

IN THE HIGH COURT OF FIJI AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 294 OF 2019

BETWEEN : **SAIYAD ABDUL GAFFAR SHAH aka SAYED GAFFAR HUSSEIN** of 41 Bertha Lane, San Francisco, California, 94124, USA and **SAIYAD MOSESE TALIM HUSSEIN** of 238 Judson Ave, San Francisco, California 94112, USA as the Sole Executors and Trustees **IN THE ESTATE OF FATIMA BIBI HUSSEIN aka FATIMA BIBI** late of Namaka Park, Nadi, Domestic Duties, Deceased, Testate

PLAINTIFF

AND : **SAUNAKA LAND PURCHASE CO-OPERATIVE SOCIETY LIMITED** a limited liability company having its registered office at Saunaka, Nadi

1ST DEFENDANT

AND : **RAVINESH KUMAR** of Saunaka, Nadi

2ND DEFENDANT

AND : **KINICONI RABAKEWA** of Saunaka, Nadi

3RD DEFENDANT

BEFORE : A.M. Mohamed Mackie J.

COUNSEL : Ms. Swamy A. – for the Plaintiff
 : Mr. B. Krishna – In Person (1st Defendant)
 : Mr. Turuva A. – for the 2nd Defendant

DATE OF HEARING : On 29th November, 2024.

WRITTEN SUBMISSIONS : Filed by the Plaintiff on 13th March, 2025.
 : Filed by the 2nd Defendant on 21st February 2025.

DATE OF RULING : On 4th April, 2025.

RULING

A. INTRODUCTION:

1. The Plaintiffs, in their aforesaid capacity as the sole Executors and Trustees of the Estate of deceased FATIMA BIBI HUSSEIN aka FATIMA BIBI, on 5th November 2019, filed their Originating Summons seeking the following reliefs against the Defendants.
 - a. *A declaration that the Estate Fatima Bibi Hussein is a member of the 1st Defendant Saunaka Land Purchase Co-operative Society Limited.*
 - b. *An order that the First Defendant arrange for sub-division, survey and distribution of holding among members of the land comprised in Certificate of Title Number 1089 and/or in the alternative the First Defendant take all necessary steps, actions and make all relevant representations to subdivide the interest of the Estate of IN THE ESTATE OF FATIMA BIBI HUSSEIN aka FATIMA BIBI from the land comprised in Certificate of Title Number 1089.*
 - c. *An order that in the event the First Defendant refuses and fails to comply with the orders of this Honorable Court, The Deputy Registrar of the High Court shall execute such papers, applications, letters as required in place of the First Defendant.*
 - d. *An order Second Defendant resides on the land comprised in Certificate of Title 1089 being a portion of land allocated to the Plaintiff.*
 - e. *Damages.*
 - f. *Costs on client solicitor indemnity basis.*
 - g. *Any further or other order as this Honorable Court may deem fit in the circumstances.*

B. GROUNDS:

2. The Plaintiffs relied on the following grounds to substantiate their reliefs claimed above, which also reveal the background of this action.
 1. **THAT** *the 1st Defendant is a Body Co-operate duly registered under the Co-operative Societies Act 1996.*
 2. **THAT** *objectives of the 1st Defendant are that,*
 - 2.1 *To purchase the land comprised in Certificate of Title Number 1089 (herein after referred to as the said land) for the use and benefit of the members of the First Defendant and;*
 - 2.2 *To arrange for sub-division, survey and distribution of holding among members.*
 3. **THAT** *the 1st Defendant despite being registered sometime in 1960s and acquiring the said land has failed to subdivide the same and provide each holding to each member in accordance with the objectives of the first Defendant.*
 4. **THAT** *by failing as aforesaid the 1st Defendant has failed in its objectives.*
 5. **THAT** *at all material times it was incumbent on the first Defendant to arrange for sub-division, survey of the said land and distribution of the holding among members.*
 6. **THAT** *Fatima Bibi and now her Estate, the Plaintiff's at material times had and have a legitimate expectation as a member that the first Defendant shall adhere and undertake its objectives as aforesaid.*
 7. **THAT** *Fatima Bibi Hussein aka Fatima Bibi was at all material times a member of the First Defendant.*

