

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Probate Action No.: 161 of 2007

IN THE ESTATE of FATEH MOHAMMED
Father's name Amir Khan late of Korovou,
Tavua, Farmer, Deceased.

BETWEEN : **WAJID ALI** of Rabulu, Tavua, Cultivator **PLAINTIFF**

AND : **KHATIJA BI aka KADIAMMABI** formerly of Korovou,
Tavua now residing at 4908 Baker, Sacramento **DEFENDANT**

Counsel : **Ms. S. Devan for the Plaintiff**
Mr. N. Nawaikula for the Defendant

Dates of Hearing : **4th and 5th November, 2014**

Date of Judgment : **3rd December 2014**

JUDGMENT

INTRODUCTION

1. The Plaintiff instituted this action in 2006 seeking for revocation of a grant of probate pronounced against the force and validity of the Will dated 14th May, 1987. He seeks an order to pronounce that the true last will and testament was the will dated 4th March, 1989. The Defendant was granted the probate upon the last will dated 14th May, 1987. (1987 Will) The Defendant alleges in paragraph 1(e) of the statement of defence fraud on the part of the Plaintiff but no allegation of forgery was made and no particulars of the said fraud were given. The allegation contained in the statement of defence was undue influence, duress and or unsound mind of the testator. These are factors that the Defendant needs to prove upon the proof of the will dated 4th March, 1989. (1989 Will). The 1989 Will was made at solicitor's office and one of the attesting witness gave evidence and recognized his signature as a witness.

FACTS

2. The Plaintiff is the 2nd eldest son of the Deceased Fateh Mohammed, but the eldest son had died in 1970s. Fateh Mohammed died on 17th August, 2002. Fateh Mohammed's first wife had committed suicide while he was in England. He had gone for a visit to England and started working there and remained there for over 3 years. According to the evidence of brother of late Fateh Mohammed, at that time it was believed he had got married or living with another woman and that was the reason for the suicide of the 1st wife in Fiji. According to the evidence of Defendant 1st wife committed suicide as she and children were not treated properly by Ibrahim Khan, the brother of Fateh Mohammed. This cannot be accepted as there was no evidence of hate between Ibrahim and Fateh Mohammed or his children from 1st wife. After the death of 1st wife and upon the return to Fiji he got married to the Defendant, presently living in USA. The Plaintiff is the son of 1st wife of late Fateh Mohammed.
3. Upon the death of Fateh Mohammed, the second wife had obtained probate for the estate of the late husband on the Will dated 14th May, 1987. (1987 Will)
4. The Plaintiff is relying on the Will dated 4th March, 1989 (1989 Will) and that will revoked previous wills and testamentary depositions. The said 1989 Will was made at a solicitor G. P. Shankar's office. Two clerks of the said solicitor witnessed the said will and one of them gave evidence and recognized his signature to the will as a witness.
5. According to the Plaintiff he had informed the Defendant about 1989 Will but was told by her that there was a subsequent will in favour of her and he had believed her and remained silent till the Defendant interfered with the land at Rabulu, where he was farming for a long time.
6. The deceased estate contained inter alia lands at Rabulu and Korovou and Rabulu farm was considered 'belonged' to the Plaintiff and he lives there with his family from 1980s.

ANALYSIS

7. In the statement of defence paragraph 1(a)-(d) alleges that the 1989 Will was not executed in accordance with the provisions of the Wills Act (Cap 59) and or the deceased was not of sound memory when the said 1989 Will was executed.
8. In the paragraph 1(e) of the statement of defence states as follows;

*‘that further and in any event the Pretended Last Will was purportedly executed when the said **Deceased was suffering under undue influence** particularly that of the Plaintiff and the Pretended Last Will was obtained by undue pressure and influence particularly of the Plaintiff and / or **fraud of the Plaintiff**’(emphasis added)*
9. In the Supreme Court Practice (UK) 1999 18/8/16 p320 states

