

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

**CIVIL APPEAL NO. HBC 172 OF 2015**

IN THE MATTER OF AN APPEAL AGAINST THE MASTER'S RULING DATED & PRONOUNCED ON 20<sup>th</sup> JANUARY 2017, WITH LEAVE BEING OBTAINED FROM THE JUDGE ON 21<sup>ST</sup> MAY 2018 IN THE LAUTOKA HIGH COURT CIVIL ACTION No. HBC 172 of 2015).

**BETWEEN** : **RADHABAI** aka **RADHA BAI** of Malolo, Nadi, Domestic Duties as the Sole Executrix and Trustee in the Estate of Abhimanyou Lingam aka Abhimanyu Lingam late of Vuniyasi, Nadi, Market Vendor, Deceased.

**APPELLANT**  
**[Original Plaintiff]**

**AND** : **BALVEER SINGH** and **JAGINDRA SINGH** aka **JAGINDAR SINGH** Trustees in the Estate of **Gurdiyal Singh** aka Gurudayal Singh aka Gurdial Singh aka Hardayal Singh of Wailoku, Suva.

**RESPONDENTS**  
**[Original Defendants]**

**BEFORE** : Mr. A.M. Mohamed Mackie-J

**APPEARANCE** : Mr. R. Singh, for the Plaintiff/ Appellant  
Mr. R. Charan, for the Defendants/ Respondents

**WRITTEN SUB.** : Filed on 11<sup>th</sup> March 2024- by the Plaintiff-Appellant.  
Filed on 05<sup>th</sup> April 2024 – by the Defendant- Respondent.  
Filed on 07<sup>th</sup> May 2024 – by the Plaintiff-Appellant (Reply).

**DATE OF HEARING** : 13<sup>th</sup> March 2025.

**DECIDED ON** : 09<sup>th</sup> October 2025.

**JUDGMENT**

[on appeal]

**A. INTRODUCTION:**

1. This is an Appeal preferred by the Plaintiff-Appellant ("the Appellant"), with the leave being obtained on 21<sup>st</sup> May 2018 from Hon. Mohamed Ajmeer-J (as he then was), against

the Ruling dated and pronounced on 20<sup>th</sup> January 2017 by the then Learned Master. Hon Jude Nanayakkara (“the Master”) as he then was.

2. By the said Ruling, the Master had struck out the Appellant’s substantive action against the Defendant- Respondents (“the Respondents”) after considering an Amended Summons filed on 22<sup>nd</sup> April 2016 by the Respondents pursuant to Sections 9 and 10 of the Limitation Act (Cap-35), Order 18 Rule 18 (1) (a) (b) & (d) of the High Court Rules 1988 and the inherent jurisdiction of this Court.
3. The said Summons and the impugned Ruling of the Master were based on the grounds that the Appellant’s action was statute barred, frivolous, vexatious, an abuse of the process of Court, and did not disclose a reasonable cause of action.
4. Being dissatisfied of the Master’s Ruling, the Appellant on 26<sup>th</sup> January 2017 filed her Summons (“the Application”) seeking leave to appeal and stay of the said Ruling. After hearing the same r Hon. Mohamed Ajmeer-j, by his Ruling dated 21<sup>st</sup> May 2018 granted leave to appeal.
5. However, pursuant to an Appeal process before the Court of Appeal in relation to a subsequent Ruling dated 20<sup>th</sup> August 2018 pronounced by Mohamed Ajmeer-J on the question of the reinstatement of the Appeal, the Court of Appeal by its Judgment dated **4<sup>th</sup> March 2022** affirmed Judge Ajmeer’s Judgment dated 20<sup>th</sup> August 2018.
6. Thereafter, the matter being allocated to this Court for the hearing of the substantive Appeal, Counsel for both parties, having filed their respective written submissions as sated above, have made their oral submissions as well at the hearing held on 13<sup>th</sup> March 2025.