8. **THAT** by list of membership issued by the First Defendant as 1976 confirmed that the deceased Fatima Bibi was a bona fide member of the First Defendant.
9. **THAT** the membership of the deceased Fatima Bibi was reconfirmed by a list of members issued in 1986 and 1996.
10. **THAT** by letter in writing dated the 7th of October 2014 the First Defendant has confirmed that the deceased Fatima Bibi was at all times a member of the First Defendant.
11. **THAT** Fatima Bibi Hussein aka Fatima Bibi passed away on the 1st of January 2016, and Probate in her Estate was issued by the High Court of Fiji by way of Probate grant Number 58615.
12. **THAT** the Plaintiffs, were appointed as **the Said Executors** and Trustees in the Estate of Fatima Bibi Hussein aka Fatima Bibi.
13. **THAT** the 1st Defendant despite confirming that the deceased was a member of the 1st Defendant has refused and/or neglected to confirm that the Estate of the deceased shall now be registered with it as a member.
14. **THAT** during the life time of Fatima Bibi, she occupied an acre of the said land prior to the purchase of the same by the 1st Defendant and had constructed her dwelling house on the same.
15. **THAT** the 2nd Defendant now occupies the deceased's holding on the same land without any authority or approval of the deceased or the Plaintiffs.
16. **THAT** the 2nd Defendant has no right either equitable or proprietary to occupy the Plaintiff's holding on the said land.
17. **THAT** despite raising an issue with the 1st Defendant, the 2nd Defendant still is permitted by the 1st Defendant to reside on the deceased's holding on the said land.

C. CHRONOLOGY OF EVENTS:

3. The originating summons was supported by the affidavit sworn by both plaintiffs and filed on 05th November 2019, together with annexures thereto marked from "A" to "G".
4. The Originating Summons was duly served on all the defendants, as per the affidavits of service filed on 20th November 2019, according to which the 2nd defendant's one was reportedly served on 12th November 2019. The Notice of Appointment to hear the Originating Summons was also duly served on both the defendants as per the affidavits of service filed on 23rd January 2020, according to which, the 2nd defendant's one was reportedly served on 7th January 2020.
5. Accordingly, the 2nd defendant appearing in person, on 23rd January 2020, filed his acknowledgment of service and an affidavit in response, together with annexures marked as "**RK-1**" to "**RK-3**", subsequent to which the matter was fixed for hearing **on 23rd June 2020** before my predecessor judge Hon. A.G. Stuart (as he then was). In the meantime, the plaintiffs' Solicitors on 13th February 2020 filed the Notice of Discontinuance of the action against the 3rd Defendant.
6. Thereafter, on 22nd April 2022, the plaintiffs filed their joint affidavit in reply to the aforesaid affidavit of the 2nd defendant, together with annexures marked as "A", which contained a copy of the Probate and the Last Will of

the deceased Fatima Bibi Hussain aka Fatima Bibi, and the same was duly served on the 2nd defendant on 19th May 2020 as per the affidavit of service filed on 27th May 2020.

7. The record also shows that the 2nd defendant on 19th June 2020 filed his written submissions prior to the hearing that stood fixed for 23rd June 2020. However, as the plaintiffs were unable to be present to give oral evidence, the court granted the plaintiffs' solicitors leave to file affidavit evidence instead of oral evidence.
8. Accordingly, the scanned copy of the plaintiffs' affidavit evidence was filed on 30th July 2020, along with annexures marked as "A" to "Q". In the meantime, when the matter had come up on 20th August 2020, being a mention date for the parties to confirm if they will be relying on the **Cooperative Act 1996**, the 2nd defendant being absent and unrepresented on the said date, order in terms of paragraph (a) to the prayer to the originating summons was granted by my predecessor.
9. As per the sealed order, the relief granted to the plaintiff, in terms of paragraph (a) of the prayer to the Originating Summons reads as follows.
 1. ***THAT it is declared that the Estate Fatima Bibi Hussain is the member of the 1st Defendant Saunaka Land Purchase Cooperative Society Limited***
10. It was after the said order was sealed and served on the 1st and 2ⁿ defendants on 14th September 2020 as per the Affidavits of service filed on 8th October 2020, the 2nd defendant on 3rd November 2020 filed the two summonses in hand, namely the **Summons for setting Aside** and the **Summons for Striking out** ("Applications"), which were supported by two separate affidavits sworn by the 2nd defendant on 3rd November 2020, but with no annexures whatsoever.
11. When the said Applications came up for hearing before me on 29th November, 2024, both Counsel agreed for the court to take up the hearing only in relation to the **Application for Striking out**. As the Counsel for the Plaintiffs raised her preliminary objection in relation to the Application **for Setting aside**, having heard both the counsel, the Court fixed the matter for ruling on the Striking out Application and on the preliminary objection for the setting aside Application, for 17th February 2025, by leaving the parties at liberty file written submissions.
12. On 17th February 2025, as none of the parties had filed written submissions and the Court needed some clarification from the Counsel for both parties on the propriety of granting the relief (a) in the originating Summons on a mention date in the absence of the 2nd defendant, the matter was adjourned for 20th February 2025 by issuing notice on the 2nd defendant's Solicitors for 20th February 2025.
13. When the matter came up on 20th February 2025, both parties were directed to file their respective submissions, by covering the question raised by the court as well. The 2nd defendant filed his written submissions on 21st February 2025 and the Plaintiffs filed their written submissions on 13th March 2025. Accordingly, the matter comes up today for ruling on the Application for Strike out and on the preliminary objection in relation to the Application for setting aside.

