

**IN THE HIGH COURT OF FIJI  
AT SUVA  
CIVIL JURISDICTION**

Civil File: HBC 88 of 2016  
[with Civil File HBC 218 of 2015]

<b>BETWEEN</b>	:	<b>AKBAR ALI</b>	<b>PLAINTIFF</b>
<b>AND</b>	:	<b>NASINU LAND PURCHASE &amp; HOUSING CO- OPERATIVE SOCIETY LIMITED</b>	<b>FIRST DEFENDANT</b>
<b>AND</b>	:	<b>VIJENDRA PRASAD</b>	<b>SECOND DEFENDANT</b>
<b>AND</b>	:	<b>REGISTRAR OF TITLES</b>	<b>THIRD DEFENDANT</b>
<b>AND</b>	:	<b>THE ATTORNEY-GENERAL</b>	<b>FOURTH DEFENDANT</b>

---

**APPEARANCES/REPRESENTATION**

<b>PLAINTIFF</b>	:	Mr S Singh [Shelvin Singh Lawyers]
<b>FIRST DEFENDANT</b>	:	Not Present [Neel Shivam Lawyers]
<b>SECOND DEFENDANT</b>	:	Mr E. Narayan [Patel Sharma Lawyers]
<b>THIRD &amp; FOURTH DEFENDANT</b>	:	Ms Ali [Attorney-General's Chambers]
<b>RULING OF</b>	:	Acting Master Ms. Vandhana Lal
<b>DELIVERED ON</b>	:	07 March 2019

---

**INTERLOCUTORY JUDGMENT**  
[Setting Aside Order on Irregularity]

---

**APPLICATION**

1. On 29 June 2016 the then Master of the High Court made certain orders as follows:

- i. Mohamed Shamsheer Ali be removed as first Plaintiff in this proceedings;
  - ii. Akbar Ali be substituted in place of Mohammed Shamsheer Ali as the *Administrator pendente lite* of the estate of Nabihah;
  - iii. The Plaintiff Akbar Ali be granted leave to file an amended Statement of Claim;
  - iv. The proceedings be consolidated with Suva High Court Civil Action No. 88 of 2016.
2. The said Orders were made in Civil File HBC 218 of 2015 where Plaintiff had filed an application pursuant to Order 15 rule 8, Order 21 rule 3 and Order 20 of the High Court rules.

Orders were made after hearing Counsels for both the Plaintiff and Defendant (Nasinu Land Purchase & Housing Co-operative Society Limited) in the said action number.

3. The Counsel for Third and Fourth Defendant in Civil File HBC 88 of 2016 is now making the said application seeking orders that *"Order Number 4 granted by the Master of the High Court on 29 June 2016 on Civil Action No. 218 of 2015 with Civil Action No. 88 of 2016 to be set aside for irregularity on the ground that the Third and Fourth Defendants are not a party to Action No 218 of 2015 and have not consented to the consolidation"*.

This application is made pursuant to Order 2 rule 2 of the High Court Rules.

According to the Third and Fourth Defendant they were not served with any legal documents pertaining to Civil File HBC 218 of 2015.

4. The Plaintiff opposes the application for setting aside the order for consolidation.

According to him, the consolidation is necessary as the reliefs in Civil File HBC 88 of 2016 flows out of the case in Civil File HBC 218 of 2015 and only affects the First Defendant and no other party.

No prejudice is caused to Third and Fourth Defendant as consent was not required for consolidation.

Documents have been served on the Third and Fourth Defendant.

The claim in Civil File HBC 218 of 2015 is against the First Defendant to this action with respect to CT 42252. The action was an action for specific performance.

Civil File HBC 88 of 2016 is for declaratory relief and ancillary relief with respect to transfer of CT 42252 wrongfully done by Third Defendant which she accepted by her letter of 3 February 2016.

The First, Second and Third Defendants acted jointly or severally to cancel a caveat on CT 42252 knowing that the Plaintiff (then Shamsher Ali) had no notice of the application for removal of caveat.

