

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBM 15 of 2017

BETWEEN: **THE DIRECTOR OF PUBLIC PROSECUTIONS**
APPLICANT

AND: **AIDONG ZHANG**
FIRST RESPONDENT

AND: **CHANGHUI LIU**
SECOND RESPONDENT

AND: **HOME FINANCE COMPANY LIMITED**
THIRD RESPONDENT

AND: **NEW HOME TRADING COMPANY LIMITED**
FOURTH RESPONDENT

AND: **YONG CHEN**
INTERESTED PARTY

Before: Mr. Justice Deepthi Amaratunga

Counsel: Mrs. Prasad J. for the Applicant
 Mr. Nandan S. for the 1st and 4th Respondents
 Mr. Singh V. for the 2nd Respondent
 Mr. Nand M. for the 3rd Respondent

Date of Judgment: 04 April, 2025

JUDGMENT

Facts

[1] The Plaintiff filed Originating Summons with affidavit in support on 24.01. 2017 seeking forfeiture orders against the properties as outlined in the Originating Summons in terms of Proceeds of Crime Act 1997.

- [2] The First Second and Forth Respondent filed their response jointly by way of an affidavit on 15 .2. 2017
- [3] On 11.5.2017 second Respondent had changed the solicitors
- [4] On 19.5.2017 first Respondent filed an application for stay of this action till conclusion of criminal action. (First Application)
- [5] This application was made on the basis that there will be prejudice to first Respondent. He was charged in criminal proceedings and stated that his right to silence is denied being a party to this civil proceedings.
- [6] Said application for stay is made pursuant to Rights of Accused secured in Bill of Rights of Constitution of Republic of Fiji (the Constitution) provision and alleged prejudice. Properties stated in this application are owned by second Respondent.
- [7] Applicant's position is that proceeds of crime a of second Respondent 'tainted' the properties stated in this originating summons.
- [8] The application for forfeiture included a land comprised in CT 25292 and a house on it, a bank account and both are in the name of second Respondent and two vehicles are registered to fourth Respondent.
- [9] First and second Respondents are husband and wife and fourth Defendant is a legal entity.
- [10] Second Respondent filed an affidavit on behalf of second and fourth Respondents despite they were not the name of second Respondent.
- [11] On 14.6.2017 second Respondent filed summons (Second Application) for;
- a. Strike out of this action (originating summons).
 - b. Alternatively, a declaration of the nature estate and value of the Second Respondent's interest to the following property, (Second Application)
 - (i). Freehold Land comprised in Certificate of Title No 25292 being Lot 19 on Deposited Plain No 5774.
- [12] Second Application was made on the following grounds;
- a. Originating summons is abuse of process.
 - b. Second Respondent is the owner of the property.

- c. There is no allegation against Second Respondent that she was involved in the commission of the alleged offence for which second Respondent had been charged.
- d. Second Respondent acquired the property on 8.10.2014 for fair value at which time the property was not and could not be classified as trained property.

[13] Both applications were after hearing of originating summons partially and adjourned to allow parties to provide translation of documents annexed to affidavits of Applicant and second Respondent.

APPLICATION FOR STAY

[14] First Respondent made application for stay of proceedings until final determination of related criminal action. This application is made on the basis of prejudice to fair trial in criminal proceedings.

[15] First Respondent rely on Section 14 of the Constitution which states

“Rights of accused persons

14.—(1) A person shall not be tried for—

(a) any act or omission that was not an offence under either domestic or international law at the time it was committed or omitted; or

(b) an offence in respect of an act or omission for which that person has previously been either acquitted or convicted.

