

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

**CIVIL ACTION NO. HBC 259 OF 2018**

**BETWEEN** : **SISH NABI** as beneficiary in the Estate of Nabi Jan, of Votualevu Nadi, Retired.

**PLAINTIFF**

**A N D** : **ABDUL AHMED AZAD NABI** as trustee in the Estate of Nabi Jan, of Kavuli, Tavua, Cultivator.

**FIRST DEFENDANT**

**A N D** : **AHMED NABI** as beneficiary in the Estate of Nabi Jan, of Kavuli, Tavua, Cultivator.

**SECOND DEFENDANT**

**A N D** : **FAZAL NABI** as beneficiary in the Estate of Nabi Jan, of Kavuli, Tavua, Cultivator.

**THIRD DEFENDANT**

**A N D** : **GULZAR NABI** as beneficiary in the Estate of Nabi Jan, of Kavuli, Tavua, Cultivator.

**FOURTH DEFENDANT**

**A N D** : **GUL NABI** as beneficiary in the Estate of Nabi Jan, of Kavuli, Tavua, Cultivator.

**FIFTH DEFENDANT**

**Appearances** : Mr R. Singh for the plaintiff  
No appearance for the defendants  
**Date of Hearing** : 19 March 2019  
**Date of Oral Ruling** : 19 March 2019  
**Date of Written Reasons:** 10 April 2019

**WRITTEN REASONS FOR DECISION**

## Introduction

[01] On 19 March 2019, after hearing the originating summons filed by the plaintiff, I granted the orders the plaintiff sought and announced that I will issue written reasons at a later date. These are my reasons for arriving at the decision.

[02] The plaintiff instituted this action by way of originating summons.

[03] By his originating summons supported by an affidavit of Sish Nabi, the plaintiff, the plaintiff seeks the following orders against the defendant:

- a) *That the first defendant execute all papers, notes, plans and memorandums to ensure that the plaintiff is bequeathed absolutely his entitled share in the Estate of Nabi Jan.*
- b) *That the plaintiff is entitled to obtain a separate title for the land comprised in Certificate of Title Number 17315 being the portion of the land being occupied by him as his entitlement in the Estate of Nabi Jan.*
- c) *The defendants execute all papers signifying their approval for the proposed subdivision of the land comprised in Certificate of Title Number 17315 to be lodged by the plaintiff with the Director of Town and Country Planning subdivision only the plaintiff's entitled in the Estate of Nabi Jan and in the event the defendants fail or refuse to execute the papers in a timely manner, the Deputy Registrar shall execute these papers in place of any of the defendants.*
- d) *That the cost of such sub-division be borne by the Estate of Nabi Jan.*
- e) *Costs on client solicitor indemnity basis.*
- f) *Any further or other order as this Honorable Court may deem fit in the circumstances.*

[04] The abovementioned orders are sought on the grounds that:

1. *That the first defendant is the Trustee and Executor in the Estate of Nabi Jan ("deceased") pursuant to the Last Will and Testament of the deceased and grant of Probate Number 42088.*

2. *That the plaintiff together with the second, third, fourth and fifth defendants are beneficiaries in the Estate of the deceased.*
3. *That the plaintiff is entitled to absolutely more or less 0.25 acres (one quarter acre) from the land comprised in Certificate of Title Number 17315 (“the said land”).*
4. *That the first defendant as Trustee in the Estate of the deceased is required to transfer 0.25 acre of the said land to the plaintiff for the plaintiff’s use absolutely (“duty”).*
5. *That in breach of his duty the first defendant has refused to transfer the plaintiff’s entitlement to the plaintiff as required.*
6. *That the second, third, fourth and fifth defendants are willing to consent to a proposed subdivision, dividing the plaintiff’s portion for the said land.*

[05] The originating summons was filed on 28 November 2018, and it was served on the defendants on 31 January 2019. An affidavit of service of Ameleti Halstead, the registered bailiff has been filed in proof of service. All five defendants had filed separate acknowledgement of service of originating summons on 6 February 2019.

[06] On 14 February 2019, the plaintiff filed notice of appointment to hear the originating summons (*‘the notice’*). The notice has been served on all the five defendants on 27 February 2019. An affidavit to that effect has been filed on 6 March 2019. The notice came up for hearing before the learned Master (*‘the Master’*) on 6 March 2019. The defendants marked their appearance by their lawyer, Ms J. Singh of Legal Aid Commission. The Master referred the matter to the Deputy Registrar (*‘DR’*) for the file to be allocated to a judge.

