

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

CIVIL JURISDICTION

Civil Action No.: HPP 47 of 2017

BETWEEN : **RISHI RAM** of 67 Pitt Avenue, Clendon, Auckland, New Zealand,
Cabinet Maker.

PLAINTIFF

AND : **ABI RAM** of 48B Grayson Ave, Papatoetoe, Auckland, Joiner.

DEFENDANT

Appearances : **Mr Vickrant Chandra for the plaintiff**
The defendant is absent and unrepresented

Date of Trial : **Monday, 22nd July, 2019**
Tuesday, 10th September, 2019

The plaintiff's closing submissions: Thursday, 14th November, 2019

Judgment : **Friday, 14th February, 2020**

J U D G M E N T

[A] INTRODUCTION

- (01) In the statement of claim filed on 01st August, 2017, the plaintiff mainly sought relief from this court in the form of a pronouncement against the Will purported to have been executed on 21st November, 2016 by Kushma Wati, deceased (the testatrix). **[The later Will]**

The plaintiff has expressly requested the court to pronounce for the Will dated 24/01/2011 **(The former Will)**.

- (02) In this action, the plaintiff principally challenged the Will dated 21st November, 2016 propounded by the defendant on the grounds that;

- (A) Kushma Wati deceased (the testatrix) was not in a sound and disposing state of mind and memory at the time when the Will was made.
- (B) Any signature on the purported Will dated 21st November, 2016 is not that of Kushma Wati, deceased, (the testatrix) and it was never signed by her.
- (03) The plaintiff and the defendant are two brothers and the sons of Kushma Wati. Kushma Wati died on the 09th January, 2017. Pursuant to the Will of the deceased dated 24th January, 2011 the plaintiff is the sole executor and trustee and the sole beneficiary of the deceased's estate. The estate mainly comprised of Housing Authority sub-lease No.252174.
- (04) The Will propounded by the defendant was dated just 49 days before the testatrix died.
- (05) On 03rd August, 2017 the court granted leave for the plaintiff to issue and serve the writ of summons outside the jurisdiction.
- (06) According to the affidavit of service filed by the plaintiff, the defendant was duly served with writ of summons and the statement of claim on 30th August, 2017 at 48B, Grayson Avenue, Papatoetoe, Auckland.
- (07) On 21st September, 2017 the defendant filed in person the notice of intention to contest the proceedings.
- (08) The defendant did not file a statement of defence.
- (09) The defendant did not enter and appearance to the writ either in person or by legal representation.
- (10) I heard formal proof of the plaintiff's claim.

[B] THE FACTUAL BACKGROUND

- (01) The statement of claim which is as follows sets out sufficiently the facts surrounding this case from the plaintiff's point of view as well as the prayers sought by the plaintiff.
1. *THAT the Plaintiff is the son and intended Executor and Trustee of the estate of Kushma Wati aka Kusmi Watti of Rifle Range, Lautoka, Domestic duties, who died on the 09th of January, 2017 (hereinafter the "The Deceased").*
 2. *THAT the Defendant is the elder son of the Deceased.*
 3. *THE Deceased died Testate leaving behind a Will dated 24th day of January, 2011 (hereinafter referred to as "The Will").*

