

IN THE HIGH COURT OF FIJI
AT SUVA
PROBATE JURISDICTION

Probate Jurisdiction HPP No. 11 of 2020

In the Estate of Surya Munidial Bidesi
also known as Suruj Narain Bidesi late of
255 Waimanu Road, Suva, Fiji, Company
Managing Director, Deceased.

BETWEEN : UDESH CHANDRA BIDESI also known **ANTHONY UDESH CHANDRA BIDESI** also known as **TONY BIDESI** of 8 Kinmont Rise, East Tamaki Heights, Auckland, New Zealand, Businessman.

PLAINTIFF

AND : ATISH CHANDRA BIDESI also known as **PETER ATISH CHANDRA BIDESI** of 255 Waimanu Road, Suva, Fiji, Businessman in his personal capacity and as Executor and Trustee of the Estate of Surya Munidial Bidesi aka Suruj Narain Bidesi.

DEFENDANT

Coram : Banuve, J

Counsels : R.PATEL LAWYERS, Barristers & Solicitors for the Plaintiff/Respondent.
MUNRO, LEYS, Solicitors, for the Defendant/Applicant.

Date of Hearing : 4th April 2025

Date of Ruling : 13th June 2025

RULING

A. INTRODUCTION

1. On 21 February 2020, the Plaintiff commenced this action by filing a Writ of Summons and a Statement of Claim against the Defendant. The Plaintiff then filed an application on 9 March 2020 for interim orders, seeking information on the Estate's assets and accounts. This application was withdrawn on 12 December 2024.
2. The Defendant filed a Statement of Defence and a Counterclaim on 20 March 2020 asserting that the Plaintiff has forfeited his entitlement to the Estate when he challenged the Will
3. On 13 May 2020, the Defendant filed a Strike Out Application with an Affidavit in Support of striking out on 6 July 2020 (**Applicant's affidavit**)¹.

In the Application the Defendant sought the following orders;

(a) Plaintiff's Writ of Summons and Statement of Claim be struck out and the action be dismissed on the grounds that it:

- (i) discloses no reasonable cause of action;*
- (ii) is frivolous and vexatious ;*
- (iii) is an abuse of the process of the Court; and*
- (iv) is statute barred*

(b) Alternatively, the Claim against the Defendant in his personal capacity be struck out and dismissed on the grounds that it discloses no reasonable cause of action against the Defendant personally;

(c) Alternatively, the Plaintiff do within seven (7) days give security for the Defendant's costs to the satisfaction of the Court and the claim be dismissed, if no security for costs is paid;

¹ The Plaintiff filed an Affidavit in Response on 17 June 2020 (Respondent's Affidavit). The Defendant filed an Affidavit in Reply on 5 November 2021 (Applicant's Reply Affidavit)

(d) The Plaintiff (and/or his solicitors) pay the Defendant's costs based on the notice that was sent to the Plaintiff before the Application was filed encouraging them to withdraw the Claim;

(e) Such other orders which the Court deems just

4. The matter was heard on 4th April 2025.
5. Both parties filed detailed submissions which the Court found most useful in clarifying their respective positions.

B. THE LAW

6. The Summons to Strike Out the Statement of Claim was made pursuant to section 26A of the *Wills Act 1972*, O.18, r.18(1)(a)-(d), O.23,r.1 and O.62, r.11 of the *High Court Rules 1988* and under the inherent jurisdiction of the Court.
7. The principles to be considered on a strike out application are settled in this jurisdiction, the cardinal one being that the Court must use its power to strike out sparingly and with care, to ensure that a Plaintiff was not improperly deprived of the opportunity for a fair trial of his case.
8. The '**Supreme Court Practice (White Book) (1985 Ed)**' summarizes the position;

' A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleadings are considered (per Lord Pearson in Drummond Jackson v British Medical Association [1970] 1 WLR 688); But the practice is clear. So long as the Statement of Claim or the particulars (Davey v Bentinck [1893] 1 QB 185; [1891-4] All ER 691, disclose some cause of action or raise some question fit to be decided by a judge or jury, the mere fact that the case is weak and not likely to succeed is not ground for striking out -Moore v Lawson (1915) 31 TLR 418 CA; Wenlock v Moloney [1965] 1 WLR 1238; [1965] 2 All ER 87.'

