

IN THE HIGH COURT OF FIJI
AT LABASA
PROBATE JURISDICTION

Civil Case No.: HPP 44 of 2013

BETWEEN : **SHAKUNTALA DEVI** of Savusavu, Domestic Duties

PLAINTIFF

AND : **SAHADEI** of Savusavu, Domestic Duties

DEFENDANT

Counsel : **Mr. A. Kholi for the Plaintiff**

Date of Hearing : **7th August, 2017**

Date of Ruling : **6th April, 2018**

RULING

INTRODUCTION

1. The Plaintiff filed motion on 1st May, 2017 seeking stay of execution of the judgment delivered on 11.11.2017 which was appealed on 23rd December, 2016. The Plaintiff was the de facto wife of late Bal Ram and the Defendant was married to the deceased when he died. Late Bal Ram did not live with Defendant at the time of death, and she had not visited him when he fell ill. The Plaintiff produced a last will where she had been granted permission to live on the land where she lived with the deceased till her death. She was not bequeathed any property, but she was appointed as executor of the said estate. There was a caveat placed on the estate preventing probate being issued to the Plaintiff. At the same time Defendant had applied for Letters of Administration, on the basis that deceased died intestate. At the conclusion of the trial judge had dismissed the Plaintiff's claim and had not considered counter claim.

FACTS

2. The Plaintiff in the statement of claim sought removal of the caveat, and for pronouncement of validity of the last will of the deceased

3. The Defendant in her statement of defence, at paragraph 14 stated that the purported will was not executed to the provisions of the Wills Act 9(sic).

Substance of the case

- a. The deceased at the time of the execution neither knew nor approved the contents of the will.
 - b. The will was not signed by the deceased or by some person in his presence or by his direction.
 - c. The deceased did not make any signature or acknowledge in the presence of the alleged two witnesses present at the same time.
 - d. The alleged witness did not attest or subscribe the will in the presence of the deceased.
 - e. The deceased never intended to make any will or any other testamentary documents.
 - f. The deceased did not give any instructions for the preparation of the will.
 - g. The execution of the will was obtained by undue influence of the plaintiff and or other acting for her whose name are at present not known to the defendant.
4. Alternatively, the Defendant had pleaded fraud for the execution of the will
 5. The Defendant had also in 'alternate cause action' in paragraphs 15-19 claimed the will had not made any provisions for the Defendant in terms of paragraphs(sic) 3 and 4 of the Inheritance (Family Provision) Act 12 of 2004.
 6. At hearing the Plaintiff had attempted to mark the last will, but it was objected and it was not marked and from the judgment I cannot see the reason for allowing it. The objection of the Defendant was failure to file testamentary script by the Plaintiff, but the Plaintiff had provided the last will to the Defendant for inspection at discovery stage and had also filed an inventory of the estate of the deceased.
 7. The Plaintiff had concluded her case without marking the last will, and also not calling any witnesses to prove it. The judge dismissed the Plaintiff's claim and declared that late Bal Ram died intestate.
 8. The grounds of appeal in the said appeal are as follows

1. That Learned Trial Judge erred in law and in fact in not determining the two issues agreed by the parties and included in the minutes of the Pre Trial Conference Minutes that is
 - a. Whether the deceased made adequate provisions for the Defendant?
 - b. Was the Defendant dependent on the Deceased during his lifetime for income which was provided and paid on regular basis together with sundry expenses?
2. That the Learned Trial Judge erred in law and in fact in determining the issue of the validity of the Will of the deceased when it was not an agreed issue and was not included in the Pre Trial Conference Minutes.
3. That the Learned Trial Judge erred in law and in fact in making certain orders contrary to the issues included in the Pre Trial Conference Minutes.
4. That the Learned Trial Judge erred in law and in fact in not determining the provisions of the Inheritance (Family Provisions) Act 2004 which was the only issue of determination of the Court as was agreed by the Parties and included in the minutes of Pre Trial Conference
5. That the Learned Trial Judge erred in law and in fact in not giving proper considerations to the followings:-
 - a. That the Appellant/Plaintiff was residing with the deceased since 1996 until his death on the 10th February, 2013;
 - b. That the Appellant/Plaintiff did all the household duties for the deceased;
 - c. That the Appellant/Plaintiff looked after the deceased, took him to the hospital when he was sick and was beside him when he died.
6. That the Learned Trial Judge erred in law and in fact in holding that the last Will and testament of the deceased was invalid and further the learned trial Judge failed to exercise the presumption of due execution applying the principle *Omnia praesumuntur rite esse acta*.
7. That the Learned Trial Judge erred in law and in fact in not holding that as there was a proper attestation clause, the presumption of due execution applies.
8. The Learned Trial Judge erred in law and in fact in applying the case of *Muni Deo Bidesi and Others v Public Trustee of Fiji*, 21 F.L.R 65 to the instant case on hand.
9. The Learned Trial Judge erred in law and in fact in holding that the Appellant was required to raise the relevant issue and prove the Will was executed by the deceased and that the Respondent had disputed the validity of the Will in the Statement of Defence and had a Counterclaim.

10. That Appellant reserves his rights to file further ground of appeal upon receipt of the records of the High Court.”

ANALYSIS

9. *Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd* [2005] FJCA 13; ABU0011.2004S (18 March 2005)(Unreported) Fiji Court of Appeal laid down the criteria for granting stay and held .

Principles on a stay application

[7] The principles to be applied on an application for stay pending appeal are conveniently summarised in the New Zealand text. McGechan on Procedure (2005).

“On a stay application the Court’s task is “carefully to weigh all of the factors in the balance between the right of a successful litigant to have the fruits of a judgment and the need to preserve the position in case the appeal is successful” Duncan v Osborne Building Ltd (1992) 6 PRNZ 85 (CA), at p 87

The following non-comprehensive list of factors conventionally taken into account by a Court in considering a stay emerge from Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd (1999) 13 PRNZ 48, at p50 and Area One Consortium Ltd v Treaty of Waitangi Fisheries Commission (1993) 7 PRNZ 200:

(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 ” (emphasis added)

10. The above list is not a comprehensive list and the competing consideration of rights of the successful party to enjoy the fruits of the judgment and effect of that on the appellant if the appeal is successful needs careful evaluation. The above list though not comprehensive is a guide in that evaluation process.
11. In Fiji Court of Appeal in Attorney General of Fiji v Dre [2011] FJCA 11, Misc.13.2010 (decided in 17 February 2011) held.

The legal framework re stays pending appeal

23. It is useful before explaining the matter further to set out a summary of the law of when a stay of execution pending appeal will or will not be granted. I take it from Volume 1 of Hong Kong Civil Procedure 2007 (The Hong Kong White Book) at page 910 the note being 59:13/1 Order 59 dealing with appeals to the Court of Appeal, is derived from the English Rules of Supreme Court (RSC) which were in place from 1873 to 1999 when English Civil Procedure was reformed as a result of a major report by Lord Woolf. In England the Civil Procedure Rules 1999 superceded R.S.C. For a jurisdiction such as Fiji that follows the substantive rules, the format and familiar numbering of the former R.S.C. in England this change is confusing and unfortunate. However the annually published Hong Kong White Book is an update with the R.S.C. Rules and commentary thereon in pari materia with the English White Book which ended in 1999. What is more it is updated with all relevant cases and amendments that have occurred between 1999 and the year in which it is published. Order 59 in England (before 1999) and in Hong Kong is the equivalent of in Fiji, the Court of Appeal Act and Rules. It follows that the commentary with cases cited is useful to all those involved with civil appeals in Fiji.

24. The heading of note 59:13/1 is "**When will a stay of execution be granted.**" I set out only the parts of this note that are relevant to the present discussion:

"An appeal does not operate as a stay on the order appealed against except to the extent that the court below, or the Court of Appeal (or a single Judge of the Court of Appeal otherwise directs) (O.59, r.13(1)(a)); see also World Trade Centre Group Ltd & Another v. Resourceful River Ltd & Another [1993] H.K.L.Y.847, and Re Schindler Lifts (HK) Ltd v. Dickson Construction Co. Ltd [1993] H.K.L.R. 45). It follows that service of notice of appeal and setting down the appeal does not, by itself, have any effect on the right of the successful party to act on the decision in his favour and to enforce the order of the court below. If an appellant wishes to have a stay of execution, he must make an express application for one (see further para.59/13/5 (below). The most important consideration in respect of whether a stay of execution should be granted is whether there are strong

grounds of the proposed appeal: World Trade Centre Group Ltd & Another v. Resourceful River Ltd & Another; Civ App No.70 of 1993, May 12, 1993. That hurdle is higher than that of chances of success for considering whether leave to appeal should be granted. See also Asha Harskishin Prem Singh v. Harskishin Isarsingh Prem Singh Kishinani M.P. No.3436 of 2000, November 12, 2000, unreported. Neither the court below nor the Court of Appeal will grant a stay unless satisfied that there are good reasons for doing so. Unless a stay can be justified by good reasons, one will not be ordered (Star Play Development Ltd v. Bess Fashion Management Co. Ltd. unreported, HCA No. 4726 of 2001, May 28, 2002, and see Wenden Engineering Service Co. Ltd v. Lee Shing Yue Construction Co. Ltd. unreported HCCT No.90 of 1999, July 17, 2002, [2002] H.K.E.C. 1059). The court does not "make a practice of depriving a successful litigant of the fruits of his litigation, and locking up funds to which prima facie he is entitled", pending an appeal (The Annot Lyle (1886) 11 P.114 at 116, CA, Monk v. Bartram [1891] 1 Q.B.346). ...

... Where the appeal is against an award of damages, the long established practice is that a stay will normally be granted only where the appellant satisfies the court, that, if the damages are paid, then there will be no reasonable prospect of his recovering them in the event of the appeal succeeding (Atkins v. Great Western Ry Co. (1886) 2 T.L.R. 400, following Barker v. Lavery (1885) 14Q.B.D. 769, CA; this rule applies equally to Admiralty cases: see: The Annot Lyle above, at 116). ..."

12. So the burden is with the Plaintiff to establish strong grounds for appeal. The Plaintiff sought removal of caveat and declaration regarding the validity of the last will. Unfortunately, though last will was produced at discovery stage, it was not marked at the hearing and perusal of the judgment does not indicate the reason for not allowing that to be marked.
13. No issue was raised at the pre-trial conference regarding the validity of the will, or proof of will.
14. The judgment at paragraph 7-8 stated as follows

'She produced a copy of the will of the deceased. At that stage, Mr. Sen, counsel for the defendant submitted that no affidavit of testamentary script had been filed by the Plaintiff, as required under O 76, r 5. In contrast, the defendant had filed a testamentary script on 2nd February, 2016. The

riposte of Mr. Sadiq counsel for the plaintiff was that no objection was raised to the will at the PTC.

15. At the Pre Trial Conference in terms of Order 34 rule 2 no issue was raised as to the validity of the will and only two issues that raised were issues that would arise once the will is admitted and they are:

*‘Whether the said deceased make adequate provisions for the defendant?
Was the defendant dependent upon the deceased during his lifetime for income which was provided and paid on regular basis together with sundry expenses?’*

16. The above two issues will arise only if the will is proved or admitted by the parties. The parties had not recorded admission as the validity of the will. Order 34 rule 2(4) of the High Court Rules of 1988 states as follows

At the conclusion of any such conference the Solicitors attending it shall draw up and sign a minute containing a succinct statement of;

(a) The matters, if any, upon which they are agreed, and

(b) The issues whether of fact, law or procedure remaining for determination by the Court.

17. The appeal ground 1, 2 and 3 deals with the interpretation of the said High Court rules and whether failure to raise an issue would amount to the admission, in the context of the two issues that were raised. The two issues stated in terms of Order 34 rule 2(4) will arise only when the court accepts the will as the true and proper intension of the deceased, but that fact was not admitted, too. So, there was an apparent defect in the said minutes of the pre trial conference and it had not complied with the Order 34 rule 2(4) by raising issues of remaining facts and law.

18. The objection raised regarding failure to file testament script and not allowing last will to be marked is also an issue central to the judgment and these are in my mind strong grounds for appeal. Section 26 B of the Wills Act, 1971 also allows admission of extrinsic evidence for the proof of the intension of the testator. In the light of the said provision the interpretation of Order 76 rule 5 of High Court Rules regarding failure to file a testamentary script also raises a strong ground for argument. Though not specifically stated, the reason

for objection for production of the will at the hearing was the Order 76 rule 5 of High Court Rules of 1988. It is also a novel issue that had not been considered earlier.

19. The other grounds for stay are dealt below

- a. By grant of a stay successful party will not be injuriously affected. Both parties had separate houses and deceased had lived with them at different times. A stay will allow parties to maintain status quo. The Plaintiff, had lived in the house where she lived for more than a decade with deceased as her de facto partner, and according to her she had built the house on a land belonging to the deceased. If stay is not granted she will be evicted from that.
- b. The Defendant lives on a house situated on a freehold land of deceased. By granting stay the status quo is maintained and two parties can continue to live in their respective houses.
- c. If the stay is not granted the Plaintiff will be evicted from the house which she claimed was built from her money. If she is evicted it would be hard to reinstate again if the appeal is successful. So if the stay is not granted the Plaintiff's appeal would be made nugatory considering the facts of the case.
- d. There is no significant effect on third parties, though there will be some delay as to the distribution of the estate between the children of the deceased. There are no evidence of any estate being wasted due to stay. The failure to produce last will and failure to prove it on the presumption that it was admitted had resulted dismissal of the action.
- e. There is novel issues for determination in this appeal. The failure to raise an issue regarding proof of will and raising two issues that needs determination only upon an admission of the will. The objection to the production of the will based on Order 76 rule 5 of the High Court Rules of 1988 in the light of Section 26B of Wills Act 1971 had not been determined earlier decision. The non compliance of Order 34 rule 2(4) and failure to raise all the issues that were not admitted is also a novel issue.

CONCLUSION

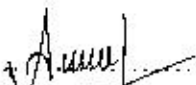
20. Considering the judgment and the evidence and the matters raised in appeal indicate novel issues and strong appeal grounds. If stay is not granted the Plaintiff's appeal will be rendered nugatory, considering undisputed evidence that she had lived with deceased in the said house for more than a decade as de facto partners. The execution of the judgment is stayed till the final determination of appeal by the Court of Appeal. No costs.

FINAL ORDERS

- a. The execution of the judgment delivered on 11.11.2017 is stayed till the final determination of the appeal by Court of Appeal.
- b. No costs.

Dated at Suva this 6th day of April, 2018




Justice Deepthi Amaratunga
High Court, Suva