

**IN THE HIGH COURT OF FIJI**

**AT LAUTOKA**

**CIVIL JURISDICTION**

**Civil Action No. HBC 23 of 2008**

**Between:**        **SHIU SHANKAR** aka Johnny Shankar f/n Ram  
Lal of Meiguniyah, Nadi, Retired.

**Plaintiff**

**And**        :        **PREMILA KUMARI** father's name Krishna Lal  
aka Shri Kissun of Nasau, Nadi, Farmer.

**Defendant**

**Before**        :        Master Anare Tuilevuka

**Counsels**    :        Samad Law for the Plaintiff

                  :        Janend Sharma for the 1<sup>st</sup> Defendant

**Date of Hearing:**                **23<sup>rd</sup> October, 2009-11-02**

**Date of Decision:**              **13<sup>th</sup> November, 2009**

**DECISION**

**Introduction**

1. Before me are two applications. The first is a Summons to Strike Out dated 26<sup>th</sup> May 2009 filed under **Order 18 Rule 18** of the High Court Rules by Janend Sharma Lawyers or the Defendant seeking the following Orders:-

- (i) that the Plaintiffs claim be struck out or alternatively be dismissed on the grounds that it does not disclose any or any reasonable cause of action;
  - (ii) that it is frivolous and vexatious
  - (iii) that it is otherwise an abuse of the process of the Court
2. The second application is a Summons for Leave to Amend the Writ of Summons dated 5<sup>th</sup> August 2009 pursuant to **Order 20 Rule 5(3)** and the inherent jurisdiction of this Court filed by Messrs Samad Law for the Plaintiff.
3. Order **25 Rule 5 (3)** states as follows:

*“An amendment to correct the name of a party may be allowed under paragraph (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the Court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or, as the case may be, intended to be sued”*

### **Background to case**

4. Shiu Shankar (“**Shankar**” – the Plaintiff) is a Canadian resident and citizen. The Defendant Premila Kumari (“**Kumari**”) is Shankar’s cousin. Rajesh Kumar (“**Rajesh**”) is Shankar’s brother. Rajesh lives with Kumari and her family. It appears that Kumari has looked after Rajesh for some time now.
5. Rajesh, according to the Statement of Claim, used to be the registered owner of a piece of land (CT 31194 known as “Nasau” (Part of) Lot 2 on DP No. 7940 in Nadi town).
6. In contrast, an Affidavit of Kumari filed on 22<sup>nd</sup> April 2008 in support of an application for security for costs (which application was determined in her

favour) deposes at paragraph 15 that Rajesh was the owner of one undivided ½ share only in CT 31194.

7. That land has a total acreage of 6.032 hectares. But on 22<sup>nd</sup> March 1999, Rajesh transferred that land (or his undivided ½ share) to Kumari. He executed that transfer by putting his thumb print on the transfer document.
8. The transfer document shows that the transfer was made in consideration of the sum of \$20,000-00 (twenty thousand dollars). In other words, that Premila paid Rajesh \$20,000-00 for that piece of land (or for Rajesh's interest in the land). Shankar pleads however that Kumari did not pay any money at all to Rajesh. Kumari appears to concede to this in paragraph 4 of her statement of defence which I reproduce in part below:

*“...the Defendant says that **she and her husband have been providing boarding and meals and have been maintaining Rajesh Chand and thus have paid for the transfer of the property in kind as verbally agreed between the Defendant and Rajesh Kumar on or about the 22nds of March, 1999**” (my emphasis)*

9. Shankar does not seem to dispute that Kumari has been taking care of Rajesh. Nonetheless, he pleads that Rajesh is of unsound mind and that the transfer was actually orchestrated by Kumari. Shankar alleges that Rajesh was in no position to comprehend what he was signing and that Kumari unlawfully (through fraud and deceit) induced Rajesh to put his thumbprint on the transfer document.
10. The Writ of Summons was filed on 31<sup>st</sup> January 2008 by Samad Law for Shankar based on the above allegations. Immediately after filing the Writ, on the 4<sup>th</sup> of February 2008, Samad Law filed a Notice of Motion seeking a declaration that the transfer of the land to Kumari was null and void and that the property be transferred back to Rajesh.

