

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION HBC No. 185 of 2024

<u>BETWEEN:</u>	<u>ROSHINI LATA DUTT</u>	<u>PLAINTIFF</u>
<u>A N D:</u>	<u>SAUNAKA LAND PURCHASE CO-OPERATIVE LIMITED</u>	<u>1ST DEFENDANT</u>
<u>A N D:</u>	<u>HARI RAM</u>	<u>2ND DEFENDANT</u>
<u>A N D:</u>	<u>PUSHPA CHANDRA NAIDU</u>	<u>3RD DEFENDANT</u>
<u>A N D:</u>	<u>THE REGISTRAR OF TITLES</u>	<u>4TH DEFENDANT</u>
<u>A N D:</u>	<u>THE ATTORNEY GENERAL OF FIJI</u>	<u>5TH DEFENDANT</u>

BEFORE : Hon. A.M. Mohamed Mackie-J

APPEARANCES

For the Plaintiff	:	Mr. Arun M.
For the First Defendant	:	Mr. Bal Krishna (Chairman of the 1 st def in person- with authority.
For the Second Defendant	:	Mr. Siwan K.
For the Third Defendant	:	Mr. U. Koroi
For the 4 th & 5 th Defendants	:	Mr. S. Kant <i>later</i> Ms. J. Raman.

WRITTEN SUBMISSIONS	:	By the 2 nd Defendant filed on 21 st January 2025
	:	By the 2 nd Defendant on 24 th January 2025 (Supplementary)
	:	By the Plaintiff filed on 11 th February 2025 (with authorities separately)
	:	By the 2 nd Defendant filed on 20 th February 2025.

DATE OF HEARING : On 22nd January 2025.

DATE OF RULING : On 27th March 2025.

RULING

(On Application to Strike out & Security for Costs)

A. INTRODUCTION:

1. Before me is a Summons by the 2nd Defendant filed on 28th October 2024 seeking , inter alia,
 1. **AN ORDER** that the cause of action in the writ of summons filed in the action herein against the Defendants be struck out and dismissed on the grounds that;
 - i. It discloses no reasonable cause of action against the Defendant.
 - ii. It is an abuse of the Court process;
 2. In the alternative for the following orders;
 - 2.1. **AN ORDER** that the Plaintiff gives Security for the second Defendant costs in this action to the satisfaction of the Second Defendant or to this Honorable Court.
 - 2.2. **AN ORDER** that the Plaintiff's action be stayed until the Plaintiff provides security for 2nd Defendant's Costs in accordance with the Order referred to in 1 above.
 - 2.3. **AN ORDER** that the second Defendant has leave to apply on 3 days' notice for an order for dismissal in the event the Plaintiff does not comply with the order 2 above.
 - 2.4. **AN ORDER** the second Defendant has leave to apply on 7 days' notice for an increase in the amount of such security.
 3. **AN ORDER THAT** the Plaintiff pay for the cost of this application.
2. The Summons is supported by the Affidavit of the 2nd Defendant **HARI RAM** sworn on 25th October 2024 and filed together with annexures marked as "**HR-1**" to "**HR-8**". The Summons states that it is filed pursuant to Order 18 Rule 18 (1) (a) & (c) and Order 23 (1) of the High Court rule 1988 and the inherent jurisdiction of this Court.
3. The Plaintiff on 7th January 2025 filed her Affidavit in opposition (Original) to strike out Application, together with annexures marked as "**RLD-1**" to "**RLD -3**", which serves as the Affidavit in reply as well in relation to her Application for the injunction. However, the 2nd Defendant has not filed his Reply Affidavit to the Affidavit in opposition filed by the Plaintiff in relation to the 2nd Defendant's striking out and Security for Costs Application.
4. At the hearing held before me on 22nd January 2025, counsel for the Plaintiff and the 2nd Defendant, having made their oral submissions, have filed their respective written submissions as well. The first and third to fifth Defendants did not participate at the hearing of the Application for strike out and security for costs.

B. BACKGROUND:

5. The Plaintiff on 22nd August 2024 filed the above styled action seeking the following reliefs against the 1st to 3rd Defendants, while claiming no specific relief against the 4th and 5th Defendants.
 - a) *A declaration that the First Defendant holds the three (3) acres of land originally comprised in Certificate of Title NO 10896 being Lot 10 on Deposit Plan No. 2679 and now in Certificate of Title No. 39114 being Lot*

3 on Deposit Plan No. 9429 (Estate Share) consisting of the area where the late Phul Kumari resided, in trust for the Plaintiff.

