

IN THE HIGH COURT OF FIJI AT SUVA
PROBATE JURISDICTION

Probate Action No. HPP 18 of 2020

IN THE MATTER of an application under the provisions of Sections 3(2), 6,7 and 23 of the Succession, Probate & Administration Act 1970, Order 85 Rule 4 of the High Court Rules' 1988.

BETWEEN: **SEMI PETERO TAGIVETAUA** of Lot 27, Tamanua Road, Nadera,
Student the Intended Administrator in **THE ESTATE OF SUNIA LOMANI**
VAKACEGU late of Lot 19, Vatoa Road, Narere, Manager Resource
Development/Geologist, Deceased, Intestate.

APPLICANT/ PLAINTIFF

AND: **SOKO LOMA VAKACEGU** of Lot 19, Vatoa Road, Narere, EA/Editorial
Manager, as Administratrix in **THE ESTATE OF SUNIA LOMANI**
VAKACEGU late of Lot 19, Vatoa Road, Narere, Manager Resource
Development/Geologist, Deceased, Intestate.

RESPONDENT/DEFENDANT

Counsel : **Plaintiff: Ms. Mataika. P**
: **Defendant: Ms. Rogers. A**

Date of Hearing : **18.06.2020**

Date of Judgment : **25.06.2020**

JUDGMENT

INTRODUCTION

1. Plaintiff filed this application seeking *inter alia* that the Letter of Administration (LA) issued to Defendant, on 17.12.2018 be revoked and the Plaintiff be allowed to take LA for the estate of Sunia Lomani Vakacegu (the Estate). Plaintiff also sought an order that administrative duties performed on behalf of the Estate null and void. Plaintiff made this application in terms of Order 85 rule 4 of the High Court Rules 1988 as an administrative action, read with Sections 3(2), 6, 7, and 23 of Succession Probate and Administration Act 1970. Plaintiff is making this application as the only child from deceased Sunia Lomani Vakacegu. Defendant had not declared Plaintiff a child of deceased, when she had obtained LA. Defendant does not admit that Plaintiff as a child of the deceased in this action,

though she had sworn an affidavit to this court previously where she admitted existence of a son and the son had lived with his mother and revealed first name of the said child. This child is Plaintiff. His birth certificate does indicate name of father. Deceased was ordered to pay maintenance and all educational expenses of Plaintiff, in the Magistrate's Court, pursuant to a settlement between deceased and mother of the Plaintiff, who were never married. In the **Magistrate's Court** Plaintiff was declared as child of deceased before an order for maintenance was made. Defendant had obtained LA as non-contentious probate matter on 17.9.2018 and at that time Plaintiff was a minor. Order 76 of High Court Rules 1988, defined probate action that exclusively includes revocation of grant and in an 'administration action', court cannot grant such orders. Probate action can only be instituted by way of writ. So the application for revocation of grant of LA cannot be granted. Plaintiff can be granted LA for the estate of Sunia Lomani Vakacegu as an additional administrator as there is a grave danger of Defendant acting in detriment to rights of Plaintiff who was a minor at the time she obtained LA. **Defendant is denying a fact already determined in an order of court, which established Plaintiff as the son of deceased.** Hence an injunction is granted preventing Defendant from acting as administrator of estate of Sunia Lomani Vakacegu till she is removed from a probate action. Her actions so far and in this action to deny Plaintiff as a beneficiary is serious enough to grant an injection to protect the rights of Plaintiff.

FACTS

2. Late Sunia Lomani Vakacegu, died intestate on or around 26.6.2018. He was not married at the time of death. His death certificate did not indicate an issue.
3. Plaintiff was born on **20.6.2001**, and his birth certificate did not indicate the name of father, and he was not included in VKB.
4. The mother of Plaintiff filed an action for maintenance and in that action deceased through a settlement agreed to pay maintenance of the Plaintiff and also all his educational expenses till he attain eighteen years of age.
5. In the said action for Maintenance filed in the Magistrate's Court, on **3.9.2007** it was ordered that deceased was '**adjudged as the father of the child namely Semi Petero Tagivetaua, a male born on 27.6.2001.**'
6. At the time of death of late Sunia Lomani Vakacegu, Plaintiff could not have obtained LA as he was seventeen years of age but Defendant is denying that Plaintiff was a child of deceased and had not disclosed Plaintiff as a child of deceased when Defendant obtained LA through non contentious probate matter.

7. Plaintiff also state that he was appointed as the sole beneficiary to life insurance policy of the deceased, but insurer, had not disbursed the funds as Defendant had claimed for said funds in terms of LA issued to her.
8. Mother of Plaintiff did not file a caveat against the grant of probate, and she had not even claimed a substantial sum of money remitted to High Court in terms of Section 57(3) of FNPF Act 2011 for which Defendant had made an application and in that application she had sworn a statutory declaration that deceased 'has a son named Semi who at all times lived with his mother and the semi was never registered at the Registry of Birth of VKB as my deceased brother's son.'

ANALYSIS

9. Plaintiff through originating summons sought orders to revoke grant of LA issued to Defendant, .Order 85 of High Court Rules 1988 deals with 'administration actions' and it is defined in Order 85 rule 1 and Order 85 rule 2 as follows;

"Rule 1

In this Order "administration action" means an action for the administration under the direction of the Court of the estate of a deceased person or for the execution under the direction of the Court of a trust.

Rule 2

(1) An action may be brought for the determination of any question or for any relief which could be determined or granted, as the case may be, in an administration action and a claim need not be made in the action for the administration or execution under the direction of the Court of the estate or trust in connection with which the question arises or the relief is sought.

(2) Without prejudice to the generality of paragraph (1), an action may be brought for the determination of any of the following questions—

(a) any question arising in the administration of the estate of a deceased person or in the execution of a trust;

(b) any question as to the composition of any class of persons having a claim against the estate of a deceased person or a beneficial interest in the estate of such a person or in any property subject to a trust;

(c) any question as to the rights or interests of a person claiming to be a creditor of the estate of a deceased person or to be entitled under a will or on the intestacy of a deceased person or to be beneficially entitled under a trust.

(3) *Without prejudice to the generality of paragraph (1), an action may be brought for any of the following reliefs—*

(a) an order requiring an executor, administrator or trustee to furnish and, if necessary, verify accounts;

(b) an order requiring the payment into Court of money held by a person in his or her capacity as executor, administrator or trustee;

(c) an order directing a person to do or abstain from doing a particular act in his or her capacity as executor, administrator or trustee;

(d) an order approving any sale, purchase, compromise or other transaction by a person in his or her capacity as executor, administrator or trustee;

(e) an order directing any act to be done in the administration of the estate of a deceased person or in the execution of a trust which the Court could order to be done if the estate or trust were being administered or executed, as the case may be, under the direction of the Court."

10. LA was issued by the Probate Registry on 17.9.2018 to Defendant as a non-contentious probate matter. This grant was issued to the Defendant less than three months from death of the deceased.
11. Defendant had obtained LA, soon after demise of her bother, Plaintiff and or her mother did not lodge a caveat against the grant of LA. Plaintiff who had not attained the age of eighteen and could not have lodged a caveat on his own when Defendant sought and got the LA.
12. Plaintiff's mother had not made an application by way of summons to the court in terms of Section 7 of Succession Probate and Administration Act 1970 as a *de facto* partner of the deceased. Accordingly wife or husband or *de facto* partner of a deceased obtains priority over all others.

13. Section 7(b) of Succession Probate and Administration Act 1970 states how the priority in the application for grant of LA and priority contained in Section 6 of Succession Probate and Administration Act 1970 applies.
14. In the absence of application for grant of LA by widow and or *de facto* partner, children of the deceased gets priority, over all others including Defendant who was a sibling of the deceased.
15. Defendant had applied to probate registry in order to obtain LA through a personal application in terms of Non-contentious Probate Rules. Defendant had obtained LA as a sibling of deceased.
16. Defendant in the said application had not disclosed about the existence of Defendant.
17. Order 1 rule 11 of the High Court Rules of 1988 states as follows:

“The rules for the time being in force in Her Majesty’s High Court of Justice in England, and the practice and procedure of that Court with respect of non –contentious probate business shall apply so far as they are applicable, with such modifications as may be necessary, to grants of probate and administration issued in common form the Registry of the High Court”
18. High Court Rules of 1988 commenced on 31.3.1988 (LN 37 of 1988)¹. So, the law that was in force in UK High Court regarding non contentious probate business should be applied to Fiji with any modifications if necessary.
19. In UK “The Non –Contentious Probate Rules 1987 (1987 No. 2024(L.10)” was made on 24.11.1987 and it was laid before UK Parliament on 10.12.1987 and it had come in to effect from 1.1.1988².
20. When High Court Rules of 1988 commenced on 31.3.1988, in UK Non Contentious Probate Rules of 1987 had commenced in UK and it should accordingly be applied to Fiji in terms of Order 1 rule 11 of the High Court Rules of 1988.
21. Rule 22 of Non Contentious Probate Rules 1987(UK) deals with the order of priority for grant in case of intestacy. And it states;

“Order of priority for grant in case of intestacy

¹ “The Laws of Fiji “ [https://laws.gov.fj/Acts/DisplayAct/87#\(26.6.2020\)](https://laws.gov.fj/Acts/DisplayAct/87#(26.6.2020))

² Non Contentious Probate Rules 1987 UK Original Queens Printer version on legislation.gov.uk (26.6.2020)http://www.legislation.gov.uk/uksi/1987/2024/pdfs/uksi_19872024_en.pdf

22.—(1) *Where the deceased died on or after 1st January 1926, wholly intestate, the person or persons having a beneficial interest in the estate shall be entitled to a grant of administration in the following classes in order of priority, namely—*

(a) the surviving husband or wife;

(b) the children of the deceased and the issue of any deceased child who died before the deceased;

(c) the father and mother of the deceased;

(d) brothers and sisters of the whole blood and the issue of any deceased brother or sister of the whole blood who died before the deceased;

(e) brothers and sisters of the half blood and the issue of any deceased brother or sister of the half blood who died before the deceased;

(f) grandparents;

(g) uncles and aunts of the whole blood and the issue of any deceased uncle or aunt of the whole blood who died before the deceased;

(h) uncles and aunts of the half blood and the issue of any deceased uncle or aunt of the half blood who died before the deceased.

(2) In default of any person having a beneficial interest in the estate, the Treasury Solicitor shall be entitled to a grant if he claims bona vacantia on behalf of the Crown.

(3) If all persons entitled to a grant under the foregoing provisions of this rule have been cleared off, a grant may be made to a creditor of the deceased or to any person who, notwithstanding that he has no immediate beneficial interest in the estate, may have a beneficial interest in the event of an accretion thereto.

(4) Subject to paragraph (5) of rule 27, the personal representative of a person in any of the classes mentioned in paragraph (1) of this rule or the personal representative of a creditor of the deceased shall have the same right to a grant as the person whom he represents provided that the persons mentioned in subparagraphs (b) to (h) of paragraph (1) above shall be preferred to the personal representative of a spouse who has died without taking a beneficial interest in the whole estate of the deceased as ascertained at the time of the application for the grant."

22. Plaintiff had filed this originating summons in terms of Order 85 rule 4 of High Court Rules 1988. This is regarding administration of estate by Defendant as trustee of the estate.

In terms of said provision court can make certain declarations and or directions, but removal of a grant is allowed in terms of Order 76 of High Court Rules 1988.

23. Interpretation of 'probate action' is contained in Order 76 rule 1(2) of High Court Rules 1988 and this is an exclusive interpretation hence it had used word 'means' to define it , and revocation of a grant is a probate action.
24. So Plaintiff cannot seek revocation of this grant in this action by way of originating summons through an 'administration action'. I am mindful of Order 28 rule 9(1) of High Court Rules 1988, which allows a court to convert originating summons to a writ of summons but this is discretionary and not always suitable considering circumstances of the case and type of action. Since this action is an 'administration action' it is not suitable to convert to a 'probate action', using said provision.
25. In this instance considering the special procedure involved in such probate action, it is not suitable for conversion to a writ of summons. There was no application to convert this action to a writ .So I decline to revoke LA granted to Defendant and Plaintiff reserves his right to bring a suitable action in terms of Order 76 of High Court Rules 1988 for that purpose.
26. Even if I am wrong on above, Defendant obtained LA, when Plaintiff was a minor. So he could not have obtained LA, at that time. So non-disclosure of Plaintiff, cannot be sole ground to revoke LA.
27. Plaintiff's birth certificate had not indicated deceased as the father, but when deceased was living he had consented to a court order declaring Plaintiff as his child and obliged for payment of maintenance to Plaintiff and also to support for Plaintiff's educational expenses , till he attains the age of eighteen.
28. In conflict to the position taken in this personal application for LA in terms of Non contentious Probate Rules, Defendant, in a separate application to High Court had disclosed the existence of a son to deceased and named that person as 'semi'. There was no son other than Plaintiff.
29. Defendant was contradicting herself in sworn affidavits and could not explain as to her own admission made to High Court in her application to distribute of FNPF money to be distributed in terms of law.
30. Defendant in the affidavit in opposition reiterated that she had 'truthfully declared' her interest in the said application for distribution of FNPF funds remitted to court in terms of Section 57(3) of FNPF Act 2011.

