

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL ABU 16 OF 2017
(High Court HPP 8 of 2007)

BETWEEN : KRISHNA KUMARI
Appellant

AND : TIGER CHANDRA NARAYAN
as intended Administrator of the Estate
of SHIU PATI and TIGER CHANDRA NARAYAN
Respondents

Coram : Calanchini P

Counsel : Mr N Vakacakau for the Appellant
Mr A J Singh for the Respondents

Date of Hearing : 8 June 2018

Date of Ruling : 24 August 2018

RULING

[1] This is a renewed application for a stay pending appeal. On 28 February 2017 the High Court delivered a final judgment in a High Court Probate action in which the parties were

relying on two different last wills purported to have been executed by the same testator. The Plaintiff Krishna Kumari (Kumari) was relying on the will dated 30 September 2002 (the first will). The first defendant Tiger Chandra Narayan (Narayan) was relying on the will dated 2 April 2004 (the second will). Kumari had sought an order from the Court that it pronounce against the second will propounded by Narayan being the will purportedly executed on 2 April 2004. Following a trial the learned High Court Judge concluded that Kumari had not established the grounds upon which she had sought to challenge the second will. As a result the High Court dismissed Kumari's action and ordered costs in favour of Narayan in the sum of \$3000.00 to be paid by Kumari within 21 days from the date of the judgment.

- [2] Being dissatisfied with that judgment Kumari filed and served a notice of appeal in the Court of Appeal. The appellant has complied with Rule 16 of the Court of Appeal Rules (the Rules) as to time and Rule 17 of the Rules as to proof of service and security for costs to prosecute the appeal.
- [3] Under Rule 34 of the Rules the filing of a notice of appeal does not operate as a stay of execution unless the court below or the Court of Appeal otherwise orders. Pursuant to Rule 26(3) whenever an application, such as an application for stay pending appeal, may be made either to the court below or to the Court of Appeal, it is required to be made in the first instance to the court below. In a judgment delivered on 11 August 2017 the learned High Court Judge refused Kumari's application for a stay pending appeal and ordered costs to be paid to Narayan in the sum of \$1000.00.
- [4] It is as a result of that refusal that Kumari renews her application for stay pending appeal before the Court of Appeal. Pursuant to section 20(1)(e) of the Court of Appeal Act 1949 (the Act) a justice of appeal may exercise the power of the Court of Appeal to grant a stay of execution pending the appeal or alternatively to make an interim order to prevent prejudice to the claim of the appellant pending the appeal.

- [5] The application was made by summons filed on 18 August 2017 and was supported by an affidavit sworn on 15 August 2017 by Krishna Kumari. The application was opposed. An answering affidavit sworn on 20 November 2017 by Tiger Chandra Narayan was filed on behalf of the respondents. A reply affidavit sworn on 19 December 2017 by Krishna Kumari was filed on 20 December 2017. Both parties filed written submissions prior to the hearing of the application.
- [6] At the outset it should be noted that the application before this Court is not an appeal from the decision of the High Court refusing a stay of execution pending appeal. This is a fresh application in the form of a renewed application. In such an application it is not the function of the Court of Appeal to review the decision of the learned High Court Judge. This Court is exercising a concurrent original interlocutory jurisdiction.
- [7] It is necessary to make one further observation. Kumari is anxious to preserve the status quo pending the appeal. She does not want the estate to be distributed before the appeal is determined. That would render nugatory her claim that the second will was not the last will of the testator. Probate had already been granted on 20 November 2006 to Narayan in respect of the second will. She has therefore made this application for a stay of the judgment of the High Court. Kumari's application for a stay is not by itself sufficient since the High Court did not order Narayan to take any action. What Kumari's legal practitioner should have applied for was an interim injunction which may be determined also by a single judge of this Court under section 20(1)(e) of the Act.
- [8] It is appropriate at this stage to outline the evidence before the High Court. It appears that the validity of the first will dated 30 September 2002 was not an issue before the Court. The issue before the Court was whether the second will dated 2 April 2004 was properly executed and represented the intentions of the testator. If it is a valid will then it revokes the earlier will dated 30 September 2002.
- [9] After receiving a minor injury to his forehead on 30 September 2002 the testator was taken to a medical centre. After returning from the medical centre the testator told

Kumari that he was going to the lawyers. When he returned from the lawyers he gave to Kumari a copy of the will of that date that he had executed at the lawyer's office. Kumari was the wife of the testator at the time the first will was made. However Shiu Pati was his wife when Deo Narayan died on 4 October 2006.

