

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HPP 26 of 2014

In the Estate of Kissun Deo Sharan
late of Malolo, Nadi, Fiji, Farmer,
deceased, Intestate.

In the Matter of Removal Caveat
pursuant to Section 47 of Succession
and Probate and Administration Act
Cap 60.

BETWEEN : **KAMAL DEO SHARAN**

APPLICANT/CAVEATEE

AND : **KAILASH DEO SHARAN** and **SUMAN DEO SHARAN**

RESPONDENTS/CAVEATORS

BEFORE : **Hon. Justice Kamal Kumar**

COUNSEL : Mr R. Singh for the Applicant
Ms S. Narayan for the Respondents

DATE OF HEARING : 12 March 2015

DATE OF JUDGMENT : 31 May 2016

JUDGMENT
(Application for Removal of Caveat)

Introduction

1. On 16 June 2014, Applicant filed Notice of Motion dated 12 June 2014, seeking following Orders:-
 - “a) That the Caveat number 03 of 2014 lodged by Caveator against the issue of Probate in the Estate of Kissun Deo Sharan be removed and discharged;*
 - b) That Probate in the Estate of Kissun Deo Sharan be granted to the Applicant herein;*
 - c) Costs for this application on client solicitor indemnity basis;*
 - d) Any other order or direction as this Honourable Court may deem fit in the circumstances.”*

(“the Application”)

2. The Application was called before the then Master on 26 June 2014, when Applicant was directed to file Affidavit of Service and the Application was adjourned to 10 July 2014.
3. On 10 July 2014, Secondnamed Respondent informed the Court that Firstnamed Respondent is out of the country and will be back in November 2014, whereupon the then Master referred this matter to Deputy Registrar to refer it to a Judge.
4. The Application was called before this Court on 12 September 2014, when Mr. A. Chand informed Court that he is waiting for instructions from the Respondents and as such the Application was adjourned to 16 September 2014, for mention only.
5. On 16 September 2014, Counsel for the Respondents sought time to file Affidavit in Opposition and as such parties were directed to file Affidavits and the Application was adjourned to 31 October 2014, to fix hearing date.
6. The Application was next called on 14 November 2014, when parties were directed to file Submission by 31 January 2015, and the Application was adjourned to 12 March 2015 at 10.00a.m., for hearing.
7. Both parties filed Submissions and made oral submissions on 12 March 2015.

8. Following Affidavits were filed by parties:-

For Applicant:

- (i) Affidavit in Support of Applicant sworn on 4 June 2014 (“**Applicant’s 1st Affidavit**”);
- (ii) Affidavit in Reply of Applicant sworn on 16 October 2014 (“**Applicant’s 2nd Affidavit**”)

For Respondent:

Affidavit in Response sworn on 1 October 2014, by the Secondnamed Respondent (“**Respondent’s Affidavit**”).

Background Facts

- 9. On 16 December 1991, Jai Raj of Malolo, Nadi became the registered lessee of all that property known as Lot 3 on ND 5126 and Lot 26 on ND 5184 Pt. of Nacaqara and Navo formerly Certificate of Title No. 11913 (Farm 2604), Island of Viti Levu, District of Nadi containing total area of 4.8485 hectares comprised and described in Crown Lease No. 9308.
- 10. Jai Raj died on 7 October 2004, and pursuant to his 3 last Will and Testament appointed Muni Deo Sharan as Executor and Trustee of his Estate and bequeathed his property as follows:-

“4. *My Residential Property at Malolo, Nadi*

- a. *to my son Kisun Deo Sharan concrete dwelling house built by him thereon and presently occupied by him with the land on the said dwelling is situated for his use.*
- b. *to my son Surya Deo Sharan concrete dwelling house built by him and presently occupied by him with the land on which the said dwelling is situated for his use.*
- c. *to my son Muni Deo Sharan concrete dwelling house built by him and presently occupied by him with the land on which the said dwelling house is situated for his use.*