D. DISCUSSION:

(a) Application for Striking Out:

14. I, have carefully perused the contents of the case record, including those of the Application for Strike out and the averments in the Affidavit in support thereto. I have also considered the contents and the effect of the Order (a) granted in terms of the Originating Summons, in the absence of the 2nd defendant before the Court on 20th August 2020, when the matter had in fact been mentioned for the parties to inform the Court whether they are relying on the Cooperative Act 1996.
15. As per the above paragraph, I find that, rightly or wrongly, a substantive relief has been granted to the Plaintiffs in terms of paragraph (a) of their Origination Summons, however without making any orders in relation to other reliefs sought in the Originating Summons. I also find that the above relief (a) granted is not only against the 1st Defendant Society as argued by the Plaintiff's Counsel in support of her preliminary objection to the setting aside Application, but it affects the purported claim of the 2nd Defendant as well.
16. However, for the purpose of considering the Application in hand for strike out, this Court has to recognize that there is a judgment entered, by the Court on 20th August 2020 against the 2nd defendant. The propriety of the procedure adopted in entering judgment granting relief (a) in the originating Summons will be gone into when considering the Application for setting aside.
17. As there is an order by the High Court made on 20th August 2020 granting a substantive relief to the Plaintiff, which is also against the interest of the 2nd Defendant, and as the said Order still remains intact, my considered view is that the 2nd defendant could not have preferred an Application for Striking Out as he has presently filed before this Court.
18. The reason being, that the Order 18 Rule 18 permits filing of the Application for Striking out only at "**any stage of the proceedings**". I find that once the substantive relief (a) was granted by the Court on 20th August 2020, there was no existing "proceedings" in respect of the relief (a). Because, the Court had already exercised its jurisdiction over the claim for the said relief.
19. So, once a final relief is granted by way an Order or judgment, it cannot be dealt with by way of an application for strike out. The only way out is an application for setting aside, which is currently pending before this Court. The 2nd defendant could not have filed an application for striking out when a final judgment/ order was hanging over his head.
20. For the above reason, I decide that the Application preferred by the 2nd despondent on 3rd November 2020 to Strike out the Plaintiff's action should be dismissed without going into the merit thereof and with costs.

(b) Application for Setting Aside:

21. The next Application pending before me is the Summons filed on 03rd November 2020 for setting aside the Order/ Judgment dated 20th August 2020, on which a full oral hearing has not so far taken place before this

court. But I find both the Counsel have filed written submissions addressing the issues involved herein to some extent.

22. However, I find that the attention of the counsel for the Plaintiff and the 2nd defendant should be drawn to the following observations made by me, which are crucial in deciding on the Application for Setting Aside.
23. The purported Application for Setting aside has been made by relying under Order 19 Rule 9 of the High Court Rule 1988("HCR"). But I observe that the Order 19 and Rule 9 come into play only when there is a failure on the part of the 2nd Defendant to file the **Statement of Defence** (in this case an affidavit in opposition to the supporting Affidavit of the Originating Summons). In the case before me, there is no such a failure on the part of the 2nd defendant which arises out of the Order 19 Rule 5 of HCR. It is only if the 2nd defendant has failed to do so, he has to come under Order 19 Rule 09. Hence, this Order and Rule relied on by the 2nd defendant to make this Application are not applicable here. Thus, the Application pursuant to it has to fail necessarily.
24. The other Order and Rule that the 2nd defendant could have relied on, if applicable, for setting aside is the Order 13 Rule 10. However, this Order and rule will come into play only in the event the 2nd defendant fails to file the **Notice of Intention to Defend**. There is no such a situation in this matter for this Court to consider the Application for setting aside at least under Order 13 Rule 10. Hence, the possibility of reliance under this Order and Rule has to be ruled out.
25. Another Order and Rule that the 2nd defendant could have relied on for setting aside, if appropriate, was the Order 35 Rule (2) of the HCR. But, for the 2nd defendant to have come under this Order and Rule, he should have failed to appear on a day **the matter had been fixed for the trial / hearing**.
26. The fateful day, i.e. 20th August 2020, on which the impugned default judgment happened to be entered **was not a trial or hearing date**. Instead, it was just a mention date on which the matter had come up for some other purpose as stated in a foregoing paragraph. Hence, the question arises as to whether the impugned judgment or order could have been granted in the absence of the 2nd defendant when the matter had not come up for trial or hearing?
27. I, find that the Application preferred by the 2nd defendant for setting aside does not fall under any of the Order and Rule stated above. However, in my view justice has to be meted out to the 2nd defendant in this regard. I have neither come across nor been referred to any other Order or Rule that the 2nd defendant could have relied upon for this purpose. Hence, in order to do justice, the only way out for the 2nd defendant was relying on the inherent jurisdiction of this Court, as pleaded in his Summons filed on 3rd November 2020.
28. Though, the Counsel for the 2nd defendant in his written submission has alluded to the irregularity of the Order entered on 20th August 2020, Counsel for the plaintiff in his subsequent written submissions has not addressed the same. Instead, the Plaintiff's counsel has filed lengthy written submissions pointing to the absence of meritorious defence for the 2nd defendant. If the judgment or Order is found to have been entered irregularly, the defendant, as of a right, can move for the setting aside of such a judgment or ruling. The 2nd defendant also should have had his day in court.