[07] Thereafter, the matter came on before me on 19 March 2019, when none of the defendants was present in court. However, Ms Singh attempted to appear for the defendants as a friend of the court as the defendants’ application for Legal Aid has been refused. The court then indicated that she can appear as a friend of the court on invitation by the court and in this instance the court did not extend an invitation to appear as a friend of the court. As a result, she withdrew from appearing for the defendants leaving the defendants unrepresented.

Subsequently, the defendants names were called thrice, but none of them had appeared.

[08] At this stage, Mr Singh of counsel appearing for the plaintiff informed the court that the defendants were well aware of the today's hearing; they are not present or represented and he is ready to proceed with hearing. The court allowed the hearing to proceed. As a result, the hearing proceeded in the absence of the defendants.

[09] At the hearing, Mr Singh relied on the affidavit filed by the plaintiff in support of the originating summons. In addition, he made oral submission on behalf of the plaintiff.

### The evidence

[10] The affidavit evidence of the plaintiff states:

- “...  
3. That I bring this action against the Estate of my father Nabi Jan (“said estate”) as beneficiary.
4. That the first defendant is the Trustee and Executor in the Estate of Nabi Jan (“deceased”) by virtues of grant of Probate Number 42088. (Exhibit “A”).
5. That by virtue of the Last Will and Testament of my late father Nabi Jan, I together with the within named Defendants are entitled to interest in the land comprised in CT No. 17315 known as Natabua (Part of) Lot 11 on DP 3401 in the Island of Vitilevu and in the District of Tavua consisting an area of 18 acres 3 Roods and 22 perches (the “said property”) (Exhibit “B” is a copy of Certificate of Title Number 17315). I am entitled to one quarter acre from the said land.
6. That Transmission by Death no. 563387 was done by the first defendant and the same was registered on 18 April 2005, against the title of the said land.
7. That by way of Transfer No. 780290 B of the said property my interest has been endorsed onto the title of the land on the 22 May 2013, wherein it is noted that I am the owner of 0.25 acres.

8. *That I then proceeded to have the house site subdivided from the said property so that a separate title may be issued to me. Upon receipt of the draft scheme plan, the Director of Town and Country Planning has notified that it requires all beneficiaries in the Estate of Nabi Jan to endorse the scheme plan. (Exhibit "C" and Exhibit "D" are copies of letters from Director of Town and Country Planning).*
  9. *That I have attempted to get the approval of the Defendants to endorse their approval for the proposed subdivision, however they have refused to do the same.*
  10. *That on 19 September 2018, my solicitors by way of a letter had sent notices to the defendants requiring them to give consent for the sub-division, however they have failed to respond to the same. (Exhibit "E" are copies of the said Notices).*
  11. *That I am the beneficiary in the Estate of Nabi Jan to the extent as noted in the said Will of the deceased.*
  12. *That I am entitled to 0.25 acres, being the house site from the said land and as endorsed on the title of the said property.*
  13. *That the defendants are interfering with my right in the said property.*
- ..."

### **The law**

- [11] Originating summons procedure is set out in O 28 of the HCR.
- [12] Dealing with affidavit evidence in a matter begun by originating summons, O 28, R 2 (1) states that the plaintiff must, before the expiration of 14 days after the defendant has acknowledged service, or, if there are two or more defendants, at least one of them acknowledged service, file with the Registry the affidavit evidence on which he or she intends to rely.
- [13] Rule 2 (3) sets out that copies of the affidavit evidence filed in court under paragraph (1) must be served by the plaintiff on the defendant, or, if there are two or more defendants, on each defendant, before the expiration of 14 days after service has been acknowledged by that defendant.

- [14] Rule 2 (4) says where a defendant who has acknowledged service wishes to adduce affidavit evidence he or she must within 28 days after service on him or her of copies of the plaintiff's affidavit evidence under paragraph (3) file his or her own affidavit evidence with the Registry and serve copies thereof on the plaintiff and on any other defendant who is affected thereby.
- [15] Rule 2 (5) provides that a plaintiff on whom a copy of a defendant's affidavit evidence has been served under paragraph (4) may within 14 days of such service file with the Registry further affidavit evidence in reply and shall in that event serve copies thereof on that defendant.
- [16] Rule 2 (6) states that no other affidavit shall be received in evidence without the leave of the Court.

