

**IN THE HIGH COURT OF FIJI**  
**IN THE WESTERN DIVISION**  
**AT LAUTOKA**

**CIVIL JURISDICTION**

HPP Action No. 23 of 2019

**IN THE MATTER** of the estate of  
**MOHAMMED NAGIFF** late of 32 Nava  
and Nasoki Street, Lautoka, Company  
Director, deceased, Intestate.

**AND**

**IN THE MATTER** of Letters of  
Administration N. 60216 granted on the 12<sup>th</sup>  
day of June, 2017.

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**BETWEEN** : **SHARINE NISHA NAGIFF** of 60 Hillcrest Road, Quakers Hill,  
NSW 2763, Australia,

**1<sup>ST</sup> PLAINTIFF**

**AND** : **SHAIRA BIBI** of 108 Wallace Road, Papatoetoe, Auckland 2025,  
New Zealand.

**2<sup>ND</sup> PLAINTIFF**

**AND** : **MOHAMMED HANIFF NAGIFF** of Saweni, Lautoka,  
Administrator and Trustee for the Estate of Mohammed Nagiff.

**1<sup>ST</sup> DEFENDANT**

**AND** : **MOHAMMED TALIF AHMAD NAGIFF** of 32 Nava and  
Nasoki Street, Lautoka,  
Administrator and Trustee for the Estate of Mohammed Nagiff.

**2<sup>ND</sup> DEFENDANT**

**Appearance** : **Mr Nilesh Lajendra for the plaintiffs**  
**Mr Ravneet Charan for the first defendant**  
**Mr Victor Sharma for the second defendant**

**Hearing** : **Wednesday, 04<sup>th</sup> November, 2020 at 9.00am.**

**Decision** : **Friday, 29<sup>th</sup> January, 2021 at 9.00am**

### **DECISION**

(01) This is an action begun by originating summons dated 14.03.2019. The matter arises in relation to the estate of one Mohammed Nagiff. The plaintiffs are the daughters of late Mohammed Nagiff. The plaintiffs as beneficiaries of the estate of Mohammed Nagiff are seeking from the defendants, the administrators and trustees, a breakdown of accounts of how the estate funds have been managed and distribution of the estate properties to the beneficiaries.

(02) On 18-06-2019, the first defendant filed summons seeking an order that the originating summons filed by the plaintiffs continue as if it was a cause or matter begun by writ. The application is supported by the affidavit sworn by the first defendant on 17-06-2019. The first defendant deposed that; (Reference is made to paragraph (6) to (10) of the affidavit.)

(6) *The plaintiffs are alleging that the defendants have failed to provide breakdown of accounts of how the estate funds have been managed and how the Defendants were planning to distribute the entitlements of the second family as per the Deed of Settlement.*

(7) *From the outset both the plaintiffs were at all times fully aware and have been provided with accounts and statements where possible. It is not quite clear what exactly the plaintiffs are seeking. They have been provided with the bank statements together with invoices and receipts.*

(8) *I don't see a need to file a reply affidavit as these factual issues cannot be decided on Affidavit evidence. That most if not all of the facts put forward by the plaintiffs in their affidavit will require oral evidence.*

(9) *I have been advised by my Solicitors and sincerely believe that the mode of institution of this case is erroneous. There is a significant dispute pertaining to factual matters that are relevant for the complete adjudication of this case.*

(10) *I have been further advised by my Solicitors that the originating process is appropriate only where issues of fact are not disputed but it is not the case here and that there is a real need that evidence is properly scrutinized by the examination and cross examination of witnesses in a trial proper.*

