IN THE HIGH COURT OF FIJI AT SUVA
PROBATE JURISDICTION

HPP Action No. 79 of 2018

IN THE ESTATE OF JAMILA KHATOON
late of 77 Main Street, Nadi Town, Nadi Businesswoman, Deceased, Intestate

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BETWEEN : **REHANA KHANUM KHAN** of 11 Matau Rise Te Atatu, Peninsula, Auckland 0610, New Zealand and **RUKSHANA KHANUM KHAN** of 25 Heyington Way, East Tamaki Heights, Auckland 2016, New Zealand, as the intended Administratrixs **IN THE ESTATE OF JAMILA KHATOON** late of 77 Main Street, Nadi Town, Nadi, Businesswoman, Deceased, Intestate.

PLAINTIFFS

AND : **BASHIR AHMAD KHAN** of 16 Heron Place, Pakuranga Heights Auckland 2010, New Zealand, Technician.

DEFENDANT

Counsel : **Plaintiff: Mr Singh P**
: **Defendant: Mr Siwan K & Ms Lata S**

Date of Hearing : **17.01.20**

Date of Judgment : **04.02.20**

JUDGMENT

INTRODUCTION

1. Plaintiffs and the Defendant are siblings. This action is filed regarding the purported last will (last will) of their deceased mother late Jamila Khatoon. Plaintiffs are alleging that signature was a forgery and also state that Defendant also agreed that it was a forgery when it was revealed after conclusion of last rites of the deceased. They were clearing the place where deceased lived, when revelation of last will was made by Naseem Yunus Khan (Naseem). Both Plaintiffs gave evidence and they had also produced an expert report on the signature of the testator. Defendants are propounding the last will.

Defendant deny that he admitted at any time, that last will was a forgery. He seeks dismissal of the Plaintiffs claim and for an order to accept the application filed in the registry relying on last will. The challenge to the last will is two prone. One is based on forgery of the signature of the testator. For that expert report is submitted and both Plaintiffs also gave their reasons that why they do not accept last will. In the oral evidence under cross examination expert of questioned documents, further fortified her position that signature on the last will was a forgery. Expert in evidence said that she was certain about that opinion after examining some of the originals of the documents herself on the day of the hearing. In her report there were limitations, as original signature samples were not available, but this restriction was eliminated at the time of hearing. Accordingly she said in cross-examination that she would alter her final conclusion and certain that the signature was a forgery. The other line of attack to the last will was based on circumstantial evidence and some disputed facts as to what happened after death. It is admitted that there was no indication of existence of a last will, till Naseem had made the revelation to both parties while they were clearing the house where deceased lived. According to the Plaintiffs' evidence when the last will was shown to parties by said Naseem, all the parties had agreed that the signature was a forgery, hence Naseem had "cancelled" it in front of all, and they had agreed to apply for letters of administration through a solicitor. The solicitor had asked for copy of "cancelled" last will and then Naseem had told that it was destroyed by her and had given a letter to the effect that there was no last will. In evidence Naseem had denied "cancellation" of last will but admitted the letter she had provided that confirmed that there was no last will of the deceased. She alleges that it was obtained under duress and or exerting undue pressure. This letter was given in front of her husband who was an ex-Police officer. She was an experienced law clerk.

2. I accept both contentions of the Plaintiffs, and signature that appears in the last will is not the signature of the deceased. On the analysis of evidence Plaintiffs' evidence as to what had happened at the time of revelation of the last will by Naseem and facts surrounding last will is proved on the balance of probability. There is more than a suspicion created through evidence of the Plaintiffs regarding last will. Defendant's witnesses had failed to eliminate that suspicion. In application of test of consistency and also probability it is proved that all siblings had a consensus as to the signature of their deceased mother appeared on last will was a forgery and they needed to apply to the Probate Registry on the basis that deceased estate was intestate. So the last will dated 6.9.2018 is invalid and the signature that appears on the last will is not hers.