11. On 20<sup>th</sup> February 2008, Janend Sharma Lawyers filed an Acknowledgment of Service for the Writ. The Statement of Defence was filed on 22<sup>nd</sup> April 2008 together with a Summons to fix Security For Costs.
12. On 29<sup>th</sup> April 2008, Samad Law filed a Summons seeking a Court Order that Rajesh be examined by a psychiatrist to determine his state of mind and whether or not "*he understands legal documents*".
13. When the case was called before Master Udit on 28<sup>th</sup> May 2008, there was no appearance for the Plaintiff. Udit M then ordered Security for Costs of \$5,000 against Shankar to be paid by the 30<sup>th</sup> June 2008. He also struck out both the Plaintiff's Notice of Motion of 4<sup>th</sup> of February 2008 (i.e. seeking declaration that the transfer was null and void) and also the Summons of 29<sup>th</sup> April 2008 (i.e. seeking an Order that Rajesh be assessed by a psychiatrist) with \$600-00 costs to the Defendant.
14. On 22<sup>nd</sup> August 2008, Samad Law filed a Notice of Motion seeking an order to reinstate the Plaintiff's Summons dated 29<sup>th</sup> April 2008. The Affidavit of Girwar Prasad sworn on 19<sup>th</sup> August 2008 was filed in support this application for reinstatement. The returnable date on the Summons was 08<sup>th</sup> September 2008. On 22<sup>nd</sup> August also, Samad Law filed their Reply to Statement of Defence.
15. The case was again called before Udit M on 8<sup>th</sup> September 2008. Both counsels appeared on that date and the case was adjourned to 15<sup>th</sup> October 2008. Then on 15<sup>th</sup> October 2008, Master Udit granted leave to the Plaintiff to withdraw the application to reinstate the Summons of 29<sup>th</sup> April 2008. He also ordered \$300 costs against the Plaintiff as the application was unnecessary.
16. Then on 26<sup>th</sup> May 2009, Janend Sharma filed the application that is now before me to strike out the Plaintiff's claim. On 21<sup>st</sup> of August 2009, Samad Law filed his application also currently before me seeking leave to amend the Writ of Summons.

## **Competing Applications**

17. Having to decide which of two competing applications to deal with first (such as I have to now in this case) is usually not a daunting task. However, in the way the proceedings have unfolded in this case, it will benefit all if attention is drawn at the outset to the procedural issues raised.
18. The law relating to striking out requires me (for now) to assume the pleaded facts as true (I discuss the law in more detail below). Hence, I can assume as true, for now, that Rajesh is of unsound mind.
19. On the other hand, under **Order 80 rule 3(5) and (6)** and **Part VI** of the **Mental Treatment Act (Cap 113)**, some evidence of *unsoundness of mind* must be required by this Court before it can sanction anyone to act as *guardian ad litem* or *next friend* for a person who is alleged to be of *unsound mind*.
20. And then, there is the issue of *locus*. In this case, proceedings have long been afoot by the Plaintiff in his own name without an **Order 80 rule 3(5)** sanction. And on a cause of action alleging of fraud against his brother who, so far, from where I sit, appears to be *oblivious* to the ongoing legal wrangle centred around him.
21. And, I do bear in mind, if evidence is adduced at this interlocutory stage tending to confirm that Rajesh is of unsound mind, will the Defendant then be estopped from challenging it at the trial proper bearing in mind that it will be the principal issue also at the substantive trial?
22. Neither Mr. Samad nor Mr. Sharma raised these issues before me at the hearing of the applications.

