IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 171 OF 2013

BETWEEN : **SHASHI KANTA** and **ASHWEETA ASHNI** both of Wailailai, Ba, Domestic Duties and School Teacher respectively.

PLAINTIFFS

AND : **MUNIAMMA** as the sole executor and trustee of the estate of Krishna Sami of Wailailai, Ba, Domestic Duties.

DEFENDANT

RU L I NG

[1]. The issue has arisen as to whether or not the plaintiffs in this case have locus to institute these proceedings by originating summons. The plaintiffs, who are mother and daughter, are claiming an equitable interest over a particular portion of CT No. 11322 which now vests in the defendant by virtue of the last will and testament of the late Krishna Sami. CT 11322 has a total area of 7 acres. The plaintiffs are claiming a small portion only of the land on which their home is built. They do not specify the details (location or the size of the portion they are claiming). The defendant, Muniamma, is the surviving spouse of the late Krishna Sami.

[2]. The plaintiffs' case is premised on the allegation that whilst Krishna Sami was still alive, he did give his son Shiu Sami the portion of land in question. Based on that, Shiu Sami then built a 3-bedroom house on the parcel of land in question.

[3]. It appears to be common ground between the parties that the said land was indeed given by Krishna Sami to Shiu Sami. Where the parties differ is whether or not the land was given to Shiu Sami to have, completely, or during his lifetime only.

[4]. Krishna Sami's last Will and Testament bequeaths nothing to Shiu Sami.

[5]. The plaintiff's however seek inter alia a declaration that they do have an equitable interest and or equitable share in CT 11322. During submissions,

Mr. Maopa, upon my query, submitted that the plaintiffs are really claiming an interest pursuant to the equitable estoppel claim that arises from Krishna Sami's "arrangement" with Shiu Sami. I say "arrangement" because the details of it are not set out with sufficient particularity in the plaintiff's affidavit.

[6]. In effect, the plaintiffs' claim on equitable estoppel, if successful, will hold Krishna Sami's estate liable to make good the promise that he (Krishna Sami) allegedly made to the late Shiu Sami way back when. The burden is extremely high on the plaintiffs to establish that considering that Courts, as a matter of principle, will adopt a cautious approach when dealing with contested claims against an estate because of the need to carefully scrutinise claims based on alleged promises or representations by deceased persons.

[7]. As I said, the material on the affidavit before me do not seem to come close to meeting that threshold.

[8]. Apart from the above, the more immediate issue I have to consider is whether or not the plaintiffs have locus to institute these proceedings. It appears to be common ground between the lawyers, and I agree, that the proceedings are irregular because the plaintiffs have not brought the claim as beneficiaries of the estate of the late Shiu Sami. But is that irregularity curable?

[9]. The basic rule is that a person who claims on behalf of an intestate's estate must first obtain a grant of letters of administration before he can file proceedings. Otherwise, his originating process will be null and void and that nullity will not be curable by amendment. In **Balekaba v Jagdish** **[2013] FJHC 555; HBC111.2012 (16 October 2013)**

> **LETTERS OF ADMINISTRATION IS THE AUTHORITY TO SUE AS "ADMINISTRATOR"**
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> [4]. A person who claims on behalf of an intestate's estate must first obtain a grant of letters of administration before he can file proceedings. Otherwise, his writ and claim will be null and void, and that nullity will not be curable by amendment. This is so because an administrator derives his title to sue from the grant of letters of administration. Because of this, he cannot institute proceedings without grant.
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> [5]. In contrast, an executor derives her title to sue from the Last Will and Testament of the testator, rather than from the grant of probate. Courts have long recognised that the executor's entitlement to sue actually crystallizes upon the testator's death. In other words, she can sue even before probate is granted to her because all rights of action of

the testator vests in her (executor) upon the testator's death. But it must be remembered that she cannot obtain a Court Order without grant because the Rules require her to prove her title-by probate, at the hearing, before a decree can even be considered[2].

[6]. Lord Parker in delivering the advice of the Judicial Committee in **Chetty v. Chetty [1916] 1 A.C. 603, 608**, explains the underlying rationale:

> *It is quite clear that an executor derives his title and authority from the will of his testator and not from any grant of probate. The personal property of the testator, including all rights of actions, vests in him upon the testator's death, and the consequence is that he can institute an action in the character of executor before he proves the will. He cannot, it is true, obtain a decree before probate, but this is not because his title depends on probate, but because the production of probate is the only way in which, by the Rules of the Court, he is allowed to prove his title. An administrator, on the other hand, derives title solely under his grant, and cannot, therefore, institute an action as administrator before he gets his grant. The law on the point is well settled (my emphasis).*
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> *(see also **Ingall v Moran [1944] 1 AER 97; Millburn-Snell and others v Evans [2011] EWCA Civ 577; [2011] WLR (D) 179**) **[2012] 1 WLR 41**[3].*