FACTS

3. 'In the pre trial conference minutes following facts are admitted:

a. *Late Jamila Khatoon died on 10.9.2018 (i.e according to the undisputed oral evidence there is an error as to the date of death certificate, but both parties in evidence stated that date of death should be corrected as 11.9.2018).*
b. *Parties are children of deceased.*
c. *After death of their mother, Defendant had made an application for grant of Probate in the estate of deceased relying on the purported last will dated 6.9.2018.*
d. *Witnesses of the purported laws will were Lalita Wati and Naseem Yunus Khan.*

4. At the hearing following further facts are no disputed:

a. *Upon the death neither party was informed of the existence of last will till Naseen Yunus Khan made revelation.*
b. *Plaintiffs and Defendant and his family had cleaned the house where deceased lived and none of the parties were able to find a last will.*
c. *Revelation of last will was through Naseem Yunus Khan, who was an ex law clerk and was also a neighbour of deceased.*
d. *Defendant had lived with deceased till he migrated to New Zealand in 2003 and Plaintiffs have lived separately after their marriages and had not participated in the family business.*
e. *Deceased had lived in USA for a long time and had worked there in a hotel and also in a bank and also in another entiry.*
f. *Defendant and their late father of the parties, were shareholders of family business where deceased also became a shareholder and Director upon death of her husband.*
g. *Defendant was involved in the family business till 2003 , and since migration Deceased became the only person who operated business accounts till this was changed on 5.9.2018.*
h. *During first five years since 2003 only once Defendant had visited Fiji.*
i. *When Defendant migrated to New Zealand, deceased had operated the family. business and was the sole signatory of the bank cheques relating business till 4.9. 2018.*
j. *Deceased had not informed about last will to the Defendant though he was in Fiji for some time.*

5. According to the evidence of Naseem Khan, she was very close with the deceased and also related to their family and was a neighbour. She had experience in drafting last wills as a law clerk, and she had done so on written instructions of the deceased. The last will was prepared on the same day when written instructions were given.

6. According to Naseem two originals of last will were given to deceased on 6.9.2018 and one was kept with her.

7. Naseem admitted that she wrote a letter denying existence of last will of the deceased, and placing her signature to that letter in front of her husband in her residence. According to her it was written under duress and or to get Plaintiffs out from her house. She said that what was written by her, in the letter of 17.9.2018 was not correct.

8. Both Plaintiffs gave evidence and husband of second named Plaintiff also gave evidence. His evidence is relating to circumstances where Naseem gave a letter to the effect that there was no last will of the deceased.

9. Defendant gave evidence and on behalf of him he called Nassem, her husband and also Lalita Wati who attested last will along with husband of Naseem. Apart from that former branch manager of the commercial bank where deceased was a customer, was called to give evidence. The ex-bank manager confirmed that she had inquired about some payments due to discrepancy of her signature in cheques.

10. Both parties were given an opportunity to file written submissions and they have filed them.

ANALYSIS

11. Plaintiffs are alleging that signature of last will was a forgery .Defendant relies on the same last will for his pending application for probate. So Defendant is propounding last will. Defendant had called two witnesses of the last will. He had called the person who drafted the last will.

12. Last will had bequeathed entire estate of the deceased, except $150,000, to Defendant and he is the sole executor under last will.

13. It is admitted that Defendant was appointed to operate internet banking regarding Account No 90140426 belonging to Khans Spares and Auto Services Ltd on 5.9.2018 and also authority to signatory to bank account of same entity with Bank of Baroda. Deceased granted such authorities to Defendant, and her signatures appear on relevant documents.

14. These letters and or other sample signatures which were examined by the expert of questioned documents, were not disputed and Plaintiffs had relied on the signatures on the said documents. These signatures, made on 4.9.2018 and 5.9.2018, represented latest signature samples of the deceased as they were dated about five days prior to her death.