9. A strike out therefore ought to be confined to exceptional cases where on the pleaded facts, the Plaintiff could not succeed, as a matter of law –*Tawake v Barton Ltd* [2010] FHHc 14; HBC231 of 2008 (28 January 2010)

10. The primary grievances set out by the parties in their pleadings are summarized ;

(a) Breach of Duty of Disclosure.

The Defendant has failed to comply with the request for disclosure, and contrary to his obligations as an Executor, failed to provide an account of all monies used from rental funds to upgrade, improve and maintain properties at Robertson Rd and Hercules St.²

The Defendant, in response denies that it breached the duty of disclosure and states that the Plaintiff is not entitled to rental information for the 2 named properties, as they are not part of the Estate³, rather they are owned by Bidesi & Sons Ltd.

(b) Failed to Distribute and Comply with Specific Bequests

The Defendant has failed to honor specific bequests made by the Testator, such as the transfer of the Hercules St and the Robertson Rd properties to the Plaintiff, from the NZD Bank Account and from the sale proceeds of the Tamavua and Waila properties, and rather, collects, uses and enjoys the rental from the Suva properties, in defiance of the Testator's specific intent.⁴

The Defendant, in response, denies the Plaintiff's claim and asserts rather, that he is not authorized to transfer properties not owned by the Estate, and, that the administration of the Estate is ongoing, the New Zealand account is now frozen pursuant to a Court order, and that the Waila property is in the process of being sold.⁵

² Paragraphs 15-19 Statement of Claim (As approved by the Registrar of the High Court of Fiji) filed on 21 February 2020.

³ Paragraphs 15 and 18 Statement of Defence and Counter Claim filed 20 March 2020

⁴ Paragraphs 20-33 of the Statement of Claim

⁵ Paragraph 20 of the Statement of Defence and Counter Claim

(c) Breach of Bequests relating to New Zealand Accounts

The Testator had given clear instructions on how monies held in the ANZ Bank New Zealand Ltd Accounts were to be paid and how the balance were to be distributed. Instead of complying with these instructions, the Defendant paid himself more than he was entitled to, paid other persons and transferred to his own account a total of \$1,160, 000 from the NZD Accounts, contrary to the Testator's intention⁶

The Defendant, in response, denies the Plaintiff's claim and states that all payments were done on a "*what may be available*" basis, as agreed with the Plaintiff, in accordance with clauses 5-8 of the Will and for the proper administration of the Estate.⁷

(d) Disclosure of Rental Income, Sale of Tamavua Property., Transfer of Property within Twelve Months/ Specific Bequests.

No account has been provided by the Defendant, to date, on the rental income collected from the Hercules Street or Robertson Road properties or the maintenance work carried out on them since 2014, or for the sale and purchase of the Tamavua Property and the distribution of its proceeds.⁸

In response,, the Defendant denies the claim and state that the Robertson Rd and Hercules St properties, are not part of the S.M Bidesi Estate and cannot therefore be bequeathed by Will, further, the Plaintiff has not been provided the records of assets, that he is legally entitled to inherit.⁹

(e) Counter-Claim

The Defendant also filed a Counter-Claim alleging that by initiating Probate Action No.11 of 2020 the Plaintiff has forfeited his entitlements, pursuant to paragraph 4 of the Will of S.M Bidesi (the testator), dated 29 August 2012 and consequently, has to refund the bequest already paid out to him.

⁶ Paragraphs 34-39 of the Statement of Claim

⁷ Paragraphs 37-40 Statement of Defence and Counter Claim

⁸ Paragraphs 43-56 of the Statement of Claim.

