

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CIVIL JURISDICTION**

**CIVIL ACTION NO: HPP 33 of 2014**

**IN THE ESTATE OF PARAS RAM** of 2  
Lucys Lane, Raiwaqa, Suva, Fiji, Retired,  
Painter, Deceased, Testator.

**BETWEEN** : **AMBIKA PRASAD** of Muniweni, Naitasiri, Farmer and  
**MAHEN PRASAD** of 9 Miles, Nakasi, Carpenter, as  
Executors and Trustees of the Estate of Paras Ram,  
(Deceased) named in the Will dated 15<sup>th</sup> November 2007.

**1<sup>ST</sup> PLAINTIFFS**

**AND** : **BIMLA WATI** of 2 Lucys Lane, Raiwaqa, Suva, Domestic  
Duties.

**2<sup>ND</sup> PLAINTIFF**

**AND** : **BINESH PRASAD** of 2 Lucys Lane, Raiwaqa, Suva, Fiji,  
Carpenter, as Executor and Trustee of the Estate of Paras  
Ram (Deceased) named in the Will dated 15<sup>th</sup> June, 2001  
of the Deceased.

**1<sup>ST</sup> DEFENDANT**

**AND** : **REGISTRAR OF TITLES** of Suva, Fiji.

**2<sup>ND</sup> DEFENDANT**

**BEFORE** : Justice Riyaz Hamza

**COUNSEL** : Mr. Parnish Kumar for the Plaintiffs  
Mr. Patrick Kumar for the 1<sup>st</sup> Defendant  
Ms. Manulisa Faktaufon for the 2<sup>nd</sup> Defendant

**Date of Hearing** : 8 June 2016

**Date of Ruling** : 22 July 2016

---

**RULING**

---

## **INTRODUCTION AND BACKGROUND**

- [1] This is an application made by the Plaintiffs, by way of a Writ of Summons, filed on 18 July 2014.
- [2] In their Statement of Claim the Plaintiffs claim the following reliefs:
1. That the Grant of Probate No. 48552 be revoked and set aside forthwith.
  2. That the Court to pronounce against the validity of the alleged Will dated the 15 June 2001.
  3. That the Transmission by Death No. 721514 in favour of the 1<sup>st</sup> Defendant in relation to the property comprised in CT No. 9308 be declared null and void and set aside.
  4. That the Transfer No. 721515 of the property comprised in CT No. 9308 in favour of the 1<sup>st</sup> Defendant and late Phul Mati as joint tenants be declared null and void and set aside.
  5. That the Record of Death registered on the property be declared null and void and set aside.
  6. That the Court shall pronounce in solemn form Probate of the Will of the said Deceased dated 15 November 2007 granted on 5 June 2009 being Probate No. 48634 and the properties of the Deceased transferred and or be distributed in accordance with the Last Will of the deceased.
  7. Such further or other Orders as may be just and equitable in the circumstances.
- [3] The 1<sup>st</sup> Defendant filed his Statement of Defence, on 13 August 2014, while the 2<sup>nd</sup> Defendant filed a Statement of Defence, on 4 September 2014. The Plaintiffs filed a reply to the Statement of Defence of the 1<sup>st</sup> Defendant, on 28 August 2014.
- [4] On 25 April 2016, the Plaintiffs filed a Summons pursuant to Order 34, Rule 3 of the High Court Rules 1988, that this matter be tried and dealt with firstly in a summary

manner on a question of law relating to double grants issued by the Probate Registry for the same estate, before other questions or issues are to be tried in this action. The Summons was supported by an Affidavit sworn by the 2<sup>nd</sup> Plaintiff, Bimla Wati.

- [5] On 19 May 2016, the 1<sup>st</sup> Defendant filed an Affidavit in Reply (Affidavit in Opposition to the Summons). An Affidavit in Response to the 1<sup>st</sup> Defendant's Affidavit was filed by the said Bimla Wati on 6 June 2016.
- [6] This matter was taken up for hearing before me on 8 June 2016. Counsel for the Plaintiffs and 1<sup>st</sup> and 2<sup>nd</sup> Defendants were heard. The parties also filed written submissions, and also referred to several case authorities, which I have had the benefit of perusing.

