

**IN THE HIGH COURT OF FIJI**  
**IN THE WESTERN DIVISION**  
**AT LAUTOKA**

**Civil Action No. HBC 264 of 2012**

**BETWEEN** : **HENRY STEPHENS** of Korolevu, Coral Coast, Service Station Operator.

**PLAINTIFF**

**AND** : **SANDRA MAY LOUISE KWAI** of 6 Chamberlain Street, Narwee, NSW 2209 Australia, Domestic Duties as the Executrix and Trustee of **THE ESTATE OF SYLVIA MARY STEPHENS** a.k.a **SILIPA TAGICI** late of Howell road, Suva in the Republic of Fiji, Businesswoman, Testate.

**DEFENDANT**

*Counsel* : *K. Qoro for the Plaintiff*  
*G. O'Driscoll for the Defendant*

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## **R U L I N G**

### **INTRODUCTION**

[1]. Below are my reasons for the injunctive Orders I have granted in this case and which Mr. Qoro has had sealed. The Orders have put a stop to the distribution of the assets of the estate in question until the issues raised are sorted out. The plaintiff (“**Stephens**”), asserts an equitable and a proprietary claim on some properties of his late mother’s estate (“**Sylvia**”). Stephens’ half sisters are poised to inherit these properties pursuant to Sylvia’s Last Will and Testament. According to Stephens, he was the one who actually paid off these properties. Sylvia, allegedly, had represented to Stephens that he (Stephens) would stand to inherit the properties, if Stephens paid off the attaching bank-mortgage. Stephens says that he did settle all debts before Sylvia died. However, Sylvia would later bequeath the properties to his half sisters by her Last Will and Testament. He only came to learn this after her death.

[2]. Stephens’ claim is based on the equitable principles of constructive trust and estoppel. As a starting point, I will say here generally that that a Court of equity may intervene to declare the existence of a beneficial interest in property. What remains is whether or not a court of equity will apply these principles against an estate to make good a promise allegedly made by a

testator and where the making good of that alleged promise will contravene the terms of the Last Will and Testament of the testator.

- [3]. Assuming the facts he pleads do disclose a reasonable cause of action, the burden will be extremely high on Stephens to establish his claim. I say that because, as a matter of principle, Courts will adopt a cautious approach when dealing with contested claims against an estate. This is because of the need to carefully to scrutinise claims based on promises or representations by deceased persons. In **Parveen Varma v Gautam Varma & Ors** [2010] NSWSC 786, the New South Wales Supreme Court explains this position thus:

418 The difficulties facing the court where a claim is based on an assurance made by a deceased have been noted in many cases. **It was conceded, in effect, by Mr Rayment that Parveen bears a comparatively difficult task in evidentiary terms in seeking to persuade the court on the balance of probabilities of the making of the alleged promises given that Sid is not alive to give his version of events.** (Of course, even had he been given the opportunity to do so when this issue first arose during his lifetime, there is a question as to how reliable Sid's evidence would have been in view of his state of mind at that time.)

419 Careful scrutiny is required (*Plunkett v Bull* (1915) 19 CLR 544; *Clune v Collins Angus & Robertson Publishers Pty Limited* (1992) 25 IPR 246, at 253). As explained in *Weeks v Hrubala* [2008] NSWSC 162, at [20], the court generally looks for corroboration of those claims (see also *Re Hodgson* (1886) 31 Ch D 177; *Vukic v Luca Grbin and Ors*; *Estate of Zvonko Grbin* [2006] NSWSC 41).

420 In *Weeks v Hrubala* (at [20]), Young CJ in Eq said:

In a case of a person suing a deceased estate the court normally looks for some sort of corroboration: see *Re Hodgson* (1886) 31 Ch D 177 even though, as a matter of law, corroboration is not absolutely necessary. Experience, however, shows that when plaintiffs are making a claim against a deceased estate the court is wise to look for corroboration.