- b) An order for restitution of the misappropriated land from the Second and Third Defendants to the Plaintiff.
 - c) An order for specific performance requiring the First Defendant to survey, subdivide and distribute the three (3) acres of land originally comprised in Certificate of Title NO. 10896 being Lot 10 on Deposit Plan No. 2679 and now in Certificate of Title No. 39114 being Lot 3 on Deposit Plan No. 9429 in accordance with the Agreement between the parties dated 30 November 1983.
 - d) Alternatively, an order that the Plaintiff be appointed to survey, subdivide and distribute the three (3) acres of land originally comprised in Certificate of Title No. 10896 being Lot 10 on Deposit Plan No. 2679 and now in Certificate of Title No. 39114 being Lot 3 on Deposit Plan No. 9429 in accordance with the Agreement between the parties dated 30 November 1983.
 - e) An order that the Second and Third Defendant be restrained from in any way interfering with the survey, subdivision and allocation of the Estate Share to the Plaintiff.
 - f) That costs of and incidental to this application be paid by the Defendant on a strict solicitor/client indemnity basis;
 - g) An Order for post judgment interest on any award of damages.
 - h) Damages against the Defendant together with interest in an unliquidated sum, in an amount to be assessed for:
 - i. Loss of profits;
 - ii. Loss of opportunity to utilize land; and
 - iii. Loss of opportunity to utilize funds.
 - i) Punitive Damages.
 - j) Any further or other relief this Honourable Court deems fair and just in all the circumstances.
6. On an Ex-parte Notice of Motion filed by the Plaintiff and supported before me on 25th September 2024, this Court has granted certain injunctive orders against the First, Second and Third Defendants, which orders are currently in force pending the inter-parte hearing on it subject to filing of Affidavit in opposition by the First, Third, Fourth and Fifth Defendants, if needed. The Second Defendant has already filed his Affidavit in opposition, which serves as Affidavit in support for this Application in hand.
 7. The Plaintiff is the Administratrix of the Estate of one **Phul Kumari**, duly appointed by the High Court in terms of the Letters of Administration No-67636 Granted on 11th August 2021, which eventuated on the discharge of the former Administrator, Mr. Ravi Sharma by Court order dated 17th May 2019.
 8. The First Defendant “**Saunaka Land Purchase Co-operative Limited**” was formed with the following two primary objectives;
 - i. “To purchase from **Mrs. Ferrier- Watson** all that piece of freehold land contained in lot 10, D.P. 2679 Certificate of Title 10896 (56 acres 0 rood 14 perches situated at Saunaka , Nadi) for the use and benefit of the members of the society ; and
 - ii. To arrange for the sub-division , survey and distribution of holdings among the members so as to provide one holding for each member , upon such terms and conditions as the general meeting shall determine , and to enter into an ‘agreement’ with each member accordingly.”

9. In order to fulfill the above objectives, the First Defendant purchased the said land in 56 acres 0 rood & 14 perches from **Mrs. Watson** on 20th July 1970. By this time Mrs. Watson had agreed to sell plots of land unto 15 families, who were already leasing undivided parts of the said land from Mrs. Watson. Most of them had built their homes and lived there since the mid of 1930's, including the late **Phul Kumari**, for whose Estate the Plaintiff hereof is claiming as the Administrator.
10. The said 15 families had solicited other individuals and formed the First Defendant Society with a total of about 30 members.
11. The late **Phul Kumari**, being an original and fully-fledged member, had on 30th November 1983, signed an 'Agreement' with the First Defendant for the purchase of 3 acres out of the said land at the total value of \$7,800.00. She also had signed a Nomination form for her Estate share in the event of her death. Other members also had similar agreements with the First Defendant. The First Defendant for last 54 years has failed and/or neglected to do the sub-division and allocate the lots to the members.
12. It is alleged that the First Defendant in or about the year 2008 wrongfully misappropriated 25.5 acres out of the said land, including 18.5 acres, of fully paid shares belonging to the original members, including the deceased Phul Kumari's Estate share, by labelling the misappropriated portion of land as "**Balance Land**".
13. It is also alleged that the First Defendant in the year 2008, without the knowledge of the majority of member shareholders, hired the Second Defendant, namely, **HARI RAM** (a Solicitor) as project Manager and by the Agreement signed on 20th October 2008 between the First and the Second Defendants they had misappropriated 25.5 acres of land, including 18.5 acres of land, belonging to non-members, by labelling it as "Balance Land" for the purpose of easy appropriation.
14. The Plaintiff alleges that the said misappropriated land was allocated to the Second Defendant as payment for his services as the Project Manager. It is out of this misappropriated land, a portion of land is alleged to have been sold to the Third Defendant, namely, **PUSHPA CHANDRA NAIDU**, who was not a member of the First Defendant.
15. It is alleged that the Fourth Defendant, namely, **THE REGISTRAR OF TITLES** through series of irregularities and possible collusion, wrongfully registered a new Head Title of the Saunaka Land, being Certificate of Title No- 39114, despite the existence of a Caveat affecting the said Title, and facilitated the subsequent dealings in breach of Caveat.
16. The Second Defendant on 28th October 2024 filed his Statement of Defence, wherein, while admitting some averments, has denied most of the averments in the Statement of Claim. He included some averments in paragraphs 5 to 13 and 15, which are in relation to the First Defendant, who is not represented by the Solicitors for the second Defendant. The Third to Fifth Defendants have not so far filed their Statement of Defence. However, it is on record that the First Defendant, who also has not filed Statement of Defence, has intimated to the Court, through its Chairman namely Bal Krishna, that it will stand with the Plaintiff and support her claim as pleaded and prayed for by her. This means that the First Defendant also, like the Plaintiff, opposes the Second Defendant's Striking out Application despite serious allegations have been levelled against it (the first Defendant) in the Statement of claim.

