IN THE HIGH COURT OF FIJI AT SUVA

PROBATE JURISDICTION

Civil Action No. 143 of 2011

BETWEEN : **SALOCCHNA LATA & MALTIK KUAR CHAND** both of 2/8 Hilltop Road, Manukau, Auckland, New Zealand, International Banking Consultant and Retired respectively as the executor/rix and trustees in the Estate of Tilak Ram.

PLAINTIFFS

AND : **BAL CHAND** of Opposite Engineers Army Camp, Cunningham Road, Suva, Self Employed.

1st DEFENDANT

AND : **LEKH RAM** of Lot 14 Nabitu Place, Caubati.

2ND DEFENDANT

BEFORE : **Justice Deepthi Amaratunga**

COUNSEL : **Mr. R. P. Singh for the Plaintiffs**

1st Defendant appearing in person assisted by a friend.

No appearance for 2nd Defendant

Date of Hearing : **3rd and 6th February, 2014**

Date of Decision : **13th February, 2014**

J U D G M E N T

Catch Words
Forgery- Will- Burden of proof- expert witness-indemnity cost

INTRODUCTION

1. The Plaintiff instituted this action seeking a declaration that the Will dated 15th July 2010 is a forgery and the caveat lodged by 2nd Defendant be removed and the Will dated 10th May, 2007 is admitted as the true and correct Will of the late Tilak Ram. The

1st Defendant admits the earlier will of the deceased made in 2007, but states that by alleged subsequent will made in 2010, the deceased repealed the earlier will made in 2007. The purported will of 2010 was made just 5 days prior to the demise of late Tilak Ram.

2. The 2nd Defendant was made a party to the action since a caveat was lodged by him. Though the writ of summons was served, according to the affidavit of service filed in record, no acknowledgment of service was filed, hence no appearance against the 2nd Defendant, and no proof of caveatable interest and it should be removed forthwith.

3. The 1st Defendant in the paragraph 1 of the statement of defence admitted the will made on 10th May, 2007. So, there is no need to prove the said Will by the Plaintiffs. By that admission the 1st Defendant had also admitted the authenticity of the signature of the testator of the said will, namely late Tilak Ram. The burden of proof is with the Plaintiffs to prove that the alleged will dated 15th June, 2010 is a forgery to obtain judgment in favour of the Plaintiffs.

4. The first witness for the Plaintiff was an official witness who explained why a probate was not granted regarding the estate of Tilak Ram. She marked the two competing applications seeking probate filed by the Plaintiff and the 1st Defendant, and also three caveats filed by parties to this action preventing the issue of probate in the estate of late Tilak Ram. The two competing applications for probate under file Nos 50465 and 50425 were marked P1 and P2 respectively. P1 contained the will made in 2007 and P2 contained the purported subsequent will made in 2010, which according to the Plaintiff is a forgery.

5. The Plaintiff called Maltik Kuar Chand who is also a joint trustee/executor and a beneficiary of the will made in 2007. In her evidence she explained that late Tilak Ram lived with her and her extended family for a long time while in Fiji as well as in New Zealand after she and her family decided to migrate to NZ. When the court inquired as to

the relationship with the deceased she stated that she was the 'mother' of the deceased. Though in fact she was only a close relative and not the biological mother of late Tilak Ram, this indicate the close relationship she had with the deceased. In her evidence she also stated that when she and her family migrated to New Zealand late Tilak Ram followed them even to New Zealand and had in fact continued to live with them, doing business there till his visa got expired, and could not be extended further that resulted the return to Fiji. The witness also stated that prior to the departure to Fiji, Tilak Ram desired she and Salochna Lata to look after his properties and the will dated 10.05.2007 was made by the deceased. The witness stated that she is not very conversant in English, and could not read the names of the witnesses who had signed said will.

