IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Appeal No: HBC 68 of 2014

BETWEEN : **MOHAMMED HANIF** of Nadi, Retired, **MOHAMMED SADIQ** of Nadi, **MOHAMMED KAUSAR** of Nadi, **MOHAMMED DAULAT** of Vancouver, Canada, Retired, **MOHAMMED HANIF** as administrator of the Estate of Saukat late of Nadi and **MOHAMMED KABIL** of San Francisco, Califonia, a limited liability company having its registered office in Labasa.

APPELLANTS

AND : **MOHAMMED SHARIF** formerly of Nadi but now of 30 Mitchell Street, Blockhouse BAY, Auckland, New Zealand as the administrator de bonis non of Mohammed Hakim late of Nadi, deceased and also sued in his personal capacity.

RESPONDENT

AND : **THE REGISTRA OF TITLES**

NOMINAL RESPONDENT

Before : Hon. Mr Justice R. S. S. Sapuvida

Counsel : Mr C. B. Young for the Appellants
Mr W. Pillai for the Respondent

Date of Judgment : 1st September, 2016

JUDGMENT

[1]. This is an appeal filed by the appellants/plaintiffs [hereinafter referred to as the appellants] against the ruling made by the Master of the High Court dated 22nd May 2015 where the Master held that the filing of the writ of summons and the

statement of claim in this original Civil Action No. 68 of 2014 is an abuse of process and ordered that the whole action be struck off.

[2]. The appellants instituted the said proceeding (that was struck out by the Master) in the Lautoka High Court by way of Writ of Summons on the 8th may, 2014 seeking the following orders:

(i) Specific performance against the Defendant of the clauses 2 and 7 of the Deed of Compromise dated 9th November, 1999 by the execution of the Transfer of one undivided fourth registered in the name of Mohammed Hakim of the land known as Cawa, Solawaru and Enamanu and containing seven hectares three thousand four hundred and sixty seven square metres more particularly described in Certificate of Title No. 34147 to the Plaintiffs.

(ii) The Defendant do within 28 days from the date of Judgment to execute the following documents:

(a) Registered Transfer of the said undivided fourth share presently registered in the name of Mohammed Hakim in favour of the Plaintiffs;
(b) An application for Capital Gains Tax Certificate;
(c) Obtain the consents of each of all the beneficiaries of the estate of Mohammed Hakim to enable the Registrar of Titles to register the Transfer of one undivided fourth registered in the name of the land known as Cawa, Solawaru and Enamanu and containing seven hectares three thousand four hundred and sixty seven square metres particularly described in Certificate of Title No. 34147 to the Plaintiffs.

(iii) Damages (General Exemplary and Aggravated).

(iv) Such further or other relief or seems to fit this Honourable Court.

(v) Costs.

[3]. For completeness and for convenient reference, the parties to the present case were/ are as follows:

Between: **Mohammed Hanif,** of Nadi, Retired, Mohammed Sadiq of Nadi, **Mohammed Kausar** of Nadi, **Mohammed Daulat** of Vancouver, Canada, Retired, **Mohammed Hanif** as administrator of the Estate of Saukat late of Nadi and **Mohammed Kabil** of San Francisco, Califonia, United States of America.

Plaintiffs

And: **Mohammed Sharif** formerly of Nadi but now of 30 Mitchell Street Blockhouse Bay, Auckland, New Zealand as the administrator de bonis non of Mohammed Hakim late of Nadi, deceased and also sued in his personal capacity.

Defendant

And: **The Registrar of Titles**

Nominal Defendant

[4]. The appellants had previously filed an action in Lautoka High Court under Civil Action No. 215 of 2007 and in that had the following parties:

Between: **Mohammed Hanif, Mohammed Kausar, and Mohammed Sadiq** all sons of Bakridi of Martintar, Nadi

Plaintiffs

And : **Mohammed Sharif** father's name Mohammed Hakim presently residing in Nadi

First Defendant

And : **The Registrar of Titles**

Second Defendant

[5]. The appellants filed the said action under the Case No. HBC 215 of 2007 against the first defendant (sued in the capacity of administrator de bonis non of Mohammed Hakim) by way of writ of summons in the Lautoka High Court seeking the following reliefs:

(i) A Declaration that in attempting to procure the registration of Transfer No. 660518 against the Certificate of Title No. 34147 the First Defendant has acted fraudulently in the sense of being dishonest and unlawful and in acting wrongfully in attempting to procure the registration of a one undivided fourth share in his name of the lands comprised and described in Certificate of Title No. 34147;

(ii) For an Order directing the Second Defendant to cancel the entry of the Transfer No. 34147 in the Registrar of Lands.

(iii) A Declaration that the Defendant is not entitled to be registered as the proprietor of one fourth undivided share in the lands comprised and described in Certificate of Title No. 34147;

(iv) Damages;

(v) Costs.

