

IN THE HIGH COURT OF FIJI AT SUVA

PROBATE JURISDICTION

Action No. HPP 08 of 2007

IN THE ESTATE OF DEO NARAYAN (father's name Ram Adhin aka Ramadin)

late of Namaka Lane, Namaka, Nadi, Deceased, Testate.

BETWEEN

KRISHNA KUMARI father's name Hari Prasad of Namaka Lane, Namaka

Nadi Domestic Duties.

PLAINTIFF

AND

TIGER CHANDRA NARAYAN as the intended Administrator of the ESTATE OF

SHIU PATI father's name Ram Bihari late of Mulomulo Nadi Domestic Duties

and **TIGER CHANDRA NARAYAN** father's name Deo Narayan of

Mulomulo Nadi a Farmer as the Executors and

Trustees of the Estate of Deo Narayan father's name

Ram Adhin aka Ramadin of Mulomulo

Nadi a retired person.

FIRST DEFENDANTS

AND

WESTPAC BANKING CORPORATION incorporated in Australia and
registered in New South Wales under the Corporations Act 2001
and having its principal place of business in the Fiji Islands
at 1 Thomson Street. Suva.

SECOND DEFENDANT

Counsel : Ms. B. Doton for the Plaintiff
1st Defendant in person
2nd Defendant absent and unrepresented

Dates of Hearing : 14th & 15th November, 2016 and & 7th December, 2016

Decided on : 28th February, 2017

JUDGMENT

[1] The plaintiff filed this action seeking the following reliefs;

1. That the court do pronounce against the purported Will propounded by the defendant namely the will purportedly executed on or about 2nd day of April 2004.
2. An order that the probate No. 45645 granted on the 20th day of November 2006 be declared as invalid and/or revoked.
3. An order that the probate be granted in accordance with the Will dated 30th day of September 2002.

4. An order that the first defendant pay the estate of Deo Narayan all money that he has withdrawn from the bank accounts of the estate of Deo Narayan together with interest thereon at the bank's current interest rate.

[2] The 1st defendant in his statement of defence sought and order on the plaintiff directing her to refund all monies unlawfully withdrawn from the bank account of the deceased in the last six years being the statutory period allowed under the limitation Act.

[3] Against the 2nd defendant the plaintiff sought the following reliefs;

1. An account of all monies unlawfully withdrawn from the accounts of the deceased in the last six years being the statutory period allowed under the Limitation Act;
2. Refund all the monies unlawfully withdrawn from the bank account of the deceased by the plaintiff in the last six years being the statutory period allowed under the Limitation Act; and
3. Damages and costs.

[4] The plaintiff avers in her statement of claim that the last will dated 02nd April, 2004 is a fraudulent document and alleges that the following are the particulars of fraud;

- (a) Signature of the deceased has been forged.
- (b) The deceased was not of sound mind, memory and understanding when the purported will was executed.
- (c) The purported will was not read over or explained to the deceased nor did he read it himself before it was executed and he was unaware of its nature and effect.
- (d) The purported signature or mark of the deceased on the purported Will was not made by the testator himself nor by anyone for at his directions.
- (e) The first defendants have fraudulently forged or caused to be forged the purported Will to fraudulently deprive the plaintiff and her children of their inheritance.
- (f) The execution of the purported will was obtained by undue influence.

- [5] In this case the parties are relying on two different last wills purported to have been executed by the same testator. The plaintiff is relying on the last will dated 30th September, 2002 and the 1st defendant is relying on the last will dated 02nd April, 2004.
- [6] At the conclusion of the hearing both parties were given time till 17th January, 2017 to file their written submissions but none of the parties tendered written submissions.
- [7] It is the evidence of the plaintiff that on 30th September, 2002 when Deo Narayan came home he had an injury on his forehead and he was taken to the medical centre. After returning from the medical centre he had informed the plaintiff that he was going to the lawyers. When he came back from the lawyer he had told the plaintiff that he prepared a last will and given a copy of it to her.
- [8] The plaintiff testified that the older children of Deo Narayan did not come to see the father and they came only when they were in need of money. She also said that Deo Narayan did not indicate to her that he was going to give any share of his properties to his older children.
- [9] Witness Janandhan Naicker is a clerk attached to "Rams Law" law firm. At the time Deo Narayan executed his last will this witness had been working for "Hariram" law firm where the last will was executed. He testified that Deo Narayan came to the office and instructed him to prepare the last will. According to his evidence Deo Narayan's son had accompanied him to the law firm and once the last will was ready the witness had read it over to the testator and obtained his signature. After the execution of the last will he had kept the original with him and given a copy to the testator.
- [10] Dr. Zen Min Low is the doctor who treated Deo Narayan. He stated that he had been treating Deo Narayan since 2001 and that he was suffering from Cardiac failure, Hypertension and Diabetes. It is also his evidence that he was a mentally strong person, one of his eyes was blind and he was slow in movement. He also stated that in 2006 he was not in his best mental condition. This witness also testified that it was the wife who brought him for treatment and stated further that the defendant also brought him to the clinic once or twice.