17. It is with the above background; the parties are before this Court. This Court has now been called upon to decide on the strike out Application preferred by the Second Defendant, at the hearing of which the First, Third, Fourth and Fifth Defendants did not participate. However, the First Defendant has already intimated its decision to support the Plaintiff in this whole action.
18. With the above facts in mind, I shall now proceed to make my Ruling on the Striking out Application pursuant to **Order 18 Rule 18 (1) (a)** of the HCR by relying only on the relevant pleadings in the Statement of Claim and the Statement of Defence filed by the Second Defendant, as no evidence is required in this regard. However, in relation to the Application pursuant to **Order 18 Rule 18 (c)** and the Application for Security for costs, I would rely on the Affidavit evidence so tendered before me by the Second Defendant and the Plaintiff.

C. LAW ON STRIKE OUT:

19. Provisions relating to striking out are contained in Order 18, rule 18 of the High Court Rules, 1988, which reads as follows;

18. – (1) *The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action or anything in any pleading or in the indorsement, on the ground that –*

(a) It discloses no reasonable cause of action or defence, as the case may be; or

(b) It is scandalous, frivolous or vexatious; or

(c) It may prejudice, embarrass or delay the fair trial of the action; or

(d) It is otherwise an abuse of the process of the court;

And may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under paragraph (1) (a). (emphasis mine)

20. I find that the following foot notes and authorities would shed sufficient light in determining the matter in hand.

- (a) Footnote 18/19/3 of the 1988 Supreme Court Practice reads;

It is only plain and obvious cases that recourse should be had to the summary process under this rule, per Lindley MR. in Hubbuck v Wilkinson (1899) 1 Q.B. 86, p91 Mayor, etc., of the City of London v Homer (1914) 111 L.T. 512, CA). See also Kemsley v Foot and Qrs (1952) 2KB. 34; (1951) 1 ALL ER, 331, CA. affirmed (195), AC. 345, H.L. The summary procedure under this rule can only be adopted when it can be clearly seen that a claim or answer is on the face of it obviously unsustainable “ (Att – Gen of Duchy of Lancaster v L. & N.W. Ry Co (1892) 3 Ch 274, CA). The summary remedy under this rule is only to be applied in plain and obvious cases when the action is one which cannot succeed or is in some way an abuse of the process or the case unarguable (see per Danckwerts and Salmon L.JJ in Nagle v Feliden (1966) 2. Q.B 633, pp 648, 651, applied in Drummond Jackson v British Medical Association (1970) 1 WLR 688 (1970) 1 ALL ER 1094, CA.

- (b) Footnote 18/19/4 of the 1988 Supreme Court Practice reads;

“On an application to strike out the statement of claim and to dismiss the action, it is not permissible to try the action on affidavits when the facts and issues are in dispute (Wenlock v Moloney) [1965] 1. WLR 1238; [1965] 2 ALL ER 87, CA).

It has been said that the Court will not permit a plaintiff to be “driven from the judgment seat” except where the cause of action is obviously bad and almost incontestably bad (per Fletcher Moulton L.J. in Dyson v Att. – Gen [1910] UKLawRpKQB 203; [1911] 1 KB 410 p. 419).”

