

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Probate Action No.: HBC 86 of 2021

IN THE MATTER of the Estate of
JASODA late of Tokotoko, in the
district of Navua in the Republic of
Fiji, Domestic Duties, Deceased,
Testate

-AND-

IN THE MATTER of the Will
dated 23rd January, 2022 of Jasoda

-AND-

IN THE MATTER of Probate
No.56926 granted on the 5th day of
June, 2015

BETWEEN : **SUNIL KUMAR** of Navua in the Republic of Fiji, Businessman.

PLAINTIFF

AND : **ANEEL PRASAD** of Navua in the Republic of Fiji, Businessman.

DEFENDANT

Counsel : **Plaintiff: Mr. Fatiaki S**

: **Defendant: Mr. Nand S**

Date of Hearing : **04.3.2022**

Date of Judgment : **31.3.2022**

JUDGMENT

INTRODUCTION

1. The Plaintiff has filed an Originating Summons pursuant to Order 85 of the High Court Rules 1988(HCR) seeking him to be added as Joint Executor and Trustee in the Estate

of his late mother Jasoda in terms of last will. Defendant had not renounced the right to become an executor under last will but remained inactive while the Defendant had carried out major part of administration of estate. When Defendant obtained the probate as sole executor he had expressly reserved the Plaintiff's right to obtain probate in terms of last will of late Jasoda. This position remains so, until completion of administration of estate. Defendant is estopped from objecting to Plaintiff to become a joint executor. Defendant's contention that Plaintiff had renounced to become a joint executor in terms of their mother's last will, in terms of Section 26 of Succession Probate and Administration Act 1970 has no application as he was not 'cited' to obtain probate. Personally citation is prerequisite to apply statutory renunciation contained in Section 26 of Succession Probate and Administration Act 1970.

ANALYSIS

2. Most of the facts material for this originating summons are not in dispute.
3. The Plaintiff and the Defendant are brother and they are beneficiaries of the Estate of their late mother, Jasoda.
4. The late Jasoda died on 2 .11.2012 and her last will, appointed the Defendant and Plaintiff as Executors and Trustees of her Estate.
5. On 13.4.2015, the Defendant's solicitors wrote to the Plaintiff requesting him to come in to their office to execute the Oath of Executors. Plaintiff did not go or take any step to obtain probate in favour of both executors.
6. Plaintiff did not object to Defendant obtaining probate as sole executors.
7. Defendant contend that due to this behaviour, of Plaintiff, he had renounced his right to obtain a probate in terms of section 26 of Succession Probate and Administration Act 1970, which reads;

"In case of renunciation or failure to take probate, right of executor gone

26. Where an executor renounces probate of the will, or dies without having taken probate, or **where, being personally cited to take probate, he does not appear to such citation, the right of such executor in respect of the executorship shall wholly cease**; and the representation to the testator and the administration of his estate shall go, devolve and be committed in like manner as if such person had not been appointed executor."(emphasis is mine)

8. The word "citation" has a legal definition according to Oxford Law Dictionary and it states

“A **document issued by court** on application of a person interested in a deceased person’s estate **calling upon the party cited to show cause** why a particular step should not be taken. **This could be a citation to take out probate, to accept or refuse a grant,** or to propound a will” (emphasis added)

9. According to above dictionary meaning a letter written by Defendant’s solicitor on 2.4.2015 and or 13.4.2015, which were admitted but not produced as evidence fall short of proof of any ‘personal citation’.
10. Halsbury’s Laws of England Vol 102 under paragraph 697. **Citations**, states,

“A citation¹ is an instrument issuing from, and under the seal of, the principal registry of the Family Division or a district **probate registry** containing a recital of the reason for its issue and the interest of the party extracting it, and **calling upon the party cited to enter an appearance² and take the steps specified in it**, with an intimation of the nature of the order the court is asked to and may make, unless good cause is shown to the contrary.

A citation is **employed only in non-contentious matters³**: its chief object is to **compel all persons having a prior⁴ right to a grant to come in and take the grant**, or, in default, that administration may be granted to the citor. A citation must be directed to all such persons so that each one has an opportunity to apply for a grant.

Any citation may issue⁵ from the principal registry of the Family Division or a district probate registry after the entry of a caveat⁶ and is settled by the district judge or registrar⁷ before being issued⁸. Every averment in a citation, and such other

¹ All citations in non-contentious business must contain an address for service within England and Wales: Non-Contentious Probate Rules 1987, SI 1987/2024, r 49.

² An appearance is entered by filing in the Non-Contentious Probate Rules 1987, SI 1987/2024, Form 5: r 46(6), Sch 1 Form 5; and see PARA 699.