5. The Second named Defendant Vijendra Prasad supports the Third and Fourth Defendant's application stating that Third and Fourth Defendant were not parties to Civil File HBC 218 of 2015 and all parties in Civil File HBC 88 of 2016 were entitled to have the matter of consolidation heard in their presence before any orders were made.

According to them the two actions have separate facts.

**What is Civil File HBC 218 of 2015 about?**

6. The Plaintiffs when the application was initially filed were – Mohammed Shamsher Ali in his personal capacity and Mohammed Shamsher Ali as Administrator and Trustee of Estate of Nabihan.

As per order of 29 June 2016 Mohammed Shamsher Ali has been removed as a Plaintiff. The Plaintiff now is Akbar Ali as Administrator lite of the Estate of Nabihan.

The Defendant is Nasinu Land Purchase and Housing Co-operative Society Limited.

The Plaintiff in his capacity as the Administrator and Trustee of Estate of Nabihan was and still the purchaser and transferee for CT 42252 being Lot 7 on DP Number 10581.

The Defendant is said to be the registered proprietor of the property.

It is alleged that by an agreement reached between the Estate of Nabihan and the Defendant on or about 23 June 2011, the Defendant agreed to transfer to the Plaintiff the said property in addition to transfer of Lot 3, 4 and 8 on same property.

The Plaintiff relies on two letters - dated 27 May 2011 from the Plaintiff to the Defendant and 23 June 2011 from the Defendant to the Plaintiff.

According to the Plaintiff, Defendant has refused to transfer the property.

Plaintiff has a Caveat placed on Lot 7.

Hence the Plaintiff claims following relief:

- I. Specific performance of the agreement reached between the Plaintiff and the Defendant for transfer of the property comprised in Certificate of Title Nos. 42252 being Lot 7 on Deposited Plan No. 10581;

- ii. Further or alternatively, an injunction restraining the Defendant whether by his servants, agents or howsoever from dealing with the property comprised and described in Certificate of Title Nos. 42252 Lot 7 Deposited Plan No. 10581 until further orders in Court;
- iii. Further or alternatively, damages for breach of contract;
- iv. General damages for breach of and/or contravention of the Commerce Commission Decree 2010.

**Claim in Civil File HBC 88 of 2016**

7. The parties are as follows:

- i. Akbar Ali as Administrator Pende Lite of the Estate of Nabihan as Plaintiff;
- ii. Nasinu Land Purchase and Housing Co-operative Society Limited as First Defendant;
- iii. Vijendra Prasad as Second Defendant;
- iv. The Registrar of Titles as Third Defendant; and
- v. The Attorney General as Fourth Defendant.

The property concerned is a piece of land comprised in Certificate of Title No. 42252 Lot 7 Deposited Plan No. 10581.

The First Defendant is said to be the previous registered proprietor of the property.

The Second Defendant is the new proprietor and purchaser.

The claim is that the Estate of Nabihan was entitled to a transfer of the property pursuant to a settlement agreement of 23 June 2011 between the previous administrator of the Estate and the First Defendant.

The Plaintiff had instituted Civil File HBC 218 of 2015 to compel the First Defendant to transfer the property.

According to the Plaintiff, the First Defendant did not have power to sell /transfer the property.

The first cause of action is for wrongful removal of caveat.

According to the Plaintiff, the Estate had lodge a Caveat Number 813809 on the property on 27 May 2015.

On 25 June 2015 the First Defendant lodged a removal of Caveat application with Third Defendant.

The Third Defendant is said to have wrongfully forwarded a Notice of Removal (dated 8 July 2018) to First and Second Defendant's Solicitors Messrs Neel Shivam Lawyers.

Acting in collusion the First and Third Defendant is said to have proceeded to register a transfer of the property in the name of the Second Defendant.