15. Defendant was in Fiji on or around 5.9.2018 and he had left to New Zealand only on 8.9.2018 and that was the date first named Plaintiff arrived to Fiji to attend to a funeral of a relative. They have met in airport in Fiji.

16. Since Defendant was already granted authority to operate above mentioned business account and also another account 9101-04-26 on 4.9.2018, there was no reason for the deceased to conceal making of last will or making Defendant had sole executor of her last will, to the Defendant. He was in Fiji at that time and had gone to bank with Defendant for said variations to the accounts.

17. First named Plaintiff was in contact with her mother, too. In her evidence she said that mother had asked her to attend a funeral of close relative and upon her request she had arrived on 8.9.2018, and till her death she was in contact with mother. Her mother had driven her vehicle to the funeral and she had met her and she had not mentioned anything about last will.

18. There was no reason for deceased not to reveal about the last will to her too. This non revelation of last will to Plaintiffs and or Defendants created a suspicion as to execution of last will, in the circumstances of the case.

19. Plaintiff could not state any reason for such non revelation, as he had gained the control of bank accounts of the business prior to death and was in Fiji during that time as he had left on 8.9.2018. Last will was dated 6.9.2018, before his departure to New Zealand.

20. Neither party were able to trace two copies of last will that were given to deceased nearly four days prior to death, according to the evidence of Naseem.

21. It was admitted fact that deceased was an organized person and she had operated family business alone from 2003 and was involved in dealings with business accounts. Such a person would have kept last will safely. The fact that it was not found by her children creates a suspicion, as to existence of last will, and also evidence of Naseem.

22. In Chadwick LJ explained in *Fuller v Strum* [2001] EWCA Civ 1879 at [59], [2002] 2 All ER 87 at [59], [2002] 1 WLR 1097:

> *"It is not, and cannot be, in dispute that, before admitting the document to probate, the judge needed to be satisfied that it did truly represent the testator's testamentary intentions; or, to use the traditional phrase, that the testator "knew and approved" its contents. Nor is it in dispute that, if satisfied that the testator knew and approved of part only of the contents of the document, the*

judge was bound, before admitting the document to probate, to require that those parts with respect to which he was not so satisfied be struck out."[1]

23. The judgment of Chadwick LJ in *Fuller v Strum* was referred in *Rowinska, Re* [2005] EWHC 2794 (Ch) (18 November 2005) where held,

> *"[66] The starting point is the seminal passage in the opinion of the Privy Council delivered by Parke B in Barry v Butlin (1838) 2 Moo PC 480 at 482–483, 12 ER 1089 at 1090:*
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> *'The rules of law according to which cases of this nature are to be decided, do not admit of any dispute, so far as they are necessary to the determination of the present Appeal: and they have been acquiesced in on both sides. These rules are two; the first that the* ***onus probandi lies in every case upon the party propounding a Will****; and he* ***must satisfy the conscience of the Court*** *that the instrument so propounded is the last Will of a free and capable Testator. The second is, that if a party writes or prepares a Will, under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true Will of the deceased.'*
>
> *[67] Parke B went on to explain what is meant by the onus probandi in that context. He said:*
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> *'The strict meaning of the term onus probandi is this, that if no evidence is given by the party on whom the burthen 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, and it cannot be that the simple fact of the party who prepared the Will being himself a Legatee, is in every case, and under all circumstances, to create a contrary presumption, and to call upon the Court to pronounce against the Will, unless additional evidence is produced to prove the knowledge of its contents by the deceased. A single instance, of not unfrequent occurrence, will test the truth of this proposition. A man of acknowledged competence and habits of business, worth £100,000, leaves the bulk of his property to his family, and a Legacy of £50 to his confidential attorney, who prepared the Will: would this fact throw the burthen of proof of actual cognizance by the Testator, of the contents of the Will,*