[10] As for the second will, one of the testator's sons took him to the lawyer's office. Janandhan Naicker, who was a law clerk was asked to prepare the will, stated in evidence that the testator having had the will read to him then signed the will in the presence of the two attesting witnesses. Also at the trial the two witnesses who had attested to the signing of the second will made on 2 April 2004 both gave evidence. As a result the learned trial Judge concluded that there was sufficient evidence to conclude that the second will had been properly executed thereby revoking the earlier will. There was no evidence of undue influence and the signature of the testator was, on the material before the Court, not a forgery. At the trial many documents with the testator's signature were admitted into evidence. The trial Judge accepted that he did not have the expertise to compare the signatures and determine whether the signature that appears on the second will was the signature of the testator.

[11] Probate was granted to Narayan on 20 November 2006. An interim stay has been granted pending the outcome of this application for intervention pending the appeal. The consequences for Kumari if a stay pending appeal is not granted are set out in some detail in her affidavit in support of the application in paragraphs 22 – 24. The application is based on the assertion that Narayan will proceed to realize and distribute the estate. Kumari, however is not a beneficiary under the second will and as a result does not appear to have any claim to any part of the testator's estate. Her only claim to the estate or part thereof is under the first will.

[12] It is not necessary to consider the many factors that are usually taken into account for determining a stay application. These are discussed in the decision of this court in Natural Waters of Viti Limited –v- Crystal Clear Mineral Water (Fiji) Limited [2015] FJCA 164; ABU 11 of 2004, 18 March 2005. Whether the application is

determined on the basis that it is an application for stay pending appeal or for an interim injunction, it is arguable that the appellant does not appear to have strong grounds of appeal. It is clear that Kumari is not relying so much on her grounds of appeal in support of her application for stay but more so on her application before this Court to adduce fresh evidence. This application may or may not be granted by the Full Court. However, it may be that until the application is determined a stay should be considered.

- [13] The application to adduce evidence was filed on 27 July 2017 and is supported by an affidavit sworn on 27 July 2017 by Krishna Kumari and an affidavit sworn on 28 June 2018 by Linda Winifred Katherine Morrell. The application was opposed. An answering affidavit was sworn on 22 August 2017 by Tiger Charan Narayan. A reply affidavit was sworn on 11 September 2017 by Krishna Kumari. This application should be heard by the Full Court on a date to be fixed and at the same time as the appeal itself. It is therefore not appropriate to assess specifically the merits of that application. However, it is necessary to make some comments on the probative value of the type of evidence that Kumari is seeking leave to adduce.
- [14] By way of background the appellant had obtained a report by a Mr A Lacroix whose conclusions supported the appellant's position that the signature on the second will was not that of the testator. However Mr Lacroix could not be located and the appellant did not seek to adduce his report. Since the trial the appellant has engaged a forensic Document Examination and Handwriting Expert (Ms Linda Morrell) who has analysed several documents containing the signature of the testator and the second will. Her conclusion was that the signature on the second will was more likely an attempt by another writer to simulate a genuine signature of the testator to make it appear that he had signed the second will. Ms Morrell strongly recommended that the originals of all the documents be examined microscopically.
- [15] In relation to this type of evidence it must be recalled that "*strictly speaking an expert in handwriting should not be asked to say definitely that a particular writing is to be assigned to a particular person. The function of the expert is to point out similarities*

between two specimens of handwriting or differences, and leave the court to draw its own conclusions.” (Cross on Evidence, 2nd Australian Edition 622). In Summer -v- Booth [1974] 2 NSWLR 174 at page 178 Holland J identified certain dangers when relying on the evidence of a handwriting expert. There is the danger in accepting the evidence of such an expert based on an insufficient number of samples of genuine signatures together with the dates when the signatures were executed. The danger of attempting to make a judgment of the effect of ill health upon a person’s handwriting and the danger of expert evidence in relation to handwriting and signatures without knowing the physical conditions under which a signature was written.

[16] These dangers do give rise to some doubt as to the probative value of the evidence sought to be adduced. However, since this is a bitterly argued probate action and in order to prevent the appeal being rendered nugatory, it is appropriate to grant the application and allow the Full Court to determine the questions of admissibility and weight at the hearing of the appeal.

[17] Each party should pay their own costs in this application.

Orders:

1. *Stay pending appeal is granted and Narayan is restrained from realising and distributing the estate pending the appeal.*
2. *Each party to pay their own costs.*



W. Calanchini

Hon. Mr. Justice W. Calanchini
PRESIDENT, COURT OF APPEAL