5. *That I declare that the land areas on which the said dwellings are situated are well known to the abovenamed beneficiaries.*
6. *That out of my sugar cane farm situated at Moala, Nadi containing 10 acres more or less I give two (2) acres each to my sons Kisun Deo Sharan and Surya Deo Sharan for their use and cultivation and the balance of the farm to my son Muni Deo Sharan for his use and cultivation and the rest and remainder of my estate to my said son Muni Deo Sharan.”*
11. The parties to this proceeding are lawful children of Kissun Deo Sharan.
12. The other children of Kissun Deo Sharan are Kumar Deo Sharan and Radhika Devi.
13. The parties to this proceeding and Radhika Devi reside on the undivided part of the property bequeathed to their father Kissun Deo Sharan.
14. Pursuant to last will and testament dated 4 April 2011, Kissun Deo Sharan appointed the Applicant as Executor and Trustee of his Estate and bequeathed all his real and personal property including his share in the Estate of Jai Raj to the Applicant absolutely.
15. Kissun Deo Sharan passed away on 20 May 2012.
16. The Applicant applied for Probate in respect to Estate of Kissun Deo Sharan pursuant to the will but Application could not be processed because of Caveats lodged by the Respondents on 17 January 2014, in the Probate Registry.

Preliminary Issues

17. Respondents' Counsel submits that the Applicant should have commenced this proceeding by way of Originating Summons and Notice of Motion as provided in Order 5 Rule 5 of the High Court Rules.
18. Order 5 Rule 1 of High Court Rules provides that:-

“Subject to the provisions of any Act and of these Rules, civil proceedings in the High Court maybe begun by writ, originating summons, originating motion or petition.”
19. Order 5 Rule 2 lists the proceedings that must be begun by Writ.

20. Any proceeding by which application is made under any Act must be begun by Originating Summons except whether Act or rule says otherwise or application is made in a pending proceedings. Order 5 Rule 3
21. Where rules or provisions or any Act, does not say that proceedings for a specific claim must be begun by Writ or Originating Summons the Plaintiff has a choice as to how the proceedings is to begin. Order 5 Rule 4(1)

It is appropriate to begin proceedings by Originating Summons where:-

- Sole or principle issue is likely to be construction of an Act, or if any instrument made under the Act or any deed, Will, contract or other document or some question of law (Rule 4(2)(a)); or
 - There is unlikely to be any substantive dispute of fact (Rule 4(2)(b)) unless Plaintiff wants to enter Summary judgment (Rule 4(2)).
22. Order 5 Rule 5 of the High Court Rules provide as follows:-

“Proceeding may be begun by originating motion or petition if, but only if, by these rules or by or under any Act the proceedings in question are required or authorised to be so begun.”

23. Applicant filed Notice of Motion seeking the Orders therein pursuant to Section 47 of Succession Probate and Administration Act Cap 60 which provides as follows:-

“s47.-(1) In every case in which a caveat is lodged, the court may, upon application by the person applying for probate or administration, or for the sealing of any probate or letters of administration, as the case may be, remove the same.

(2) Every such application shall be served on the caveator by delivering a copy of the same at the address mentioned in his caveat.

(3) Such application may be heard and order made upon affidavit or oral evidence, or as the court may direct.”

24. It is obvious that section 47 does not provide as to how the application is to be made and as such Order 5 Rule 5 of the High Court Rules has to be complied with.
25. It is not doubted, that the Applicant has failed to comply with Order 5 Rule 5 of the High Court Rules as he was supposed to file Originating Summons and not Notice of Motion.
26. The Respondent relied on the case of **Amos v. Fiji Trustee Corporation Ltd** [2010] FJHC 617; Probate Action No. 48456 of 2009 (28 July 2010); **In re Estate of Nayan Singh** [2012] Probate Action No. 43 of 2011 (31 May 2012).
27. In **Amos** the Applicants filed Notice of Motion to remove Caveat lodged by the Respondent.