- (c) In the case of *Electricity Corporation Ltd v Geotherm Energy Ltd* [1992] 2 NZLR 641, it was held;

“The jurisdiction to strike out a pleading for failure to disclose a cause of action is to be sparingly exercised and only in a clear case where the Court is satisfied that it has all the requisite material to reach a definite and certain conclusion; the Plaintiff’s case must be so clearly untenable that it could not possibly succeed and the Court would approach the application, assuming that all the allegations in the statement of claim were factually correct”

- (d) In the case of *National MBF Finance (Fiji) Ltd v Buli* [2000] FJCA 28; ABU0057U.98S (6 JULY 2000), it was held;

“The law with regard to striking out pleadings is not in dispute. Apart from truly exceptional cases the approach to such applications is to assume that the factual basis on which the allegations contained in the pleadings are raised will be proved. If a legal issue can be raised on the facts as pleaded then the courts will not strike out a pleading and will certainly not do so on a contention that the facts cannot be proved unless the situation is so strong that judicial notice can be taken of the falsity of a factual contention. It follows that an application of this kind must be determined on the pleadings as they appear before the Court”.

- (e) In *Tawake v Barton Ltd* [2010] FJHC 14; HBC 231 of 2008 (28 January 2010), Master Tuilevuka (as he was then) summarized the law in this area as follows;

“The jurisdiction to strike out proceedings under Order 18 Rule 18 is guardedly exercised in exceptional cases only where, on the pleaded facts, the plaintiff could not succeed as a matter of law. It is not exercised where legal questions of importance are raised and where the cause of action must be so clearly untenable that they cannot possibly succeed (see Attorney General –v- Shiu Prasad Halka 18 FLR 210 at 215, as per Justice Gould VP; see also New Zealand Court of Appeal decision in Attorney –v- Prince Gardner [1998] 1 NZLR 262 at 267.”

- (f). In ***Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 3)* [1970] Ch 506** it was held that the power given to strike out any pleading or any Part of a pleading under this rule is not mandatory but permissive, and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending plea.

- (g). In ***Drummond-Jackson v British Medical Association* [1970] 1 W.L.R. 688; [1970] 1 All ER 1094** it was held;

“Over a long period of years, it has been firmly established by many authorities that the power to strike out a statement of claim as disclosing no reasonable cause of action is a summary power which should be exercised only in plain and obvious cases”.

- (h). In the case of ***Walters v Sunday Pictorial Newspapers Limited* [1961] 2 All ER 761** it was held:

“It is well established that the drastic remedy of striking out a pleading or, part of a pleading, cannot be resorted to unless it is quite clear that the pleading objected to, discloses no arguable case. Indeed, it has been conceded before us that the Rule is applicable only in plain and obvious cases”.

- (i). In ***Narawa v Native Land Trust Board* [2003] FJHC 302; HBC0232d.1995s (11 July 2003)** the court made the following observations:

“In the context of this case, I find the following statement of Megarry V.C. in Gleeson v J. Wippell & Co. [1971] 1 W.L.R. 510 at 518 apt:

First, there is the well-settled requirement that the jurisdiction to strike out an endorsement or pleading, whether under the rules or under the inherent jurisdiction, should be exercised with great caution, and only in plain and obvious cases that are clear beyond doubt. Second, Zeiss No. 3 [1970] Ch. 506 established that, as had previously been assumed, the jurisdiction under the rules is discretionary; even if the matter is or may be res judicata, it may be better not to strike out the pleadings but to leave the matter to be resolved at the trial”.

21. Another Order moved for by the Second Defendant, in terms of his Summons, is Security for Costs against the Plaintiff, who is said to be Resident out of Fiji. However, this is an alternative order that is to be considered in the event the Second Defendant fails in his attempt to have the action against him struck out.

D. LAW ON SECURITY FOR COSTS

Security for costs of action, etc. (O.23, r.1)

(1) *Where, on the application of a defendant to an action or other proceeding in the High Court, it appears to the Court-*

- (a) *that the plaintiff is ordinarily resident out of the jurisdiction, or*
- (b)
- (c)
- (d)

Then if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceeding as it thinks just.

22. The wording of the above rule to the effect **“having regard to all circumstances of the case, the Court think, it just to do so, it may order”** confer upon the Court a discretion whether or not to order security for costs.