*‘It is the duty of counsel not to enter a plea of fraud on the record “unless he has clear and sufficient evidence to support it”(see per Lord Denning in **Associated Leisure Ltd v Associated Newspaper Ltd** [1970] 2 Q.B. 450 at 456). Any charge of fraud or misrepresentation must be pleaded with the utmost particularity and see....’*
10. The only instance where the Defendant alleges fraud in the statement of defence is paragraph 1(e) which was quoted in full, but in the said paragraph the reference was to undue influence by the Plaintiff. In the Defence evidence the deceased lived with Defendant and her children in Korovou. Further, the Defence evidence was that the Plaintiff and the deceased were not very friendly due to a dispute regarding a lorry which happened in 1970s. If so alleged fraud of undue influence is contrary to the evidence of the Defence. The Defence Witness no 3 (DW3) denied even Plaintiff visiting Korovou when the deceased was living in Korovou with 2nd wife and her children. If so how undue influence was exerted to a person who hated Plaintiff was not explained. So the allegation of fraud which was not sufficiently particularized in the said paragraph 1(e) cannot be expanded to anything other than undue influence which is in conflict with the evidence given on behalf of the Defence. It is noteworthy that the evidence of DW3 is contradictory *inter se*. The Defendant admitted Plaintiff visiting the deceased at Korovou residence, as the eldest son of the deceased.
11. The Plaintiff and four witnesses gave evidence for the Plaintiff. One of them was a neighbour by the name of Bhajat Singh, from Tavua and he said he had used late Fateh

Mohammed's vehicles to transport his harvest namely, peanuts to one Harry in Suva. He also said late Fateh Mohammed was very friendly with him and he also met him at G.P. Shankar's office and he was informed by the deceased that he had come to prepare the last will and it was 1989 when this happened. He said at that time he saw the Plaintiff with the deceased and also saw some document being shown by the clerks of the solicitor.

12. Though he was old his memory was good and explained more fully of the circumstances relating to this case in his answers to cross-examination. He also said that he was told by the deceased that he was not happy with activities of Ishad Mohammed, a son from the second wife as he had sexually abused one of his granddaughters, and she was pregnant from the said illicit relationship. This was revealed to Mr. B. Singh at the solicitor's office to him by the deceased.
13. The Defendant said that Wajid Ali visited late Fateh Mohammed at the house at Korovou, but the 1st Witness for the Defendant (DW1) said Wajid Ali did not come to the house at Korovou. The DW1 is a child of the Defendant and he said he was unaware of the reason for the death of 1st wife of late Fateh Mohammed. This is also unlikely as the 1st wife had committed suicide in the same house or in the same place. It is unlikely that 2nd wife's children would be unaware of such a tragic event, though they were not born at that time. DW1 gave evidence to indicate animosity between the deceased and Plaintiff. He said there was a dispute regarding the ownership of a lorry brought from the cheque given by Ibrahim Khan. This was denied by Ibrahim Khan and also by the Plaintiff. Ibrahim Khan said that he had a commercial dispute with Plaintiff, but it was amicably settled and there was no dispute relating a lorry. Ibrahim also denied any dispute relating to a lorry, with late Hazan Ali who was the eldest son of the 1st wife and late Fateh Mohammed.
14. The evidence of brother of late Fateh Mohammed, Ibrahim Khan, was that the 1st wife committed suicide when she heard that late Fateh Mohammed was having 'a relationship' with another woman in UK. He said he was unaware whether this woman was married to

the deceased. The evidence of Ibrahim, the brother of the testator can be accepted as an independent witness. He is not a beneficiary of the estate and he explained the events clearly. There is no suggestion of any animosity or rivalry between him and the widow of late Fateh Mohammed or any of the children. There was no evidence of animosity between deceased and Ibrahim. So the evidence of Defendant that suicide of 1st wife was due to ill treatment to her and her children by Ibrahim needs to be rejected. If so, the 8 children from 1st wife and also late Fateh Mohammed should hate him.

