

IN THE HIGH COURT OF FIJI
AT SUVA
PROBATE JURISDICTION

Civil Action No. HPP 49 of 2020

IN THE MATTER of the **ESTATE** of
KALAWATI also known as **KALA WATI** late of
Sigatoka Town, Sigatoka in the Republic of Fiji,
Retired Businesswoman, Deceased, Testate.

AND

IN THE MATTER of the Will dated 11th day of
December 1974 of Kalawati aka Kala Wati.

AND

IN THE MATTER of Probate No. 35187 on the
3rd day of March 1998.

BETWEEN: **RAVINDRA CHANDRA** of 45 Nganui Avenue, Manurewa 2105, Auckland, New Zealand, Self-employed.

PLAINTIFF

AND: **CHANDAN GAURI** of 8 Christie Crescent, Bellbird Park, Brisbane, QLD 4300, Australia, Retired.

DEFENDANT

BEFORE: **Hon. Mr. Justice Vishwa Datt Sharma**

COUNSELS: **Mr Singh R.** for the Plaintiff
No Appearance by the Defendant

Date of Decision: **26th October 2022 at 9.30am**

DECISION

[Removal of Executrix/Trustee pursuant to Order 85 of the High Court Rules 1988]

INTRODUCTION

1. The Plaintiff's [Ravindra Chandra] Originating Summons seeks the removal of the Defendant [Chandan Gauri as the Executrix and Trustee from the Estate of Kalawati also known as Kala Wati.
2. The application is made in support of the Affidavit deposited by Agnes Chute.
3. The Defendant was served with the application by Pre-paid Registered post on 12th August 2020. An Affidavit in Support has been filed herein.
4. The Plaintiff [Ravindra Chandra] is one of the Executors and Trustees of the Estate of Kalawati also known as Kala Wati by virtue of Probate No. 35187 dated 3rd March 1998. He is also one of the children of the late Kalawati aka Kala Wati who died on 2nd December 1997. The other Executor and Trustee of the said Estate is his sister, the Defendant, Chandan Gauri.
5. The deceased was at all material times the registered proprietor of Certificate of Title No. 10051 being Lot 49 on DP 2456 (as to one undivided half share) situate at Sigatoka in Fiji.
6. After the death of the deceased, the Defendant and the Plaintiff were granted Probate on 3rd March 1998 and they were then supposed to fully administer the said estate for the benefit of the beneficiaries but the Defendant has not been cooperating with the Plaintiff in this regard. The Plaintiff believes that the Estate property should be administered for the benefit of the beneficiaries in accordance to his late mother's will dated 11th December 1974.
7. On or about 2003, the Plaintiff's Solicitors had prepared the Transmission by Death and Transfer documents over the subject property Certificate of Title No. 10051 but the Defendant refused to sign on the said document.
8. Despite numerous follow ups with the Defendant, she still refused to execute on the Transmission by Death and Transfer documents.
9. On or about the 16th day of September 2010, the Defendant finally signed the Transmission by Death and Transfer documents.
10. On or about 11th May 2018, the Plaintiff's Solicitors sent a set of a new Transmission By Death, Transfer, CGT Return, CGT Declaration, Application for TIN registration for the Defendant and Instructions to Act under their covering letter to the Defendant's Lawyers in Mansfield, Australia for the Defendant to execute the documents there but she still refuses to do so.
11. On or about 26th July 2018, the Plaintiff's Solicitors again wrote a letter to the Defendant which was sent by post but she did not reply to it nor contact the Solicitors at all.
12. On 20th June 2018, the Plaintiff's Solicitors wrote a letter to the Defendant's Solicitors attaching the Defendant's letter dated 18th June 2018 stating that the Defendant has refused to release the original Certificate of Title to the Plaintiff's Solicitors.

13. The Defendant is not co-operative as the Executrix and Trustee of the Estate.
14. All the beneficiaries (except the Defendant) have agreed to remove the Defendant as Executrix and Trustee of the Estate of Kalawati aka Kala Wati and the Plaintiff to remain the sole Executor and Trustee of the said Estate and to look after and administer the Estate in the interest of all the beneficiaries.