PARTICULARS OF THE WILL

- (i) Pursuant to the Will of the Deceased dated 24th January, 2011 the Plaintiff is the sole Executor and Trustee and the sole beneficiary of the Deceased's Estate.
 - (ii) The Plaintiff believes that the Will and Testament dated 24th of January, 2011 is the Deceased's last Will wherein all former Will and codicils have been revoked and the Deceased appointed the Plaintiff as the sole Executor and Trustee of the Estate of Kushma Wati aka Kusmi Watti.
 - (iii) The contents of the said last Will explicitly expresses the free will of the Deceased in the presence of all those present at the material time.
 - (iv) At the material time of expressing her will, the mental faculty of the Deceased was never impeded in any manner whatsoever.
 - (v) The Deceased was of sound mind and was fully aware of the instructions she was dictating to be included in her last Will.
 - (vi) The Deceased's instructions were drawn up by her Solicitors S.B. Patel & Co. as her last Will and Testament.
 - (vii) Each clause of the said Will was read back and explained to the Deceased on the 24th day of January, 2011 at the law office of S.B. Patel & Co., in the Hindustani language in presence of the witnesses, Ms. Jasweeni Jotika Devi, Solicitor's clerk, Lautoka and Ms. Navnita Devi Kumar, Solicitor's clerk, Lautoka.
 - (viii) The Deceased at all material times was fully aware of what was being read and explained.
 - (ix) The Deceased was satisfied that her instructions were fully encompassed and reflected in the said Will.
 - (x) The Deceased put her signature on the Will in the presence of the two Law Clerks who duly endorsed the deceased's signature in the presence of the Deceased those present.
4. **THAT** after the Deceased's death, the Plaintiff applied for probate pursuant to the Last Will and Testament of the Deceased to the High Court of Fiji.
 5. **THAT** subsequently the Defendant made applications to the High Court to have the probate granted in his favour.

6. *THAT the Defendant made the application for Probate pursuant to a purported Will which he alleges to be the Last Will and Testament of the Deceased (hereinafter referred to as the "Purported Will").*

PARTICULARS OF THE PURPORTED WILL

- (i) *The Purported Will is dated 21st November, 2016.*
 - (ii) *It is purported to be the Last Will and Testament of the Deceased.*
 - (iii) *That in the Purported Will, the name of the deceased has been spelt incorrectly.*
 - (iv) *The Will is witnessed by Ropate Tuigunu, Solicitor's clerk and Aqela Dibuna, Typist, both of 111 Vitogo Parade, Lautoka.*
7. *THAT upon being made aware of the second Probate, application by the Defendant, the Plaintiff, vide his Solicitors, took steps to lodge a Caveat on the issuance of the Probate in favour of the Defendant pursuant to the purported Will.*
8. *THAT the Plaintiff firmly believes that the Last Will and Testament dated 24th day of January, 2011 is the Last Will and Testament of the Deceased, Kushma Wati aka Kusmi Watti.*
9. *THAT the Purported Will of the Deceased dated 21st day of November, 2016 was made fraudulently and was forged.*

PARTICULARS OF FRAUD

- (i) *That prior to the making of such Will the testator was sickly.*
 - (ii) *That the testator was mentally unfit and unsound.*
 - (iii) *That in the purported Will, the name of the Deceased has been spelt incorrectly.*
 - (iv) *That the testator's signature was forged as it is not consistent with her usual signatures.*
 - (v) *The witnesses to the Purported Will were Ropate Tuigunu, Solicitors clerk, and Aqela Dibuna, Typist, both of 111 Vitogo parade, Lautoka and they were not present at the time of the execution.*
10. *AS consequence of the matters aforesaid, the Plaintiff has been unable to obtain Probate and look after the properties under the Estate of Kushma Wati aka Kusmi Watti.*
11. *THE deceased has left behind her house which was her principle place of residence, which is comprised of Housing Authority Sub-Lease 252174 described as Lot 6 on DP No. 5551, in the Province of Ba, in the Tikina of Vuda ("the Property").*
12. *THAT the Defendant is trespassing, interfering and is dealing with the property.*

PARTICULARS OF TRESPASS/INTERFERENCE

- (i) The Defendant has without authority entered the Deceased's property.*
- (ii) The Defendant has removed most of the belongings of the Deceased.*
- (iii) The Defendant has without authority leased the property to the tenants.*
- (iv) The Defendant has benefitting from the rental income since February 2017.*

(02) The Plaintiff claims from the defendant;

