

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

CIVIL ACTION NO. HBC 78 OF 2018

BETWEEN : MOHAMMED TAHIR KHAN of Emori Village, Sigatoka,  
Retired.

PLAINTIFF

AND : MOHAMMED YUSUF KHAN of Emori Village, Sigatoka,  
Farmer.

1<sup>ST</sup> DEFENDANT

THE DIRECTOR OF LANDS

2<sup>ND</sup> DEFENDANT

**Appearances** : Mr E. Maopa for the plaintiff  
First defendant unrepresented  
Second defendant: no appearance

**Date of Hearing** : 20 August 2018

**Date of Ruling** : 20 August 2018

## R U L I N G

[01] This is an originating summons filed by the plaintiff. Subsequently, he has filed a notice of appointment to hear the originating summons pursuant to the High Court Rules 1988, as amended ('HCR'), Order 28, Rule 3 ('the notice') which requires the plaintiff must, within one month of the expiry of the time within which copies of affidavit evidence may be served under Rule 2, obtain an appointment for the attendance of the parties before the court for the hearing of the summons. The hearing of the notice was taking up today (20 August 2018), when Mr Maopa of counsel for the plaintiff brought to the indulgence of the

court that the defendant had denied the agreement signed by their father and that he had also denied signing the agreement. He also informed the court that he is desirous of converting the originating summons into a writ action if the court so ordered.

- [02] The claim arises out of a Testimony of Agreement dated 19 March 1968 and allegedly signed by their (the plaintiff's and the first defendant's) late father, Mohammed Ramzan Khan (*ToA*), in respect of the land in dispute which is 20 acres of agriculture land (*the land*). The ToA allocates shares of the land to the three sons: 8 acres to the first defendant who is the elder son and 6 acres each to Sabir Khan and the plaintiff.
- [03] In this action brought by way of originating summons, the plaintiff seeks among other things a declaration that the ToA be effective and enforceable and that the first defendant shall transfer 6 acres of the land to the plaintiff from the land.
- [04] The affidavit evidence adduced by both parties demonstrates that the parties are at variance on material facts, especially the execution of the ToA upon which the plaintiff's action hinges. The defendant states that he only came to know about the ToA when the solicitors for the plaintiff sent it to him.
- [05] The court has the power under the HCR, O 28, R 9, to order to continue any proceedings begun by way of originating summons as if it had been begun by a writ where it appears to the court at any stage of the proceedings. Rule 9 provides:

*9.-(1) Where, in the case of a cause or matter begun by originating summons, it appears to the Court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause or matter had been begun by writ, it may order the proceedings to continue as if the cause or matter had been so begun and may, in particular, order that any affidavits shall stand as pleadings, with or without liberty to any of the parties to add thereto or to apply for particulars thereof.*

*(2) Where the Court decides to make such an order, Order 25, rules 2 to 7, shall, with the omission of so much of Rule 7(1) as requires parties to serve a notice specifying the orders and directions which they require and with any other necessary modifications, apply as if there had been a summons for directions in the proceedings and that order were one of the orders to be made thereon.*

*(3) This Rule applies notwithstanding that the cause or matter in question could not have been begun by writ.*

*(4) Every reference in these Rules to an action begun by writ shall, unless the context otherwise requires, be construed as including a reference to a cause or matter proceedings in which are ordered under this Rule to continue as if the cause or matter had been so begun.*

[06] The document the plaintiff intends to rely upon in support of his claim is denied and challenged by the defendant on the basis that he (the defendant) was unaware of and he did not sign it. The issue raised by the defendant could not be decided on affidavit evidence. Since there are disputed issues of facts, oral evidence, cross examination, re-examination and further discovery would be required to determine the issue.

[07] In my view, this proceeding should continue as it had been begun by writ. Accordingly, I order that the affidavits filed by the parties must stand as pleadings. However, the parties are at liberty to add thereto or apply for particulars thereof or they may file fresh pleadings. I would make no order as to costs. For this purpose, the matter will take its normal course.

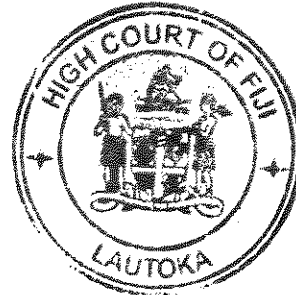
**The outcome**

1. The proceedings shall continue as writ action.
2. The affidavits filed by the parties shall stand as pleadings with liberty to the parties to add thereto or to apply for particulars thereof or to file fresh pleadings.
3. At the close of the pleadings, the plaintiff shall file summons for direction.
4. There will be no order for costs.

*M.H. Mohamed Ajmeer*  
*20/8/18*

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**M.H. Mohamed Ajmeer**

**JUDGE**



**At Lautoka**  
**20 August 2018**

**Solicitors:**

For the plaintiff: M/s Babu Singh & Associates, Barristers & Solicitors

For the first defendant: Unrepresented

For the second defendant: No appearance