The Court dealt with the Application and determined the Application even though Applicants commenced proceedings by Notice of Motion, and not Originating Summons and ordered for removal of Caveat and for grant of Probate in favour of the Applicants. His Lordship Justice Calanchini, the current President of Fiji Court of Appeal in respect to Order 5 Rule 5 stated as follows:-

“Finally, I should comment briefly on the use of the Notice of Motion by the Applicants to commence these proceedings. The effect of Order 5 is that, in the absence of any such requirement or authorization, proceedings, such as the present case, where the principal question at issue involves the interpretation and application of legislation (i.e. written laws) and where there is unlikely to be any substantial dispute of fact, should be commenced by the use of the originating summons procedure.”

28. The Court in **Amos** (Supra) did not deal with the issue arising in respect to Order 5 Rule 5 but highlighted it before making the Orders.
29. In **Estate of Nayan Singh** his Lordship Justice Amaratunga stated as follows:-

“13. The ‘applicant’ has filed ex-parte notice of motion and an affidavit in this action. The said motion indicate Order 85 rule (2)(c) and inherent jurisdiction as the basis for this application. The Order 85 rule 2 specifically indicates that invoking jurisdiction under the said

provision is by way of an action. The mode of institution of action is clearly laid down in Order 5. There is no method sanctioned by said provision that allows institution of action by Ex-parte motion supported by an affidavit, the Ex-parte notice of Motion should be dismissed. Apart from this irregularity, error and or mistake the motion itself is vague and not easily comprehensible and contains factually incorrect position as regard to purported 'will' and the status of the 'applicant' who has been described as appointed executor without even before admitting the document as the will of the deceased. The final relief is the leave of the court to allow the applicant to insert the date to the will. I have not been referred any provision of law that allows such insertions to a 'will'. There ex-parte notion of motion dated 24th October 2011 should be dismissed on merits as well as on wrong procedure followed in the institution of this action. I order no cost."

30. In **Estate of Nayan's** case the irregularity was quite serious in that Applicant commenced proceedings by Ex-parte Notice of Motion. The Court did not deal with this issue in detail, before Ex-parte Notice of Motion was dismissed for failure to comply with Order 5 Rule 5 of High Court Rules.
31. In this instance the Applicant filed Notice of Motion instead of Originating Summons as was in **Amos** case (Supra).
32. Order 2 of the High Court Rules deal with the effect of non-compliance of the High Court Rules.
33. Order 2 Rules (1) and (2) of High Court Rules provides as follows:-

“Non-Compliance with rules (O.2, r.1)

1.-(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be

treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.

- (2) **Subject to paragraph (3), the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1), and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein or exercise its powers under these Rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit.**
- (3) **The Court shall not wholly set aside any proceedings or the writ or other originating process by which they were begun on the ground that the proceedings were required by any of these Rules to be begun by an originating process other than the one employed.**

Application to set aside for irregularity (O.2, r.2)

- 2.-(1) **An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.**
- (2) **An application under this rule may be made by summons or motion and the grounds of objection must be stated in the summons or notice of motion.” (emphasis added)**

34. Order 2 Rule 1(1) of the High Court Rules make it clear that failure to comply with requirements as to “manner, form, content or in any other respect” is an irregularity and does not nullify the proceedings.

35. Hence, the filing of Notice of Motion instead of Originating Summons by the Applicant is an irregularity and does not nullify the proceedings.
36. Order 2 Rule 1(3) makes it very clear, that the Court should not set aside proceedings that were to be begun by originating process other than the one employed.
37. In any event, the Respondent has not complied with the provisions of Order 2 Rule 2 of the High Court Rules for following reasons:-
- (i) *Respondent should have filed an Application by Summons or Motion stating the ground of objection on the Summons or Motion before taking any fresh steps;*
 - (ii) *Respondent has failed to do so and only raised the objection in final Submissions;*
 - (iii) *Respondents took fresh steps by seeking time to file Affidavit and filing the Affidavit.*
38. In exercise of the Courts discretion under Order 2 Rule 1-(2) of the High Court Rules and the fact Respondent has failed to comply with Order 2 Rule 2 of the High Court Rules I will not strike out the Notice of Motion and deal with the application for removal of caveat as prayed for in the Notice of Motion.

