

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

CIVIL ACTION NO. HPP 15 OF 2012
LA NO. 49604

IN THE ESTATE of CYRIL CEDRIC
BENJAMIN ANTHONY JOSEPH Intestate of
71-73 Rewa Street, Suva, Fiji

BETWEEN : **IMELDA MARY LOURDES GITA JOSEPH**

Plaintiff

A N D : **VIKATORIA VAKALOLOMA PUAMAU**

Defendant

BEFORE : **Hon. Justice Mayadunne Corea**

COUNSEL : **Mr. N. Lajendra for the Plaintiff**
Mr. A Sokimi for the Defendant (*On instructions- Patel
Sharma Lawyers*)

Date of Hearing : 8th October, 2013

Date of Decision : 20th March, 2014

DECISION

[1]. The Plaintiff has filed a summons for summary judgment.

[2]. This application is made pursuant to Order 14 Rule 1 and Order 27 Rule 3 of the High Court Rules of Fiji.

[3]. The Plaintiff is claiming her share from the estate of her late father. The defendant incidentally is her step mother who also has got the letters of administration pertaining to the estate of her late father. The plaintiff has valued her claim for a sum

of FJ\$30,000 on the basis that it should be her share from the sale of her later father's property.

Plaintiff's Case

- [4]. The plaintiff filed the writ of summons dated 6 July 2012.
- [5]. In her affidavit in support of the present application the plaintiff deposes that she is the daughter of one Cyril Cedric Benjamin Anthony Joseph and has attached her birth certificate marked "A" and that her father had passed away. The Letters of Administration of the Estate had been granted to the defendant.
- [6]. In 2009 the plaintiff's father had died, and on 2010 March 22nd the defendant had been granted with the letters of administration.
- [7]. The defendant has had 4 issues, but on 7th April 2010 they had renounced their rights on the estate in favour of the defendant. However the plaintiff had not transferred her rights to the defendant.
- [8]. On 1st November 2011 the defendant had sold the property. As the defendant failed to give her share plaintiff has filed this cause.
- [9]. In the statement of defence the defendant had pleaded a sum of FJ\$364,231.68 was utilized to pay the debts and cost of the estate. However the plaintiff had requested to have a breakdown of the accounts and the defendant had failed to submit the same. The plaintiff by letter marked "H" had sought for the accounts. The defendant's reply to this letter was marked as "I". The defendant had sought 21 days to submit the accounts. Plaintiff argues that since a precise figure of \$364,231.68 was pleaded as the money utilized to pay debts and cost of the estate. The defendant should have the accounts. Plaintiff further submitted to court that if not the defendant would not be in a position to give such an exact amount as debts and cost of the estate.
- [10]. As the defendant has admitted plaintiff's rights as an heir and a beneficiary of the estate and in the absence of any accounts or her share been given to her she has filed this claim.

[11]. The affidavit further deposes that the defendant had admitted her as a beneficiary and as the defence filed is a sham defence she is entitled to the claims in her writ of summons.

The Law

[12]. Order 14 Rule 1, deals with these applications.

[13]. Plaintiff is entitled to obtain relief if the defendant has no defence to the plaintiffs claim or if the defence submitted is a sham defence, which does not disclose any issues which are ought to be tried

[14]. This provision has been incorporated to prevent defendants who does not have bona fide defences but tries to delay litigation to prevent judgement in favour of the plaintiff.

[15]. The Law relating to summary Judgments is well settled in this jurisdiction and the principles that ought to be followed was laid down in **Carpenters Fiji Ltd –v- Joes Farm Produce Ltd.** (.....06) FJCA 60, ABU 0019U.2006 as per the principles laid down.

- a. *The purpose of O.14 is to enable a plaintiff to obtain summary judgment without trial if he can prove his claim clearly and if the defendant is unable to set up, **bona fide** defence or raise an issue against the claim which ought to be tried.*
- b. *The defendant may show cause against a plaintiff's claim on the merits e.g. that he has a good defence to the claim on the merits or there is a dispute as to the facts which ought to be tried or there is a difficult point of law involved.*
- c. *It is generally incumbent on a defendant resisting summary judgment, to file an affidavit which deals specifically with the plaintiff's claim and affidavit and states clearly and precisely what the defence is and what facts are relied on to support it.*