#### **STATEMENT OF CLAIM**

- [7] The contents of the Statement of Claim can be summarized as follows:
1. The 1<sup>st</sup> Plaintiffs and the 1<sup>st</sup> Defendant are the lawful sons of the Deceased Paras Ram, while the 2<sup>nd</sup> Plaintiff is the daughter of the Deceased. The Deceased passed away on 10 December 2008.
  2. The Deceased resided at 2 Lucys Lane, Raiwaqa, Suva, Fiji and was a painter by profession.
  3. The Deceased had made and duly executed his true Last Will on 15 November 2007, wherein he appointed the 1<sup>st</sup> Plaintiffs to be the Executors and Trustees of his said Last Will.
  4. The Deceased is said to have made an earlier Will dated 15 June 2001, wherein he appointed the 1<sup>st</sup> Defendant as Executor and Trustee of the said Will.
  5. On 5 June 2009, the Probate Registry granted Probate to the 1<sup>st</sup> Plaintiffs as Executors and Trustees of the Deceased, under Probate No. 48634. This was in respect of the Will of the Deceased dated 15 November 2007. Pursuant to this



Will, the Deceased had bequeathed all his property situated at Lucys Lane, Raiwaqa, to his sons Binesh Prasad (1<sup>st</sup> Defendant), Mahend Prasad (1<sup>st</sup> named 1<sup>st</sup> Plaintiff) and his daughter, Bimla Wati (2<sup>nd</sup> Plaintiff), for their use and benefit absolutely.

6. On 22 June 2009, the Probate Registry granted Probate to the 1<sup>st</sup> Defendant as Executor and Trustee of the Deceased, under Probate No. 48552. This was in respect of the Will of the Deceased dated 15 June 2001. Pursuant to this Will, the Deceased had bequeathed all his property situated at Lucys Lane, Raiwaqa, to his wife Phul Mati and his son Binesh Prasad, the 1<sup>st</sup> Defendant, in equal share, for their use and benefit absolutely.
7. Thus the Plaintiffs discovered that the Probate Registry had issued double grant for the same estate.
8. Thereafter, the Plaintiffs filed this action seeking the reliefs enumerated above.

#### **SUMMONS FILED BY THE PLAINTIFFS**

[8] In the Summons filed by the Plaintiffs pursuant to Order 34, Rule 3 of the High Court Rules 1988, they seek the following Orders:

1. THAT the hearing date set for 2<sup>nd</sup> and 3<sup>rd</sup> May 2016 be tried and dealt with firstly in a summary manner on a question of law relating to Double grants issued by the Probate Registry for the same estate before other questions or issues is to be tried in this action.
2. THAT such other orders as may be just and equitable in the circumstances be granted by the Court.

#### **THE AFFIDAVIT FILED BY BIMLA WATI**

[9] The 2<sup>nd</sup> Plaintiff filed an Affidavit in support of the Summons. The contents of the Affidavit can be summarized as follows:

1. She deposed that by a Will, which was executed by the Deceased on 15 June 2001, the Deceased gave his property at 2 Lucys Lane, Raiwaqa, being CT 9308, to his wife and 1<sup>st</sup> Defendant in equal shares.
2. That another Will was executed by the Deceased on 15 November 2007, in which the Deceased gave his property at 2 Lucys Lane, Raiwaqa, equally to the 1<sup>st</sup> named 1<sup>st</sup> Plaintiff, the 2<sup>nd</sup> Plaintiff and also the 1<sup>st</sup> Defendant.
3. That the purported Will dated 15 June 2001 was not the Last Will of the Deceased and had been revoked by the Will dated 15 November 2007.
4. That the 1<sup>st</sup> Defendant in his Statement of Defence has not made any Counter Claim to challenge the validity of the Will dated 15 November 2007, in as much as Probate No. 48634 is concerned.
5. That since the validity of the Will dated 15 November 2007 is not contested by the 1<sup>st</sup> Defendant, the only issue left before the Court to determine on legal arguments in which Grant takes precedence? Copies of the grant issued by the Probate Registry has been annexed and marked as "B1".
6. She states that the High Court Rules provide that a Defendant in a probate action must add to his defence a counterclaim in respect of the matter. However, that the 1<sup>st</sup> Defendant has failed to do so.
7. That all pleadings and discovery has closed in this matter and the matter is set for Hearing on the 2<sup>nd</sup> and 3<sup>rd</sup> May 2016.
8. That in light of the above that the 1<sup>st</sup> Defendant has not filed any counterclaim, the only issue left to be determined by the Court is which grant takes precedent and or alternatively whether orders sought in the Writ of Summons dated 17<sup>th</sup> July 2014 should be granted.
9. That in light of the above since the 1<sup>st</sup> Defendant has not filed any counterclaim, the only issue left to be determined by the Court is which grant takes precedent and or alternatively whether orders sought in the Writ of Summons, dated 17<sup>th</sup> July 2014, should be granted.
10. She deposes that no prejudice would be caused to the 1<sup>st</sup> or 2<sup>nd</sup> Defendant. In fact it would save time and financial expense to proceed with the hearing on