23. In ***Ali v Rafiqah [2022] FJHC 644; HPP60.2016 (24th June 2022)***, then Learned Master Mohamed Azhar had declined the Defendants’ application for security for costs by outlining the following principles:

- a. *The power to grant security for costs is a discretionary power.*
- b. *The Court will grant security for costs if, having regard to all the circumstances of the case, the Court thinks it just to order security for costs. As such, it is no longer an inflexible rule that Plaintiff resident abroad must provide security for costs.*
- c. *Application for security for costs may be made at any stage of the proceedings, although, ideally, it should be made earlier.*
- d. *Delay in applying for security for costs is a factor in the exercise of the discretion, though it is not a decisive factor.*
- e. *An order for security for costs should not oppress the Plaintiff.*
- f. *It may be a denial of justice to order a Plaintiff to give security for costs in favor of a Defendant who has no defence to the claim.*

24. Lord Denning M.R. when interpreting the same word used in the Companies Act 1948 held in ***Sir Lindsay Parkinson & Co. Ltd v. Triplan Ltd [1973] 2 All ER 273 at 285*** that;

“Turning now to the words of the statute, the important word is “may”. That gives a judge a discretion whether to order security or not. There is no burden one way or other. It is a discretion to be exercised in all the circumstances of the case”.

25. The next important phrase in that rule is ‘if having regard to all the circumstances of the case, the Court thinks it just to do so’, which requires the court to consider all the circumstances of the case before it, in exercising the said discretion and to come to a conclusion that ‘it is just to do so’, before making any order and determine, whether and to what extent or for what amount a plaintiff (or the defendant as the case may be) may be

ordered to provide security for costs. **Sir Nicolas Browne Wilkinson V.C in Porzelack K G v. Porzelack (UK) Ltd, (1987) 1 All ER 1074 at page 1077** as follows:

"Under Order 23, r1 (1) (a) it seems to me that I have an entirely general discretion either to award or refuse security, having regard to all the circumstances of the case. However, it is clear on the authorities that, if other matters are equal, it is normally just to exercise that discretion by ordering security against a non-resident plaintiff. The question is what, in all the circumstances of the case, is the just answer".

26. It follows that, it is no longer an inflexible or rigid rule that a plaintiff resident abroad should provide security for costs. The Supreme Court Practice 1999 (White Book), in Volume 1 at pages 429 and 430, and in paragraph 23/3/3, states clearly and explains the nature of the discretion given to the court. it reads that;

"The main and most important change effected by this Order concerns the nature of the discretion of the Court on whether to order security for costs to be given. Rule 1 (1) provides that the Court may order security for costs, "if having regard to all the circumstances of the case, the Court thinks it just to do so". These words, have the effect of conferring upon the Court a real discretion, and indeed the Court is bound, by virtue thereof, to consider the circumstances of each case, and in the light thereof to determine whether and to what extent or for what amount a plaintiff (or the defendant as the case may be) may be ordered to provide security for costs. It is no longer, for example, an inflexible or rigid rule that a plaintiff resident abroad should provide security for costs. In particular, the former O.65, r.6s, which had provided that the power to require a plaintiff resident abroad, suing on a judgment or order or on a bill of exchange or other negotiable instrument, to give security for costs was to be in the discretion of the Court, has been preserved and extended to all cases by r.1 (1).

E. SUBMISSIONS ON BEHALF OF THE SECOND DEFENDANT:

27. Learned counsel for the Second Defendant, in his oral and written submissions has raised, *inter alia*, the following arguments in support of the Application for strike out.

- a) *"The alleged Nomination form, and the alleged Agreement between **Phul Kumari** and the First Defendant cannot be pleaded nor given in evidence pursuant to section 41 of the Stamp Duty Act.*
- b) *The purported Agreement dated 30th November 1983 is null and void and unenforceable due to various reasons stated in paragraphs 5.1 to 5.14 of the written submissions.*
- c) *If the alleged nomination by Phul Kumari is valid, then the Estate of Phul Kumari does not have any cause of action against the Defendants for the reasons stated in paragraphs 6.1 to 6.8 of the written submissions.*
- d) *The Plaintiff not being a member of the first Defendant, she has no right or interest in regard to the nature of the agreement entered into between the first and the second Defendant.*
- e) *The Second Defendant has an indefeasible title and the registration is everything when it comes to the Torrent System of Registration.*
- f) *Section 39 and 40 of the Land Transfer Act affords protection to the registered proprietor by guaranteeing a good title upon registration except in the case of fraud. (Counsel has drawn my attention to few authorities in this regard in his submissions).*
- g) *The Plaintiff has not disclosed any cause of action against the second Defendant and it is an abuse of process".*

28. Learned Counsel for the Plaintiff, in his oral and written submissions, having highlighted the undisputed facts pleaded in the statement of defence by the Second Defendant, has aptly countered the arguments advanced by the counsel for the Second Defendant in support of his striking out Application.