⁹ Paragraphs 43-60 of the Statement of Defence and Counter Claim

(f) Statute -Barred

The Defendant further states that the Plaintiff's Claim is statute barred, relies on section 3 of the Wills Act, and allege that the Plaintiff is estopped from prosecuting the Claim because of unreasonable delay.¹⁰

11. The Parties Position on the Application to Strike Out-Summary

(a) Limitation

The Defendant alleges that the Claim is time barred because it was not filed within 6 months of the grant of probate in accordance with section 26A of the *Wills Act* 1972. The Plaintiff has asked the Court to determine the deceased's intention which under the Act ought to have been filed within 6 months from the grant of probate.

The Plaintiff, in response states that he is not challenging the Will, rather he asserts that the contents of the Will and the Testator's intentions in relation to its distribution from his Estate are clear and unambiguous and, in that regard, his initiation of the current matter before the Court, ought not be construed as a challenge against the Will. The Plaintiff does not seek rectification under section 26A (1) of the *Wills Act*, rather, he seeks its implementation, according to existing terms. The initiation of the probate matter in 2020, was caused by the Plaintiff not becoming aware until 2019, that the Defendant would not honor the bequest in the Will of the Hercules St and Robertson Rd properties, because they were not 'estate' property. The Plaintiff asserts that the change in the position of the Defendant was only confirmed in 2019, when the Defendant sought that he, by Deed, cede his bequests from the Estate of SM Bidesi, in return for the transfer to him of the 2 subject properties

(b) Personal Capacity

The Defendant alleges that the Plaintiff seeks relief (including costs) in a personal capacity against him, but fails to plead any specific allegation or cause of action

¹⁰ Paragraphs 61 -63 of the Statement of Defence.

against him, personally. The Claim only specifically makes allegation against the Defendant involving his position as the executor and trustee of the Estate.

The Plaintiff, in response, alleges that the claim against the Defendant in his personal capacity is justified, as the Defendant seeks to unjustly enrich himself by refusing to honor the specific bequest of the two properties to him under the Will. The Defendant is clearly enriching himself in collecting and keeping all the rental income from the two properties bequeathed to the Plaintiff,¹¹ in the Will.

Further, the Defendant sought that the Plaintiff sign the Deed, not only in his capacity as Trustee, but in a personal capacity. The Defendant as the sole shareholder in Bidesi & Sons, is personally liable.¹²

(c) Not Estate Property

The Defendant alleges that the bequests that Plaintiff claims from the Estate are not owned by the Estate but by Bidesi & Sons Ltd and therefore cannot be distributed by the Estate. Bidesi & Sons Ltd, is not a party to the probate proceedings before the Court.

The Plaintiff, in response, alleges that S.M Bidesi (the testator) was the sole owner of all shares in Bidesi & Sons Ltd, and from 1996 until his demise in 2013 operated the business as a 'sole trader', rather than a private company. As a sole trader all the assets and liabilities of that business would be vested and owned by the sole shareholder. This is the reason why the testator bequeathed two properties in the name of Bidesi & Sons Ltd, to the Plaintiff.

(d) Security for Costs

The Defendant alleges that, if the matter is not struck out, the Plaintiff should pay security for costs, being a foreign resident with no assets in Fiji.

The Plaintiff, in response, states that this assertion is clearly without merit. The Plaintiff is ordinarily resident out of Fiji but does have assets within Fiji. He has a stake in the Waila land and is entitled to 30% of the proceeds from the sale of that

¹¹ Paragraphs 21,23,45,46, 51.

¹² **The Defendant, as the shareholder would be personally liable, if the company was a sole trader, not if it is a private company.**

land. The Defendant is also resident out of the jurisdiction has filed a Counterclaim and has not produced any evidence that he owns property in Fiji.¹³

(e) Costs

The Defendant seeks that the Plaintiff and/or its lawyers pay the costs of this application on an indemnity basis.

