IN THE HIGH COURT OF FIJI AT SUVA

PROBATE JURISDICTION

Civil Action No. HPP 08 of 2007

IN THE ESTATE OF DEO NARAYAN (father's name Ram Adhin late of Namaka Lane, deceased, testate.)

BETWEEN

KRISHNA KUMARI Namaka Lane, Namaka, Nadi, Domestic duties.

PLAINTIFF-APPELLANT

AND

TIGER CHANDRA NARAYAN (father's name Deo Narayan) of Mulomulo, Nadi.

DEFENDANT-RESPONDENT

Counsel : Mr. N. Vakacakau for Appellant

Mr. A. J. Singh for the Respondent.

Date of Hearing : 29th June, 2017

Date of Ruling : 11th August, 2017

RULING

(On the application for stay pending appeal.)

[1] The appellant instituted these proceedings seeking inter alia, the following reliefs:

> The court do pronounce against the purported Will propounded by the defendant (respondent) namely the will purportedly executed on or about 2nd day of April 2004.
>
> An order that the probate No. 45465 granted on the 20th day of November 2006 be declared as invalid and/or revoked.
>
> An order that the probate be granted in accordance with the Will dated 30th Day of September 2002.

[2] On 28th February, 2017 the Court dismissed the action of the appellant with costs and she appealed. The present application is for the stay of the operation of the judgment pending the decision of the appeal.

[3] The first ground of appeal is that the court has not made a finding on the merits of the case in that not properly weighed the evidence adduced by the parties. Parties relied on two different last wills of the testator. The plaintiff's position was that the testator was not in a mental and physical condition to execute the 2nd last will. As I said in the judgment the burden in entirely on the plaintiff to prove that the testator was not in a mental and physical condition to execute a last will at the time he was supposed to have executed the 2nd last will. The doctor who treated the testator was called to testify at the trial by the plaintiff. He did not say conclusively that the testator did not have the mental and physical capacity to execute a last will. Witness Siteri Celua said that the testator once could not recognize her. This evidence was grossly insufficient to conclude that the

testator did not have the capacity to execute a last will at the time he execute the 2nd last will. The evidence was that the testator's mental condition was deteriorated in the year 2006 which was almost two years after the last will in questioned was executed.

[4] The second ground of appeal is virtually the same as the 1st ground after the last will in questioned of appeal that the court has failed to weigh the evidence adduced by the plaintiff and the defendant. In addition to what I have already stated above it is important to note that the burden of proving their respective cases is on the parties and the court is not expected to go on a voyage of discovery in finding evidence for the parties. As I have held in my judgment the evidence adduced by the plaintiff was not at all sufficient to hold that a fraud had been perpetrated in executing the 2nd last will and as submitted by the learned counsel for the respondent there was clear evidence that the last will in question was an act and deed of Deo Narayan.

[5] The third ground of appeal is that the court failed to consider that the last will in question was not read over and explained to testator in Hindustani language. There was no evidence that the testator was not conversant in English language. If the testator did not understand he should have requested that the contents of the last will be explained to him in a language which he was conversant with. It is also important to state that this is not the only last will or the first ever last will the testator executed.

[6] The fourth ground of appeal that the court has failed to consider the evidence on unsound mindedness of the testator has already been dealt with above by me.

[7] The fifth ground of appeal is that the court has failed to consider that at the time the last will in question was executed the testator was using his thumbprint as his signature. There was in fact evidence that the testator was using thumbprint as his signature but a bare statement without any evidence that he could not write or signed is not sufficient for the court to arrive at the conclusion that the testator was only using the thumbprint and was unable place his usual signature on any document.

[8] Ground six is also based on the above ground that the testator was using his thumbprint as his signature at the time the last will was executed. I do not wish to repeat what I have stated above on this ground of appeal.

[9] The seventh ground appeal is that the court erred in concluding that the last will in question had been properly executed without calling all the others who were present at the time of the execution to testify at the trial. There is no requirement in law to call all persons as witnesses who were present at the execution of a document to establish the due execution of that document. All what the law requires is to call sufficient number of witnesses who can testify to the execution. The findings of the court depend on the credibility of witnesses. In this case the plaintiff has not been able to show court that the attesting witnesses were not credible or they were not telling the truth in court. When the court has no reason to disbelieve a witness it has to accept and rely on his evidence.

[10] The eighth ground of appeal is that the court erred in concluding that evidence adduced by the plaintiff only creates doubt and was not sufficient to conclude that the signature of the testator had been obtained fraudulently. Once the due execution of the last will is established by the party who propounds it, as I have already said in this ruling, the burden shifts to the other party to establish that a fraud has been perpetrated in executing the last will and it has to be done by adducing strong evidence. The court cannot be expected to base its findings on assumptions. In this case as I have already said in my judgment that is now in appeal, the plaintiff failed to adduce reliable evidence for the court to act upon and arrive at the finding that a fraud had been perpetrated in executing the last will in question.

[11] The ninth ground of appeal is that the court has failed to observe that the signature of the testator was different from his signatures found other documents during the last few years. The burden was on the plaintiff to establish that the signatures were different and not on the court. Judges are not hand writing experts. In this case the plaintiff had obtained two reports from handwriting experts one of which was long before this matter was taken up for trial but not tendered in evidence for reasons unknown to the court.

[12] The tenth ground of appeal is a mere repetition of grounds of appeal five and six.

[13] The eleventh ground of appeal is that the court has failed to give the adequate weight to the fact that at the time of the execution of the last will in question the testator did not own the tractor referred to in the said last will and the same had already been sold and transferred to Sushil Chandra. This cannot be a ground of appeal. This is absolutely

irrelevant to the substantive matter before the court. Whether the tractor was there or not was never an issue at the hearing.