6. Maltik in her evidence explained the circumstances under which the 2007 Will was made by the late Tilak Ram. The deceased had lived in New Zealand with Maltik's family and also had a business in the construction industry but he was compelled to return to Fiji after his visa was not extended. According to said witness, he had stated to her that he was making the will before returning to Fiji since she should look after the properties if he dies there. By this time he would have been approximately 59 years old and making a will under the circumstances is justified. In the said will made in 2007 said Maltik is made as one of the two joint executors and this can also be understood by the evidence before the court. She also explained how she and the deceased along with the co-trustee went to a solicitor's office in New Zealand to make the last will of the deceased. Though this witness was subjected to cross-examination by the 1st Defendant with the assistance of his Mackenzie friend[1] the credibility of the witness was not shaken.

[1] *McKenzie v. McKenzie [1970] 3 WLR 472; [1970] 3 All ER 1034, CA head note -Any person, whether he be a professional man or not, may attend a trial as a friend of either party, may take notes, and may quietly make suggestions and give advice to that party – Davies LJ in the said case applied Collier v Hicks (1831) 2 B & Ad 663, 9 LJOSMC 138, 109 ER 1290, 3 Digest (Repl) 356, 48 where In the course of giving the first judgment in that case, Lord Tenterden said ((1831) 2 B & Ad at 669):*
'Any person, whether he be a professional man or not, may attend as a friend of either party, may take notes, may quietly make suggestions, and give advice; ***but no one can demand to take part in the proceedings as an advocate, contrary to the regulations of the court as settled by the discretion of the justices****.'(emphasis is mine)*

7. On behalf of the Plaintiff Suman Lata who is a daughter of Maltik gave evidence and vividly explained the close relationship she and her family had with the deceased. She said that she had lived with late Tilak Ram till she got married and he was 'an elder brother' to her and though she also had a brother, when she and her sister got married both of them were given away by late Tilak Ram, according to the Hindu tradition, and this speaks volumes of the very close relationship deceased had with the family of Maltik Kuar. These facts were not challenged by the 1st Defendant in the cross examination. Suman Lata also stated that late Tilak Ram was not very close to his siblings or his immediate family, according to her deceased had a special liking for Dilip Chand and Angila Devi, among his siblings. She also stated that the deceased did not like 1st Defendant at all and in fact stated that he was the trouble maker in the family and had expressed his reservations about him. She stated that the deceased would never have appointed such a person as the sole executor of his estates as evinced in the purported will date 15.7.2010. In her evidence she also stated that 1st Defendant did not know the place where the deceased lived, at the time of death and had asked from others, hence the circumstances in which the said will dated 15.7.2010 came in to being raised an eye brow. The fact that 1st Defendant did not know Tilak's house was never challenged either by cross-examining or through his evidence. According to her the news of this purported will dated 15.7.2010 had come only 2-3 moths after the demise of late Tilak Ram and she also expressed her concern of all the circumstances and said that she is suspicious of the authenticity of the will. She also stated that though she is not an expert on handwriting, she had seen the signatures of the deceased and the signature on the purported will of 2010 is different from his usual signature.

8. The Plaintiffs called a forensic expert witness[2] to compare the signatures of the deceased with the signatures in the two wills. This evidence was not challenged and a report was

[2] *Halsbury's Laws of England VOLUME 28 (2010) 5TH EDITION, PARAS 452-962)/10. EVIDENCE AND WITNESSES/(14) OPINION AND EXPERT EVIDENCE/608.(electronic version Lexis data base) Duty of expert witnesses to assist the court -Expert witnesses have an obligation to assist the court. They must remain objective and express only genuinely held opinions which are not biased in favour of either party R v Maguire [1992] QB 936, [1992] 2 All ER 433, CA; R v Ward (Judith) [1993] 2 All ER 577, 96 Cr App Rep 1, CA; R v Harris [2005] EWCA Crim 1980, [2006] 1 Cr App Rep 55, [2005] All ER (D) 298 (Jul).Halsbury's Law of England ; VOLUME 28 (2010)*

also submitted marked P 25 and the latest passport of the deceased which was obtained about one month prior to the death was also examined prior to the oral testimony of the said expert. She had the opportunity to examine the original wills and the other original signatures of the deceased contained in the marked documents, and the expert witness while confirming the signature in the P1 namely the will dated 10.05.2007 had rejected the authenticity of signature contained in the will dated 15.07.2020.

