

IN THE HIGH COURT OF FIJI
IN THE WESTERN DIVISION
AT LAUTOKA

PROBATE JURISDICTION

Action No. 115 of 2012

BETWEEN : **ABDUL LATIFF** of Korovutu, Ba, Fiji

PLAINTIFF

AND : **MOHAMMED HAKIM** of Korovutu, Ba, Fiji in his personal capacity and as sole executor and trustee of the estate of Kunjal Bi, late of Korovutu, Ba, Fiji.

DEFENDANT

Appearances : **Mr. Nivan Ram Padarath for the plaintiff**
Mr. Andrew Liverpool with Mr. Jaynesh Ram, for the defendant

Trial : **25th October 2018; 04th, 05th February 2019 and 23rd April 2019.**

Written Submissions: **21st August, 2019**

Judgment : **25th October, 2019.**

JUDGMENT

(A) BACKGROUND

- (01) The plaintiff (**Latiff**) and the defendant (**Hakim**) are siblings. They had nine (09) other siblings. Their father, Kunjal Bi, dies testate on 15th September 2004. The estate property comprises, Crown Lease No: - 14722 (Sugar Cane Farm No:- 1370) which would have been the only real property that the late Kunjal left behind.
- (02) **Latiff, Hakim** and the other brother **Jamal** are heirs or beneficiaries to the estate of Kunjal. Pursuant to the Will, Latiff and Hakim are beneficiaries of approximately 1 ½ acres of estate farm. Their other brother, Mohammed Jamal is the beneficiary of two acres of estate farm. Mohammed Jamal is residing in United States since 2004.
- (03) Pursuant to Kunjal's Will and Testament, probate was granted to Hakim. Hakim became the trustee of Kunjal's estate on 04th March 2005.
- (04) On 23rd May 2012, Latiff filed a Writ of Summons and Statement of Claim alleging that;

9. *The Defendant has unlawfully and without any colour of right interfered and/or stopped the use, occupation and cultivation of the Plaintiff's share of the cane farm.*
10. *The Defendant has further interfered with the occupation and enjoyment of the Plaintiff's house.*
11. *Between the year 2006 and 2011, the Defendant has in breach of his duties as Executor and Trustee refused and/or neglected to pay the plaintiffs share of cane proceeds in the sum of \$6,556.79.*
12. *Despite several demands by the Plaintiff the Defendant has neglected or refused to pay the said amount or any other amount.*
13. *The Defendant further on or about the 6th February 2010 caused damage to the dwelling house occupied by the Plaintiff.*
14. *The Estate of Kunjal Bi owned a tractor registration no. E 3792 which the Plaintiff has been using for his own purpose and has been refusing to account for to the Plaintiff.*
15. *The defendant has failed, neglected and/or refused to account to the plaintiff for the affairs of the Estate of Kunjal Bi or to pay or transfer to the plaintiff any of his entitlements.*

(05) Latiff seeks Orders that;

- a. *Judgment in the sum of \$6,556.79.*
- b. *Judgment in the sum of \$13,800.00.*
- c. *An order that the Defendant furnish and verify full accounts of the Estate of Kunjal Bi.*
- d. *The Defendant do provide full accounts of all income from Sugar Cane Farm No. 1370 Koronubu Sector, situated in Crown Lease Reference No. 14722, from 2006 to the date of judgment.*
- e. *The Defendant to furnish an update account of all Estate properties sold and money received by him and refund or compensates the Estate of Kunjal Bi for any such sum.*
- f. *The Defendant do transfer the Plaintiffs share of Crown Lease No. 14722 to the Plaintiff as provided in the last Will of Kunjal Bi and that the costs of any such transfer be paid from the Estate.*
- g. *The Defendant be restrained from threatening or interfering with the Plaintiff and/or his agents and/or servants or with the shares and entitlements of the plaintiff.*
- h. *The Defendant be removed as the Executor and Trustee of the Estate of Kunjal Bi and the Plaintiff be appointed the Executor and Trustee of the Estate of Kunjal Bi.*

