

IN THE COURT OF APPEAL, FIJI

[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 0065 of 2022

[Suva High Court Action No. HPP 085 of 2020]

BETWEEN : **AKUILA DAVID ANTONIO**
QITOKEMAORIMAILAUTOKA TAVUTO aka
AKUILA TAVUTO
Appellant

AND : **ANASAINI MARETA TAVUTO**
1st Respondent

: **SELINA TOVAKI TAVUTO**
2nd Respondent

Coram : **Prematilaka, RJA**
Morgan, JA
Tuilevuka, JA

Counsel : **Ms. S. Nayacalevu for the Appellant**
: **Ms. S. Devi for the Respondents**

Date of Hearing : **5 November, 2025**

Date of Judgment : **28 November, 2025**

JUDGMENT

Prematilaka, RJA

[1] I agree with the reasons, conclusions along with the Orders of Morgan, JA.

Morgan, JA

Introduction

- [2] The Appellant and the Respondents are siblings and the only children of their late mother **JOKAPETI NABORI MALANI aka JOKAVETI NABORI TAVUTO** late of 11 Marau Place, Adams Street, Lautoka, (“the deceased”) who died a widow and intestate on 11th, February 2019. The deceased’s estate comprised a house in Lautoka. The Appellant lives overseas and the Respondents, his sisters, live in Fiji. The Appellant wished to apply for Letters of Administration of his late mother’s estate. The Respondents initially agreed with his intention to apply. The Appellant was advised by his solicitors that in order to file an application for letters of administration he required Deeds from his sisters confirming that they renounced their rights to apply for letters of administration. The Appellant consequently instructed his solicitors to forward the required deeds to the Respondents for execution. The Respondents however had subsequently changed their minds and refused to sign the deeds prompting the Appellant to file an application by way of Originating Summons (“the Summons”) in the High Court at Suva on the 7th October 2020 seeking inter alia an order allowing the Appellant to file an Application for Letters of Administration in the Deceased’s Estate without the Respondents’ Deeds of Renunciation.
- [3] The summons was supported by an affidavit of the Appellant and was filed pursuant to Section 3 of the Succession, Probate and Administration Act 1970 (“the Act”) and the inherent jurisdiction of the Court.
- [4] The First Respondent filed an affidavit in opposition on behalf of both Respondents to the Appellants affidavit in support and the Appellant filed an affidavit in response to the First Respondent’s Affidavit in opposition.
- [5] All parties filed written submissions before the hearing of the summons. The hearing of the summons took place on the 8th February 2022. The Appellant was represented by counsel and the Respondents appeared in person although it is evident from the Respondent’s Affidavit in Opposition and their oral submissions that they had received advice from Legal Aid.¹

¹ Paras 42 and 182 of the High Court Record (“HCR”)

[6] After hearing the parties the Judge made the following orders in his Decision on the 8th February 2022:-

- “(i) The Applicant’s Application filed on 7th October 2020 is dismissed.*
- (ii) Senior Court Officer Probate Registry to process the impending Letters of Administration Grant in application number 66572 to the First Respondent Anasaini Mareta Tavuto.*
- (iii) There will be an order for costs summarily assessed at \$350.00 to be paid to the Respondents.”*

[7] The Appellant has appealed to this Court against those orders and seeks an order of this Court that the Decision be wholly set aside on the following grounds:-

1. ***THAT*** His Lordship erred in law and in fact in determining that the Appellant’s application is dismissed: -
 - (a) without considering the Affidavit of Akuila David Antonio Qitokeimaorimailautoka Tavuto a.k.a Akuila Tavuto, file on the 8th of October 2021;*
 - (b) without providing a reason(s) for not considering the Affidavit of Akuila David Antonio Qitokeimaorimailautoka Tavuto a.k.a Akuila Tavuto, filed on the 8th of October 2021;*
2. ***THAT*** His Lordship erred in law and in fact in determining that the Appellant’s application is dismissed without considering that:-
 - (a) the Appellant had commenced the proceedings for Letters of Administration when he caused an advertisement for the Deceased estate to be in the Fiji Sun on the 16th of July 2019;*
 - (b) the Respondents had used the advertisement of the Appellant for their application for Letters of Administration despite the notice specifically stating that Appellant as the person to who notice was to be sent to;*
 - (c) the Appellant had been solely managing the estate and spending personal funds for the management of the estate;*
3. ***THAT*** His Lordship erred in law and in fact in concluding that “it is always appropriate that an Administrator/Administratrix is appointed in a deceased’s estate who resides within the jurisdiction” when:-
 - (a) the Appellant, despite residing in the United Kingdom, had been solely managing the estate and spending personal funds for the management of the estate;*
 - (b) the Respondents are unemployed and do not have the financial means to administer the estate and had not contributed to the administration of the estate;*

- (c) *such a conclusion was contrary to section 28 of the Succession, Administration and Probate Act 1970;*
4. ***THAT*** *His Lordship erred in law and in fact in directing that the Senior Court Officer process the pending Letters of Administration 66572 to allow the Second Respondent to carry out full administration of the Deceased's estate when:-*
- (a) *the Respondent's Letter of Administration application 66572 was not before the court nor was it part of the documents made available to the Applicant;*
- (b) *the Respondents' application for Letters of Administration contained the Appellant's advertisement and therefore could not be a complete application;*
- (c) *the Respondents are unemployed and had earlier consented for the Appellant to file Letters of Administration.*

The Decision

[8] Before considering the grounds of appeal it is useful to set out an overview of the Decision. The Judge firstly stated the following as background to the case which relate to the issues before him and this appeal:

- “5. *The Applicant and the 1st and 2nd Respondents are biological siblings and children of the late JOKAPETI NABORI MALANI aka JOKAVETI NABORI TAVUTO of 11 Marau Place, Adams Street, Lautoka, Fiji, Deceased, Intestate.*
6. *The Applicant resides overseas at 18 Salmond Avenue Stafford ST16 3 QY, United Kingdom.*
7. *The Applicant is the youngest of the siblings.*
8. *The Respondents have lodged an Application No. 66572 for Letters of Administration with the Principal Probate Registry on 26th October 2020.*
-
11. *The Applicant and the Respondents are the only beneficiaries of the Deceased's Estate of Jokapeti Nabori Malani.”*

[9] The Judge then set out the issue that required his determination that is relevant to this appeal as follows:-

“Whether an Order be granted allowing the Applicant Akuila David Antonio Qitokeimaorimailautoka aka Akuila Tavuto to file an application for Letters of Administration in the Estate of JOKAPETI NABORI MALANI aka JOKAVETI NABORI TAVUTO of 11 Marau Place, Adams Street, Lautoka, Fiji, Deceased, Intestate, without the Deed of Renunciation of the 1st

*Respondent, Anasaini Mareta Tavuto, born on 11 January 1968 and 2nd
Respondent Selina Tovaki Tavuto, born on 1st May 1970.”*

[10] The Judge observed that Section 7 of the Act provides for the persons entitled to a grant on an intestacy and that under Section 6 of the Act the Appellant and the Respondents were entitled to equal shares in the estate absolutely. The Judge then makes the following findings which the Appellant's are aggrieved by:

- “ 22. The parties must understand that responsibility in terms of Arrangement and/or appointment of an Administrator is the final step in the Deceased's Estate.*
- 23. Upon appointment of an Administrator, he or she will have a responsible duty to perform according to the requirements of the law and failing in this duty to complete the administrative of the Deceased's Estate holistically and expeditiously may result with the Removal of the Administrator.*
- 24. In this case, I have taken cognizance of the fact as to the contents of the Affidavit filed herein.*
- 25. Further, the fact that the Applicant who is the youngest of the three (3) siblings resides overseas whereas the other two (2) reside in Fiji. It is always appropriate that an Administrator/Administratrix is appointed in a Deceased's Estate who resides within the jurisdiction to ensure comfortable administration and eradicate all difficulties in its disposition and able to fully administer the Deceased's Estate.*
- 26. In Deceased's Estate matters, the Courts always ensure that a proper and honest administration and disposition is carried out without wastage of the Deceased's Estate funds expeditiously and in accordance to the law.*
- 27. The Applicant so far has not made any application with the Principal Probate Registry seeking for a grant to administer the Deceased's Estate. However, he is only currently asking this Court that he be allowed to file an application for letters of Administration grant in the Deceased's Estate.*
- 28. The Applicant must understand that the Succession, Probate and Administration Act and Rules provides for Grant of Administration to persons entitled to a grant.*
- 29. Therefore, rather than making this application, the applicant should have advertised the Deceased's Estate and filed an application seeking for a grant for Letters of Administration instead of seeking the present application for an Order to allow him to apply for a grant in the Deceased's Estate in absence of the Deed of Renunciation from the Respondents.*
- 30. Bearing in mind, the aforesaid rationale I have no alternative but to refuse the orders sought by the Applicant and dismiss the application accordingly.*

31. *However, an application for a Letters of Administration grant is impending with the Principal Probate Registry. Application No. 66572 refers. This application is filed by the First Respondent Anasaini Mareta Tavuto.*
32. *I direct the Senior Court Officer Probate Registry to process the First Respondent's application for a Letters of Administration grant expeditiously to allow the First Respondent to carry out the full administration of the Deceased's Estate in accordance with the law without delay."*

[11] I will now consider the Appellant's grounds of appeal.

GROUND 1

[12] This ground avers that the Judge erred in law and in fact in dismissing the application without considering the Appellant's affidavit filed on the 8th October 2021 ("the affidavit") and without providing reasons for not considering the affidavit.

[13] The Appellant submits that despite the statement of the Judge in paragraph 24 above it is clear from the judgment that the Judge only considered the position and evidence presented by the Respondents.

[14] The Appellant then refers to the affidavit to illustrate that if the Judge had properly considered the matters attested to in the affidavit he would not have dismissed the Appellant's application.

[15] The Respondents on the other hand submitted that the Court had considered the affidavit in terms of the Act and that in any event the affidavit appears to contain substantive and new facts which were supposed to have been put in an earlier affidavit filed in support of the application.

Discussion

[16] It is not necessary to consider this ground because as set out later in this Judgment this Court is of the view that the Judge has fundamentally erred in his Decision on other grounds.

GROUND 2

[17] This ground is essentially that the Judge erred in law and in fact when he made the finding set out in paragraph 29 of his Decision above. The Appellant points out that the affidavit of the Appellant specifically deposed in paragraph 8(b) as follows:

“8. b) 16th July 2019 – I initiated the process of obtaining the Letter of Administration after the Respondents had verbally agreed that I should act as Administrator for our late mother’s Estate. Annexed hereto and marked “D” is the Fiji Sun Advertisement and payment receipt of money sent to the 1st Respondent for payment of the said advertisement.”

A copy of the advertisement was annexed to the affidavit.

Discussion

[18] The Judge has clearly overlooked this fact. This Court is aware that as a matter of procedure in applications for letters of administration in Fiji where more than one person is entitled to a grant the Probate Registry will not accept an application for letters of administration from one of the persons entitled without a deed of renunciation from the other person or persons entitled to a grant renouncing that person or person’s right to a grant. Counsel appearing for the parties in this appeal confirmed during the hearing that this was the usual practice.

[19] The Appellant in his written submissions filed before the hearing stated that the Appellant had been advised that the Respondents would need to renounce their rights as administrators in order for the Appellant to take out a grant for letters of administration².

[20] The Judge also appears to have recognised this requirement in the following exchange between the Judge and Counsel for the Appellant at the hearing.³

“His Lordship: You should know that’s why I said you come prepared to my Court. I ask a lot of questions. Ms. Vaurasi your

Ms Vaurasi: Ours is just an application that was

His Lordship: Yes, what is the number?

² p 133 HCR

³ Pp 182 and 183 HCR

Ms Vaurasi: *I'm just referring to*
His Lordship: ***The Deed?***
Ms Vaurasi: *I don't have the deed with me my Lord.*
His Lordship: ***Yes in fact the Deed was never signed?***
Ms Vaurasi: *Yes.*
His Lordship: ***I understand.***
Ms Vaurasi: *Because they need the deed of renunciation*
His Lordship: ***Yes.***
Ms Vaurasi: *So the complaint that we had lodged with the Registry is how is it that you demand the deed of renunciation no how is it that you did not demand the deed of renunciation from them? But as lawyers we know that a deed of renunciation is necessary, we don't want to get the hiccup."*

[21] The affidavits of the Appellant filed in support of the summons deposed to the fact that the Appellant had attempted to obtain deeds of renunciation from the Respondents to enable him to apply for letters of administration but that the Respondents had refused to sign the Deeds although they had earlier verbally agreed to do so. These facts are not in dispute.

[22] The Judge erred in not recognising that the Appellant had commenced the preliminary requirements in order to apply for letters of administration namely advertising his intention to apply and attempting to obtain deeds of renunciation from his siblings and was not able to apply for a grant of letters of administration without the deeds of renunciation hence the need for the application before him.

GROUND 3

[23] This ground relates to paragraph 25 above of the Decision where the Judge notes that the Appellant is the youngest of the three siblings and that he resides overseas. The Judge then goes on to state that "...it is always appropriate that an administrator/administratrix is appointed in a deceased's estate who resides within the jurisdiction to ensure comfortable administration and eradicate all difficulties in its disposition and able to fully administer the deceased's estate."

[24] The Appellant submits out that Section 7 of the Act does not give priority to the eldest of the surviving issue to apply for letters of administration nor does it give priority to

issue who are resident in Fiji over issue who are not. The Appellant contends further that the Judge's view is contrary to Section 28 of the Act which provides:-

“[SPA 28] Where person entitled to probate or administration is out of the jurisdiction

28 Where an executor or any person entitled to probate or administration is out of the jurisdiction but has some person within the jurisdiction appointed under power of attorney to act for him or her, administration may be granted to such attorney, but on behalf of the person entitled thereto, and on such terms and conditions as the court thinks fit, provided that nothing in this Act shall prevent the Court from granting probate to an executor who is out of the jurisdiction.”

[25] The Respondents on the other hand contended that the Act “appears to prefer” an administrator residing in the jurisdiction without pointing out which provision in the Act supports this contention.

[26] Further the Respondents contend that Section 28 requires a person entitled to administration who is out of the jurisdiction to have someone in the jurisdiction appointed under power of attorney to act for him or her and as the Appellant did not have an attorney at the time of the hearing therefore Section 28 did not apply.

Discussion

[27] The judge has not provided any authority or basis for this proposition expressed above. There is no priority given in the Act and particularly under Section 7 for the granting of Letters of Administration to an issue resident in Fiji over an issue resident outside of Fiji. Section 7 provides that all issue are equally entitled to apply for administration. Section 28 of the Act specifically recognises that a person resident outside Fiji may apply for a grant.

[28] The Respondents' argument above regarding a power of attorney does not have substance because the Appellant had not at the time of the hearing made an application for administration. He was seeking an order to allow him to file an application for administration without the Respondents' Deeds of Renunciation.

[29] I consider that the Judge has erred in law in reaching this finding and in relying on that finding to reach his decision.