## **The Law**

### Striking Out

23. In a striking out application, the Courts assume that the facts in the pleadings are proved. Hence, at this interlocutory stage, the Courts will not strike out a claim on the contention that the facts as pleaded cannot be proved. Whether or not a pleaded fact is proved is to be decided by the judge who will eventually preside at the trial of the substantive matter.
24. So as long as the facts pleaded do raise a legal issue, the Courts will not strike out a pleading.
25. The New Zealand Court of Appeal has said that even where a Judge has begun to harbour a feeling that a claim is likely to fail at the end of the day, it is still an inchoate feeling and is not firm enough ground to strike it out a claim (as per Thomas J in **New Zealand Maori Council -v- A-G [1996] 3 NZLR 140 at 175-6**).
26. And so it is only in plain and obvious cases when the claim is on its face “*obviously unsustainable*” that recourse should be had to the summary procedure under **Order 18 Rule 18(1)**. An example of such a plain and obvious case is when a fact pleaded is so false that judicial notice can be taken as to its falsity (**National MBf Finance (Fiji) Limited -v- Nemani Buli [2000] ABU 0057/98**).
27. The facts as pleaded are summarised above in paragraphs 6 to 11. In my view, there is a reasonable cause of action. I also do not think that the allegations are frivolous and vexatious.

### Amendment of Pleadings

28. As for amendment of pleadings, the underlying principle is that it is in the best interest of the administration of justice that the pleadings in an action should state fully and accurately the factual basis of each party’s case. The

*test* is whether the amendment is necessary in order to determine the real controversy between the parties and does not result in injustice to other parties. And the guiding principle is that an amendment should always be allowed in the interest of bringing the '**whole contest between the parties**' before the Court. If so, leave to amend may be given, even at a very late stage of the trial (**Elders Pastoral Ltd v. Marr (1987) 2 PRNZ 383 (C.A.)**).

29. But if the other party will be seriously prejudiced by an amendment, the court may either refuse leave or grant leave to amend subject to costs. (**G.L.Baker Ltd. v. Medway Building and Supplies Ltd [1958] 1 WLR 1231 (C.A.)**).
30. When leave to amend is granted, the party seeking the amendment must bear the costs of the party wasted, as a result of it (see also **Peter Sujendra Sundar and Anor -v- Chandrika Prasad Civil appeal No; ABU 0022/97**).

Locus

31. In this case, the only amendment sought on the Writ is for Rajesh to be named as Plaintiff with Shankar as *guardian ad litem* or *next friend*.
32. Mr. Samad concedes that Shankar lacks *locus*. That concession in fact is what prompted his application to amend the Writ to name Rajesh as the Plaintiff with Shankar as *guardian ad litem* or *next friend*. Mr. Samad appears to argue that the failure to name Rajesh as Plaintiff is rectifiable by this Court by exercising its discretion under **Order 20 Rule 5**. His Summons does not make reference to **Order 80** of the High Court Rules though he appears to concede that the application should have been made pursuant to **Order 80**.
33. Mr. Sharma submits that the Court can only grant leave after first determining whether Rajesh is in fact of unsound mind. And the only conclusive evidence on whether one is of unsound mind is an expert medical report to that effect. No such evidence is contained in Shankar's Affidavit or in any document he has so far filed in Court. Such a Report,

Mr. Sharma submits, can only be obtained through an Order by the Magistrates Court under the procedures set out in the **Mental Treatment Act (Cap 113)** and **Order 80** of the High Court Rules.

34. I note that section 2 of the Act defines “Court” to mean the “Supreme Court” which of course is now the High Court. Mr. Sharma submits that Shankar’s assertions are frail without medical evidence and, accordingly, this Court should not grant Shankar leave to amend his Writ.

35. Mr. Sharma cites the case of **Proceedings Commissioner, Human Rights Commission -v- Commissioner of Police & A-G [2003] HBC 093D/025S** as an example of a case which was struck out for lack of locus standi. I note that in that case, the Court had to consider the Proceedings Commissioner’s locus against the legislative scheme within which that office was set up and in which it functions.

#### **Order 80 HCR & Mental Treatment Act**

36. **Order 80 Rule 2(1)** states that a person under disability may not bring or make a claim in any proceeding except by his next friend.

37. I note that **Order 15 Rule 6(4)** requires that:

*“No person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorised”*

38. **Order 80 Rule 3 (5)(a)** states as follows:

*“Except where the next friend or guardian ad litem...of a person under disability has been appointed by the Court – the name of any person shall not be used in a cause or matter as next friend of a person under disability unless and until the documents listed in paragraph (6) have been filed in the appropriate office”*

39. **Order 80 Rule 3 (6)** then lists the following documents that are required to be filed.