- i. *An injunction restraining the Defendant from uplifting any future cane proceeds in respect of farm No. 1370 Koronubu Sector or alternatively all the proceeds be held up by FSC until further orders of the court.*
- j. *Costs.*

(06) In his statement of defence, the defendant pleaded that; (reference is made to paragraph (6) and (7) of the statement of defence filed on 12.06.2012);

- 6. *That the defendant admits the content written therein and further says that the Plaintiff was given his share of the cane proceeds and which he has signed and says that it is the Plaintiff who are uncooperative and have not performed or cultivated and still not performing their duties as trustees who are inconsistent with the duties imposed under the Will and Testament of ESTATE OF KUNJALIBI*
- 7. *That the defendant denies the contents and further says that during the life of ESTATE OF KUNJALIBI and after his death the defendant cultivated, managed and looked after the Estate farm and devoted all his time, energy, monies therein.*

(07) Before the commencement of the trial, Counsel for the plaintiff and the defendant informed court that the issue in relation to the distribution of the share and subdivision of the land has been resolved amicably.

(08) Therefore, the plaintiff claimed only prayer (a), (h) and (j) in the plaint. They are;

- (a) *Judgment in the sum of \$6,556.79.*
- (h) *The Defendant be removed as the Executor and Trustee of the Estate of Kunjal Bi and the Plaintiff be appointed the Executor and Trustee of the Estate of Kunjal Bi.*
- (i) *Costs.*

(09) Therefore, the issues to be tried are;

- 1. Whether the Defendant has unlawfully interfered and/or stopped the use, occupation and cultivation of the Plaintiff's share of the cane farm?
- 2. Did the Defendant refuse and/or neglect to pay the Plaintiff his share of the cane proceeds amounting to \$6,556.79 between 2006 to 2011?
- 3. Whether the actions of the Defendant between years 2006 to 2011 in breach of his duties as Executor and Trustee of the Estate of Kunjal Bi?

(B) THE WITNESSES

The plaintiff's case; PW (1) The plaintiff
PW (2) Abdul Rashid
PW (3) Mohammed Jalil
PW (4) Isan Kumar
PW (5) Salim Khan

The defendant's case; Ishwar Chandra (Accountant)

(C) THE LEGAL PRINCIPLES

The starting point is that the Courts have a jurisdiction to administer trusts. This jurisdiction is conferred both by statute and under common law. As a beneficiary, Latiff has locus to institute proceedings against the trustee namely, Hakim. Latiff's locus derives from **Section 89 of the Trustee's Act (Cap 65)** as well as in equity. **Section 89** states inter alia that any person beneficially interested in any property the subject of a trust may apply to Court for an order concerning such property. Latiff also has rights in equity. Rooney J confirms this at page 7 in **Ratu Epi Volavola v. Adi Lady Lalabalavu Litia Kaloafutoga Mara**¹. Equity confers upon a beneficiary a right to demand information pertaining to any trust property and his or her interest in it.

The Trustee has a corresponding duty to provide such information upon demand by the beneficiary. In **Patel v Nodhana Ltd**², Fatiaki J sets out some established case law material on the point.

The information that the Trustee is obliged to give on demand is set out in **Volume 8 of Halsbury's Laws of England (4th ed.)** (Cited by Fatiaki J) as:

"830...[information] as to the mode in which the trust property or [beneficiary's] share in it has been invested or otherwise dealt with, and as to where it is and full accounts respecting it, whether the beneficiary has a present interest in the trust property or only a contingent interest in remainder, or is only an object of a discretionary trust."

In **Re-Watson**³ (also cited by Fatiaki J), Kekewich J speaks of three duties that the trustee must adhere to strictly. These are, firstly, the duty to keep accounts. Secondly, the duty to deliver accounts and, thirdly, the duty to vouch accounts. The Trustee must always keep proper accounts and to have them always ready when called upon to render them (as per Stuart VC in **Kemp v. Burn**⁴). Hence, even if a

¹ Civil Action No. 293 of 1986.

".....a beneficiary enjoys rights against a trustee as provided for under the Trustees Act (Cap.65) and under the system of equity developed in the former Court of Chancery in England and which is now administered in this Court."

² [1994] FJHC 208; [1994] 40 FLR 118 (26 August 1994).