- (03) The application is opposed by the plaintiffs. In opposition, the plaintiffs say;
- (\*) there is no substantial dispute of facts which requires the parties to give oral evidence.
  - (\*) the relief sought by the plaintiffs could be determined on affidavits.
  - (\*) the first defendant bears the onus to show why the court should convert the action into a writ.
  - (\*) the first defendant has done nothing towards that onus other than to state a bare proposition that there exist factual issues that cannot be decided on affidavit evidence.
  - (\*) the application of the first defendant is nothing but a delaying tactic to prolong the determination of the plaintiffs' relief sought in the originating summons.
- (04) Counsel for the plaintiffs primarily relied on the following decisions;
- (\*) **Dharam Singh and Others v Hardayal Singh and Others.**  
**HBC 0215r.945 (30 May 1995)**
  - (\*) **Rajendra Prasad Brothers Limited v Fai Insurance (Fiji) Limited**  
**HBC 0205 of 2001, Decision of High Court Suva on 07-05-2002.**
- (05) The plaintiffs alleged that the defendants have failed to provide breakdown of accounts of how the estate funds have been managed and how the defendants were planning to distribute the entitlements of the second family as per the deed of settlement.
- (06) As I understand the affidavit in reply of the first plaintiff sworn on 10-06-2020, in reply to the affidavit of the first defendant sworn on 28-02-2020, the plaintiffs are primarily disputing the breakdown of the estate accounts provided by the first defendant. The plaintiffs allege that the estate accounts are not verified by bank statements and the estate expenses are not supported by invoices and receipts. As to the breakdown of the estate accounts provided by the first defendant, the first plaintiff alleges that; (Reference is made to paragraph (16) and (17) of the affidavit sworn on 10-06-2020).
- (16) *In response to this paragraph I say that the breakdown of accounts that the 1<sup>st</sup> defendant refers to which is contained in annexure "O" of my affidavit in support filed on 14 March, 2019 is the most **horrible** and **deficient** breakdown of estate expenses that the 1<sup>st</sup> defendant has recorded and is now attempting to rely upon. Matters such as:*

- (a) *paying himself salary;*
- (b) *withdrawing petty cash with no particulars;*
- (c) *paying large amounts of monies for maintenance and fuel cost for a vehicle which was solely run and used for his personal benefit; and*
- (d) *recording shopping for mum and funeral expenses for mum's family*

*are some of those horrible breakdown of expenses that the 1<sup>st</sup> defendant is fraudulently attempting to pass on the estate and justify as estate expenses. If anything, annexure "O" clearly shows that the 1<sup>st</sup> defendant went on a rampage to use the monies from the estate account for his personal benefit as if the same was his and my sister and I have no share in it.*

- (17) *This is the height of abuse of estate accounts that my sister and I have been vehemently complaining of for years which has now resulted in this unfortunate court proceedings amongst family members. The court can now see for itself how the estate accounts have been abused and my sister and I have been denied our just share.*

[Emphasis added]

- (07) It appears that, in this case, the plaintiffs are alleging fraud and breach of fiduciary duty against the defendants. There is an allegation that the first defendant has converted the proceeds of the estate to his use. This matter involves two pleas; first fraud and secondly breach of fiduciary duties. It is clearly desirable that such charges, being of a serious nature, and involving considerably detailed oral and other evidence, should be by an action in which the issues are clearly defined and in which there should be full discovery by each side to the other of all documents that each side holds related to the issues as so defined. Order 5, rule 2 in the High Court Rules provides that proceedings in which a claim made by the plaintiff is based on an allegation of fraud must be begun by writ. There is a provision in High Court Rules, Order 28, Rule 9, that in any matter begun by originating summons, where it appears to the court that it should be continued as if it had

begun by writ, the court may order the proceedings to continue as if the matter had been so begun.

In this case there must be pleadings; there must be discovery; the action must be at least continued as though it had begun by writ. This is not a technicality; it is a most important matter of substance because it is only by this means that the parties can see perfectly clearly what are the serious issues involved and be sure of having made available to them by discovery all the relevant documentary evidence which generally plays such an important part in their cases.

- (08) In the circumstances, I allow the first defendant's application filed pursuant to Order 28 r.9 of the High Court Rules, 1988.
- (09) The originating summons to continue as if it was a cause or matter begun by writ.

  
29/01/2021  
Jude Nanayakkara  
[Judge]



**High Court – Lautoka**  
**Friday, 29<sup>th</sup> January, 2021**