

IN THE HIGH COURT OF FIJI
AT LAUTOKA
WESTERN DIVISION

Civil Action No. HBC 169 of 2008

BETWEEN : **MURRE J.S. NAIDU** also known as Swamy Naidu (father's name Murri Appalswamy Naidu) also known as Appal Sami of Samabula, Suva, Accountant.

Plaintiff

AND : **NARAYANAMMA** (father's name Rangal Swamy Naidu) of Namaka , Nadi.

1st Defendant

AND : **NARAYANAMMA** (father's name Rangal Swamy Naidu) of Namaka, Nadi, the executor and Trustee of the estate of Murri Appalswamy Naidu also known as Appal Sami (father's name Murri Appana)late of Namaka, Nadi and in propria personam.

2nd Defendant

AND : **DHANSURJA NARAYAN** (father's name Appal Sami) who known as Murri Appal Swami Naidu of Namaka, Nadi, School Teacher.

3rd Defendant

AND : **REGISTRAR OF TITLES**

4th Defendant

AND : **ATTORNEY GENERAL OF FIJI**

5th Defendant

Counsel: M/S Pillai Naidu & Associates for Plaintiff
M/S Babu Singh & Associates (1st, 2nd, 3rd Defendant)
AG's Chambers – 4th & 5th Defendant

R U L I N G

BACKGROUND

1. This case concerns the distribution of the estate of the late Murri Appalswamy (“Murri”).
2. Murri died on 07 February 1969. His survivors include his son, Murre J.S.Naidu (“Naidu”) who is the plaintiff, and his daughter Dhansurja Narayan (“Dhansurja”) who is the third defendant, as well as his widow

Narayanamma (“**Narayanamma**”) who is the first defendant in this case. Apart from Naidu, there are two other sons, namely Raghaw Naidu (“**Raghaw**”) and Vasant Rao Naidu (“**Vasant**”). Raghaw and Vasant are not a party to these proceedings.

3. Narayanamma is being sued in person and also in her capacity as executor/trustee of the Murri estate.
4. The statement of claim was filed on 05 September 2008. Naidu pleads therein that under Murri’s Last Will & Testament, all the real and personal estate of Murri, save for “certain pecuniary legacies” to the sum of \$200-00 (two hundred dollars only), were bequeathed to Narayanamma and to him (Naidu) and Raghaw and Vasant in equal shares. The defendants admit to this in their statement of defence.
5. The main assets of the estate are two pieces of land. Naidu also alleges that there are substantial funds in a Bank Account without naming a Bank – which the defendants deny.
6. The first of the estate’s real property is comprised in Certificate of Title Number 6895. The said land is three acres two roods and eleven perches in size.
7. The second of these is comprised in CT 16654 comprising 7 acres and 35 perches.
8. In his pleadings, Naidu alleges various acts of improprieties and misdeeds in the way his mother, Narayanamma, has handled the administration of the estate. Below I set out his specific allegations concerning each asset.

CERTIFICATE OF TITLE NUMBER 6895

9. Naidu pleads at paragraph 1 of the Statement of Claim that the said land was registered to both Narayanamma and her late husband, Murri. Murri held one third undivided share while Narayanamma held two third shares. The defendants admit to this in their statement of defence.
10. Naidu asserts that he paid off the balance of the ANZ mortgage on the said land in 1991. The sum he paid was \$5,000. He had lodged a caveat on the said land (Caveat Number 555265).
11. He alleges that Narayanamma and Dhansurja fraudulently got the Registrar of Titles to have the said caveat removed in January 2006. He pleads that the Registrar of Titles removed his caveat without complying with the 21 day Notice to him as required under the Land Transfer Act.
12. The defendants plead at paragraph 2 of their statement of defence that they had duly applied to the Registrar of Titles for the removal of the said caveat. They plead at paragraph 3 that they were unaware of the alleged failure of the Registrar of Titles to send the requisite Notice to Naidu.