³ (1904) 49 Sol. Jo. 54

⁴ (1863) 141 R.R. 225, 226)

Trustee has put the estate funds into his own personal bank books, the Trustee cannot tell a beneficiary that his (Trustee's) personal bank account is out of bounds so to speak to the beneficiary. As Lord Eldon L.C. in **Freeman v. Failie**⁵ said;

“It is, and must be understood to be, the bounden duty of an executor to keep clear and distinct accounts of the property which he himself is bound to administer; and I have not the slightest difficulty in saying that, if all these books were the books of a banking house in London, and an executor thought proper to put the accounts of testator's estate into his banking books, he shall not be allowed to tell me, the cestui que trust, that I have no right to see his original accounts of my property. To an executor so acting I should say, they shall see every part of these original books which contain any part of this transaction.”

It well settled in law and in equity that the Court's jurisdiction to administer trusts includes, incidental to it, the powers to remove and appoint new Trustees. The Courts power to remove the Trustee and appoint a new one is set out in Section 35 of the Succession, Probate and Administration Act, Cap.60, and Section 73 of the Trustee Act. In **Vosailagi v Mara**⁶, Fatiaki J cited the following English cases with authority in exploring the boundaries of the Court's equitable jurisdiction in this regard.

Scott J. said in **Chellaram v. Chellaram**⁷,

The jurisdiction of the Court to administer trusts to which the jurisdiction to remove Trustees and appoint new ones is ancillary, is an in personam jurisdiction. In the exercise of it, the Court will inquire what personal obligations are binding upon the Trustees and will enforce those obligations.... The trustees can be ordered to pay, to sell, to buy, to invest, whatever may be necessary to give effect to the rights of the beneficiaries, which are binding on them. If the Court is satisfied that in order to give effect to or to protect the rights of the beneficiaries, Trustees ought to be replaced by others, I can see no reason in principle why the Court should not make in personam orders against the Trustee requiring them to resign and to vest the trust assets in the new Trustees.”

In **Letterstedt v. Broers**⁸ the Privy Council laid down the 'guiding principles' to be applied in the removal of Trustees in the following passages by Lord Blackburn at pp.387 and 389.

“It seems to their Lordships that the jurisdiction which a Court of Equity has no difficulty in exercisingis merely ancillary to its principle duty, to see that the trusts are properly executed. This duty is constantly being performed by the substitution of new Trustees in the place of original Trustees for a variety of reasons in non-contentious cases. And therefore, though it should appear that the charges of misconduct were either not made out, or were grossly exaggerated, so that the Trustee was justified in resisting them,yet if satisfied that the continuance of the Trustee would prevent the trusts being properly executed, the Trustee might be removed.

⁵ (1812) 17 R.R. 7

⁶ supra

⁷ (1985) 1 Ch.D 409 at p.428

⁸ (1884) 9 App. Cas. 371,

It must always be borne in mind that Trustees exist for the benefit of those to whom the creator of the trust has given the trust estate.

As soon as all questions of character are as far settled as the nature of the case admits, if it appears clear that the continuance of the Trustee would be detrimental to the execution of the trust, even if for no other reason than that human infirmity would prevent those beneficially interested, or those who act for them, from working in harmony with the Trustee,the Trustee is always, advised by his Counsel to resign, and does so.

In exercising so delicate a jurisdiction as that of removing Trustees, their Lordships do not venture to lay down any general rule beyond the very broad principle above enunciated, that their main guide must be the welfare of the beneficiaries.”

.....

“It is quite true that friction or hostility between Trustees and the immediate possessor of the trust estate is not of itself a reason for the removal of the Trustees. But where the hostility is grounded on the mode in which the trust has been administered,it is certainly not to be disregarded.”

A Trustee may apply to Court for directions under Section 88 of the Trustee Act if he or she does not know how to go about his or her duties (see **Matai v. Uluilakeba**)⁹ and/or may simply consult a Solicitor for the same.