³ Citations in contentious business have been abolished. As to the present contentious practice where citations would formerly have been used see PARA 380. As to the distinction between non-contentious and contentious business see PARA 686.

⁴ *Re Harper* [1899] P 59

⁵ Application for the issue of a citation may be made by post: *Practice Direction* [1969] 3 All ER 192, [1969] 1 WLR 1283.

⁶ See the Non-Contentious Probate Rules 1987, SI 1987/2024, r 46(3) (amended by SI 1991/1876; SI 2018/1137). The citor must enter a caveat (see para 692) before issuing a citation and, unless a district judge or registrar by order made on summons otherwise directs, any caveat in force at the commencement of the citation proceedings, unless withdrawn pursuant to the Non-Contentious Probate Rules 1987, SI 1987/2024, r 44(11) (see para 695), remains in force until application for a grant is made by the person shown to be entitled to one by the decision of the court in such proceedings, and upon such application any caveat entered by a party who had notice of the proceedings ceases to have effect: r 46(3). As to the meaning of 'district judge' see para 633. As to the meaning of 'grant' see para 633.

⁷ As to the meaning of 'registrar' see para 633.

⁸ Non-Contentious Probate Rules 1987, SI 1987/2024, r 46(1) (amended by SI 1991/1876). The fee for perusing and settling a citation is £4: Non-Contentious Probate Fees Order 2004, SI 2004/3120, art 2, Sch 1 Fee 11 (Sch 1

information as the registrar may require, **must be verified by an affidavit sworn or a witness statement made by the person issuing the citation** (the 'citor'), provided that the district judge or registrar may in special circumstances accept an affidavit sworn by the citor's solicitor or probate practitioner⁹. Every will referred to in a citation must be lodged in a registry before the citation is issued, except where the will is not in the citor's possession and the district judge or registrar is satisfied that it is impracticable to require it to be lodged¹⁰.”(emphasis added)

11. Defendant had not proceeded to citation of Plaintiff through following proper procedure. Defendant had reserved Plaintiff’s entitlement while obtaining probate in his name.
12. A letter (undisclosed to court) but admittedly written by solicitor of Defendant has no application to Section 26 of Succession Probate and Administration Act 1970. The word “personally cited” has a specific legal meaning and only that meaning can be attributed it. Citation compels a party and failure to comply will result in point of no return for a person who can be considered as statutorily renounced the desire to become a grantee of a probate.
13. Halsbury’s Laws of England Vol 102 under **Citation to Accept or Refuse Grant**, stated

“A citation to accept or refuse a grant may be issued at the instance of any person who would himself be entitled to a grant in the event of the person cited renouncing his right. The person cited is compelled by this to accept or refuse a grant. He can accept after entering an appearance by application *ex parte* by affidavit or witness statement to a district judge or registrar for an order for a grant to himself. If the person cited has entered an appearance to the citation but has not applied for a grant or has failed to prosecute his application with reasonable diligence the citor may **apply by summons to a district judge or registrar for an order for a grant to himself**. If the time limited for appearance has expired and the person cited has not entered an appearance, the citor may apply to a district judge or registrar for an order for a grant to himself.

Where power to make a grant to an **executor has been reserved**, a citation calling on him to accept or refuse a grant may be issued at the instance of the executors who have proved the will or the survivor of them or of the executors of the last survivor of deceased executors who have proved. He may then accept by application in the manner described above. If the time limited for appearance has expired and the person cited has not entered an appearance, the citor may apply to a district judge or registrar for an order that a note be made on the grant that the executor in respect of whom power was reserved has been duly cited and has not appeared and that all his rights in respect of

substituted by SI 2011/588; Non-Contentious Probate Fees Order 2004, SI 2004/3120, Sch 1 Fee 11 amended by SI 2020/720).

⁹ Non-Contentious Probate Rules 1987, SI 1987/2024, r 46(2) (amended by SI 1991/1876; SI 1998/1903; and SI 2020/1059). Cf *Re Hutley* (1869) LR 1 P & D 596. As to the meaning of 'probate practitioner' see para 690.

