

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action HPP No. 55 of 2020

IN THE ESTATE of FREDERICK WEATHERALL an application made pursuant to Order 85 Rule 2(3) (d) of the High Court Rules of Fiji, 1988.

AND
IN THE MATTER of SECTION 35 of the SUCCESSION, PROBATE AND ADMINISTRATION ACT.

BETWEEN: **ELIZABETH WEATHERALL** of Nabouvua, Savusavu, Retired.
FIRST PLAINTIFF

FRANK DONALD WEATHERALL of Semina Lane, Lautoka, Maintenance Supervisor.
SECOND PLAINTIFF

FREDERICK NATHERN WEATHERALL of Nabouvua, Savusavu, Carpenter.
THIRD PLAINTIFF

ELISE FAYE WEATHERALL aka **ELISE RAVAI** of 11 Wau Lane, Lautoka, Domestic Duties.
FOURTH PLAINTIFF

AND: **SHIRI BINESSARI NAND** of Matalaqere, Savusavu, Retired.
DEFENDANT

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

COUNSEL: **Ms Jackson L.** for the Plaintiffs
 Mr Faktaufon V. and Ms Chaudhary for the Defendant

Date of Decision: **31st October 2022 @ 9.30am.**

DECISION

[Originating Summons seeking removal of Executor/Trustee, revocation of Grant and Appointment of Executor with costs pursuant to Section 35 of the Succession, Probate and Administration Act, Order 85 Rules 2(1) and 2(a) of the High Court Rules 1988]

Introduction

1. The Plaintiffs filed the Originating Summons and sought for the following orders:-
 - (a) that the Defendant be removed as the Executor and Trustee of the Estate of Fredrick Weatherall (hereinafter; "the Deceased"), late of Lot 2 Nabouvua, Savusavu, Retired, Testate;
 - (b) that the Grant of Probate No. 58477 be revoked forthwith;
 - (c) that the Defendant immediately deliver to the Principal Probate Registry the Grant of Probate No. 58477;
 - (d) that the Second Defendant be appointed the Administrator with the Will annexed of the Estate of the Deceased, late of Lot 2 Nabouvua, Savusavu, Retired, Testate;
 - (e) A Declaration that it was the intention of the Deceased at Clause 6 of his Last Will and Testament dated 5 March 2015, that subject to the lifetime interest of the First Plaintiff, his residential property situated at Nabouvua Dreka (part of) comprising of Certificate of Title No. 38269 being Lot 2 on Deposit Plan No. 9195, Savusavu, Vanua Levu is to be transferred to Second and Third Plaintiff in equal shares; and
 - (f) That the costs of this application be paid for by the Defendant within a prescribed period.

Affidavits Filed

2. The following Affidavits were filed:-
 - (i) Affidavit in Support by Second Plaintiff;
 - (ii) Affidavit in Support by Defendant;
 - (iii) Affidavit in Reply by Second Plaintiff
3. The Originating Summons was scheduled for hearing on 15th March 2022.
4. Orders by consent was granted by the Court on 15th March 2022 in terms of the orders sought within the Originating Summons at prayers -(a), (b), (c), (d) and (e) as enumerated at paragraph 1 (a)- (e) of my Judgment hereinabove respectively.
5. This Court was only left to determine with the Plaintiff's order sought at prayer (f) :
 - (i) **That the Costs of this Application be paid for by the Defendant within a prescribed period; and**
 - (ii) **Whether the Defendant should be reimbursed in the sum of \$31,000 which he had to use from his persona funds to tidy up the Deceased's estate?**
6. Both parties to the proceedings furnished Court with their respective written submissions.

Plaintiff's Contention

7. That the Defendant was not objecting to the Plaintiff's application to remove him as the Executor of the Deceased's Estate.
8. The Plaintiff referred Court to paragraphs 21, 23 and 29 of the Defendant's affidavit in Reply where the Defendant has clearly stated that he is unwilling to complete his duty as the Executor of the Deceased's estate and asks Court to discharge him from his duties.
9. That the Defendant's willingness to be removed as the Executor and Trustee of the Deceased's Estate however, is subject to the misguided assumption that the Plaintiffs are to personally bear the administration costs of the Deceased's Estate and as such, the Defendant is seeking from the Plaintiff legal fees he has had to pay transferring his own personal beneficial entitlements under the Deceased's Will and Testament dated 5th March 2015 to himself.
10. The Defendant's understanding on who bears the cost of administering the Deceased's Estate is misguided.
11. The Plaintiffs sought for the orders therein and costs of this application to be paid for by the Defendant.