421 In *Plunkett v Bull*, Isaacs J said:

Then we come to the question how far the onus of proof which lay upon the plaintiff was satisfied. She had the burden of establishing the original creation of the indebtedness of the deceased to her, and undoubtedly it is established that in cases of this sort the Court scrutinizes very carefully a claim against the estate of a deceased person. It is not that the Court looks on the plaintiff's case with suspicion and as *prima facie* fraudulent, but it scrutinizes the evidence very carefully to see whether it is true or untrue.

422 In *Vukic* and in *Joseph Saliba & Anor v Thomas Tarmo* [2009] NSWSC 581, respectively, each of Brereton and Nicholas JJ emphasised that the court must closely scrutinise claims against an estate in circumstances where the only person who can contest the issue is deceased.

423 Similarly, in *Lewis v Lewis & Anor* [2001] NSWSC 321, Hodgson J (as his Honour then was) referred to the need for caution before finding an intention to create legal relations in a family situation

[4]. I did keep the above in mind. However, because I was dealing with an application for an interim injunction, I have had to readjust accordingly considering that an interim injunction is granted merely to preserve the status quo until the issues in a case have been sorted out in a full hearing. The principles involved were well settled in the well known case of **American Cyanamid Co. v Ethicon Ltd** (1975) 1 ALL ER 509. The three issues upon which the court directs its inquiry when faced with such an application are: (i) whether or not there is a serious issue to be tried (ii) whether or not damage would be an adequate remedy, and (iii) where the balance of convenience lies?

### **IS THERE A SERIOUS ISSUE TO BE TRIED?**

[5] There are some serious issues to be tried in this case. These are:

- (i) firstly, whether a promise made and expectation raised by a testator **(A)** to another **(B)** and which was relied on and acted upon by **(B)** to his detriment, can give **(B)** a valid claim against **(A)**'s estate based on the principles of equitable estoppel and/or on the principles of constructive trust.
- (ii) secondly, if the answer to the above is "yes", and if the promise made and expectation raised by **(A)** to **(B)** is that **(B)** will inherit a particular piece of land (Blackacre), can a Court of equity still award Blackacre to **(B)** contrary to the Last Will and Testament of **(A)**?. In other words, can a court of equity intervene to declare a beneficial interest in property based on constructive trust and/or equitable or promissory estoppel even if such intervention will be tantamount to unsettling the Will of the deceased testator?

[6]. Mr. Qoro cites the New South Wales Supreme Court case of **Joseph Saliba & Anor v Thomas Tarmo** [2009] NSWSC 581 (23 June 2009) to illustrate that the above is arguable. If it is arguable also in Fiji, then the onus must be extremely high on any claimant.

- [7]. In **Saliba**, a widow who did not have any children and who lived alone in her suburban house in Bankstown in Sydney, Australia, had verbally promised her neighbours (husband and wife, her close friends) on numerous occasions, that she would leave them half of her house when she dies. The woman later made a Will to that effect at her solicitors' office on her own initiative - with the neighbours in question in attendance - on the woman's request. The woman made the promises (and the Will) in acknowledgement and in gratitude for the neighbours' friendship and their past and on-going care and support of her. After the Will, the neighbours remained unwavering (if not, even more) in their support, and also felt obligated on account of the prospect of their inheritance upon the woman's death. However, some years later, the woman made another will leaving the entire house to her nieces who resided in the US. The neighbours succeeded in their claim on constructive trust and/or equitable estoppel and were awarded half of the estate.
- [7]. It is not clear to me at this time whether or not this ruling is on appeal to the High Court of Australia. However, Mr. Qoro's case is indeed arguable because the equitable principles he relies on are established and would seem to apply on the facts as he presents them.
- [8]. Where a plaintiff has acted to his or her detriment on an assumption or expectation induced either by a promise of the defendant, or was merely encouraged by the defendant, the law of equitable estoppel will come to the relief of the plaintiff, if the defendant reneged. It must be shown that the defendant knew or intended that the plaintiff would act (or not act) in reliance on the assumption or expectation (see **Waltons Stores (Interstate) Limited v Maher** [1988] HCA 7; (1988) 164 CLR 387, 404 (Mason CJ and Wilson J)]. The underlying rationale is that it would be unconscionable (and unfair or unjust) if the defendant were left free to ignore his promise/inducement.
- [9]. Assuming Mr. Qoro's client is able to prove his case, the question then arises as to whether or not the principles of constructive trust/equitable estoppel that he relies on can be extended in this case to defeat the testator's intentions as set out in her Last Will and Testament.