The Plaintiff claims that the First and Second Defendant knew that the Plaintiff had no knowledge of the Removal Notice hence the Second Defendant is said to be not a bona fide purchaser for value since the transfer was fraudulent, it is null and void and ought to be set aside.

The second cause of action is against the Third Defendant who undertook to cancel the registration of transfer and reinstate the Plaintiff's caveat.

Despite the undertaking the Third Defendant failed to take any steps for cancellation of the transfer and reinstatement of Plaintiff's caveat.

Hence relief sought by Plaintiff are;

- i. A declaration that the Transfer dated 27 May 2015 between the First and Second Defendant of the property comprised in Certificate of Title No. 42252 being Lot 7 Deposited Plan Number 10581 is null and void;
- ii. An Order that Caveat Number 813809 be reinstated;
- iii. An order that the Defendants pay damages to the Plaintiff;
- iv. An order that the first and second Defendants pay exemplary damages to the Plaintiff.

#### **Order 2 rule 2 of the High Court Rules**

8. Order 2 requires for application to set aside for irregularity any proceedings to be made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.

9. Commentary to Order 2 rule 2 in the Supreme Court Practice (1993) Volume 1 at paragraph 2/2/2 discusses what is "within a reasonable time":

*"It was held too late; after a year to set aside services out of jurisdiction (Reynolds v. Coleman (1887) 36 Ch.D. 453, C.A.; and after four months to apply to set aside service of a writ claiming "damages for personal injuries" (Pontin v. Wood) [1962] 1.Q.B. 594).*



*A Defendant who applies to set aside an irregular judgment three months after learning of the judgment may be too late to rely on Order 2 rule 2 (1) and to have the judgment set aside as a matter of right; instead he may have to seek the exercise of the discretion of the Court under Order 13 rule 9...."*

Further on paragraph 2/2/3 the phrase "taken any fresh step after becoming aware of the irregularity" is discussed:

*"A "fresh step" for the purpose of this rule is one sufficient to constitute a waiver of the irregularity. "In Order to establish a waiver you must show that the party has taken some step which is only necessary or only useful if the objection has been actually waived or has never been entertained". (Rein v. Stein (1892) 66 L.T. 469, per Cave J. p. 471).*

*Thus steps taken, with knowledge of an irregularity, either with a view to defending the case on the merits (Boyle v Sacker (1889) 39 Ch.D. 249, CA; Fry v Moore (1889) 23 Q.B.D. 395, CA) or to obtain an advantage such as security for costs (The Assunta [1902] P. 150) will waive irregularities in the institution or service of proceedings, since they could only usefully be taken on the basis that the proceedings were valid...."*

#### **Consolidation of proceedings Under the High Court Rules**

10. Order 4 rule 2 lays out provision for consolidation of proceedings and it reads:

*"Where two or more causes or matters are pending, then, if it appears to the court-*

- a) That some common question of law or fact arises in both or all of them, or*
- b) That the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transaction; or*
- c) That for some other reason it is desirable to make an order under this rule,*

*the court may order those causes or matter to be consolidated on such terms as it thinks just or may order them to be tried at the same time or one immediately after another or may order any of them to be stayed until after the determination of any other of them..."*

11. The Supreme Court Practice (1993) Volume 1 on paragraph 4/9/1 commentary to Order 4 rule 9 outlines principles the Courts have applied in considering whether or not to consolidate actions:

*"The main purpose of consolidation is to save costs and time, and therefore it will not usually be ordered unless there is "some common question of law or fact bearing sufficient importance in proportion to the rest" of the subject matter of the actions "to render it desirable that the whole should be disposed of at the same time".*

*But no order for consolidation will be made without hearing all parties affected and therefore it will only be made on the hearing of applications in all actions (Daws v Daily Sketch),...."*

Paragraph 4/9/5 further states:

*"A separate summons should be issued in each action proposed to be consolidated, or one summons may be issued provide it fully sets out the title of each such actions. The principle is that the actions to be consolidated or tried together should be before the court at the same time."*

**Were the Defendants in Civil File HBC 88 of 2016 served with the application for consolidation made in file Civil File HC 218 of 2015?**

12. Upon perusing both the files I do not find any affidavit of service for service of the summons dated 16 May 2016 or the order of 29 June 2016.