Defendant's Contention

12. The Defendant had no objection to Orders (a) to (e) sought by the Plaintiffs in the Originating Summons provided that he is reimbursed for this investment with the Deceased's Estate, that is, obtaining the grant of Probate, filing the transmission of death and partial transfer on CT 44817 and sorting out the issues in relation to all the titles mentioned in the Deceased's Will.
13. The Defendant's position is that he has had to use his own funds to tidy up the Deceased's Estate and he denies that he has not been discharging his duties as the Executor and Trustee of the Deceased's Estate.
14. The Defendant's position is also that the Plaintiffs have also been non-cooperative in providing the duplicate of CT 38269 and CT 20547 to him to process the transmission of death on the property.

Analysis and Determination

15. Orders by consent were made by the Court on 15th March 2022 in terms of the Orders that were sought in the Originating Summons at prayers (a), (b), (c), (d) and (e) respectively.
16. The only issue and or orders left for Court's determination is at (f) of the Plaintiff's Originating Summons:-

(i) That costs of this application be paid for by the Defendant within a prescribed period; and

(ii) Whether the Defendant should be reimbursed in the sum of \$31,000 which he had to use from his personal funds to tidy up the Deceased's Estate?

17. The Deceased appointed the Defendant as the Executor and Trustee of his Estate in the Will dated 5th March 2015.
18. The Defendant explained in his Affidavit in Reply at paragraph 11 that the Deceased appointed the Defendant as his Executor and Trustee because the Deceased was always financially assisted by the Defendant as the Deceased had no one to support him, not even the Plaintiffs.
19. At paragraphs 12 - 15 of the Defendant's Affidavit in Reply, the Defendant deposed that:-
 - The grant was issued some 4 years ago that he had carried out a substantial amount of work on the Deceased's Estate having used his own funds and to rectify the orders on CT 20550 case No. HBC 46 of 2000 refers.
 - He had filed transmission by death and partial transfer on CT 4487
 - Spent own funds to obtain Probate grant and sorting out issues in relation to all the Titles mentioned in Deceased's name. This amount to a total of \$31,000.
20. The Defendant refers in his Affidavit in Reply at paragraph 15 to annexure 'SBN3' which contains a bundle of Receipts issued to him by Vama Law. The receipts state the fees paid were for payment of BOC, part payment, legal fees and part payment of fees and re-estate of Frank Weatherall.
21. The purpose for which these receipts were issued by Vama Law is a bit ambiguous in that whether the money paid is for legal fees and/or for administration expenses for the Deceased's Estate borne by the Defendant. I do note at paragraph 15 of the Defendant's Affidavit in Reply that he had deposed 'I have spent from my own funds in obtaining the Grant of Probate and sorting our issues and in relation to all the titles mentioned in the name of the Deceased. The total amounted to \$31,500.
22. The administration costs of administering the Deceased's Estate are to be borne by the Deceased's Estate.
23. Reference is made to **Section 19B of the Succession Probate and Administration Act 1970** which provides as follows:-

"19 (B) (1) *Where the estate of a deceased person is solvent, the deceased person's real and personal estate shall, subject to the rules of court and section 19A and to any provision of the will, be applied towards the discharge of the funeral testamentary and administration expenses, debts and liabilities payable out of the estate in the following order:-*

- (a) *firstly, property of the deceased not disposed of by will subject to retention out of it of a fund sufficient to pay pecuniary legacies;*

- (b) *secondly, property of the deceased not specifically devised or bequeathed by will but included (either by a specific or general description) in a residuary gift, subject to the retention out of it of a fund sufficient to meet any pecuniary legacies, so far as not provided for;*
- (c) *thirdly, property of the deceased specifically appropriated or devised or bequeathed (either by a specific or general description) for the payment of debts;*
- (d) *fourthly, property of the deceased charged with, or devised or bequeathed (either by a specific or general description) subject to a charge for the payment of debts;*
- (e) *fifthly, any fund, retained to meet pecuniary legacies;*
- (f) *sixthly, property specifically devised or bequeathed rateably according to value;*
- (g) *finally, property appointed by will under a general power rateably according to value;*
- (h) *any other right or interest of the testator in or in relation to property.*

(2) *The order of application under subsection (1) may be varied by the will of the deceased."*

24. The Deceased at **Clause 3** of his Last Will and Testament dated **5th March 2015** stated as follows:-

"3. I Direct my Executor and Trustee to pay all legally enforceable debts, expenses of any illness and Administration Expenses, inheritance, transfer, succession and taxes from my assets (if any) or as agreed from his or asset and if the latter to be reimbursed before distribution."

25. In essence, in terms of **payment of Administration expense**, there are two (2) limbs to **clause 3 of the Deceased's Will**;

- **Firstly- Directing the Executor/Trustee to pay for all Administration Expenses from the Deceased's Estate; and/or**
- **As agreed from his [Defendant's] assets.**

26. However, if the Administration expenses had been incurred by the Defendant as the Executor/Trustee from the Defendant's assets, then, the Defendant to be reimbursed for the expenses 'before the distribution of the Deceased's assets within his Estate.

27. The question that arises herein is whether the Defendant has completed the administration and distribution of the assets within the Deceased's Estate and/or whether the administrator of the Deceased's Estate has been completed in terms of the disposition and transfer of the titles?

