

R U L I N G

PART A - BACKGROUND

1. This matter is affixed today for a 2 day trial.
2. The matter in contention is the existence of two Wills for which the parties are now seeking to prove in Court.
3. The First Defendant/Applicant has made a formal application for adjournment of trial and sort leave to file their amended Statement of Defence and Counter Claim. The leave to amend is sort under Order 20 Rule 5 of the High Court Rules.
4. The premise of their application is based the allegations of fraud on the Will relied upon by the First Defendant/Applicant. They purport to raise that the Will dated the 23 March 2011 executed by the Testator is not the same and original signature of the Testator.

PART B: SUBMISSIONS OF PARTIES

5. The Applicant /First Defendant seeks adjournment of trial on the basis that they seek to amend the Statement of Defence and Counter claim which was recently raised to them by their clients.
6. The Applicant/First Defendant relies upon the Abraham Narsey Properties Limited –v- Mohamed Yakub Khan, Mohammed Nasir Khan, Mohammed Sabir Khan, Mohammed Iqbal Khan, Moahmmed Muktar Khan and Moahmmed Azak Khan HBC 0136/96 for which Justice Gates found that leave be granted for the amendment to the Statement of Defence and that further relevant witnesses be recalled.
7. In response Counsel for the Third Defendant objected to the application for amendment and leave to file Statement of Defence on the basis that the application was made at a very late stage and the formal application was only served on them this morning. Witnesses were ready to give evidence and if adjournment was granted, costs be sort against the Applicant/First Defendant.
8. Counsel for the Plaintiff also objected to the application. He had relied upon three grounds. He argued that the First Defendant has raised this in their affidavit in opposition in 2018 which was deposed on their behalf in paragraph 34 for an application to file their Statement

of Defence and Counter Claim. They had knowledge of the purported allegations of fraud but failed at any time to seek amendments until now.

9. The second ground relied upon is that all witnesses are present including the medical practitioner and the lawyer who prepared the Will of 2011. Their evidence is crucial. Given the delay of this case for a number of years, the primary witness, the lawyer needed to give evidence or would not be able to return because of his sick mother.
10. Third ground relied upon by the Plaintiff to object is that the Applicant/First Defendant is that the application is not made in good faith. The Plaintiff refers Court to the Affidavit in Support which appends a medical report which alleges that the Testator could not have been admitted in 2011 if he had signed the Will. The Plaintiff argues that the author of the medical report was not sort for clarification and that the Medical Report relied upon referred to the admission of the Testator in 2014 but that he was seen by the Doctors as an outpatient between 2011 to 2015. He relied upon the Supreme Court Rules 1985 as to the test to consider.

PART C: LAW AND ANALYSIS

11. In Order 20 Rule 5 of the High Court Rules empowers the Court to adjourn the proceedings at any stage in order to allow for amendments to the pleadings where a new cause of action arises from the same facts. Although this is a general discretion of the Court, this discretion must be used sparingly on reasonable grounds.
12. In Abraham Narsey Properties Limited -v- Mohamed Yakub Khan, Mohammed Nasir Khan, Mohammed Sabir Khan, Mohammed Iqbal Khan, Moahmmed Muktar Khan and Moahmmed Azak Khan HBC 0136/96 His Lordship Justice Gates stated:

“Order 20 rule (5) of the High Court Rules provides:

‘5 –(1) Subject to Order 15, unless rules 6,8,9 and the following provisions of these rules, the Court may at any stage of the proceedings allow the Plaintiff to amend his writ or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.

Amendment may be allowed at any stage of the proceedings’ which includes during trial The Duke of Buccleuch [1892] at p. 211 per Lord Esher M.R G.L Baker Ltd -v- Medway Building Supplies Ltd [1958] 1 WLR 1216. With some reluctance the trial judge was prepared to allow the statement of claim to be

amended in Loufi -v- C Czarnikow Ltd [1952] 1 All ER 823 as late as after close of the case but before judgment.

I have come to the view that there has been no malafide here, but rather a genuine mistake. At the outset the proposed defence regarding an independent contractor should have been pleading.

In considering whether to allow a late amendment of the pleadings in Court must consider prejudice caused to the other parties.”

13. Supreme Court Rules 1985, in paragraph 20/5 to 8/10 which explains the application of similar provisions to Order 20 Rule 5 of the High Court Rules of Fiji which states:

“There will be difficulty however where there is ground for believing that the application is not made in good faith. Thus, if either party seeks to amend his pleading, by introducing the for the First time allegations of fraud or misrepresentation or such serious allegations, the Court will ask why this new case was not presented original; and may require to be satisfied as to the truth of the substantially of the proposed amendment (Lawrence -v- Norreys (1890) 39 CHD)”
14. This matter has been pending since 2016 and today is affixed for Trial. The application today raises a new cause of action relied upon by the Applicant/First Defendants on the same facts.
15. As per the Affidavit of the Applicant/First Defendant, he had deposed allegations of fraud in 2018 already. So all parties were aware of the allegation.
16. However the Applicant/First Defendant did not pursue this allegation and claims until today. These allegations arise from the same facts.
17. The Counsel for the Plaintiff is correct to raise the point in issue that the Testator was in admission only in 2014. The question is whether this indeed is bad faith. From the submissions and the affidavit, the party relies upon a Medical Report which purports to show that the Testator was checked by the doctors between 2011 to 2015. It is correct to then consider that if there are allegations of fraud in that the Testator was in admission since 2011, what then in 2015, the very Will they purport to prove. ‘
18. The Court therefore finds there is no reasonable proper grounds to seek leave to amend. Their Current grounds to seek amendment does not satisfy the Court that the amendments purported to rely upon raised crucial issues for which can be proven in evidence and relied upon by law.


19. The Court will not grant an amendments if there are no reasonable grounds, the Court must balance proper administration of justice together with the dispensing of the proceedings in a timely manner with in a reasonable time required by the Constitution under section 15 (3).
20. Such an application the Court finds does not raise genuine issues of mistake. There is indeed bad faith in which they have referred to their evidence. An adjournment will cause prejudice to the Second Defendants and the plaintiffs who have prepared for the Trial.
21. Despite the Applicant/First Defendant relying upon principles that the Court has the discretion under Order 20 Rule 5 of the HCR, the Court is mindful in exercising its discretion that there is no prejudice and there are reasonable grounds for doing so.
22. In this instance, the Court is not satisfied that the grounds raised are reasonable because the manner in which the allegations of fraud was raised, the purported delays to the case proceedings, the fact that the Applicant was well aware and did not raise this since 2018, the prejudice to the parties involved and the Courts mandate under section 15 (3) of the Constitution raised, requires the Court to proceed to trial.

Orders of the Court

23. **The Court orders as follows:**

- (a) That the Court will not grant an application for adjournment;*
- (b) Trial will proceed; and*
- (c) Costs of in the Cause.*





Ms Senileba LTT Waqainabete-Levaci
Puisne Judge