CERTIFICATE OF TITLE 16654

13. This land was also registered to both Narayanamma and Murri. Murri held one third undivided share. Narayanamma held the balance of two thirds share undivided. The defendants admit to this in their statement of defence at paragraph 4.
14. Naidu alleges that Narayanamma and Dhansurja also fraudulently subdivided this land and, thereafter, transferred a greater majority of the shares to a company called J.Y. Investments Limited (“JYIL”).

15. The balance which was not transferred to JYIL is comprised in two separate titles namely Certificate of Title 32400 and Certificate of Title 32401.
16. Naidu alleges that the part of the land that was transferred to JYIL included a portion that was held by Narayanamma as executrix and trustee of the estate.
17. He also alleges that Narayanamma and Dhansurja then colluded to have CT 32400 and CT 32401 transferred from the former to the latter out of natural love and affection. At paragraph 21 of the Statement of Claim, Naidu alleges that these properties:

“have been rented out and [Narayanamma and Dhansurja] have been receiving rents in respect of the same at all material times and even to date”.
18. I observe that at paragraph 11 of their statement of defence, the defendants plead that the plaintiff himself had previously collected rental on these properties up until the year 2000.
19. Naidu then sets out in paragraph 17 (i) to (iv) the particulars of fraud he alleges against Narayanamma and Dhansurja.
20. In paragraph 13 (i) to (v), he sets out the particulars of recklessness and negligence alleged against the Registrar of Titles in registering the transfer of property to JIYL.
21. Notably, at paragraph 5 of the statement of defence, the defendants assert that the plaintiff was actively involved in the subdivision of this land and in fact participated in negotiations with Mr. Joseph Yee of YJIL. They assert that Naidu facilitated all negotiations over the price/land portions/surveying/land retention et for and on behalf of the defendants.

22. The defendants further state at paragraph 6 that Naidu had placed caveats number 213662,437620 and 448046 over the land at some point. He later withdrew these to allow YYIL and the defendants to be registered as owners.
23. The defendants also assert at paragraphs 7 and 8 of their statement of defence that the gifting of CT 32400 and CT 32401 from Narayanamma to Dhansurja was not fraudulent as Narayanamma was the owner of these lands in her own personal right. These lands were not part of the assets of the estate.
24. The defendants further plead that the plaintiff had been paid his due share out of the estate and had no further interest therein.

MONIES IN BANK ACCOUNT

25. Naidu pleads at paragraph 18 of his Statement of Claim that:

The deceased also had substantial monies in his Bank Account at the date of his death.

26. At paragraph 9 of the statement of defence, the defendants deny that Murre had a bank account.

LOSSES CLAIMED

27. Naidu pleads at paragraph 22 of his Claim that he:

...has been deprived of the loss of use of the proceeds in respect of the sale of the Second Land and the income from [CT 32400 and CT 32401].

28. He also pleads at paragraph 23 that Narayanamma has refused to distribute the estate in terms of the Last Will and Testament and/or to give full accounts in respect of the estate from the date of death up to the present time.
29. He pleads at paragraph 27 that Narayanamma should be removed as executor/trustee of the estate and that he (Naidu) replaces her as such.

30. He seeks the following relief:

1. For an Order that the First Defendant and the Second Defendant do furnish full accounts to the Plaintiff in respect of the estate of Murri Appalswamy Naidu since the death of the said Deceased.
2. For an Order that the Second Defendant be removed as the Executrix and Trustee of the Estate of Murri Appalsawmy Naidu and the Plaintiff be substituted in her place.
3. For an Order that the Fourth Defendant do not register any further dealing in respect of Certificate of Title Number 6895 until the determination of this Action.
4. For an Order that the Third Defendant and her servants, agents and Solicitors do not deal with the land comprising Certificate of Titles Numbers 32400 and 32401 until the determination of this Action.
5. For an Order that the Third Defendant do retransfer Certificate of Titles Numbers 32400 and 32401 to the Second Defendant and after the appointment of the Plaintiff as the executor and trustee of the Estate of Murri Appalswamy Naidu for the said lands to be transferred to the Plaintiff.
6. For an Order that the First and Second Defendants be restrained from uplifting any monies kept on account of the estate of Murri Appalswamy Naidu until the determination of this Action.
7. For an Order that the First Defendant do pay to the estate of Murri Appalswamy Naidu in respect of the share of the estate for the sale of the Certificate of Title No. 16654 to J.Y. Investments Limited.
8. For and Order that the third Defendant do furnish full accounts of all the monies and income and rent received in respect of Certificate of Titles Numbers 32400 and 32401 from the date of the transfer of the said Certificates of Titles to her until the determination of this action.
9. For all consequential reliefs as the result in the Orders aforesaid.
10. Special and General Damages (including Aggravated and Punitive Damages).
11. Such further or other relief that may seem just and proper to this Honourable Court.
12. Costs.