(2) Every person charged with an offence has the right—

(a) **to be presumed innocent until proven guilty according to law ;**

(b) to be informed in legible writing, in a language that he or she understands, of the nature of and reasons for the charge;

(c) to be given adequate time and facilities to prepare a defence, including if he or she so requests, a right of access to witness statements;

(d) to defend himself or herself in person or to be represented at his or her own expense by a legal

practitioner of his or her own choice, and to be informed promptly of this right or, if he or she does not have sufficient means to engage a legal practitioner and the interests of justice so require, to be given the services of a legal practitioner under a scheme for legal aid by the Legal Aid Commission, and to be informed promptly of this right;

(e) to be informed in advance of the evidence on which the prosecution intends to rely, and to have reasonable access to that evidence;

(f) to a public trial before a court of law, unless the interests of justice otherwise require;

(g) to have the trial begin and conclude without unreasonable delay;

(h) to be present when being tried, unless—

(i) the court is satisfied that the person has been served with a summons or similar process requiring his or her attendance at the trial, and has chosen not to attend; or

(ii) the conduct of the person is such that the continuation of the proceedings in his or her presence is impracticable and the court has ordered him or her to be removed and the trial to proceed in his or her absence;

(i) to be tried in a language that the person understands or, if that is not practicable, to have the proceedings interpreted in such a language at State expense;

(j) to remain silent, not to testify during the proceedings, and not to be compelled to give self-incriminating evidence, and not to have adverse inference drawn from the exercise of any of these rights;

(k) not to have unlawfully obtained evidence adduced against him or her unless the interests of justice require it to be admitted;

(l) to call witnesses and present evidence, and to challenge evidence presented against him or her;

(m) to a copy of the record of proceedings within a reasonable period of time and on payment of a reasonably prescribed fee;

(n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time the offence was committed and the time of sentencing; and

(o) of appeal to, or review by, a higher court.

(3) Whenever this section requires information to be given to a person that information must be given as simply and clearly as practicable, in a language that the person understands.

(4) A law is not inconsistent with subsection (1) (b) to the extent that it—

(a) Authorizes a court to try a member of a disciplined force for a criminal offence despite his or her trial and conviction or acquittal under a disciplinary law; and

(b) Requires the court, in passing sentence, to take into account any punishment awarded against the member under the disciplinary law “

[16] First Respondent's rights in the criminal action are constitutionally guaranteed and he is not denied these rights by institution of civil action relating properties stated in this action which are in the name of second and fourth Respondents.

[17] First Respondent had filed an affidavit on behalf of second and fourth Respondents in this originating summons filed in terms of Proceeds of Crime Act 1997 for properties belonged to second and fourth Respondents and hearing of originating summons was also partially completed when it was adjourned as both parties relied on documents in Chinese language and translations were not provided in the affidavits before the court hearing.

[18] First Respondent contend that being a party to this proceedings he is compelled to reply to allegations put forward in this proceedings, hence a violation of Section 14 of the Constitution. This cannot be accepted as being a party to civil action itself is not a violation of Section 14 of the Constitution. In this originating summons properties are not registered in the name of first Respondent though he is named in this action as a party. He filed an affidavit in response on behalf of second Respondent who is the wife of first Respondent and also for legal entity forth Respondent.

- [19] This is civil action and burden of proof is different from criminal action. So even a finding of fact on lower burden not affected by rights of accused person. It is not a violation of right to silence in criminal prosecution.
- [20] Even if I am wrong on that first Respondent had filed an affidavit in opposition and hearing had also commenced, so stay will not serve any purpose as he had provided a reply to the allegations contained in the originating summons.
- [21] In this action Applicants have already replied to the affidavit in support hence no purpose will be served by stay of this proceedings at this stage and this will only amount to delay.
- [22] Proceeds of crime required urgent remedies to protect proceeds from being lost or converted to another form or dispersion beyond trace. In that context Applicant is statutorily empowered to seek suitable interim remedies and first Respondent can elect either to object by adducing evidence or only make submissions without adducing evidence.
- [23] Applicant is required to establish certain facts relating to the property before an order for forfeiture is made.
- [24] First Respondent while replying on behalf of second and fourth Respondents had admitted some of the facts on behalf of other Respondents, and all of them were represented by same the same solicitors at that time. He had also proceeded to hearing before adjournment of hearing, to allow translation of documents in foreign language.
- [25] This action is instituted in terms of civil proceedings. By way of originating summons, it is not uncommon to have more than one action relating to same incident or facts. E.g. criminal action for theft of money and civil action for recovery of the same from the person responsible. The burden of proof is different in civil action, and second and fourth Respondents were not made accused in criminal prosecution, and the forfeiture sought not based on conviction.
- [26] Similarly there can be more than one civil action arising from same incident or facts. There are provisions under High Court Rules 1988 to deal such situations. So stay of this originating summons is not suitable remedy.
- [27] A party to civil proceeding, can similarly be a party to more than one action in civil suits and also accused of criminal action. If Plaintiff had acted unreasonably in criminal prosecution there are provisions under law that sufficiently guarantees any malicious prosecution including damages. Stay of this proceedings is not the remedy.