F. DISCUSSION:

i. On Preliminary Objections.

29. Prior to go into the substantive issues hereof, I would first deal with the preliminary objections raised by the Counsel for the Second Defendant in relation to the mode of Service of Summons and the locus of the Plaintiff to have this action filed and proceeded with.
30. The Second Defendant claims that the Plaintiff should have sought the leave of the Court to serve the Summons on the Second Defendant, who was living in Australia. Plaintiff's Counsel submits that in the initial application for extension of caveat and on the notice of removal received, the Second Defendant had provided a local address for service. The Second Defendant, having duly responded to the Summons served locally at an address given by he himself, cannot now challenge the propriety of the service. Even if the service is found to be irregular, such irregularity can be cured by invoking Order 2 Rule 1 of the HCR. Accordingly, I decide that the purported objection in relation the propriety of service should be overruled.
31. In relation to the objection on the Plaintiff's locus, prima facie, I find that the Plaintiff as the Administratrix of the Estate of the deceased Phul Kumari, has locus to file and proceed with this action. The beneficiaries of the Estate were named by Phul Kumari in a "Nomination" signed at the time of signing the Agreement with the First Defendant. So far the First Defendant has failed to recognize the nomination. However, if there is any further issue on this, it can be addressed at the trial. Thus, I leave this issue for the substantive trial, if needed.

ii. On Striking Out:

32. The issues before the Court for the time being, as per the Second Defendant's Summons, are ***whether the pleading or the indorsement of the Plaintiff's writ discloses a reasonable cause of action? Whether it is an abuse of process?*** (The Order relied on in this regard is O18, Rule18 (1) (c) not (d). If the above 2 issues attract answers favorable to the Second Defendant, undoubtedly, the Court will have to strike out the action. Conversely, if the above issues are answered negatively, then the question will arise ***whether this Court should order Security for costs?***
33. What the Second Defendant moves for, as per his Summons, is to strike out the Plaintiff's action against all the Defendants, instead of moving to strike out the action only against him. It is to be observed that when the First, Third, Fourth and Fifth Defendants are not represented by the Second Defendant's Solicitors and when the First Defendant appears in person through its chairman who intimated that it sails with the Plaintiff, and when the rest of the Defendants are represented by their respective Solicitors, who have not taken part in this ancillary proceedings, it is improper for the Second Defendant's Solicitors to have made such an application covering those Defendants too.
34. It is also to be observed that none of the other Defendants, namely, the First, Third, Fourth and the Fifth Defendants, have filed their Statements of Defence. Thus, in the absence of their pleadings, it is not prudent for this Court to rush through the Second Defendant's Application to strike out the action against other Defendants as well, since this will prejudice the Plaintiff.
35. The most pertinent point to be observed here is the intimation by the Chairman of the First Defendant that the First Defendant is not going to contest the substantive action against it by the Plaintiff, instead it will support the Plaintiff's whole claim. With this stance taken by the First Defendant, the task before the Second

Defendant will become enormous wherein, he has to withstand the allegation of fraud by the Plaintiff singlehandedly, by duly challenging the evidence that would be adduced by the Plaintiff to prove the allegation of fraud. He cannot escape or avoid this by simply making an application for strike out.

36. Further, the Plaintiff in paragraph (c) of her prayer to the Statement of Claim has moved for specific performance, which is a substantive relief. In **Ronna Lynn Goldstien v Sat Narayan [HBC 413/01S by decision dated 9th July 2002 Pathik – J stated**

“A claim for specific performance raises important issues of facts and discloses reasonable cause of action. Thus, application to strike out refused”.

