

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

CIVIL JURISDICTION

Civil Action No. HBC 118 of 2019

BETWEEN : **AFROZ KUTTI** of 3-19 Landscape Road, Papatoetoe, Auckland, the
Administrator of the estate of **IYOOB** aka **IYOOB KUTTI** aka **AYUB**
KUTTI of Lomolomo, Lautoka.

PLAINTIFF

AND : **IBRAHIM** of Lomolomo, Lautoka as Trustee of the estate of **ABRAN**
aka **AVARAN** aka **AVRAN**.

DEFENDANT

Appearances : (Ms) Arthi Swamy for the plaintiff
Mr Mohammed Zoyab for the defendant

Hearing : Monday, 31st August, 2020 at 9.00am.

Decision : Friday, 18th September, 2020 at 9.00am.

DECISION

[A] INTRODUCTION

(01) The matter before me stems from an application filed by the plaintiff seeking the grant of the following orders;

- (a) *THAT the defendant execute all papers, notes, plans and memorandums to transfer the plaintiff's interest in the Estate of Abran aka Avaran aka Avran pursuant to the last Will and Testament of the deceased and grant of Letters of Administration De Bonis Non with Will No. 55676 comprised in State Lease No. 21490 being known as Lot 3 on ND 5028 part of Lomaloma, Kubunasarava and Togoloa Tiri.*

- (b) *THAT the defendant takes all action that is required to transfer State Lease No. 21490 being known as Lot 3 on ND 5028 part of Lomaloma, Kubunasarava and Togoloa Tiri unto the plaintiff.*
- (c) *In the event the Defendant fails or refuses to execute any or all papers for the transfer to transfer Lease No. 21490 being known as Lot 3 on ND 5028 part of Lomaloma, Kubunasarava and Togoloa Tiri unto the plaintiff, the Deputy Registrar of the High Court be permitted to execute such papers in place of the defendant.*
- (d) *Costs on client solicitor indemnity basis.*
- (e) *Any further or other order as this Honourable Court may deem fit, in the circumstances.*

On the following grounds:

- (1) ***THAT** the plaintiff is the administrator and the beneficiary in the Estate of Iyoob aka Iyoob Kutti aka Ayub Kutti by virtue of Letters of Administration No. 61652 granted by the High Court of Fiji on the 27th of February, 2018.*
- (2) ***THAT** the defendant is the Trustee in the Estate of Abran aka Avaran aka Avran. The late Abran was the father of Iyoob aka Iyoob aka Iyoob Kutti aka Ayub Kutti and my grandfather.*
- (3) ***THAT** the Estate of Iyoob aka Iyoob Kutti aka Ayub Kutti is entitled to one undivided fifth share in the Estate of Abran aka Avaran aka Avran as per the last Will and testament of Abran dated the 6th of January, 1970.*
- (4) ***THAT** Estate of Abran aka Avaran aka Avran predominantly comprises of land comprised in State Lease No. 21490 being known as Lot 3 on ND 5028 part of Lomaloma, Kubunasarava and Togoloa Tiri (formerly CT's 10661, 742 (hereinafter referred as the "said property").*
- (5) ***THAT** the Estate of Abran aka Avaran aka Avran has not been distributed till to-date even though the grant in the Estate was issued on the 14th of September, 2017.*
- (6) ***THAT** the defendant as the Trustee in the Estate of Abran aka Avaran aka Avran is obliged to distribute the said property however the defendant has refused to do the same.*
- (7) ***THAT** the defendant is bound to distribute the Estate of Abran aka Avaran aka Avran pursuant to the Letters of Administration in Estate of Abran aka Avaran*

aka Avran and also in terms of his last Will and Testament of Abran dated the 6th of January, 1970.

- (8) ***THAT*** the original application for consent to a transfer and transfer documents duly executed by plaintiff were forwarded to the defendant's Solicitors for execution by the defendant.
 - (9) ***THAT*** the defendant has failed to execute the same and has not responded to the letters issued by the Solicitors of defendant.
 - (10) ***THAT*** in breach of his duty the defendant has refused to transfer the plaintiff's entitlement to the plaintiff as required.
- (02) The application was made by "Originating Summons" dated 13th May, 2019 and supported by an affidavit sworn by the plaintiff on the 9th May, 2019.
 - (03) The application was opposed. An affidavit in Opposition sworn on 11-06-2019 by one "Abdul Karim" (the son of the defendant), by virtue of the powers vested in him under the purported Power of Attorney No. 57797, registered on 30-08-2016 was filed. The plaintiff filed an affidavit in reply sworn on 04-07-2019.

[B] The preliminary objection

- (04) At the commencement of the hearing before the court, Counsel for the plaintiff raised a preliminary objection to the affidavit of Abdul Karim, the son of the defendant, sworn on 11-06-2019.
- (05) Counsel for the plaintiff submitted that;
 - (A) The deponent 'Abdul Karim' has no authority to depose an affidavit on behalf of the defendant Ibrahim, the Trustee of the Estate of Abran aka Avaran aka Avran.
 - (B) Under the Power of Attorney No. 57797, the deponent could not depose an affidavit on behalf of the defendant, 'Ibrahim' the Trustee of the estate of 'Abran aka Avaran aka Avran.
 - (C) The affidavit in opposition sworn by Abdul Karim is in breach of Section 50(5) of the Trustees Act, Cap 60.
- (06) Counsel for the defendant made three (03) submissions in regard to that. He said, first (in his own words) "*the relationship between the two individuals is a clarified one. And that is Abdul Karim and Ibrahim are in son and father relationship. As such, Abdul Karim (the son) has locus standi to executive documents on behalf of the father (Ibrahim)*".