(D) DISCUSSION

(01) In the statement of claim the plaintiff relied upon the allegation that;

(9) *The defendant has unlawfully and without any colour of right interfered and/or stopped the use, occupation and cultivation of the plaintiffs' share of the cane farm.*

(02) In the statement of claim the plaintiff **also** relied upon the allegation that;

(11) *Between the years 2006 to 2011 the defendant has in breach of his duties as executor and trustee refused and/or neglected to pay the plaintiff's share of cane proceeds in the sum of \$6,556.79.*

Whether the defendant has unlawfully interfered and/or stopped the use, occupation and cultivation of the plaintiff's share of the cane farm?

(03) The plaintiff (Latiff) testified that he cultivated cane on his share in the estate farm from the year 2004 to 2010. He also testified that from the year 2010, the defendant,

⁹ [2011] FJHC 761; hbp08.2008 (22 November 2011)

Hakim did not allow him to cultivate on his share in the estate farm. The defendant informed him that he does not have a share in the estate farm.

The transcript of Latiff's evidence in chief contains this; (page 10 and 11 of the transcript Vol.1)

Q: Thank you, Mr Latiff, can you confirm that you were in cultivation of 1 ½ acres of land? For how long were you cultivating this land for?

A: From year 2004 to year 2010, my Lord.

Q: So, is there a particular reason why you stopped cultivating from the year 2010?

A: Mohammed Hakim advised me that I do not have a share in that land my Lord, and for me to vacate the house, my Lord.

Q: So, this happened in 2010?

A: Yes my Lord. He stopped in 2006.

Q: Just one second, one second Mr Latiff.

A: From year 2006 he stopped giving me money, my Lord.

Q: When I asked you when you stopped working, so year 2010 you stopped completely working?

A: Yes my Lord.

Q: When I asked you why and you'd informed us that Mohammed Hakim told you that you don't have the share in the land and move out?

A: Yes my Lord.

Q: Prior to him telling you this; were you aware of the contents of the Will?

A: Yes my Lord. I knew and I had got a copy of this Will and he did not know that.

Q: And was this informed to Mr Hakim when he attempted to stop you?

A: My Lord, Mohammed Hakim was charged by the Police because Mr Latiff was putting up cement blocks to his porch.

Crt: No, the question is

PC: No, no, no.

Crt: The question is; did he inform Mohammed Hakim both contents of the Will when he was stopped from cultivating this land?

A: Yes my Lord, I did.

Q: So, you informed them regarding that?

A: Yes my Lord.

Q: Then what did Mr Hakim do? Did he allow you to cultivate the area?

A: He stopped me from cultivating the land, my Lord.

Q: And he stopped you cultivating?

A: Yes my Lord.

(04) The defendant refutes that and says that the plaintiff was in outside employment. Latiff was asked in cross-examination; (page 19 and 20 of the transcript Vol.1)

Q: Now, it is my instructions Mr Latiff, that after year 2005 you have actually never worked or cultivated the land, at this time you were actually working at the Rarawai Sugar Mill? Is that true?

A: I was also working on my sugarcane field and also working at Rarawai Mill, my Lord. I had cultivated the land from the year 2004 my Lord, when my Father was alive, my Lord.

Q: Mr Latiff, it is also my instruction that you did not work the land. I'll be very specific here. These are my instructions of my client so, I'm going to put it to you and you respond, right? That you did not work the land in the years 2006, 2007, 2008, I want to be specific year by year so that if you have anything to say about any of those years, you can tell. 2008, 2009 and 2010?

A: I have worked my Lord, from the year 2004 to 2010 my Lord.

Q: Okay. It is my instructions that you have cultivated the land from 2011 onwards due to a change in government policy which was basically that if you did not cultivate your land, you stood to lose it because it was crown lease? Is that correct?

A: My Lord, I only cultivated till 2010, my Lord. Because the Defendant stopped me, my Lord. Can I say something, my Lord.

(05) On this disputed issue, the plaintiff has provided corroboration of his account and satisfies the court as to his reliability. The corroboration, or supporting, evidence is provided by the testimony of P.W (3) Mohammed Jalil (The Gang President) and P.W (4) Isan Kumar (the Gang Sardar). Mohammed Jalil testified that the defendant informed the Gang¹⁰ that he is the beneficiary to the estate farm and all sugar cane proceeds from the estate farm should be paid to him. The transcript of Mohammed Jalil's evidence in Chief contains this; (page 26 of the transcript of hearing Vol.2).

