

IN THE HIGH COURT OF FIJI
AT SUVA
PROBATE JURISDICTION

HPP Case No.: 14 of 2015

Probate No.: 40531

IN THE MATTER of the **ESTATE OF KWAN CHEW KUVA** aka **CHEW KUVAN KWAN** late of 88 Milverton Road, Raiwaqa, Suva, Republic of Fiji, Businessman, Deceased, Testate

BETWEEN : **BYRON KWAN**, Beneficiary of 88 Milverton Road, Raiwaqa, Suva
APPLICANT

AND : **NELSON KWAN**, Beneficiary of 88 Milverton Road, Raiwaqa, Suva, Trustee
1st RESPONDENT

AND : **KAREN KWAN**, Beneficiary of 88 Milverton Road, Raiwaqa, Suva, Trustee
2nd RESPONDENT

Counsel : **The Applicant appear in person**
Ms. Rakai M for 1st Respondent

Date of Hearing : **27th November, 2015**

Date of Judgment : **12th February, 2016**

JUDGMENT

INTRODUCTION

1. The Applicant filed this Originating Summons application seeking appointment of trustee to the estate of Kwan Chew Kuva. The 1st Respondent and a third party obtained probate for the said estate. The said persons were removed as executors by a court order. Now the Applicant is seeking a new appointment as the trustee of the estate.

ANALYSIS

2. The removal of the 1st Respondent was pronounced by a judgment on 27th May, 2015 having heard an Originating Summons on 4th May, 2015. The said order was sealed on 9th June, 2015 by the Chief Registrar. The 1st Respondent had filed an appeal on 7th July, 2015 and this appeal has not concluded yet.
3. The Originating Summons in this action was filed on 23rd June, 2015 and there is no stay order against the said judgment delivered on 27th May, 2015. It is also important to note that 1st Respondent did not file an application for stay of the judgment even as late as October, 2015 but the undated affidavit in opposition states they would be filing an application for stay.
4. In the circumstances the trustees of the estate were removed by a court order in May, 2015 and though it was appealed in July, 2015 there was not a stay order sought even as late as October, 2015.
5. The 1st Respondent failed to submit estate accounts for more than a decade in the said action in which he was removed but strangely such accounts appear in his undated affidavit filed in the present action. Why these were not produced in the previous action where he was removed was not explained and it is also not clear as to when those accounts were prepared. In any event I do not have to consider these statements of accounts in this Originating Summons. The Originating Summons in the present action only seeks an order to appoint the Applicant as new trustee.
6. The previous trustees including the 1st Respondent were removed by this court on 27th May, 2015. The Applicant, 1st and 2nd Respondents are the only children of late Kwan Chew Kuan. 2nd Respondent was present in the court and indicated that she would not file objection, but according to the Applicant she is of unsound mind.(see paragraph12 of the affidavit in support dated 23rd June, 2015).

7. The Applicant states that the 2nd Respondent is a person of unsound mind. I do not have evidence to assess her mental status, but even in the last will of the deceased she was referred to as 'My invalid daughter'.
8. If she is of unsound mind as alleged by the Applicant (not denied by the 1st Respondent) this proceeding cannot be continued against her without an appointment of a proper person on behalf of her in terms of Order 80 rule 2 of the High Court Rules of 1988. The Applicant had named 2nd Respondent to this application, but failed to appoint *next friend*.
9. In terms of Order 80 rule 2 (1) of High Court Rules of 1988 a '*person under disability may not bring, or make a claim in any proceeding except by his next friend and may not acknowledge service, defend, make a counterclaim or intervene in any proceedings or appear in any proceedings under a judgment or order notice of which has been served on him except his guardian ad litem.*' (underlining is mine)
10. According to the interpretation contained in Order 80 rule 1 of High Court Rules of 1988 a 'person under disability means a person who is an infant or a patient' and "patient" is defined in the same provision as 'a person who by reason of mental disorder is incapable of managing and administering his property and affairs'.
11. According to the Affidavit in Support of Originating Summons, 2nd Respondent is not capable of administering estate as she is of unsound mind.
12. The Originating Summons proceeded to hearing without compliance of the mandatory provision contained in Order 80 rule 2(1). In terms of Order 80 rule 2(1) the service to the 2nd Respondent was erroneous hence the entire proceeding becomes defective. There is no proper acknowledgment of service of the 2nd Respondent. The appearance of 2nd Respondent cannot be considered proper. There was no application to regularize the defect even at the time of hearing. In the circumstances this Originating Summons has to be struck off for the said irregularity.

CONCLUSION


13. Due to the irregularity in terms of Order 80 Rule 2(1) this Application needs to be struck off. The 1st Respondent has not raised this irregularity as an objection. In the circumstances the Originating Summons is dismissed. Each party to bear their own costs.

FINAL ORDERS

- a. The Originating Summons struck off.
- b. No costs.

Dated at Suva this 12th day of February, 2016




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Justice Deepthi Amaratunga
High Court, Suva