[10]. I will note here that during argument, Mr. O’Driscoll did raise the valid point that, even if the reasoning in **Salibo** is good law, it will not apply here because, from Stephens’ own affidavit, he did pay off the debt in question by running and operating a service station and shop which at all material times, belonged to Sylvia (and now vests in the estate) and for which services Stephens was paid a salary. Hence, the monies which Stephens says he used to pay for the debt actually belonged to Sylvia. Where is the detrimental reliance then? This is a very strong argument but which is best postponed for trial.

### **WHETHER OR NOT DAMAGES WOULD BE AN ADEQUATE REMEDY?**

[11]. The defendant in this case before me resides overseas. The other beneficiaries of the estate also all appear to be residents abroad. If the interim injunctive Orders are not granted, so that the estate properties are distributed now, there is every chance that the defendant and the other beneficiaries will dissipate the assets and return abroad. It will disadvantage the plaintiff considerably if he were then to try and mount a claim to seek damages from the estate. Once the estate properties are distributed, the estate will be worth nothing and it may prove difficult for the plaintiff to seek recovery from the beneficiaries (if at all he can) considering that his cause of action is against the estate and not against the beneficiaries personally.

### **BALANCE OF CONVENIENCE**

[12]. For the same reasons above, the balance of convenience favours an interim injunction.

### **INTERIM ORDERS**

[13]. The Interim Orders:

1. restraining the defendant by herself or in her capacity as the executor/trustee of the estate from executing and/or distributing and/or transferring and/or taking and/or dealing with Korolevu Country Store and Howell Road Property in accordance with the late Sylvia Mary Stephens a.k.a Silipa Tagici Will dated 26 July 2004 until further order of this Court.

2. allowing the plaintiff to continue to manage, control and administer Korolevu Service Station and to occupy all that piece of land known as “Korolevu” “Nakalu” and situate in the District of Serua in the island of Viti Levu on CT 20396 until further order of this court.
3. restraining the defendant by herself or in her capacity as the executor/trustee of the estate from transferring, selling, charging, mortgaging, assigning, renting or dealing with land known as ‘Nakalu’ and ‘Korolevu’ and containing 1 acre and situate in the District of Serua in the island of Viti Levu and being Lot 4 on deposited plan No. 2567 on CT No. 26583 (Korolevu Country Store – Hing Hong Store) until further order of this Court.
4. restraining the defendant by herself in her capacity as the executor/trustee of the estate from transferring, selling, charging, mortgaging, assigning, renting and/or dealing with freehold land situated in the District of Suva in the island of Viti Levu being Lot 10 on DP No. 1944 on CT 8162 (Howell Road Property) until further order of this Court.
5. restraining the defendant by herself in her capacity as the executor/trustee of the estate from taking and/or receiving and/or using and/or distributing and/or dealing with the sum of \$189,000 kept by MC Lawyers being the balance purchase price of all that piece of land delineated by the plan hereon known as “Tubakula” (part of) containing 1 rood be the same a little more or less and being Lot 41 on the Deposited Plan No. 4022 and situated in the District of Conua in the island of Viti Levu on CT 16174 (Korotogo Property) until further order of this Court.

[14]. This case is adjourned to **Wednesday 12 March 2014 at 10.30 a.m.**  
before me for mention.

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Anare Tuilevuka  
**JUDGE**  
26 February 2014