Determination

15. The issue for this Court to determine is "**Whether the Defendant Chandan Gauri be removed as one of the Executrix/Trustees of the Deceased's Estate of Kala Wati?**"
16. This application is made pursuant to *Order 85 Rule 2 and the Inherent Jurisdiction of this Honourable Court*. It is noted that the application is not made pursuant to *Section 35 of the Succession Probate and Administration Act Cap 60*. However *O.85 Rule 2* needs to be read together with the statutory provision of *Section 35 of the Succession Probate and Administration Act (SPA)*. The Court accordingly regularizes the same in terms of *Order 2 of the High Court Rules 1988* since no proper administration of the Deceased's Estate has been carried out by the Executors and Trustees and to ensure the Deceased's Estate is fully administered now in the best interest of all beneficiaries.
17. The Deceased took demise on 2nd December 1997.
18. Probate was granted vide Grant No. 35187 to the Plaintiff [Ravindra Chandra] and the Defendant [Chandan Gauri] on 3rd March 1998 to administer the Deceased's Estate of Kala Wati in terms of the Deceased's Will dated 11th October 1974.
19. Since the grant of Probate, the Estate remains un-administered in terms of the Deceased's Will for a period of 22 years now.
20. The Plaintiff alleges that the Defendant as the other Executrix and Trustee was Overseas in Mansfield Australia and is not cooperative.
21. The Defendant is in possession and custody of the Original Certificate of Title No. 10051. The Defendant has directed one Kishore Patel who now subsequently has the possession and custody of the Certificate of Title No. 10051 not to release any documents or the original Title No. 10051 to the Plaintiff, Ravindra Chandra or his Solicitors until further notice.
22. Transmission by Death from the Deceased to the Executrix and Trustee has still not been registered on the subject property.
23. It is evident that both Executrix and Trustees, the Plaintiff and the Defendant are residents overseas in New Zealand and Australia respectively.

24. The Defendant has not filed any affidavit response to oppose the Plaintiff's application for the reasons best known to her.
25. However, it can be ascertained from the Plaintiff's affidavit deposed by Agnes Chute and the written submission made to Court that it is the Defendant who is not co-operating to ensure that the disposition of the Estate is accordingly carried out in terms of the Defendant's Will and the respective law.
26. The High Court of Australia (as per Dixon J) echoes the same sentiments in **Miller v Cameron** (1936) 54 CLR 372 (my emphasis):

"The jurisdiction to remove a trustee is exercised with a view to the interests of the beneficiaries, to the security of the trust property and to an efficient and satisfactory execution of the trusts and a faithful and sound exercise of the powers conferred upon the trustee. In deciding to remove a trustee the Court forms a judgment based upon considerations, possibly large in number and varied in character, which combine to show that the welfare of the beneficiaries is opposed to his continued occupation of the office. Such a judgment must be largely discretionary."

27. I have borne in mind the fact that the Deceased took demise on 2nd December 1997 and the Probate grant was given to the Plaintiff and the Defendant as Executors and Trustees to administer the Deceased's Estate in terms of the said Will 24 years ago on 03rd March 1998. Further, that the Defendant has not filed any response affidavit to show cause why she should not be removed as one of the Executrix and Trustee of the Deceased's Estate, prompts the Court to proceed with and grant the order to remove the Defendant, Chandan Gauri as one of the two Executrix and Trustees of the Deceased's Estate with immediate effect.
28. This now leaves the Plaintiff, Ravindra Chandra as the only Executor and Trustee of the Deceased's Estate to administer and carry out all the necessities required of an Executor and Trustee to fully administer the Deceased's Estate of Kala Wati in accordance with the Deceased's Will and the Law accordingly.
29. There will be no order as to costs although I have borne in mind the fact that the Defendant failed to file any Opposition and or appear in person in court to defend the application.
30. The orders are made accordingly.

ORDERS

31. Following are the Orders of this Court:-
 - (i) The Defendant, Chandan Gauri is removed as one of the Executrix and Trustee of the Deceased's Estate.
 - (ii) The Plaintiff is the remaining Executor and Trustee to carry out all the necessities and ensure that the disposition of the Deceased's Estate is administered fully in terms of the Will.

(iii) There will be no order as to costs.

Dated at Suva this 26th day of October 2022.



VISHWA DATT SHARMA
JUDGE

cc: *Sherani & Co., Suva.*
Chandan Gauri, Australia