INTERIM INJUNCTIVE ORDERS

31. On 26 September 2008, the following freezing injunctive Orders were granted by Madam Justice Phillips on Naidu's application to prevent Narayanamma and the defendants from disposing of or dealing with the assets of the Murri estate:

- i. For an Order that the Third Defendant and her servants, agents and Solicitors do not deal with the land comprising Certificate of Title Numbers 32400 and 32401 until the determination of this Application of the Plaintiff.
- ii. For an Order that the Fourth Defendant do not register any dealings in respect of Certificate of Title Number 6895 until the determination of this Application of the Plaintiff.
- iii. For an Order that the First, Second and Third Defendants be restrained from uplifting any monies kept on account of the Estate of Murri Appalswamy Naidu or payable to the said Estate until the determination of this Application of the Plaintiff.

- iv. Twenty one days for all the Defendants to file and serve Answering Affidavits and the Plaintiff be at liberty to file and serve Affidavit in Reply within seven days thereafter.
- v. The matter is adjourned to 7th November, 2008 for mention to fix a hearing date for the Application.

DEATH OF NAYANAMMA

32. Narayanamma died on 31 January 2009. Upon her death, the plaintiff would file a Notice of Motion on 17 February 2011 firstly, to inform the Court of her passing and secondly, to seek Orders to be substituted as first defendant and also as second defendant. He was seeking these Orders pursuant to his being granted Probate No. 49875 with Will attached on 28 June 2010 over the estate of Narayanamma. The Will attached was purportedly executed on 17 December 1991 ("**1991 Will**") by Narayanamma by affixing her left thumb mark thereon.
33. Dhansurja responded to the above Notice of Motion by filing a cross Notice of Motion on 20 March 2011 seeking Orders that she be substituted as executor/trustee of the estate of Narayanamma and, accordingly, that she also be substituted as first and second defendant. She seeks these Orders on the basis of a Will purportedly executed by the late Narayanamma on 01 April 2004 ("**2004 Will**").
34. In her affidavit filed in support of the application, Dhansurja deposes as follows at paragraphs 3 to 10:
 3. That my mother, Narayanamma passed away on 31st January 2011. That my Solicitors informed the Plaintiff by correspondences that I am would be applying for the grant of probate. I annex herein letters dated 10/2/09, 17/3/09 marked as annexure DN1 and DN1a respectively.
 4. That the last WILL and testament of Narayanamma dated 1st April 2004 appointed me as the sole executrix and trustees of her WILL. I annexed herein a copy of the WILL marked as annexure DN2.

5. That I was informed by my Solicitors and verily believed that the earlier WILL of my mother dated 17th December 1991 and being relied on by the Plaintiff is null and void and without any effect.
6. That my brother instituted this action against us the reason being that he wanted to take over all the Estate properties of my late father and mother.
7. That I looked after and cared for my mother prior to her death. She resided with me at Namaka, Nadi.
8. That probate was granted onto me on 2nd June 2009. I annexed herein a copy of the Probate marked annexure DN3.
9. That according to the Will of my late father, the Plaintiff was paid his share and bought a house in Samabula, Suva.
10. I urge the Court to dismiss the application by the Plaintiff and order that I be substituted as the 1st and 2nd Defendant.

35. Naidu has not filed any affidavit in response to Dhansurja's affidavit.

WHICH OF THE TWO WILLS SHOULD PREVAIL?