[1] *Marley v Rawlings and another* - [2014] 1 Al ER 807 at p814

on the party propounding it, so that if such proof were not supplied, the Will would be pronounced against? The answer is obvious, it would not. All that can truly be said is, that if a person, whether attorney or not, prepares a Will with a Legacy to himself, it is, at most, a suspicious circumstance, of more or less weight, according to the facts of each particular case; in some of no weight at all, as in the case suggested, varying according to circumstances; for instance the quantum of the Legacy, and the proportion it bears to the property disposed of, and numerous other contingencies: but in no case amounting to more than a circumstance of suspicion, demanding the vigilant care and circumspection of the Court in investigating the case, and calling upon it not to grant probate without full and entire satisfaction that the instrument did express the real intentions of the deceased. Nor can it be necessary, that in all such cases, even if the Testator's capacity is doubtful, the precise species of evidence of the deceased's knowledge of the Will is to be in the shape of instructions for, or reading over the instrument. They form, no doubt, the most satisfactory, but they are not the only satisfactory description of proof, by which the cognizance of the contents of the Will may be brought home to the deceased. The Court would naturally look for such evidence; in some cases it might be impossible to establish a Will without it, but it has no right in every case to require it.' (See (1838) 2 Moo PC 480 at 484–486, 12 ER 1089 at 1091.)

[69] Confirmation that what has come to be known as the rule in Barry v Butlin is an evidential rule can be found in the judgment of Scarman J in Re Fuld (dec'd) (No 3), Hartley v Fuld (Fuld intervening) [1965] 3 All ER 776, [1968] P 675. It was necessary, in that case, for the judge to decide whether the English requirements as to proof of knowledge and approval were a part of substantive law—in which case they would be irrelevant in the circumstances that the testator died domiciled in Germany; or whether they were rules of evidence—in which case they fell to applied as part of the lex fori. After referring to the reaffirmation, in Wintle v Nye, of the rule in Barry v Butlin, Scarman J said:

'In my opinion, the whole point of the rule is evidential; it is concerned with the approach required of the court to the evidence submitted for its consideration. In the ordinary case proof of testamentary capacity and due execution suffices to establish knowledge and approval, but in certain circumstances the court is to require further affirmative evidence. The character of the rule as evidential emerges clearly from the speeches of VISCOUNT SIMONDS and of LORD REID.' (See [1965] 3 All ER 776 at 781, [1968] P 675 at 697.)

[71] It is, I think, this flexibility of approach within the civil standard of proof which lies behind the observations of Viscount Simonds in Wintle v Nye [1959] 1 All ER 552 at 557, [1959] 1 WLR 284 at 291:

*'**In all cases the court must be vigilant and jealous. The degree of suspicion will vary with the circumstances of the case. It may be slight and easily dispelled**. It may, on the other hand, be so grave that it can hardly be removed. In the present case, the circumstances were such as to impose on the respondent as heavy a burden as can well be imagined.'*

I think, also, that Lord Reid had the same approach in mind when, in the context of very special facts in Wintle v Nye, and after referring to the direction to the jury in Atter v Atkinson (1869) LR 1 P & D 665 at 668, that 'you ought to be well satisfied, from evidence calculated to exclude all doubt, that the testator not only signed it, but knew and approved of its contents', he said:

'To my mind, the direction of the learned judge was not at all calculated to make the jury realise that they must be "satisfied from evidence calculated to exclude all doubt" or even all reasonable doubt that the respondent had not only shown to the testatrix the relevant information and discussed the will with her but had brought home to her mind the effect of her will ...' (See [1959] 1 All ER 552 at 561, [1959] 1 WLR 284 at 296.)

