

IN THE HIGH COURT OF FIJI
AT LAUTOKA
PROBATE JURISDICTION

PROBATE ACTION NO. HPP 50 OF 2015

BETWEEN : **NAND KISHORE** and **VIDYA NARAYAN** both of Meigunyah,
Nadi, Handyman/Terminal Assistant and Taxi Driver respectively.

PLAINTIFFS

AND : **KAMLA WATI** of Meigunyah, Nadi, Domestic Duties as the sole
Executrix and Trustee of the Estate of Shiu Narayan late of
Meigunyah, Nadi, Cultivator, Deceased, Testate.

FIRST DEFENDANT

AND : **ESTATE OF SHIU NARAYAN** late of Meigunyah, Nadi, Cultivator,
Deceased.

SECOND DEFENDANT

Appearances : Mr Anil J. Singh for the plaintiffs
Ms A. Swamy for the defendants

Date of Hearing : 14 March 2018

Date of Submissions: 09 April 2018 (plaintiffs), 13 April 2018 (defendants)

Date of Judgment : 04 May 2018

J U D G M E N T

Introduction

[01] The plaintiffs brought this action through originating summons supported by an affidavit sworn by the plaintiffs (Nand Kishore and Vidya Narayan) to remove the first defendant as the Executrix and Trustee of the second defendant and to appoint the plaintiff as the administrators for the second defendant. The

plaintiffs allege that the first defendant is an illiterate person and third parties are taking advantage of her in a way that she is in breach of her duties and undertaking to court.

- [02] The first defendant filed an affidavit in opposition and deposed that under clause 4 of the Will of her late husband (Shiu Narayan) the plaintiffs lost their absolute interest and her life interest in estate became absolute with the plaintiffs entitled to only the residue.
- [03] In reply to the affidavit in opposition, the plaintiffs filed the affidavit of Vidya Narayan and allege that the first defendant as the Executrix of the estate sold the property unlawfully.
- [04] At the hearing, neither party led oral evidence. Both the parties agreed to file their respective written submissions. Accordingly, the parties have filed their written submissions.

The Background Facts

- [05] Briefly, the background facts are as follows.
- [06] A Shiu Narayan (Kamla Wati's husband, first defendant and the father of Nand Kishor and Vidya Narayan, the plaintiffs) ('*the deceased*') made his last Will and testament dated 11 September 1985. The deceased died on 24 June 1990. On 18 September 1990, as the sole Executrix and Trustee, Kamla Wati, the first defendant obtained a Probate Number 26020 with the last Will and Testament annexed. The first defendant has a life interest in the estate. Clause 4 of the Will provides:

"4. *I DEVISE this residue of my property both real and personal and of whatsoever kind and nature and wheresoever situate to my wife KAMLA WATI for her life and upon her death to my sons NAND KISHOR and VIDYA NARAYAN in equal shares share and shares alike absolutely. In the event of the death of my wife my said sons shall be the executors and trustees of my will. PROVIDED that if any of my said sons NAND KISHOR and VIDYA NARAYAN shall cease to reside on my farm and Meigunyah, Nadi or resides thereon but does not work on the farm during my life time or during life time of my wife then in such case he shall not be entitled to any share in my estate and shall not be entitled to be the executor and trustee and in such case my son shall take the residue of my property absolutely and shall be the sole executor and trustee of my will."*

- [07] Pursuant to the will of the deceased the plaintiffs will become executors and trustees upon the death of the first defendant. Clause 2 of the Will states:

"2. I APPOINT my wife KAMLA WATI father's name Appanna of Meigunyah, Nadi, Domestic Duties to be the executrix and trustee of this my will and after her death my sons NAND KISHOR and VIDYA NARAYAN to be executors and trustees."

- [08] The previous action brought by the plaintiffs under Action No. HPP No. 18 of 2015 against the defendants was dismissed, presumably on technical ground.
- [09] In the present action brought by the originating summons, the plaintiffs seek orders removing the first defendant from office as the executrix of the Will and appointing administrators in her place to administer the estate of the deceased.

The Law

- [10] Order 85 of the High Court Rules 1988, ('HCR') deals with the administration and similar actions. Order 85, Rule 4 provides:

"Grant of relief in action begun by originating summons (O.85, R.4)

4. In an administration action or such an action as is referred to in Rule 2, the Court may make any certificate or order and grant any relief to which the plaintiff may be entitled by reason of any breach of trust, wilful default or other misconduct of the defendant notwithstanding that the action was begun by originating summons, but the foregoing provision is without prejudice to the power of the Court to make an order under Order 28, Rule 9, in relation to the action. [Emphasis added]

- [11] Section 35 of the Succession, Probate and Administration Act, Cap 60 ['SPA Act'] says:

"Court may remove executor

35. The court may for any reason which appears to it to be sufficient, either upon the application of any person interested in the estate of any deceased person or of its motion on the report of the Registrar and either before or after a grant of probate has been made-

- (a) make an order removing any executor of the will of such deceased person from office as such executor and revoking any grant of probate already made to him or her;*
(b) by the same or any subsequent order appoint an administrator with the will annexed of such estate;

(c) make such other orders as it thinks fit for vesting the real and personal property of such estate in the administrator and for enabling the administrator to obtain possession or control thereof; and

(d) make such further or consequential orders as it may consider necessary in the circumstances” [Emphasis added]

The Issue

[12] The only issue that is to be determined by the court is whether the plaintiffs are entitled to an order removing the first defendant from office as the executrix and trustee of the estate of Shiu Narayan, the second defendant.