- (i) A declaration that the last Will and Testament of Kushma Wati aka Kusmi Watti dated 21st day of November, 2016 is null and void.*
- (ii) A declaration from this Honourable Court that the Will of the Deceased dated the 24th day of January, 2011 fully and correctly encompasses and is a true reflection of the intention of the Deceased.*
- (iii) An Order that the Court seals the application for Probate No. 59995 in respect of the Estate of Kushma Wati aka Kusmi Watti lodged by the Plaintiff, Mr Rishi Ram.*
- (iv) An Order that the application for Probate No. 60003 in respect of the Estate of Kushma Wati aka Kusmi Watti lodged by the Defendant be cancelled forthwith.*
- (v) An Order that all rent from the said Property received by the Defendant be deposited into the Estate's Bank Account for proper administration of the Estate.*
- (vi) An Order that all belongings of the Deceased taken by the Defendant from the Deceased's property be returned to the Estate for proper administration failing which damages be awarded in favour of the Estate.*

[C] ORAL EVIDENCE

The plaintiff's case:

- (01) Mike Maran – (the examiner of questioned documents) He adduced evidence by way of an affidavit.
- (02) Reginald Ravendra Prasad (the tenant)
- (03) Ulamila Tabutabu (The Senior Court Officer, Probate Section)
- (04) Jasweeni Jyotika Devi (Solicitor's Clerk)

SUMMARY OF ORAL EVIDENCE

PW1 – Mr. Reginald Ravendra Prasad (Tenant)

Prasad was the plaintiff's first witness and he confirmed in Court that he has been renting the Estate Property for the past two years by making arrangements with the defendant's representative. He has been paying \$300.00 per month since April 2017. Prasad confirmed that he continued paying rental to the defendant's representative until such time when he was served with the Court order to deposit rental monies into High Court income generating account. Now he is depositing the monies into High Court.

(I gather from his evidence that since April 2017 till October 2018, the defendant has been receiving rental monies from Prasad at a rate of \$300.00 per month. This would amount to \$5400.00 (Five Thousand Four Hundred Dollars), which the plaintiff submits is due and owing to the Estate.)

PW2 – (Ms.) Ulamila Tabutabu [Senior Court Officer, Probate Section]

Ulamila was called to produce the original Will of 2011. Ulamila is a Senior Court Officer in the Probate Section of the High Court Registry, Suva. She confirmed to Court that she received the original Will of 2011 through an application made by the plaintiff's Solicitors Law Firm. Ulamila confirmed that the Will of 2011 was part of an application filed by the plaintiff. She further confirmed that probate was not granted in this application because there was another application for probate lodged by another law firm with Will of 2016 so the Registry held on to the application because there was a dispute.

Ulamila confirmed to Court that in these situations, the Registry will await the orders made by the Court as to which probate application to process. Upon receipt of the Court Order, the application will be processed accordingly.

PW3 – (Ms.) Jasweeni Jotika Devi (One of the attesting witnesses to the Will of 2011)

Jasweeni was called as a witness to the Will of 2011 and to propound the same. She was the litigation clerk at S.B Patel & Company, Solicitors, Lautoka. Jasweeni was shown the original Will of 2011 that was tendered into Court by Ulamila. Jasweeni confirmed that the Will of 2011 was typed in her principal's office in which she was working. She said That Mr.Anu Patel and Ms. Kushma Wati came to their office to make the Will of 2011.

Jasweeni identified and confirmed that her signature is on the Will as one of the attesting witnesses. Jasweeni testified as to the procedure her office followed in relation to the Wills as follows; (Reference is made to page six of the transcript of hearing Vol -2)

“When we used to make Wills for any of our client, they used to come in first then we used to sit with them. If any families are with them we used to part

them apart and take them to a private room where as I was the Chief Conveyance Clerk and I used to take instructions from them. With these, we normally use, we also make instructions to Will too which maybe in the file or somewhere not aware of. But there was instructions of Will, there should be because we used to make it where they give instructions to us, moved with that instructions. They tell us what they want in their Will then we prepare the Will. And I as the Chief Conveyance Clerk, I used to take instructions from the clients and whatever they used to tell us, we used to type it in. Read it to them in Hindi or English language whichever they prefer, if they fully understand and we know if they are of sound mind, then we used to ask them to sign.”

Jasweeni further confirmed that all the steps highlighted hereinabove were also taken in the late Kushma Wati’s case. Jasweeni confirmed that there was no influence or pressure on Ms. Kushma Wati when she signed the Will of 2011.

