

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

**CIVIL JURISDICTION**

**CIVIL ACTION NO.: HBC 453 OF 2008**

**BETWEEN:**

**LAVENIA RADITORA**

***Plaintiff***

**AND:**

**ONISIMO NAILOVU AND ESALA JAMES**

***1<sup>st</sup> Defendants***

**COMMISSIONER OF POLICE**

***2<sup>nd</sup> Defendant***

**ATTORNEY-GENERAL OF FIJI**

***3<sup>rd</sup> Defendant***

**Counsel: Mr. Maharaj & Ms. Maharaj for Plaintiff**  
**Mr. Vakaloloma for 1<sup>st</sup> Defendants**  
**Mr. Singh for 2<sup>nd</sup> and 3<sup>rd</sup> Defendants**

**Date of Hearing: Friday 9<sup>th</sup> January, 2009**

**Date of Ruling: Tuesday 13<sup>th</sup> January, 2009**

**DECISION**

[1] The Plaintiff, Lavenia Raditora, by way of motion seeks the following Orders:

- (a) Mandatory injunction ordering the 2<sup>nd</sup> Defendant to forthwith release the motor vehicle registration No. DY298 currently in the custody and possession of the 2<sup>nd</sup> Defendant to the Plaintiff.
  - (b) An Order restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants by themselves through their servants and agents, howsoever from taking possession of any of the items referred to in paragraph 1 of the Statement of Claim and further restraining them from threatening or threatening to assault or in any way harm the Plaintiff and or coming within touching distance of the Plaintiff.
  - (c) An order for costs of this application against the Defendants jointly or severally on indemnity basis.
  - (d) Such further and other relief.
- [2] The application was made *ex-parte*, but on the Court's directive it was heard *inter parte*.
- [3] The 1<sup>st</sup> Defendants are brothers. Defendant Esala James is a police officer by profession. The Plaintiff is their niece. The 1<sup>st</sup> Defendants' father, Esala Nawaqaliva, who was also the Plaintiff's grandfather, in his Will gave all his assets to the Plaintiff upon his death.
- [4] After Esala Nawaqaliva's death, the Plaintiff applied to the High Court for Letters of Administration in her late grandfather's estate. On 10 July 2007, the Master of the High Court granted the application and made the following orders:

1. That the typewritten documents dated 6<sup>th</sup> January 2007 as contained in two papers is admissible as the original last will and testament for the purpose of grant of Letters of Administration with Will annexed.
  2. That Lavenia Raditora is granted the right to apply for Letters of Administration with Will annexed as the intended Administratrix of Letters of Administration with Will annexed for the Estate of Esala Nawaqaliva.
- [5] Following the Orders of the Master of the High Court, the Acting Chief Registrar issued copy of Letters of Administration No. 46517 in the name of the estate of Esala Nawaqaliva, naming the Plaintiff as the Sole Executrix and Trustee of the said estate.
- [6] On 17 December 2007, a Writ of Summons against the Defendants was issued by the Plaintiff, in which the following reliefs were pleaded:
- (a) An Order for return of motor vehicle DY298 to the Plaintiff;
  - (b) An Order for return of 1x15 horsepower Johnson outboard engine or alternatively damages;
  - (c) General damages;
  - (d) An injunction restraining the Defendants either by themselves through their servants and/or agents, howsoever from trespassing into Plaintiff's property at 26 Delainavesi Road, Lami taking possession of any of the

properties referred to in paragraph (a) above threatening, molesting or to come within touching distance of the Plaintiff;

- (e) A declaration that the third named Defendants' failure to release the vehicle to the Plaintiff was without any basis and wrongful;
  - (f) Costs on indemnity basis;
  - (g) Such further and other relief.
- [7] This application for injunction and restraining order followed the Writ of Summons.
- [8] In response to the Plaintiff's application, the 1<sup>st</sup> Defendants have filed Notice of Motion seeking the following orders:
- (i) That this action be stayed until final determination of Application No. P46517 in the Probate Jurisdiction of this Honourable Court;
  - (ii) That the Plaintiff be stopped from disposing off any property which is the subject of Letter of Administration No. 46517 until further Order of this Court;
  - (iii) That the cost of this action be in the cause; and
  - (iv) Any other relief which this Honourable Court may deem just.
- [9] None of defendants has filed a Statement of Defence.

- [10] The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have filed an affidavit from Sakaraia Tuberi, Police Officer, Lami Police Station in reply to the Plaintiff's application. According to Mr. Tuberi, the vehicle concerned was seized from the possession of the 1<sup>st</sup> Defendants as a result of a complaint lodged against them by the Plaintiff. Mr. Tuberi said he made every effort to check the ownership details of the vehicle with the Land Transport Authority but he was informed the transfer documents were in the archives. Sometimes in December 2008, Mr Tuberi said he contacted the Plaintiff to take the vehicle and park in her garage at her house to avoid the vehicle being damaged, but the Plaintiff refused to do so because the matter is in Court.
- [11] The Plaintiff in her affidavit deposes that she became the lawful owner of the properties owned by her grandfather including the vehicle (DY298) after the Court granted her Letters of Administration in her late grandfather's estate. She said despite being granted the Letters of Administration, she could not fully enjoy the benefits of her inheritance because her uncles the 1<sup>st</sup> Defendants have been harassing her and threatening her with use of violence if she does not return their father's properties to them. She said when she asked the police to release the motor vehicle after it was seized from the 1<sup>st</sup> Defendants, she was told to obtain a court order for release.
- [12] The issuance of an injunction, interim or mandatory, is within the discretion of the Court. The test for an injunction is settled and was laid down by the House of Lords in **American Cyanamid Co v Ethicon Ltd** (1975) AC 396. The test is two-fold:
- (i) Is there a serious question to be tried;

(ii) If, so, where does the balance of convenience lie.

