

IN THE HIGH COURT OF FIJI AT SUVA
PROBATE JURISDICTION

Civil Action No. HPP 12 of 2020

IN THE ESTATE of TEVITA DAVUOCE VOSAICAKE of 209 Fletcher Road,
Vatuwaqa, Deceased, Intestate

BETWEEN

MARY KOTO HO ALENA GAUNAVOU aka **MARY KOTO HO ALENA**
GAUNAVOU QILASIO of Lot 9 Ramatau Road, Navosai, Narere.

PLAINTIFF

AND

MIRIAMA PATRICIA TAGIMAUCIA VEREBASAGA of
1913 Ellen Avenue, San Jose, CA 95125.

DEFENDANT

Counsel : Mr Nair D. with Ms Kete P. for the Plaintiff
Ms Nayacalevu S. for the Defendant

Date of Hearing : 24th July 2020

Date of Judgment : 07th August 2020

JUDGMENT

- [1] The plaintiff filed this originating summons seeking the following orders:
1. An order that leave be granted for sealing of a grant of Letters of Administration in favor of the plaintiff in the Estate of TEVITA DAVUOCE VOSAICAKE.
 2. Such other and further relief as seems just and equitable by this Honourable Court.
 3. Costs of this action.
- [2] The plaintiff came to court seeking the Letters of Administration on the ground that the marriage between the deceased and the defendant had broken down and for the last eight years she is living in USA. The plaintiff's position is that she is the de facto partner of the deceased and since 2009 they had been living as husband and wife looking after the property.
- [3] The defendant has appointed her brother Robert Verebasaga as her attorney to look after her interests in this matter.
- [4] In his affidavit in opposition he has sought the following orders:
- (i) Dismiss the originating summons of the plaintiff with costs.
 - (ii) Declaration that the plaintiff is not the de facto partner of the late Tevita Dauvoce Vosaicake.
 - (iii) Order that Letters of Administration of the estate of the late Tevita Dauvoce Vosaicake, 249 Fletcher Road, Vatuwaqa, Retired Architect, Intestate, be granted to the defendant.
 - (iv) Costs against the plaintiff on a Solicitor/Client indemnity basis.
 - (v) Any other order that this court deems just and expedient.

- [4] At the commencement of the hearing Mr Nair objected to the affidavit of Robert Verebasaga, the defendant's brother on the ground that contents of the affidavit are based on hearsay evidence. The submission of the learned counsel is, the affirmant was not aware of the facts averred in the affidavit.
- [5] Whether the affirmant was personally aware of the facts averred in the affidavit is a matter exclusively within his knowledge. Unless he has specifically stated in the affidavit certain information contained in the affidavit were obtained from a third party, the court has to rely on information contained in the affidavit which have been affirmed to by the affirmant, the court has no reason to disregard the averments in the affidavit. Since there is no averment in the affidavit in opposition that the information contained therein are not within his personal knowledge the court can safely rely on the affidavit in opposition of Robert Verebasaga.
- [6] The plaintiff came to court on the basis that she was the de facto partner of the deceased. The burden of establishing that she was in a de facto relationship as required by law is on the plaintiff. This burden can only be discharged by adducing evidence in a proper hearing and it cannot be done by affidavit evidence.
- [7] Section 2 of the Succession, Probate and Administration Act 1970 as amended defines "de facto partner" as follows:
- "de facto partner" means a person in a de-facto relationship; and
- "De facto relationship" means a relationship between a man and a woman who are at least 18 years of age and, although not legally married to each other, have lived with each other as spouses on a genuine domestic basis for –
- (a) a period of more than 3 years; or
- (b) a period less than 3 years, provided-
- (i) the relationship has resulted in the birth or adoption of a child ; or
- (ii) the court, having regard to the circumstances listed in section 154A of the Family Law Act 2003, considered it just to treat the relationship as a de facto relationship.
- [8] Section 154A of the Family law Act 2003 provides:

In determine whether 2 persons are in a de facto relationship, all the circumstances of the relationship are to be taken into account, including but not limited to the following as may be relevant in a particular case –

- (a) the duration of the relationship;
- (b) the nature and extent of common residence;
- (c) whether or not a sexual relationship exists;
- (d) the degree of financial dependence or interdependence and arrangements for financial support between the parties;
- (e) the ownership, use and acquisition of property;
- (f) the degree of mutual commitment to a shared life;
- (g) the care and support of children, if any;
- (h) the performance of household duties; and
- (i) the reputation and public aspect of the relationship.

[9] To decide whether the relationship between the plaintiff and the deceased satisfies the above requirements is a question of law and the burden is on the plaintiff establish such a relationship existed between them. In this matter no such evidence was adduced by the plaintiff.

[10] Learned counsel for the defendant submitted Rule 22 of the Non-Contentious Probate Rules 1987 (UK) do not provide for granting of probate or letters of administration to a de-facto partner. It is important to note that Non-Contentious Probate Rules (UK) were enacted in 1987 and amendments to the Succession, Probate and Administration Act 1970 and Family Law Act 2003 were amended by including the provisions to make de-facto partners entitled to obtain letters of administration or probate to administer the estates their respective de-facto partners. Therefore, in deciding whether it is the legally married partner or de-facto partner who is entitled to probate or letters of administration of the estate of deceased partner the court cannot rely on the Non-Contentious Probate Rules 1987 (UK).

[11] Since the plaintiff in this matter has failed to establish by adducing evidence that her relationship with the deceased satisfies the requirements of the law her application seeking leave to obtain letters of administration must be refused.

- [12] The defendant is the legally married wife of the deceased. Although they lived in separation her right to the estate of the deceased remains unimpaired.
- [13] For the reasons set out above the court makes the following orders.

ORDERS

1. The Originating Summons (Expedited Form) of the plaintiff is struck out and the application for leave to obtain letters of administration is refused.
2. The defendant is declared entitled to obtain letters of administration to administer the estate of the deceased.
3. There will be no order for costs.



A handwritten signature in purple ink, appearing to read "Lyone Seneviratne", written over a horizontal line.

Lyone Seneviratne

JUDGE

07th August 2020