

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

Civil Action No. HPP 32 of 2014

**BETWEEN** : **RAJNESH KUMAR and MANKUMARI aka MAAN KUMARI aka MAAN KUMAR** both of Ragnai Street, Rifle Range, Lautoka.

**PLAINTIFFS**

**AND** : **SHIRI RAMLU aka SHRI RAMLU** Retired of Rifle Range, Lautoka.

**DEFENDANT**

Appearances : Krishna & Company for the Plaintiffs  
Iqbal Khan & Associates for the Defendant

## **R U L I N G**

### **INTRODUCTION**

1. The plaintiffs seek the following Orders in their Statement of Claim:
  1. Revocation of Probate No. 54884;
  2. That the Honourable Court shall pronounce in solemn form for the true last will of the said deceased dated the 19<sup>th</sup> February, 2007;
  3. That the Defendant pay damages to the Plaintiffs;
  4. That the Defendant pay costs to the Plaintiffs;
  5. Such other and further relief as this Honourable Court deems just and fair.

### **OBSERVATIONS**

2. This is a rather simple matter. At issue in this case are two Wills. The first was executed by the late Mr. Yogi on 19 December 1978 (“**1978 Will**”). There is no dispute between the parties that Mr. Yogi did execute the 1978 Will.
3. The second Will was purportedly executed by the said Mr. Yogi on 19 February 2007 (“**2007 Will**”). The plaintiffs are propounding this Will. The defendant questions whether the left thumb print affixed to the Will and attested to by two law clerks was really that of Mr. Yogi.

4. There was in fact another Will executed on 16 January 1997. (“**1997 Will**”) in between the two Wills named above. However, this 1997 Will is not relevant to the issues raised in this case.
5. It is not disputed between the parties that when the defendant applied for probate pursuant to the 1978 Will, he followed all the correct procedures. He conducted a search through his solicitors and was told that there was no Will or caveat in place. He then followed the normal processes and advertised but no one came to stake a claim. The probate was then issued. Two months after probate, Krishna & Company then wrote to Young & Associates to advice that there was another Will.
6. The late Yogi had eight children, seven of whom have passed away. The only surviving child of the Yogi children is the defendant who is the youngest.
7. One of the eight Yogi children was Yenkat Pati. He was the father of the first plaintiff and the husband of the second plaintiff. When Pati passed away on 27 May 2013, the plaintiffs became executor/trustees of his estate.
8. By his Will, Yenkat Pati had bequeathed all his properties (real and personal) unto his wife (2<sup>nd</sup> plaintiff) and, upon her death, unto the first plaintiff absolutely.
9. The plaintiffs are saying that under the 2007 Will, their late father/husband was appointed executor/trustee and also beneficiary. They stake a *de-bonis non* interest in the Yogi estate.

### **BURDEN OF PROOF**

10. As I have said, the plaintiffs seek to propound the 2007 Will. The onus is on them to prove the 2007 Will. Lord Hanworth MR in **In the Estate of Lavinia Musgrove, Davis v Mayhew** [1927] P 264 said as follows 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 **Barry v 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. In all cases the onus is imposed on the party propounding a will it is in general discharged by proof of capacity, and the fact of*

*execution, from which the knowledge of and assent to the contents of the instrument are assumed."*

## **ANALYSIS**

11. The first thing to be determined is whether or not the 2007 Will was executed in accordance with the provisions of the Wills Act (Cap 59).
12. If the 2007 Will is, on its face, in compliance with the Wills Act, the second question I have to consider is whether or not the 2007 Will was actually procured by fraud as the defendant appears to allege. On this point, the defendant alleges that the left thumbprint mark purportedly affixed by the late Yogi on the 2007 Will was not Yogi's.

## **WAS THE 2007 WILL EXECUTED IN TERMS OF THE WILLS ACT (Cap 59)**

13. Ms Ranita Kumar (**PW1**) was a Clerk at Krishna & Company in 2007 when the late Yogi presented himself at the firm with instructions for the drafting of a Will. One Rakesh Kumar (**PW2**) was also a Clerk at Krishna & Company at that time.
14. Both PW1 and PW2 gave evidence that they attended to Yogi when he presented himself at Krishna & Company.
15. PW1 said that she took the instructions from Yogi. She said she read the instructions back to Yogi in Hindi after taking them. Yogi affirmed the instructions by affixing his left thumb print on the instruction sheet. She said Yogi was asked whether he wanted to sign on the attestation part of the Will, or whether he preferred to leave a thumb print. She said Yogi opted for the latter.
16. The Client Instruction Sheet was tendered through PW1 and marked **PEX1**. PW1 prepared the 2007 Will based on PEX1. PW1 said she and PW2 both witnessed Yogi affix his thumbprint on the Will. This was confirmed by PW2.
17. Both PW1 and PW2 said that Yogi was in his right state of mind throughout all this time. They both said that Yogi walked unassisted into room where the signing of the Will took place and appeared to have no difficulty in hearing them, nor did he appear to have any problem with his eyesight. PW2 said that if someone had accompanied Yogi to the office, that other person did not come right through to the office where the business about the Will was conducted with Yogi and must

have waited back at the reception. The Will is marked **PEX2** and was tendered through PW1.