31. Without an explanation again, Defendant further stated that deceased was not the biological father and relied on the birth certificate of Plaintiff and Death Certificate to contradict herself.
32. I do not need to analyze Defendant's own conflicting sworn, evidence before this court in order to determine paternity of Plaintiff. It was a settled issue in the Magistrate's Court through an order made on 3.9.2007 when deceased was living and this was soon after birth of Plaintiff. The only person who could have disputed the paternity had admitted, it without contesting and till his death he had not sought to change it.
33. This consent decision was not set aside or challenged through a separate action by deceased.
34. Defendant cannot change the fact of paternity determined by court of law. Whether it was by evidence or settlement the order of the court was final at the time of death of late Sunia Lomani Vakacegu
35. So the denial of Defendant a fact established by court and admitted by deceased cannot make that established fact by a court of law, any different. The only person who could have disputed paternity had not only consented to the court order declaring Plaintiff as his son and also ordering maintenance against the deceased. Defendant is not entitled to deny and or disentitle Plaintiff as the sole beneficiary of the Estate, subject to his mother's claim as de facto partner. She had not shown any interest in this matter or earlier application to this court in order to release money remitted to court in terms of FNPF Act 2011, which was not a part of estate of the deceased.
36. A fact established by court through evidence and or through consent orders of the court cannot be overridden by birth certificate of the Plaintiff and or death certificate of the deceased. These are *prima facie* evidence and rebuttable by order of court. There was no need to make Registrar of Birth and Death a party to this proceedings as Magistrate's Court had already decided on this issue in 2007 and bound to accept it.
37. According to affidavit in opposition Plaintiff was appointed as sole beneficiary to the life insurance policy of the deceased. Defendant in the affidavit in opposition denied that she had knowledge about such an insurance policy. If so why did insurer did not disburse the funds for more than two years from demise of policy holder needs explanation.
38. Communication by Plaintiff's solicitors to the insurers indicated that Plaintiff was the sole nominee under said policy and Defendant had also claimed for the same as an administrator of the estate of policy holder. In their reply none of these facts were denied by insurers and

insurers had indicated that they awaits decision in this action. This is entirely wrong procedure adopted by insurer.

39. If there was a valid nomination by the deceased in terms of insurance policy that person should be entitled for the same and funds should be disposed to nominee, forthwith. Already two years had lapsed from the death and there was no reason for insurers to hold the money under the policy if there was a nomination. An Administrator of the Estate cannot interfere with such disbursement to a nominee of a life insurance.
40. In terms of Section 143(1) of Insurance Act 1998 if there was a dispute as to the entitlement such money should be deposited in High Court without delay. Insurers cannot state that they will keep funds with them, as stated in the communication to Plaintiff's solicitors, when there is clear provision of law as to what should be done.
41. Plaintiff as the only child of deceased gets priority over Defendant as regard to all the estate property of deceased, subject to his mother's claim if any.
42. Defendant is not a beneficiary to the estate of late Sunia Lomani Vakacegu, though she had got appointed herself as administrator when Plaintiff was a minor and his mother had not shown interest in administration of the estate as *de facto* partner of the deceased.
43. Plaintiff is seeking that he be allowed to administer the estate of late Sunia Lomani Vakacegu. He is the sole beneficiary in the absence of his mother not showing any interest to the Estate. So he is allowed to administer estate of Sunia Lomani Vakacegu especially considering denial of his and his mother's rights by present administrator, the Defendant.
44. Order 84 rule 4 of High Court Rules 1988 states;

"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)
45. In terms of Order 85 rule 4 Plaintiff can seek him appointed as additional administrator now. Defendant was granted LA, when Plaintiff was a minor, without disclosing of that fact. Plaintiff has priority over Defendant in terms of Section 6 of Succession Probate and Administration Act 1970. If he is not appointed immediately it will be detrimental for his

rights in the estate. Defendant can take actions that will be difficult to reverse or seek any meaningful remedy against Defendant.

