

IN THE HIGH COURT OF FIJI
AT SUVA
PROBATE JURISDICTION

Probate Action No.: HPP 08 of 2006

IN THE MATTER of the Trustee
Act Cap 65

AND

IN THE ESTATE OF SAVITA
DEVI [f/n Adit Singh] of 322
Princess Road, Tamavua, Suva,
Domestic Duties, Deceased, Testate.

BETWEEN : DINESHWAR NARAYAN
PLAINTIFF

AND : PUSHPA WATI
FIRST DEFENDANT

AND : REGISTRAR OF TITLES
SECOND DEFENDANT

APPEARANCES/REPRESENTATION

PLAINTIFF : Ms K Maharaj [Mishra Prakash & Associates]

FIRST DEFENDANT : Mr V Maharaj [MC Lawyers]

SECOND DEFENDANT : Ms Taukei [Attorney General's Chambers]

RULING OF : Acting Master Ms Vandhana Lal

DELIVERED ON : 07th February 2019

INTERLOCUTORY RULING

Application

1. This is an application filed on 1 February 2018 seeking orders that the order made on 5 December 2016 whereby Pranita Singh was substituted in place of Pushpa Wati as the 1st Defendant is wholly set aside.

Said application is made pursuant to Order 2 rule 3; Order 10 rule 5 (2) and Order 32 rule 5 of the High Court Rules.

An Affidavit of Pranita Singh has been filed in support of aforementioned application.

2. The Plaintiff who is opposing the application has filed following affidavits:
 - i. Affidavit of Narsa Reddy sworn on 26 March 2018; and
 - ii. Affidavit of Priyanka Nirmata Roy Prasad sworn on 26 March 2018.

Orders of 5 December 2016 and how Pranita Singh entered appearance.

3. On or about 9 January 2016 the Plaintiff had made a formal application for substituting of party seeking orders:

"That Pramita Singh of Lot 98 K. Street , Nepani, Nasimu, Fiji Electronic Publisher as the Sole Executrix and Trustee in the Estate of Pushpa Wati aka Pushpavati aka Pushpa Wati Sharma late of Nepani, Nasimu, Fiji be substituted in place of Pushpa Wati the 1st Defendant in this action and the title to these proceedings and pleadings be amended accordingly".

4. The reasons outlined in the Affidavit in Support were:
 - *During the continuation of the proceedings the court on 11 April 2014 granted orders to consent the action as a proceeding began by writ and file pleadings. Fiji Public Trustee was ordered to be joined as the 3rd Defendant.*
 - *The order for joinder of 3rd Defendant could not be served on the (then) 1st Defendant Pushpa Wati. Enquiries revealed that she had died.*
 - *Upon further enquiries and searched it was revealed that Pushpa Wati had died on 21 October 2014 and Probate No. 56334 in her Estate was granted by the High Court of Fiji on 12 February 2015 to Pramita Singh of Lot 98 Kaikat Street, Nepani as Sole Executrix and Trustee. [A copy Probate was annexed].*
 - *The cause of action against the 1st Defendant has survived and her liability to the Plaintiff's claim has been transmitted to the Executrix and Trustee of the 1st Defendant's Estate.*
5. The said application was first called on 5 December 2016 and the court upon hearing Counsel for the Plaintiff and 2nd Defendant made orders for substitution.
6. Said order was not served on Pramita until 26 September 2017. An Affidavit of Service of Narsa Reddy was filed on 4 October 2017.

7. Messrs MC Lawyers filed a Notice of Appointment of Solicitors for Pramita on 20 October 2017.

The Substantive Claim

8. The claim concerns a piece of residential property being CT 7279 an area of 1 acre, 1 road and four perches.

Savita Devi died testate on 12 December 2001. Under her will of 25 September 2001, she had Appointed Pushpa Wati the then 1st Defendant as executor and trustee. A probate was granted to Pushpa Wati on 18 July 2003.

Clause 3(a) and (b) of the Will concerning the distribution of the property is the centre of dispute between the parties.

9. On 12 November 2010 Justice Hettiarachchi on an application for removal of the 1st Defendant as executrix and trustee had made orders removing the 1st Defendant as executrix and trustee of the Estate of Savita Devi and appointed the Public Trustee of Fiji as Trustee of the Estate.

10. Later on 11 April 2014 on the Plaintiff's application the Court amended the name and description of the 1st Defendant in the Title to the proceedings as follows:

"Pushpa Wati (F/N Durga Prasad) of Nepani, Nasinu, Retired Bank Officer in her personal capacity and as former Executor and Trustee in the Estate of Savita Devi (F/N Adit Singh) of 322 Princess Road, Tamavua, Suva, Domestic Duties, Deceased, Testate".

11. Other orders were:

- Plaintiff to continue proceedings as an action begun by a Writ and pleadings to be filed and served.
- Fiji Public Trustee Corporation Limited a body incorporation under the Fiji Public Trustee Corporation Act 2006 be joined as the Third Defendant in the Action.

12. However the Plaintiff failed to file and serve its Statement of Claim and matter was left in abeyance until an Order 25 rule 9 Notice was issued by the Registry in 2016.