legal arguments firstly on the issue concerning issuance of double grants by the Probate Registry.

11. Accordingly, she prays that this Court allow this matter to proceed to hearing on legal arguments only.

#### **THE AFFIDAVIT IN REPLY FILED BY BINESH PRASAD**

[10] In the Affidavit in Opposition filed by the 1<sup>st</sup> Defendant he deposes as follows:

1. He states that when he discovered the Last Will of the Deceased, dated 15 June 2001, he brought it to the attention of all the beneficiaries.
2. That on Wednesday 11 February 2009 he advertised in the Daily Post setting out his intention to make application in the High Court for issue of the Probate. A copy of the advertisement obtained from the High Court Probate Registry has been annexed and marked as "A".
3. That the advertisement, dated 11 February 2009, was a notice to all persons having interest and claim in any form in the Estate of Paras Ram of 2 Lucys Lane, Raiwaqa, Suva and enabling all the interested parties to send their claims in writing to his Solicitors Messrs Sherani & Company.
4. That his Solicitors, Messrs Sherani & Company waited for 21 days for any claims to be received by any interested parties in respect in the Estate of Paras Ram.
5. That since no claims were received, his Solicitors proceeded to file the Oath of Executor in the High Court Probate section for issue of the probate in his favour. A copy of the Oath of Executor obtained from the High Court Registry has been annexed and marked as "B".
6. Based on his application by way of the Oath of Executor, that Probate Number 48552 was issued from the High Court Probate Registry and he was appointed as the Sole Executor and Trustee of the said estate.
7. He deposes that he administered the Estate in accordance to the Last Will and Testament of the Will dated 15 June 2001.

8. That he appointed his Solicitors, Messrs Sherani & Company to register the Transmission by Death on the Certificate of Title No. 9308, Lot 27, on DP 2274 as per the Probate No. 48552. A copy of the Transmission by Death No. 721514 has been annexed and marked as "C".
9. That simultaneously the Transfer No. 721515 was also registered in favour of Phul Mati and himself, on the Certificate of Title No. 9308, Lot 27, on DP 2274, pursuant to the Will of Paras Ram, dated 15 June 2001.
10. The 1<sup>st</sup> Defendant denies having any knowledge of any other Last Will of the Deceased, apart from the Last Will dated 15 June 2001.
11. He states that the Probate No. 48552 is a proper grant and has been issued in accordance with the provisions of the Succession, Probate and Administration Act.

#### **THE AFFIDAVIT IN RESPONSE FILED BY BIMLA WATI**

- [11] In her Affidavit filed in Response Bimla Wati reiterates that the purported Will, dated 15 June 2001, was not the Last Will of the Deceased and that the said Will had been revoked by the Last Will dated 15 November 2007. Further she denies that the Last Will, dated 15 June 2001, was brought to the attention of all the beneficiaries.
- [12] In any event, she deposes that the Probate Registry granted Probate to the 1<sup>st</sup> Plaintiffs, as Executors and Trustees of the Deceased, under Probate No. 48634, on 5 June 2009, which was prior to the 22 June 2009, the date on which the Probate Registry granted the second Probate to the 1<sup>st</sup> Defendant, as Executor and Trustee of the Deceased, under Probate No. 48552.

