

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Action No. HBC 60 of 2006

BETWEEN: **MAHENDRA SHARMA** father's name Ram Lakhan Sharma of
Naikabula, Lautoka, Businessman.

1ST PLAINTIFF

AND: **RAJENDRA SHARMA** father's name Ram Lakhan formerly of
Naikabula, Lautoka but now of 153 Triangle Road, Auckland, New
Zealand, Businessman.

2ND PLAINTIFF
(Deceased)

AND: **NATIVE LAND TRUST BOARD** a body corporate duly constituted
under the Native Land Trust Act Cap. 134.

DEFENDANT

Before:

Priyantha Nāwāna J.

Counsel:

For 1st & 2nd Plaintiffs : Mr H Ram
For Defendant : Ms L Macedru

Date of Order : 08 October 2012

O R D E R

1. This case came up initially for trial from 21 – 22 November 2011, the said dates having been fixed on 24 May 2011.
2. On 21 November 2011, Mr Mahendra Sharma who was the 1st Plaintiff gave evidence on his own behalf and chose to give evidence on behalf of the 2nd Plaintiff Rajendra Sharma, whom he claimed to be his brother, on the alleged authority of a Power of Attorney marked as MS1.

3. In the course of the cross-examination, court intervened and questioned the whereabouts of the 2nd Plaintiff from the 1st Plaintiff. It was only then that it was brought to light that the 2nd Plaintiff had already died on 30 July 2011. This showed that the 1st Plaintiff was purportedly giving evidence on behalf of the 2nd Plaintiff without lawful authority.
4. As this case involved a property matter, court was cautious to have the parties before court in their proper settings. On application by Mr Ram on behalf of the Plaintiffs, court adjourned the proceedings on 22 November 2011 to effect substitution in place of the deceased-2nd Plaintiff and the matter was adjourned for such steps to be taken before the learned Master.
5. The matter came up before this court on 19 June 2012 apparently on completion of the process of substitution before the learned Master and the trial was fixed with the consent of the parties for 8, 9 and 11 October 2012.
6. As the court went through the proceedings relating to substitution, court noted that order for substitution, as ordered by the learned Master on 23 April 2012 and sealed on 24 April 2012, the 1st Plaintiff-Mahendra Sharma 'had been substituted as the 2nd Defendant' in this action.
7. When the matter was brought to the notice of Mr Ram, Mr Ram chose to downplay the situation by saying that it was a clerical mistake and this court could correct the mistake and proceed with the trial.
8. This court declined to take that as a clerical mistake because the sealed order had flowed from the papers that had been filed by Mr Ram as could be seen from the exparte motion dated 27 March 2012 seeking the 1st Plaintiff be substituted as the 2nd Defendant. Learned Master, too, had made his order for substitution of the Plaintiff as the 2nd Defendant in his order dated 23 April 2012 on which date Mr Ram himself had appeared on behalf of the 1st Plaintiff.
9. Therefore, it would appear that the irregularity of substitution did not occasion from a mere clerical error but the whole process of substitution as initiated by Mr Ram was erroneous and irregular. In the result, there was no proper substitution as required by law for the deceased-2nd Plaintiff to proceed with his case.

10. As the matter stood for trial today, court granted an adjournment for Mr Ram to regularize the substitution before the Master with corrected papers in light of the learned Master's decision dated 23 April 2012.
11. Court reconvened at 11.20 am at the request of the learned counsel as court was made to understand that the process of substitution was correctly rectified.
12. Mr Ram submits that he did not have an audience, obviously due to the short notice, before the Master. In the circumstances, he had got a member of the clerical staff to strike off the word "Defendant" in the first paragraph of the order dated 23 April 2012.
13. The circumstances of this case, as shown above, would show that the defect in substitution could not have been cured by that kind of interpolation because there was no proper application for substitution in the first place before the Master. The process of substitution has to be meticulously conducted as wrong parties could get substituted with collusion of interested parties. In this case, the court is seriously mindful of that aspect especially in light of the attempt of the 1st Plaintiff to give evidence on behalf of the 2nd Plaintiff knowing very well that he was dead by 30 July 2011.
14. Court concludes that there is no proper substitution for court to proceed with, as the adjournment given to Mr Ram, too, was not put into proper use. The proceedings, are, accordingly, adjourned for the proper substitution in place of the deceased-2nd Plaintiff Rajendra Sharma.
15. Orders, accordingly.

Priyantha Nāwāna
Judge
High Court
Lautoka

08 October 2012