Application for Removal of Caveat

39. In this instance:-
- (i) The Respondents lodged Caveat being Caveat No. 03 of 2014 against grant of Probate in respect to Estate of Kissun Deo Sharan late of Malolo Nadi, Farmer;
 - (ii) On 29 April 2014, Applicant filed Warning which stated that within eight (8) days of service of the Warning Respondents had to enter an appearance and set forth the interest they have in the Estate of Kissun Deo Sharan contrary to that of the Applicant;
 - (iii) On 9 May 2014, Respondents through their then Solicitors filed Appearance to Warning which did not set-forth contrary interest.

40. Section 46 of the Succession Probate and Administrative Act Cap 60 (“SPAA”) provides as follows:-

“s46.-(1) Any person may lodge with the Registrar a caveat against any application for probate or administration, or for the sealing of any probate or letters of administration under the provisions of this Act, at any time previous to such probate or administration being granted or sealed.

(2) Every such caveat shall set forth the name of the person lodging the same, and an address within the city of Suva at which notices may be served on him.”

41. Section 47 of the SPAA is quoted at paragraph 23 of this Judgment.

42. Rules 44(1), (5), (6) and (10) of Non Contentious Probate Rules 1987 (“NCPR 1987”) are relevant to this proceeding which rules provide as follows:-

“44.-(1) Any person who wishes to show cause against the sealing of a grant may either enter a caveat in any registry or sub-registry, and the registrar shall not allow any grant to be sealed (other than a grant ad colligenda bona or a grant under section 117 of the Act) if he has knowledge of an effective caveat; provided that no caveat shall prevent the sealing of a grant on the day on which the caveat is entered.

(2) Any person wishing to enter a caveat (in these Rules called “the caveator”), or a solicitor on his behalf, may effect entry of a caveat-

(a) by completing Form 3 in the appropriate book at any registry or sub-registry; or

(b) by sending by post at his own risk a notice in Form 3 to any registry or sub-registry and the proper officer shall provide an acknowledgement of the entry of the caveat.

(3)

(4)

(5) *Any person claiming to have an interest in the estate may cause to be issued from the registry in which the caveat index is maintained a warning in Form 4 against the caveat, and the person warning shall state his interest in the estate of the deceased and shall require the caveator to give particulars of any contrary interest in the estate; and the warning or a copy thereof shall be served on the caveator forthwith.*

(6) *A caveator who has no interest contrary to that of the person warning, but who wishes to show cause against the sealing of a grant to that person, may within eight days of service of the warning upon him (inclusive of the day of such service), or at any time thereafter if no affidavit has been filed under paragraph (12) below, issue and serve a summons for directions.*

(7)

(8)

(9)

(10) *A caveator having an interest contrary to that of the person warning may within eight days of service of the warning upon him (inclusive of the day of such service) or at any time thereafter if no affidavit has been filed under paragraph (12) below, enter an appearance in the registry in which the caveat index is maintained by filing Form 5 and making an entry in the appropriate book; and he shall serve forthwith on the person warning a copy of Form 5 sealed with the seal of the court.”*

43. Parties have relied on following authorities in respect to issue as to whether and when the Caveator is to declare contrary interest:-

- (i) **Reddy v Webb** (1994) 40 FLR 52 (25 March 1994);
- (ii) **In re the Estate of Sakina** [1994] HPC Action No. 29 of 1993s (12 October 1994);
- (iii) **Amos v. Public Trustee Corporation Ltd** [2010] (Supra)

(iv) **In re Estate of Naresh Chand** [2011] FJHC 424; Caveat No. 36 of 2009 (8 August 2011).

44. In **Reddy v Webb** (Supra) the Caveators lodged caveat on behalf of Michael Caroll, the illegitimate son of the deceased, Narayan Reddy who the Caveators claim was entitled to a share in the deceased's estate.

The Caveatee served Warning on the Caveator who did not take any action for almost a year.

The Caveatee on or about 4 November 1993, (after a lapse of almost one year) filed Application to remove caveat pursuant to section 47 of SPAA.

The Caveator filed Affidavit in Opposition identifying their contrary interest as stated above.