(Jasweeni had confirmed through her testimony that the late Ms. Kushma Wati was of sound disposing mind and there was no influence or pressure on her when she signed the Will of 2011 and that it was rightly witnessed by Jasweeni.)

[D] CONSIDERATION AND THE DETERMINATION

- (01) Whilst most grateful for the benefit of written submissions and research of counsel for the plaintiff, I venture to say that I have given my mind to the written submissions and the judicial authorities referred to there in.
- (02) In the statement of claim filed on 01st August, 2017, the plaintiff mainly sought relief from this court in the form of a pronouncement against the Will purported to have been executed on 21st November, 2016 by Kushma Wati, deceased (the testatrix). [The later Will]. The plaintiff has expressly requested the court to pronounce for the Will dated 24/01/2011 (the former Will).
- (03) In this action, the plaintiff challenged the Will dated 21st November, 2016 propounded by the defendant principally on the grounds that;
 - (A) Kushma Wati deceased (the testatrix) was not in a sound and disposing state of mind and memory at the time when the Will was made.
 - (B) Any signature on the purported Will dated 21st November, 2016 is not that of Kushma Wati, deceased, (the testatrix) and it was never signed by her.
- (04) The plaintiff and the defendant are two brothers and the sons of Kushma Wati. Kushma Wati died on the 09th January, 2017. Pursuant to the Will of the deceased dated 24th January, 2011 the plaintiff is the sole executor and trustee and the sole beneficiary of the deceased’s estate. The estate mainly comprised of Housing Authority sub-lease No.252174.

- (05) The Will propounded by the defendant was dated just 49 days before the testatrix died.
- (06) 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.

Whenever it is necessary for an executor to establish due execution of a Will, he is required, at common law, to call one of the attesting witnesses, if any was available.

See; *Belbin v Skeates¹
*Bowman v Hodgson²

The burden imposed on a party who seeks to propound a Will was stated clearly by Lord Hanworth MR in In the Estate of Lavinia Musgrove, Davis v Mayhew³

“It is clear first, that the onus of proving a Will lies upon the party propounding it, and secondly, that he must satisfy the conscience of the Court that the instrument so propounded is the last Will of a free and capable testator. To develop this rule a little further – he must show that the testator knew and approved of the instrument as his testament and intended it to be such.”

Parke B in the course of his judgment in Barry v Butlin (1) says:

“The strict meaning of the term onus probandi is this, that if no evidence is given by the party on whom the burden 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.”

The Court will usually pronounce for a Will if one of the attesting witnesses deposes to the due execution of the Will. However, the Court will not exclude further relevant evidence for the purpose of avoiding fraud. Vere – Wardale v Johnson and Others⁴ is authority for the proposition that *“evidence of the attesting witness to a Will is not necessarily conclusive, and the court is competent to receive evidence in rebuttal.”* Willmer LJ at page 397 stated:

It appears to me that the object of the legislature in imposing the strict formalities required by the Wills Act, 1837, was to prevent fraud. My duty here is to do all that I can see that no fraud is perpetuated; and if I exclude

¹ 164 ER 669

² (1867) 1 L.R.P. and D 362

³ [1927] AC 264 at page 276

⁴ [1949] 2 ALL E.R.250, at P 395

further evidence such a ruling can only assist the possibility of the perpetration of fraud.

In the circumstance it is my opinion that it would be quite wrong, and not in accordance with authority, to exclude such further evidence with regards to the attesting of the Will as may be available.”

Before other evidence is admissible, it must be shown that all the attesting witnesses are dead, insane, beyond the jurisdiction or that none of them can be traced.

If none of the attesting witnesses can be called for the reasons indicated in the previous paragraph, steps must be taken to prove at least one of them. This constitutes secondary evidence of attestation.

See; * In the Will of Hutchins⁵
* In the Will of Hobbs⁶

If evidence of handwriting is unobtainable, evidence of those who saw the Will executed, or any other evidence from which an inference of due execution can be drawn becomes admissible, but it seems that every effort first be made to prove the handwriting of one of the attesting witnesses.

