

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

CIVIL ACTION NO. HPP 35 OF 2013

BETWEEN : **VINCENT THOMAS RAJALINGAM**

Plaintiff

A N D : **EDMOND CLARENCE RAJALINGAM**

Defendant

Counsel : **Mr. R. Naidu for the Plaintiff**
Mr. S. Karavaki for the Defendant

Date of Hearing : 1st May, 2014

Date of Judgment: 30th April, 2015

JUDGMENT

[1]. The originating summons filed before me seeks for the following orders:-

- 1. An order that the defendant, Edmond Clarence Rajalingam be removed as an Executor and Trustee of the Estate of Michael Rajalingam.***
- 2. Such further and other relief as seems just and equitable to this Honourable Court.***
- 3. Costs of this action.***

Background

- [2]. The plaintiff and the defendant are two brothers who are the trustees of the estate of their late father Michael Rajalingam.
- [3]. The late Michael Rajalingam had seven children including the plaintiff and the defendant. Except for the plaintiff and the defendant the other siblings are living out of Fiji.
- [4]. The only asset to be administrated in the estate is the property in which the top flat is occupied by the defendant and the bottom flat occupied by the plaintiff. The plaintiff has pleaded that as per the Will the estate has to be distributed among all beneficiaries in equal shares and that only way it can happen is by selling the property. It was alleged that the defendant as a trustee was not co-operative in administering the estate by selling the property and distributing the proceeds among the heirs, therefore this application has been filed.
- [5]. Both parties were not at dispute pertaining to the fact that the property could not be sold when their mother was alive and now the mother is dead.
- [6]. I have considered the affidavits filed, the written submissions and oral submissions of both counsel.

Determination

- [7]. The plaintiff submits that its nearly 16 years from the date of obtaining the probate but the trustees are yet to give effect to the Will and conclude the administration of the estate. For this purpose the property has to be sold but the defendant being a co trustee is not co-operative on the issue. As a result the property is deteriorating and other beneficiaries are deprived of their benefits from the father's estate.

- [8]. The defendant objects to the sale and his main objection is based on the fact that the testator's last wish was not to sell the property but to retain it till, the last sibling leaves Fiji and thereafter to dispose it. Therefore he was not co-operative on such sale and objected to the sale. Further he submitted that he and the plaintiff are benefitting from the property.
- [9]. On a simple reading of the Will it is clear that the testator's intention had been to distribute the estate among all beneficiaries upon his wife's death. Further the defendant conceded that his assumption of the property should not be sold till the last of the sibling move away from Fiji is not written in the Will.
- [10]. The parties were not at a variance of the fact that after nearly 16 years of obtaining Probate the beneficiaries other than the plaintiff and the defendant have not benefitted from the estate. In the absence of any material to substantiate the defendant's belief pertaining to the sale I am inclined to think that the defendant's objection for sale and not co-operating in the sale falls apart.
- [11]. Now the court will proceed to determine whether this ground is sufficient to remove a trustee.
- [12]. This application has been filed pursuant to section 35 of the Succession, Probate and Administration Act, Cap 60.
- [13]. Section 35 of the Act states:

The court may for any reason which appears to it to be sufficient, either upon the application of any person interested in the estate of any deceased person or of its motion on the report of the Registrar and either before or after a grant of probate has been made-

- (a) *make an order removing any executor of the will of such deceased person from office as, such executor and revoking any grant of probate already made to him; and*
- (b) *by the same or any subsequent order appoint an administrator with the will annexed of such estate; and*
- (c) *make such other orders as it thinks fit for vesting the real and personal property of such estate in the administrator and for enabling the administrator to obtain possession or control thereof; and*
- (d) *make such further or consequential orders as it may consider necessary in the circumstances.*

[14]. As per this section this court is vested with the powers of removing any executor of the Will. However the court will exercise that power only if the Co Trustees have failed to administer the said estate and it affects the beneficiaries from benefitting from the estate under Section 35.

[15]. The main allegation in this case by the plaintiff is that the defendant is uncooperative in administering the property by selling it and distributing the money among the heirs and as a result the estate is dilapidating and the beneficiaries are deprived from their inheritance.

[16]. In Surjan Sing –v- Pratap Singh Lautoka High Court No. 280 of 97 it was held that:

"In his Affidavit in Support of Originating Summons filed on the 22nd September 1997, the Plaintiff alleges that the Defendant is being uncooperative and obstructionist. It appears to me that this may well be the case. The defendant in this matter, although having been given great

deal of latitude and assistance, has done nothing but put forward allegations to the court which have been unsupported by any documentation. It appears to me that the Defendant has no interest in cooperating with the court to have the matter resolved. He shows no intention of putting any cogent and understandable material before the court.

The Courts have a clear inherent jurisdiction to make such decisions as will facilitate the orderly and proper winding up of estates. Accordingly, as the defendant, in my view plainly being uncooperative, I think it best to cede to the application and have the defendant removed as application and have the defendant removed as the Executor and Trustee of that estate. Hopefully this will now lead to this matter being concluded."