Discussion

[13] The plaintiffs apply by way originating summons for the removal of the first defendant, Kamla Wati who is the executrix of the Will of Shiu Narayan (*‘the deceased’*). By virtue of section 35 of the SPA Act read with O 85, R 4 of the HCR, the plaintiffs are entitled to make such an application for any reason which appears to the court to be sufficient. In an administrative action, the court, according to Rule 4, has the discretion to make an order removing any executor of the will of such deceased person from office. An application for removal of the executor of the Will may be made either before or after a grant of probate has been made. In this case, the plaintiffs make their application after the grant of probate to the first defendant.

[14] The court is also empowered to make an order removing an executor of the Will on its own motion on the report of the Chief Registrar of the High Court or Deputy Registrar or District Registrar (see section 35, SPA Act).

Inability and Breach of Trust

[15] The ground relied upon by the plaintiffs for the removal of the first defendant from office as executrix is that she is an illiterate person and that third parties are taking advantage of her in a way that she is in breach of her duties and undertaking to the court.

[16] Mr Singh, counsel appearing for the plaintiffs submits that: the first defendant has grossly miscarried her duties as the executor of the Will, particularly when the Will is abundantly clear that her primary duty was to maintain the *status quo*

as left by the deceased until her death and then the property would devolve to the absolute beneficiaries. He also submits that the affidavit in opposition is defective as it does not contain the endorsement as required by Order 41, Rule 9 of the HCR. Therefore, it should not be read into the records.

[17] Conversely, the first defendant submits that: the plaintiffs' application discloses no reasonable cause of action against the defendants. The plaintiffs have compromised the Estate. In fact, the bulk of the Estate Property has been sold off at the behest of the plaintiffs and as such only a small portion now remains. The plaintiffs have dispossessed the first defendant from the family home and further attempted to deprive the first defendant of her life interest as per the Will of her late husband dated 11 September 1985. Her submission refers to the case authority of *Nizam v Shah* [2014] FJHC 218; HBC 47.2009 (28 March 2014).

[18] *Nizam's* (above), Justice Tuilevuka in dealing with an application for the removal of a Trustee and appointment of a new Trustee stated at paras 30 to 32:-

"[30]. One of the reasons why the Courts will not lightly remove an executor/trustee is because of the need to respect the testator's (or settlor's) choice of executor/trustee.

[31]. I think this is good principle. In Harsant v Menzies [2012] NZHC 3390, the New Zealand High Court (as per Ellis) said, inter alia, said at para [57]:

[57] The intensely discretionary nature of the jurisdiction has been repeatedly recognised in the case law. The particular facts and circumstances of the particular case are all important. Other relevant guiding principles that are evident in the cases are that:

(a) the starting point is the Court's duty to see estates properly administered and trusts properly executed;

(b) the wishes of the testator/settlor (evidenced by the appointment of a particular executor or trustee) are to be given considerable weight;

(c) the welfare of the beneficiaries is the "litmus" test; and

(d) hostility as between administrators/trustees and beneficiaries is not by and of itself a reason for removal. Such hostility assumes relevance if and when it risks prejudicing the interests of the beneficiaries.

[32]. *In the balancing exercise, the court should still give due weight to the testator's/settlor's wishes as evidenced by his choice of executor/trustee. However, at the end of the day, it is the interest of the trust and the beneficiaries which is paramount. This is good law in my view and there is every reason for this court to follow suit when considering whether or not to remove and/or appoint an executor under section 35.*"

- [19] In the matter at hand, the deceased made a Will (*Annexure A*) appointing the first defendant as the executrix and trustee of his Will and at the same time devised his property both real and personal to his wife, the first defendant for her life. It will be noted that the Will had created a life interest over the deceased's property in favour of the first defendant (see clause 4 of the Will).
- [20] The Will of the deceased appoints and declares that the first defendant to be the executrix and trustee of the Will and that after her death the plaintiffs to be executors and trustees (see clause 2 of the Will). According to the Will, the plaintiffs will and can become the executors and trustees only after the death of the first defendant.
- [21] The plaintiffs allege that the first defendant is illiterate and therefore is unfit and unable to perform her duties as the executrix and trustee of the Will. The first defendant says she is illiterate but that does not mean that she is unable to comprehend the powers and duties that have been given to her as the executrix and trustee.
- [22] There is no cogent evidence such as medical opinion to establish that the first defendant is unfit to be the executrix and trustee of the Will. The plaintiffs merely assert that the first defendant is unfit that she is unable to perform her duties as the executrix and trustee of the Will. The plaintiffs are not entitled to remove the first defendant from the office as the executrix and trustee of the Will against the testator's wish. I am inclined to follow Justice Tuilevuka's judgment in *Nizam's case* (above) that *in the balancing exercise, the court should still give due weight to the testator's/settlor's wishes as evidenced by his choice of executor/trustee. However, at the end of the day, it is the interest of the trust and the beneficiaries which is paramount.*
- [23] At this point in time, the cause of action for the plaintiffs had not arisen because the first defendant has a life interest in the estate of the deceased and the plaintiffs will only become the executors and trustees of the estates upon the death of the first defendant. The deceased had wished to appoint his wife, the