[6]. When the appellants instituted the present (original) action the respondent/original defendant [hereinafter referred to as the respondent] filed a summons for striking out the claim of the appellant on 23rd July 2015 under which the Master made the said ruling dated 22nd May 2015 by striking out the whole action.

[7]. The appellants' present appeal is against the afore mentioned ruling relying on the following grounds of appeal:

1. The Master erred in law when he failed to appreciate that in High Court Civil Action No. 215 of 2007, the Defendant Mohammed Sharif was sued in his personal capacity when in High Court Civil Action 68 of 2014, the Defendant Mohammed Sharif was sued in his capacity as "the administrator de bonis non" of the estate of Mohammed Hakim.

2. The Master erred in law when he failed to appreciate that the limitation period had not expired against the Estate of Mohammed Hakim.

[8]. Hearing of the appeal was concluded and it was only between the appellants and the respondent. The nominal respondent did not participate in the hearing. The parties to the hearing later filed their written submissions.

[9]. The appellant's counsel advances the argument that the Master had erred in law when he held at paragraph 10 that it was *"breath taking disingenuousness that in the present action the Defendant is sued in the capacity of Administrator De Bonis Non of the estate of Mohammed Hakim and in the earlier proceedings (HBC 215 of 2007) the Defendant was sued in his personal capacity"*.

[10]. The counsel further points out that the said statement of the Master fails to capture and appreciate that in Civil Action No. 68 of 2014 there were two defendants, the Estate of Mohammed Hakim and Mohammed Shariff in person. His argument is that Mohammed Shariff just happens to be the administrator of the Estate and it is a requirement if one was to sue an estate of a deceased, one needed to join the legal representative (in this case the

Administrator De Bonis Non) who happens to be Mohammed Shariff of the deceased's estate.

[11] The appellant's counsel at the same time states that this appeal does not challenge the judgment of the Master to the extent of striking out the claim against Mohammed Shariff in person. It is only appeal against the part of the judgment that struck out the proceedings against the Estate of Mohammed Hakim.

[12] The appellants' counsel submits that, for him it appears that the Master has failed to appreciate that the allegation or the comment he made in paragraph 10 of his ruling when he says these words:

> "1. By virtue of Letters of Administration De Bonis Non. No 45025 the Defendant is and was at all material times the administrator of the Estate of Mohammed Hakim father's name Bakridi (hereinafter referred to as "Hakim")"
>
> and by saying that, the Master led himself to conclude that Mohammed Shariff was "sued in the same capacity".

[13]. It appears to me that the counsel for the appellants' has for some reason slightly mistaken himself when he states that the Master made a comment or allegation in paragraph 10 of his ruling as quoted in bold above. Because it is not an allegation or a comment that the Master made on his own, but it is an extract the Master has taken from the paragraph 1 of the statement of claim filed by the appellants in the case No. 215 of 2007.

[14]. Therefore, the Master's statement on the above context when he further said in paragraph 10 of his ruling that:

> *"On the strength of this I concluded that the Defendant is sued in the same capacity (capacity of administrator De Bonis Non of the Estate of Mohammed Hakim) in the earlier proceedings and in the present action"*, cannot be found to be wrong.

[14]. However, the appellants' counsel further states that this is not correct and Mohammed Shariff has been sued in person along with the Estate of Mohammed Hakim whose administrator happened to be Mohammed Shariff and previously the administrator happened to be Jaitun Bibi (as per paragraph 20 of the Statement of Claim) and Jaitun Bibi died on 19th August 2001. Then on

26th June 2006 Mohammed Shariff was granted Letters of Administration De Bonis Non in the Estate of Mohammed Hakim.

[15]. The appellants have advanced two grounds of appeal as mentioned in paragraph 7 above. However, the appellants cannot equally depend on either one of the grounds because if the court decides that the ground No. 1 has no merits in it, then the appellant cannot or even the court either cannot shift to the other ground of limitation issue and say that the appellants are within the limitation period when they original instituted the action as the ground No.1 is based on the issue of *res judicata* (the decided matter). Then even if the appellants' original action is considered to have been filed within the limitation period the second action cannot stand as it is a decided matter.

[16]. Therefore, firstly I will deal with the issue of res judicata as pointed out by the respondent.

[17]. The respondent at the very outset in his submissions states that the ground No.1 has no merit in it.

[18]. The respondent refers to paragraph 1 of the statement of claim in HBC No. 215 of 2007, which is annexed as "A" in the respondent's affidavit in support of striking out application filed on 23rd July 2014 to submit that the respondent/defendant was described as and pleaded in the claim as:

> 1. ***By virtue of Letters of Administration De Bonis Non No. 45025 the Defendant is and was at all material times the administrator of the Estate of Mohammed Hakim father's name Bakridi (hereinafter referred to as "Hakim"***

[19]. The respondent in the intituling in HBC No. 215 of 2007 is described as MOHAMMED SHARIFF. The respondent submits that the intituling is not a pleading against any party in an action and here in this case the pleading commences from paragraph 1 of the statement of the claim, in which the respondent is clearly sued and pleaded as being the Administrator in paragraph 1 of the statement of claim.