¹⁰ Non-Contentious Probate Rules 1987, SI 1987/2024, r 46(5) (amended by SI 1991/1876).

the executorship have wholly ceased. If the person cited has entered an appearance but has not applied for a grant or has failed to prosecute his application with reasonable diligence the citor may apply by summons to a district judge or registrar for an order striking out the appearance and for the indorsement on the grant of a similar note” (foot notes deleted)(emphasis added)

14. From the above it is clear that Defendant’s contention that Plaintiff had renounced his entitlement to become a joint executor is misconceived. It is a process which Defendant had not even initiated, hence no renouncement by Plaintiff’s entitlement to become joint executor.
15. There was no “citation” prior to grant of probate to Defendant as sole executor through Probate No 56926. In contrary to Defendant’s contention in court, he had expressly in the affidavit filed had stated that

“... power is reserved to other Executrix and Trustee appointed namely Sunil Kumar to apply for like grant.....”
16. Grant of Probate No.56926 was issued to the Defendant on 5.6.2015 on that basis. Defendant cannot retract from this position as he had not personally cited Plaintiff to obtain probate as joint executor or obtained his consent for renunciation of his rights.
17. There is no evidence of Defendant misusing or neglecting to administer the estate of late Jasoda. There is evidence of Defendant taking steps to subdivide property due to parties living on it.
18. There is no need for Plaintiff to prove Defendant’s failure to administer the estate for exercise his reserved ‘power’ to apply to a like grant. Defendant is estopped from denying this due to his own affidavit upon which the grant was made as sole executor.
19. If such an assurance was not made to the probate registry, only other way to obtain a probate as sole executor was when Plaintiff had expressly renounced by consent or renunciation by operation of law in terms of Section 26 of Succession Probate and Administration Act.
20. Accordingly Plaintiff is entitled to be a joint executor of the estate of late Jasoda in terms of last will as he had not renounced his entitlement under the last will.
21. Plaintiff had filed originating summons in terms of , Order 85 rule 1 of HCR states, Interpretation (O.85, R.1)

“In this Order “administration action” means an action for the administration **under the direction of the Court** of the estate of a deceased person or for the execution under the direction of the Court of a trust”.(emphasis added)

22. There is no dispute that the issue before this Court is in respect of the administration of an estate where by a grant of probate has been issued in the estate of a deceased person to Defendant as sole executor when last will had named both parties to this action as joint executors. Defendant had reserved Plaintiff's entitlement to obtain probate but now objecting to it, hence required court intervention, by way of direction including declaration of Plaintiff's status in relation to estate of Jasoda in terms of last will.
23. By objecting to Plaintiff's application to become a joint executor there is a need for the court to intervene and declare the legal position regarding Plaintiff as to the administration of estate of late Jasoda.
24. Order 85 rule 2 of HCR states;

“Determination of questions, etc., without administration (O.85, r.2)

2.-(1) An action may be brought for the determination of **any question or for any relief which could be determined or granted**, as the case may be, in an administration action and a claim need not be made in the action for the administration or execution under the direction of the Court of the estate or trust in connection with which the question arises or the relief is sought.” (emphasis added)
25. Given that the current action is in respect of an action arising from the Estate of a deceased person Order 85 of HCR is applicable. Plaintiff in the originating summons seeks to appoint him as joint executor, but he needs to make an application to probate registry for that and needs to comply with procedural requirements.
26. Plaintiff had not sought any specific order other than appointing him as joint executor, but this is possible subject to procedural and other requirements needed. So at this moment only a declaration as to his entitlement is made.
27. Defendant in the written submission had sought intervention of court in terms of section 41 and 35 of Succession Probate and Administration Act 1970, but there is no counterclaim filed by Defendant. Hence no such orders can be made at this case.
28. Defendant also submitted that joining Plaintiff as a joint executor will revert to ‘square one’. This is not correct as whatever the work that had already completed need not be repeated on the basis of Plaintiff joining as executor. In any event this is a position created by Defendant when he reserved Plaintiff's entitlement to be an executor, without seeking renunciation by consent or through citation of Plaintiff to compel or renounce it.

29. It is in the best interest of all beneficiaries, of the estate of late Jasoda to comply with last will and conclude distribution of their respective shares. Plaintiff had done major part of work on this and his work needs to be acknowledged by all parties including Plaintiff.
30. At the same time Defendant is directed to comply with requirement in order for both parties to obtain joint executorship for the estate of late Jasoda. In that way it will serve the intention of their late mother who wished Plaintiff and Defendant to be joint executors.

CONCLUSION

31. Plaintiff is entitled to make an application to be joint executor of the estate of Jasoda in terms of last will. He had not renounced his right to become an executor at any time before fully administration of the estate. Defendant is estopped from denying this right as he had obtained the grant of probate subject to preservation of such right to probate registry. No cost granted to Plaintiff, considering circumstances of this case.

FINAL ORDERS

- a. A declaration that Plaintiff is entitled to be a joint executor and trustee of the Estate of Jasoda subjected to formal application process for such a grant.
- b. Probate registry is directed to take all necessary steps to include Plaintiff as joint executors of the estate of late Jasoda.
- c. No cost ordered.

Dated at Suva this 31st day of March, 2022.



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Deepthi Amaratunga
Justice Deepthi Amaratunga
High Court, Suva