[17]. When a plaintiff establishes that the action of the defendant is hindering the orderly administration of the assets of the estate by uncooperativeness and if its detrimental to the proper administration, and affects the interests of the beneficiaries, then the court has inherent jurisdiction to remove such a trustee.

[18]. Both counsel have conceded of this power of court as laid down in **Lettersted -v- Broers 9 app case 371 [1884] UK PC 1.**

[19]. The plaintiff's counsel cited several overseas judgments from other jurisdictions and also submitted the quotation of Lord Blade Burn pertaining to removal of a trustee on grounds of misconduct referring to Story's Equity Jurisprudence s1287 where it was stated:-

"Story says, but in cases of positive misconduct, courts of equity have no difficulty in interposing to remove trustees who have abused their trust; it is not indeed every mistake or neglect of duty, or inaccuracy of conduct of trustees, which will induce courts of equity to adopt such a course. But the

acts or omissions must be such as to endanger the trust property or show a want of honesty, or a want of proper capacity to execute the duties, or a want of reasonable fidelity."

[20]. A trustee can be removed for abuse of the trust by misconduct and such misconduct would include neglect of duty, *inaccuracy of conduct of trustees*, or by the acts of omission or commission that would endanger the property to the detriment of its beneficiaries.

[21]. Attention of Court was drawn to **Re Consiglio Trusts No. 1 [1973] 3 OR 326**, the courts have gone further on its powers of removal of trustees on grounds of misconduct where it was held:

"Misconduct on the part of a trustee is not a necessary requirement to justify his removal by the court. Where the continued administration of the trust becomes improbable with due regard to the interests of cesti que trust because of misunderstandings and bitterness between the trustees, the court is not only justified but compelled to order a trustee's removal."

"It is our view that misconduct on the part of a trustee is not a necessary requirement for the court to act and that the court is justified in interfering, and indeed required to interfere, when the continued administration of trust with due regard for the interests of the cesti que trust has by virtue of the situation arising between the trustees become impossible or improbable. There is no doubt that such a situation had arisen here. We see no error in the orders of the Judge of first instance removing the trustees; in fact we are of the view that he could have made no order, orders under the circumstances".

[22]. Taking into prime consideration the proper administration of the estate and to prevent any detrimental consequence to its beneficiaries, the court has removed trustees,

when the hostilities between co-trustees become an impediment for proper administration of the estate. This approach was taken in the Canadian case of **Mailing –v- Conrad 2003 CanLII 21143 (ONSC)** and in **Venebles –v- Gordon Esht (2012) ONSC956 (CanLII)**. I find both cases have been following the principles laid down in the English case of **Letterstedt –v- broers** (*Supra*).

- [23]. The defendants in justifying his opposition to cooperate and not consenting to the sale submitted that the beneficiaries have not consented to the sale of the property. However the plaintiff has proved this submission wrong by submitting documents VTR 1 – VTR III whereby three beneficiaries have consented to the sale and sought for their rightful shares as well.
- [24]. The defendant’s submission of not cooperating to sell the estate property cannot be justified. Without the sale of the property the proper administration of the estate and distribution of the benefits to the beneficiaries cannot be completed.
- [25]. The defendant’s attempt to distinguish the cases cited from the present case in my view has failed to succeed.

Conclusion

- [26]. As per the submission made, it is apparent that the co trustees who are siblings no longer see eye to eye any more. The plaintiff has succeeded in establishing the lack of cooperation by the defendant in administering the estate. As per the evidence submitted the beneficiaries are awaiting to get the benefits of their late father’s estate. The plaintiff has also succeeded in establishing the fact that the non-cooperation of the defendant in properly administering the estate has resulted in detriment to the beneficiary’s interest and the estate.

- [27]. It was submitted that the co-trustees, the plaintiff and the defendant are not seeing eye to eye and leaving aside the proper administration of the estate are not even on talking terms. This animosity has hindered the proper administration of the estate and giving effect to the testator's last wishes to the detriment of the beneficiaries and the estate. It was submitted the testator's death had occurred in '91' nearly 23 years ago and the probate had been obtained nearly 18 years back. Still the beneficiaries have not been able to obtain their benefits.
- [28]. I have also considered the judgment of **Nizam -v- Jamal Shah, HBC 47 of 2009 Lautoka High Court.**
- [29]. In my view the plaintiff has convinced this court that under the given circumstances, to give effect to the testator's wish of executors for the distribution of assets, would hinder the interest of the beneficiaries and the estate. Thus the testator's choice of co-trustee has to be disregarded.
- [30]. In this instance I find the defendant uncooperative in facilitating the orderly and proper winding up of the estate. Thus making it improbable to conclude the proper administration.
- [31]. Accordingly for the above stated reasons, the plaintiff has satisfied court to obtain the reliefs prayed in the originating summons. Accordingly court grants order no. 1 in the originating summons.
- [32]. Since the plaintiff has been successful in this application I award a summarily assessed cost of \$3,000 to the plaintiff.




Mayadunne Corea
JUDGE