

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HPP 31 of 2014

IN THE ESTATE of JOANA
RAILALA CAKAU aka JOANA
CAKAU aka JOWANA RAILALA
late of 72 Ratu Dovi Road, Nadera, Fiji.
Deceased, Testate.

BETWEEN : **TORIKA NASILASILA WAQAIRAWAI AS THE INTENDED**
EXECUTRIX FOR THE ESTATE OF JOANA CAKAU AKA JOANA
CAKAU AKA JOWANA RAILALA of Bukshi Street, Samabula, Suva, Fiji.
APPLICANT

AND : **SOKOVETI CAKAU**, of 72 Ratu Dovi Road, Nadera.
RESPONDENT

BEFORE : **Master Thushara Rajasinghe**

COUNSEL : **Ms. Vaurasi L.** for the Plaintiff
Mr. Prem Narayan for the Defendant

Date of Hearing : **12th September, 2014**

Date of Ruling : **10th November, 2014**

RULING

A. INTRODUCTION

1. The Applicant instituted this action by way of this Summons for removal of caveat seeking an order that caveat No 20 of 2014 lodged by the Respondent be removed

pursuant to section 47 of the Succession, Probate and Administration Act. This Summons is supported by an affidavit of the Applicant.

2. The learned counsel for the Respondent raised a preliminary objection that the filing of this Summons is defective as the Applicant has not properly issued a warning pursuant to Rule 44 (7) of the Non Contentious Probate Rules 1954. The hearing of this preliminary issue was set down on 12th of September 2014, where both counsel for the Applicant and the Respondent made their oral submissions. At the conclusion of the hearing both parties tendered their respective written submissions. Having considered the Summons, and respective oral and written submissions of the parties, I now proceed to pronounce my ruling as follows.

3. The preliminary objection of the Respondent is founded on the allegation that the Applicant has not properly issued a warning pursuant to Rule 44 (7) of the Non Contentious Probate Rules 1954. Rule 44 (7) states that;

“A caveat may be warned by the issue from the principle registry of a warning in form 5 at the instance of any person interested (in this rule called “ the person warning”) which shall state his interest and, if he claims under a will, the date of the will, and shall require the caveator to give particulars of any contrary interest which he may have in the estate of the deceased; and every warning or a copy thereof shall be served on the caveator”.

4. Having cited Rule 44 of Non Contentious Probate Rules 1954, the learned counsel of the Respondent submitted that the procedure of the removal of caveat has been stipulated under Rule 44 and the Applicant has failed to comply with the procedure set out under rules.

5. The learned counsel for the Applicant having referred number of authorities submitted that there are two sets of procedures for the removal of caveat. The first is the procedure stipulated under Rule 44 of the Non Contentious Probate Rules 1954. The second is the procedure set out under part VII of the Succession, Probate and Administration Act (hereinafter referred as “the Act). The Applicant stated that they have adopted the

procedure set out under Part VII of the Act, wherefore it is not required to issue a warning pursuant to Rule 44(7).

6. Justice Balapatabedi in **Lata v Prakash** [2013] FJHC 378; Caveat 35.2011 (8 August 2013) having comparatively reviewed the Rule 44 of Non Contentious Probate Rules 1954 and Part VII of the Act, found that;

*"In the application under Section 47 of the Succession, Probate and administration Act, the Court has discretion to remove Caveat. Thus the court of Appeal in **Rosy Reddy – v- Manchama Webb and Lawrence Webb** (unreported Civil Appeal No. 14 of 1994 delivered on 11 November 1994) stated that:*

"We note that the procedure for dealing with a caveat under the Rules is different from the removal of a caveat provided under section 47 of the Act. Under the Rules a caveat shall remain in force for six months (r 44 (4)). A caveat may also cease to have any effect if the caveator does not file an appearance or take out s summons for direction (r 44 (11)). Under these Rules, a caveat may cease to have any effect in this way without there being a need for resort to court proceedings. However, under the Act, section 47 provides that in every case where a caveat is lodged, an application may be made to the Court to remove the caveat."

*In **Amos v. Fiji Public Trustee Corporation Limited** [2010] FJHC 617; Probate 48456.2009 (28 July 2010), Calanchini J stated as follows:*

"The Applicant seek removal of the caveat under section 47 (1). The section does not offer any guidance as to the grounds on which a caveat should be removed. In effect, section 47 gives the Court discretion.

*In the **Reddy decision** (supra) the Court of Appeal stated on this point that:*

"In the formulating the discretion of the Court in such an application, we are of the opinion that the Court may have regard to the practice set out in the Rules as a guide. This is not the same as applying the Rules. The relevant rule for consideration in this


regard is r44 (7). For the purpose of a warning, a caveator is required to give particulars of a contrary interest. We would adopt this and formulate that a caveator should establish a contrary interest to the person applying for the removal of a caveat."

7. In view of the aforementioned passage of Justice Balapatabedi in **Lata v Prakash** (supra) it appears that the procedures set out in Rule 44 and Part VII of the Act have two distinct approaches. It is required to issue a warning to invoke the procedure stipulated under Rule 44 to remove a caveat, while under section 47 of the Act, the requirement is the institution of an action in court. The caveator is required to give his contrary interest in his appearance pursuant to Rule 44 (8). In respect of the proceedings instituted under part VII of the Act, the Caveator is required to establish his contrary interest against the applicant.

8. Having considered the reasons set out above, it is my conclusion that the Applicant is not required to issue a warning to the caveator, in order to institute an action for removal of caveat pursuant to section 47 of the Succession, Probate and Administration Act. I accordingly make following orders that;
 - i. The preliminary objection raised by the Respondent is hereby refused and dismissed,
 - ii. The Applicant is awarded a sum of \$500 for cost of this application assessed summarily.

Dated at **Suva** this **10th** day of **November, 2014**.




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R.D.R. Thushara Rajasinghe
Master of High Court, Suva