[28] First Respondent contend that there is a risk of fair trial , as Applicant has its possession evidence of first Respondent, hence proceeding with this hearing further prejudice Respondent and should be stayed. This cannot be accepted as matter proceeded to part hearing and the affidavit of first Respondent filed.

[29] At the hearing Applicant stated that though the prosecution is from the same institution it will not use the evidence produced in this action and had separated the unit dealing with this case with the prosecution. So stay of this proceedings will not serve any purpose.

[30] Applicants also contend that if this action is not stayed there will be multiplicity of proceedings where Applicants will be asked to reply in civil proceedings so that a party will is required to answered three times relating to same issue in three proceedings . Two in civil proceedings including this proceedings and one in criminal proceedings.

[31] The above contention already addressed in this judgment hence rejected for same reasons stated earlier.

[32] Respondent contend that possession of evidence by way of affidavits filed by them in the hand of prosecution authority in criminal action and Plaintiff in this action are the same hence balance of power has shifted to Applicant (Prosecution) in criminal action. This is not correct. As stated earlier prosecution had stated that it will not use the evidence adduced by Respondents for the prosecution unless they elect to do so.

[33] Section 27 D of The Proceeds of Crimes Act 1997 states:

“Stay or adjournment of proceedings

27 D. Proceedings for an order or declaration are **not to be stayed or adjourned for the purpose of awaiting the outcome** of any **criminal proceedings that have commenced or are to commence involving a person** whose property is or may be affected by the proceedings”.

[34] The above provision prevents stay or adjourning this proceeding awaiting criminal proceedings. Proceedings for recovery of proceeds of crime is a separate civil action and it can proceed with or without criminal action as it does not depend on conviction.

[35] First Respondent in submissions relied on **Commissioner of the Australian Federal Police v Zhao and Ors** [2015] HCA 5, (decided on 12 .2. 2015,) the High Court of Australia dealt with interpretation of section 319 of the Australian Proceeds of Crime Act before subsequent amendment which stated:

"The fact that criminal proceedings have been instituted or have commenced (whether or not under this Act) is not a ground on which a court may stay proceedings under this Act that are not criminal proceedings."