Clerk reads: No. 18; I recall that the Defendant had at one point informed the Gang he is the lawful owner and all proceed will be given to him?

A: Yes my Lord.

Clerk reads: No. 19; The Gang record book task had the records of all the canes harvested and it was under the Farm Number of the Defendant?

A: Yes my Lord.

This is further corroborated by the testimony of P.W (4) Isan Kumar. The transcript of Isan Kumar's evidence in chief contains this; (page 42 of the transcript of hearing Vol.2)

¹⁰ A gang is a collection of cane cutters who are appointed by the farmers to harvest cane.

24. Q: *I recall that the Defendant had at one point informed the Gang he is the lawful owner and all proceed will be given to him?*
 A: *Yes my Lord.*
25. Q: *The Gang record book thus had the records of all the cane harvested and it was under the farm number of the Defendant?*
 A: *Yes my Lord.*
26. Q: *I am not aware as to whether the proceeds were distributed to the Plaintiff.*
 A: *Yes my Lord.*

(06) No suggestion was made to Jalil and Isan in cross-examination that the above was not the case and had let go unchallenged so far as the conduct of the defendant's case is concerned. By itself it does prove that the defendant's Counsel did not have reasonable grounds to suspect the evidence of Jalil and Isan on this particular point. In other words, the absence of grounds for suspicion have been provided by the defence Counsel. It must be accorded weight.

(07) It should be firmly stated that if a witness is not cross-examined in relation to a particular matter upon which he has given evidence, then that circumstance would often be a very good reason for accepting the evidence of that witness upon that matter. For example, **Cross on Evidence**¹¹ the authors state (at para 10.50);

"Any matter upon which it is proposed to contradict the evidence in chief given by the witness must normally be put to him so that he may have an opportunity of explaining the contradiction, a failure to do so this may be held to imply acceptance of the evidence in chief."

See; **Phipson on Evidence**¹²

(08) The evidence of Jalil and Isan lends credence to the plaintiff's claim that the defendant did not allow him to cultivate on his share in the estate farm from the year 2010.

(09) If the defence Counsel proposes to submit that the evidence of Jalil and Isan on this particular point should not be accepted, the witnesses should be allowed an opportunity to deal with the suggestion. The significance in that suggestion is that (A) It gives Jalil and Isan the opportunity to deny the suggestion on oath. (B) It gives the party calling the witnesses the opportunity to call corroborative evidence which in the absence of such a suggestion is unlikely to have been called.

(10) It is still clear in my mind the demeanour and deportment of Latiff, Jalil and Isan in court. I have no hesitation in accepting the evidence of Latiff, Jalil and Isan. The

¹¹ 2nd Australian ed, 1979.

¹² 12th ed, 1976 at para 1593.

suggestion made to Latiff during cross-examination, viz, *Latiff was in outside employment*, is not substantive evidence.

- (11) As stated, Gang Sardar (Isan) and Gang President (Jalil) testified in court that in a gang meeting the defendant, told them that he is the lawful owner of the estate farm and all sugar cane proceeds from the estate farm should be paid to him [see paragraph (5) above]. This lends credence to the plaintiff's claim that the defendant stopped him from cultivating on his share in the estate farm because the defendant informed him that he (the plaintiff) is not an heir or a beneficiary to the estate of their father, Kunjal.
- (12) As regards standard of proof, civil law requires only that a party should establish his case on a balance of probabilities. The plaintiff has satisfied this court as to his reliability on the disputed issue by providing corroborative evidence. I have no hesitation in reaching the conclusion that the plaintiff's version of the fact is the most probable account of the events.
- (13) In civil cases the onus of proof is placed on the plaintiff and the plaintiff is required to establish that his or her case is more probable than not. In the present case the defendant did not come to the witness box to give evidence. He called an accountant to submit his statement of account. An adverse inference [*Jones v Dunkel*¹³], can be drawn only if there is some other evidence to support an inference, and despite that, if a party fails to rebut that inference by not calling a witness, then an inference may, in an appropriate case be drawn that, had the witness being called, his evidence would not have assisted to rebut the evidence that already exists. This is not such a case.

