

IN THE HIGH COURT OF FIJI
AT LAUTOKA
PROBATE JURISDICTION

Probate Action No. HPP 32 of 2011

BETWEEN : **ASHWIN MANI** of Kiteroa Place, Cashmere 8022,
Christchurch, New Zealand, Businessman..
PLAINTIFF

AND : **DOR SAMI** of Saweni Beach Road, Lautoka, Labourer.
DEFENDANT

Appearances : Vuataki Law for the Plaintiff
Defendant in Person

R U L I N G

INTRODUCTION

1. The plaintiff and the defendant are surviving nephews of the late Ms. Kistammal. Kristammal was the administratrix and beneficiary of the estate of her husband, the late Perumal aka Permal Goundar, who died on 22 November 2003 in Saweni in Lautoka. Ms Kistammal died on 29 January 2010 in Lautoka (Death Certificate tendered as **PEX1**¹) leaving the estate of Permal un-administered. There are two Wills of the said Ms. Kistammal that are at issue in this case. The first one, she had executed on 15 July 2009 ("**2009 Will**"). This was tendered through the plaintiff and marked **PEX2**. Under this 2009 Will, the plaintiff is appointed executor and trustee. The second Will was purportedly executed by Ms. Kistammal on 12 January 2010 ("**2010 Will**"). This was also tendered through the plaintiff and marked **PEX3**. Under this 2010 Will, the defendant is named executor and trustee.

¹ Tendered through PW1 Ashwin Mani.

2. The defendant had proven the 2010 Will “in common form” following which he was then granted Letters of Administration (With Will Annexed) De Bonis Non 50004 over the Permal estate on 03 June 2011 (tendered through the plaintiff and marked **PEX4**)
3. The plaintiff is propounding the 2009 Will. He seeks to revoke the instruments granted to the defendant pursuant to the 2010 Will. He does this by alleging that the signature thereon the 2010 Will purportedly affixed by the late Ms. Kistammal - was in fact a forged signature.

ORDERS SOUGHT

4. The Plaintiff seeks the following particular Orders:
 - (a) A Declaration that the late Kistammal Will dated 12th January 2010 is forged and is therefore null, void and of no effect.
 - (b) A Declaration that the late Kistammal Will dated 15th July 2009 is the last Will of the Deceased and is therefore valid.
 - (c) An Order that an Order of the High Court entered on 3rd June 2011 appointing the Defendant as the Administrator and Personal Representative by Letters of Administration De Bonis Non No. 50004 (Will dated 12th January 2010) of the Estate of Perumal aka Permal Gounder be set aside.
 - (d) An order that the Letters of Administration De Bonis No. 50004 issued to the Defendant be recalled and delivered forthwith to the High Court at Suva.
 - (e) An Order that the Plaintiff be at liberty to apply for Letters of Administration based on the Will dated 15th July 2009 through the appropriate process.
 - (f) Costs to be paid the Defendant.
 - (g) Any other Orders this Honorable Court deem just.

ONUS

5. The onus is on he who propounds a Will to prove it. Lord Hanworth MR in **In the Estate of Lavinia Musgrove, Davis v Mayhew** [1927] 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."

6. I have to determine whether or not the 2009 Will was executed in accordance with the provisions of the Wills Act (Cap 59).
7. Assuming all is in order with regards to the 2009 Will, I have to then consider whether or not the 2010 Will was actually procured by fraud as the plaintiff alleges. In this regard, the onus is still on the plaintiff. The general rule of evidence is that one who alleges fraud must prove it. Furthermore, considering that the said 2010 Will is already proven in form, which led to the grant of probate to the defendant, it would seem logical that the onus should rest initially with the plaintiff who seeks to disturb the 2010 Will on the ground of fraud.

2009 WILL

8. Ashwin Mani (**PW1**) gave sworn evidence in Court. He said the 2009 Will was prepared by his former lawyer, Mr. Kemueli Qoro. He said that Ms. Kistammal

had affixed her signature thereon which was witnessed by two clerks. PW1 said he was familiar with Ms Kistammal's signature. He was shown the 2009 Will which he identified. He pointed to the signature on the said Will which he said he recognized as that of Ms Kistammal.

9. On this point, the plaintiff alleges that the signature purportedly affixed by the late Ms Kistammal on the 2010 Will was not hers.
10. If the signature on the 2010 Will was forged, then of course, the 2009 Will will have been proven in solemn form. Otherwise, the 2010 Will is the Last Valid Will and Testament of the late Ms. Kistammal and will have been proven in solemn form.
11. 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).
12. The plaintiff relies on an Affidavit of Testamentary Script sworn by Mr. Praveen Shiriwastow and filed on 14 December 2011. Mr. Shiriwastow was one of two attesting witness to Ms Kistammal's signature on the 2009 Will. Mr. Shiriwastow also gave sworn evidence in Court that Ms Kistammal had come to the Office of Qoro Legal to sign the 2009 Will in his presence and also in the presence of another attesting witness who he named but who was not called to give evidence.

2010 WILL

13. As I have said, the plaintiff (Ashwin Mani (**PW1**)) is alleging that the testator's signature on the 2010 Will was forged. He was shown a copy of the 2010 Will. He looked at the signature thereon and said that it (the signature) was not that of his

aunty Ms Kistammal. He said he is familiar with Ms Kistammal's signature. He compared the signature on the 2010 Will with the signature on the late Ms Kistammal's passport No. 175998 (**PEX5**) as well as signature on some hire purchase documents from Carpenters Fiji Limited. Indeed, as I observe, the signatures on these documents are different. However, I accept that one's signature may change over the course of years and this evidence may not necessarily be conclusive.

14. What is more compelling though is the evidence of one Mr. Jay Pal Singh (**PW2**) and one Jainendra Singh (**PW3**). These gentlemen are related to both the plaintiff and the defendant. They are supposed to be attesting witnesses to the 2010 Will because their names, and purported signatures, appear on the said instrument.
15. PW2 and PW3 however both swore in Court that they never ever signed the 2010 Will and that the signatures thereon which are purported to be theirs, were in fact forged signatures. In fact, both even tendered in their respective Driver's License. I observe that the signatures thereon are markedly different from the ones on the 2010 Will.
16. In addition to the above, the plaintiff also raises issues about the late Ms Kristamma's capacity by drawing attention to her Death Certificate. The said Certificate records the cause of death as Septicemia (blood poisoning) electrolyte imbalance, and renal impairment (kidney failure). Considering these, and the date of the 2010 Will, it means that the late Ms Kistammal would have been very sick at the time she purportedly executed the 2010 Will which was just a little over two weeks before she passed away. It would be ideal if a Doctor were to give evidence

on the effect of these conditions on the mental capacity of someone suffering them.

17. The defendant said in evidence that the two gentlemen are denying their signatures because he (defendant) was suing them for the late Ms Kistammal's gold. However, there is no ignoring the difference in the signatures on the 2010 Will and their respective Driver's License.
18. The defendant's evidence is that he had a discussion with the late Ms. Kristammal after her leg was amputated concerning her post treatment care at home. He said the deceased had promised that he would bequeath all her property to the defendant if his wife were to look after her. The defendant did not call any other witness to testify to this.

COMMENTS

19. As Parke B had said in **Barry v Butlin** cited in **In the Estate of Lavinia Musgrove** (supra), an 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. I have no problem in saying that the plaintiff has established all these with regards to the 2009 Will.
20. However, I cannot say the same for the 2010 Will.
21. **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."

22. 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.

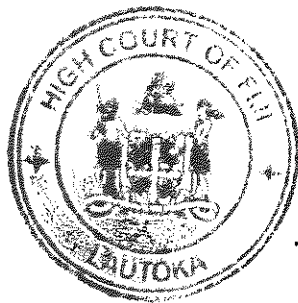
In the circumstance it is my opinion that it would be quite wrong, and not in accordance with authority, to exclude such further evidence with regard to the attesting of this will as may be available."

23. The two gentlemen who purportedly attested to the affixing of the late Ms Kristamma's signature on the 2010 Will, have denied having witnessed the same.

They also refute that the signatures thereon the said instrument belonged to them.

CONCLUSION

24. I grant Order in Terms of the Plaintiffs' application but refuse to award any damages. I award costs to the plaintiff which I summarily assess at \$2,500 (two thousand five hundred dollars only).



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Anare Tuilevuka
JUDGE
Lautoka

16 March, 2018