See; * Clarke v Clarke⁷

Propounding Will dated 24-01-2011

- (07) As stated, the defendant did not file a statement of defence challenging the validity and the genuineness of the Will dated 24-01-2011 (the former Will). Therefore, the validity and the genuineness are not in issue. As a result, it is not necessary for the plaintiff to call either of the attesting witnesses to the Will dated 24-01-2011 (the former Will) to establish due execution, validity and genuineness.
- (08) Nevertheless, Jasweeni was called as a witness to the Will of 2011 and to propound the same. She was the litigation clerk at S.B Patel & Company, Solicitors, Lautoka. Jasweeni was shown the original Will of 2011 that was tendered into Court by Ulamila. Jasweeni confirmed that the Will of 2011 was typed in her principal's office in which she was working. She said That Mr.Anu Patel and Ms. Kushma Wati came to their office to make the Will of 2011.

Jasweeni identified and confirmed that her signature is on the Will as one of the attesting witnesses. Jasweeni testified as to the procedure her office followed in relation to the Wills as follows; (Reference is made to page six of the transcript of hearing Vol -2)

⁵ (1893) 14 ALT 223

⁶ (1931) 48 WN (NSW) 166

⁷ (1879) 5 LR lr 47

“When we used to make Wills for any of our client, they used to come in first then we used to sit with them. If any families are with them we used to part them apart and take them to a private room where as I was the Chief Conveyance Clerk and I used to take instructions from them. With these, we normally use, we also make instructions to Will too which maybe in the file or somewhere not aware of. But there was instructions of Will, there should be because we used to make it where they give instructions to us, moved with that instructions. They tell us what they want in their Will then we prepare the Will. And I as the Chief Conveyance Clerk, I used to take instructions from the clients and whatever they used to tell us, we used to type it in. Read it to them in Hindi or English language whichever they prefer, if they fully understand and we know if they are of sound mind, then we used to ask them to sign.”

Jasweeni further confirmed that all the steps highlighted hereinabove were also taken in the late Kushma Wati’s case. Jasweeni confirmed that there was no influence or pressure on Mrs. Kushma Wati when she signed the Will of 2011.

Jasweeni had confirmed through her testimony that the late Mrs. Kushma Wati was of sound disposing mind and there was no influence or pressure on her when she signed the Will of 2011.

The court will usually pronounce for Will if one of the attesting witnesses deposes to the due execution of the Will. When the formalities for executing a Will are carried out, the presumption is that the Will is validly executed and cogent and strong evidence is needed to rebut the presumption⁸. The evidence of one of the attesting witnesses to the Will, Jasweeni deposed to the due execution of the Will and proved to the court that the formalities for executing the Will are carried out.

I therefore, hold that due, execution and attestation of the will had been proved and it was also proved that the testatrix was of sound disposing state of mind at the time of the execution and that there was no undue influence, or coercion exercised on the testatrix by the plaintiff in connection with the execution of the Will. **As a result, I pronounce for the will dated 24th January 2011.**

Will dated 21-11-2016

- (09) As stated, the Will propounded by the defendant was dated just 49 days before the testatrix died.
- (10) The plaintiff’s principal challenge to the Will dated 21-11-2016 was based on the allegation of fraud in that the signature of the testatrix was forged. It was alleged that the testatrix had not executed the testamentary document.

⁸ *Sherrington v Sherrington (2005) EWCA CIV 326;*
Channon & Channon v Perkin & Others (2005) EWCA CIV 1808

- (11) There were further allegations that; (1) Prior to the making of such Will the testatrix was sick. (2) The testatrix was mentally unfit and unsound. (3) The attesting witnesses were not present at the time of the execution.
- (12) Therefore, the burden falls on the plaintiff to establish principally that fraud was involved in the sense that the signature on the Will dated 21/11/2016 was not the signature of the deceased and had been forged.
- (13) In a civil case involving 'fraud' the applicable standard of proof is higher. Denning L.J. said in "**Hornal v Neuberger Products Ltd**⁹, the more serious the allegation the higher the degree of probability that is required".