[14] The twelfth ground of appeal is that the court erred in accepting the evidence that the purported will was read over and interpreted to the to the testator in Hindustani language, and he appeared fully to understand the meaning and effect thereof, when if it was, the testator would have known had he been of sound mind, that the tractor was not there for him to give. The last will in question was executed in the year 2004 and the probate was granted on 20th November, 2006. The tractor in question was transferred on 29th November, 2006. This ground of appeal is therefore without merit.

[15] The thirteenth ground of appeal is that the court erred in accepting that the purported will was duly executed taking into account vagueness of clause 9. Clause 9 of the last will in question reads as follows;

> THAT I FURTHER DECLARE the money given to my wife KRISHNA KUMARI to be the shares of my son RAVINESH CHANDRA NARAYAN and KRISHNEEL CHANDRA NARAYAN both of Namaka, Nadi.

[16] I do not see any vagueness or ambiguity in the above clause. However, a last will does not become invalid or ineffective for the reason of ambiguity or vagueness. It is the duty of the court to interpret the will in a manner that will give effect to the intention of the testator.

[17] The fourteenth ground of appeal is that the court erred in failing to consider or put adequate weight on the evidence that the evidence of Siteri Celua that between 2004 and 2006 the testator could not identify her. I have already discussed this issue under the 1st ground of appeal. I will state further that there was no evidence that this happened before the execution of the will or not. On the other hand failing to recognize someone known to a person does not necessarily mean that such person is not of sound mind.

[18] In **Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd** [2005] FJCA 13; ABU0011.2004S (18 March 2005) the Court of Appeal held that in an application of stay pending appeal the court should consider the following;

a) Whether, if no stay is granted, the applicant's right of appeal will be rendered nugatory (this is not determinative). See Philip Morris (NZ) Ltd v Liggett & Myers Tobacco Co (NZ) Ltd [1977] 2 NZLR 41 (CA).
b) Whether the successful party will be injuriously affected by the stay.
c) The bona fides of the applicants as to the prosecution of the appeal.
d) The effect on third parties.
e) The novelty and importance of questions involved.
f) The public interest in the proceeding.
g) The overall balance of convenience and the status quo."

In the same judgment the Court of Appeal made the following observations;

> Many of the factors to which we have referred relate to the overall balance of convenience and the status quo. When regard is had to all of these factors, we are satisfied that the interests of justice are against the grant of a stay. This is particularly so in view of our comment above that the application for leave to appeal is unlikely to succeed. We can find no factors that come anywhere near outweighing this consideration - indeed most of the factors are to the contrary.

[19] For the reasons aforementioned the court is of the view that the appellant does not have strong grounds of appeal for the Court of Appeal to interfere with the findings of this court. In every appeal depending on the facts of each case there may be important questions of law to be decided but in my view that alone is not sufficient for the court to stay the operation of the judgment pending appeal. Unless the court is satisfied that there are good grounds of appeal which the appellant can successfully maintain at the hearing of the appeal it should not grant a stay. I will discuss below the new grounds of appeal introduced by the appellant by way of a supplementary affidavit to see whether there are sufficient grounds for this court to grant the stay pending the determination of the appeal.

[20] The learned counsel for the appellant submitted that in the present application for stay pending appeal the appellant does not rely much on the grounds of appeal but on the ground that she had obtained two reports from handwriting experts which if she is allowed to tender in evidence the appellant will secure a judgment in her favour. It

appears from the submissions of the learned counsel that the appellant is seeking to adduce new evidence that was not tendered at the hearing.

[21] The appellant has annexed the two reports to the affidavit in support of the stay application. Handwriting expert Adrian Lacroix's report had been prepared on 01st March, 2011, more than 5½ years before the trial of the action. If the appellant in fact intended to rely on this report she should have tendered it in evidence. The appellant has not offered any reason why she did not tendered this report in evidence.

[22] The second report has been prepared by Handwriting Expert Linda Morrell. This report has been prepared after the judgment was delivered. It is also pertinent to note that the report of Linda Morrell is not conclusive for the reason that in the report she states that it should be noted that this opinion is not conclusive owing to the copy quality of the documents.

[23] In **Ladd v Marshall** [1954] 1 W.L.R. 1489 (25 November 1954) / [1954] 3 All ER 745 Lord Denning made the following observations:

> In order to justify the reception of fresh evidence or a new trial, three conditions mast be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence most be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive: thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.

[24] In **Pillay v Chand** [1998] FJCA 35; Abu0064u.96s (28 August 1998) the Court of Appeal held:

> There can be no doubt that where there has been a full hearing as in this case it would be "a grave injustice if a successful party were deprived of his Judgment by the emergence of material which should have been before the Court originally" refer: Australia and New Zealand Banking Group Ltd v Merchant Bank of Fiji 1994 F.C.A. at page 581.

[25] It appears from the above decisions that there is no novelty in the question of introducing new evidence at the stage of the appeal or after the judgment is delivered. This question of law has been discussed on many occasions by various courts. The beneficiaries of the estate of the testator are not third parties to these proceedings because the appellant and the respondent are both before the court in representative capacity. This is not a personal action of the appellant or the respondent. They are before the court on their own behalf and also on behalf of the beneficiaries of the estate.

[26] Whether a retrial should be ordered to allow the appellant to adduce new evidence is a matter entirely within the discretion of the Court of appeal. However, taking into consideration the facts of this case and the principles enunciated in the decisions cited above I hold that had the appellant acted with due diligence she could have obtained and tendered this evidence before the trial of the action.

[27] For these reasons I make the following orders.

ORDERS

(1) The application for the stay of enforcing the judgment pending the decision of the appeal is refused.

(2) The appellant is ordered to pay the respondent $1000.00 as costs of this application.

Lyone Seneviratne

JUDGE

11th August, 2017