[20]. In HBC 68 of 2014, the defendant is described in the intituling as ...**administrator de bonis non of Mohammed Hakim late of Nadi, deceased and also sued in his personal capacity** ..... and in the claim at paragraph 2, it is pleaded as :

2. ***The Defendant is the son of Mohammed Hakim who died on the 11th October 1988 and the Administrator De Bonis Non of the estate of Mohammed Hakim.***

[21]. In both actions filed by the appellants, the respondent is sued as Mohammed Shariff and as the Administrator De Bonis Non and even the Learned Master very correctly has noted this important fact in sub heading **C** paragraph 1 and 5 on pages 3 and 4 of his Ruling as follows:

"1. Initially, the Plaintiffs filed an action against the Defendant (sued in the capacity of administrator de bonis non of Mohammed Hakim) by way of Writ of Summons in the Lautoka High Court Case No. HBC 215 of 2007 seeking the following reliefs;

(vi) A Declaration that in attempting to procure the registration of Transfer No. 660518 against the Certificate of Title No. 34147 the First Defendant has acted fraudulently in the sense of being dishonest and unlawful and in acting wrongfully in attempting to procure the registration of a on undivided fourth share in his name of the lands comprised and described in Certificate of Title No. 34147;

(vii) For an Order directing the Second Defendant to cancel the entry of the Transfer No. 34147 in the Registrar of Lands.

(viii) A Declaration that the Defendant is not entitled to be registered as the proprietor of one fourth undivided share in the lands comprised and described in Certificate of Title No. 34147;

(ix) Damages;

(x) Costs.

5 Nearly 02 years after that the judgment, the Plaintiff brought this present action by way of Writ of Summons, against the same Defendant (sued in the capacity of administrator de bonis non of Mohammed Hakim), relying on the said Deed of Compromise dated 9th November 1999 seeking the following reliefs:

(1) Specific performance against the Defendant of the clauses 2 and 7 of the Deed of Compromise dated 9th November 1999 by the execution of the transfer of one undivided fourth registered in the name of Mohammed Hakim of the land known as Cawa, Solawaru and Enamanu and containing seven hectares three thousand four hundred and sixty seven square metres more particularly described in Certificate of Title No. 34147 to the Plaintiff.

(2) *The Defendant do within 28 days from the date of Judgment to execute the following documents.*

(a) *Registered transfer of the said undivided fourth share presently registered in the name of Mohammed Hakim in favour of the Plaintiffs.*

(b) *An application for Capital Gains Tax Certificate*

(c) *Obtain the consents of each of all the beneficiaries of the estate of Mohammed Hakim to enable the Registrar of Titles to register the Transfer of one undivided fourth registered in the name of Mohammed Hakim of land known as Cawa, Solawaru and Enamanu and containing seven hectares three thousand four hundred and sixty seven square metres more particularly described in Certificate of Title No. 34147 to the Plaintiffs."*

[22]. The appellants had raised the same argument in opposing the striking out application and the Learned Master has made a determination on this issue at paragraph C, 10 of his Ruling (page 6) to which I have no different opinion but totally agree and I extract it as follows.

"10. In adverso, the Plaintiffs submit with breath taking disingenuousness that in the present action the Defendant is sued in the capacity of Administrator De Bonis Non of the estate of Mohammed Hakim and in the earlier proceedings (HBC 215 OF 2007) the Defendant was sued in his personal capacity.

I must confess that, I remain utterly unimpresses by the effort of the Counsel for the Plaintiffs.

it is perfectly clear from the paragraph 01 of the Statement of Claim in the earlier proceedings (HBC 215 OF 2007) that the Defendant was sued in the capacity of Administrator De Bonis Non of the Estate of Mohammed Hakim. For the sake of completeness, paragraph 01 of the earlier proceedings (HBC 215 OF 2007) is reproduced below in full:

(1) *By virtue of Letters of Administration De Bonis Non No. 45025 the Defendant is and was at all material times the administrator of the Estate of Mohammed Hakim father's name Bakridi(hereinafter referred to as "Hakim")*

On the strength of this I concluded that the Defendant is sued in the same capacity (capacity of administrator De Bonis Non of the Estate of Mohammed Hakim) in the earlier proceedings and in the present action"

[23]. The respondent too submits that in both actions in Civil Action No. 215 of 2007 and Civil Action No. 68 of 2014, the appellants are relying on the same Deed of Compromise dated 9th November, 1999 and seeking similar relief in both actions.