first defendant to be the executrix and trustee of the Will with a life interest over the estate and after her death his sons, the plaintiffs to be executors and trustees. This means the first defendant is entitled to enjoy the property during her lifespan. The beneficiaries, the plaintiffs will be able to enjoy the property only after the first defendant's lifespan.

- [24] The parties have obtained DVRO and counter DVRO. This shows that there has been hostility as between the executrix and trustee (the first defendant) and the beneficiaries (the plaintiffs). Such hostility is not by or of itself is not a reason for removal of the first defendant from the office of executrix and trustee in the absence of risks prejudicing the interests of the beneficiaries, the plaintiffs. The plaintiffs have failed to sufficiently prove that risks prejudicing their interests in the estate for the removal of the first defendant.

Sale of Estate Property

- [25] The substantial portion of the estate property has been sold. The plaintiffs claim that the first defendant is in breach of the trust as she had sold approximate 10 acres of the farm out of a total of approximate 11 ½ acres to a third party.
- [26] I have carefully perused the transfer documents (plaintiffs' annexure 'B'). The sale of the estate property had taken place with the approval and consent of the plaintiffs, as the beneficiaries. They also had signed the transfer document and got financially benefited by sharing the proceeds of the sale. The plaintiffs, the absolute beneficiaries of the estate by their actions had irrevocably waived their interests in the estate property. I, therefore, reject the plaintiffs' allegation that the first defendant had breached the trust by selling the estate property.

Technical Issue

- [27] The plaintiffs have raised a technical issue in respect of the first defendant's affidavit in opposition. Counsel for the plaintiffs argues that the affidavit in opposition filed by the first defendant cannot be read into the records as it does not contain endorsement required by Order 41, Rule 9 (2) of the HCR.
- [28] It is worth noting that the plaintiffs had filed an affidavit in reply to the affidavit in opposition filed by the first defendant. The plaintiffs did not make any application to set aside the first defendant's affidavit for irregularity. The objection to the irregularity of the document filed in the proceedings is raised in the submission. A party who has taken a fresh step after becoming aware of the

irregularity will not be allowed to set aside for irregularity any documents (see Order 2, Rule 2 (1), HCR). The plaintiffs did not apply for setting aside of the first defendant's affidavit in opposition and they have taken a fresh step after becoming aware of the irregularity by filing an affidavit in reply. Therefore, the plaintiffs will not be allowed to raise such objection in the submission filed after the hearing of the matter.

First Defendant's Power of Attorney

- [29] The plaintiffs believe that the first defendant may be in the process of abdicating her duties and appointing a Power of Attorney.
- [30] The first defendant admits that she has appointed an attorney due to the mistreatment she received from the plaintiffs. She says this is not an abdication of her duties but rather due to plaintiffs failing to provide her with food, shelter and care in her old age.
- [31] The first defendant has a life interest in the property. She is the lifetime executrix and trustee of the Will of the deceased. There is no evidence before the court that the first defendant had abdicated any of these rights by appointing an attorney. I find that the plaintiffs' belief that the first defendant had abdicated her duties as the executrix and trustee is untenable.

Conclusion

- [32] For the reasons set out above, I conclude that the plaintiffs have failed to prove their case. The cause of action did not arise for the plaintiffs to remove the first defendant because she is the lifetime executrix and trustee of the Will of the deceased. Since she has a life interest in the estate property, the plaintiffs can only get their beneficial interest in the property after the lifespan of the first defendant. The allegation of breach of the trust has not been established. There is a need to respect the testator's choice of executor and trustee of the estate property. The court will not lightly remove an executor and trustee in the absence of proved risk prejudicing the interests of the beneficiaries. As such, the plaintiffs are not entitled to remove the first defendant from the office as executrix and trustee of the Will of the deceased.
- [33] I would, therefore, dismiss the plaintiffs' claim with the costs of \$2,000.00, which I have summarily assessed.

The Result

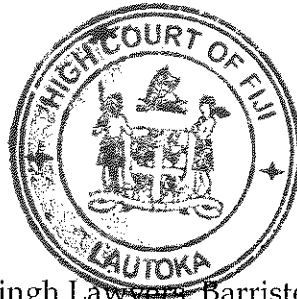
1. Plaintiffs' action dismissed.
2. The defendant is entitled to the summarily assessed costs of \$2,000.00.

H.H. Higgins

4/5/18

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M. H. Mohamed Ajmeer

JUDGE



At Lautoka

04 May 2018

Solicitors:

For the plaintiffs: Messrs Anil J Singh Lawyers, Barristers & Solicitors

For the defendants: Messrs Fazilat Shah Legal, Barristers & Solicitors