37. *“A reasonable cause of action means a cause of action with some chance of success when only allegations in the pleadings are concerned. If, once allegations are examined, it is found that the alleged action is bound to fail the Statement of claim should be struck off”. The cause of action against D5 on duties of a consecutive trustee may appear weak, but certain issues can be clarified by testimony of witness. The Court ought not to reach a conclusion on an interlocutory application: per Singh – J in **Rt Osea Raqica Tuinakelo v Director of Lands , Native Land Trust Board , Conservator of Forest , Attorney General and Fiji Hardwood Corporation Ltd [2003] HBC 303 / 02 S Ruling in January 2003.***
38. *“The Court will not strike out where the role of Court is to uphold the rule of law”; per **Gates –J in Chandrika Prasad v Republic of Fiji & Attorney General (No 4) (2000) 2 FLR 89 Judgment dated 15th November 2000.***
39. *“The first thing that the Court will do when faced with an application to strike out under Order 18 Rule 18 is to assume that each every one of the facts pleaded in the Statement of Claim is true and will be capable of proof at the trial . Once the assumption is made, the next step is to assess whether or not the pleaded facts do raise a reasonable cause of action”..... Per **Tuilevuka – J. M in Hemart Sharma v Deans Signs Ltd, Praveen Chazala Akbar , Nitty Nand t/a Premier Real Estate and Abinesh Ashish Chand [2011] HBC 108/06S Ruling dated 17th February 2011 at (4).***
40. It is to be observed that the following facts are said to be not disputed by the Second Defendant.
- The first Defendant is a registered cooperative,*
 - Late Phul Kumari was a fully-fledged and a founding member of the First Defendant during her lifetime,*
 - Phul Kumari paid \$7,800.00 to the First Defendant.*
 - The Cooperative was formed for the purchase, subdivision and distribution of the property comprised in Certificate of Title No- 10896.*
 - The property comprised in Certificate of Title No-10896 was assigned a new title in Certificate of Title No- 39114.*
 - The Second Defendant was engaged in 2008 as the First Defendant's project Manager.*
 - The subdivision by the First Defendant has not been completed and thereby the First Defendant's second objective has not been fulfilled.*
 - The Second Defendant is not and never was a member of the First Defendant.*
 - In the year 2010, two years after his appointment, the Second Defendant received a portion of the property previously comprised in CT No 39114.*
 - An oversight occurred by the Registrar of Title in registering the transfers to the Second Defendant and Third Defendant , inter alia, resulting in the transfer of portions of the property previously comprised in CT No-39114.*
 - The Plaintiff viz a viz its preceding Administrator was entitled to a share of the land and this was relayed to the Second Defendant.*
41. With the above undisputed facts and, particularly, when the First Defendant sails with the Plaintiff, what substantially remains for adjudication is the allegation of fraud against the Second Defendant, details of which are more fully described from paragraph 84 to 93 of the Plaintiff's written submissions.

42. The burden of proof of the allegation of fraud squarely lies with the Plaintiff and the discharge of such liability should necessarily be at the trial stage by way of leading oral and documentary evidence, subject to cross examination and re-examination. This cannot be done at this preliminary stage by merely relying on the pleadings.
43. The Second Defendant has to explain as to how he, not being a member of the First Defendant and only by being the project Manager of the First Defendant for a short period of time, became a registered owner of the portion of subject land even before the First Defendant could formally subdivide and distribute the lots to other members to fulfill its one of the objectives. This is a serious question, among others, for which answer has to be ascertain through the process of trial.
44. There are serious allegations against the First Defendant as well. The main allegation is that it had misappropriated a total of 25.5 acres of Cooperative land, including 18.5 acres of fully paid shares of land (including the land that the Plaintiff's grandmother is entitled to).
45. The First Defendant now stands with the Plaintiff, whose claim against the First Defendant would probably go uncontested. The Second and Third Defendants will have to answer series of questions, inter alia, as to how they became registered owners of the portions out of the subject land before any other members were given their due ownership by subdivision and distribution. The Plaintiff should not be deprived of her right of having all the truth behind this land deal elicited at the trial. Summarily striking out the action will undoubtedly prejudice her right, if any. There appears to have been a surreptitious deal conducted to the detriment of the Plaintiff and other members who were earnestly waiting for the ownership of their respective blocks of land.
46. The purported ground and the argument advanced by the Counsel for the Second Defendant to justify the Striking out Application; that the Plaintiff cannot rely on the AGREEMENT and NOMINATION marked as "RLD-7" and "RLD-10" respectively due to non-compliance with the Stamp Duty Act, will not hold water. This allegation cannot be levelled against the Plaintiff, but against the First Defendant. However, there is provision under the Act to overcome this hurdle, prior to the trial, by paying the relevant stamp duty, together with any fine involved therein. Accordingly, this ground and the argument on it have to fail necessarily.
47. The Second Defendant's mere allegation that the said Agreement is null and void and unenforceable will not take him anywhere. He appears to be deliberately pleading ignorance about the Agreement. The First Defendant does not contest the validity of the Agreement. On the face of it, this Agreement has all the characteristics of valid contract and the presumption on the validity remains un-assailed until the contrary is proved at the trial.
48. The Second Defendant, who claimed ignorance of the said Agreement, cannot be heard to say that the Agreement is void for uncertainty. However, the propriety and validity of this Agreement has to be scrutinized at the trial. In the absence of due process of trial, this Court cannot decide on the fate of the said Agreement.
49. In relation to the purported defence advanced by the Second Defendant that the Plaintiff's action is statutory barred under Section 4 of the Limitation Act, the Plaintiff's Counsel has made convincing submission countering the same.
50. As alluded to in a foregoing paragraph, this is an action for specific performance against the First Defendant and inter alia on the allegation of fraud/ misappropriation / negligence against the remaining Defendants. The validity and enforcement of the Agreement entered into between the Plaintiff and the First Defendant needs to be determined through the process of trial.