- (a) *a written consent to be next friend or guardian ad litem, as the case may be, of the person under disability in the cause or matter in question given by the person proposing to be such friend or guardian*
- (b) *where the person proposing to be such friend or guardian of the person under disability, being a patient, is authorised under any enactment to conduct the proceedings in the cause or matter in question in the name of the patient or on his behalf, an office copy, sealed with the seal of the court of the order or other authorisation made or given under any enactment by virtue of which he is so authorised; and*
- (c) *except where the person proposing to be such friend or guardian of the person under disability, being a patient, is authorised as mentioned in sub-paragraph (b), a certificate made by the barrister and solicitor for the person under disability certifying –*
  - (i) *that he knows or believes as the case may be that the person to whom the certificate relates is an infant or a patient, giving (in the case of a patient) the grounds of his knowledge or belief; and*
  - (ii) *where the person under disability is a patient, that there is no person authorised as aforesaid; and*
  - (iii) *where the person named in the certificate as next friend or guardian ad litem, as the case may be, is the Fiji Public Trustee Corporation Limited, that the person so named has no interest in the cause or matter in question adverse to that of the person under disability*

40. **PART VI of the Mental Treatment Act (Cap 113)** states as follows-

**PROVISIONS REGULATING PROCEEDINGS IN  
INQUIRIES INTO UNSOUNDNESS OF MIND**

***Court may order inquiry***

39.-(1) The Court may, on such application as is hereinafter mentioned, make an order directing an inquiry whether any person subject to the jurisdiction of the Court who is alleged to be of unsound mind, is or is not of unsound mind and incapable of managing himself and his affairs.

(2) Such order may also contain directions for inquiries concerning the nature of the property belonging to the person alleged to be of unsound mind, the persons who are his relatives or next of kin, the time during which he has been of unsound mind or such other questions as to the Court shall seem proper.

#### **Application by whom made**

40. Application for such inquiry may be made by any person related by blood or marriage to the person alleged to be of unsound mind, or by any officer in the public service of Fiji nominated by the Minister for the purpose of making the application.

#### **Provision as to notice of inquiry**

41.-(1) Reasonable notice of the time and place appointed for the inquiry shall be given to the person alleged to be of unsound mind.

(2) If it shall appear that the person alleged to be of unsound mind is in such a state that personal service on him would be ineffectual, the Court may direct such substituted service of the notice as it shall think proper.

(3) The Court may also, if it thinks fit, direct a copy of such notice to be served upon any person related by blood or marriage to the person alleged to be of unsound mind.

#### **Power to examine person alleged to be of unsound mind**

42. At any time after the application for the inquiry the Court may require the person alleged to be of unsound mind to attend at such convenient time and place as the Court may appoint for the purpose of being personally examined by the Court or by any person from whom the Court may desire to have a report of his mental capacity and condition, and the Court may also make an order authorizing any person or persons named therein to have access to the person alleged to be of unsound mind for the purpose of a personal examination.

#### **Questions to be decided by Court**

43. On the day fixed for the inquiry, after receiving such reports and hearing such evidence and arguments as it may think fit, the Court shall decide whether the person who is alleged to be of unsound mind is or is not of unsound mind and incapable of managing himself and his, affairs and shall also decide any other questions as to which an inquiry has been directed.

41. In **Civil Action No. HBC 407J of 2004S - In the Matter of an Application by Raj Gokal (f/n Maganlal Gokal) for an Inquiry under Part VI of the Mental Treatment Act**, Jitoko J, referring to sections 39, 40, 41, 42 and 43 said as follows:

*“All of these provisions point to and reflect the belief that the State bears the responsibility in ....ensuring their interests including those of their families are secured and protected”*

42. In the above case, an Originating Summons was filed by the applicant son of the person alleged to be under a disability seeking a Court Order directory an inquiry into the mental state of his father to determine whether he is of unsound mind and incapable of managing his affairs and, if found to be such, that the applicant be appointed as the committee to manage his father and his father’s estate.

43. It is noteworthy that in his deliberations, Jitoko J had to consider three specialist medical reports including one from a neurologist based in Singapore plus a report from the Office of the Director of Social Welfare (on home visits and an interview with the patient conducted by her officers).