46. In terms of Order 85 rule 4 the court is given a wide discretion to make orders when there is misconduct or breach of trust, by the trustee. In this instance Defendant had denied a fact determined by a court of law for her own advantage and if she is not prevented from acting as administrator of the estate she can do irreparable harm to the rights of the Plaintiff who was a minor when LA was obtained. She is denying this fact even now and this is for her own benefit, and needs immediate intervention.
47. Defendant who had attained LA must consider sole minor beneficiary's interest as Plaintiff had not attained the age of eighteen in order to obtain LA.
48. Defendant is denying sole beneficiary to the estate and had obtained LA, within three months from demise of late Sunia Lomani Vakacegu. This urgency of the Defendant was not for preservation of the Estate for Plaintiff and his mother, but to deny both of them any rights to the Estate. This is a breach of trust as well as improper conduct on the part of administrator of the estate.
49. There is no need for oral evidence as the acts of Defendant *ipso facto* supports the appointment of Plaintiff as administrator of the estate and also to prevent Defendant from acting as administrator till she is removed through probate action. Defendant is denying facts that a court can take judicial notice such as determinations by Magistrate's Court. This not a legitimate dispute, that needs oral evidence.
50. Plaintiff is seeking an injunction to prevent Defendant from administering the estate. Though I cannot grant revocation of the grant considering the circumstances of this case a permanent injunction can be granted against Defendant from actin as administrator of the estate, in an administrative action if there is grave danger to rights of beneficiary as in this case.
51. In terms of Order 85 rule 4, through an administration action, Plaintiff can seek him appointed as additional administrator.
52. Plaintiff cannot seek removal of Defendant in this administration action without filing a proper probate action. Even if I am wrong on that, the sole reason for removal of Defendant was the non-disclosure of Plaintiff as a child of the deceased, who was a minor at that time of the grant of LA to Defendant. Plaintiff's mother did not seek interest in obtaining LA for the Estate for reasons best known to her. So in terms of rule 22 of Non-contentious Probate Rules Defendant could seek a grant after fulfillment of requirements under law.

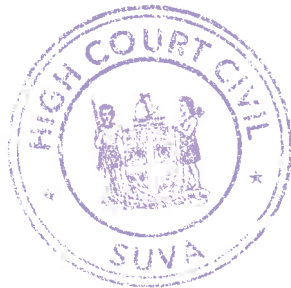
CONCLUSION

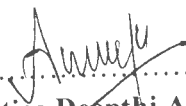
Plaintiff filed originating summons for an administration action. Apart from revocation of grant which is outside the jurisdiction of such an action other orders can be granted as stated below in final orders. Plaintiff is the sole beneficiary of the Estate subject to his mother's rights. He was a minor when Defendant obtained LA, but had not only did not declare Plaintiff as a child, but also denying him as a beneficiary to the Estate. Plaintiff was also prevented from claiming funds of the life insurance of the deceased, from insurer. Defendant cannot prevent as the administrator such disbursements of funds by insurer. Defendant is prevented from acting as an administrator for the Estate through an injunction as her actions needs immediate relief. Plaintiff is appointed as administrator of the Estate. Considering circumstances of this case I am not awarding any costs.

FINAL ORDERS

- a. Plaintiff is granted Letters of Administration for the estate of Sunia Lomai Vakacegu in addition to present LA granted to Defendant.
- b. Plaintiff is at liberty to file separate *probate action inter alia* for removal of LA by way of writ. So application for revocation of grant is not allowed as an *administrative action*.
- c. Defendant is prevented from acting as the administrator of Sunia Lomani Vakacegu permanently, through an injunction. Defendant is directed from denying the rights of Plaintiff as child of deceased and also sole beneficiary of deceased subject to his mother's claim if any to the estate of Sunia Lomai Vakacegu.
- d. No costs awarded.

Dated at Suva this 25th day of June, 2020.




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Justice Deepthi Amaratunga
High Court, Suva