GROUND 4

- [30] This ground relates to the finding of the Judge in paragraph 31 above of his Decision that an application for grant of letters of administration by the First Respondent in application 66572 was pending in the “Probate Registry” and the direction in paragraph 32 of his to the Senior Court Officer of the Probate Registry to process the First Respondent’s said application expeditiously “...to allow the First Respondent to carry out the full administration of the Deceased’s Estate in accordance with the law without delay.”
- [31] The Appellant submits that the Respondents’ application for letters of administration was not before the Court nor was it part of the documents made available to the Appellant. No documents relating to the application were annexed to the affidavit of the Respondents. The Judge therefore made the orders regarding the Respondents’ application for letters of administration without any documentary evidence of such before the Court.
- [32] Further the Respondents’ affidavit in opposition confirms that their application for administration was accepted by the Probate Registry without a deed of renunciation by the Appellant. This it is submitted by the Appellant “...constituted a failure to follow formal procedures and the Court should not have granted the Respondents letters of administration.”
- [33] The Respondents on the other hand contend that at the time of the Decision the Registry already had the Respondents’ application for letters of administration and that the application was “checked” by the Judge before he made his decision.

Discussion

- [34] The only evidence before the judge at the time of the hearing regarding the First Respondent’s application for letters of administration was in paragraph 8 of the First Respondent’s Affidavit in Opposition which stated:

“8. *I object to paragraph 1 of the Applicant’s Affidavit annexed as “ST 2” in the affidavit of Sevenaia Tabuakara and further state that I with the assistance of the 2nd Respondent have lodged an application for Letters of Administration on 26th October 2020 for my deceased mother’s Estate of **JOKAVETI MALANI aka JOKAPETI***

NABORI MALANI aka JOKAVETI NABOU MALANI aka JOKAVETI NABORI TAVUTO late of 11 Marau Place, Lautoka, Fiji, Retired, Deceased, Intestate. I ask the Court to take judicial notice of this. I was informed by the Registry that they will not process the application until a determination is made by this Court."⁴

And in paragraph 10 which states:

*"10.I further on wish to state that when I filed for letters of administration it was vetted by the registry and accepted without the need of a deed of renunciation."*⁵

[35] In written submissions filed by the Respondents in the matter on 08/11/21 the Respondents referred to Judicial Department Receipt # 589621 P# 66572 for the Application for Grant of Letters of Administration for the Estate of the late Jokapeti Malani and stated:-

"I, the 1st Respondent lodged an application for a Grant of Letters of Administration for my deceased mother's Estate. I applied in time so the application was vetted by the Registry and accepted without the need for a Deed of Renunciation. Ref. P# 66572: annexed "ATI" "

[36] Later in those submissions the Respondents stated:-

"We the Respondents humbly seek order and pray that:

1) The Court allow me, the 1st Respondent's application for Grant filed on 15th September 2020 and appoint me, as the Administratrix of our late mother's Estate. I would be representing her personally and be most suitable as I had applied in time."

[37] At the hearing the Judge questioned the First Respondent as to whether she had filed an application for letters of administration and when she said she had the Judge responds "Okay anyway I will tell my clerk to look for it."⁶

[38] The Judge did not indicate in his Decision whether he had viewed the application but made the statements set out above in his Decision that the First Respondent had filed an application for a grant of Letters of Administration in application No. 66572 and that the same was pending. He then made the direction in paragraph 32 of his Decision and the consequential order.

⁴ Page 41 HCR

⁵ Page 41 HCR

⁶ Page 183 HCR

- [39] It is this Court's view that the Judge has erred in law in doing so.
- [40] It is trite that a Court cannot make an order in proceedings without the substance of the order being properly pleaded or applied for. There was no cross summons or other application filed by the Respondents seeking this order to enable the Appellant the opportunity to properly respond. The purported application for Letters of Administration was not even exhibited before the Court to enable the Appellant to consider and make submissions on it.
- [41] The First Respondent had disclosed in her affidavit in opposition and again in her submissions that her application was accepted by the Probate Registry without the Appellant's Deed of Renunciation which on its face appears irregular.
- [42] The only application before the Judge was the Appellant's summons which sought an order allowing the Appellant to apply for Letters of Administration without the Respondents' Deeds of Renunciation.