[7]. Luxmore L.J. in **Ingall v Moran** at page 167 to 169 said:

> *It is...well established that an executor can institute an action before probate of his testator's will is granted, and that, so long as probate is granted before the hearing of the action, the action is well constituted, although it may in some cases be stayed until the plaintiff has obtained his grant. The reason is plain. The executor derives his legal title to sue from his testator's will. The grant of probate before the hearing is necessary only because it is the only method recognized by the rules of court by which the executor can prove the fact that he is the executor...there is no doubt that both at common law and in equity, in order to maintain an action the plaintiff must have a cause of action vested in him at the date of the issue of the writ...It is true that a person who ultimately becomes an administrator may start proceedings in the Chancery Division for the protection of the intestate's estate, and can obtain in a proper case interim relief by the appointment of the receiver pendente grant, but in all such cases the person who institutes such proceedings has a beneficial interest in the intestate's estate, for he would not obtain a grant unless he had such an interest either as heir at law or as one of the next of kin or as a creditor. In such cases the well recognized practice in the Chancery Division is to endorse the writ in the first instance for the only relief then obtainable, namely, the appointment of a receiver pendente grant, and to apply to amend the writ after the grant has been obtained, if further relief is required, by adding a claim for administration of the estate with or without specific directions with regard to any special relief required.*
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> *(my emphasis)*

IT IS THE COURT THAT GIVES THE AUTHORITY TO SUE AS ADMINISTRATOR

[8]. To reiterate, the grant of letters of administration is the only valid authority from which an administrator derives capacity and locus to sue on behalf of the estate. Having said that, it must then be noted that a grant of letters of administration is actually given by the High Court of Fiji (section 7 Succession, Probate and Administration Act (Cap 60).

[9]. In Fiji, grants of Letters of Administration are issued under the hand of the Chief Registrar of the High Court and the Seal of the High Court (see Notice LN 104/45 WEF 4 May 1945)[4]. Hence, there is every reason to say that it is the High Court of Fiji that grants that authority to sue in the capacity of an administrator and that the administrator acquires standing and locus by virtue of his being appointed so by the High Court of Fiji.

[10]. In **Williams, Mortimer & Sunnucks on Executors, Administrators and Probate**[5] at paragraphs 8-10, the learned authors reiterate the point thus:

> *...an executor may perform most of the acts pertaining to his office, before probate. However, for an administrator, the general rule is that a party entitled to administration can do nothing as administrator before letters of administration are granted to him. <u>This is because he derives his authority entirely from the appointment of the court</u>... After his appointment, he has the same rights and liabilities and is accountable as if he were the executor*
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> *(my emphasis)*

[11]. That the court is the appointing authority was explained by Scott LJ in **<u>Ingall v Moran</u>** at (164-165) as follows at (164-165):

> The cause of action arose, and was vested in the deceased lad, at the moment when he was injured, and the measure of his damages included fair compensation for such loss of expectation of life as was caused to him by the defendant's tort. That chose in action was his. <u>To it the common law maxim **"Actio personalis moritur cum persona"** would have applied on his death but for the Act of 1934 which caused it to survive. If he had left a will, it would at the moment of his death automatically have vested in his executor. As he died intestate, it vested in the President of the Probate, Divorce and Admiralty Division, and remained in him until letters of administration were issued. Then - and not before - it would automatically pass from the President to the administrator.</u> As the writ was issued on September 17, 1942, and there was no grant till November, it follows, necessarily, that at the time of writ issued the plaintiff had no shadow of title to his son's surviving chose in action, in respect of which he purported to issue a writ, falsely (although no doubt quite innocently) alleging that he issued it as administrator. It purported to launch a representative action under Or. III, r. 4 - an action in which he confessed, first, that he was not suing in his own right, and, secondly, that he had no right in that action to prosecute any claim except in his representative capacity.

<u>PROCEEDINGS ON BEHALF OF AN INTESTATE'S ESTATE WITHOUT GRANT – AN IRREGULARITY</u>

[12]. Following from the above, any proceeding commenced purportedly for and on behalf of an intestate's estate when no letters of administration had been granted by the High Court of Fiji, will be irregular because the court, which is the source of that authority from which the claimant is to derive capacity and locus, has not yet conferred that authority, by appointment, upon the claimant.

[13]. This seems to be the position taken by the Courts in Fiji[6] based on various English decisions (see **<u>Chetty v. Chetty</u> (1916) A.C. 603; <u>Ingall v Moran</u>** (supra) **<u>Finnegan v. Cementation Co. Ltd</u>**[7] **[1953] 1 Q.B. 688 CA;** see comments of Luxmoore and Scott LLJ below). But is that irregularity curable?