The degree of proof depends on the subject matter, and as Denning L.J. observed in '**Bater v Bater**¹⁰.

"A civil Court when considering a charge of fraud will naturally require for itself a higher degree of probability than that which it would require when asking itself if negligence is established. It does not expect so high a degree as a criminal Court even when it is considering a charge of a criminal nature; but it still does require a degree of probability which is commensurate with the occasion."

- (14) The plaintiff tendered affidavit evidence of an expert witness by the name of Mr Mike Maran of Auckland, New Zealand, the handwriting and document examiner.
- (15) Mr Maran in his affidavit evidence has described himself as handwriting and questioned document examiner. Mr Maran had prepared a report dated 01-11-2018 which was admitted into evidence. The expert's evidence of handwriting in this case was evidence by comparison. A number of documents which were accepted as having been signed by the deceased were forwarded to the expert. These signatures were compared with the signature on the Will dated 21/11/2016. The purpose of such evidence and the role of the expert was succinctly stated by the learned Authors of '**Cross on Evidence**'¹¹.

"Strictly speaking an expert in handwriting should not be asked to say definitely that a particular writing is to be assigned to a particular person. His function is to point out similarities between two specimens of handwriting or differences, and leave the Court to draw their own conclusions; (Wakefield v Bishop of Lincoln (1921) 90 L3 PC 174)".

- (16) Mr Maran's qualifications were set out in annexure "A" in his Affidavit.
- (17) In paragraph (10) of the report, Mr Maran has stated that a comparison of the questioned signature on the Will dated 21-11-2016 and Kushma Wati's specimens revealed a

⁹ (1957) 1 Q.B. at page 258

¹⁰ (1950) 2 ALL. E.R. 458

¹¹ Second Australian Edition at page 622;

similarity in general appearances. **He then listed eleven (11) significant differences.** In paragraph eleven he concludes;

Findings and Opinion on Signature

*There are substantial significant dissimilarities between the questioned signature and the known signatures. The signature appears to be a well-executed simulation by another author. However, while trying to simulate the signature, the author has not been able to penetrate or copy the finer handwriting characteristics of the known signatures. **Therefore, I have determined that there is strong probability that the signature attributed to Kushma Wati on the Will is an attempted simulation by another author.** More exemplars of Kushma Wati's known signature would have been helpful in establishing the highest opinion of conclusive. However, the quantity of other known signatures was not available.*

(Emphasis added)


- (18) There was no evidence to infer that the significant differences in the questioned signature was the result of ill health or senility on the part of the deceased at the time when she was alleged to have executed the Will dated 21-11-2016.
- (19) In my judgment, Mr Maran's evidence in the form of his report is balanced, professional and objective. His methodology was logical and comprehensible. The substance of his evidence was persuasive and, in my view, reliable.
- (20) The evidence of Mr Mike Maran that I have considered above leads me to the point of not accepting the genuineness of the signature on the Will dated 21-11-2016. **As a result, the Court pronounces against the Will dated 21-11-2016.**

ORDERS

- (1) I pronounce against the Will dated 21st November, 2016.
- (2) I pronounce for the Will dated 24th January, 2011.
- (3) I order that the probate of the Will dated 24th January, 2011 be granted in common form to the plaintiff as the executor and the trustee subject to the lodgment with the Chief Registrar of the necessary application.
- (4) I order that all the rent received by the defendant from Mr. Reginald Ravendra Prasad since April 2017 in relation to the Housing Authority Sub-Lease Nò: 252174 (the estate property) be deposited in the estate bank account (within 14 days from the date of the Judgment) for proper administration of the estate.

- (5) I order that the defendant pay the plaintiff's costs of these proceedings which are fixed summarily in the sum of \$2,500.00. The costs should be paid within 14 days from the date of this judgment.




.....14/02/2020.
Jude Nanayakkara
[Judge]

At Lautoka
Friday, 14th February, 2020