Following which the Plaintiff made the 09 January 2016 application for substitution of Party.

Grounds for Making the Application to Set Aside the Orders For Substitution

13. Pramita was served with the order of 5 December 2016 on 26 September 2017.

She was not served with a summons for substitution by the Plaintiff neither any Affidavit in Support of the Summons. Hence she was neither aware of the application nor aware of the ground upon which substitution was sought.

She was informed by the bailiff not to do anything as the document was for her information only.

Later on 16 October 2017, the same bailiff came to her and served on her "summons for joinder and other orders" and an "Affidavit in Support".

She thereafter got in touch with her solicitors who explained to her the contents of the various documents.

Since she was not served with the application for substitution and she was not present, she claims the order made on 5 December 2016 is irregular and in breach of natural justice and ought to be set aside.

Opposition

14. According to the Plaintiff, Pramita was on 26 September 2017 served with the order for substitution of 1st Defendant.

The bailiff (Affidavit of Narsa Reddy) denies informing Pramita that there was no need for her to do anything or that the order was only for information. According to Mr Reddy, Pranita had informed him to serve the order on her solicitor Mr Vijay Maharaj. However he had instruction to serve her personally.

Initially Pushpa Wati was joined as a Defendant in the action when the matter commenced by way of originating summons on 22 February 2006. However, on 11 April 2014 her name in the proceedings was amended by an order of Mr Justice Kumar on 11 April 2014.

According to the Plaintiff, the order for substitution can be properly made on ex-parte basis.

The 1st Defendant has delayed in making the application for setting aside the order of 5 December 2016. The order is likely to cause further delays in determining the action.

The cause of action against Pushpa Wati has survived and the liability to the Plaintiff's claim has been transmitted to the Executrix and Trustee of Pushpa Wati.

Should the order for substitution be set aside?

15. **Order 15 rule 8(2)** of the High Court Rules allows *the Court in case the interest or liability of any party is assigned or transmitted to or devolves to another person, it thinks necessary in order to ensure that all matters in dispute may be effectively and completely determined and adjudicated upon, order that other person to be made a party to the cause or matter.*

The rules allows for an order to be made ex-parte.

16. Sub-rule 4 directs the party on whose application an order was made *to serve the order with a copy of the writ or originating summons by which the cause or matter was begun and form of acknowledgement of service.*
17. A person served with the order made ex-parte has 14 days after the service of the order, apply for the discharge or variation.
18. Rule 9 provides for provisions consequential on making of order under Rule 8.

Sub rule (4) reads:

"where by an order and rule 6 or 8 a person is to be added as a party or is to be made a party in substitution for some other party, that person shall not become a party until –

- a) *Where the order is made under rule 8, the order has been served on him or her under rule 8 (4) or, if the order is not required to be served on him or her order has been noted in the cause book.*

19. The basis on which Pushpa Wati was sued was in her personal capacity and as the Executrix and Trustee in Estate of Savita Devi as per the will of the deceased.
20. The footnote to Order 15 rule 7 of the Supreme Court Practice Volume 1 (1993) on paragraph 15/7/11 states:

"where there is a question whether the representative of a deceased are liable for his wrongful acts they may be joined as defendants, leaving the question of their liability to be decided at the trial "

21. According to the Plaintiff, the cause of action against the First Defendant is one that has survived and the Plaintiff is accordingly seeking orders to continue the proceedings as against the executor and trustee of Pushpa Wati.
22. However there is no statement of claim filed and served by the Plaintiff as per the order of the court which would outline the claim/cause of action against the 1st Defendant in her personal capacity and as former Executrix and Trustee for the Estate of Savita Devi.

Neither is there any evidence to say an acknowledgment of service was served on Pramita with the order.

23. Footnote 15/7/23 to Order 15 rule 23 of the Supreme Court Practice (1993) Volume 1 states that:

"it is describe that the order served on him should contain a notice of endorsement to the following effect: take notice that from the time of service of this order upon you will be bound by the proceedings in the action and that you should within 14 days of the service of the order upon you counting the day of service return to the Court Office

mentioned in this order the accompanying acknowledgment of service stating therein whether you intend to contest the proceedings and that in default of your doing so the Plaintiff may proceed in the action in your absence”.

24. There is no endorsement to that effect nor is there evidence that whilst serving the order, Pramita was informed that she needs to acknowledge service in 14 days of service.
25. With no amended statement of claim being filed as per order of the court on 11 April 2014 and served on Pramita with any acknowledgment of service it just and in the interest of Pramita that the orders of 5 December 2016 ought to be set aside.

Final Orders

26. The order of 5 December 2016 substituting Pramita in place of Pushpa Wati as the 1st Defendant is set aside.
27. The Plaintiff is further ordered to file and serve its amended Writ of Summons and Statement of Claim as per order of 11 April 2014 in 14 days.

Unless the amended Writ of Summons and Statement of Claim is filed and served within 14 days from date of delivering of this Judgment the Action shall stand dismissed.





Vandhana Lal [Ms]
Acting Master
At Suva.