*[72] I am satisfied that there is no basis for an approach that requires, in all cases, that a person propounding a will which he has prepared, and under which he takes a benefit, must satisfy the court by evidence which excludes all doubt—or by evidence which excludes all reasonable doubt (the standard of proof required in criminal proceedings)—that the testator knew and approved the contents of the will. The standard of proof required in probate proceedings (as in other non-criminal proceedings) is satisfaction on the preponderance (or balance) of probability. **But the circumstances of the particular case may raise in the mind of the court a suspicion** that the testator did not know and approve the contents of the document which he has executed which is so grave that, as Viscount Simonds observed in Wintle v Nye, it can hardly be removed. The burden of proof of law will is with the person who propounds it. When there is suspicion on that that suspicion should be eliminated.* (emphasis added)

24. From the above decisions it can be deduced that considering all the evidence before court if there is suspicious about the execution of last will, including and not limiting the signature of the last will, the propounder of the last will should adduce evidence to alleviate such suspicion. This is not limited to cases where a party who prepare or draft a last will is also a beneficiary.

25. Naseem, who was the person who prepared last will, is not a beneficiary. Nevertheless, the circumstances in this case creates suspicion as to the existence of last will, and

circumstances surrounding it as well as evidence of Naseem, her husband and other attesting witness, Lalita Wati.

26. Making and or even intention to create a last will, was not revealed by deceased to Plaintiffs and or Defendant, though they were in constant contact with deceased on or around 6.9.2008.

27. Four days after last will testator died, but two originals of last will which were in her custody, according to evidence on behalf of were not discovered. Even at the time of hearing, such original were not produced.

28. Parties could not find two original copies of the last will though they have cleaned the house where deceased lived. This is again suspicious considering time and circumstances of the case. There is no evidence that Naseem had told about the existence of two original last wills with deceased at all, to parties.

29. Naseem had also given a letter to the effect that there was no last will, which she now state was given under undue influence. This again creates a suspicion. Naseem is a witness for Defendant. Why should she give such a letter that there was no last will, and why should she tell Plaintiffs that she had destroyed last will also create grave suspicion as to the existence and or execution of last will.

30. In the evidence adduced on behalf of the Defendant these suspicions were not eliminated. It is trite law at least one of the two attesting witnesses should be called to give evidence if such person can be found.

31. Evidence of the attesting witnesses are not conclusive. Two attesting witnesses to last will stated that last will was not explained, before signature of the deceased. In the analysis of their evidence their evidence cannot be relied.

32. One attesting witness was husband of Naseem. The allegation forgery is serious , hence Naseem and her husband and their standing in society is affected through such a finding against them. So both of them are interested parties in the analysis.

33. Apart from being an interested party it was clear that Naseem's husband who was an ex-Police officer was participated in the discussion that resulted letter of 17.9.2018 of Naseem where she had stated that there was no last will.

34. Naseem's husband said that she advised her wife not to write a letter but she did so in contrary to his advice. This indicates that the letter of 17.9.2018 was voluntary and Naseem's evidence on duress cannot be accepted.

35. Naseem had written said letter upon request by Plaintiffs as to destruction of last will. Plaintiffs had come to her house on her invitation and in their evidence said even directions were given by her. This was after solicitor was related to the circumstances of "cancellation" of last will by Naseem.

36. Plaintiffs stated that they went with the husband of second named Plaintiff to Naseem's house and requested for "cancelled" last will. Naseem admitted that she lied to the Plaintiffs and stated that last will was destroyed, but she denied "cancellation" of last will in front of parties. If so why should Plaintiffs ask for "cancelled" last will. If Naseem did not cancel the last will why should she lie to the Plaintiffs that last will was destroyed? At the same time why should she give a letter of 17.9.2018 that there was no last will? Naseem was an experienced law clerk and her husband was and ex law enforcement officer attached to Fiji Police. Why did Naseem refrain from mentioning two originals of last will left with the deceased? If said, they would have searched for them. No party said that Naseem told about two original last wills.

37. In the circumstances the reason given by Naseem to write the letter of 17.9.2018 and her husband's evidence cannot be accepted in the analysis of evidence.