<u>IS THAT IRREGULARITY CURABLE</u>?

[14]. The English Court of Appeal, recently, in the case of **<u>Millburn-Snell and Others v. Evans</u> [2012] 1 WLR 41**, reaffirmed the position in **<u>Ingall</u>** that any writ issued purportedly for and on behalf of an intestate's estate without grant is an incurable nullity. Lord Neuberger MR (at paragraph 16) said:

> I regard it as clear law, at least since **<u>Ingall</u>**, that an action commenced by a claimant purportedly as an administrator, when the claimant does not have that capacity, is a nullity. That principle was recognised and applied by this court in **<u>Hilton v. Sutton Steam Laundry</u> [1946] KB 65** (per Lord Greene MR, at 71) and **<u>Burns v. Campbell</u> [1952] 1 KB 15** (per Denning LJ, at 17, and Hodson LJ, at 18). In **<u>Finnegan v. Cementation Co. Ltd</u> [1953] 1 QB 688, Jenkins LJ... at 700**....

[15]. The reasons why the irregularity is considered a nullity and why the nullity is considered incurable are not clear to me at this time. It appears though from the cases that the only way by which the nullity could be cured is if the **doctrine of relation back** was so applied to remedy the irregularity. However, the Courts have never applied the doctrine to remedial effect.

[16]. The doctrine has long been applied by English Courts to enable them to relate a grant of administration back to the time of death to prevent injury to the estate[8]. But, as stated, although "retroactivity" is at the very heart of the application of the doctrine, the courts have never applied it to validate a pre-grant court action commenced by the (subsequent) grantee purportedly as administrator[9].

[17]. Suffice it to say that, as such, the courts have been unwavering in the view that the irregularity is an incurable nullity. Hence, neither the writ nor the statement of claim can be amended to convert the action into a valid action by, for example, changing the capacity in which the plaintiff is indorsed on the writ. Scott LJ expresses the following sentiments in **Ingall** at (164-165):

> Such an action was, in my opinion, incapable of conversion by amendment into a valid action - just as much so as if he had issued a personal writ claiming to be lawfully possessed of the estate of the deceased and had subsequently asked leave to amend by substituting a representative claim. It is true that when he got his title by the grant of administration he prima facie became entitled to sue, and could then have issued a new writ, but that was all. An application by him to treat the original writ of September 17 as retrospectively valid from that date would have been refused by the court, not only because it might prejudice existing rights of defence, but because it would not be permissible under the Rules of the Supreme Court or the Judicature Acts. The old writ was, in truth, incurably a nullity. It was born dead and could not be revived. If that conclusion is right it follows equally that the statement of claim was not delivered in any action recognized by the Rules of the Supreme Court, and all subsequent proceedings in the supposed action, including the judgment of the learned county court judge, were likewise nugatory, for, if the action and the pleadings were bad, there was no valid action before the learned judge to try and it is our duty to say so.

[18]. The Australian High Court[10] and the High Court of Ireland[11] have both expressed similar views.

[19]. Hence, the only option for a claimant for an intestate's estate who obtains, subsequent to filing proceedings, a grant of letters of administration, is to file fresh proper proceedings. This will not be a problem if the claim is still within the Limitations Act.

[10]. I think the above statements apply equally to proceedings which are begun by Originating Summons. For the record, Mr. Maopa relies on **Baro v Mati** [2013] FJHC 362 HBC 92 .2009 (31 July 2013) but that case concerns Order 15 Rule 7 which deals with action against a deceased person where no grant of probate or administration has been made. This case before me is different.

[11]. I note at paragraph 7 of the affidavit sworn by the 2nd plaintiff that:

> No one has taken the probate for the estate of my father (i.e. Shiu Sami).

[12]. If the above means that the late Shiu Sami did leave a Will but for which the appointed executor/trustee has not taken probate, then the proceedings in this case, although irregular, are curable, in light of what the authorities say above.

[13]. In the circumstances, I will require from the plaintiffs a further affidavit clarifying the point whether the late Shiu Sami did leave a Will or not. If he did, and assuming either of the plaintiffs is the duly appointed executor/trustee under that Will, then I will make appropriate directions on how the case should proceed.

[14]. Otherwise, if the late Shiu Sami did not leave a Will, I will have to strike out the Originating Process on the next occasion.

[15]. The case is adjourned to **17 April 2014 at 10.30 a.m.** before me. Costs reserved.

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Anare TUILEVUKA
<u>JUDGE</u>

28 March 2014.