

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBC 121 of 2009

BETWEEN : **HAFIZ SHER KHAN** f/n Sher Khan of Vomo Street, Drasa
Vitogo, Lautoka Foreman

Plaintiff

AND : **NAZMEEN NISHA HUDSON** formerly of Korociri Nadi
but now residing in 11 Halinda Street, Whalam 2770
Sydney, Australia Domestic Duties

1st Defendant

AND : **NABI SHER KHAN** formerly of Korociri, Nadi but now
residing in Australia (Residential Address unknown to the
plaintiff), Plumber

2nd Defendant

AND : **JIUTA NAISAKI** of Lautoka (Residential Address
unknown to the Plaintiff), Bailiff

3rd Defendant

FINAL JUDGMENT

Of: Inoke J.

Counsel Appearing: No Appearance for the Plaintiff
Mr I. Khan for the Defendants

Solicitors: Messrs Qoro Legal for the Plaintiff
Messrs Iqbal Khan & Associates for the
Defendants

Date of Hearing: 28 October 2009

Date of Judgment: 30 October 2009

INTRODUCTION

[1] The Originating Summons filed on **24 July 2009** seeks the following
Orders:

1. **That a Declaration Order that the Notice of Distress for Rent dated 21st July 2009 is irregular and therefore null and void and of no effect.**
2. **That an Order that the Defendants by their servants and/or agents and whosoever be restrained from levying distress for rent against the Plaintiff until further order of the Court.**
3. **That an Order that the Defendants by their servants and/or agents and whosoever be restrained from interfering howsoever with the Plaintiff's possession and occupation of the said premises located at Vomo Street, Lautoka until further order of the Court.**
4. **Costs be in the cause.**
5. **Any other orders this Honourable Court deem just.**

[2] On the same day an Ex-parte motion was filed for interim relief as follows:

1. **That an Interim Order that the Defendants by their servants and/or agents and whosoever be restrained from interfering howsoever with the Plaintiff's possession and occupation of the said premises located at Vomo Street, Lautoka until further order of the Court.**
2. **That an Order that the Defendants by their servants and/or agents and whosoever be restrained from levying distress for rent against the Plaintiff until further order of the Court.**
3. **That an Order that the Defendants by their servants and/or agents and whosoever be restrained from interfering howsoever with the Plaintiff's possession and occupation of the said premises located at Vomo Street, Lautoka until further order of the Court.**
4. **Costs be in the cause.**

CASE HISTORY

[3] I heard the Ex-parte application on **24 July 2009**. I was convinced that there was urgency and there was likelihood of serious mischief or harm being done and granted the interim relief sought and ordered that the matter be mentioned inter-parte on 31 July 2009.

[4] On 31 July 2009 I gave directions for the filing of affidavits and submissions and set the matter down for hearing on 8 October 2009. The Defendants filed their affidavit in reply on 30 July 2009. No directions were given for the Plaintiff to file an affidavit in response. On 8 October 2009,

Counsel for the Plaintiff sought and I granted him leave to file an affidavit in response within 14 days and set the application down for hearing on 28 October 2009. No affidavit was filed when the hearing commenced on 28 October 2009. Mr Qoro, Counsel for the Plaintiff was engaged in another court but he had filed written submissions so I proceeded to hear Mr Khan, Counsel for the Defendants. Mr Qoro's clerk attempted to file the affidavit in response but I refused to accept it because it was out of time.

THE FACTS

[5] The Plaintiff, Hafiz, says in his affidavit that the first and second Defendants are his half sister and half brother, respectively. They have different mothers but the same father, Sher Khan. The siblings lived together at Vomo Street, Drasa Vitogo in Lautoka. It is their family home built by their father. Their father transferred the family home to the second Defendant, Nabi, before he passed on in 1995. Nabi migrated to Australia sometime after that and has lived there ever since. The first Defendant, Nisha, has also migrated to Australia and has been living there for more than 20 years. Before, Nabi and Nisha left for Australia, they signed a Deed on 20 January 1995 in which they promised to assist with the repayments of the Housing Authority housing loan. **Clause 3** of the Deed stated:

NABI shall allow the father, step mother and two step brothers to live on the said property and to occupy any house existing or built thereon by NISHA and not to interfere with their peaceful occupation and enjoyment of the same.

[6] Hafiz was left with looking after the family home after Nabi and Nisha migrated and had renovated and extended the home. It appears that Nabi and Nisha have returned this year on holiday from Australia and issued a notice of distress for rent on **22 July 2009**. The notice was served by the bailiff, the Third Defendant. Hafiz says he was shocked when served with the notice and has now issued these proceedings.

[7] Nisha has filed an affidavit in reply in which she admits that she and Nabi signed and issued the notice of distress. But she argues that paragraph 3 of the Deed did not mean that Hafiz was entitled to live in the family home for life. She admits that they were all living together at the time of their father's death.

THE ARGUMENTS

[8] Mr Khan pushed his client's argument a little further by submitting that clause 3 made no mention of the names of the step mother and half brothers.

[9] He argued that Hafiz has been living in the house without paying any rent and has sublet part of it.

[10] Mr Qoro cited several cases on distress for rent in his written submissions but I think I need not consider them because this case turns on the interpretation of clause 3 of the Deed.

CONSIDERATION OF THE ARGUMENTS

[11] It is clear in my view, that their father intended Hafiz and his mother to stay in the matrimonial home for their lifetimes. Nisha and Nabi admit that they were living together at the time. Their names need not be stated in the Deed because there was no need to do that. This is not a commercial agreement entered into between complete strangers. Nisha and Nabi were migrating overseas at the time so the need to return to Fiji must have been far from their minds. As for the allegation of subletting, I think so long as Hafiz and their mother do not let out the whole house or part with possession, they can still enjoy the rights which they were intended to enjoy under clause 3. I therefore think clause 3 of the Deed should be enforced and Hafiz and his mother should be allowed to stay in the family home for their lifetimes.

COSTS

[12] I do not think I should award costs to aggravate the relationship between the parties.

ORDERS

[13] The **Orders** are therefore as follows:

1. **The Defendants, their servants and agents are restrained from levying distress for rent against the Plaintiff whilst the Plaintiff, his mother and brother or any of them are in occupation of the family home at Vomo Street, Lautoka.**

2. **The Defendants their servants and agents are restrained from interfering howsoever with the Plaintiff's, his mother's and brother's quiet enjoyment, possession and occupation of the said family home during their life times but they must keep the home in good repair.**

3. **There is no order as to costs.**

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Sosefo Inoke

Judge