38. Plaintiffs dispute signature of the testator. According to them the last will had come to light after they could not find any evidence of an execution of a last will. They were clearing up the residence where deceased lived, and Defendant had stated that their mother had not left a last will. This was before Naseem arrived.

39. Plaintiffs and Defendants were still at that house Naseem had arrived and had made a revelation about existence of last will and she having a copy of that.

40. At that time she had not indicated how many copied she had and first Plaintiff had disputed the signature of the last will when it was first shown to her.

41. In *Onassis v Vergottis* [1968] 2 Lloyds Rep 403, Lord Pearce considered the assessment of a witness' oral evidence :

> *"Credibility involves wider problems than mere demeanour which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be. Credibility covers the following problems. First, is the witness a truthful or untruthful person? Secondly, is he, though a truthful person, telling something less than the truth on this issue, or, though an untruthful person, telling the truth on this issue? Thirdly, though he is a truthful person telling the truth as he sees it, did he register the intentions of the conversation correctly and, if so,*

has his memory correctly retained them? Also, has his recollection been subsequently altered by unconscious bias or wishful thinking or by overmuch discussion of it with others? Witnesses, especially those who are emotional, who think that they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason a witness, however honest, rarely persuades a Judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred. Therefore, contemporary documents are always of the utmost importance. And lastly, although the honest witness believes he heard or saw this or that, is it so improbable that it is on balance more likely that he was mistaken? On this point it is essential that the balance of probability is put correctly into the scales in weighing the credibility of a witness, and motive is one aspect of probability. All these problems compendiously are entailed when a Judge assesses the credibility of a witness; they are all part of one judicial process and in the process contemporary documents and admitted or incontrovertible facts and probabilities must play their proper part".[2]

42. Defendant admits that signature on last will was not admitted by first named Plaintiff, when the document was first given to her to read. He said no sample signatures were brought to the scene at that time. This again cannot be accepted on balance of probability. They were at the place where deceased lived till her death. So, there would have been many documents where her signature appeared and it would be prudent to check with those when challenging signature, by all parties.

43. Defendant in his evidence said that first named Plaintiff had raised the issue of authenticity of the signature. First named Plaintiff said that she immediately went to the room and got some signature samples and confronted Naseem as to the authenticity of the signature. This position was corroborated by second named Plaintiff, though Defendant denied it. According to Defendant no samples of signatures were brought to attention at that time, and this cannot be accepted as correct.

44. According to Plaintiffs all siblings admitted that signature was a forgery and then Yaseem had suggested that she can cancel last will. I accept this as correct.

45. Yaseem did not reveal why she did not tell Plaintiffs and Defendants to look for two originals of the last will that she gave to deceased four days prior to her demise. If so authenticity of last will would have resolved on the same day at that time.

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[2] *Parsonage (acting as personal representative in the estate) v Parsonage & Ors* [2019] EWHC 2362 (Ch) (10 September 2019)

46. If a last will was executed four days prior to her demise, and two of the originals were given to deceased, they should be with her documents. At that time, all the parties were there and they were also in the process of cleaning the house of the deceased. Any reasonable person would have requested to look for the said original copies given to deceased. So none would have proceeded to any action without further examining all the documents of deceased for originals of the last will that was given to her.

47. Yaseem admitted that first named Plaintiff did not accept the last will when it was given to her to examine. Since she had only a copy, she would have requested parties to search for originals at home as well as any other places where the deceased kept important documents. There was no evidence of such request was ever made by Yaseem. This again cast serious doubt as to the evidence adduced on behalf of propounder of last will.

48. Absence of such request corroborate that there was no last will made on 6.9.2018 and hand over of two original copies of last will cannot be accepted. Evidence of two original last wills given to deceased, cannot be accepted.

49. Evidence produced on behalf of the Plaintiffs was consistent. There are cogent evidence that the last will was a forgery.

50. On the balance of probability I accept the evidence of Plaintiffs that samples of signatures were shown at that time by first named Plaintiff and all siblings had consensus that signature was a forgery. I also accept that Yaseem had told parties that she "cancel" last will.