- (07) Secondly, Abdul Karim deposed the affidavit in opposition by virtue of the powers vested in him under the Power of Attorney No. 57797, registered on 30-08-2016 (Annexure AK-1).
- (08) Thirdly, Counsel submitted that (in his own words) *“the deponent is very well versed with the estate matters as he was the one doing all ground work on instructions of his father Ibrahim”*.

[C] **Consideration and the Determination**

- (09) The annexure “AK-1” is the Power of Attorney No. 57797, registered on 30-08-2016. The court closely examined the Power of Attorney. It is significant to note that on the basis of the Power of Attorney, the deponent Abdul Karim could only defend the defendant, if the defendant is sued in his ***personal capacity***. In the present case, the defendant is sued as ***Trustee*** of the estate of Abran aka Avaran aka Avran.
- (10) Next I turn to consider the plaintiff’s counsel’s Section 50(5) of the Trustee’s Act argument. The plaintiff’s objection calls into consideration Section 50 of the Trustee’s Act. Section 50 reads as follows;

“Power to delegate trusts”

50 - (1) A trustee who for the time being is out of Fiji or is about to depart there from, or is a member of Her Majesty’s Forces, or who is, or may be about to become, by reason of Physical infirmity, temporarily incapable of performing all his duties as a trustee may, subject to the provisions of this section, but notwithstanding any rule of law or equity to the contrary, by power of attorney, delegate to any person the execution or exercise during his absence or incapacity, as the case may be, of all or any trusts, powers, authorities and discretions vested in him as such trustee, whether alone or jointly with any other person or persons; but a person being the only other co – trustee and not being a trustee corporation shall not be appointed to be an attorney under the provisions of this subsection.

(2) Where any delegation has under the provisions of this section been duly made to an accepted by any person and is for the time being in operation, that person shall have, within the scope of the delegation, the same trusts, powers, authorities, discretion, liabilities and responsibilities (except the power of delegation conferred by the provisions of this section) as he would have if he were then the trustee.

(3) In any proceedings brought by any person beneficially interested under the trust against the donor of a power of attorney given under the provisions of this section, in respect of any act or default of the donee of the power, it shall be a

defence for the donor to prove that the donee was appointed by him in good faith and without negligence.

(4) All jurisdiction and powers of any court shall apply to the donee of a power of attorney given under the provisions of this section in the same manner, so far as respects the execution of the trust or the administration of the estate to which the power of attorney relates as if the donee were acting relation to the trust or estate in the same capacity as the donor of power.

(5) A power of attorney given under the provisions of this section shall not come into operation unless and until the donor is out of Fiji or is incapable of performing all of his duties as a Trustee, and shall be suspended by his return to Fiji or by his recovery of that capacity, as the case may be.

(6) In favour of any person dealing with the donee of a power of attorney given under the provisions of this section, any act done or instrument executed by the donee shall be, notwithstanding that the power has never come into operation or has been suspended or revoked, whether by the act of the donor of the power or by operation of law, as valid and effectual as if the power had come into operation and remained unrevoked at the time when the act was done or the instrument executed, unless that person had at that time actual notice that the power had never come into operation or of suspension or revocation of the power.

(7) A statutory declaration by the donee of a power of attorney given under the provision of this section relating to any trust or estate that the power has come into operation, or that in any transaction the donee is acting in the execution of the trust or the administration of the estate, shall be, in favour of a person dealing with the donee of the power, conclusive evidence of the fact.

(8) The fact that is appears from any power of attorney given under the provision of this section, or from any evidence required for the purposes of any power of attorney or otherwise, that in any transaction the donee of the power is acting in the execution of a trust shall not affect with notice of the trust any person dealing in good faith with the donee.

(9) Where it is intended that the donee of a power of attorney given under the provisions of this section shall be entitled to transfer, or otherwise deal with, land under the operation of the Land Transfer Act the power of attorney shall be in the form, and executed and attested in the manner, prescribed by Part XVIII of that Act. (Cap. 131.)”

(Emphasis added)

- (11) Counsel for the defendant frankly admitted that the defendant is in the country and because of his old age he did not depose the affidavit or attended the court. It is critical to note that the deponent Abdul Karim has not deposed to the medical condition of the defendant in his affidavit in opposition to the application.
- (12) **There is no evidence to show that the defendant is incapable of performing his duties as a Trustee by reason of a physical infirmity. Besides, the Power of Attorney (Annexure AK-1) does not relate to the execution of the trust or the administration of the estate. I do not see any delegation of power conferred by the provisions of Section 50 of the Trustees Act, Cap 60.**
- (13) Therefore, I hold that the affidavit in opposition sworn by Abdul Karim is in breach of Section 50 (5) of the Trustees Act, Cap 60.
- (14) Section 50 (5) is a mandatory provision which a court is bound to take notice of. In other words, the court cannot use its discretion when a provision is mandatory.
- (15) Having regard to the considerations to which I have referred, the deponent Abdul Karim has not shown special circumstances to exist which justify a departure from the provisions in Section 50 of the Trustees Act.
- (16) I uphold the preliminary objection raised by Counsel for the plaintiff to the affidavit in opposition sworn by Abdul Karim sworn on 11-06-2019.

[D] ORDERS

- (01) The preliminary objection is upheld.
- (02) The affidavit in opposition filed by Abdul Karim sworn on 11-06-2019 is expunged from the court record.
- (03) Costs in the cause.



At Lautoka
Friday, 18th September, 2020


.....18.09.2020
Jude Nanayakkara
[Judge]