- d. *Set off, which is a monetary cross claim for a debt due from the plaintiff, is a defence. A defendant is entitled to unconditional leave to defend up to the amount of the set off claimed. If there is a set off at all, each claim goes against the other and either extinguishes or reduces it **Hanak v. Green (1958) 2 QB 9 at page 29 per Sellers LJ.***
- e. *Likewise where a defendant sets up a bona fide counter claim arising out of the same subject matter of the action, and connected with the grounds of defence, the order should not be for judgment on the claim subject to a stay of execution pending the trial of the counter claim but should be for unconditional leave to defend, even if the defendant admits whole or part of the claim. **Morgan and Son Ltd v. S. Martin Johnson Co (1949) 1 KB 107 (CA)**.*

[16]. When seeking summary Judgment, the onus is on the plaintiff to prove his claim clearly and, that the defendant is unable to set up a bona fide defence, with issues that ought to be tried for court to come in to a final conclusion, also that the defence submitted has no merit or prospect of success.

[17]. Once the plaintiff satisfactorily establishes his case then the onus shift to the defendant to show that his defence is a meritorious defence with issues that ought to be tried.

[18]. The defendant should establish this by adducing affidavit evidence and resist the summary judgment. **Megan Lal Brothers Ltd –v- L.B. Maston & Company** Civil Appeal 31/84. **Hibiscus Shopping Town Pty Ltd –vs- Woolworth Ltd (1993) FLR 106.**

[19]. In this instance the plaintiff has brought to the notice of court the Judgment of **Coral Surf Resort Ltd –v- Yam** (2010) FJHC 25, HBC 066.2008. The court has considered the said judgment too.

The Defence

- [20]. The defendants have filed their statement of defence dated 13 September and also an affidavit by the daughter of the defendant on behalf of her mother opposing the application for summary judgment.
- [21]. In the statement of defence it is stated that a sum of FJ\$364,231.68 had been utilised from the estate to pay the debts & cost of the estate. The defendant also has admitted paragraphs 1, 2, 3, 4, 5, 6, 8 of the Statement of Claim.
- [22]. In the affidavit opposing the application for summary Judgment the deponent deposes that the property has been sold for a sum of FJ\$450,000.
- [23]. Exhibit “B” annexed to the said affidavit dated 19.2.2013 submitted a copy of the accounts of funds raised from the sale of the property. It is pertinent to note as per annexure “B” the amount depicted as total expenditure amounts to FJ\$201,490.09 which creates a discrepancy from the sum stated in the statement of defence. It is also pertinent to note that the deponent has failed to depose an explanation as to how this difference arose. Even though that the deponent had deposed to say that instructions were given to make an appropriate affidavit to amend the statement of defence. No effort has been made to this effect.
- [24]. As per annexure “B” the defendant concedes that a sum of FJ\$2,612.21 is due to the plaintiff. The deponent has also deposed that the defendant was willing to pay the said sum to the plaintiff.

Analysis

- [25]. In the defence submitted, the defendant had admitted paragraphs 1-6 and 8 of the statement of claim.
- [26]. The Defendant by the documents submitted to court, has admitted that the plaintiff is a beneficiary in that estate and also that the property stated had been sold for a sum of FJ\$450,000.

- [27]. It is also noted by court that the defendant had obtained the letters of administration of the estate on 22nd February 2009 and the property had been disposed of in year 2011.
- [28]. However the defendant as the administratrix of the estate had failed to submit the accounts or to distribute the plaintiff share till 14 June 2012, despite the fact that the plaintiff's solicitors had made a request for the accounts.
- [29]. The defendant had specifically mentioned a sum in paragraph 4 of the statement of defence stating that it was the amount utilised to pay the debt and costs of the estate but still failed to submit a detailed statement of accounts.
- [30]. Even when the accounts submitted were challenged the defendant informed court that they don't have receipts to substantiate what they have submitted to court. In my view the administratrix is bound to submit the receipts when the accounts are challenged. Failure to do so demonstrates the lack of proper administration of the Estate.
- [31]. When the defendant submits a specific sum as the expenditure of the estate the defendant should have accounts to show the expenditure stated in the defence. The defendant cannot plead a hypothetical sum in a statement of defence submitted to court. However when the defendant filed a statement of accounts with the affidavit opposing summary judgment the amounts stated differed from what was stated in the statement of defence. The defendants were not in a position to substantiate the 2nd amount submitted to court with the statement of accounts pertaining to the estate. The defendants counsel in his submission informed that as required by the plaintiff they were not in a position to submit receipts for the sums stated in the statement of accounts.
- [32]. Even though it was not pleaded, the defendant in the oral submissions states that the plaintiff is not entitled to summary Judgment as her interest is a residual interest and her rights commence only after the completion of the administration of the deceased estate. However no evidence was submitted, nor is it pleaded that the administration of the estate is still not concluded. If this was the case the defendant should have pleaded it in the statement of defence. It has not been pleaded even in the affidavit, submitted in opposing the summary Judgment.