18. When put to her in cross-examination that the thumbprint was not of Yogi's, PW1 asserted that the thumbprint was affixed by Yogi right in front of her. PW2 asserted the same as he was the other attesting witness.
19. When put to her that Yogi had actually signed in writing by hand in his other Wills, PW1 said that the late Yogi had come to her office in his old age and personally opted to affix his thumbprint. All this was re-asserted by PW2.
20. PW1 and PW2 were attesting witnesses to the purported 2007 Will.

### **Comments**

21. An executor who desires to prove that a Will had been duly executed must, at common law, call one of the attesting witnesses, if any was available (**Bowman – v- Hodgson** (1867) 1 L.R. P and D 362).
22. Obviously, in this case, the plaintiffs have called both and have more than complied with that requirement.
23. As Parke B had said in **Barry v Butlin** cited in **In the Estate of Lavinia Musgrove** (supra), the executor will have discharged his or her burden of proving the Will upon proof of capacity on the part of the testator and also that the executor did in fact execute the Will in question.
24. Once these are established, the Court will assume that the testator knew and assented to the contents of the Will.
25. I have no reason to doubt the capacity of Yogi when he made the 2007 Will. As to whether or not Yogi did execute the said Will, I examine this question below in light of the issues raised by the defendant in that regard.

### **FRAUD**

26. While the evidence of the attesting witnesses (PW1 and PW2) is that Yogi had capacity and that he did in fact execute the said 2007 Will, where fraud is alleged, their evidence should not be taken to be conclusive.

27. The defendant, as I have said, questions whether the thumbprint on the 2007 Will was in fact that of Yogi's. Let me just say at the outset that the onus is on he who alleges fraud to prove it.

28. **Vere – Wardale –v- Johnson and Others** [1949] P 395 cited by Mr. Justice Callanchini (as the President of the Fiji Court of Appeal then was) in **Chandra v Chandra** [2012] FJHC 1080; HPP41119.2003 (14 May 2012) is authority that:

"the evidence of the attesting witness to a Will is not necessarily conclusive, and the court is competent to receive evidence in rebuttal."

29. Willmer LJ in **Vere – Wardale** said at page 397:

"It appears to me that the object of the legislature in imposing the strict formalities required by the Wills Act, 1837, was to prevent fraud. My duty here is to do all that I can to see that no fraud is perpetuated; and if I exclude further evidence such a ruling can only assist the possibility of the perpetration of fraud.

In the circumstance it is my opinion that it would be quite wrong, and not in accordance with authority, to exclude such further evidence with regard to the attesting of this will as may be available."

30. The only foolproof way to challenge the authenticity of a thumbprint is to juxtapose it with a sample of a genuine one. A forensic expert would, I imagine, require a specimen of the genuine print as a reference point against which to test the disputed one. While the defendant is not himself a forensic expert, nor did he summon one to verify his claim, I would have allowed him to make a comparison if he said he was familiar with Yogi's thumbprint and if he had a reliable sample of the genuine print. In this case, the defendant does not even have a genuine specimen of Yogi's thumbprint, nor has he even suggested in evidence or in cross-examination that he is familiar with Yogi's thumbprint. Frankly, the defendant is incapable of ever substantiating his allegations in this regard. For the record, the defendant had requested that the case be adjourned to enable him to check with the Social Welfare Department to see whether Yogi had left a thumbprint there when signing of while collecting welfare benefits. The defendant's previous solicitors had been saying this in Court over quite some time long before the case was fixed for trial. They never really got around to doing it. While I am mindful of the comments of Willmer LJ in **Vere – Wardale** (supra), there is no need, in my

view, to adjourn the case further to enable the defendant to garner any more evidence on this allegation. For the record, the trial of this case was vacated once to enable the defendant to gather that evidence, but to no avail.