**B. BACKGROUND:**

7. The Appellant **RADHABAI**, as the sole Executrix and Trustee of the Estate of her Late Husband **ABHIMANYOU LINGAM** (the Mortgagor) had brought this action on 07<sup>th</sup> October 2015 against one **BALVEER SINGH** Respondents, who are now representing the Estate of late **GURDIYAL SINGH, aka GURUDAYAL SINGH aka GURDIAL SINGH aka HARDAYAL SINGH** (“the Mortgagee”).
8. The Appellant had pleaded that the foreclosure order obtained by the Respondents in the year 2000 was without complying with the provisions of ss.73, 74 & 75 of the Land Transfer Act (‘LTA’) and s.79 of the Property Law Act (‘PLA’).
9. The Respondents filed a striking-out Application to strike out the claim on the ground that the action was caught up by provision of section 4 of the Limitation Act (‘LA’). In the proceedings before the Master, the Appellant had argued that she had a proper cause of action against the Respondents and her claim was not caught up by the limitation Act. The Master did not agree with the contention of the Appellant. The Master by his impugned Ruling dated 20<sup>th</sup> January 2017 held against the Appellant and struck out the action.

10. The Master in pages 17 and 18 of his said decision dated 20<sup>th</sup> January 2017 had stated as follows;

*"(10) I note annexure and marked 'B', 'D' and 'E' of the Affidavit of "Radhabai" (the Plaintiff) filed on 20th May 2016.*

*It seems tolerably clear that the application for an Order for Foreclosure was registered on 02nd March 2000 on the Crown Lease No:- 12891. Dealing with the question this far, I would hold that in spite of the force with which Counsel for the Plaintiff put her submission, it is wrong to argue that 'the foreclosure is not complete hence the time has not started to run to challenge any foreclosure.'*

*Moreover, in accordance with Section 74 of the Land Transfer Act, the Registrar of Titles issued a Public Notice for Foreclosure to advertise in the News Proper.*

*The late Abhimanyou Lingam did not object and/or obtained an Injunction restraining the Mortgagee from exercising their rights and/or to restrain them to proceed with the Foreclosure.*

*Late Abhimanyou Lingam passed away on 29th May, 2009. Since year 2000 when the Foreclosure was registered till May, 2009 the late Abhimanyou during his lifetime has not filed any action challenging the validity of the Foreclosure.*

*The Plaintiff issued the Writ against the Defendants on 7th October, 2015. After a slumber of 15 long years the Plaintiff is now challenging the validity of the Foreclosure and seeking an account of the income derived from the said property and the Estate of Abhimanyou Lingam. Equity aids the vigilant and not those who slumber over their rights.*

*The Plaintiff does not allege fraud. The Plaintiff alleges that there has been a breach of Sections 73, 74 and 75 of the Land Transfer Act and seeks a declaration that the foreclosures granted in year 2000 which was 15 years ago is invalid and be cancelled accordingly. Moreover, the Plaintiff is claiming for accounts which go back beyond year 2000.*

*As correctly pointed out by Counsel for the Defendants, the Plaintiff's Claim is obnoxious to Section 4 (1) and (2) of the Limitation Act and therefore statute barred."*

11. The propriety of the decision arrived at the Master to strike out the Appellant's action, based on the above observations made by the Master, in his impugned Ruling dated 20<sup>th</sup> January 2017, has to be carefully scrutinized during the analysis of the merits of the Grounds of Appeal adduced by the Appellant.

**C. GROUND OF APPEAL:**

12. Followings are the Grounds of Appeal adduced by the Appellant for the purpose of this Appeal, upon consideration of which, my predecessor judge has granted leave to appeal.

1. *The Learned Master of the High Court erred in law and in fact in holding that the action by the Appellant is statute barred by virtue of Section 4 (1) and (2) of the Limitation Act when Section 8 (2) of the Limitation Act permits various actions dealings with foreclosure may be instituted within 20 years from the date the right to foreclosure accrued.*
2. *The Learned Master of the High Court erred in law and in fact in striking out the Appellant's cause of action when a reasonable cause of action was pleaded on the grounds that the Respondent had breached Sections 73, 74 and 75 of the Land Transfer Act and Section 79 of the Property Law Act when the Respondent foreclosed on the land comprised in Crown Lease Number 12891 known as Nacaqara & Navo in the District of Nadi, containing an area of 4399m<sup>2</sup> (hereinafter referred to as "the said land").*
3. *The Learned Master of the High Court erred in law and in fact in finding that the cause of action by the Appellant was based on equity.*
4. *The Learned Master of the High Court erred in law and in fact in not considering the legal effect and consequence of Section 8 (2) of the Limitation Act.*
5. *The Learned Master of the High Court erred in law and in fact in finding that the cause of action arose 15 years ago, when the Appellant was made aware of the cause of action, the breach of Section 73, 74 and 75 of the Land Transfer Act and Section 79 of the Property Law Act when the action was instituted.*