[24]. The previous action being Civil Action No. 215 of 2007 was heard in the High Court Lautoka wherein the appellant had called three(3) witnesses and upon hearing the witnesses and submissions the Court dismissed the appellants' action on 13th June 2012.

[25]. It is impeccably clear the appellants in Civil Action No. **68 of 2015** once again trying to re-litigate the same cause of action relying on the same Deed of Compromise.

[26]. The respondent in his submissions draws the attention to the House of Lords in **Workington Harbour & Dock Board –v- Trade Indemnity Co., Ltd (1938) 2 ALL ER 101 ,** where the plaintiffs sued on a bond which the defendant had given to guarantee the performance of a contractor who had undertaken to build a dock for the plaintiffs. The bond provided that a certificate which complied with certain criteria would prove the amount due. In addition on the bond the plaintiffs relied upon a certificate which they said complied with the criteria and was thus conclusive evidence of the defendants' liability under the bond. The action failed because the certificate did not specify a relevant act or default as required by the bond. The plaintiffs brought a second action relying, not upon the certificate, but upon the underlying facts which they said amounted to breaches of the contract and thus triggered liability under the bond. The action failed on the basis of res judicata.

Lord Atkin described the issue succinctly at pp 105-106:

> *"The question will always be upon whether the second action is for the same breach or breaches as the first, in which case the ordinary principles governing the plea of res judicata will prevail. In the present case, in my opinion, the Plaintiffs are suing on precisely the same breaches as those in the first action, and for the same damages, though on different evidence. ... I am satisfied that the first action raised the issue of all the contractors' breaches, and treated and meant to treat, the engineers' certificate as conclusive proof of both the breaches and the losses arising therefrom... the result is that the Plaintiffs, who appear to have had a good cause of action for a considerable sum of money, fail to obtain it, and on what may appear to be technical grounds, reluctant, however as a Judge may be to*

fail to give effect to substantial merits, he has to keep in mind principles established for the protection of litigants from oppressive proceedings. There are solid merits behind the maxim memo bis vexari debet pro eadem causa."

[27]. The respondent is mainly relying on res judicata principles and abuse of process and stresses that the appellants are trying to re-litigate the same issues that were decided by this court in the earlier action.

[28]. In addressing the issue of res judicata, the counsel for respondent in his submissions cites Spencer Bower and Handley on *Res Judicata* 4th edition (2009) as cited with approval by Lord Clarke (with whom Lord Phillps P, Lord Rodger, Lord Collins and Lord Dyson agreed) in the recent case of ***R (on the application of Coke – Wallis) v Institute of Chartered Accountants in England and Wales*** **[2011] UKSC1 [2011] 2 ALL ER 1 at [34],** in support of the argument.

Lord Clarke in his concluding remarks said at paragraphs 51 to 53 said

"51... it follows that I would allow the Appellant's appear on the basis that the first and second complaints relied upon the same conduct and that, once the first complaint was dismissed, it was contrary to the principles of res judicata to allow the Institute to proceed with the second complaint.

Abuse of process

52... the conclusions which I have reached so far make the question whether the second complaint should be dismissed or stayed on the ground of abuse of process academic. The question of abuse of process raises points of some interest but I have reached the conclusion that it would not be appropriate for the Court to express an opinion on them. This is in part because it would in all probability involve doing so on the hypotheses that the first and second complaints are different. It does not seem to me to be sensible to embark on that exercise in circumstances in which I have concluded that they are the same. I therefore express no opinion under this head.

Conclusion

53..For the reasons I have given, I would allow the appeal on the ground that the second complaint made the same complain as the first complaint and that the dismissal of the first complaint, which was final determination of the first complaint on the merits, made that complaint res judicata such that the Institute was not entitled to make or proceed with the second complaint."

[Italic added]

[29]. Similarly, in the present case, the parties are same and both actions have ascended from the Deed of Compromise dated 9th November 1999.

[30]. Therefore, on the foregoing reasons I uphold the submissions made by the respondent and decide that the appellant cannot re-litigate the same cause of action which has already been decided by the Court in the previous action No. HBC 215 of 2007 on merits.

[32]. Hence, I need not delve into the issue of limitation factor which does not have any superlative bearing over the issue of res judicata for the reason that even if the appellants instituted the second action well within the limitation period irrespective of whether it is 6 years or 12 as argued by the appellants' counsel, that it fails on the ground of res judicata.

[33]. I make the following orders:

1. The appeal is dismissed with costs summarily assessed at $1500.00 payable to the respondent by the appellants.

2. No further proceeding since the Master stuck off the whole action by his ruling dated 22 May 2015.

R. S. S. Sapuvida

[JUDGE]
High Court of Fiji

On the 1st day of September, 2016
At Lautoka