

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

Civil Action No. HBC 07 of 2018

BETWEEN : **MOHAMMED SADIQ & SONS LIMITED** a limited liability
company with registered office at Masimasi, Sabeto, Nadi.

PLAINTIFF

AND : **ASHIK ALI** of Masimasi, Sabeto, Businessman, **JIOJI NIULEVU**
TIKO of Suva, Businessman and **VERENIKI TUISOWAQA** of
Koroiyaca, Sabeto, Farmer.

DEFENDANTS

Appearances : **Mr Kitione Vuataki for the plaintiff**
: **Mr Nacolawa for the defendants**

Hearing : **Thursday, 11th July, 2019**
Ruling : **Friday, 30th August, 2019**

RULING

- (01) This case was set to be formally proved on 02/11/2018. On 01/11/2018, the Solicitors for the defendants filed a Notice of Motion to set aside the formal proof.
- (02) When the hearing for formal proof was called on 02/11/2018, Mr Musuvanua, Counsel for the defendants moved to vacate the formal proof hearing in view of the Notice of Motion filed on 01/11/2018 to set aside formal proof. Counsel for

the plaintiff Mr Tikoca opposed the defendants' late application and moved for costs of \$ 6,000.00 for the vacation of formal proof hearing.

- (03) Counsel for the defendants, Mr Musuvanua, consented to pay \$3,000.00 as costs and Mr Tikoca agreed.
- (04) As a result, the formal proof hearing is vacated by consent subject to costs of \$3,000.00 to be paid to the plaintiff by the defendants.
- (05) On 26/11/2018, the Solicitors for the defendants filed a Notice of Motion to set aside the costs of \$3,000.00 awarded against the defendants on 02/11/2018 for vacating the formal proof hearing. The Solicitors for the defendants say that Counsel for the plaintiff Mr Tikoca had pleaded them to file a Notice to vacate the hearing because he wanted to avail himself to attend political matters for his father. The defendants say that it is mischievous for Mr Tikoca to move for costs in Court on 02/11/2018 for vacating formal proof hearing. The defendants' complaint essentially is against Mr. Tikoca.
- (06) Counsel for the plaintiff oppose the defendants application to set aside the cost order and argues that the costs of \$3,000.00 was awarded to the plaintiff by consent and therefore to set aside a consent order the defendants need to institute fresh proceedings to set aside on the grounds as a contract could be set aside, especially on the ground of fraud or mistake.
- (07) I agree with those submissions. Mr Musuvanua, Counsel for the defendants agreed to pay costs of \$3,000.00. The costs of \$3,000.00 was awarded by consent for vacating the formal proof hearing. The costs award is a consent order. This is the order about which the defendants are unhappy about. In order to set aside the consent order, the defendants should have brought a fresh action.
- (08) On setting aside of consent order, in Halsbury 4th Ed. Vol. 26 p. 286 it is clearly stated:

*“Unless all the parties agree, a consent order, when entered, can only be set aside by a **fresh action**, an application cannot be made to the Court of first instance in the original action to set aside the judgment or order.”*

(Emphasis added)

ORDERS

- (01) The defendants Notice of Motion filed on 26/11/2018 to set aside the costs awarded against the defendants for vacating the formal proof hearing is dismissed.
- (02) I make no order as to costs.




Jude Nanayakkara
[Judge]

At Lautoka,
Friday, 30th August, 2019