THE ANAYSIS

9. The will dated 10.05.2007 is admitted in the paragraph 1 of the statement of defence of the 1st Defendant. Presumably, the making of the will and the signature is not in question at this trial because of this admission by the 1st Defendant. The 1st Defendant's contention is this earlier will was repealed by the purported will dated 15.7.2010 The expert witness gave evidence confirming that the signature contained in the will made in 2007 as genuine signature of the deceased. While giving reasons for her conclusions she stated the pictorial similarities and also stated that it was written fluently and also there were not 'pen lefts'. She explained that pen lefts occur when the pen was taken on and off frequently indicating copying or some kind of simulation of the signature by another person. In sharp contrast to this, the signature found in the will dated 15.07.2010, had lot of 'pen lefts' and stated that apart from the inverted 'v' shape of the signature which is prominent in all signatures, the other characteristics of the signature of the said will of 2010, also lacked pictorial similarities. So even the pictorial similarities were limited to the said inverted 'v' shape part of the signature. The court can accept expert evidence for assistance of special sciences, including the hand writing experts or forensic experts, but they are only assisting the court in submitting their reports and conclusions and the court needs to properly evaluate such evidence with facts and circumstances to arrive at a determination of the issues before court.

5TH EDITION, PARAS 452-962)/10.EVIDENCE AND WITNESSES/(14) OPINION AND EXPERT EVIDENCE/608. Halsbury's Laws of England (2009) Vol 11 Duty of expert witnesses to assist the court

10. There is no issue of proving the will dated 5.10.2007 as it was admitted by the Defendant. The issue is the authenticity of the purported will made five days before the death of late Tilak Ram in 2010. According to the Plaintiffs it is a forgery. Maltik and her daughter in the evidence stated that signature in the subsequent will is a forgery. The expert witness after examining the genuine signatures and the purported will made in 2010 said that the signature on that will was either copied by someone else or not written by the deceased in the usual manner. Though the expert witness was called by the Plaintiffs, her finding and testimony before court was objective and scientific in her conclusions, and without bias. In her evidence she gave reasons for her conclusions and findings, objectively.

11. Suman Lata in her evidence vividly described the traits, attributes and behavior of the deceased. She said that for all his business dealings late Tilak Ram had consulted only one lawyer and his name was Suruj Sharma of Patel and Sharma Lawyers at Suva. In support of that she marked number of legal documents prepared by this lawyer. These facts were again not challenged in the cross-examination and 1st Defendant did not produce a single document to the contrary. On the balance of probability the evidence is overwhelming, that the deceased consulted Mr. Suruj Sharma for all his legal matters. She said that this lawyer was a distant relative of late Tilak and had told her that some efforts were made by the family of the deceased, at the last moments of his life, to attest a will of the deceased and he had refused such request since the deceased could not comprehend when the said lawyer visited late Tilak, upon the said request of his family members. The witness did not reveal who had made such a request to said lawyer. Though this part of the evidence is hearsay as to the actual happening of the incident the fact that such a statement was made by the lawyer is not hearsay. Again this evidence was not challenged by the Defendant. There was no reason for the lawyer to fabricate such a story, and Suman Lata's evidence can be accepted as true. In the proper analysis of the evidence the fact that such an incident was stated by the lawyer , can be accepted and it also supports the contention that the 2010 will was a not made by the deceased while he could understand the things properly. When he was alive he had consulted only one

lawyer, hence if he was conscious it is highly improbable not to engage the same lawyer or even another lawyer for a vital document such as revocation of a last will made in New Zealand in 2007 before a solicitor.

12. According to Maltik and Suman the deceased had made the Will dated 10.5.2007 since the deceased desired her mother to administer the properties in an event of a death, and according to the evidence after making the will he had not returned to NZ. The time of return to Fiji from New Zealand and making of a will before returning can be accepted upon the circumstances. Though the deceased came to Fiji he was in contact with Maltik and her family. Late Tilak had also indicated that he was sick to Maltik, but did not want her to visit Fiji since she was also sick and old. In such a circumstance there was no reason for the deceased to revoke the will dated 10.5.2007. In the said will the deceased had bequeathed equal sums to his siblings including the 1st Defendant and in the purported will made in 2010 the sole beneficiary and the executor is 1st Defendant. There was no evidence for such a complete change of mind of the deceased, specially considering that deceased was unable to explain the circumstances that resulted in the making of purported will and or how he was able to find it. No one gave evidence for the Defendant. Though the trial lasted only 2 days there sufficient time to call any witnesses for Defence.