51. Since they were clearing the house of the deceased and she was an active person who had even signed important bank documents on 5.9.2018, there would have been ample signature samples at home, and there was opportunity to find such samples at that time.

52. There was undisputed evidence that till death late Jamila Khatoon even engaged in charity work and this was stated by Yaseem in her evidence.

53. Plaintiffs in their evidence stated that everybody including Defendant at that point agreed that the signature that appeared on the last will was not a genuine signature. Defendant denied that he agreed that last will was forgery.

54. Plaintiffs in their evidence said that they went to a solicitor's firm to apply for probate. It is illogical to do so unless they all were satisfied that estate was intestate. They also stated that solicitor had requested for "cancelled" last will. Defendant had failed to turn

up to Solicitor's office and since then had deviated from his earlier admission as to forgery.

55. Plaintiffs in their evidence said when confronted with the sample signatures with the signature of the last will, even Yaseem had agreed that the signature was not genuine and she had crossed the entire document with a line drawn across and got the signatures of Plaintiffs and Defendants and said that it was "cancelled". First named Plaintiff said she had asked how a last will can be "cancelled" in that manner.

56. This "cancellation" has led to Plaintiffs again visiting Naseem's home where she had written a letter of 17.9.2018 denying existence of a last will. Yaseem admitted this letter but said she had given it under duress. This cannot be accepted as this was in her house that the letter was written. It was in her hand writing while her husband who was an ex-Police officer, by her side, and he had asked not to write the letter of 17.9.2019.

57. Yaseem admitted that she had told Plaintiffs that last will was destroyed. She had lied to Plaintiffs. Why did she said a lie, if she did not "cancelled'. At that time she knew that she had not destroyed the last will. Plaintiffs have threatened to go to Police. If Yaseem had not done anything wrong, she should not be afraid to a complaint being made to Police. Her husband was an ex Police officer who also witnessed the last will and he was with her when they visited her home, till they left.

58. So the reason given for writing letter of 17.9.2018 was an afterthought. Naseem had made a false "cancellation" of last will in front of Plaintiffs and Defendants, but later had given this letter to Plaintiffs and given the last will to Defendant to apply for probate. Naseem's evidence cannot be relied on test of probability. Her actions speaks themselves.

59. On the analysis of evidence it is proved on balance of probability that there was no last will of deceased.

60. Plaintiffs produced expert report regarding signature. This is through a report and also oral evidence of the expert.

61. There is no dispute as to expertise of the expert. In her oral evidence she excluded even slightest qualification as to her opinion. She had the opportunity of examining original documents in court and was certain that the signature on the last will was not made by deceased. She had identified material differences. They are revealed in her report and also reiterated in evidence. In cross examination these differences were more elaborated hence the evidence is more fortified.

62. It is trite law that court needs to make an opinion based on the evidence of the experts. There are material differences that were pointed out in the signature of the last will and they were relating to characteristics of letter "J" and also "K" which were unique in the signature samples but had materially differed to the signature in last will.

63. Another significant factor is the presence of a full stop at the middle of the signature after initial "K" which is only absent in the signature of last will.

64. Examiner of questioned documents gave cogent reasons for not accepting signature of last will as authentic. She had examined even signatures of the deceased made on 4.9.2018 and 5.9.2018. These can be considered as contemporary signatures, when compared to the signature made on 6.9.2018 in the last will.

65. There is no need of an expert to comment that the signature appears in the last will is markedly different from the other signatures of the deceased. So I accept the evidence of the expert and also reasons given in her report and testimony in court.

66. On the balance of probability Plaintiffs had proved that the signature on the last will was a forgery. There are material differences in the signature of last will with the sample signatures.