44. I reiterate here that no such evidence is before me in this case.

45. At this stage, I again ask myself whether the lack of locus, particularly on the circumstances of this case, should lead inevitably to the striking out of this whole claim.

46. Pathik J in his comments in **Waisea Mataitini -v- Director of Lands & Ors (Civil Action No. 296 of 1998)** faced the same dilemma in dealing with an interlocutory striking out application where the Plaintiff’s locus in a representative action type situation was at issue. In particular, what was at stake was whether or not the Plaintiff had locus to continue the action:

*“The issue of representative action has also been raised. **Or. 15r14** of the High Court Rules authorises representative actions. The Plaintiff at paragraph 2 of his Statement of Claim stated that he was duly authorised to represent the mataqali.*

*The plaintiff has also correctly argued that no evidence shall be admissible at this stage of the proceedings as stipulated under **Order 18 rule 18(2)**.*

*I am therefore of the view that **the representative action issue is undisputed in this interlocutory proceedings and can only be put to strict proof during the trial**”(my emphasis).*

47. The general approach in the above case is to “postpone” the locus issue for trial as it raised an evidentiary issue.
48. In the case before me, I am of the view that there are enough reasons raised in the pleadings to shy away from striking this matter out. These are as follows:
  - (i) Rajesh lives with the Kumari.
  - (ii) Kumari is taking care of Rajesh.
  - (iii) Kumari had agreed to take care of Rajesh as consideration for his transferring his interest in the land in question to her
  - (iv) when Rajesh signed the transfer, he imprinted his thumb print on the transfer document.
  - (v) Shankar, is Rajesh’s brother. He lives in Canada. He pleads that Rajesh is of unsound mind. Surely, as Rajesh’s brother, it is reasonable to expect him to know these things about his brother Rajesh – subject of course to conclusive medical proof.
  - (vi) Rajesh appears so far to be oblivious to the wrangle between the Plaintiff and the Defendant in this case.

49. In addition to all the above, it is my view that if I was to refuse Shankar's application and strike out the Writ and Statement of claim on the basis that he lacks locus, it is Rajesh's interest that is *likely* to suffer the greatest compared to the Plaintiff's interest or the Defendant's.
50. However, unlike **Waisea Mataitini** where the *locus* issue was postponed for trial, the nature of the locus issue in this case must be dealt with immediately to comply with **Order 15 rule 6(4)** and **Order 80 Rule 3(5)** and **(6)**. I caution though that the issue of whether Rajesh was of *unsound of mind* at all material times must remain open for contest at the substantive hearing of this matter and not be caught in the doctrine of *issue estoppel*.
51. Having said that, I reiterate that there is not enough material before me to enable me to make an Order that Rajesh be substituted as Plaintiff with Prakash as his *next friend* and/or *guardian ad litem*. I reiterate that Mr. Samad's application was made pursuant to Order 25 Rule 3. There is no mention of it of **Order 80**.
52. I believe the following comments of Bowen LJ in **Cropper v Smith (1884) 26 Ch. D. 700 at p. 710** and cited by Byrnes J in **Abraham John Henry – v- Lautoka City Council Civil Action HBC 25 of 1993L** are worth noting:

*“.....it is a well established principle that the object of Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. Speaking for myself, and in conformity with what I have heard laid down by other divisions of the Court of Appeal and by myself as a member of it, I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendments as a matter of favour or grace”*

53. Having said that, I therefore Order as follows:

- (i) the Striking Out application is dismissed with no order as to costs.
- (ii) the Application for leave under Order 25 Rule 3 is hereby struck out.
- (iii) the Defendant however is at liberty to file a fresh application to seek appropriate orders to be appointed either as next friend or as guardian ad litem. Unless this fresh application is filed and served within 21 days from today (i.e. by **Friday 04<sup>th</sup> December 2009**), the claim will be struck out.

54. In the way the proceedings have unfolded, I am of the view that it is only right that the Defendant be compensated with costs. I therefore order the Plaintiff to pay \$500-00 costs to the Defendant within 21 days from today.

**A. Tuilevuka**  
**Master**

**13<sup>th</sup> November 2009.**