**D. DISCUSSION:**

13. The Appellant's plea in her Statement of Claim is that the Respondents, whilst conducting the disputed foreclosure in respect of the subject matter, has failed to comply with Section 73, Section 74 and Section 75 of the Land Transfer Act and Section 79 of Property Law Act. The Appellant in her Affidavit sworn on 25<sup>th</sup> January 2017 also has averred, on advice, the same to the following effect;
  - a. THAT **no** final notice of the Respondent's intention for foreclosure was served on her deceased husband Abhimanyou Lingam. She draws the attention of the Court to the Exhibit "E", which should contain the signature of her late husband as the proof of the acknowledgment, bears that of the 1<sup>st</sup> Respondent **Balveer Singh**.
  - b. THAT the required application for foreclosure was not advertised as required by section 74 of the LTA. She draws the attention to annexures marked as "F" & "G" which are Newspaper and Gazette Publications respectively.
  - c. THAT the actual auction for the sale of the Land had not taken place at the relevant Land situated at Malolo in Nadi, which according to the declaration by the 2<sup>nd</sup> Respondent marked as "H" , has taken place in Toorak Suva.
  - d. THAT Certificate of Auctioneer is erroneous and sham.

- e. THAT as per the advice she received, the Auction did not take Place as required. The Auctioneer states that the Auction took place not in Malolo, Nadi where the subject Land is situated, and he was instructed by "Colonial".
  - f. THAT the Registrar of Title's advertisement was published after the date of registration of the application for the foreclosure on the lease of the said land.
14. The Appellant's aforesaid averments and the submission made by the learned Counsel for her before me in support thereof have convinced this Court that the matters raised hereof were best suited to be adjudicated at a formal trial before a judge, without being subjected to a summary process of striking out exercised by the Master pursuant to Order 18 Rule 18 of the High Court Rules 1988.
  15. The allegation; that the Respondents had failed to meet the requirements of the law before the application for foreclosure was made and during the purported sale was conducted, the order granted for foreclosure and the sale were irregular and bad in law, should not be disregarded or lightly taken. The Appellant, in my view, should have been afforded an opportunity to put across her case for it to be decided upon providing evidence at trial. The impugned decision of the Master in stating that there is no reasonable cause of action is clearly wrong and the same cannot stand as a valid and justifiable decision.
  16. The absence of any fraud prior to and/ or during the process of foreclosure need not necessarily deprive the Appellant from vindicating her right as the owner and mortgagor of the subject property, when the very procedure adopted in the whole process is alleged to be tainted and contravene the law. The court has to ascertain the identity of the person or entity referred to as "colonial" who was not a party to the proceedings.
  17. In his impugned decision , the Master has found the Appellant guilty of laches owing to her coming to Court after 15 years from the occurrence purported foreclosure, without affording her an opportunity to explain the delay, if any, when it appears that there was no delay on her part in terms of Section 8(2) of the Limitation Act.
  18. The circumstances that prevailed during the time material and the reason, if any, that prevented her or caused the delay in coming to court after 15 years from the date of the said foreclosure have to be spoken in court by way of formal evidence with cross examination and re-examination before deciding the propriety of the purported foreclosure. If the Court deviates from the due process, the outcome could be finally detrimental to the Appellant as far as her rights are concerned. Substituting the Summary process in place of the above could be disastrous.
  19. I have carefully scrutinized the all 5 grounds of Appeal adduced on behalf of the Appellant, which I find mainly raise two legal issues. First one being whether the said foreclosures order is to be set aside on the grounds that it was obtained without following the due procedures set out in ss. 73, 74 and 75 of the Land Transfer Act and s.79 of the Property

Law Act? The second issue being, what is the limitation period applicable to a claim founded on foreclosure?

20. The provision under Section 8 (2) of the Limitation Act seems to have had escaped the attention of the learned Counsel for the Respondents, when they opted to file the Summons for strike out. His attention was mainly on Section 4(2) of the Limitation Act, which cannot have aided the Respondents in defeating the Appellant's substantive claim. However, the Master also appears to have disregarded the applicability of Section 8(2) of the Act which could be resorted to by the Appellant during the trial proper, if and when such an opportunity is afforded to the Appellant.
21. Section 8 (2) of the Limitation Act states:

*“(2). No foreclosure action in respect of mortgaged personal property shall be brought after the expiration of twenty years from the date on which the right to foreclose accrued, provided that if, after that date the mortgagee was in possession of the mortgaged property, the right to foreclose on the property which was in his possession shall not, for the purposes of this subsection, be deemed to have accrued until the date on which his or her possession discontinued.” (Emphasis provided)*
22. The main contention of the Counsel for the Respondent before the Master was that the applicable law to the Appellant's action in respect of limitation is s.4 (2) of the Limitation Act, which states:

