

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 106 OF 2016

BETWEEN : **SHAVEENA KUMARI** of Jinnu Road, Lautoka, Domestic Duties.

PLAINTIFF/APPLICANT

AND : **IFTIKAR IQBAL KHAN** of Lautoka, Barrister & Solicitor, operating as **IQBAL KHAN & ASSOCIATES**, Barristers and Solicitors, Lautoka.

1ST DEFENDANT/1ST RESPONDENT

AND : **SHAH NEWAZ KHAN** of Lautoka, Senior Law Clerk to **IQBAL KHAN & ASSOCIATES**, Barristers and Solicitors, Lautoka.

2ND DEFENDANT/2ND RESPONDENT

Appearances : Ms S. Ravai for the plaintiff/applicant
Non-appearance for the defendants/respondents

Date of Hearing : 22 May 2018

Date of Ruling : 22 May 2018

R U L I N G

[01] This is an *ex parte* application filed in conjunction with an affidavit of Shaveena Kumari, the plaintiff (*'the application'*). The application seeks leave of the court to substitute Shah Newaz Khan, the second defendant who had passed away on 15 November 2017 (*'the deceased'*) with that of Mustaffa Newaz Khan who has been granted a probate in respect of the estate of the deceased.

[02] The application is made pursuant to Order 15 Rule 8 of the High Court Rules 1988 ('HCR'). Rule 8 provides:

Change of parties by reason of death etc (O 15, R8)

"8 (1) Where a party to an action dies or becomes bankrupt but the cause of action survives, the action shall not abate by reason of the death or bankruptcy.

(2) Where at any stage of the proceedings in any cause or matter the interest or liability of any party is assigned or transmitted to or devolves upon some other person, the Court may, if it thinks it necessary in order to ensure that all matters in dispute may be effectually and completely determined and adjudicated upon, order that other person to be made a party to the cause or matter and the proceedings to be carried on as if he or she had been substituted for the first mention party.

An application for an order under this paragraph may be made ex parte.

(3) An order may be made under this Rule for a person to be made a party to a cause or matter notwithstanding that he or she is already a party to it on the other side of the record; or on the same side but in a different capacity, but –

(a) if he or she is already a party on the other side, the order shall be treated as containing a direction that he or she shall cease to be a party on that other side; and

(b) if he or she is already a party on the same side but in another capacity, the order may contain a direction that he or she shall cease to be a party in that other capacity.

(4) The person on whose application an order is made under this Rule must procure the order to be noted in the cause book, and after the order has been so noted that person must, unless the Court otherwise directs, serve the order on every other person who is a party to the cause or matter or who becomes or ceases to be a party by virtue of the order and serve with the order on any person who becomes a defendant a copy of the writ or originating summons by which the cause or matter was begun and form of acknowledgement of service in Form 2 in Appendix 1.

(5) Any application to the Court by a person served with an order made ex parte under this Rule for this discharge or variation of the order must be made within 14 days after the service of the order on that person."

- [03] The deceased had passed away before the delivery of the judgment. The plaintiff has obtained a judgment against the deceased. The judgment is still to be enforced. The substitution of the deceased by reason of death is sought at the enforcement of judgment stage. The plaintiff is entitled to make such an application pursuant to O 15, R 8 of the HCR, which allows change of parties by reason of death or bankruptcy at any stage of the proceedings.
- [04] The deceased second defendant's liability to satisfy the judgment has passed to his estate.
- [05] Having read the application and the supporting affidavit, and having heard the submissions advanced by counsel for the plaintiff. I am satisfied that the substitution sought by the plaintiff is necessary in order to ensure that all matters in dispute are effectively and completely determined and adjudicated upon. I would, therefore, grant leave to substitute the deceased with that of Mustaffa Newaz Khan who has been granted probate in respect of the deceased's estate and order that he (Mustaffa Newaz Khan) be made a party to the cause and proceedings be carried on as if he had been substituted for the second defendant, the deceased.
- [06] The plaintiff is also asking a consequential order to amend the Order dated 3 April 2018 to reflect the change. I, acting under O 15, R 9, grant leave to the plaintiff to amend the order to reflect the change as a result of the substitution.

The Result

1. Leave is granted to the plaintiff to substitute the deceased second defendant with that of Mr Mustaffa Newaz Khan, the trustee of the estate of the deceased second defendant by virtue of the probate.
2. Leave is also granted to the plaintiff to amend the order dated 3 April 2018 to reflect the change arisen out of the substitution.
3. There will be no order as to costs.

M.H. Mohamed Ajmeer
22/5/18

M.H. Mohamed Ajmeer
JUDGE

At Lautoka
22 May 2018