- [36] The above provision is not identical to local provision. Section 27D of Proceeds of Crimes Act 1997 makes it clear that no proceedings under said act for an order or declaration, be stayed or adjourned for the purpose of awaiting outcome of criminal proceedings.
- [37] In contrast, Australian provision is discretionary, and used the word 'may' which allowed discretion of the court to stay. This distinction clearly makes that the said Australian action distinguishable.
- [38] In **Commissioner of the Australian Federal Police v Zhao and Ors** [2015] HCA 5 (at paragraph 39, relied by first Respondent, in the written submissions at paragraph 7) held,
- "It may be accepted that forfeiture proceedings should not be unduly delayed. No litigation should be delayed except for good cause, especially criminal proceedings. On the other hand **nothing in the POC Act or in the nature of forfeiture proceedings under the Act suggest that they must proceed** at all costs. It could hardly be said from any point of view, that they are more important than criminal proceedings and should be given priority".(emphasis added)
- [39] This is in sharp contrast to Section 27D of Proceeds of Crimes Act 1997 which specifically state priority should be given to civil proceedings under Proceeds of Crime Act 1997, irrespective of pending criminal action. This prevents stay as priority to proceedings in terms of Proceeds of Crime Act 1997 is specific under Proceeds of Crime Act 1997.
- [40] So, civil actions filed under Proceeds of Crime Act 1997 cannot be stayed awaiting outcome of criminal actions in terms of Section 27 D of Proceeds of Crime Act 1997 and the summons filed by first Respondent is struck off.
- [41] First Respondent also associated with second Respondent's summons for strike out for non-compliance of Order 7 rule 3 of High Court Rules 1988. This issue is dealt in Second Application.

SECOND APPLICATION

- [42] Second Defendant along with first and fourth Defendants filed the 'Acknowledgment of Service of Originating Summons' on

21.2.2017. First Respondent had sworn an affidavit in Response on behalf of second and fourth Respondents.

[43] So second Respondent proceeded to hearing of this action and hearing was partially completed when it was brought to the notice of the court that there were some documents in Chinese language and required translation. Since both parties requested translation of such documents both parties were allowed to file supplementary affidavit including second Respondent and continuation of hearing adjourned to 25.5.2017.

[44] On 11.5.2017, second Respondent file 'notice of appointment of solicitors'. Second Respondent had already filed a 'Notice of Appointment of Solicitors', 'along with first and fourth Respondents and an affidavit in response was also filed on behalf of second Respondent when the hearing commenced. The hearing adjourned in order to accommodate parties to obtain translation of documents in Chinese language.

[45] On 14.6.2017 second Respondents solicitors on record filed summons seeking following orders

- a. Strike out
- b. Alternatively, declaration of the nature and value of the Second Respondent's interest in the following property;
 - i. Freehold Land comprised in Certificate of Title No 2592 being Lot 19 on Deposited Plan No 5774.

[46] Second Application was made on the basis of

- i. Originating summons is an abuse of the process of the court.
- ii. Second Respondent is the owner of the property.
- iii. There is no allegation against the second Respondent that she was involved in the commission for the alleged offence for which the first Respondent was charged.
- iv. Second Respondent acquired the property on 8.10.2014 for fair value at which time the property was not and could not be classified as tainted property.

STRIKE OUT

[47] For strike out second Defendant had relied on several grounds. This is an application in terms of Order 18 rule 18 (1) of the High Court Rules 1988.

THE GROUNDS FOR STRIKE OUT ARE

[48] Non Compliance of Order 7 rule 3 of High Court Rules 1988.

[49] Applicant had failed to file a statement in terms of Order 7 rule 3 (1) of High Court Rules 1988. In my mind this not fatal and curable defect as the hearing had not concluded.

“Order 7 rule 3 of High Court Rules 1988 states

‘3.-(1) Every originating summons must include a statement of the questions on which the plaintiff seeks the determination or direction of the High Court or, as the case may be, a concise statement of the relief or remedy claimed in the proceedings begun by the originating summons with sufficient particulars to identify the cause or causes of action in respect of which the plaintiff claims that relief or remedy.’

[50] Apart from this without raising this as a defect in terms of Order 2 rule 2(1) of the High Court Rules 1988, first second and fourth Respondents have filed a joint affidavit in response.