51. Since there is an allegation of fraud related to the Plaintiff's claim against the Second Defendant, I find that the section 15 of the Limitation Act throws some light in this regard.

15. Where, in the case of any action for which a period of limitation is prescribed by this Act, either-

- (a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; or*
- (b) the right of action is concealed by the fraud of any such person; or*
- (c) the action is for relief from the consequences of a mistake,*
the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it:

Provided that nothing in this section shall enable any action to be brought to recover, or enforce any charge against or set aside any transaction affecting, any property which-

- (i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or*
- (ii) in the case of mistake, has been purchased for valuable consideration, subsequently to the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.*

52. The Plaintiff appears to be having sufficient and convincing reasons to justify her filing of action only in the year 2024. She claims that her cause of action accrued only in the year 2019 after she obtained the required letters of Administration for the Estate of Phul Kumari and necessary information to identify and pursue the claim.

53. The lengthy submissions, counter submissions and reply thereto together with the contents of the available pleadings very clearly demonstrate that there are serious issues to be tried by adducing oral and documentary evidence at the trial. Under these circumstances, it is my considered view that the remedy of strike out is not warranted. I don't see any room for the allegation of abuse of process either. Thus, the Second Defendants summons pursuant to Order 18 Rule 18 (1) (a) and (d) has to necessarily fail and should be dismissed with a reasonable amount of costs payable by the Second Defendant to the Plaintiff..

iii. On Security for Costs:

54. As the Application to Strike out the Plaintiff's claim fails, the Second Defendant has to defend this action, for which purpose he has moved to order security for costs as an alternative remedy. I have discussed in detail, the Law in relation to the subject and the decided authorities, which guide the Court in making its decision.


55. The Plaintiff has already submitted an asset in the form of a State Lease, of which she and her husband appear to be the Lease Holders, with the consent of her Husband, to be held as an undertaking for damages in relation to the injunction Orders. The Plaintiff's cause of action and the Statement of Claim on it should not be defeated by an Application for strike out in this manner. Her move should not be crippled by Orders for Security for costs. She needs her day in court to vindicate her right and entitlement without being subjected to hurdle of this nature. Accordingly, considering the circumstances that surround this case, by exercising my discretion, I decide not to make any order granting security for costs.

56. For the reasons stated above, I find that the Application of the Second Defendant for striking out and for Security for Costs has no merits and liable to be struck out. Considering the circumstances, I decide to order the second Defendant to pay the Plaintiff a sum of \$1,500.00 Fijian Dollars, being the summarily assessed cost of this Application.

G. FINAL ORDERS:

- A. The 2nd Defendant's objection in relation to the propriety of the service of the Writ of Summons is overruled.
- B. The purported preliminary objection by the 2nd Defendant on the Plaintiff's Locus-Standi is reserved to be considered at the trial.
- C. The Summons preferred by the 2nd Defendant on 28th October 2024 to strike out the cause of action in the Plaintiff's writ of Summons is hereby struck out and dismissed.
- D. The Application by the 2nd Defendant for an Order for security for costs and related Orders is also hereby dismissed.
- E. The 2nd Defendant shall pay the Plaintiff a sum of \$1,500.00 (One Thousand Five Hundred Fijian Dollars) being the summarily assessed costs of this Application within 21 days from today.

On this 27th Day of March 2025 at the CIVIL High Court of Lautoka.


A.M. Mohamed Mackie
JUDGE
High Court
Lautoka.



SOLICITORS:

Messrs. MILLBROOK HILLS LAW PARTNERS- BARRISTERS & SOLICITORS- For the Plaintiff.
The 1st Defendant Society Represented by its Chairman Mr. Bal Krishna (with authority)
Messrs. RAMS LAW- BARRISTERS & SOLICITORS- For the 2nd Defendant.
Messrs. NAIDU LAWYERS – For the 3rd Defendant.
Hon. Attorney General's Chambers for the 4th & 5th Defendants.