13. According to the evidence of Suman Lata the relationship between the 1stDefenant and the deceased was not very favourable and this evidence was also not challenged through cross-examination or when the 1st Defendant gave evidence. In the proper evaluation of evidence the evidence of Suman Lata can be accepted and it is highly improbable for the deceased to bequeath all the properties to one person when he had about more than a dozen of siblings, and that was also to a person he least associated and a person who was unaware of the house of the deceased.

14. The 1st Defendant who gave evidence did not explain the circumstances under which he was able to find the said will. He did not state that he was present at the time of the

making of the said will in 2010 and he did not call any witnesses of the purported will. He did not obtain any expert report regarding the authenticity of the signature contained in the said will. The 1st Defendant was unable to state when the deceased suffered a stroke.

15. The hand writing expert excluded the differences of the signature to the said sickness namely the stroke on two grounds. Firstly, on the available evidence the deceased had suffered a stroke only about 3 days prior to the death and the purported will was made 5 days before the death, indicating that the deceased had not suffered a stroke at the time of the making of the said document. Secondly, if the signature was placed after the stroke, the overall deterioration of the quality of the formation of the signature will be seen as against 'pen lefts' and lack of pictorial similarity. The forensic expert stated that she had examined the signatures of the persons who suffered strokes number of times as a forensic expert. The expert witness also compared the signature of the passport marked P26 which was made about 6 weeks prior to the death of late Tilak Ram since it was the latest signature, that was available for her to examine and compared it with the will made on 15.7.2010.

CONCLUSION

16. On the preponderance of evidence, the purported will made on 15.7.2010 is a forgery. There is no reason or circumstances on which the deceased to entirely change his prior will and bequeath everything to 1st Defendant. The unchallenged evidence of the expert witness corroborate that the purported document dated 15.7.2010, just five days prior to the death, is nothing but a forgery. The lethargic attitude in the conduct of the 1st Defendant in this case also indicate the strength of his defence. The 1st Defendant was able to delay the grant of probate on a forged document. He did not explain the circumstances on which he found this document or the making of the said document. In the circumstances the 1st Defendant had abused the process of the court by having the knowledge or have reasonable grounds to know that this document was a forgery.

COSTS

1. Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION, PARAS 1-1108; VOLUME 12 (2009) 5TH EDITION, PARAS 1109-1836)/26. COSTS/(2) GENERAL RULES ABOUT COSTS/(ii) Assessment of Costs/1747. **Basis of assessment** states as follows

(ii) Assessment of Costs

1747. Basis of assessment.

"Where the court[1] is to assess the amount of costs[2] (whether by summary[3] or detailed assessment[4]) it will assess those costs on the standard basis or on the indemnity basis, but the court will not in either case allow costs which have been unreasonably incurred or are unreasonable in amount[5]. Where the amount of costs is to be assessed on the standard basis, the court will only allow costs which are proportionate to the matters in issue[6] and will resolve any doubt which it may have as to whether costs were reasonably incurred or reasonable and proportionate in amount in favour of the paying party[7]. Where the amount of costs is to be assessed on the indemnity basis[8], the court will resolve any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party[9].

Where the court makes an order about costs without indicating the basis on which the costs are to be assessed or makes an order for costs to be assessed on a basis other than the standard basis or the indemnity basis, the costs will be assessed on the standard basis[10]." (foot notes excluded)

Foot note 8 to the above passage deals with indemnity costs and states as follows:

'8 The award for costs on the indemnity basis is often, but not always, reserved to cases where the court wishes to indicate its disapproval of the conduct of the paying party. **Indemnity costs** may be awarded against a party whose conduct has been unreasonable, even though the conduct could not properly be regarded as lacking moral probity or deserving moral condemnation: ***Reid Minty (a firm) v Taylor*** [2001] EWCA Civ 1723, [2002] 2 All ER 150, [2001] All ER (D) 427 (Oct); explained in ***Kiam v MGN Ltd*** *(No 2)* [2002] EWCA Civ 66, [2002] 2 All ER 242, [2002] All ER (D) 65 (Feb). The thrust of the CPR regime is to require the parties to behave reasonably towards each other: ***Baron v Lovell*** [2000] PIQR P20, (1999) Times, 14 September, CA (late service of expert's report). **Indemnity costs** are not intended to be penal but compensatory: ***PetrotradeInc v Texaco Ltd*** [2001] 4 All ER 853, [2002] 1 WLR 947,

CA; ***McPhilemy v Times Newspapers Ltd*** *(No 2)* [2001] EWCA Civ 933, [2001] 4 All ER 861, [2002] 1 WLR 934. See also ***Kiam v MGN Ltd*** *(No 2)* [2002] EWCA Civ 66, [2002] 2 All ER 242, [2002] All ER (D) 65 (Feb), where it was held that the refusal of a settlement offer would rarely attract an adverse order for costs on the indemnity rather than the standard basis; ***MGN Ltd v Holborn*** [2002] All ER (D) 176 (Apr), where Jacob J held that the defendant had behaved unreasonably and that an award of **indemnity costs** was appropriate; ***Craig v Railtrackplc (in railway administration)*** [2002] EWHC 168 (QB), [2002] All ER (D) 212 (Feb) (defendants' approach in taking five years to resolve the liability issue unreasonable, considering that it was certain that at least one of the defendants would be held liable; indemnity basis for costs appropriate). **Indemnity costs** will not be awarded on the ground that a party has brought proceedings which have failed or have little chance of success: ***Shaina Investment Corpn v Standard Bank London Ltd*** [2002] CPLR 14. An award of costs on an indemnity basis may be made to a party in receipt of legal aid: ***Brawley v Marczynski (Nos 1 and 2)*** [2002] EWCA Civ 756, [2002] EWCA Civ 1453, [2002] 4 All ER 1060, [2003] 1 WLR 813. In deciding whether to award costs on an indemnity basis it is immaterial that the claim arises out of very serious conduct: ***Coca-Cola Co v Raymond Ketteridge*** [2003] EWHC 2488 (Ch), [2004] FSR 608. See also ***Jones v Associated Newspapers Ltd*** [2007] EWHC 1489 (QB), [2008] 1 All ER 240.' (emphasis added)

17. The 1st Defendant had not only delayed due administration of the estate, where certain banks, as debtors threatened to proceed with mortgagee sales of the properties of the estate according to the evidence before court, which may even result a waste of the estate due to inordinate delay in the grant of probate. The conduct of the 1st Defendant resulted this. The 2nd Defendant's caveat could have been removed after serving a warning if not for this proceedings. In any event 2nd Defendant did not contest in this action. The conduct of the 1stDefendant had resulted unnecessary legal costs, including cost of expert witness to travel from NZ to give evidence and to examine the original documents, as well as incidental expenses as delay in obtaining probate. By doing this the 1st Defendant has partially successful in frustrating the Plaintiffs from obtaining the probate for the estate of the late Tilak Ram. One of the joint executors who gave evidence had to travel to Fiji to give evidence. She is old and delay in this process of obtaining probate will affect her as she is also a beneficiary to the residue of the estate. In the circumstances

this is a fit and proper case to award indemnity costs to the Plaintiffs from the 1st Defendant as the 1st Defendant had abused the process of the court in order to delay the due administration of the estate of late Tilak Ram, that had not only had adverse effects to the estate, where banks were threatening for mortgagee sales, but also frustrated the entitlements of the beneficiaries specially to beneficiaries who are advanced in their age.

FINAL ORDERS

a. The will dated 15.7.2010 is rejected as the true and correct will of late Tilak Ram.

b. The will dated 10.5.2007 is the true and correctly executed will of late Tilak Ram.

c. The caveat filed by the 2nd Defendant is struck off forthwith.

d. The 1st Defendant to pay indemnity costs to the Plaintiffs, assessed by the Master.

Dated at **Suva** this 13th **day** of February, **2014**.

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Justice Deepthi Amaratunga

High Court, Suva