67. Defendant in the cross examination of Plaintiffs' witnesses did not suggest the deceased was suffering from a severe form of arthritis, that affected her hand writing. Having not confronted with such a proposition to Plaintiffs and or to the expert witness produced evidence to such a fact through oral evidence of former branch manager of the bank where business accounts were maintained. This is not acceptable and violate ***Browne v. Dunn*** (1893) 6 R. 67, H.L. Apart from that Defendant had failed to adduce any medical evidence as to the effect of such illness to her ability to write and more specifically to her signature.

68. Plaintiffs on the balance of probability had proved that the signature on the last will was a forgery. Expert witness excluded any qualification as to her opinion, contained in the report, in cross examination. She said that when she prepared her report which is marked in the court she did not have all the original sample signatures for examination but in court she had the advantage of examining all originals. She was certain that signature that appears on the last will was a forgery. Defendant had not produced any expert report but challenged it through oral evidence of witnesses. One such witness was a manager of a commercial bank who testified that deceased was suffering from arthritis and had difficulty in signing bank cheques. This proposition was not put the expert witness or to any of the witnesses. In line with ***Browne v. Dunn*** (1893) 6 R. 67, H.L such position cannot be introduced without that proposition being put to the Plaintiffs 'witnesses.

69. Even if I accept the oral evidence of bank manager it only will proves that there were some signatures where she got the confirmation. No such signature was produced in court. Since there is a requirement to archive bank documents, for a considerable time there was no difficulty for the Defendant to produce such documents. No reason adduced for not producing such signatures with material differences.

70. In contrast signature samples provided to the court that covered a considerable period of time till just five days prior to her death shows marked consistency in the form and manner which is wanting in the signature of last will. This proves on balance of probability that signature on last will was a forgery.

71. So, on the balance of probability I reject the contention of the Defendant that there were material differences in the signatures of the deceased. Plaintiffs on the balance of probability proved that the signature of the last will was a forgery so the last will is invalid.

72. Section 6 of Wills Act 1972, contains the requirement of a valid last will and Section 6A allows a court to accept a last will which had not formed to all the requirements.

73. Defendant had also failed to propound last will. Lalita Wati who was also a commissioner for oaths , and a witness to the last will produced a her log book and said deceased had signed in that book. This signature is completely different to the normal signature and why it was not produced earlier to the Plaintiffs and or to the expert witness was not explained. This proves on balance of probability the said Latia Wati was not a witness to last will and signature on her log book as the signature of deceased was not a genuine one. The entries of the details of passport of the deceased is not conclusive evidence as these would have been available with the Defendant and other interested parties.

CONCLUSION

74. Expert report had analysed signatures over a period of time including a signature that was made on 5.9.2018 where she had granted authority to the Defendant to access to internet banking and Letter of Mandate to Operate Account which was also signed on the same date where Defendant was granted authority to operate an account. I agree with the expert opinion and evidence given in the court as to the discrepancies in the signature of the last will which are material. Starting letter 'J' and middle letter K had such material differences and there was no full stop after middle letter 'K' which is also a difference. Evidence given by the Plaintiffs are consistent and I accept the facts as related by the Plaintiffs as to the "cancellation" of copy of last will by Naseem after all siblings admitted that signature was a forgery. Defendant for his own reason had deviated from

that position, but his version of the events cannot be accepted on the balance of probability. The purported last will dated 6.9.2018 was forgery and it is null and void. Considering that Plaintiffs are residing overseas and also an overseas expert witness was called to give evidence in court I award a cost of $7,000 assessed summarily to the Plaintiffs to be paid by Defendant within 28 days from today.

FINAL ORDERS

a. A declaration that purported last will dated 6.9.2018 , which is the basis of Defendant's pending application for probate filed in the Probate Registry is invalid and of no effect and or null and void .
b. The cost of this action is summarily assessed at $7,000 to be paid by the Defendant to the Plaintiffs within 28 days from this judgment.

Dated at Suva this 4th day of February, 2020.

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Justice Deepthi Amaratunga
High Court, Suva