15. Ibrahim said that the deceased lived in Korovou in the family house. He also denied that he had a fight with Wajid Ali or his deceased brother Hazan over ownership of a lorry. If there was any animosity between the Plaintiff and Ibrahim he would not come from USA to give evidence on behalf of the Plaintiff.
16. The 1989 Will specifically renounced previous last wills and if that is accepted as the true last will of the deceased the 1987 Will cannot have any legal validity and the probate granted upon it needs to be revoked.
17. The Plaintiff gave evidence and said his father, late Fateh Mohammed on 4th March, 1989 went to the Solicitor G.P. Shankar's office with him and gave the last 1989 Will to him and said that if something happens he has to look after the properties. At the office both of them had met Mr. Bhagat Singh, the neighbour at Rabulu farm, who gave evidence for the Plaintiff. Bhagat Singh said that the deceased told him, he was going to make a last will. According to him, the deceased had also told him that he was not happy with the sexual abuse of the grand daughter by his son from the second marriage namely Ishan Mohammed. The deceased had told that he could not face the others due to this incident.
18. Ibrahim Khan, who gave evidence for the Plaintiff also corroborated this allegation of sexual abuse by Fateh's son Ishan Mohammed. He said he was told about this incident of sexual abuse or incest, by the deceased while he was in USA. Ibrahim said that though he was in USA the deceased talked to him over the phone and even visited him in USA. The deceased had also told him about the intention of making a will as he was upset over the

alleged sexual abuse and incest. When he was told about making a will, Ibrahim answered to the deceased, that he could do what ever with his property. So, it seems two brothers were close though they were not doing business together at that time. This can be accepted as they were a long time business partners of Golden Eagle Company engaged in heavy items transportation around the island including cements, logs etc. They were also transporting farmers' produce to Suva for sale. The evidence of Ibrahim Khan can be accepted and the fact that he was told of the alleged incest by a son of second wife indicate that the deceased was very unhappy over that incident.

19. The Plaintiff in his evidence said late Fateh Mohammed had requested Ishan, to marry the grandchild after she gave birth to the child. This did not happen as his 2nd wife and the Ishan refused to such a marriage, and later he had married another girl. This had made things sour at home and the deceased had told the Plaintiff that he was mistreated at home by his 2nd wife and her children. This can be accepted as he had told about alleged sexual abuse to his brother who was in USA at that time and had also told his neighbour Bhagat Singh at solicitor's office. If the deceased was not extremely unhappy such a thing would not have shared with even close friends. So, this proves that deceased was not happy with his 2nd wife and also with her children including the alleged abuser of the grandchild. This would have led him to prepare the 1989 Will as evidenced at the trial.
20. Though the Defendant contended that the deceased was not of sound mind when the 1989 Will was executed this was disproved by the Defence witnesses. No evidence was presented to prove that the deceased was not well during 1989 or even around that year. The evidence that was presented to the court, by the defence, was that he was suffering from Diabetic and High Blood Pressure 3-4 years before he died. Fateh Mohammed died in 2002 and the sick period cannot be a time before 1998.
21. Even from 1998 till his death he had done numerous things on his own except during the time of alleged hospitalization. This hospitalization was not proved by documentary evidence. Even assuming that the deceased was suffering from Diabetic and High Blood Pressure it did not cover 1989 or even early part of 1990s. The Defendant failed to prove any unsoundness of mind of the deceased on or around 4th March, 1989. DW3

specifically stated that the deceased was not suffering from any illness prior to 3-4 years from the demise. So, there cannot be sickness to prove unsound mind at the time of making the 1989 Will. Even during his alleged sickness in year 2000 he had participated at a wedding.