Conclusion

- [43] For the reasons set out above the Appellants ground 2, 3 and 4 are successful and are determinative. It is not necessary therefore as stated earlier to consider ground 1. The appeal is allowed.
- [44] As concluded above the Judge dismissed this application for reasons this Court considers were made in error. That was not the end of the matter however. The Judge went on, again in this Court's view in error, without a formal application, to direct the Probate Registry to process the First Respondent's Application for Letters of Administration to allow the First Respondent to carry out administration of the deceased's estate without delay.
- [45] There is no evidence before this Court as to whether a grant was made however Counsel for both parties at the hearing of the matter indicated that a grant had been issued to the First Respondent. This leaves this matter in a difficult situation. It appears that Letters of Administration have been issued pursuant to an order made in error.

[46] The Appellant in his written submissions before this Court in addition to seeking orders that the Decision be set aside and costs seeks the following orders:

“An Order that the Respondents surrender the Letters of Administration for the Estate of Jokapeti Nabori Malani aka Jokaveti Nabori Tavuto of 11 Marau Place, Adams Street, Lautoka, Fiji.

An Order that the Respondents provide the Appellant and the Court with a Statement of Account for the Estate of Jokapeti Nabori Malani aka Jokaveti Nabori Tavuto of 11 Marau Place, Adams Street, Lautoka, Fiji, within 21 days.

An Order allowing and appointing the Appellant to be the Administrator for the Estate of Jakapeti Nabori Malani aka Jokaveti Nabori Tavuto of 11 Marau Place, Adams Street, Lautoka, Fiji.”

[47] This Court considers in the circumstances that justice would be best served by the following:-

- (a) The appellant be allowed 30 days to file an application for grant of letters of administration of the deceased’s estate without the Respondents’ Deeds of Renunciation.
- (b) Upon the filing of the application the matter is to be placed before another Judge in the High Court at Lautoka to consider both the Appellant and the First Respondents applications for letters of administration and determine to whom a grant should be issued. It is noted that Section 7 of the Act allows the Court to grant letters of administration to one or more of those entitled and also that Section 38 of the Act allows the Court to revoke an administration already granted. It is also noted that under Section 18(1)(e) of the Fiji Public Trustee Corporation Act 2006 the High Court has the power to appoint the Fiji Public Trustee Corporation Pte Limited as the executor or administrator of any deceased persons estate. Because of the predicament in which this matter has been left we consider it appropriate that if Letters of Administration have been granted to the First Respondent, those Letters of Administration be surrendered to the Probate Registry pending determination of this matter.

Tuilevuka, JA

[48] I agree with Morgan, JA's draft judgment.

Orders of the Court:

1. *The appeal is allowed.*
2. *The Decision of the High Court dated 08 February 2022 is set aside.*
3. *An application for Grant of Letters of Administration by Akuila David Antonio Qitokeimaorimailautoka aka Akuila Tavuto in the Estate of Jokapeti Nabori Malani aka Jokaveti Nabori Tavuto of 11 Marau Place, Adams Street, Lautoka, Fiji, Deceased, Intestate is to be filed within 30 days of this Judgment and the Senior Officer of the Probate Registry is directed to accept that application without Deeds of Renunciation from Anasaini Mareta Tavuto and Selina Tovaki Tavuto.*
4. *Upon the filing of the application referred to in 3 above, this matter is to be called before another Judge of the High Court in Suva to consider all applications for grants of Letters of Administration filed in respect of the deceased's estate and determine to whom letters of administration should be granted and to make such orders in relation to the deceased's estate as it deems appropriate.*
5. *The First Respondent is ordered to surrender any Letters of Administration in the deceased's estate heretofore granted to her to the Probate Registry.*
6. *In the circumstances, there is no order as to costs either in the High Court or in this Court.*



Hon. Mr. Justice Chandana Prematilaka
RESIDENT JUSTICE OF APPEAL

Hon. Mr. Justice Walton Morgan
JUSTICE OF APPEAL

Hon. Mr. Justice Anare Tuilevuka
JUSTICE OF APPEAL

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