think appropriate in the circumstances.
30. The First and Second Applicants are the same Applicants in the impending Probate Action No. HPP 40 of 2020. They are not the members of the company and cannot rely upon the Will(s) in Contention in HPP No. 40 of 2020 in the absence of the disposition of the probate action No. HPP 40 of 2020.
31. I find that the First and second Applicant's do not have any Legal Capacity and/or *Locus Standi* to commence these two proceedings HBE 38 of 2021 and 39 of 2021 against the Respondent accordingly .
32. Further, notably, the originating summons commenced and filed by the First and second Applicants against the Respondent(s) coupled with the five (5) interlocutory applications on which a determination needs to be made currently raises a lot of **triable issues in absence of a determination yet to be made in the substantive probate Action No. HPP 40 of 2020**; whether the Respondent being the Director and shareholder of the Company has failed in his civil obligations as the beneficiary of the Will, to avoid conflict of interest and whether pursued his personal interest that will benefit him personally before the Company interest and deprive other beneficiaries of their share and entitlement and continues to carry out the work for the company with reasonable care and diligence?
33. Whether the Respondent has acted recklessly with intentional dishonesty and failing to discharge his duties in good faith in the best interest of the company or for proper purpose?
34. All above can only be determined and resolved once the substantive probate action no. HPP 40 of 2020 is determined that will iron out most of the triable issues accordingly.
35. It is only proper that I find that the First and Second Applicants do not have the legal capacity and/or *Locus Standi* to file and commence these companies action no. 38 of 2021 and 39 of 2021, since the determination is yet to be made in the Probate Action No. 40 of 2020. Any Decision make therein in First and Second Applicants favour may entitle them to the share(s) in the Will of Deceased, Kunjan Nair, upon pronouncement for and against the Deceased Will(s).
36. Therefore, for the current time I have no alternative but must proceed to strike out and dismiss the First and Second Applicants Originating Summons in its entirety in both cases HBE 38 of 2021 and 39 of 2021 respectively.
37. Hence, the Respondent's striking out application succeeds accordingly.
38. Further, there is no need to make any orders for Security for Costs against the First and Second Applicants in terms of Order 23 Rule 1(1)(a) of the High Court Rules 1988 since both companies action no. HBC 38 of 2021 and 39 of 2021 have been struck out and

dismissed in its entirety.

39. For the aforesaid rational, the Notice of Motion filed on 07<sup>th</sup> November 2021 in the like seeking for Interim Injunction and Restraining Orders against the Second Applicant is also accordingly dismissed.

**Costs**

40. Both matters proceeded to full hearing with five (5) Interlocutory application and parties to the proceedings furnished Court with written submissions and orally argued each of the 5 interlocutory applications.
41. It is only just and fair that each party to the proceedings bear their own costs at the discretion of this Court accordingly.
42. Following are the orders of this Court:

**Orders**

- (i) Summons filed on 27 November 2023 and 13 December 2023 seeking to strike out the First and Second Applicants substantive action HBE 38 of 2021 and 39 of 2021 wholly succeeds.
- (ii) First and Second Applicants substantive originating summons HBE 38 of 2021 and 39 of 2021 are accordingly struck out and hence dismissed.
- (iii) Respondent's Notice of Motion seeking for Interim Injunction against the Second Applicant and Restraining order filed on 7<sup>th</sup> November 2021 is also struck out and dismissed.
- (iv) Respondent's Summons filed on 14<sup>th</sup> September seeking for Security for costs against the First and Second Applicants is also accordingly struck out and dismissed.
- (v) Each party to the proceeds HBE 38 of 2021 and 39 of 2021 to bear their own costs at the Discretion of this Honourable Court.
- (vi) File No. HBE 38 of 2021 and HBE 39 of 2021 are closed.

Dated at Suva this 24<sup>th</sup> day of September ,2024.



  
VISHWA DATT SHARMA  
PUISNE JUDGE

Cc: Messrs, O'Driscoll & Co., Suva  
Nilesh Sharma Lawyers, Suva