29. The 2nd defendant has filed his application for setting aside on 3rd November 2020 within a short period of time from the date of serving the default judgment on him. There was no substantial delay on his part. He need not be punished for the failure of his Solicitor/counsel to appear on 20th August 2020, it being a mention date. The learned judge should have fixed the matter for hearing and notified the hearing date through the Registry instead of entering the judgment against the 2nd defendant. So far there has not been a hearing in this matter in relation to any of the reliefs sought in the Originating Summons.
30. I, find that as the Judgment/ Order granted on 20th August 2020 in terms of paragraph (a) of the Originating Summons, in the absence of the 2nd defendant is an irregularly entered one and the circumstances warrant it to be set aside as of a right. The learned Judge on 20th August 2020 could and should not have granted such an Order/ Judgment without hearing the 2nd Defendant and when the matter had not come up for trial or hearing on the said date.
31. Therefore, in exercise of the inherent jurisdiction, without further going into the merits and demerits of the Application for setting aside and wasting the time and resources on it, I decide to set aside the impugned Order made on 20th August 2020 before my predecessor in the absence of the 2nd defendant.


(c) The Substantive Application: (The Originating Summons)

32. The substantive Application pending before this Court is the Originating Summons filed on 5th November 2019, which contains several key reliefs prayed for by the Plaintiff against both the 1st and the 2nd defendants. This Originating Summons remains without being taken up for any formal hearing in relation to any relief sought therein. In this matter, the 1st defendant appears to have intimated his stance in favor of the Plaintiff by an Affidavit sworn and filed by the Chairman of the 1st Defendant. However, the Court has the duty of giving a hearing to the 2nd Defendant in relation to all reliefs prayed for by the Plaintiff against him (2nd Defendant) as per the Originating Summons.
33. Accordingly, there shall be a formal hearing between the plaintiff and the 2nd defendant on the originating Summons filed on 5th November 2019 at an earliest possible date convenient to the counsel for both parties and the Court.
34. Considering the circumstances, particularly the failure on the part of the 2nd defendant to appear in court on 20th August 2020, the resultant time consumption and the expenses the plaintiffs apparently had to bear, the Court decides to order the 2nd defendant to pay the plaintiffs a sum of \$2,000.00 being the summarily assessed cost, as pre-payment.

E. FINAL ORDERS:

- a. The Application for Striking Out, filed by the 2nd defendant on 3rd November 2020, is hereby dismissed.
- b. The preliminary objection, in relation to the Application for setting aside, is hereby overruled.
- c. Application for Setting Aside, filed by the 2nd defendant on 3rd November 2020 succeeds.
- d. The judgment/Order entered on 20th August 2020, in terms of paragraph (a) of the prayers to the Plaintiff's Originating Summons, is hereby set aside and vacated.
- e. There shall be a hearing of the originating Summons, involving the Plaintiffs and the 2nd defendant, on an earliest date convenient to both the Counsel and Court.
- f. The 2nd defendant shall pay the Plaintiff a sum of \$2,000.00 (Two Thousand Fijian Dollars) being the summarily assessed costs, and the payment should be made prior to the date of hearing.

On this 4th Day of April 2025 at the High Court of Lautoka.


A.M. Mohamed Mackie
Judge
High Court- Lautoka

**SOLICITORS:**

Messrs. Patel & Sharma Lawyers- Barristers & Solicitors – For the Plaintiff.

The first Defendant appeared through its chairman – Bal Krishna. (In person)

Messrs. Turuva Legal- Barristers & Solicitors – For the 2nd Defendant.