[13] **American Cyanamid** (supra) also laid down the principles upon which the balance of convenience is to be determined. The Court said:

*"As to that (i.e the balance of convenience) the governing principle is that the Court should first consider whether if the Plaintiff succeeds at the trial, he would be adequately compensated by damages for any loss caused by the refusal to grant an interlocutory injunction. If damages-----would be adequate remedy and the Defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the Plaintiff's claim appeared to be at that stage.*

*If, on the other hand damages would not be an adequate remedy, the Court should then consider whether, if the injunction were granted, the Defendant would be adequately compensated under the Plaintiff's undertaking as to damages.*

*If damages in the measure recoverable under such an undertaking would be an adequate remedy and the Plaintiff would be in a financial position to pay them, there would be no reason on this ground to refuse an interlocutory injunction.*

*It is where there is doubt as to the adequacy of the respective remedies in damages-----that the question of balance of convenience arises. It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight, to be attached to them. These will vary from case to case.*

*Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo.*

*The extent to which the disadvantages to each party would be incapable of being compensated in damages in the event of his succeeding at the trial is always a significant factor in assessing where the balance of convenience lies.*

*If the extent of the uncompensatable disadvantage to each party would not differ widely, it may not be improper to take into account in tipping the balance the relative strength of each party's case is revealed by the affidavit evidence adduced on the hearing of the application. This, however, should be done only when it is apparent on the facts disclosed by evidence as to which there is no credible dispute that the strength of one party's case is disproportionate to that of the other party.*

*In addition to (the factors) to which I have referred, there may be many other special factors to be taken into consideration in the particular circumstances of individual cases”.*

[14] The property subject of the application for mandatory injunction is a motor vehicle. The legal basis upon which the vehicle was withheld from the Plaintiff by the 1<sup>st</sup> Defendants and then later seized by the 2<sup>nd</sup> Defendant are serious issues to be tried. I do not make any findings on those issues at this stage. However, as the matter stands now, the Plaintiff is the lawful owner of the vehicle albeit the 1<sup>st</sup> Defendants are alleging that she obtained the ownership by fraud, namely, forging the Will of the 1<sup>st</sup> Defendant's father. Whether there is any substance in this claim is not again a matter I should determine at this stage. The question for determination is that on whose favour the balance of convenience lie in terms of the possession of the vehicle. In this regard, unless the Court sets aside the ownership of the vehicle on the ground of fraud, the Plaintiff could not be deprived of a property which prima facie belongs to her.

[15] The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants consent to the release of the vehicle to the Plaintiff, which currently is in the possession of the Lami Police Station. By consenting to the release of the motor vehicle, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants obviously are not asserting any legitimate future interests over the said vehicle. Arguably there is no need for an injunction because the party currently in possession of the vehicle is not asserting any interests in it.

[16] As far as the 1<sup>st</sup> Defendants' interests in the said vehicle are concerned if their application to set aside the Letters of Administration granted to the Plaintiff on the ground of fraud is successful, their interests could be equitably secured by an undertaking for damages by the Plaintiff. I am satisfied that the Plaintiff has means to take such undertaking. For these reasons, I find the balance of convenience favours the Plaintiff to retain the vehicle in her possession and control subject to an undertaking for damages pending the determination of the substantive matter.

[17] As for the second order being sought, I accept the affidavit evidence of the Plaintiff. The 1<sup>st</sup> Defendants are in a position of authority over the Plaintiff and that authority could be used to influence or intimidate the younger members of the family in a conflict over ownership of property. Since the dispute is now before the Court, the Court has a duty to protect the Plaintiff to have full access to justice without fear of being victimized by her family members. I do not make a finding that the 1<sup>st</sup> Defendants have harassed or threatened the Plaintiff. I find the circumstances of this case are such that there could be harassment or threat to the Plaintiff. I grant the restraining order sought by the Plaintiff.

[18] I now deal with the application for stay by the 1<sup>st</sup> Defendants. The Plaintiff submits the application by the 1<sup>st</sup> Defendants is misconceived. Mr. Maharaj informed the Court that he wishes to respond to the application by way of submissions. I therefore do not reach any conclusion on the merits of the application. The Plaintiff is granted time to file submissions.

[19] The Court, therefore, makes the following **Orders**:

- (i) The motor vehicle (DY298) is to be released to the Plaintiff forthwith upon an undertaking for damages.
- (ii) The 1<sup>st</sup> Defendants must not harass the Plaintiff in any manner whatsoever.
- (iii) The Defendants to file a Statement of Defence within 14 days.
- (iv) The Plaintiff to file submissions in respect to the 1<sup>st</sup> Defendant's application within 7 days.
- (v) The 1<sup>st</sup> Defendants to reply to the Plaintiff's submissions within 7 days thereafter.
- (vi) The 1<sup>st</sup> Defendants stay application to be heard on Friday 30<sup>th</sup> January 2009 at 2.00pm.
- (vii) Costs of this application to be assessed after the conclusion of the substantive matter.

**SO ORDERED**

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**Daniel Goundar**  
**JUDGE**

**At Suva**  
**Tuesday 13<sup>th</sup> January, 2009**

**Solicitors:**

MC Lawyers, Suva for the Plaintiff  
Vakaloloma and Associates, Suva for the 1<sup>st</sup> Defendant  
Office of the Attorney-General for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants