

THE HIGH COURT OF FIJI AT SUVA

CIVIL JURISDICTION

PROBATE ACTION NO. 29/2013

BETWEEN:

Moneel Mohitesh Chand

Plaintiff

Vindulla Arti Mala

First defendant

Vijay Chand

Nominal defendant

COUNSEL: Mr K. Qoro for the plaintiff
Mr R. Singh for the first defendant

Date of hearing: 27th March, 2015

Date of Judgment: 24th August, 2016

J U D G M E N T

1. The plaintiff is the son of Mahesh Chand, (deceased) from his first marriage. The first defendant, the second wife of the deceased obtained letters of administration in the estate of the deceased. The plaintiff alleges that the first defendant did not disclose the deceased's will of 27th May, 2010, in her application for letters of administration. The plaintiff and his sister were beneficiaries under the will. The plaintiff seeks a declaration that the grant of letters of administration to the first defendant contravenes the will of 27th May, 2010, an order that the grant be revoked and the nominal defendant, the brother of the deceased be appointed as sole executor of the will.
2. The first defendant, in her statement of defence, states that the "*purported*" will is not a valid will of the deceased and does not represent his true intention. A caveat filed by the plaintiff opposing the grant of letters of administration to her, was struck out by the High Court in HPP16 of 2013. In her counter-claim, the first defendant moves for a declaration that the will of 27th May, 2010, is null and void, as it is not witnessed by two witnesses

and was made to appease the nominal defendant for a claim for monies he may have against the said deceased. The nominal defendant was not a dependent of the deceased. The deceased provided financial support to the plaintiff, in his lifetime.

3. *The hearing*

(i) PW1(*Mohini Chand, the former wife of the deceased*) gave evidence. She said that she was married to the deceased for 13 years and had two children, the plaintiff, aged 21 and a daughter aged 30 years. She divorced him in 2000. She resides in California. The deceased came to California once in two to three years. He passed away on 15th October, 2012. He called his children often and provided financial help to them. He She attended his funeral with the two children. She said that she knew he had a will. The two children were the beneficiaries. The nominal defendant faxed a copy of the will to her.

Mr Singh, counsel for the defendant objected to the marking of the copy of the will. He submitted that if the plaintiff is propounding the will, the original has to be produced. The nominal defendant should have been subpoenaed to produce the original.

I upheld the objection raised.

(i) In cross-examination, she said that her daughter had a degree and worked at Citibank. Her son was a mechanical engineering student.

There was a previous will with a close friend of the deceased, Nirbhay Singh as trustee. It transpired that the deceased trusted him. PW1 denied that the deceased had borrowed money from Nirbhay Singh.

PW1 said that she had a house in the US which belonged to four people: the deceased, herself, her sister and brother-in-law. She had transferred the share of the deceased to herself.

She was shown the marriage certificate of 28 August, 2012 of the deceased to the first defendant, as attached to the affidavit of the first defendant, as filed in her application for letters of administration. She said that the first defendant and the deceased were in a de facto relationship for a long time. Their daughter was born on 1st December, 2008.

In re-examination, she said that the house in US was purchased with her money. It is under a mortgage.

(ii) PW2, *(the plaintiff)*

PW2 said that he was studying in the US on a scholarship. He had a good relationship with his father. He told him that everything was for his children. He told his sister about his will. PW2 said that he attended his funeral.

The first defendant worked in his father's store. He had a shoe store and a saw mill.

In cross-examination, PW2 said that he had been in the US since 1996, when he was 7 years old. He admitted that the first defendant, in her application for letters of administration disclosed that he and her sister were beneficiaries.

(iii) DW1 (*Hirdeshini Kumari, Acting Senior Court Officer*) stated that letters of administration was granted to the first defendant. She produced the original file bearing No.53395 containing the application for letters and other documents.

The determination

4. The plaintiff seeks a declaration that the grant of letters of administration to the first defendant contravenes the deceased's will of 27th May, 2010, and is null and void.
5. The first defendant's riposte is that the will is not valid, as it does not represent the true intention of the deceased. It was admittedly, not witnessed by two witnesses, as required by law.
6. The case for the plaintiff is that the will of 27th May, 2010, embodies the testamentary intention of the deceased, albeit it does not conform to section 6. The plaintiff relies on section 6A of the Wills (Amendment) Act, 2004.