The Counsel for the Caveatee raised the issue that Caveator has failed to disclose "interest contrary to the person warning..." namely the Public Trustee acting for and on behalf of the lawful widow of the deceased, who was the person first entitled to grant of Letters of Administration in the deceased's estate.

The issue that the Court needed to determine was whether there was proof of paternity, that is, whether father had admitted paternity or it was established against the father when father and child were living - s6(4) of SPAA.

The Court stated as follows:-

"From the above it is patently clear that the caveators have fallen well-short of discharging the evidential onus placed upon them by the provisions of Section 6(4) of the Succession, Probate and Administration Act (Cap. 60). Equally clearly the discharge of the statutory onus is unlikely to be determinable upon affidavit evidence only.

In all the circumstances I would exercise my discretion in favour of maintaining the caveat until such time as the claim or interest of the child in the Estate has been finally determined by an appropriately constituted action."

The Court also stated that under s47 of SPAA this Court has discretion as to whether to remove the Caveat or not.

45. In **re the Estate of Sakina** (Supra) the deceased was the parties' mother. On 28 July 1993, deceased who died on 10 September 1993, made a will appointing Applicant as sole executor and trustee. The Applicant applied for Probate and the Respondents lodged Caveat against grant of Probate in respect to Estate of Sakina. The Applicant on 15 December 1993 served Warning on the Caveator.

The Respondents filed Appearance eleven days after the Applicant filed Application before the Court to remove the Caveat. The Respondents as Caveators did not disclose contrary interest in the Appearance to Warning.

The Respondents in the Affidavit filed by them stated that they wished ***“to contest the validity of the alleged Will of our mother dated the 28th day of July, 1993 on the grounds that at the time of execution of the alleged will our mother did not know and approve the contents thereof or alternately the thumb print is not her own.”***

The Court stated as follows:-

“On the Affidavit evidence before me and on the oral submissions made by counsel I find, inter alia, that the defendants have disclosed their “interest” in the estate although they did not do so in the form required and at the relevant time, namely, when the warning to caveator was served on them under the Probate Rules; and when they did file the appearance it was beyond the eight days within which it should have been entered. Now in their reply to the Plaintiff’s affidavit on the present application they are asking the extension of caveat until the “proof of the alleged Will” after disclosing their ‘interest’.”

The Court refused to remove the Caveat on the ground that Respondents by their Affidavit had shown contrary interest that needed to be determined by the Court.

46. In **Amos** (Supra) the Fiji Trustee Corporation Ltd (by its predecessor, Public Trustee of Fiji) was Trustee in respect to Estate of Robert Emerson Amos until such time deceased's wife was released from prison.

The Estate was subject to various Court proceedings and when the Applicant applied for Letters of Administration, the Respondent lodged Caveat on the ground that it was owed fees which Estate had to pay.

The Applicant served Warning on the Respondent and filed Affidavit of Service. The Respondent failed to enter Appearance or file Summons for Discretion within the prescribed time. Rule 44(6) of NCPR 1987.

The Court held that since the Respondent was no longer the Administrator or beneficiary it no longer had any interest that was contrary to the interest of the Applicant.

The Court noted that the Caveat was removed under Rule 44(12) of NCPR 1987.

47. **In re Estate of Naresh Chand** (supra) the Court removed Caveat, on the ground that the Caveatee failed to state contrary interest in the Appearance to Warning and delay in filing the Appearance. The Court stated as follows:-

“So it is clear that a person who is lodging a caveat no longer can maintain it unless that person shows that person has an interest and that interest should be stated in the ‘appearance to warning’ in terms of the Non Contentious Probate Rules 1987. This was a requirement even in the previous Rules of 1954. The non-compliance should be considered fatal; as such a person who lodges a caveat and who could not describe the interest, and waits for more than 8 months without any further action, in that estate should not be allowed to maintain the caveat. The very purpose of providing a form in the probate rule, is to compel the caveator to comply with the requirements as the minimum requirements in the law and anyone who does not comply with the said minimum requirement should not be considered as a proper ‘appearance to warning’. In the circumstances there is no proper appearance to warning as per Non Contentious Probate Rules 1987 and more specifically the essential requirement in the form 5 of the Non

Contentious Probate Rules 1987 has not been complied with by the caveator”.