*“(2) An action for an account shall not be brought in respect of any matter which arose more than six years before the commencement of the action.” (Emphasis provided)*
23. The Master, when deciding the application for strike out the Appellant's action, has grossly erred by fully relying on the said S.4 (2) of the Limitation Act. S. 4 (2), which deals with the actions for account. This section stipulates that such actions must not be brought after 6 years.
24. The Appellant's one of the relief prayed for, as per her Statement of Claim , is for the submission of accounts, which is only an ancillary relief , while the substantive relief pertains to her proprietary right over the mortgaged property, which can be extinguished only at the expiry of 20 years from the date the right to foreclosure accrued .
25. The Master has completely ignored the correct legal position enshrined in Section 8(2) of the Limitation Act, which states that the time limited for a foreclosure action in respect of mortgaged property is 20 years from the date on which the right to foreclose accrued. The submission of the Counsel for the Appellant, that the Master was clearly wrong in striking out the action on the issue of limitation, when the same can only be fully adjudicated upon providing evidence at trial, holds water. Though, the main issue hereof is a legal one, it is always prudent to try such issues along with the issues of facts as well through the process of due trial.


26. The Appellant's main grievance averred in her pleading is; that she had suffered loss and damage as the Respondents have illegally taken control and possession of the land through this purported foreclosure. Dismissing the Appellant's action prematurely, by utilizing the Strike Out mechanism under Order 18 Rule 18 at that juncture was unwarranted.
27. The arguments that involve the substantial point of law, which do not give once and for all answer through the exercise of summary process. It may be best not to have it determined on a striking-out application. In the striking-out application, the Master had determined a limitation issue, a point of law, when there were conflicting arguments as to the relevant provision applicable to the claim brought by the Appellant. The Appellant argued that section 8 (2) of the Limitation Act was the applicable provision as far as the limitation period is concerned, and not section 4 (2) of the said Act as argued by the Counsel for the Respondent. Therefore, it would be prudent to reserve such issues for the trial stage, with all the other issues too in place before a trial Judge.
28. The Appellant came before the Court to vindicate her proprietary right over the Mortgaged property, which formed a part of her deceased husband's Estate, apparently on a well-founded cause of action, and not based on equity as wrongly decided by the Master.
29. The alleged breach of the Sections 73, 74 and 75 of the Land Transfer Act and Section 79 of the Property Law Act have to be gone into at the trial, with special attention focused on Section 8(2) of the Limitation Act to decide whether it would operate as a bar for the Appellant in commencing and proceeding with this action. The Appellant should be allowed to explain her alleged delay for 15 years, the reason for delay and whether Section 8(2) stands on her way for justice. Let the appropriate issues be raised and answered at the end of the trial.

**E. CONCLUSION:**

30. Having carefully perused the Pleadings and heard the learned Counsel for both parties, for the foregoing reasons, I stand convinced that the Appellant's Statement of Claim discloses a reasonable cause of action, which needs to be tried by the Court at a proper trial, without being subjected to the striking out.
31. The Master has erred in allowing the action to be struck out, on the wrong basis that the Appellant's claim is frivolous, vexatious, an abuse of the process of the Court and does not disclose a reasonable cause of action, when the pleadings demonstrated contrary. Thus, on the grounds of Appeal adduced hereof, intervention of this Court is warranted to have the impugned Ruling pronounced by the Master on 20<sup>th</sup> January 2017 set aside, the action of the Appellant reinstated along with her Statement of Claim for the same tried before a judge. Costs to be in course.

**F. FINAL ORDERS:**

1. The Appeal is allowed.
2. The Master's Ruling dated and pronounced on 20<sup>th</sup> January 2017 is hereby set aside.
3. The Appellant's action, together with the statement of claim, is hereby reinstated to the role.
4. The matter shall take its normal course.
5. The pre-trial formalities be attendant with the least possible delay.
6. Costs in course.

  
A.M. Mohamed Mackie  
Judge



At the High Court of Lautoka on this 9<sup>th</sup> day of October 2025.

**SOLICITORS:**

For the Appellant:

Messrs. Patel & Sharma Lawyers, Barristers & Solicitors

For the Respondent:

Messrs. Sherani & Co., Barristers & Solicitors