Court record in Civil File HBC 218 of 2015 shows that only the Plaintiff Counsel and Counsel for Nasinu Land Purchase & Housing Co-operative Society Limited were present in Court on 29 June 2016.

Civil File HBC 88 of 2016 was not called in court with Civil File HBC 218 of 2015 on 29 June 2016 until on 10 April 2017 by an order of the court made on 28 February 2017.

13. The Third and Fourth Defendant had gone ahead and filed their Statement of Defence on 6 March 2017 in Civil File HBC 88 of 2016.

Furthermore a summon for direction was issued in Civil File HBC 88 of 2016 and order made in terms on 10 April 2017.

Parties have filed their respective Affidavit Verifying List of Documents in the Civil File HBC 88 of 2016.

14. It was only on 16 October 2017 that counsel for Second Defendant raised issue regarding the orders for consolidation.

Court had then adjourned the matter to 24 October 2017 to "..... out issues of consolidation"

On 12 February 2018 the Court gave directions for the Plaintiff to serve all documents to all parties.

Following several adjournments concerning the orders for consolidation the Third and Fourth Defendant on 16 April 2018 filed their application to set aside the order for irregularity.

**Are the Third and Fourth Defendant too late in making their application for setting aside and have they waived the irregularity by proceeding with the matter on the summons for direction?**

15. Based on my findings above I find they are not late in making the application nor have they waived the irregularity since there is no evidence for service of the application and order for consolidation.

16. The summons so filed by Plaintiff in Civil File HBC 218 of 2015 only sets out the title of this action Civil File HBC 218 of 2015.

Neither had the Plaintiff filed another separate summons [since the summon had title of one action only] in Civil File HBC 88 of 2016.

17. The application was not served on the Second, Third and Fourth Defendants in Civil File HBC 88 of 2016 and they were not heard on the application.

Neither was the Civil File HBC 88 of 2016 listed before the Court on 29 June 2016 when the order was made for consolidation.

18. After obtaining the order for consolidation, Plaintiff failed to serve order on the Defendants in Civil File HBC 88 of 2016.

19. Furthermore there is no direction sought from court and procedure laid down on consolidations.

20. Upon consolidation of actions it is prudent for the Plaintiff to obtain directions on consolidation.

21. The Plaintiff's Counsel went ahead to file an amended Statement of Claim in Civil File HBC 218 of 2015 and not as a consolidated proceeding.

They thereafter filed a Summons for Direction in Civil File HBC 88 of 2016 and not in consolidated proceeding.

The Affidavits Verifying List of Document are filed in Civil File HBC <sup>88</sup>~~22~~ of 2016 and not under consolidated proceedings.



22. The proceeding in Civil File HBC 218 of 2015 is still at the pleading stage whilst the proceeding in Civil File HBC 88 of 2016 is at discovery stage.

23. For now it is only prudent that the order for consolidation made on 29 June 2016 is set aside with liberty for the Plaintiff to make fresh application.

24. Another option available apart from consolidation of the proceedings is for the two actions to be heard by one trial Judge at one time or one after the other as the Plaintiff will not be



able to proceed to seek orders in Civil File HBC 218 of 2015 until he is successful in Civil File HBC 88 of 2016.

**Final Orders**

25. The order for consolidation of proceeding made on 29 June 2016 is set aside wholly. Consolidation proceeding is hereby discontinued. Civil Files HBC 218 of 2015 and HBC 88 of 2016 are to proceed under respective file numbers.
26. The Plaintiff is ordered to pay costs to \$500 to the Second Defendant and \$500 jointly to the Third and Fourth Defendants.



  
Vandhana Lal [Ms]  
Acting Master  
At Suva.