[51] Order 1 rule 2 of the High Court Rules 1988 defines the word ‘Pleading’ inclusively as

“Pleading include any petition or summons, and also includes the statements in writing of the claim or demand of any Plaintiff, and of the defense of any defendant thereto, and of the reply of the plaintiff to any counterclaim of a defendant, but does not include a petition, summon or preliminary act’

[52] The court has discretion to allow ‘any party to amend his or her pleading’ including originating summons at ‘any stage’ when it is ‘just’ to do so in terms of Order 20 rule 5 of the High Court Rules 1988 read with Order 20 rule 6 of High Court Rules 1988. As the statement required in terms of Order 7 rule 3(1) of the High Court Rules 1988 is part and parcel of originating summons hence amendment of such originating summons can be allowed instead of strike out. This can be allowed by the court on its own motion or when a party is seeking to strike out of an action in terms of Order 18 rule 18 of High Court Rules 1988

“Order 18 rule 18(1) states that ‘*Court may at any stage of the proceedings order to be be struck out or amend any pleadings or the indorsement, of any writ in the action, or anything in any pleading or*’.

[53] So in my mind there is no need to strike out this action for noncompliance of Order 7 rule 3(1) of High Court Rules 1988 as it is a curable defect in terms of Order 18 Rule 18(1) of High Court Rules 1988. This is analogous to order for amendment of pleadings

in a writ of summons if such amendment could cure the defect instead of strike out, which is the last resort.

[54] Accordingly Applicant is allowed to cure the defect by filing a statement in terms of Order 7 rule (3) of High Court Rules 1988.

[55] Without prejudice to above, second Respondent had not raised this in terms of Order 2 rule 2 of High Court Rules 1988. So in terms of Order 2 rule 1 of High Court Rules 1988 such defect or irregularity does not nullify the proceedings in this action so as to strike out this action. This provision is more fully discussed below.

NON COMPLIANCE WITH ORDER 6 RULE 6

[56] Second Respondent states that she 'ordinarily resides in China' but in this originating summons Applicant stated an address of her husband the first Respondent. She had filed an acknowledgment of service of originating summons on 15.2.2017 with first Respondent. So she is estopped from raising that she was not served with the originating summons and or that she resides overseas hence leave should have been obtained in order to serve the originating summons to her.

[57] Even if I am wrong on the above, second Respondent had also filed an affidavit in response through her husband and she is estopped from raising this late objection after part hearing concluded in terms of Order 2 of High Court Rules 1988

[58] Order 2 of High Court Rules 1988, states

"Order 2 rule 1

1.-(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and **shall not nullify the proceedings**, any step taken in the proceedings, or any document, judgement or order therein.

(2) Subject to paragraph (3), the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1), and on such term as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any

document, judgment or order therein or exercise its powers under these Rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit

3) The Court shall not wholly set aside any proceedings or the writ or other originating process by which they were begun on the ground that the proceedings were required by any of these Rules to be begun by an originating process other than the one employed.

2.-(1) An application to set aside for irregularity any proceedings, any step taken in any proceedings or any documents, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.

(2) An application under this rule may be made by summons or motion and the grounds of objection must be stated in the summons or notice of motion".(emphasis is mine)

[59] Second Respondent had not taken steps by filing an affidavit in response through her husband, first Respondent and had proceeded to hearing of this action hence failed to take action in terms of Order 2 rule 2 (2) 'within a reasonable time' as she was not only aware of the proceedings due to her husband but also had filed acknowledgment of service and also an affidavit through her husband.

Whether Originating summons is abuse of process due to allegation of fraud.

[60] This is not a ground to strike out this action for abuse as Order 5 rule 2 (b) read with order 28 rule 9 of High Court Rules 1988 allows a court to order the matter to be converted to a writ action. A mere allegation of fraud in an affidavit is not sufficient for such conversion, leave aside strike out for abuse of process.

Alternate Remedy

[61] As an alternate remedy second Respondent seeks and order in terms of Section 13 of Proceeds of Crime Act 1997 which reads;

"13. Protection of third parties

“(2) If a person applies to the Court for an order under this subsection in respect of the person's interest in property and the **Court is satisfied**:

(a) the Applicant had an interest in the property;

(b) that the applicant was not in **any way involved in the commission of an offence** in respect of which forfeiture of the property is sought, or the forfeiture order against the property was made; **and**

(c) the applicant

(i) had the interest before the serious offence occurred; or

(ii) acquired the interest during or after the commission of the offence bona fide for fair value, and did not know or could not reasonably have known at the time of acquisition that the property was tainted property’

The **court may** make an **order declaring the nature, extend and value** (as at the time when the order is made) of the applicant’s interest.”