22. The Plaintiff had gone with the deceased to make the 1989 Will but he was not told about this till he went to solicitor's office. Even in the office there was evidence that Plaintiff was not in a position of influence as deceased had met the solicitor alone while the Plaintiff was sitting in the waiting area. There was no evidence of any undue influence proved by the Defendant. The Plaintiff's evidence was that even he was not told of the making of the 1989 Will till it was completed and a copy was given to him. All defence witnesses said deceased lived in Korovou with his 2nd wife and her children and that Fateh did not like the Plaintiff, if so how could the Plaintiff exert undue pressure was not explained.
23. Defendant as well as DW1 and DW3 said late Fateh Mohammed and the Plaintiff did not see eye to eye. According to their evidence animosity had developed between Fateh Mohammed and the Plaintiff for a long time. This contention is completely opposite to their contention of undue influence. If Fateh Mohammed was angry with the Plaintiff how can the Plaintiff unduly influence him to make a last will in favor of him?
24. This indicates that the Defense is relying on conflicting contentions and lacks clarity.
25. The Plaintiff through his evidence and also Bhagat Singh proved that late Fateh Mohamed went to G.P. Shankar, the Solicitor's office to make a last will in 1989. The 1989 Will was prepared by G.P. Shankar's office and the two attesting witnesses were the two clerks of the said solicitor at that time. One of the said attesting witness gave evidence at the trial via Skype from New Zealand and identified his signature on the document. He said that all the procedure relating to preparation of last will were adhered and he could not specifically recollect this incident due to the lapse of time. He also said he could not remember late Fateh Mohammed now, but he said he would have known him at that time as a client of the solicitor for whom he worked at that time.

26. Halsbury's Laws of England/WILLS AND INTESTACY (VOLUME 102 (2010), PARAS 1-564; VOLUME 103 (2010), PARAS 565-1304)/10. CONTENTIOUS PROBATE (4) GROUNDS FOR OPPOSING PROBATE/(ii) Want of Due Execution/895. Presumption of due execution states as follows;

'The principle omnia praesumuntur rite esse acta¹ applies where the will is regular on the face of it, with an attestation clause and the signatures of the testator and witnesses in their proper places². This presumption of due execution applies where there is a proper attestation clause, even though the witnesses have no recollection of having witnessed the will³ (underlining added)

Further at Halsbury's Laws of England(supra) at paragraph 733 states

'733. Proof of due execution

Where the will is perfect on the face of it and there is an attestation clause showing that the statutory requirements have been complied with, probate in common form issues on the oath of the executor alone'

27. In this case the 1989 Will is marked as P4 and it contained an attestation clause and two witnesses had signed it. The 1989 will is regular on the face of it with attestation clause and signatures of testator and witnesses in their proper places. One of the attesting witness, Mr. Kumar gave evidence and identified his signature. He said he was employed by solicitor G.P.Shankar from January 1989. Though he could not recollect specifically about this 1989 Will, that would not affect the validity. The 1989 Will had complied with the provisions of law relating to last wills.
28. There is no allegation of forgery of the signature on P4. The alleged fraud in paragraph 1(e) was not forgery. In the circumstances there is no need of expert report relating to signature on P4.

¹ Ie the principle that all things are presumed to have been done rightly

² Vinnicombe v Butler (1864) 3 Sw & Tr 580 at 582 per Sir J Wilde; Lloyd v Roberts (1858) 12 Moo PCC 158; Wright v Sanderson (1884) 9 PD 149, CA; and see Harris v Knight (1890) 15 PD 170, CA; Re Musgrove, Davis v Mayhew [1927] P 264, CA (no step taken to prove will for 20 years); Scarff v Scarff [1927] 1 IR 13, CA. In Otuka v Alozie [2006] EWHC 3493 (Ch), [2005] All ER (D) 265 (Dec) the court said that the presumption of due execution increases in force where the will contained a 'perfect attestation' clause. As to proof of due execution see also para 733.

³ Woodhouse v Balfour (1887) 13 PD 2; Byles v Cox (1896) 74 LT 222; Re Webb, Smith v Johnston [1964] 2 All ER 91, [1964] 1 WLR 509.