#### **THE POSITION TAKEN UP BY THE 2<sup>ND</sup> DEFENDANT, THE REGISTRAR OF TITLES**

- [13] The Registrar of Titles position in this matter is only nominal. It is only a Registration body.



- [14] Pursuant to the Last Will, dated 15 June 2001, the 1<sup>st</sup> Defendant transferred the property to himself and Phul Mati (his mother), as joint tenants and subsequently transferred the property to himself upon Phul Mati's death.
- [15] When presented with the Probate No. 48552, by the 1<sup>st</sup> Defendant, the 2<sup>nd</sup> Defendant accepted and lodged the documents provided by the 1<sup>st</sup> Defendant. The 2<sup>nd</sup> Defendant could not have known that the Probate Registry had issued a double grant of probate, nor was it aware (or obligated to be aware) of the competing Wills.
- [16] However, when made aware of the same, the Registrar of Titles lodged a Caveat, being Caveat No. 793645 to protect any interest of any beneficiaries.

#### **LEGAL PROVISIONS AND ANALYSIS**

- [17] In terms of Section 35 of the Succession, Probate and Administration Act (Chapter 60) this Court has been granted wide powers. The Section is reproduced below:

*"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."*



[18] The Plaintiffs have filed the Summons pursuant to Order 34, Rule 3 of the High Court Rules 1988. The rule provides as follows:

*“(1) In cases where-*

*(a) the parties have stated a special case for the adjudication of the Court on a question of law only, or*

*(b) an order has been made under Order 33, Rule 4 that a question of law shall be tried before other questions or issues,*

*any of the parties may apply to the Registrar to set the case down for trial on a date to be agreed upon by all the parties and the Registrar.”*

[19] Order 33, Rule 3 of the Rules stipulates that *“The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.”*

[20] As per Order 33, Rule 7, *“If it appears to the Court that the decision of any question or issue arising in a cause or matter and tried separately from the cause or matter substantially disposes of the cause or matter or renders the trial of the cause or matter unnecessary, it may dismiss the cause or matter or make such other order or give such judgment therein as may be just.”*

[21] Therefore, the main issue at hand is whether it is appropriate for this matter to be dealt with in a summary manner on questions of law.

[22] Considering the facts and circumstances of this case, as enumerated in the Affidavits filed by the 2<sup>nd</sup> Plaintiff and the 1<sup>st</sup> Defendant, and considering the very nature of the causes of action and the reliefs prayed for by the Plaintiffs, it is necessary and essential for oral testimony to be heard in this matter prior to coming to a finding.

[23] The Plaintiffs allege that the 1<sup>st</sup> Defendant in his Statement of Defence has not made any Counter Claim to challenge the validity of the Last Will, dated 15 November

2007, in as much as Probate No. 48634 is concerned. However, the Counsel for the 1<sup>st</sup> Defendant argues that the Plaintiff cannot take up this position now, since these matters have been clearly set out as “Issues” to be determined by this Court, in the Pre-Trial Conference Minutes, signed by the Solicitors for the Plaintiffs and the 1<sup>st</sup> Defendant, on 16 April 2015.

[24] It is clear that this Court cannot adjudicate upon these Issues in a summary manner purely based on questions of law. Therefore, it is imperative to hear oral testimony of the relevant witnesses.

### **CONCLUSION**

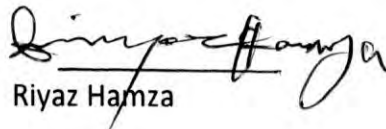
[25] For all the aforesaid reasons, it is the view of this Court that the Summons filed by the Plaintiff is struck out.

[26] Accordingly, I make the following Orders:

### **ORDERS**

1. The Summons filed by the Plaintiffs, on 25 April 2016, is struck out.
2. I grant costs to the 1<sup>st</sup> Defendant summarily assessed at Fijian Dollars \$1,500, to be paid jointly by the 1<sup>st</sup> Plaintiffs and 2<sup>nd</sup> Plaintiff within one month from today.

Dated this 22<sup>nd</sup> day of July 2016, at Suva.

  
Riyaz Hamza

**JUDGE**

**HIGH COURT OF FIJI**