Did the defendant refuse and/or neglect to pay the plaintiff's share of the cane proceeds between the years 2006 to 2011?

- (14) The plaintiff (Latiff) testified that the defendant did not pay the plaintiff's share of the cane proceeds between the years 2006 to 2010.

The transcript of Latiff's evidence in chief contains this; (page 15 and 16 of the transcript Vol. 01)

Q: And was your son involved with you during the cultivation period from 2004 to 2010?

A: Yes my Lord.

Q: So Mr Latif, my question is for how many years did you receive the proceeds for?

A: 2005 and in 2005 my Lord. But the last amount from the year 2005 ending to the following year 2006, he did not receive, my Lord.

Q: Are these the only years you have received the proceeds for?

A: Yes my Lord.

Q: There's no other years you have received?

A: No my Lord.

¹³ (1959) 18 CA 8; 101 CLR 298

Q: Mr Latiff, you mentioned that you have received proceeds for 2006 and 2005 year ending? You cultivated until 2010, is that correct? You've answered that you've never received year ending 2005 and 2006, the cane proceeds?

A: 2005 October payment going on to 2006 he hasn't received, my Lord,

Q: And the entire 2006?

A: Yes my Lord.

Q: And you've earlier mentioned to us that in 2010 you stopped cultivating? Or you were stopped from cultivating?

A: Yes my Lord.

Q: What about the other years, did you receive the cane proceeds?

A: No my Lord.

Q: Can you just tell us for which years you haven't received the cane proceeds? For which years he did not receive?

A: From 2006 to 2010, my Lord.

Q: So, 6, 7, 8 9,10 you haven't received cane proceeds?

A: Yes my Lord.

Crt: For 5 years? 5 years.

Q: For 5 years you haven't received cane proceeds?

A: Yes my Lord.

(15) The defendant says at the trial that the plaintiff did not cultivate after year 2005 because the plaintiff was in outside employment. However, I should not pay attention to it for the purpose of deciding the case, because the circumstance was not pleaded in the statement of defence. The plaintiff was asked in cross-examination; [page 19 and 20 of the transcript Vol.01)

Q: Now, it is my instructions Mr Latiff, that after year 2005 you have actually never worked or cultivated the land, at this time you were actually working at the Rarawai Sugar Mill? Is that true?

A: I was also working on my sugarcane field and also working at Rarawai Mill, my Lord. I had cultivated the land from the year 2004 my Lord, when my Father was alive, my Lord.

Q: Mr Latiff, it is also my instruction that you did not work the land. I'll be very specific here. These are my instructions of my client so, I'm going to put it to you and you respond, right? That you did not work the land in the years 2006, 2007, 2008, I want to be specific year by year so that if you have anything to say about any of those years, you can tell. 2008, 2009 and 2010?

A: I have worked my Lord, from the year 2004 to 2010 my Lord.

Q: Okay. It is my instructions that you have cultivated the land from 2011 onwards due to a change in government policy which was

basically that if you did not cultivate your land, you stood to lose it because it was crown lease? Is that correct?

A: My Lord, I only cultivated till 2010, my Lord. Because the Defendant stopped me, my Lord. Can I say something, my Lord.

(16) The plaintiff denies vehemently the defendant's suggest to him and says "I was also working at Rarawai Mill".

(17) Leave all that aside for a moment and let me go back to the pleadings. In paragraph (11) and (12) of the statement of claim, the plaintiff made the following allegations of fact against the defendant;

(11) Between the years 2006 to 2011 the defendant has in breach of duties as Executor and Trustees refused and/or neglect to pay the plaintiff share of cane proceeds in the sum of \$6,556.79

(12) Despite several demands by the plaintiff the defendant has neglected or refused to pay the said amount or any other amount.

(18) **The above allegation of fact is not specifically traversed by the defendant in his pleading. The defendant in his statement of defence does not deal with paragraph (11) and (12) of the plaintiff's statement of claim. Therefore, by virtue of the provisions of Order 18, rule 12, the defendant has admitted the allegation of fact made by the plaintiff in paragraph (11) and (12) in the statement of claim by not traversing them.**

Therefore, what is there for the Court to decide?