- [34] The defendants had cited the case reported in (1948) 1 All ER 274, however I decline to follow this case. The facts and circumstances differ in the present case, in the present case accounts are kept by the defendant. The defendant has to substantiate the accounts submitted to court. The defendant has pleaded a precise sum in the statement of defence but to substantiate the accounts, the receipts are not there. When the accounts submitted are challenged the onus of proving that the accounts are correct is with the defendant and he has failed to discharge it. Further it is observed by this court that the defendant has tried to delay the case rather than taking a genuine interest to submit the accounts to court.
- [35] It was submitted to court that before the commencement of the trial the defendant had sought 21 days to submit the accounts and receipts. Once the writ of summons was taken out the defendants again sought further 21 days to produce the receipts. When the case was before me the defendants counsel informed the court that they were not in a position to submit the receipts, to substantiate the entries in the statement of accounts submitted.
- [36] In this case, the defendant heavily relied on *contract discount Carpenters Ltd –v- Furlong and Others* (1948) 1 ALL ER 274 case. The accounts were submitted by the plaintiff and the defendants agreed only to a partial amount reflected in the said accounts. The onus of proving the accounts were on the plaintiff. However in present case the facts and circumstances differs. The defendant who is the administratrix of the estate has submitted to court a precise sum as the expenses of the estate. Thereafter when challenged on the accuracy of the figures in the accounts submitted, the defendant has failed to present any receipt to substantiate the amount stated.
- [37] When the account submitted by the defendant is challenged, the onus is on the defendant to produce the receipts and prove the accounts submitted. For the above stated reasons and as the facts differs in the present case before me I decline to follow the above case cited by the defendant.
- [38] Defendant also has relied on Sherani vs Jagroop [1973] FJ SC 3; [1973] 19 FLR 85 in support of his contention to say that the plaintiff as a residuary legatee will have no claim or right on the estate until the conclusion of the administration of the estate. However it was pointed out by the plaintiff to this court, that in the statement of

defence, the defendant has not pleaded that the administration of the estate is still not completed. As per documents submitted, the property has been sold in 2011. In the statement of defence a specific figure has been assessed as the expenses. For the defendant to submit a specific sum, the defendant should have the receipts and finalised the accounts of the estate. In the given circumstances of this case specifically in the absence of pleadings to say that the Administration of the Estate is still not completed, this argument of the defendant fails. For the aforesaid reasons I decline to follow **Sherani vs Jagroop**. As submitted by the plaintiff the defendant's last minute submission of the non conclusion of the administration of the estate is an afterthought. If that was the case that should have been pleaded in first instances as then this application becomes premature.

[39] Defendants had sighted the case reported in [1948] 1 ALL ER 274 as per that case. The accounts were to be determined by documents in the plaintiff custody. In the case before me the accounts were submitted by the defendants. The receipts and documents pertaining to the statements of accounts were kept by the defendant. The Defendant is the Administrator of the Estate. This is an instance where the defendant has submitted a precise sum in the statement of defence filed in this court and then has stated that she can't vouch for the correctness of the accounts by submitting the receipts. The onus of proving that the accounts are accurate and clear is on the defendant and she has failed to discharge it.

Conclusion

[40] In the statement of defence the Defendant had admitted that the plaintiff was a beneficiary and that the defendant was the Administratrix of the Estate of the Plaintiff's deceased father.

[41] The sale of the property to the value for FJ\$450,000 is admitted.

[42] The statement of defence does not plead that the administration of the estate is not concluded, nor does it plead that the plaintiff has no right to file the claim. It gives a precise sum as the expenses of the estate; but by the subsequent statement of accounts filed with the affidavit in opposing summary judgment defendant gives a much lower amount and contradicts defendant's own statement of defence.