### **OTHER COMMENTS**

31. There was some cross-examination on the allegation that the address on the Will was wrong. PW2 said the address was the one given by Yogi. I gather that the address on the will was that of the plaintiffs. I do not think this is of any relevance to the case.
32. PW3 Anmun Sami said the plaintiffs are his cousin and aunty. The defendant is his uncle. The first plaintiff's deceased father, and second defendant's deceased husband, was PW3's father's brother. Yogi was their father. The late Yogi was PW3's grandfather and neighbor in Rifle Range. PW3 said his grandfather was always in the right frame of mind. He also said the first plaintiff had looked after his grandfather up to the time of the latter's passing.
33. In cross-examination, the defendant put to PW3 that although the late Yogi did not live with the defendant, the defendant had contributed \$50 per week towards his expenses.
34. I think that only confirms that the late Yogi did not live with the defendant.
35. PW4, the first plaintiff is a Customs Officer. He confirmed what PW3 said. He said that under the 1997 Will, his father was the appointed executor/trustee. His father had died on 27 May 2013.
36. The 1997 will was tendered through PW4 and marked PEX4. He said the estate has just one property on which is erected a temple. He said PEX2 (2007 Will) was the last Will and testament of the late Yogi wherein his later father, Yenkat Pati, is the named executor/trustee. He said in both the 1997 and 2007 wills, his father is named the executor/trustee as well as the beneficiary.
37. PW4 also had a look at the 1978 Will and the probate that was tendered pursuant to it. The probate was tendered and marked PEX5. He also looked at the Will of his late father which was then tendered and marked PEX6. The said will appoints PW4 and his mother (2<sup>nd</sup> plaintiff) as executor/trustee. PW4 said he had taken out

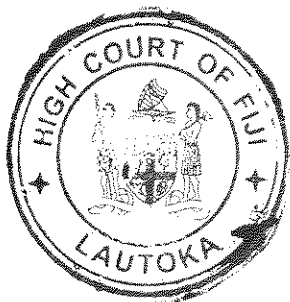
- probate of his father's will. (PEX7). W4 also tendered a bundle of receipts to show that he and his father had paid all city rates on the estate property.
38. It was put to PW4 that the Defendant had alleged that the plaintiffs had waited 5 years of Yogi's death to raise the 2007 will. Yogi last will was executed in February 2007. He passed away in May 2007. PW4 said that the said 2007 Will was always with his father. He died in 2013. He waited for a year to complete all rituals before he could take out probate. He had issued letter to Defendant after his father died. (PEX9). He highlighted that on the Death Certificate (PEX10) of Yogi, his father Yenkat Pati was the informant. PW4 also tendered his parent's marriage certificate (PEX11) as well as his own birth certificate (PEX12).
  39. In cross examination, it was put to PW4 that in 2012, the house was partly damaged and there was a caveat on the property by both parties. The house had to be dismantled and sold off. During Winston, there was no house there, save for the foundation. PW4 said part of the house was damaged in an earlier cyclone. The remaining part was blown away by Winston. He refuted the suggestion that he had dismantled and sold the house. He said that due to the damage, they could not sell the house but to give to someone else just to clear debris, which was what the house had become.
  40. PW4 reiterated that the house went on rent from 2012. He and his father had paid all housing and city rates on the property from 2002 till to date.
  41. PW4 was questioned about the \$300 per month he collected as rental on the property. He said the income is not enough to meet all temple expenses.
  42. It was put to PW4 that for his probate, the defendant had done a search but was told that there was no will or caveat so he could take out probate. But no one had come to stake a claim. The probate was then issued.
  43. PW4 said that two months after the probate was issued to the defendant, Krishna & Company wrote to Young & Associates to advise that there was another Will.
  44. In answering the question as to why he had not come forward upon the advertisement, PW4 said he had told the defendant about the 2007 Will and that they had even attempted mediation.
  45. I have no reason to doubt any evidence of PW4.

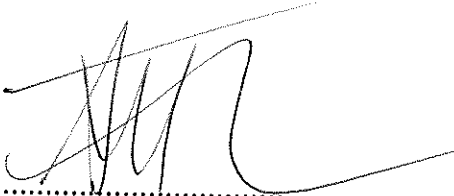
## DAMAGES

46. I am not inclined to grant damages to the plaintiffs in the circumstances of this case. The evidence that came through at trial, and which PW4 admitted in cross examination, was that he has been receiving rental income from the estate property throughout up to the present day.
47. Also, in refusing damages, I take into account that the fact that the defendant had gone through the correct channel in obtaining probate on the 1978 Will.
48. There is no evidence before me that the defendant was ever aware of the 2007 Will or the 1997 Will. The evidence of PW4 was that these Wills were always with his late father and that he only came upon them after his father's death.
49. However, I am of the view that the plaintiffs are entitled to their costs as costs follow the event.

## CONCLUSION

50. I grant Order in Terms of the Plaintiffs' application but refuse to award any damages for the reasons set out above. I award costs to the plaintiffs which I summarily assess at \$3,500 (three thousand five hundred dollars only). It is still open to the plaintiffs to enforce the previous cost-Orders which have not been supplanted by these new ones.



  
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Anare Tuilevuka  
**JUDGE**  
Lautoka

23 February, 2018