### **Discussion**

- [17] The plaintiff has filed his affidavit evidence along with the originating summons, which he filed on 28 November 2018. The same has been served on the defendants on 31 January 2019. The defendants had, in person, filed separate acknowledgement of service on 6 February 2019. In terms of O 28, R 2 (4), the defendants who had acknowledged service ought to have adduced their affidavit evidence within 28 days after service on them of copies of the plaintiff's affidavit evidence. The plaintiff's affidavit evidence was served on the defendants on 31 January 2019. 28 days after the service of the plaintiff's affidavit expired on 28 February 2019. The defendants did not file their affidavit evidence to date. The defendants thereby had defaulted in filing their affidavit evidence in violation of O 28, R 2 (4) of the HCR.
- [18] Even at the hearing, the defendants defaulted in appearance. Therefore, the hearing proceeded in their absence.
- [19] The plaintiff's claim arises out of the Last Will of his late father, Nabi Jan dated 26 January 1996 (Exb/A). Cl. 7 of the Will provides:

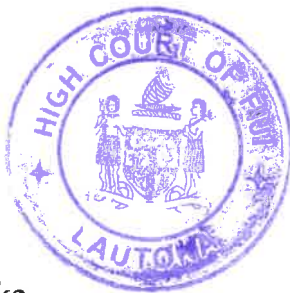
*"I GIVE DEVISE AND BEQUEATH ¼ acre (One quarter Acre) of my land and the house situated hereon presently occupied by my son SISH NABI of Kavuli, Tavua unto the said SISH NADI absolutely."*

- [20] The parties are brothers. The first defendant is the trustee of the estate of Nabi Jan (*the estate*). The first defendant had obtained probate and transition by death has been effected by the first defendant and registered against the estate property on 18 April 2005.
- [21] As a beneficiary, the plaintiff is entitled to 0.25 acres in the estate property. His interest has been endorsed on the title of the estate property on 22 May 2013, where it is noted that Sish Nabi, the plaintiff is the owner of 0.25 acres.
- [22] On his affidavit evidence the plaintiff states: he had *the house site subdivided from the estate property in order to get a separate title. Upon receipt of the draft scheme plan, the Director of Town and Country Planning ('DTCP') has notified that it requires all beneficiaries in the Estate of Nabi Jan to endorse the scheme plan.*
- [23] The DTCP's letter dated 7 May 2018 has been submitted to court (Exb/D). In that letter he states:  
"  
*The Title states (Transfer No. 780290'B') - "As to 1.25 acres undivided 0.25 acres each", undivided being the key word. Therefore you are requested to advice the applicant that it is paramount that you obtain the consent of the other beneficiaries to subdivide the land in the manner shown on the scheme plan.*  
..."
- [24] Other beneficiaries are the defendants. It is true that the property cannot be subdivided without the consent of the other beneficiaries.
- [25] The evidence before the court is that the plaintiff attempted to obtain the defendants' approval for the proposed subdivision, however they have refused to endorse.
- [26] Thereafter, the plaintiff had caused his solicitors to issue solicitors' notice to the defendants requiring their approval for the subdivision. The defendant did not respond to the solicitors' notice.

[27] The affidavit evidence adduced by the plaintiff remains unchallenged. I would, therefore, accept his evidence. It appears to me, on the evidence, the plaintiff is entitled to the relief he seeks. I accordingly grant orders 1, 2 and 3 of the originating summons with the summarily assessed costs of \$2, 500.00.

**The outcome**

1. The first defendant shall execute all papers, notes, plans and memorandums to ensure that the plaintiff is bequeathed absolutely his entitled share in the Estate of Nabi Jan.
2. The plaintiff shall be entitled to obtain a separate title for the land comprised in Certificate of Title Number 17315 being the portion of the land being occupied by him as his entitlement in the Estate of Nabi Jan.
3. The defendants shall execute all papers signifying their approval for the proposed subdivision of the land comprised in Certificate of Title Number 17315 to be lodged by the plaintiff with the Director of Town and Country Planning subdivision only the plaintiff's entitled in the estate of Nabi Jan.
4. The defendants shall pay summarily assessed costs of \$2,500.00 to the plaintiff.



*M. H. Mohamed Ajmeer*  
10/4/19

.....  
**M. H. Mohamed Ajmeer**  
**JUDGE**

**At Lautoka**  
**10 April 2019**

Solicitors:

For the plaintiff: M/s Patel & Sharma, Barristers & Solicitors

For the defendants: non-appearance