The Plaintiff, in response states that the application to strike out is unmeritorious and in pursuing it, the Defendant further delays the finalization of litigation, therefore costs ought to be borne by the Defendant on an indemnity basis.

C. ANALYSIS

12. The Defendant's application to strike out can only succeed if it can clearly establish that the case filed by the Plaintiff on the pleaded facts, could not succeed, as a matter of law.¹⁴
13. The parties have raised comprehensive arguments relating to their respective positions on this application however, the Court will focus only on 2 issues as pertinent in determining this application;
 - (i) Limitation
 - (ii) The Role of the Defendant as Trustee

14. Limitation

The primary plaintiff of the Defendant is that the Plaintiff seeks rectification of the Will by initiating current proceedings on 21 February 2020, which is time barred, under section 26A (2) of the *Wills Act* 1972.¹⁵ The relevant provisions are laid out;

¹³ This is incorrect. It is not disputed that the Defendant is a shareholder in Bidesi & Sons Ltd

¹⁴ *Tawake v Barton Ltd* [2010] FJHC 14

¹⁵ As amended by the *Wills (Amendment) Act*-No 10 of 2014

Power of the Court to rectify will in construction

26A-(1) *If the court is satisfied that a will is so expressed that it fails to carry out the testator's intention, the Court may order that the will be rectified to carry out the testator's intentions.*

(2) *Subject to section (3), no application under subsection (1) shall be heard by the Court unless the proceeding are instituted before or within a period of 6 months after the date of the grant of probate in the Fiji Islands.*

(3) *Notwithstanding subsection (2), if the Court is satisfied that reasonable grounds exist for the extension of the period of 6 months, and bearing in mind particularly the state of administration of the estate and the rights or interests of any other person, the Court may allow an application to be made outside the period of 6 months, upon such terms and conditions as the Court thinks fit.*

The Defendant asserts that any issue regarding the interpretation of the Will, or the Testator's intention should have been raised by 11 May 2017. As the claim was not filed within that period, it was statute barred, constitutes abuse of process and should be struck off.¹⁶

The Court does not find such a conclusion inevitable on the pleadings. As stated by the Court of Appeal in *Riches v DPP* [1973] 2 All ER 935;

"Where the statement of claim discloses that the cause of action arose outside the current period of limitation and it is clear that the defendant intends to rely on the limitation act and there is nothing before the Court to suggest that the Plaintiff could escape from that defence, the claim will be struck out as being frivolous, vexatious, and an abuse of the process of the court" I do not want to state definitely that, in a case where it is merely alleged that the statement of claim discloses no cause of action the limitation objection should or could prevail. In principle, I cannot see why not. If there is any room for an escape from the statute, well and good, if it can be shown..."

The Court cannot resolve the issue concerning limitation clearly to justify striking out for the following reasons;

¹⁶ Paragraph 48 –Defendant's Submissions in Support of Striking Out filed on 21 March 2025.

- (i) The proceedings filed by the Plaintiff are not clearly rectification proceedings, governed by section 26A of the **Wills Act 1972**, rather, it could be construed also as proceedings to settle questions arising under a will or administration, pursuant to section 41(1) of the **Succession, Probate and Administration Act** [Cap 60]¹⁷.
- (ii) The initiation by the Plaintiff of probate proceedings on 21 February 2020, rather than on 11 May 2017, would seem to have been caused by an event that transpired in 2019,¹⁸ which confirmed that the bequest of 2 Suva properties to the Plaintiff, would not be carried out by the Defendant, as the subject properties were not estate property, but rather were company property belonging to Bidesi & Sons Ltd.
In short, the proceeding filed by the Plaintiff could not have been filed earlier on 11 May 2017, (assuming section 26A(2) of the **Wills Act 1972**, applied in the circumstance), because the Plaintiff only came to know that the properties would not be transferred to him in 2019.