48. After analyzing the above case authorities, the provision of sections 46 and 47 of SPAA, Rule 44 of NCPR 1987, I am of the view that failure by any party to comply with Rule 44 of NCPR 1987, is not determinative factor in dealing with Application filed under Section 47 of SPAA for Removal of Caveat against grant of Probate or Letters of Administration.

49. The reason why I say this is as follows:-

(i) Rule 44 of NCPR 1987 is to deal with Caveat and removal of Caveats in respect to non-contentious matters, inexpensively and expeditiously;

In some cases such as that in **Amos** case (Supra), the Caveator after being served with the Warning may have realized that it has no legitimate interest and therefore did not file Appearance or Summons for Directions as was noted by the Court. In other instances parties upon receipt of Warning and Appearance may resolve the dispute without resorting to Court proceedings.

(ii) Section 47 of SPAA gives this Court unfettered discretion to either remove the Caveat or let the Caveat remain until the dispute is determined by the Court;

This discretion is to be exercised judicially and in the interest of justice.

(iii) Section 47 of SPAA is not subject to Rule 44 of NCPR 1987.

(iv) The Caveator if he/she chooses can move the Court for removal of Caveat under section 47 of SPAA, even without giving the Caveator the Warning.

(v) When dealing with an Application under Section 47 of SPAA, the Court would definitely consider Rule 44 of NCPR 1987.

This view was also expressed in **Reddy v. Webb**.

50. For the reason stated in preceding paragraph and with all due respect I have to disagree with approach adopted by this Court in **Re Estate of Naresh Chand** on the issue of failure to state contrary interest in Appearance to Warning.

51. Even though, the Respondents did not disclose contrary interest in the Appearance to Warning they could have disclosed it to this Court by Affidavit evidence.
52. In this instance, after analyzing the Affidavit evidence of the parties, I hold that Respondents have failed to disclose any contrary interest to that of the Applicant.
53. The Applicant is named as the sole executor and trustee in the Last Will and Testament of Kissun Deo Sharan dated 4 April 2011.
54. In the said Will, all of Kissun Deo Sharan's property is bequeathed to the Applicant.
55. The Respondents at paragraph 10 of Respondents' Affidavit stated as follows:-
"10. That in response to paragraph 12 of the said Affidavit, I state that the deponent himself does not seem to have proper knowledge as to whether the Will annexed to his Affidavit is the last Will of our father."
56. The Applicant at paragraph 8 of Applicant's 2nd Affidavit stated as follows:-
"8. That as to paragraph 10 of the said Affidavit I say that the Will dated the 4th of April, 2011 is the last Will of my late father, there is no other Will or Testament disposition of my late father and the said Will was made with firm of Rams Law, Solicitors of Nadi and was duly registered with the High Court of Fiji."
57. The Respondents apart from stating that they have contributed financially towards construction of dwelling and have been residing on the property have not stated as to whether they are challenging the validity of Will, and if so, then on what grounds, as was the case in **In re Sakina**.
58. I find that the Respondents have not disclosed any contrary interest to that of the Applicant.
59. Therefore, the Caveat No. 03 of 2014 filed on 17 July 2014, in the Probate Registry in respect to Estate of Kissun Deo Sharan by the Respondents should be removed forthwith.

Costs

60. I have taken into consideration that parties have filed Affidavits and Submissions and made Oral Submissions.

Orders

61. I make following Orders:-

- (i) That the Caveat number 03 of 2014 lodged by Respondents as Caveators on 17 January 2014, against the issue of Probate in respect the Estate of Kissun Deo Sharan be removed and discharged;
- (ii) That Probate in the Estate of Kissun Deo Sharan be granted to the Applicant;
- (iii) Respondents jointly and severally do pay Applicant's costs of this action assessed in the sum of \$1,000.00 within twenty-one (21) days of this Judgment.



K. Kumar

JUDGE

At Suva

31 May 2016

Messrs. Patel & Sharma for the Applicant

Messrs. Diven Prasad Lawyers for the Respondents