(19) For the sake of completeness, Order 18, r.12 is reproduced below in full.

Admissions and denials (O.18, r.12)

12.-(1) Subject to paragraph (4), any allegation of fact made by a party in his pleading is deemed to be admitted by the opposite party unless it is traversed by that party in his pleading or a joinder of issue under rule 13 operates as a denial of it.

(2) A traverse maybe made either by a denial or by a statement of non-admission and either expressly or by necessary implication.

(3) Subject to paragraph (4), every allegation of fact made in a statement of claim or counterclaim which the party on whom it is served does not intend to admit must be specifically traversed by him in his defence or defence to counterclaim, as the case may be; and a general denial of such allegations, or a general statement of non-admission of them, is not a sufficient traverse of them.

(4) Any allegation that a party has suffered damage and any allegation as to the amount of damages is deemed to be traversed unless specifically admitted.

Breach of Trust

- (20) The trustee (the defendant) has breached the Will by not allowing the plaintiff (beneficiary) to cultivate his share of the estate farm from the year 2011. This is misbehaviour and misconduct in the administration of the Will. The trustee has gone against the will of the testator.
- (21) The trustee has also been guilty of misconduct by not paying the plaintiff's share of the cane proceeds amounting to \$6,556.79 between the years 2006 to 2010. Moreover, this is dishonesty.
- (22) The trustee was obliged to allow the plaintiff to cultivate his share of the estate farm. The trustee was obliged to make all payments in relation to the plaintiff's share of cane proceeds. The trustee was obliged to follow the rules of the Will and the common law. The trustee has breached the common law duty by failing to look after the beneficial interest of the beneficiary.
- (23) Further, the plaintiff has indisputably testified that he has asked the trustee for the accounts but the trustee failed to give any account of the estate. The trustee was under a common law duty to provide accounts to the beneficiaries. **The Halsbury's Laws of England, 4th edition, Volume 17, paragraph 1551** clearly stipulates that it is the duty of a personal representative to keep accounts and render them to the beneficiaries when called upon to do so. It states;

"It is the duty of the personal representative to keep clear and accurate accounts always to be ready to render such accounts when called upon to do so. It is no excuse that they are inexperienced in keeping accounts, for in that case it would be their duty to employ a competent accountant to keep them. When they are required by the beneficiaries to furnish accounts, they may demand to have the costs of doing so paid or guaranteed before complying with the request."

- (24) As stated in the present case, the trustee has breached the provisions of the Will by not allowing the plaintiff to cultivate his share in the estate farm from the year 2011. The trustee has also breached the common law duty by failing to provide accounts of the estate farm to the beneficiaries when requested to do so. The trustee has been guilty of misconduct by not making payments to the plaintiff for his share in the cane proceeds. The trustee has breached the common law duty by failing to look after the beneficial interest of the plaintiff.

Remove the trustee

- (25) The plaintiff beneficiary asks that the defendant trustee be removed. The court's power to remove the trustee and appoint a new one is enshrined in Section 35 of the succession, Probate and Administration Act, Cap 60 and Section 73 of the Trustee Act. The provisions respectively read as follows;

"S.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; and

(b) By the same or any subsequent order appoint an administrator with the Will annexed of such estate; and

(c) Make such others 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."

"73-(1) The Court may, whenever it is expedient to appoint a new Trustee or new Trustees, and it is inexpedient, difficult or impracticable so to do without the assistance of the Court, make an order for the appointment of a new Trustee or new Trustees, either in substitution for or in addition to any existing Trustee or Trustees or although there is no existing Trustee.

(2) In particular, and without limiting the generality of the provisions of subsection (1), the Court may make an order appointing a new Trustee in substitution for a Trustee who-

(a) desires to be discharged;

(b) has been held by the Court to have misconducted himself in the administration of the trust;

(c) is convicted of any misdemeanour involving dishonesty, or of any felony;

(d) is a person of unsound mind;

(e) is bankrupt; or

(f) is a corporation that has ceased to carry on business, or is in liquidation, or has been dissolved.

