

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

CIVIL ACTION NO. HBC 162 OF 2007

In the matter of the Estate of Phul Kumari of Martintar, Nadi, Domestic Duties, Deceased, Testate.

In the matter of Ravindra Kumar of Martintar, Nadi, a Disabled Person.

BETWEEN : **VED KUMARI SHANKAR** of Martintar, Nadi, now residing at Vancouver, Canada, Retired and **SHALENDRA KUMAR** of Nasau both as guardian-ad-litem of Ravindra Kumar, Disabled.

PLAINTIFFS

AND : **PUBLIC TRUSTEE OF FIJI** as Trustee in the **ESTATE OF PHUL KUMARI**, Deceased.

FIRST DEFENDANT

AND : **PREM WATI** of Martintar, Nadi.

SECOND DEFENDANT

AND : **SUMAN LATA** of Martintar, Nadi.

THIRD DEFENDANT

Appearances : Mr R. Singh for the plaintiffs
Ms S. Sonika for the first defendant

Date of Hearing : 1 May 2019

Date of Judgment : 1 May 2019

J U D G M E N T

Introduction

[01] On 23 May 2007, the plaintiff filed an originating summons supported by an affidavit sworn by the plaintiff and sought the following relief against the defendants:

1. *The plaintiffs be appointed as guardian-ad-litem for RAVINDRA KUMAR Father's name Vidya Rattan Sharma of Martintar, Nadi.*
2. *The first named defendant furnish the plaintiffs with the accounts of the Estate of Phul Kumari father's name Ram Phal also known as Ram Pal, late of Martintar, Nadi from 22 March 1989, till to date.*
3. *The second and third defendants be restrained whether by themselves and or by their agents or servants from interfering with, in any manner whatsoever with RAVINDRA KUMAR father's name Vidya Rattan Sharma, Martintar, Nadi, quite enjoyment of the land comprised in Certificate of Title No. 13405 Lot 23 on DP 2069.*
4. *That RAVINDRA KUMAR father's name Vidya Rattan Sharma be paid his share of rental income derived from the land comprised in Certificate of Title No. 13405 Lot 23 on DP 2069.*
5. *That the plaintiffs be substituted as administrators in place of the first defendant of the Estate of Phul Kumari father's name Ram Phal also known as Ram Pal late of Martintar, Nadi, Domestic Duties, Deceased, Testate.*
6. *That the first defendant be restrained from evicting the first named plaintiff from the land comprised in Certificate of Title No. 13405 Lot 23 on DP 2069.*
7. *Costs on client/solicitor indemnity basis.*
8. *Any other or further relief as this Honourable Court may deem fit in the circumstances.*

- [02] The defendants filed their affidavits in reply, and the first defendant filed a further affidavit in addition to its affidavit in reply.
- [03] Eventually, on 25 April 2008, the parties informed the court that the terms of settlement is to be filed as the matter was resolved. The court accordingly noted that: *'Matter is settled. Terms of settlement to be filed'* with no date for mention for that purpose.
- [04] The terms of settlement were not filed until the plaintiff filed a notice of intention to proceed under O 3, Rule 5 of the High Court Rules 1988, as amended (*'HCR'*) and summons supported by an affidavit of Ved Kumari Shankar to reinstate the matter on 20 February 2018.
- [05] The reinstatement application came before the learned Master (*'the Master'*) on 19 June 2018 after several adjournments, when the Master ordered that: *'Plaintiff is advised to file the summons for hearing of originating summons for the matter to be transferred to a judge. Notice the solicitor for defendant. Mention on 27 June 2018.'* On 27 June 2018, the Master transferred the record to a judge to hear and determine the originating summons.
- [06] The file was allocated to Justice Mackie (as he then was), and he had granted leave to the plaintiff to file affidavit in reply. Accordingly, the plaintiff had filed the affidavit in reply of Ved Kumari Shankar on 27 September 2018. The defendants did not file any response to that affidavit in reply.

Discussion

- [07] On 25 April 2008, the parties through their solicitors informed the court the matter has been resolved and they will file the terms of settlement in due course. The court then recorded that the matter is settled and terms of settlement will be filed. Thus, the proceedings were terminated. However, the terms of settlement were not filed as there was disagreement with the costs claimed in the proposed terms of settlement drafted by the first defendant, Public Trustee of Fiji (now Fiji Public Trustee Corporation).

[08] The first defendant drafted the terms of settlement and sent to the plaintiffs for their approval. The plaintiffs appear to have agreed to all terms except the costs. The costs issue was not resolved by the parties. As a result, the terms of settlement were not filed until the plaintiffs filed the reinstatement application on 20 February 2018. The draft terms of settlement is annexed to the affidavit in support of the plaintiff filed in support of the reinstatement application which was filed on 20 February 2018 as **Exhibit G**.

[09] Both parties have maintained that the action has been resolved and settled, however subject to terms of settlement to be filed at a later date. There is no dispute by the parties that the matter was settled subject to the filing of the terms of settlement.

[10] The plaintiff in her affidavit in support to reinstate the matter to the cause list filed on 20 February 2018 deposed at paragraph 4 as follows:

“THAT the parties in these proceedings had advised the Court that this matter was resolved in that the 1st Defendant was to relinquish trusteeship of the Estate of Phul Kumari to me and the matter was taken off the cause list for the parties to attend to filing of the Terms of settlement and obtaining orders.”

[11] The first defendant did not dispute and challenge the above statement. This confirms that the first defendant had agreed to relinquish the trusteeship of the Estate of Phul Kumari to the plaintiff.

[12] It appears that Exhibit G was the terms of settlement intended by the parties to be filed in court. Unfortunately, it was not filed due to disagreement in relation to the issue of costs. The first defendant drafted the proposed terms of settlement (Exhibit G). There is no evidence before me that the first defendant had acted against the proposed terms of settlement drafted by them. The plaintiff even now agrees to every aspect of the proposed terms of settlement except the costs.

[13] For all these reasons, I am satisfied, after hearing this matter, that the matter was settled on 25 April 2008 subject to the terms of settlement to be filed by the

parties at a later date. The proposed terms of settlement (*Exhibit G*) has not been filed because of the cost issue. There is no reason why the court should not accept this proposed terms of settlement as agreed terms of settlement by the parties except for costs. I would, therefore, enter judgment by consent in terms of settlement (*Exhibit G*) except for costs. The costs need to be assessed before the Master, if not agreed.

The result

1. There will be judgment by consent in terms of settlement (*Exhibit G*) except for costs.
2. The first defendant shall relinquish the trusteeship of the Estate of Phul Kumari to the plaintiff.
3. The cost is to be assessed before the Master, if not agreed.

M. H. Mohamed Ajmeer
1/5/19
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M. H. Mohamed Ajmeer
JUDGE



At Lautoka
1 May 2019

Solicitors:

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

For the first defendant: Legal Department, Fiji Public Trustee Corporation Limited