

- [2]. The application is made pursuant to Section 47 of the Succession, Probate & Administration Act.
- [3]. The Summon is supported by an affidavit sworn by applicant on 08.03.2022.
- [4]. The respondent strongly opposed the application and filed an affidavit in opposition sworn on 19.04.2022.
- [5]. I note with concern that the applicant did not file an affidavit in reply, a course which she was entitled to take.
- [6]. The applicant and the respondent were heard on the summons. They made oral submissions to court. In addition to oral submissions, counsel for the respondent filed written submissions for which I am grateful.

(B) BACKGROUND

- [1]. Abdul Haq and Johera Bibi had five sons and a daughter. Two of the five sons had passed away and only three sons and the only daughter a still alive. The respondent Abdul Munaf (the Caveator) is the eldest child in the family. Abdul Altaf is the fourth child in the family and was married to the Applicant-Caveatee.
- [2]. The property described as Lot 3, DP No. 4323 situated in Nakasi, Naitasiri in the island of Vitilevu is registered by Transfer No:- 288866 dated 09.08.1999 to Abdul Haq and Abdul Munaf – the Caveator [Annexure “C” referred to in the affidavit of Zakia Zoireen Nisha, the Applicant Caveatee sworn on 08.03.2022]. The classification of tenant is not mentioned in the memoriam. Therefore, they can be considered as joint tenants or tenants in common. Under joint tenancy, both partners jointly own the whole property and upon the death of one partner, the surviving partner becomes the sole proprietor. That means that when one of the joint dies, the interest of the deceased joint tenant automatically passes to the surviving joint tenant and does not form part of the estate of the deceased. Tenancy in common, on the other hand, refers to ownership over a certain property by parties who do not automatically have a right of survivorship. They are co-owners of the property, however their shares and interest over the property do not have to be equal and depend entirely on the agreed shares of the parties. In a tenancy in common arrangement, if one of the parties dies their interest in the property forms part of the deceased’s estate and does not automatically pass on to any co-owner of the property.
- [3]. Abdul Haq passed away on 20.1.2008 and Abdul Altaf by way of Probate No. 60230 dated 01.06.2017 acquired his father’s interest to administer the said estate. Abdul Altaf passed away on 20.04.2020 and his vested interest were acquired by way of Probate No. 68421 by his wife Zakia Zoireen Nisha, the Applicant Caveatee.

- [4]. The applicant says that she being the Trustee of the estate of her late husband Abdul Altaf is entitled to receive his shares from the estate of her father-in-law Abdul Haq.
- [5]. On 20.09.2021, the respondent has placed a caveat against the grant of Letters Of Administration De Bonis in the estate of Abdul Haq.
- [6]. The applicant seeks the following orders from this court:
- (A) *That Caveat No. 42 of 2021 be struck out.*
- (B) *That Letters of Administration De Bonis be granted in the estate of Abdul Haq in favour of the applicant.*
- [7]. The respondent Caveator strongly opposed.
- [8]. The Caveator's (the respondent's) main objection to the granting of Letters of Administration De Bonis Non in the estate of Abdul Haq is that his late father (Abdul Haq) and him are tenants in common and the two beneficiaries of his father have passed away intestate and as a result his late father's interest in the property will automatically pass on to him as the surviving co-owner of the property. Next, Caveator contends that the execution of Transmission by Death has not been fulfilled from late Abdul Haq to Abdul Mustaq and Abdul Altaf and therefore the Caveatee lacks legal standing to apply for Letters of Administration De Bonis to administer the estate of Abdul Haq.

(C). **CONSIDERATION**

- [1]. The respondent Abdul Munaf filed a caveat against the grant of Letters of Administration De Bonis Non in the estate of Abdul Haq on 20.09.2021 in terms of Section 46 of the Succession Probate and Administration Act [Chapter 60].
- [2]. The warning to the said caveat was filed by the applicant Caveatee on 20.01.2022. There is no dispute as to the service and date of service.
- [3]. A caveator who has **no** interest contrary to that of the person warning, then Rule 44(6) of the Non-Contentious Probate Rules of 1987 applies which is in the following terms:

“ A caveator who has no interest contrary to that of the person warning, but who wishes to show cause against the sealing of a grant to that person, may within eight days of service of the warning upon him (inclusive of the day of such service), or at any time thereafter if no affidavit has been filed under paragraph (12) below, issue and serve a summons for directions.”

- [4]. A Caveator who has an interest contrary to that of the person warning, then Rule 44(10) of the Non - Contentious Probate Rules applies, which is in the following terms:

“A caveator having interest contrary to that of the person warning may within eight days of service of the warning upon him (inclusive of the day of such service) or at any time thereafter if no affidavit has been filed under paragraph (12) below, enter an appearance in the (nominated registry) by filing Form 5; and he shall serve forthwith on the person warning a copy of Form 5 sealed with the seal of the court”.

- [5]. The Respondent Caveator failed to act either under Rule 44(6) or Rule 44(10) of the Non – Contentious Probate Rules 1987.

- [6]. It is not only an appearance is needed, but also need to be in Form 05 of the said Rules.

- [7]. In Re The Estate of Kumar [1998] FJHC 34, Justice Byrne said:

“As no other form of appearance is given in Tristran and Coote I am prepared to accept the failure to comply with the form as set out in the book vitiates any appearance not entered in accordance with that form. This makes common sense as the person filing a warning to caveat must be entitled to know the interest in the estate claimed by the caveator. I therefore, accept the submission of the application in action in HBC 21 of 1997”.

- [8]. The Respondent Caveator neither filed an appearance to warning nor summons for directions as per Rule 44(6) or 44(10) of the Non – Contentious Probate Rules 1987.

- [9]. Therefore, the caveat ceased to have effect in terms of Rule 44(12) of the Non – Contentious Probate Rules 1987.

- [10]. For the sake of completeness, Rule 44(12) of Non-Contentious Probate Rules is reproduced below in full.

“If no appearance has been entered by the caveator or no summons has been issued by him under paragraph (6) of this rule, the person warning may at any time after eight days after service of the warning upon the caveator (inclusive of the day of such service) file an affidavit in the (nominated registry) as to such service and the caveat shall thereupon cease to the effect provided that there is no pending summons under paragraph (6) of this rules”.

- [11]. As I said before, on 20.09.2021, the respondent lodged a caveat [42/2021] prohibiting the grant of Letters of Administration De Bonis Non in the estate of Abdul Haq. Thereafter, the estate remained ‘in limbo’ for (04) months without any attempt to obtain Probate or

Letters of Administration until 20.01.2022 when the applicant lodged an application in the High Court seeking the grant to her Letters of Administration De Bonis Non.

- [12]. The mere lodgment of a caveat against a grant does not render any application thereafter a 'contentious' proceeding for which a writ would have to be issued. Indeed the respondent has no intention of instituting any probate action. He has neither entered an appearance to a warning nor issued a 'Summons for Directions'. In the absence of an 'entry of appearance' or a 'Summons for Directions' the respondent can hardly be described as a person who '..... Intends to make any real objections'. Therefore, in my view the applicant is entitled to the grant of Letters of Administration De Bonis non in the estate of Abdul Haq.

ORDERS

- [1]. The Caveat No. 42 of 2021 filed on 20.09.2021 is struck off.
- [2]. The Letters of Administration De Bonis Non is granted in favour of the Applicant/Caveatee.
- [3]. The Respondent Caveator to pay the applicant's costs of this proceedings summarily assessed in the sum of \$750.00 which is to be paid within (07) days hereof.




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Jude Nanayakkara
JUDGE

High Court - Suva
Friday, 14th October, 2022