[62] Identical provision is found in Section 19 E(2) of Proceeds of Crime Act 1997, and this provision allows the court to exercise its discretion, to make an order upon being satisfied of certain facts and they are;

- a. Has an interest in the property;
- b. was not in any way involved in the commission of an offence in respect of which forfeiture of the property is sought;
- c. Had an interest before commission of offence; or
- d. Purchased it bona fide at any time without reasonable knowledge that it was tainted property.

[63] In my mind depending on the circumstances of this case where first and second Respondents are husband and wife and had already filed a joint response and there are evidence before the court for determination of forfeiture, no order in terms of Section 13 (2) of Proceeds of Crime Act 1997 can be made as interim order. Applicant had in the affidavit in support stated that property comprised in CT25292 is tainted due to two reasons and they are that proceeds of crime utilized for payment of loan account with third Respondent which was utilized for reduction of loan account

of the said property and also payment for improvements on the said property through construction company.

[64] Section 41 A of Proceeds of Crime Act 1997, defines proceeds of crime as;

“(1A) In this Act, in relation to a serious offence or a foreign offence, "proceeds of crime" means property or benefit that is-

(a) wholly or **partly derived or realized directly or indirectly** by any person from the commission of a serious offence or a foreign serious offence;

(b) wholly or partly derived or realized from a disposal or other dealing with proceeds of a serious offence or a foreign serious offence; or

(c) wholly or partly acquired proceeds of a serious offence or a foreign serious offence, and includes, on a **proportional basis, property into which any property derived or realized directly from the serious offence** or foreign serious offence is later converted, transformed or intermingled, and any income, capital or other economic gains derived or realized from the property at any time after the offence."(emphasis added)

[65] A property can be tainted through ‘proportional basis’ from proceeds of crime. So Section 13(2) of Proceeds of Crime Act 1997 cannot be determined without considering all the facts and circumstances. Accordingly CT 25292 cannot be considered in isolation, in the middle of hearing as this is a part heard and require conclusion without further delay.

[66] So the court Section 13 (2) of Proceeds of Crime Act 1997 cannot be invoked in an interlocutory application at this stage and applies at the time of making final order for forfeiture, considering all the facts, and circumstances.

[67] Determination of second Respondent’s interest through interlocutory application in terms of Section 13(2) allows discretion to court to make an order to prevent forfeiture and unfairness and the order needs to be reasonable in the exercise of discretion given to court. This can be exercised at the time of determination of forfeiture.

[68] The above facts cannot be determined through ‘mini hearing’ in originating summons hence the alternative remedy sought by second Respondent is deferred to hearing for obvious reasons.

CONCLUSION

[69] First and second Respondents who are husband and wife had filed a joint acknowledgment. Second Respondent had even filed an affidavit in response on behalf of second Respondent. Second Respondent's application for stay is refused. Application for strike out is dismissed. Applicant is allowed to file a statement in terms of Order 7 rule 3(1) of High Court Rules 1988. Second Respondent's application in terms of Section 13 (2) of the Proceeds of Crime Act 1997 is deferred for determination after conclusion of this part heard hearing. No costs ordered considering the circumstances of the case.

FINAL ORDERS:

- a. Application for stay is struck off.
- b. Summons for strike off is dismissed.
- c. Application in terms of Section 13(2) is deferred for final hearing considering circumstances of the case.
- d. No costs.




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Deepthi Amaratunga
Judge

At Suva this 04th day of April, 2025.

Solicitors

Director of Public Prosecutions

Nilesh Sharma Lawyers

Vosorogo Lawyers

O'Driscoll and Co