

IN THE FIJI COURT OF APPEAL

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APPELLATE JURISDICTION

CIVIL APPEAL NO. 35 OF 1992

(High Court Civil Action No. 203 of 1992)

BETWEEN:

MAIRUN, MOHAMMED HAKIM
AND MOHAMMED SAHIM KHAN

APPELLANTS

-and-

MOHAMMED SALEEM

RESPONDENT

Mr. P. Cowey for the Appellants
Mr. H.A. Shah for the Respondent

Date and Place of Hearing

: 26th August 1994, Suva

Date of Delivery of Judgment

: 26th August 1994

JUDGMENT OF THE COURT

On the 23rd July 1992 Saunders J delivered a brief Judgement as follows:-

"The Defendant is the Executor. He can sell - I really do not think that plaintiffs, who have no benefit under the probated will, can have an extension. The Summons is dismissed. Costs to Respondent."

It is against this Judgement that the appellants now appeal to this court seeking an Order that Caveat No. 319808 be registered against Native Lease No. 12091.

Since no chronology has been filed by the Appellant, we have had to prepare this as follows:-

"3rd June 1985 - Mohammed Yaseen made a will appointing his wife Mariam Sole Executrix and Trustee; and that his wife and 3 of his 4 children be equal beneficiaries. His son Mohammed Saleem was excluded from the will.
(Record page 21).

20th September 1985 - Mohammed Yasin (hereinafter called "the Deceased") made a second will appointing his son Mohammed Saleem Executor and Trustee; providing for two specific bequests; and for the balance of the estate to the son Mohammed Saleem. The other 2 sons of the Deceased were not included in the will.

(Record page 19).

26th January 1986 - the Deceased died at Namoli.
(Record page 18)

23rd July 1987 - Proceedings were issued in the High Court - Probate Division by Miriam widow of the Deceased for the Court to declare the will dated the 20th September 1985 null and void because the Deceased was of unsound mind; because of undue influence, fraud and trickery.

(Record pages 23-24)

1st September 1987 - Following the filing of proceedings in the High Court - Terms of Settlement were negotiated and signed whereby Mohammed Salim, in consideration of the sum of \$5000 consented to an order renouncing the will dated the 20th September 1985 of which he was the principal beneficiary and Sole Executor and Trustee; and agreeing that the earlier will dated the 3rd June 1985 be the true will of his late father the Deceased.

The terms of Settlement were signed by Mariam the widow of the Deceased, the mother of the four children; and by the four children.

(Record pages 15-16)

15th February 1988 - Miriam died leaving a will dated the 15th October 1986 appointing two of her Sons Executors and Trustees and making them Sole beneficiaries. Her daughter Mairun and her son Mohammed Saleem were excluded.
(Record page 26)

27th March 1992 - Respondent is granted a limited grant of Probate of the will dated the 20th September 1985.

11th May 1992 - The Plaintiffs lodged a Caveat No. 319808 against Native Lease No. 12091.
(Record page 9)

30th June 1992 - Registrar of Titles issued a notice pursuant to Section 110 of Land Transfer Cap 131 to withdraw Caveat No. 319808
(Record page 14)

10th July 1992 - Applicants - file Summons for an order extending the time for withdrawal of Caveat.
(Record page 6)

23rd July 1992 - Judgement of Saunders J.
(Record pages 33-34)

24th August 1992 - Notice of Motion and grounds for appeal.
(Record pages 3-4)

The above chronology identifies quite unacceptable delays which the record nor the submissions attempt to explain. For example -

1. The terms of settlement dated the 1st September 1987 were intended to permit the will dated the 3rd June 1985 to be probated in Solemn form. It appears from

the record that nearly 7 years later probate has not been granted;

2. The terms of settlement dated the 1st September 1987 acknowledge that the alleged will dated the 20th September 1985 is not to be probated because of the allegations detailed in proceedings 11/87 of the Probate Jurisdiction of the High Court. However the Respondent did apply for probate of the alleged will dated the 20th September 1985. This was granted on the 27th March 1992;
3. There is no record of the payment of \$5000 agreed to in the terms of Settlement;
4. Probate of the will dated the 20th September 1985 is a "limited grant" only and there is no information as to whether it has been perfected.

The record of the proceedings in the Court below on the 23rd July 1992 state that the Respondent has been appointed executor under a limited grant of Probate of the will dated the 20th September 1985 of which he is the Sole beneficiary. That since the appellants have no interest or benefit in that will the Court below was therefore justified in dismissing the summons for extension of the caveat.

However one of the appellants, the only daughter Mairun, is in fact a beneficiary in that will - and therefore does have an interest. Unfortunately it is apparent that the Court did not address the implications of the terms of settlement which were signed by the Respondent following the issue of proceedings alleging that the same will dated the 20th September 1985 was not executed in accordance with the provisions of the wills Act Cap 59; was obtained by the undue influence; fraud and trickery of the Respondent; and further when the Deceased was not of sound mind; and when the Deceased did not know or approve of the contents of what he was signing.

These are very serious allegations against the Respondent that are detailed in the High Court proceedings No. 11/87. The terms of settlement signed by all the family, acknowledge the will dated the 3rd June 1985 and denounce the will dated the 20th September 1985. However despite that acknowledgment the Respondent has applied for probate of that denounced will dated the 20th September 1985; and the order appealed against has given that limited grant of probate an accolade of respectability to which we believe it is not entitled.

The original order applied for was pursuant to Section 110 (3) of the Land Transfer Act Cap 131 which states:

"(3) The caveator may either before or after receiving notice from the Registrar apply by summons to the court for an order to extend the time beyond the twenty-one days mentioned in such notice, and the summons may be served at the address given in the application of the caveatee, and the court, upon proof

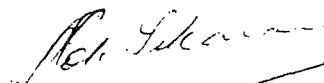
that the caveatee has been duly served and upon such evidence as the court may require, may make such order in the premises either *ex parte* or otherwise as the court thinks fit."

Mr Shah concedes that the appellants have a caveatable interest in Native Lease No. 12091; and that such interest is entitled to be protected by a caveat. However he challenges the authority of this Court to allow the appeal and make the order which we believe the Court below should have made. He says that any such order must be made within the 21 days period specified in the notice issued by the Registrar of Titles on the 30th June 1992. We have no evidence from the Registrar as to the present status of Caveat No. 319808, and therefore make no decision on that submission.

Because it is conceded that the appellants have a caveatable interest, the appeal is allowed and the Judgement of Saunders J. dated the 23rd July 1992 set aside.

There will be an Order under Section 110 (3) of the Land Transfer Act Cap. 131 extending the time for the registration of Caveat No. 319808 until further order of the High Court; or in the alternative an order directing the Registrar of Titles to receive a second caveat by the appellants affecting Native Lease No. 12091 such caveat to be so registered until further order of the High Court.

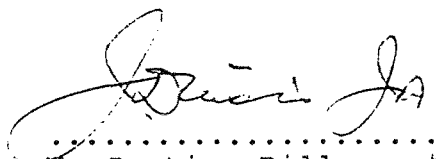
Costs in this Court and in the Court below in favour of the appellants.



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Sir Moti Tikaram
President Fiji Court of Appeal



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Sir Edward Williams
Judge of Appeal



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Mr Justice Dillon
Judge of Appeal