- [11] Witness Siteri Celua was the tenant of Deo Narayan. Her evidence is that between 2004 and 2006 Deo Narayan could not recognise her.
- [12] Abhinesh Narayan is a son of the plaintiff and Deo Narayan. He testified that in Fiji he was living with his parents, brothers and sisters but the step brothers visited the father only when they were in need on money. He also said that he accompanied his father to Mr. Hariram's office to execute the last will.
- [13] The defendant while denying the allegation that he went to see the father only when he was in need of money testified that he and his brothers Sathish, Subhash, Vijay, Sushil and Ravin Chandra used to drive for him whenever he needed them and also that it was he who took the father to the Lautoka hospital. He testified further that he did not see the execution of the last will (D1) and after the demise of the father the mother gave it to him.
- [14] Witness Sevika Nand Reddy is a witness to the last will (D1) who testified that nobody forced Deo Narayan to sign the last will. He also testified that when he went to the place where the last will was executed, the last will was ready and when it was read over to the testator he did not raise any questions.
- [15] Witness Andrew Navin Samy is the other witness to the last will. The witness identified his signature on the last will and stated that before signing it, the last will was read over to the testator by Master Reddy.
- [16] After summarising the evidence relating to the execution of the last will in question (D1) the court will now proceed to consider whether the plaintiff has been successful in establishing the allegation that the last will "D1" is a fraudulent document.
- [17] The plaintiff made an attempt to show court that the testator had no intention to give part of his estate to the defendant and his other children of his earlier marriage by adducing evidence that the defendant and his brothers came to see him only when they were in need of financial assistance but the evidence of her own witness, the doctor, stated that once or twice the defendant brought the testator to his clinic and the defendant's uncontradicted evidence is that he and his brothers assisted the father whenever their assistance was sought.

- [18] *"Ei incumbit probatio qui dicit non qui negat"* which means - *"He who asserts and not he who denies, must prove"*. There is sufficient evidence before the court that the last will "D1" had been properly executed. The burden of proving that the last will "D1" is a forgery or the signature of the testator was obtained by fraudulent means or by the use of undue influence is therefore shifts to the plaintiff. The evidence adduced by the plaintiff at the trial is not sufficient for the court to arrive at the conclusion that the defendant obtained the signature of the testator fraudulently and/or by the use of undue influence to the last will. Creating a mere doubt in the mind of the court is not sufficient for it to rule that the signature of the testator was obtained by fraudulent means or by the use of undue influence.
- [19] There is absolutely no evidence before the court to arrive at the conclusion that the signature of the testator had been forged. Many documents with the signature of Deo Narayan were tendered in evidence. The court is not competent to compare the signatures and say whether the signature appears of the last will "D1" is the signature of Deo Narayan or not. As I stated earlier, the evidence led by the defendant on the question of execution of the last will "D1" shows, that the said last will has been properly executed. There is no evidence that Deo Narayan was forced to place his signature on the last will. The learned counsel for the plaintiff, although cross-examined the defendant and his witnesses, was not able to challenge their evidence successfully. The court sees no reason to disregard the evidence of the defendant and his witnesses.
- [20] It is also the position of the plaintiff that the testator was not in a proper physical and mental state to execute a last will in 2004. The doctor's evidence is that the testator was not in his best mental condition in 2006 which is two years after the execution of the last will in question. There is no evidence that in 2004 the testator's was not in a position to understand the nature and consequences of his acts. The plaintiff's own witness, the doctor's evidence does not support the contention that the testator did not have the capacity to execute this last will in 2004.
- [21] Although the 1st defendant sought an order on the plaintiff to refund the monies withdrawn by her from the deceased's account within last six years he did not adduce any evidence in that regard.

[22] For the above reasons the court holds that the plaintiff has not been successful in establishing the grounds upon which she challenged the last will "D1". According the court makes the following orders;

1. The plaintiff's action is dismissed.
2. The plaintiff shall pay the defendant \$3000.00 as costs of this action within twenty one (21) days from today.
3. The reliefs prayed for in the statement of defence by the 1st defendant are also dismissed.




Lyone Seneviratne

JUDGE

28th February, 2017.