(3) An order under the provisions of this Section, and any consequential vesting order or conveyance, shall not operate further or otherwise as a discharge to any discharged, former or continuing Trustee than an appointment of new Trustees under any power for that purpose contained in any instrument would have operated.

(4) Nothing in this section contained shall confer power to appoint an executor or administrator.

(5) Every Trustee appointed by the Court shall have, before as well as after the trust property becomes by law or by assurance or otherwise vested in him, the same powers, authorities and discretions, and may in all respects

act, as if he had been originally appointed a Trustee by the instrument (if any) creating the trust."

- (26) It has long been settled that, in determining whether or not it is proper to remove a trustee, the court will regard the welfare of the beneficiaries as the dominant consideration. (**Letterstedt v Broers**,¹⁴). Perhaps the principal element in the welfare of the beneficiaries is to be found in the safety of the trust estate.
- (27) In the present case, there has been dishonesty, misbehaviour and misconduct in the management of the trust estate. The jurisdiction to remove a trustee is exercised with a view to the interests of the beneficiaries, to the security of the trust property and to an efficient and satisfactory execution of the trust and a faithful and sound exercise of the powers conferred upon the trustee.
- (28) In the present case, dishonesty of the defendant and his misbehaviour and misconduct in administration of the Trust (see para 20, 21 above) afford enough ground to authorise the court to remove the trustee. His continued administration of the trust is detrimental to the interests of the beneficiaries. His dishonesty, misbehaviour and misconduct may impair the confidence felt in his further administration of the trust.

Costs

- (29) In the ordinary case, a trustee brings or contests legal proceedings on behalf of the trust and not on his own behalf. He is often a necessary party to proceedings where he ought to present even though he may do no more than submit to the judgment of the court. In such a case the trustee receives his costs. **The position is admittedly different in a case of misconduct.** In this case, there has been dishonesty, misbehaviour and misconduct in the management of the trust estate.
- (30) In this case, the plaintiff's witness Salim Khan was the Sugar Cane Growers Council Counsellor. He stated that the plaintiff and the defendant were present before Counsellor Suresh Raj to mediate and resolve the dispute between the plaintiff and the defendant. He further stated that Counsellor Suresh Raj after hearing all the parties advised the defendant that the cane proceeds from the harvest in the plaintiff's share in the estate farm should be paid to the plaintiff.
- (31) In my opinion, the defendant's refusal to pay heed to the words of Counsellor Suresh Raj and keeping for his advantage all cane proceeds from the estate farm has resulted in legal proceedings which ought to have been avoided. The defendant would have acted wisely and properly in paying off the plaintiff's cane proceeds from the harvest in the plaintiff's share in the estate farm.
- (32) In defending this action the defendant has been representing and supporting his own interests and not those of the trust estate. The defendant has failed to show that his interests coincide with the interests of the trust estate. In such a case I consider it quiet proper that the defendant should pay the plaintiff's costs of the action.

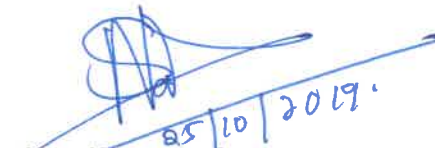
¹⁴ (1884) 9 App. Cas. 371 at 387

(E) ORDERS

- (i) Judgment for the plaintiff.
- (ii) The defendant is ordered to pay the plaintiff the estate monies in the sum of \$6,556.79. The estate monies should be paid within 14 days from the date of this judgment.
- (iii) The defendant is removed from his position as the executor and trustee of the estate of Kunjal Bi. The Grant No- 43163 appointing the defendant as the executor and trustee of Kunjal Bi's estate is hereby cancelled.
- (iv) The plaintiff is appointed as the executor and trustee of the estate of Kunjal Bi.
- (v) The defendant is ordered **in his personal capacity** to pay the plaintiff's costs of this action summarily assessed in the sum of \$2500.00. The costs should be paid within 14 days from the date of the Judgment.



**At Lautoka
Friday, 25th October, 2019**


.....
Jude Nanayakkara
Judge