29. The Defence counsel tried to point out an erasure contained in the photocopy of the agreed bundle of document, but there is no erasure or alteration in the original P4 the last Will dated 4th March, 1989. The alteration was description of the Plaintiff in paragraph 2 of the document no 2 of the agreed bundle of documents filed on 14th August, 2008. Even in the said document there is no alteration in the following paragraph where all the properties were bequeathed to the Plaintiff. There are no alterations in any of the paragraphs in P4 marked at the trial. So what was produced at the hearing does not contain any alterations and on the face of it is perfect and accordingly it is proved by the Plaintiff on the balance of probability as the true last will of late Fateh Mohammed.
30. The 1989 Will had expressly revoked all the previous wills and testaments and accordingly the 1987 Will is revoked.
31. The Plaintiff explained the delay in production of this 1989 Will. He said he had a good relationship with his step-mother and she used to come for their functions whenever needed. After the death he had informed about 1989 Will to her and he was told that there was a subsequent will and he had not inquired about the alleged subsequent will from his step mother. The Plaintiff had inquired about the last will only when the Defendant tried to interfere with the property he was farming at Rabulu. According to the Plaintiff till then he believed the words of his step-mother and never inquired about the alleged subsequent will of his late father.
32. This position can be accepted as there was no evidence of dispute between the Plaintiff and Defendant and or her children after death over the property of the deceased father. For about 4 years the Plaintiff was happy with his income from the farming of the land at Rabulu, but when the 'ownership' to that was interfered with by the Defendant he had inquired about the last will and discovered from a government institution that probate was issued to an earlier last will made in 1987 which was revoked in 1989 Will. Till then he had believed his step-mother and there was no dispute with Defendant and or her children over property. All the witness for the Defendant admitted Rabulu farm was

maintained by the Plaintiff for a long period of time and it was given to the Plaintiff by Fateh long before he died.

CONCLUSION

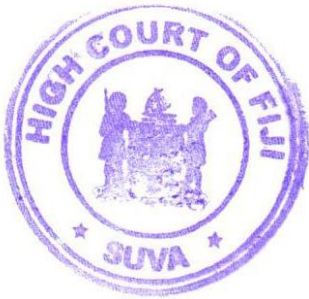
33. The Plaintiff had proved the last will dated 4th March, 1989 where it expressly revoked all the earlier wills. There is no proof of undue influence or unsoundness of mind of the testator at the time of making the will in 1989. Evidence for the defence said late Fateh Mohammed was not suffering from any illness prior to 4 years from 2002. So the defence contention of unsoundness of mind due to sickness was disproved by their own evidence. The contention that the Plaintiff exerted undue influence or duress to the deceased was not proved on the balance of probability. All the witnesses for the defence said there was animosity between the Plaintiff and late Fateh Mohamed. If so the contention of the undue influence is contrary to such evidence. In any event on the analysis of evidence, on the balance of probability it is not established that there was animosity between the Plaintiff and the deceased during 1989 and or even after that. The brother of late Fateh Mohammed rejected any animosity between him and Plaintiff and also Plaintiff and deceased. The evidence for the defence is incoherent. There are contradictions *per se* and *inter se* and on the balance of probability defence contentions are not proved. In the circumstance the will dated 4th March, 1989 is accepted as the true last will of the deceased. Accordingly the probate granted to the Defendant needs to be revoked and the Defendant needed to return all money due to estate. The cost of this action is summarily assessed at \$5,000. The Defendant is further restrained from dealing with the properties of estate and or bank accounts of the late Fateh Mohammed as contained in final orders.

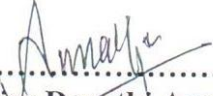
FINAL ORDERS

- a. The will dated 14th May 1987 is revoked by the will dated 4th March, 1989 and the probate granted on the said will namely probate No 40802 dated 16th January, 2003 is revoked.
- b. The true last will of late Fateh Mohammed was the will dated 4th March, 1989. (Marked P4)
- c. The Defendant is ordered to produce full and proper accounts for all the dealings by her

- by virtue of the said revoked probate.
- d. The Defendant to pay to Plaintiff all sums of money due to the estate.
 - e. The Defendant to transfer /assign vest all properties of the estate into the Plaintiff upon grant of probate to him.
 - f. The Defendant is restrained from acting on behalf of the estate of Fateh Mohammed.
 - g. Cost of this action is summarily assessed at \$5,000.

Dated at **Suva** this **3rd** day of **December, 2014**.




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Justice Deepthi Amaratunga
High Court, Suva