- [43] Defendant has failed to give any explanation as to how a specific sum that had been pleaded in the statement of defence had now got reduced. When the amount was challenged by the plaintiff the defendant informed court that they were not in a position to submit receipts to prove the entries in the statement of accounts.
- [44] The defendant has failed to give an explanation as to why the proceeds of the sale of the property were not distributed despite the fact that it had been sold in 2011. She was statutorily required to do so. The court has given consideration to the judgment of **Kuari vs Narayan [2010] FSHC 571 Probate Action 27.2008** submitted by the plaintiff.
- [45] Also in the judgment of **Vosailagi v Mara [1992] FSHC 62; HBC 0569/91S** which clearly shows the responsibilities of the Administrator as a trustee to the beneficiaries in Quoting Ra Waters [1904] 99 sol. Jo 54. *“The duty of a trustee is three-fold: there is the duty to keep accounts, the duty to deliver accounts, and the duty to vouch accounts... The duty to keep accounts is an essential duty, he must keep such accounts so as to be able to deliver a proper account within a reasonable time showing what he has received and paid ...”* Accordingly this court comes to the conclusion that in the absence of supplying receipts for the amounts stated in the accounts submitted in annexure “B” of the opposing affidavit, the defendant has failed to vouch for the accuracy of the accounts stated therein.

Application of S 39

- [46] As per S39 of the succession, Probate and Administrator Act Cap 60 as amended by Act No. 12 of 1985, I think in this instance the administratrix is bound to submit to court, the accounts of administration of the estate with the receipts to substantiate.
- [47] As per the amendment and as to what transpired at the submissions I am of view that the defendant is bound to disclose to the court the receipts to substantiate the accounts when accuracy of the accounts are challenged.
- [48] In this case the plaintiff has clearly challenged the accounts and the accuracy of the statement of accounts. The defendant filed the accounts marked as annexure “B” without receipts for each and every entry in accounts. The defendant also informed the Court’s while making oral submissions that they were not in a position to hand

over the receipts for the entries depicted in the accounts submitted. Thus the defendant as the administrator has failed to produce the receipts for the accounts submitted to court.

[49] Without pleading in the affidavits, the defendant from the bar table submitted to court to order or inquire for the accounts to be taken in open court. However in the absence of a formal application submitted to court, in my view this application has no merit.

[50] I am also of the view that this is a further delaying method of the defendant. As per the material submitted to this Court it is amply clear that the defendant had failed to keep proper accounts and had failed to give the accounts or the plaintiff's entitlement as beneficiary to the plaintiff, which has forced her to come to court.

[51] Once the matter was before courts the defendant submitted two contradictory amounts as the debts and costs paid from the proceeds of the estate.

[52] When the entries in the accounts were challenged the defendant informed that they were not in a position to submit the receipts to prove the accounts submitted. When the plaintiff challenged the accounts submitted, the defendant had a duty to disclose the detailed accounts substantiated with documents. The defendant had failed to prove the accuracy of the entries submitted.

[53] After giving careful considerations to the material before this Court and the submission made, I am of the view that the Defence filed in this case lacks merit and failed to raise issues ought to be tried and therefore becomes a sham defence.

[54] For the above stated reasons and in view of the particular nature of this case, I conclude that the plaintiff is entitled in this instance for summary judgment. I am also of the view that the defendant has failed to substantiate the entries in the account filled by submitting individual receipts and in view of the two contradictory sums stated as the payment due from the deceased's estate plaintiff is entitled to the amount claimed.

[55] In the summons filed to enter summary judgment the plaintiff has pleaded for an interest of 13.5% from 1.12.11 till the full payment of the judgment sum. However at

the hearing plaintiff failed to demonstrate as to how the plaintiff arrived at such on high interest rate. Accordingly the court using its discretion awards interest at 3% from the date of filing this action to the date of this decision.

[56] I also conclude that the plaintiff is not entitled for cost on indemnity basis, but plaintiff is entitled for some cost in this case.

[57] Accordingly I make following orders;

1. *Judgment in the sum of FJ\$30 000 in favour of the plaintiff.*
2. *Interest on the judgment sum at 3% per annum from the date of filing of the writ of summons to the date of the decision.*
3. *Cost in favour of the plaintiff summarily assessed at FJ\$600.*

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Mayadunne Corea
JUDGE

20.3.14