

IN THE HIGH COURT OF FIJI
CIVIL JURISDICTION
AT LAUTOKA

CIVIL ACTION NO. HBC 13 OF 2023

BETWEEN: **ABDUL HABIB aka HABIB ALI. Of Olosara, Sigatoka. Farmer**

PLAINTIFF

AND: **Mohammed Ishaq aka Mohammed Isakh as the sole EXECUTOR AND TRUSTEE OF**
THE ESTATE OF RAMZAN ALI of Olosara Sigatoka, Businessman

DEFENDANT

BEFORE : Hon. A.M. Mohamed Mackie-J

COUNSEL : Mr. Bulu S. For the Plaintiff.

 : Mr. J.K .Singh. For the Defendant.

DATE OF HEARING : 18th September 2024.

DATE OF RULING : 7th November 2024.

PRONOUNCED ON : 11th November 2024 @ 10.00 am.

RULING

(On Preliminary Objection)

1. Before me is an Originating Summons filed by the Plaintiff hereof on 31st January 2023 and amended on 28th February 2023 seeking for the following reliefs against the Defendant.
 - a. ***THAT*** the Defendant by virtue of the will dated 17th November, 2005 and grant of Probate No. 48712 to proceed with the execution of LOT 1 SO 8981 – Tavanasaisai & Muasara (Pt Of) Formerly Bal Lot 4 SO 1453 (LD Reference NO: 4/11/2646) and transfer the same to the Plaintiff;
 - b. ***THAT*** should the Defendant failed to Execute and Transfer LOT 1 SO 8981 – Tavanasaisai & Muasara (Pt Of) Formerly Bal Lot 4 SO 1453 (LD Reference NO: 4/11/2646) and transfer the same to the Plaintiff, the Deputy Registrar of the High Court be appointed to execute the same forthwith.
 - c. ***THAT*** all costs incurred by the Plaintiff to be paid by the Defendant.
 - d. ***SUCH*** further Orders and/relief as to this Honorable Court deems just and expedient.
2. The amended originating summons states that it is made pursuant to Order 7 Rule 2 of the High Court Rules 1988 and section 38 of Succession, Probate and Administration Act 1970 and inherent jurisdiction of this Court.
3. Subsequent to the filing of the Affidavit in opposition and the Affidavit in reply, when the matter came up for hearing, Counsel for the Defendant raised 2 preliminary objections and the Court, having briefly heard the same, directed both the Counsel to file short submissions on it and fixed the matter for ruling.
4. The Defendant's Counsel was granted 14 days to file his written submissions, with the service on the Plaintiff's Counsel, for him to file his written submissions in 14 days thereafter. However, as no written submission was filed by the Defendant as per the direction, this ruling is pronounced considering the contents of the oral submissions made and those of the record.
5. The, purported preliminary objections raised by the defendant's Counsel are;
 - a. That the Plaintiff could not have commenced this action by way of Originating Summons as the Plaintiff is seeking the interpretation of the Will, thus this becomes a triable issue. As such, this action has to be converted as a writ action.

- b. The Plaintiff is relying up on a Deed of family arrangement which has not been consented to by the Director of Lands. Thus, the Deed amounts to dealing with the land pursuant to Section 12 of the Land Transfer Act.
6. The aforesaid, purported, preliminary objections appear to be frivolous and raised with the intention of delaying the process and/or frustrating the Plaintiff. In his Affidavit in opposition the Defendant has admitted that he is the Executer & Trustee of his Father's Will, the Plaintiff was given 5 ½ Acres out of the Subject land and the Plaintiff is already cultivating 3.36 acres out of it.
7. It is on record that the parties were attempting a settlement in terms of the Will and the Deed of Family arrangement dated 15th December 1976. On careful reading of the contents of the Will and those of the Deed of Family arrangement, the intention of the Testator and that of the parties for the Deed of Family Arrangement is very clear. The provisions in the Will and the Deed do not warrant any serious interpretation as sought by the counsel for the Defendant.
8. As to the extent of the land to be distributed, I don't see any ambiguity. At the end of the day, when the presently available total extent is ascertained by a Survey, with the consent of the Director of Lands, it is nothing but the physically available current extent that will be shared between the Plaintiff and the Defendant. The terms "*More or less*" found in the Will need not create any confusion or ambiguity. Whatever the extent physically available will have to be shared between the parties in terms of the Will and the Family arrangement.
9. There need not be any hurdle for the hearing of the Originating Summons, if needed, with the interpretation of the will and the Deed of Family arrangement, by purely relying on the very contents thereof, with no evidence being led.
10. The consent of the Director of Lands is required only when the land is "dealt with" as per the Will and the Family arrangement. The dealing with the land has so far not taken place. However, obtaining the consent is a duty casted upon the Defendant, being the Executer and Trustee of the Will. He cannot shy-away from his duties and responsibilities as a Trustee & Executer by raising this kind of objection at this stage.

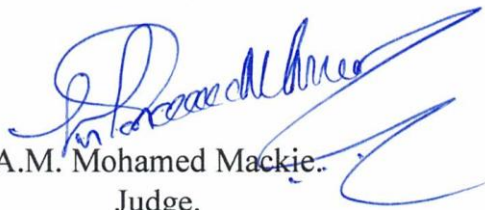
11. Accordingly, this court decide to overrule the, purported, preliminary objections and fix the matter for hearing. Considering the frivolous nature of the objections raise and the circumstances, Court decides to impose a summarily assessed costs of \$400.00(Four Hundred Fijian Dollars) payable by the Defendant unto the Plaintiff.

FINAL ORDERS:

- a. The preliminary objections raised by the Counsel for the Defendant are overruled.
- b. The Substantial Application is to be re-fixed for hearing.
- c. The Defendant shall pay the Plaintiff a sum of \$400.00 (Four Hundred Fijian Dollars) being the summarily assessed costs, within 21 days from today.

On this 12th Day of November 2024 at High Court Lautoka.




A.M. Mohamed Mackie.
Judge.
High Court (Civil Division)
Lautoka.

SOLICITORS:

Messrs.: KOROITAMUDA LAWYERS- Barristers & Solicitors- For the Plaintiff.
: J.K.SINGH LAWYERS- Barristers & Solicitors- For the Defendant.