36. The New Zealand Court of Appeal in **J.J. Bishop v P.J. Odea & Another** – (1999) NZCA 239 considered the legal principles applicable in cases of testamentary capacity. It summarized the legal principles as follows:

"(1) In probate proceedings those propounding the will do not have to establish that the maker of the Will had testamentary capacity, unless there is some evidence raising lack of capacity as a tenable issue. In the absence of such evidence, the maker of a will apparently rational on its face, will be presumed to have testamentary capacity **Re White** [1951] NZLR 393 (CA) and **Peters v. Morris** (CA 99/85: judgment 19 May 1987)."

(2) Whenever it is necessary for an executor to establish due execution of a will, he is required at common law, to call one of the attesting witnesses, if any was available (**Bowman v Hodgson** (1867) 1L.R.P and D 362).

(3) The burden imposed on a party who seeks to propound a will was stated clearly by Lord Hanworth MR in the **Estate of Lavinia Musgrove, Davit v Mayhew** [1927] P264 at page 276:

"It is clear 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 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 the courtesy of his judgment in **Barry v Butlin** (1) says:

The strict meaning of the term onusprobandi 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."

37. The onus is on he who propounds a Will to prove it.
38. In **Naidu v Kaveri** [1967] FJLawRp 3; [1967] 13 FLR 201 (15 December 1967), Knox-Mawer J. said:
- Whenever a will is prepared under circumstances which raise a well grounded suspicion that it does not express the mind of the testator, it is for those who propound the will to remove such suspicion. **Barry v. Butlin** (1838), 2 Moo. PC 480; **Fulton v. Andrew** (1875) LR 7 HL 448; **Brown v. Fisher** (1890) 63 LT 465; **Tyrell v. Paynton** (1894) P. 151; **Finny v. Govett** (1908) 25 TLR 186; **In re Begley**, [1939] LR 479.
39. This burden is discharged upon:
- (i) proof of capacity
 - (ii) that the testator did execute the Will
40. Once the above are proved, it is then assumed that the testator knew of and assented to the contents of the Will (as per Parke B in **Barry v Butlin** (1838), 2 Moo. PC 480).
41. 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).
42. However, the evidence of the attesting witness is not necessarily conclusive as the Court may still receive evidence in rebuttal (see **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).
43. Section 6 of the Wills Act provides what constitutes a valid Will.

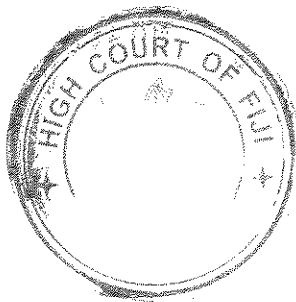
"Execution generally

6. Subject to the provisions of Part V, a Will is not valid unless it is in writing and executed in the following manner:

- (a) it is signed by the testator or by some person in his presence and by his direction in such place on the documents as to be apparent on the face of the will that the testator intended by such signature to give effect to the writing as his will;
- (b) such signature is made or acknowledged by the testator in the presence of at least two witnesses present at the same time; and
- (c) the witnesses attest and subscribe the will in the presence of the testator.

COMMENTS

- 44. Naidu has the benefit of Probate No. 49875. He has proven the 1991 Will in common form. Prima facie, he is entitled to the Orders he seeks to be substituted as 1st and 2nd Defendants.
- 45. The only way that Dhansurja can validly oppose an Order for Substitution is to prove the 2004 Will in solemn form. As she is propounding the 2004 Will, the onus is on her to prove.
- 46. Her affidavit falls short of establishing the requirements I have discussed above.
- 47. I am mindful that if need be, it is prudent to adjourn the case to enable Dhansurja to garner more evidence to prove her Will.
- 48. At this time, I will not make any Orders on both applications and instead, adjourn the case to Friday 27 April 2018 for further directions.



A handwritten signature in black ink, appearing to read "Anare Tuilevuka", is written over a horizontal dotted line.

Anare Tuilevuka
JUDGE
Lautoka

18 April 2018