7. Section 6A reads :

- 1) *A document purporting to embody the testamentary intentions of a deceased person, even though it has not been executed in accordance with the formal requirements under section 6, constitutes a will of the deceased person if the Court is satisfied that the deceased person intended that the document to constitute his or her will.*
- 2) *The Court may, in forming its view, have regard, in addition to the document, to any other evidence relating to the manner of execution or testamentary intention of the deceased person, including evidence, whether admissible before or after the commencement of this section, of statements made by the deceased person.*
- 3) *A party that seeks a declaration under this section has the onus of proof.*(emphasis added)

8. In support, Mr Qoro counsel for the plaintiff, in his closing submissions cites the following passages from a decision of the Supreme Court of NSW in *Alan Yazbek v Ghosn Yazbek & Anor*, [2012] NSWSC 594:

. In the context of informal wills “a document in which a person says what that person intends shall be done with that person’s property upon death seems.. to be a document which embodies the testamentary intentions of that person”: Re: Estate of Masters(1994) 33 NSWLR 446 at 446 per Priestly JA.

..if there is evidence whether in the form of the contents of the document itself, or evidence as to the circumstances in which the document came into being, such as to satisfy the Court that the deceased, by some act or words, demonstrated that it was his or her intention that the document in question should without more operate as his or will: (emphasis added)

9. Section 6A(3) provides that the onus of proof to establish that a document embodies the testamentary intention of the deceased lies on the party propounding the will.

10. The original will was not produced at the hearing.

11. Mr Singh, in the closing submissions filed on behalf of the defendant has cited *Chandra v Chandra*, (2012) FJHC 1080 where Calanchini J (as he then was) stated :

Whenever it is necessary for an executor to establish due execution of a will, he is required at common law, to call on of the attesting witnesses, if any was available. (Bowman vs Hodgson (1867) 1 L.R.P and D 362).

The burden imposed on a party who seeks to propound a will was stated clearly by Lord Hanworth MR in In the Estate of Lavinia Musgrove, Davis vs Mayhew(1927) P 264 at page 276.

It is clear first, that the onus of proving a will lies upon the party propounding it, and secondly, that he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator. To develop this rule a little further – he must show that the testator knew and approved of the instrument as his testament and intended it to be such.

Parke B in the course of his judgment in Barry vs Butlin (1) says:

The strict meaning of the term onus probandi is this, that if no evidence is given by the party on whom the burden is cast, the issue must be found against him. (emphasis added).

12. In my view, the plaintiff has failed to discharge his burden. The plaintiff's claim fails.
13. The statement of claim avers that the first defendant was the second wife of the deceased. The deceased married the first defendant on 28 August, 2012, after divorcing PW1. The will is dated 27th May, 2010. The marriage certificate, as attached to the application for letters of administration was produced by DW1.
14. Section 13 provides that a will is revoked by a subsequent marriage of the testator.

15. In my view, in any event, the purported will was revoked by the subsequent marriage of the deceased.
16. The counter-claim of the first defendant challenges the will of 27th May, 2010.
17. Mr Singh, in his closing submissions points out that the failure of the plaintiff to file a reply to the statement of defence and counter claim constitutes an admission of the counter-claim. In support, he cited Or 18, r12(3) and the Supreme Court Practice, 1999.
18. Or 18, r12(3) provides that “..every allegation of fact made in a .. Counterclaim which the party on whom it is served does not intend to admit must be specifically traversed by him in his . defence to counterclaim, ..; and a general denial of such allegations, or a general statement of non- admission of them, is not a sufficient traverse of them.”
19. The **Supreme Court Practice**, 1999, Vol 1, page 340 states:
- Implied admissions – under this rule there is an implied admission of every allegations of fact made in a pleading which is not traversed in the next succeeding pleading. Such an admission has the same value and effect as if it were an express admission.*”
20. In my judgment, the first defendant is entitled to a declaration that the will of 27th May, 2010, of the deceased is null and void.
21. **Orders**
- (i) I decline the claim of the plaintiff.
 - (ii) I grant the first defendant a declaration that the will of 27th May, 2010, of Mahesh Chand is null and void.
 - (iii) The plaintiff shall pay the first defendant costs summarily assessed in a sum of \$ 3000.



ALB Brito Mutunayagam

ALB-Brito Mutunayagam
JUDGE

24th August, 2016