28. Both Counsels have subsequently confirmed to Court that the Executor, Shiri Binnessari Nand has only carried out the transfer of the property in terms of the Certificate of Title No. 4487 and not completed the Administration of the Deceased's Estate in terms of the transfer of Certificate of Title Nos. 20550 and 20507 respectively.

29. Therefore in the current stage, the Defendant is at liberty to seek an order for the reimbursement of the expenses (if any) that he had incurred in the administration of the Deceased's Estate pursuant to Clause 3 of the Deceased's Will.
30. However, I reiterate that the Defendant has only carried out the partial transfer of his interest in the Certificate of Title No. 4487. He did not complete the administration in his capacity as an Executor/Trustee as was required of him in terms the Deceased's WILL, with regards to the disposition of the Certificate of Titles Nos. 20550 and 20507.
31. The Defendant in his Affidavit in Reply at paragraph 15 has annexed a bundle of receipts "SBN3" which shows that legal fees was paid to Vama Law together with part payment of fees for Estate of Frank Weatherall.
32. The receipts are very ambiguous in nature and do not clearly indicate the legal fees and part payment of fees for what purpose. Was the amounts reflected therein for the purpose of carrying out and completing the administration work in the Deceased's Estate and/or was the fees paid was the lawyers legal fees?
33. In fact there are no invoices annexed to the affidavits and the Defendant has also failed to establish that he had incurred out of pocket Administration expenses in one way or the other.
34. In absence of any evidence, I have no alternative but to dismiss the Defendant's Statement of Defence and the orders sought therein in terms of the reimbursement of administrative expenses.
35. On the other hand, the Plaintiffs have proved their case on the balance of probabilities and accordingly succeeded in seeking orders sought for in their Statement of Claim at (f) for costs of the application to be paid by the Defendant.
36. If I may reiterate that on 15th of March 2022, the orders sought at prayers (a), (b), (c), (d) and (e) were granted by this court by consent of the parties to the proceedings.
37. The only issue left for this Court to determine was that of Administration expenses (if any) within the Defendant's Statement of Defence incurred by the Defendant to be reimbursed to him accordingly together with costs of this proceedings.

Costs

38. Bearing in mind above, the matter proceeded to trial on the Defendant seeking for reimbursement of the Administration Expenses incurred by the Defendant in order to administer the Deceased's Estate. Orders sought at (a), (b), (c), (d) and (e) did not proceed to trial rather resolved by consent orders.
39. It is fair that some reasonable costs must be awarded to the Plaintiff in light of the fact that this action was commenced on 24th July 2020 and remained impending for whatever reasons and currently being disposed off by consent orders and a short trial on reimbursement of administration expenses.

40. In the like, it is appropriate that I award a summarily assessed cost of \$500 against the Defendant to be paid to the Plaintiff accordingly.

In conclusion

41. Orders sought by the Plaintiff in his Originating Summons at prayers (a) to (e) inclusive were granted by consent of the parties to the proceedings on 15th March 2022 and are the following:-
- (a) That the Defendant is removed as the Executor and Trustee of the Estate of Fredrick Weatherall , late of Lot 2 Nabouvua, Savusavu, Retired, Testate;
 - (b) That the Grant of Probate No. 58477 is revoked forthwith;
 - (c) That the Defendant immediately deliver to the Principal Probate Registry the Grant of Probate No. 58477;
 - (d) That the Second Defendant is hereby appointed as the Administrator with Will annexed of the Estate of the Deceased, late of Lot 2 Nabouvua, Savusavu, Retired, Testate;
 - (e) A Declaration is granted that it was the intention of the Deceased at Clause 6 of his Last Will and Testament dated 5 March 2015, that subject to the lifetime interest of the First Plaintiff, his residential property situated at Nabouvua Dreka (part of) comprising of Certificate of Title No. 38269 being Lot 2 on Deposit Plan No. 9195, Savusavu, Vanua Levu is to be transferred to Second and Third Plaintiffs in equal shares.
42. The Plaintiff's originating summons in terms of the costs order succeeds and is granted a summarily assessed cost of \$500 against the Defendant.
43. The Defendant's Affidavit in Reply seeking for reimbursement of Administration Expenses in the sum of \$31,500 is hereby dismissed.

Orders

- (i) Orders by consent were granted on 15th March 2022 at prayers (a), (b), (c), (d) and (e) of the Originating Summons as paraphrased at paragraph 1 (a) to (e) of my Judgment hereinabove.
- (ii) The Defendants Affidavit in Reply seeking for reimbursement of Administration Expenses is dismissed.
- (iii) The Defendant is ordered to pay a summarily assessed cost of \$500 to the Plaintiffs.

Dated at Suva this 31st day of October 2022.



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VISHWA DATT SHARMA
JUDGE

cc: Jackson Bale Lawyers, Suva.
Vama Law, Suva.