The Court, is of the view, rather that on the pleadings, there is a plausible defence which, the Plaintiff can explore, *and [this] is not a clear case justifying a strike off of the claim* per Lord Donaldson in **Ronex Properties Ltd v John Laing Construction Ltd and Others** [1983] QB 398;

“Where it is thought to be clear that there is a defence under the Limitation Act, the defendant can either plead that defence and seek the trial of a preliminary issue or, in a very clear case, he can seek to strike out the claim upon the ground that it is frivolous, vexatious and an abuse of the process of the court and support the application with evidence”

15. The Role of the Defendant as Trustee

In paragraph 20(i) of the Statement of Claim, under the heading ‘*Failure to Distribute and Comply with and Honor Specific Bequests*’, the Plaintiff alleges that the Defendant,

- i. ... has failed to transfer the properties located at Lot 1 Hercules Street and Lot 1 & 2 Robertson Road, Suva free from all encumbrances and charges to the Plaintiff within a reasonable time

¹⁷ Page 25 Plaintiff’s Submissions on Defendant’s Striking Out Application filed on 19 March 2025.

¹⁸ Proposed Deed to be signed by the Plaintiff is return of ceding all other entitlements under the Will

In response, the Defendant states at paragraph 20(a) of the Statement of Defence;

20. Paragraph 20 is denied as:

- (a) *the Defendant is not authorized as the executor and/or trustee of the Estate to transfer the properties which are not owned by the Estate*

The Defendant's position is that it is patently clear from the pleadings that the claim is unsustainable and ought to be struck off as constituting an abuse of process and/or is frivolous and vexatious.

What does the evidence say?

Clauses 11 and 12 of the Will¹⁹ state;

11. *I direct my Executor to transfer CT10533 DP2892 Lot 1 situated at 8 Hercules Street, Suva to my nephew Udesch Chandra Bidesi (f/n Shiu Pal Bidesi) within 5 (five) years after my death free from all state and succession duties.*
12. *I direct my Executor to transfer CT 7747 DP 2892 situated at Robertson Road to my nephew Udesch Chandra Bidesi (f/n Shiu Pal Bidesi) free from all state and succession duties as soon as practically possible.*

The Court is of the view given the pleadings and the evidence, as they stand, that it cannot resolve the following issues without a further hearing;

- (i) Whether the two subject Suva properties, are estate property, or company property, which cannot be bequeathed to the Plaintiff and further, whether when S.M Bidesi executed his Will, the entity Bidesi & Sons Ltd, was operating as a private company or as a sole trader. This issue would apply to other properties and assets which the Defendant deems he is unable to transfer as Executor of the Estate, because they are not estate property, despite the terms of the Will seemingly stating so.

¹⁹ Annexure A to the Affidavit of Udesch Chandra Bidesi filed on 28 October 2021

- (ii) As the Executor, (and beneficiary), of the Estate of SM Bidesi, what ought the Defendant have done to clarify the construction of a Will, to forestall a potential dispute with another beneficiary? What would a Trustee exercising a duty of 'even handed ness' have done in such a situation? – *Re Stewart* [2003] 1 NZLR 809; *Sadler v Public Trust* [2009] NZCA 364.

Would it have been feasible for the Defendant to have first sought directions from the Court on whether the subject property belonged to the Estate or to the company pursuant to section 88 of the *Trustee Act* [Cap 65], for example?²⁰

ORDERS

1. The Defendant's Summons to Strike Out Statement of Claim filed on 13 May 2020 is refused and dismissed in its entirety;
2. Costs summarily assessed at \$1,500.00 to be paid by the Defendant to the Plaintiff within 21 days of this Ruling.




Savenaca Banuve
Judge

Dated at Suva this 13th day of June, 2025.

²⁰ *Nevill's Law of Trusts, Wills and Administration* (13th Ed) Lexis Nexis NZ Ltd (2019), Chapter 11, paragraph 11.2, p 326-7